Massachusetts Association of Land Surveyors & Civil Engineers

The Ninth Annual
Legal Perspectives in Land Surveying

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Denise A. Chicoine
Jutta Deeney
Edward S. Englander
Robert S. Mangiaratti
Kathleen M. O'Donnell
Shannon Slaughter
F. Sydney Smithers

Massachusetts Association of Land Surveyors and Civil Engineers Seminar
Friday, January 26, 2018
The Conference Center at Waltham Woods
Waltham, MA

The Ninth Annual Legal Perspectives on Land Surveying

Agenda

8:00AM – 9:15 AM	Recent Developments in Massachusetts Case Law *Ed Englander*
9:15 AM – 10:00 AM	Retaining Walls and Condominium Site Plans *Denise Chicoine*
10:00 AM – 10:15 AM	Break
10:15 AM – 11:00 AM	Grandfathering Rights *Robert Mangiaratti*
11:00 AM – 12:00 PM	Unique Survey Issues for Title Insurance *Jutta Deeny*
12:00 PM – 1:00 PM	Lunch
1:00 PM – 2:00 PM	Adverse Possession and Color of Title *Shannon Slaughter*
2:00 PM – 2:45 PM	Streets and Ways for Surveyors *F. Sydney Smithers*
2:45 PM – 3:00 PM	Break
3:00 PM – 4:00 PM	Conservation Restrictions, Agricultural Preservation Restrictions, and Mixed Uses *Kathleen M. O'Donnell*

Instructor Biographies

Denise A. Chicoine
Ms. Chicoine is a partner in the Boston law firm of Englander & Chicoine P.C. She has significant experience litigating disputes involving rights in the intertidal zone and beach access claims, easements, construction disputes, conveyancing, Chapter 91, and zoning matters.

Jutta Deeney
Ms. Deeney is Vice President, Massachusetts State Counsel for Stewart Title Guaranty Company, responsible for overseeing the underwriting services to Massachusetts agents for Stewart Title. Preceding her career in the title insurance industry, she worked in both the private sector, at a Boston law firm, and in the public sector, as an associate corporation counsel for the City of Boston.

Edward S. Englander
Mr. Englander is a partner in the Boston law firm of Englander & Chicoine P.C. His expertise includes the Colonial Ordinance of 1641-47 and beach rights, easements, boundary disputes, agricultural preservation restrictions, aquacultural grants, construction disputes, conveyancing, analyzing complex back titles, condominium conversions, and real estate leases.

Robert S. Mangiaratti
Mr. Mangiaratti is the former city solicitor for Attleboro, handling all aspects of municipal law, including litigation, environmental law, land use, personnel, and real estate transactions. Previously he was a partner at the law firm of Murphy, Hesse, Toomey & Lehane, in Quincy, Massachusetts where he focused primarily on municipal and real estate law.

Kathleen M. O'Donnell
Ms. O'Donnell concentrates her practice in real estate law with a specialty in municipal law including acquisitions of land for open space, affordable housing, and community preservation. A past president of the Real Estate Bar for Massachusetts, she is currently co-chair of the Real Estate Section of the Boston Bar Association.

Shannon F. Slaughter
Ms. Slaughter is a partner in the Boston law firm of Englander & Chicoine P.C. Her areas of practice include land use, condominium disputes, bankruptcy, and civil litigation.

F. Sydney Smithers
Mr. Smithers is an expert in unique title issues as well as streets and ways. He is a past president of the Real Estate Bar Association, a past president of the Abstract Club, and former editor in chief of the 10th edition of Crocker's Notes. He is also an honorary member of MALSCE.

Case Law Update

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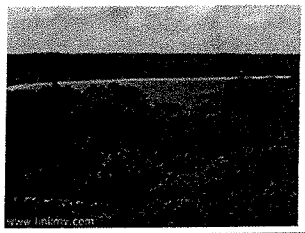
Zeltzer v. Talbot

25 LCR 548
(August 11, 2017)

Creation of a View Easement

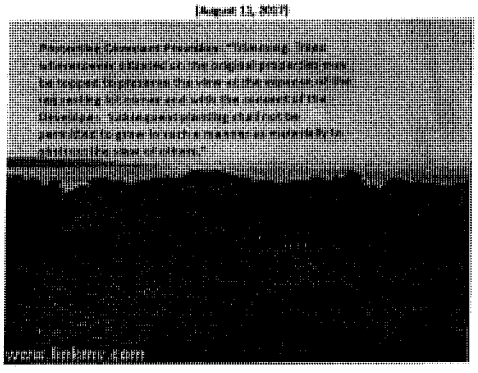
Rules for View Easements:

- View easements require the identification of dominant and servient estates as well as some clear indication of the scope of the easement.
- There also must be some indication that the owner of the dominant estate has the right to make changes on the servient estate.



Zeltzer v. Talbot

25 LCR 548
(August 11, 2017)



Halfenger v. Cofield

91 Mass. App. Ct. 116
(April 2017)

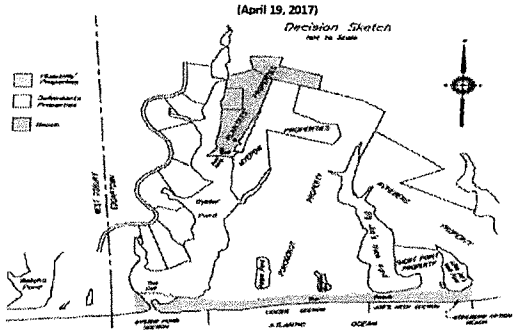
Prescriptive Easement: Is established when the claimant shows the *continuous, open, notorious, and adverse* use of another's land, conducted under a claim of right, for a period of 20 years. All elements must be established to claim a prescriptive easement.

Implied Permission v. Acquiescence: Permission by the owner, even implied permission negates the adverse element, however the owner's acquiescence to a claimant's clearly adverse acts does not negate the adverse element.

Absent proof of permission to allow neighbor to have utility lines on property, owner merely acquiesced.

Cohn v. Myerow

25 LCR 241
(April 19, 2017)



Cohn v. Myerow
25 LCR 241
(April 19, 2017)

Occasional, interrupted use of different portions of a beach is insufficient to establish prescriptive easement.

Holbrook v. Town of Hopkintown
91 Mass. App. Ct. 1128
(June 16, 2017)

- **Conversion of private way to public way**: Neither occasional use by general public nor cleaning and removal of snow and ice by town, where done as a courtesy, are sufficient to convert private way into public street by prescriptive easement.

Martha's Vineyard Land Bank Comm'n v. Taylor
25 LCR 481
(July 11, 2017)

Martha's Vineyard Land Bank Comm'n v. Taylor
25 LCR 481
(July 11, 2017)

Prescriptive easement not established where use by inn proprietor and its guests of pathway within parcel covered by trees, shrubs and brush in order to reach beach was not sufficiently open and notorious to give record owner fair chance to protect its property interests.

Kneer v. Luciano

2017 Mass. LCR Lexis 81
(May 5, 2017)

Merger Doctrine for Zoning Purposes

Kneer v. Luciano

2017 Mass. LCR Lexis 81
(May 5, 2017)

- **Merger Doctrine:** Adjacent lots in common ownership will normally be treated as a single lot for zoning purposes so as to minimize nonconformities.
  - Once merger occurs it cannot be undone to restore old record boundaries.
- A vacant dimensionally nonconforming parcel of land has merged for zoning purposes with an adjacent property when the nonconforming parcel is owned/controlled by a trustee who also owns the adjacent property and thus vacant lot is not separately buildable.
- Broad powers conferred to the trustee relating to the disposition of trust's real estate effectively gives the trustee legal control over the parcel.

Retaining Walls and Condominium Site Plans

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Trs. of Deer Crossing Condo. Trust v. Deer Crossing Assocs.,
6 LCR 271
(1998)

Condominium Site Plans and Easements

Issue Presented:

A residential condominium and the adjacent commercial condominium created by the same declarant have a dispute over whether the residential condo granted the commercial condo parking easement. The only documents referencing the parking easement are the two condos site plans.

Trs. of Deer Crossing Condo. Trust v. Deer Crossing Assocs.,

Pertinent Facts

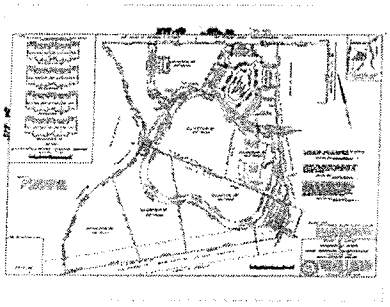
- Residential condo created first and 2 years later commercial condo created.
- Residential condo M.D. references specific easements but didn't include grant of parking easement to commercial condo.
- Commercial M.D. references the benefit of parking easement as shown on the commercial site plan and also references the residential site plan.
- Commercial site plans contains dashed lines depicting the parking easement including a westerly boundary which boundary was not included on the residential plan.
- Only evidence of parking easement is the two site plans. No other written instrument.

Trs. of Deer Crossing Condo. Trust v. Deer Crossing Assocs.,

Rule

- A site plan purporting to show an easement, absent a supporting instrument, cannot create an easement.
- A surveyor or engineer who holds no title to the affected land lacks authority to vest a property interest in a third party when drawing a plan. It is only the record owner who has the legal right to grant or reserve an easement.

Trs. of Deer Crossing Condo. Trust v. Deer Crossing Assocs.,
6 LCR 271
(1998)



Hunt v. Brink
84 Mass. App. Ct. 1136
(2014)

Condominium Site Plan

Issue Presented:

Unit Owner of two unit condominium wanted to erect a fence in the rear yard of the condominium to separate her exclusive use of the yard from her feuding neighbor's based upon and equal 50/50 split down the middle of the yard in accordance with her 50% interest in the common areas and facilities as set forth in the Master Deed. However, site plan depicts the line of demarcation between the two unit owners' exclusive areas as an uneven split. Does Master Deed or Site Plan control?

Hunt v. Brinck

Rule:

When there is an ambiguity between a Condominium Master Deed and the Condominium Site Plan regarding boundaries of exclusive common areas, Site Plan shall control if Master Deed contains the following provision: "site plan fully depicts the location, layout, number, approximate area, main entrance and immediate common area of each unit."

Takeaways

- Make sure site plan accurately depicts all boundaries and locations of exclusive common areas.
- Make sure Master Deed includes provision that "site plan fully depicts....."

Glover Court Condo. Trust v. Amaru,

22 LCR 157
(2014)

Condominium Site Plans and Easements

Issue Presented:

The ability and limitations of unit owners to park upon and pass over portions of Lot 1 and Lot 2 and the Annexable Land which had not been submitted to condominium status and instead retained by Defendants with a now-expired option to develop the lots as additional phases of Condominium.

Glover Court Condo. Trust v. Amaru

Pertinent Facts

The Condominium Site Plan and Master Deed signed by the Defendants referenced the availability of parking for the Condominium residents on Lot 1 and Lot 2 until such time as the Master Deed was amended, and residents have used Lot 1 and Lot 2 and the Annexable Land for parking since purchasing their units.

Holding

Defendants intended that Plaintiff be permitted by the terms of the Master Deed to park in such spaces marked on Lot 1 and Lot 2 of the Condominium Site Plan until such time as the Master Deed was amended regarding parking. Therefore, Unit owners are permitted to park in the spaces marked... until such time as the Master Deed is amended with regard to permanent parking.

Fenmore Assocs., LLC v. Brough

18 LCR 459
(2010)

Condominium Site Plans and Easements

Issue Presented

Are parking easements extinguished by a foreclosure, becoming part of a condominium common area and under the control of condominium trustees?

Pertinent Facts

The Master Deed's language intended to create and reserve easements over the parking spaces. The Site Plan was recorded 20 days after the Deed depicting the parking spaces existing on the land.

Fenmore Assocs., LLC v. Brough

Holding and Rule

The grant of easements was sufficiently precise – it granted easements to all parking spaces on the land to the Declarant or his successors and assigns.

A "deed is to be construed to give effect to the intent of the parties as manifested by the words used, interpreted in light of the material circumstances and pertinent facts known to them at the time it was executed."

Lutz v. Bauman

25 LCR 614
(August 2017)

Retaining Walls

- Planting of vegetation and installation of retaining wall and fence are sufficient to establish adverse possession of portion of neighbor's yard.
- Retaining wall is considered a significant permanent improvement to show ownership and such an improvement is an adequate basis for adverse possession.

Gorton v. Schofield,
311 Mass. 352
(1942)

Retaining Walls

Issue Presented

What are the legal duties and responsibilities of the defendant with relation to the maintenance of the retaining wall built by a predecessor in title?

Pertinent Facts:

- The granite retaining wall is not strong enough to support the Plaintiff's land without being repaired or properly braced.
- The Plaintiff's land has caved or fallen in, and the wall has cracked along the entire rear line of the property.

Gorton v. Schofield

Rule

- The Law of Lateral Support:

The right of an owner of land to the support of the land adjoining is jure naturae, like the right in a flowing stream. Every owner of land is entitled, as against his neighbor, to have the earth stand and the water flow in its natural condition... [and] in the case of land, which is fixed in its place, each owner has the absolute right to have his land remain in its natural condition, unaffected by any act of his neighbor; and, if the neighbor digs upon or improves his own land so as to injure this right, may maintain an action against him, without proof of negligence.

Takeaways

- If a retaining wall is on your property, whether it was put there by you or the predecessors in title, you are bound to maintain the wall in such a condition that it will not damage your neighbors land.

Rubin v. Waipate Constr. Mgmt.,
1999 Mass. Super.

Retaining Walls

Issue Presented

A retaining wall on an adjacent property was in danger of imminent collapse onto Plaintiff's property.

Pertinent Facts

- The two properties are separated by a seven-foot retaining wall, with plaintiff's property situated below the retaining wall.

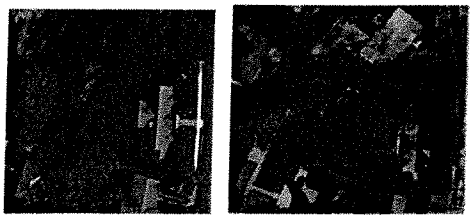
Rubin v. Walpate Constr. Mgmt.,

Holding and Rule

- The "natural condition" of the Plaintiff's land would be adversely affected if earth from the Defendant's property spilled onto it from a collapse of the Defendant's allegedly ill-maintained retaining wall. To prevent that injury to their land, the Plaintiffs may seek injunctive relief for the maintenance of the retaining wall.

The Law of Lateral Support applies

Rubin v. Walpate Constr. Mgmt.,



Franchi v. Boulger,
12 Mass. App. Ct. 376
(1981)

Retaining Walls

Issue Presented

Trustees of a trust were found liable for maintaining a retaining wall that was improperly constructed prior to the establishment of the trust, but injunctive relief was not granted.

Pertinent Facts:

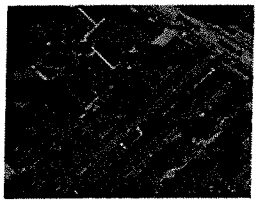
- The retaining wall was not built in accordance with good and acceptable engineering practices or in accordance with the State Building Code.
- On two separate occasions, portions of the wall broke and fell onto plaintiff's property.
- The superior court found that there is likelihood that the wall will further disintegrate, and ... its precarious condition diminishes the value of the property of the plaintiff. and this, the defendants are liable in maintaining the wall.

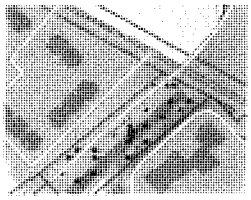
Franchi v. Boulger

Holding and Rule

- In Massachusetts, a landowner is ordinarily entitled to mandatory equitable relief to compel removal of a structure significantly encroaching on his land... in rare cases, courts of equity have refused to grant a mandatory injunction and have left the plaintiff to his remedy of damages, 'where the unlawful encroachment has been made innocently, and the cost of removal by the defendant would be greatly disproportionate to the injury to the plaintiff from its continuation, or where the substantial rights of the owner may be protected without recourse to an injunction, or where an injunction would be oppressive and inequitable.
- Although it the plaintiffs are entitled to have the wall removed or rebuilt, the case must be remanded to determine the scope of the injunction and to recompute the damages.

Franchi v. Boulger



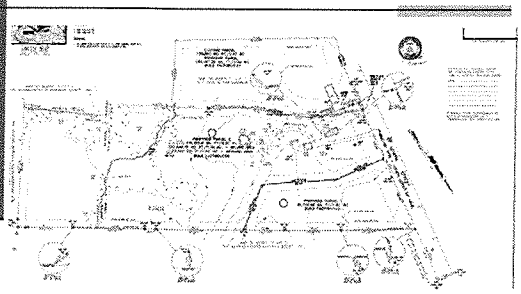


MH TL MURPHY HESSE TOOMEY & LEHANE LLP
Attorneys at Law

A DISCUSSION OF GRANDFATHERING RIGHTS UNDER THE FIRST PARAGRAPH OF M.G.L. c. 40A, SECTION 6

By Robert S. Mangiaratti, Esq.

DISCUSSION PLAN....



M.G.L. c. 40A, s. 6 (First Paragraph)

- A zoning...by-law shall not apply to structures or uses lawfully in existence or lawfully begun... before [a zoning change].
- But such [zoning change] shall apply to any change or substantial extension of such use... to any reconstruction, extension or of such structure...any alteration of a structure ...to any reconstruction for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent.
- Except where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure.
- Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be **permitted unless there is a finding by...the special permit granting....that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood.**

VARIANCES, Mass. Gen. Laws Ann. ch. 40A, § 10

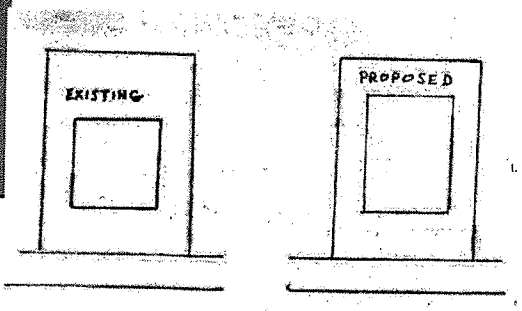
- The permit granting authority shall have the power ...to grant ....a variance ...where such permit granting authority specifically finds that **owing to circumstances relating to the soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district** in which it is located, a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship, financial or otherwise, to the petitioner .... and that desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such ordinance or by-law.

BRANSFORD v. ZONING BOARD OF APPEALS OF EDGARTOWN ,444 Mass. 852 (2005).

Facts:

- Zoning By-Law currently requires 1 1/2 acre lots and Owner's lot only contains 1/2 acre.
- Court recognized that the undersized lot has grandfathering protection.
- Owner proposes to tear down the existing old house and build a new larger house which conforms to all zoning requirements except lot size.
- New house would have significantly greater interior living area and a greater footprint. It would also be higher.

BRANSFORD v. ZONING BOARD OF APPEALS OF EDGARTOWN, 444 Mass. 852 (2005).



Issues:

- Did the proposed house increase the non-conforming nature of the grandfathered house?
- Did new house require a special permit finding that it would not be substantially more detrimental to the neighborhood?

Decision:

Even though the new house would comply with all dimensional requirements except lot size, it would intensify the non- conformity and require a special permit finding that the new house would not be substantially more detrimental to the neighborhood.

Additionally, the Court affirmed the decision of the Board of Appeals denying the special permit.

Discussion:

- Court pointed out that the purposes of lot size requirement include maintaining the character of a neighborhood, controlling density, providing adequate light and air, and preventing overcrowding of land.
- Court said "The expansion of the residence's footprint, and the expansion in living area, will, at the very least, tend to reduce the open space previously existing on the lot and to increase the density of the residential neighborhood. Creating a distinction in treatment between a nonconforming structure and a nonconforming lot is one that analytically and practically should not be made.

Discussion:

Court also recognized that Board of Appeals had broad discretion in denying the special permit. Its decision should be upheld unless it is based on a legally untenable ground or is unreasonable, whimsical, capricious, or arbitrary.

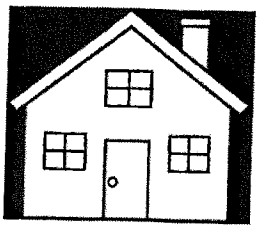
(Note: Bransford was a concurring decision in which three justices voted to affirm and three justices voted to overturn the trial court. Subsequently in Bjorkland v. Board of Appeals of Norwell, 450 Mass. 357 (2008) the SJC by seven to two vote expressly adopted the reasoning in the concurring decision.)

DEADRICK v. ZONING BD. OF APPEALS OF CHATHAM, 85 Mass. App. Ct. 539, review denied, 469 Mass. 1108, 20 N.E.3d 610 (2014).

Facts:

- An owner's house was nonconforming as to lot size, building coverage, frontage, front yard setback, and side yard setback.
- The proposed new structure would be built on same footprint and would maintain the same nonconformities as the old structure with respect to frontage, setbacks, lot size, and building coverage. However, the height of the new structure exceeds the maximum allowable height in the zoning District.

Old



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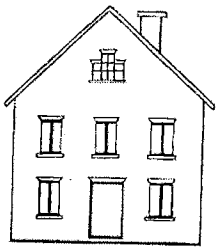


Issue:

- Whether the addition of new nonconformities to a pre-existing nonconforming residential structure requires a variance or special permit?

- Decision:

The creation of a new nonconformity in a pre-existing nonconforming structure requires a variance not just a special permit with a Section 6 finding.

Discussion:

- The court observed that "the ultimate objectives of zoning would be furthered by the eventual elimination of nonconformities is most cases."
- Variances should be granted "only in rare instances and under exceptional circumstances."
- With respect to residential properties, the Court interpreted the first two sentences of M.G.L. c. 40A,s. 6 to allow the extension of existing, nonconformities upon a showing of no substantial detriment but require a variance for the creation of any new nonconformity.

ROCKWOOD v. SNOW INN CORP.
409 Mass. 361 (1991).

- Facts:
  - Commercial building used as an inn did not conform to current set back requirements of the Zoning By-Law, but it was protected as a pre-existing, nonconforming structure under M.G.L.c. 40A, s. 6.
  - Proposed changes and extensions to the structure would have violated the By-law's to coverage requirements.

Issue:

- Do the proposed changes require only a
- special permit finding that the change would
- not be substantially more detrimental to the
- neighborhood?

Decision:

More than a special permit was required for the project. For a commercial structure the extension would be allowed only if:

1) all of the changes complied with the by-law; and;
2) the Board of Appeals determined that the change would not be substantially more detrimental to the neighborhood.

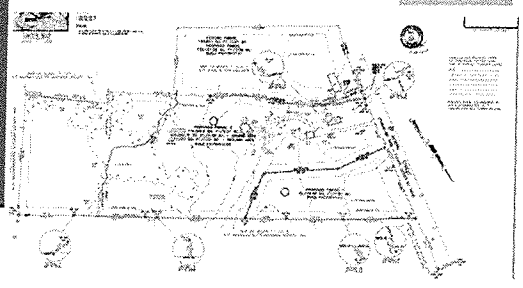
Discussion:

Except for one and two family houses, the statute says that a new by-law applies to any shall apply "to any reconstruction, extension or structural change of such structure and to any alteration of a structure."

ALTERATION OF PRE-EXISTING NONCONFORMING STRUCTURES PURSUANT TO THE FIRST PARAGRAPH OF M.G.L. c. 40A, 6.

USES OF LAND	SUBSTANTIAL CHANGE NO INCREASE IN EXISTING NONCONFORMITIES DOES NOT CREATE A NEW NONCONFORMITY	SUBSTANTIAL CHANGE INCREASES AN EXISTING NONCONFORMITY DOES NOT CREATE A NEW NONCONFORMITY	SUBSTANTIAL CHANGE CREATES A NEW NONCONFORMITY
ONE & TWO FAMILY DWELLINGS	Permitted	Section 6 Finding*	Variance & Section 6 Finding
OTHER USES	Section 6 Finding	Variance & Section 6 Finding	Variance & Section 6 Finding

DISCUSSION PLAN....



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WELCH-PHILIPPINO v. ZONING BD. OF APPEALS OFNEWBURYPORT,86 Mass. App. Ct. 258, (2014).

Facts:

- The defendants' 100—bed nursing home facility, built in 1968, was a dimensionally conforming commercial structure situated on a conforming lot in a residential zone.
- Use of the facility as a nursing home pre-dates the adoption of the zoning ordinance, and was a lawful preexisting nonconforming use.
- The defendants plan to replace the old structure with a modernized 121—bed facility that will meet the dimensional requirements of the current zoning ordinance.

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Issue:

Could the defendant construct the new nursing home as a matter of right?

Decision:

- The new nursing home was a continuation of the pre-existing, nonconforming use and protected as a matter of right

Discussion:

- Court applied the three part test first stated in Chuck ran and determined (1) the locus was operated and would continue to operate as a nursing home, (2) operation of a nursing home with 121 beds rather than 100 beds would not alter the quality, character, or degree of that use, and (3) the project would not have any adverse effect on the neighborhood different in kind from the existing use.
- Court said that a valid nonconforming use does not lose that status merely because it is improved and made more efficient, provided the changes are ordinarily and reasonably adapted to the original use and do not constitute a change in the original nature and purpose of the undertaking.

Questions?

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stewart title

Title Insurance Endorsements

When Surveys are Necessary & How They Help Underwriters Assess Risk and Provide Coverage

Jutta R. Deeney, Esq.
Vice President, Massachusetts State Counsel
Stewart Title Guaranty Company

Title Insurance

- Generally backward looking
- Basic policy insures ownership of land described in a deed
- Legal access to and from land
- Insures against loss from undisclosed liens and encumbrances

Carve Outs

- Standard exception – matters disclosed on survey
- Actual vehicular and pedestrian access
- Shape/size & location of land
- Impacts of easements
- Zoning
- Prospective use
- Contiguity of multiple parcels

With the help of a Survey

- Delete standard and non-standard exceptions
- Issue endorsements
  - Endorsements – expand coverage of the policy

Same as Survey Endorsement

- ALTA 25-06

The Company insures against loss or damage sustained by the Insured by reason of the failure of the Land as described in Schedule A to be the same as that identified on the survey made by _____ dated _____, and designated Job No. _____.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Zoning – Completed Structure

- ALTA 3.1-06

1. The Company insures against loss or damage sustained by the Insured in the event that, at Date of Policy,

a. …

2. The Company further insures against loss or damage sustained by the Insured by reason of a final decree of a court of competent jurisdiction either prohibiting the use of the Land, with any existing structure, as specified in paragraph 1.b. or requiring the removal or alteration of the structure, because, at Date of Policy, the zoning ordinances and amendments have been violated with respect to any of the following matters:

a. Area, width, or depth of the Land as a building site for the structure
b. Floor space area of the structure
c. Setback of the structure from the property lines of the Land
d. Height of the structure, or
e. Number of parking spaces.

Zoning – Land Under Development

- ALTA 3.2-06

1. For purposes of this endorsement:

a. "Improvement" means a building, structure, road, walkway, driveway, curb, subsurface utility or water well existing at Date of Policy or to be built or constructed according to the Plans that is or will be located on the Land, but excluding crops, landscaping, lawns, shrubbery, or trees.

b. "Plans" means those site and elevation plans made by [*name of architect or engineer*] dated ____, last revised _____, designated as [*name of project*] consisting of ___sheets.
…

3. The Company further insures against loss or damage sustained by the Insured by reason of a final decree of a court of competent jurisdiction either prohibiting the use of the Land, with any existing Improvement, as specified in paragraph 2.b. or requiring the removal or alteration of the Improvement, because, at Date of Policy, the zoning ordinances and amendments have been violated with respect to any of the following matters:

a. Area, width, or depth of the Land as a building site for the Improvement
b. Floor space area of the Improvement
c. Setback of the Improvement from the property lines of the Land
d. Height of the Improvement, or
e. Number of parking spaces.
4. There shall be no liability under this endorsement based on:
…

Access & Entry

- ALTA 17-06 & 17.1-06
  - Direct Access & Indirect Access

Direct Access

The Company insures against loss or damage sustained by the Insured if, at Date of Policy (i) the Land does not abut and have both actual vehicular and pedestrian access to and from _____ (the "Street"), (ii) the Street is not physically open and publicly maintained, or (iii) the Insured has no right to use existing curb cuts or entries along that portion of the Street abutting the Land.

Indirect Access – access by easement

The Company insures against loss or damage sustained by the Insured if, at Date of Policy (i) the easement identified as Parcel _____ in Schedule A (the "Easement") does not provide that portion of the Land identified as Parcel _____ in Schedule A both actual vehicular and pedestrian access to and from _____ (the "Street"), (ii) the Street is not physically open and publicly maintained, or (iii) the Insured has no right to use existing curb cuts or entries along that portion of the Street abutting the Easement.

Restrictions, Encroachments

- ALTA 9 series

…
2. For the purposes of this endorsement only:
   a. "Covenant" means a covenant, condition, limitation or restriction in a document or instrument in effect at Date of Policy.
   b. "Improvement" means an improvement, including any lawn, shrubbery, or trees, affixed to either the Land or adjoining land at Date of Policy that by law constitutes real property. . . .

4. The Company insures against loss or damage sustained by reason of:
   a. An encroachment of:
      i. an Improvement located on the Land, at Date of Policy, onto adjoining land or onto that portion of the Land subject to an easement; or
      ii. an Improvement located on adjoining land onto the Land at Date of Policy
      unless an exception in Schedule B of the policy identifies the encroachment otherwise insured against in Sections 4.a.i. or 4.a.ii.;

continued

c. Damage to an Improvement located on the Land, at Date of Policy:

   i. that is located on or encroaches onto that portion of the Land subject to an easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved; . . .

Contiguity

- ALTA 19 (series)
  - Multiple Parcel
  - Single

The Company insures against loss or damage sustained by the Insured by reason of:

the failure [of the * boundary line of Parcel A] of the Land to be contiguous to [the * boundary line of Parcel B] or;

2. the presence of any gaps, strips, or gores separating any of the contiguous boundary lines described above.

. . .

Easements & Encroachments

- ALTA 28 (series)

28-06 / easement- damage or forced removal

The Company insures against loss or damage sustained by the Insured if the exercise of the granted or reserved rights to use or maintain the easement(s) referred to in Exception(s) _____ of Schedule B results in:

(1) damage to an existing building located on the Land, or

(2) enforced removal or alteration of an existing building located on the Land.

. . .

- ALTA 28 (series – continued)

ALTA 28.1- 06 / boundaries and easements

For purposes of this endorsement only, "Improvement" means an existing building, located on either the Land or adjoining land at Date of Policy and that by law constitutes real property.
3. The Company insures against loss or damage sustained by the Insured by reason of:
a. An encroachment of any Improvement located on the Land onto adjoining land or onto that portion of the Land subject to an easement, unless an exception in Schedule B of the policy identifies the encroachment;
b. An encroachment of any Improvement located on adjoining land onto the Land at Date of Policy, unless an exception in Schedule B of the policy identifies the encroachment;
c. Enforced removal of any Improvement located on the Land as a result of an encroachment by the Improvement onto any portion of the Land subject to any easement, in the event that the owners of the easement shall, for the purpose of exercising the right of use or maintenance of the easement, compel removal or relocation of the encroaching Improvement; or
d. Enforced removal of any Improvement located on the Land that encroaches onto adjoining land.
4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from the encroachments listed as Exceptions _____ of Schedule B.

Thank you!

Jutta R. Deeney, Esq.
VP, Massachusetts State Counsel
Stewart Title Guaranty Company

ENDORSEMENT

ATTACHED TO POLICY NUMBER _____

STEWART TITLE GUARANTY COMPANY

File No.: **Charge:**

The Company insures against loss or damage sustained by the Insured by reason of the failure of the Land as described in Schedule A to be the same as that identified on the survey made by _____ dated _____, and designated Job No. _____.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Countersigned by:

_____
Authorized Countersignature

_____
Company Name

_____
City, State

stewart
title guaranty company

STEWART TITLE GUARANTY CO. INCORPORATED 1908 TEXAS

Matt Morris
President and CEO

Denise Carraux
Secretary

Endorsement Serial No.	**E-9388-**_____

stewart title

ALTA ENDORSEMENT 3.1-06 (ZONING-COMPLETED STRUCTURE)

ATTACHED TO POLICY NUMBER _____

ISSUED BY
STEWART TITLE GUARANTY COMPANY

File No.: _____ **Charge:** _____

1. The Company insures against loss or damage sustained by the Insured in the event that, at Date of Policy,
   a. according to applicable zoning ordinances and amendments, the Land is not classified Zone _____;
   b. the following use or uses are not allowed under that classification: _____.
   There shall be no liability under paragraph 1.b. if the use or uses are not allowed as the result of any lack of compliance with any conditions, restrictions, or requirements contained in the zoning ordinances and amendments, including but not limited to the failure to secure necessary consents or authorizations as a prerequisite to the use or uses. This paragraph 1.c. does not modify or limit the coverage provided in Covered Risk 5.
2. The Company further insures against loss or damage sustained by the Insured by reason of a final decree of a court of competent jurisdiction either prohibiting the use of the Land, with any existing structure, as specified in paragraph 1.b. or requiring the removal or alteration of the structure, because, at Date of Policy, the zoning ordinances and amendments have been violated with respect to any of the following matters:
   a. Area, width, or depth of the Land as a building site for the structure
   b. Floor space area of the structure
   c. Setback of the structure from the property lines of the Land
   d. Height of the structure, or
   e. Number of parking spaces.
3. There shall be no liability under this endorsement based on:
   a. the invalidity of the zoning ordinances and amendments until after a final decree of a court of competent jurisdiction adjudicating the invalidity, the effect of which is to prohibit the use or uses;
   b. the refusal of any person to purchase, lease or lend money on the Title covered by this policy.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Countersigned by:

_____
Authorized Countersignature

_____
Company Name

_____
City, State

Matt Morris
President and CEO

Denise Carraux
Secretary

For purposes of this form the "Stewart Title" logo featured above is the represented logo for the underwriter, Stewart Title Guaranty Company.

File No.: _____
ALTA 3.1-06 Zoning-Completed Structure Endorsement 10-22-09
Endorsement Serial No.: E-9381-_____

ALTA Endorsement 3.2-06 (Zoning - Land Under Development) (04-02-12)

ENDORSEMENT

Attached to Policy No. SPECIMEN

Issued by

STEWART TITLE GUARANTY COMPANY

1. For purposes of this endorsement:

a. "Improvement" means a building, structure, road, walkway, driveway, curb, subsurface utility or water well existing at Date of Policy or to be built or constructed according to the Plans that is or will be located on the Land, but excluding crops, landscaping, lawns, shrubbery, or trees.

b. "Plans" means those site and elevation plans made by Co-Operative Land Surveyors, LLC dated 12/21/12 designated as 1-5 Green Street, Clinton, Massachusetts, consisting of 3 sheets.

2. The Company insures against loss or damage sustained by the Insured in the event that, at Date of Policy

a. according to applicable zoning ordinances and amendments, the Land is not classified Zone _____;

b. the following use or uses are not allowed under that classification: _____

c. There shall be no liability under paragraph 2.b. if the use or uses are not allowed as the result of any lack of compliance with any condition, restriction, or requirement contained in the zoning ordinances and amendments, including but not limited to the failure to secure necessary consents or authorizations as a prerequisite to the use or uses. This paragraph 2.c. does not modify or limit the coverage provided in Covered Risk 5.

3. The Company further insures against loss or damage sustained by the Insured by reason of a final decree of a court of competent jurisdiction either prohibiting the use of the Land, with any existing Improvement, as specified in paragraph 2.b. or requiring the removal or alteration of the Improvement, because, at Date of Policy, the zoning ordinances and amendments have been violated with respect to any of the following matters:

a. Area, width, or depth of the Land as a building site for the Improvement

b. Floor space area of the Improvement

c. Setback of the Improvement from the property lines of the Land

d. Height of the Improvement, or

e. Number of parking spaces.

4. There shall be no liability under this endorsement based on:

a. the invalidity of the zoning ordinances and amendments until after a final decree of a court of competent jurisdiction adjudicating the invalidity, the effect of which is to prohibit the use or uses;

ALTA Endorsement 3.2-06 (Zoning - Land Under Development) (04-02-12)
b. the refusal of any person to purchase, lease or lend money on the Title covered by this policy.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

STEWART TITLE GUARANTY COMPANY

By: __SPECIMEN_____ Date: _____

stewart title®

ALTA 17-06 ENDORSEMENT (ACCESS AND ENTRY)

ATTACHED TO POLICY NUMBER _____

ISSUED BY
STEWART TITLE GUARANTY COMPANY

File No.: _____ **Charge:** _____

The Company insures against loss or damage sustained by the Insured if, at Date of Policy (i) the Land does not abut and have both actual vehicular and pedestrian access to and from _____ (the "Street"), (ii) the Street is not physically open and publicly maintained, or (iii) the Insured has no right to use existing curb cuts or entries along that portion of the Street abutting the Land.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Countersigned by:

_____
Authorized Countersignature

_____
Company Name

_____
City, State

STEWART TITLE GUARANTY COMPANY INCORPORATED 1908 TEXAS

Matt Morris
President and CEO

Denise Carraux
Secretary

For purposes of this form the "Stewart Title" logo featured above is the represented logo for the underwriter, Stewart Title Guaranty Company.

File No.: _____
ALTA 17-06 Access and Entry Endorsement 6-17-06
Endorsement Serial No.: E-9361-_____

AMERICAN LAND TITLE ASSOCIATION

ENDORSEMENT

ATTACHED TO POLICY NUMBER: SPECIMEN

ISSUED BY

File No.:

ENDORSEMENT

Attached to Policy No. _____

Issued by

STEWART TITLE GUARANTY COMPANY

1. The insurance provided by this endorsement is subject to the exclusions in Section 5 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

2. For the purposes of this endorsement only:

a. "Covenant" means a covenant, condition, limitation or restriction in a document or instrument in effect at Date of Policy.

b. "Improvement" means an improvement, including any lawn, shrubbery, or trees, affixed to either the Land or adjoining land at Date of Policy that by law constitutes real property.

3. The Company insures against loss or damage sustained by the Insured by reason of:

a. A violation of a Covenant that:

i. divests, subordinates, or extinguishes the lien of the Insured Mortgage,

ii. the invalidity, unenforceability or lack of priority of the lien of the Insured Mortgage, or

iii. causes a loss of the Insured's Title acquired in satisfaction or partial satisfaction of the Indebtedness;

b. A violation on the Land at Date of Policy of an enforceable Covenant, unless an exception in Schedule B of the policy identifies the violation;

c. Enforced removal of an Improvement located on the Land as a result of a violation, at Date of Policy, of a building setback line shown on a plat of subdivision recorded or filed in the Public Records, unless an exception in Schedule B of the policy identifies the violation; or

d. A notice of a violation, recorded in the Public Records at Date of Policy, of an enforceable Covenant relating to environmental protection describing any part of the Land and referring to that Covenant, but only to the extent of the violation of the Covenant referred to in that notice, unless an exception in Schedule B of the policy identifies the notice of the violation.

4. The Company insures against loss or damage sustained by reason of:

a. An encroachment of:

i. an Improvement located on the Land, at Date of Policy, onto adjoining land or onto that portion of the Land subject to an easement; or

ii. an Improvement located on adjoining land onto the Land at Date of Policy unless an exception in Schedule B of the policy identifies the encroachment otherwise insured against in Sections 4.a.i. or 4.a.ii.;

b. A final court order or judgment requiring the removal from any land adjoining the Land of an encroachment identified in Schedule B; or

c. Damage to an Improvement located on the Land, at Date of Policy:

i. that is located on or encroaches onto that portion of the Land subject to an easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved; or

ii. resulting from the future exercise of a right to use the surface of the Land for the extraction or development of minerals or any other subsurface substances excepted from the description of the Land or excepted in Schedule B.

5. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:

a. any Covenant contained in an instrument creating a lease;

b. any Covenant relating to obligations of any type to perform maintenance, repair, or remediation on the Land;

c. except as provided in Section 3.d, any Covenant relating to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances;

d. contamination, explosion, fire, fracturing, vibration, earthquake or subsidence; or

e. negligence by a person or an Entity exercising a right to extract or develop minerals or other subsurface substances.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Signed under seal for the Company, but this endorsement is to be valid only when it bears an authorized countersignature.

stewart
title guaranty company

Chairman of the Board

STEWART TITLE GUARANTY CO. INCORPORATED 1908 TEXAS

President

Countersigned:

_____
Authorized Countersignature

_____
Company Name

_____
City, State

Endorsement Serial No. E-9330-_____

File No.: _____

ALTA Endorsement 19-06 (Contiguity-Multiple Parcels)

ENDORSEMENT

Attached to Policy No.

Issued by

STEWART TITLE GUARANTY COMPANY

The Company insures against loss or damage sustained by the Insured by reason of:

1. the failure [of the _____ boundary line of Parcel A] of the Land to be contiguous to [the _____ boundary line of Parcel B] **[for more than two parcels, continue as follows: of [the _____ boundary line of Parcel B] of the Land to be contiguous to [the _____ boundary line of Parcel C] and so on until all contiguous parcels described in the policy have been accounted for]**; or

2. the presence of any gaps, strips, or gores separating any of the contiguous boundary lines described above.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Signed under seal for the Company, but this endorsement is to be valid only when it bears an authorized countersignature.

stewart
title guaranty company

Chairman of the Board

STEWART TITLE GUARANTY CO. INCORPORATED 1908 TEXAS

Malcolm S. Morris
President

Countersigned:

_____
Authorized Countersignature

_____
Company Name

_____
City, State

ENDORSEMENT

ATTACHED TO POLICY NUMBER _____-_____-_____

ISSUED BY

stewart
title guaranty company

File No.:

The Company insures against loss or damage sustained by the Insured if the exercise of the granted or reserved rights to use or maintain the easement(s) referred to in Exception(s) _____ of Schedule B results in:

(1) damage to an existing building located on the Land, or

(2) enforced removal or alteration of an existing building located on the Land .

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Signed under seal for the Company, but this endorsement is to be valid only when it bears an authorized countersignature.

stewart
title guaranty company

Chairman of the Board

STEWART TITLE GUARANTY CO. INCORPORATED 1908 TEXAS

Malcolm S. Morris
President

Countersigned:

_____
Authorized Countersignature

_____
Company Name

_____
City, State

Endorsement Serial No. E-9362-_____

ENDORSEMENT

ATTACHED TO POLICY NUMBER _____-_____-_____

ISSUED BY

stewart title guaranty company

1. The insurance provided by this endorsement is subject to the exclusions in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.
2. For purposes of this endorsement only, "Improvement" means an existing building, located on either the Land or adjoining land at Date of Policy and that by law constitutes real property.
3. The Company insures against loss or damage sustained by the Insured by reason of:
    a. An encroachment of any Improvement located on the Land onto adjoining land or onto that portion of the Land subject to an easement, unless an exception in Schedule B of the policy identifies the encroachment;
    b. An encroachment of any Improvement located on adjoining land onto the Land at Date of Policy, unless an exception in Schedule B of the policy identifies the encroachment;
    c. Enforced removal of any Improvement located on the Land as a result of an encroachment by the Improvement onto any portion of the Land subject to any easement, in the event that the owners of the easement shall, for the purpose of exercising the right of use or maintenance of the easement, compel removal or relocation of the encroaching Improvement; or
    d. Enforced removal of any Improvement located on the Land that encroaches onto adjoining land.
4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from the encroachments listed as Exceptions _____ of Schedule B.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Signed under seal for the Company, but this endorsement is to be valid only when it bears an authorized countersignature.

Countersigned:

_____
Authorized Countersignature

_____
Company Name

_____
City, State

Adverse Possession by Color of Title

Shannon F. Slaughter
Englander & Chicoine P.C.
44 School Street, Suite 800
Boston, MA 02108
(617) 723-7440

ADVERSE POSSESSION BY COLOR OF TITLE

- When a claim of adverse possession is accompanied by a "color of title" claim, the possessor is asserting a claim of ownership based on an instrument, such as a deed, purporting to pass valid title, although it does not. *Norton v. West*, 8 Mass.App.Ct. 348, 351 (1979).

- "It is settled that where a person enters upon a parcel of land under a color of title and actually occupies a part of the premises described in the deed, his possession is not considered as limited to that part so actually occupied but gives him constructive possession of the entire parcel." *Dow v. Dow*, 243 Mass. 587, 593 (1923)

- if adverse possession is established, the possessor's ownership extends to the entire parcel described in the instrument and not just the part actually used and possessed. *Inhabitants of Nantucket v. Mitchell*, 271 Mass. 62, 68 (1930)

ADVERSE POSSESSION BY COLOR OF TITLE

Elements

A successful claim under color of title requires:

(a) a successful adverse possession claim; and

(b) proof that the claim of ownership is based on a document or writing of title.

Long v. Wickett, 50 Mass.App.Ct. 380, 382 n.3 (2000).

ADVERSE POSSESSION BY COLOR OF TITLE

Elements

"[P]roof of non-permissive use which is exclusive, actual, open [and] notorious, and adverse for twenty years." *Lawrence v. Town of Concord*, 439 Mass. 416, 421 (2003).

ADVERSE POSSESSION BY COLOR OF TITLE

Elements

Exclusive: Only the possessor must use and enjoy the property continuously for the required period as the average owner would use it. *Kendall*, 413 Mass. at 619.

ADVERSE POSSESSION BY COLOR OF TITLE

Elements

Actual: Claimant must show that he or she made changes to the land that constitute "such a control or dominion over the premises as to be readily considered acts similar to those which are usually and ordinarily associated with ownership. *Peck v. Bigelow*, 34 Mass.App.Ct. 551, 556 (1993).

The nature and extent of use required to establish title by adverse possession varies "with the character of the land, the purposes for which it is adapted, and the uses to which it has been put." *LaChance v. First Nat'l Bank & Trust Co.*, 301 Mass. 488, 490 (1938).

- Wild or woodlands: *a more pronounced occupation is needed*; the land must have been enclosed or reduced to cultivation. *Sea Pines Condo. III Ass'n v. Steffens*, 61 Mass.App.Ct. 838, 933 (2004).

ADVERSE POSSESSION BY COLOR OF TITLE

Elements

Open & Notorious: Use is "sufficiently pronounced so as to be made known, directly or indirectly, to the landowner if he or she maintained a reasonable degree of supervision over the property." *Boothroyd v. Bogartz*, 68 Mass.App.Ct. 40, 44 (2007).

- Intended to secure to the owner of the affected land a fair chance of protecting his or her property interests.

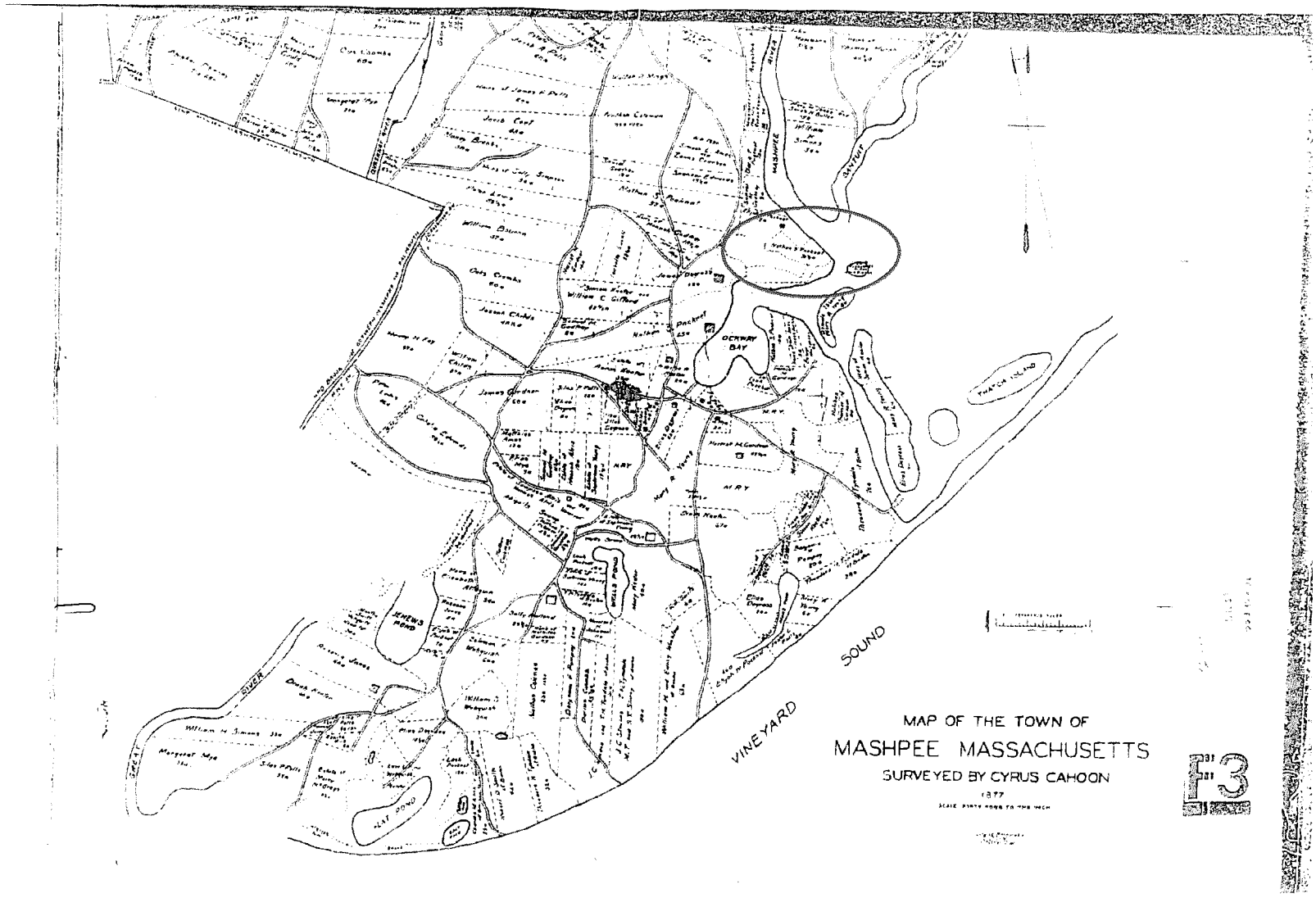
Continous:"[U]interrupted for the full twenty-year period." *Hewitt v. Peterson*, 253 Mass. 92, 94 (1925).

Wolpe et al. v. Haney, Trustee of SN Trust

Facts:

- History of Mashpee
- Mashpee Books 1-3
- Setoff of the Uplands
    - Nathan S. Pocknet (a/k/a Upland of Elijah W. Pocknet)
    - Homestead Lot of Elijah W. Pocknet
- Setoff of the Marshes
    - Lot 16: Leah Pocknet, Phebe E. Pocknet, Elijah W. Pocknet, Phebe A. Pocknet, and Joshua Pocknet
    - Lot 17: Elizabeth S. Coombs, George S. Coombs
    - Lot 18: Walter R. Mingo, Francis Mingo

Wolpe et al. v. Haney, Trustee of SN Trust



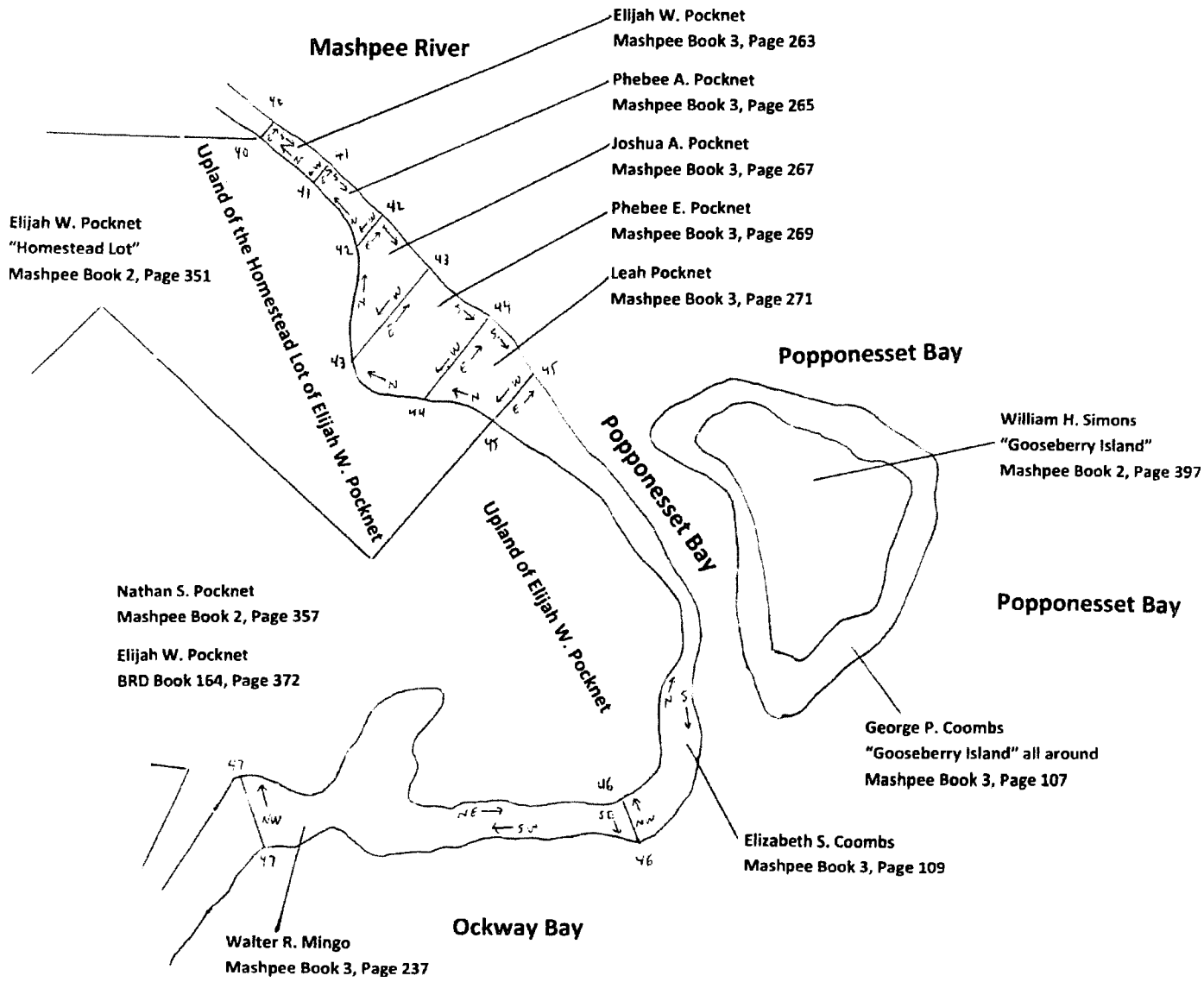
Wolpe et al. v. Haney, Trustee of SN Trust

Wolpe et al. v. Haney, Trustee of SN Trust

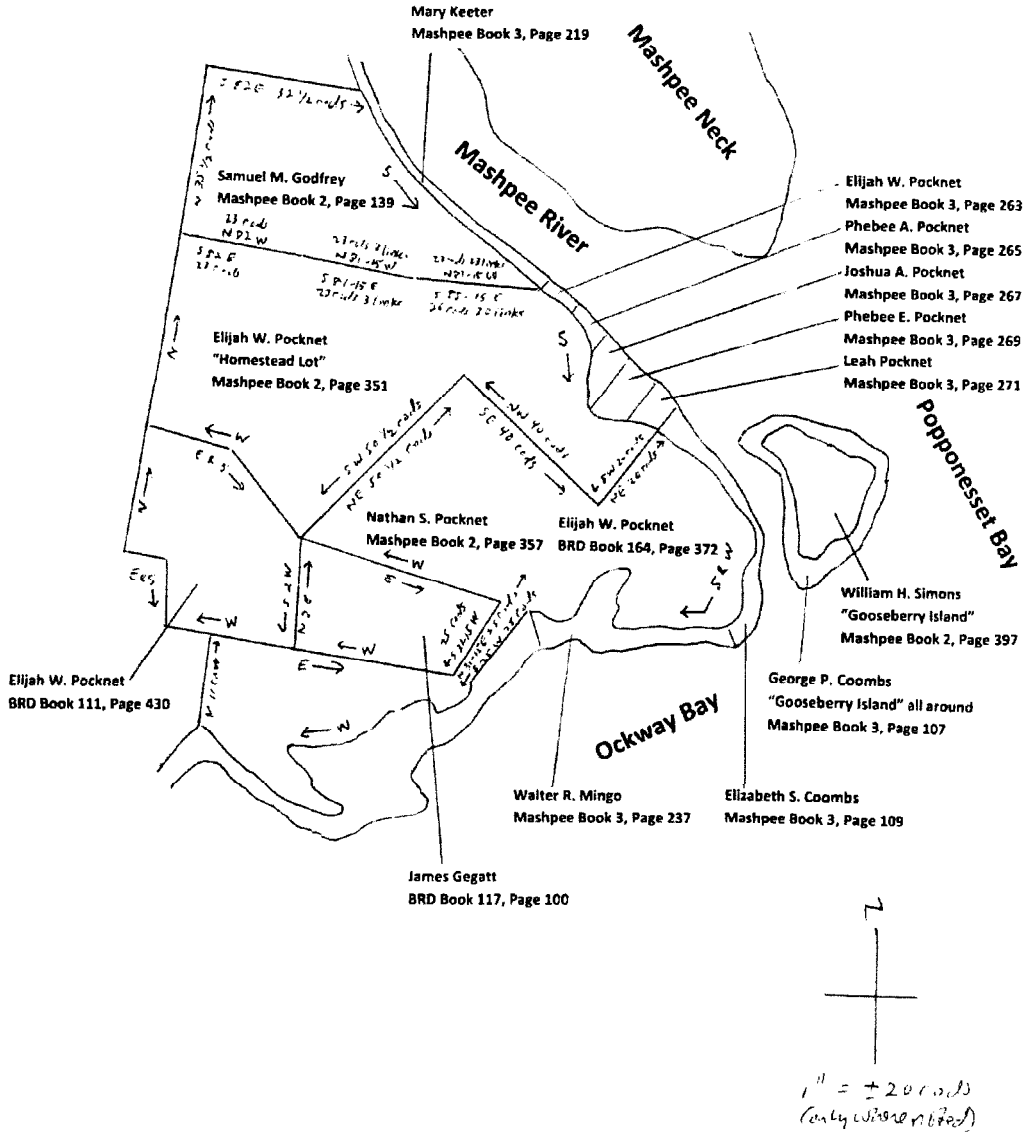
Facts:

- Chains of Title for 80 and 84 Punkhorn Point Road
  - 1946 subdivision
  - 1998 Plan
  - 2000 Plan
  - 2002 Land Swap
- Acquisition of the Leah Pocknet Marsh Setoff by the Plaintiffs
- Location of the Elizabeth S. Coombs Setoff
- Location of the Leah Pocknet Setoff

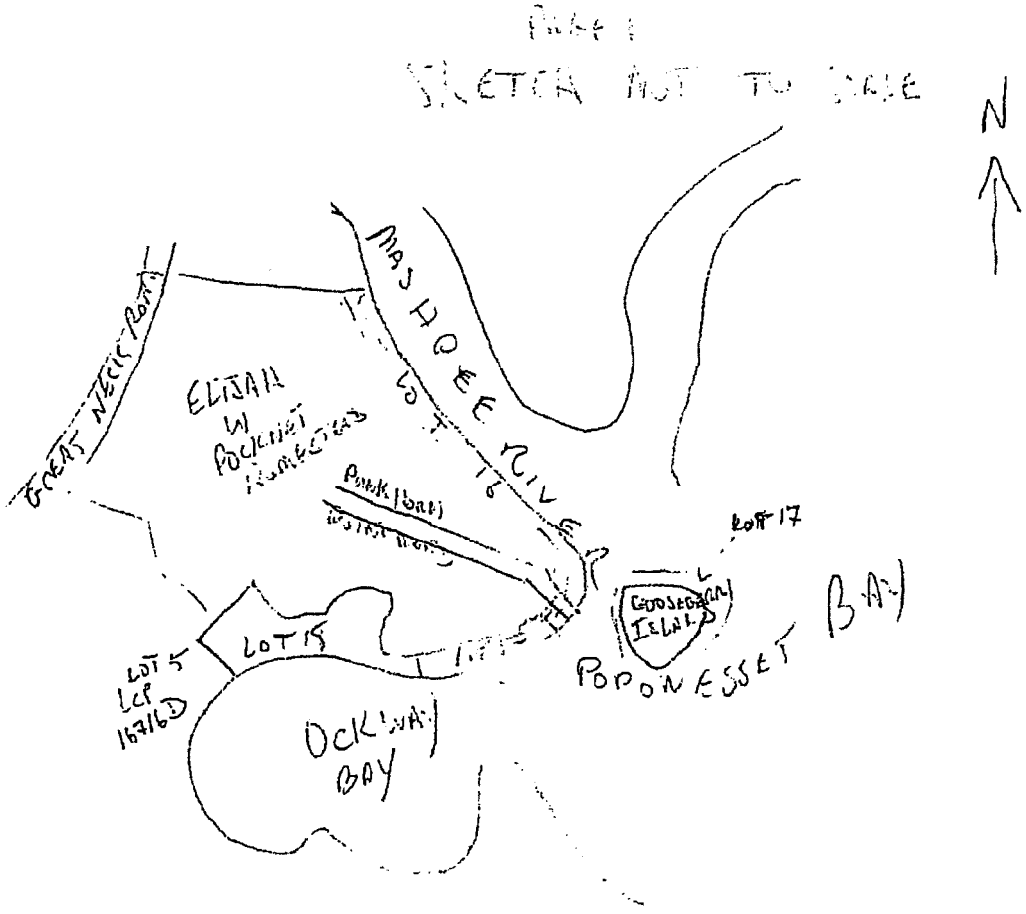
Wolpe et al. v. Haney, Trustee of SN Trust



Wolpe et al. v. Haney, Trustee of SN Trust



Wolpe et al. v. Haney, Trustee of SN Trust



LOT 16 BOUNDED BY OCKWAY BAY

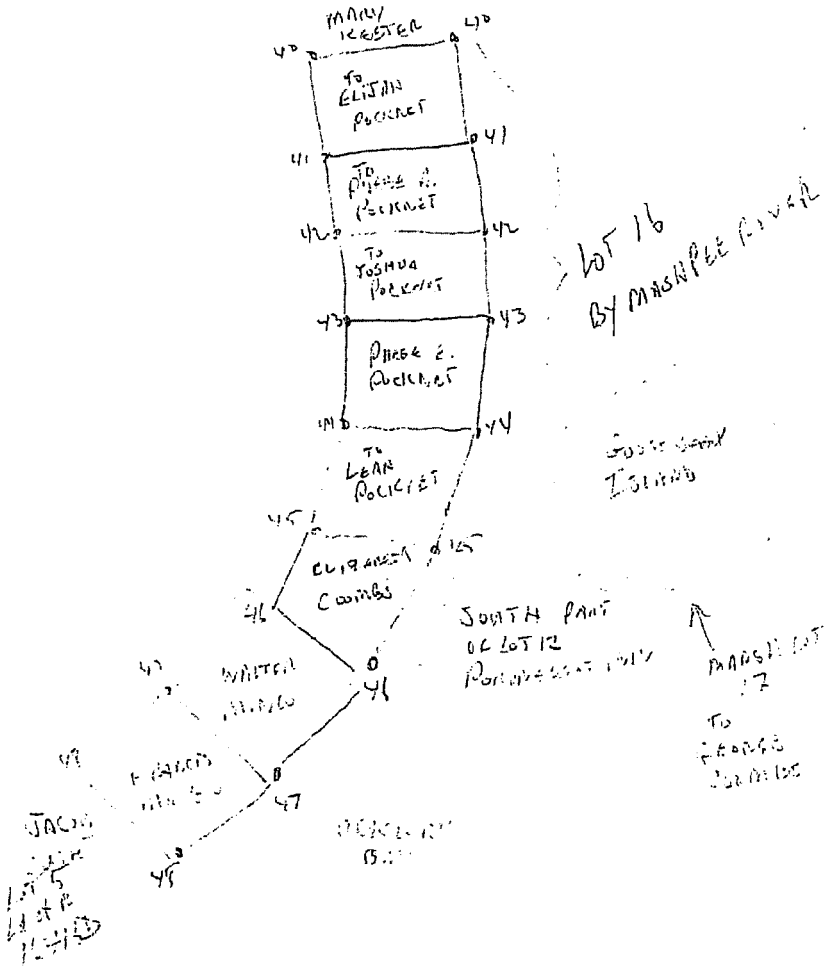
LOT 17 (SOUTH) BOUNDED BY POPONESSET BAY

LOT 16 BOUNDED BY MASHPEE RIVER

Wolpe et al. v. Haney, Trustee of SN Trust

PAGE 2

SKETCH NOT TO SCALE

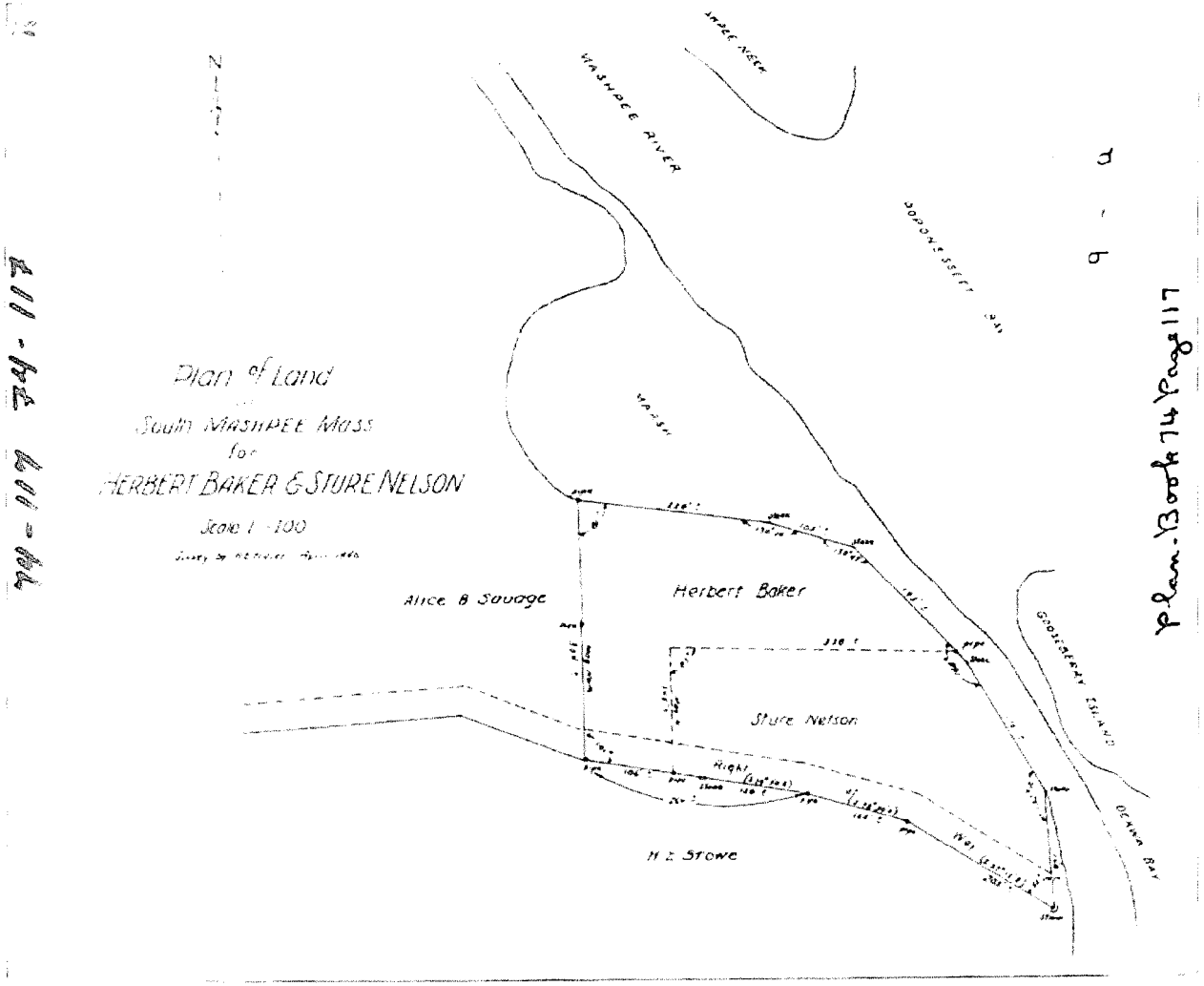


Wolpe et al. v. Haney, Trustee of SN Trust

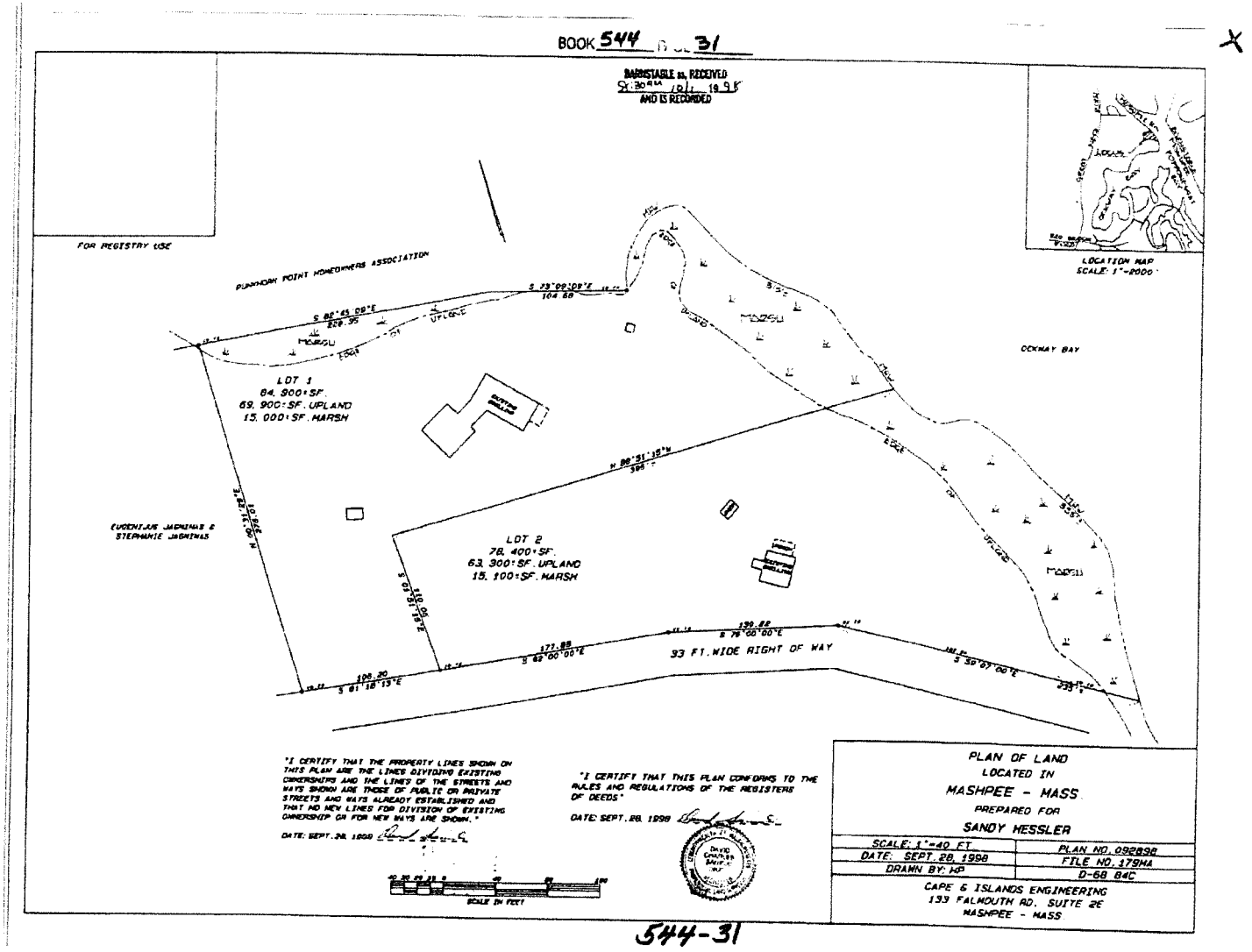
Adverse Possession by Color of Title:

1. Adverse Possession
    - Exclusive
    - Actual
    - Open
    - Notorious
    - Continuous
2. Document or writing of title

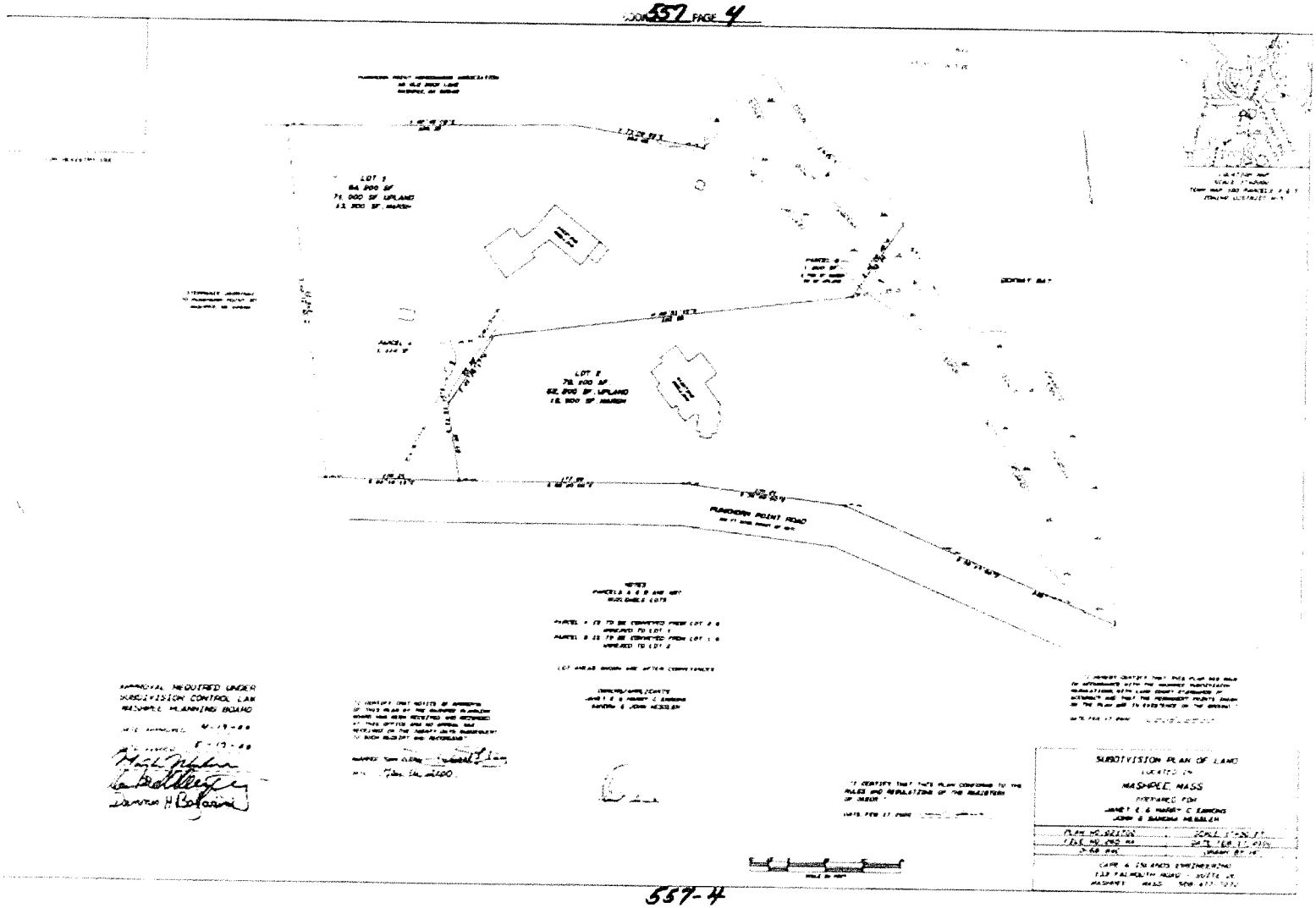
Wolpe et al. v. Haney, Trustee of SN Trust



Wolpe et al. v. Haney, Trustee of SN Trust



Wolpe et al. v. Haney, Trustee of SN Trust

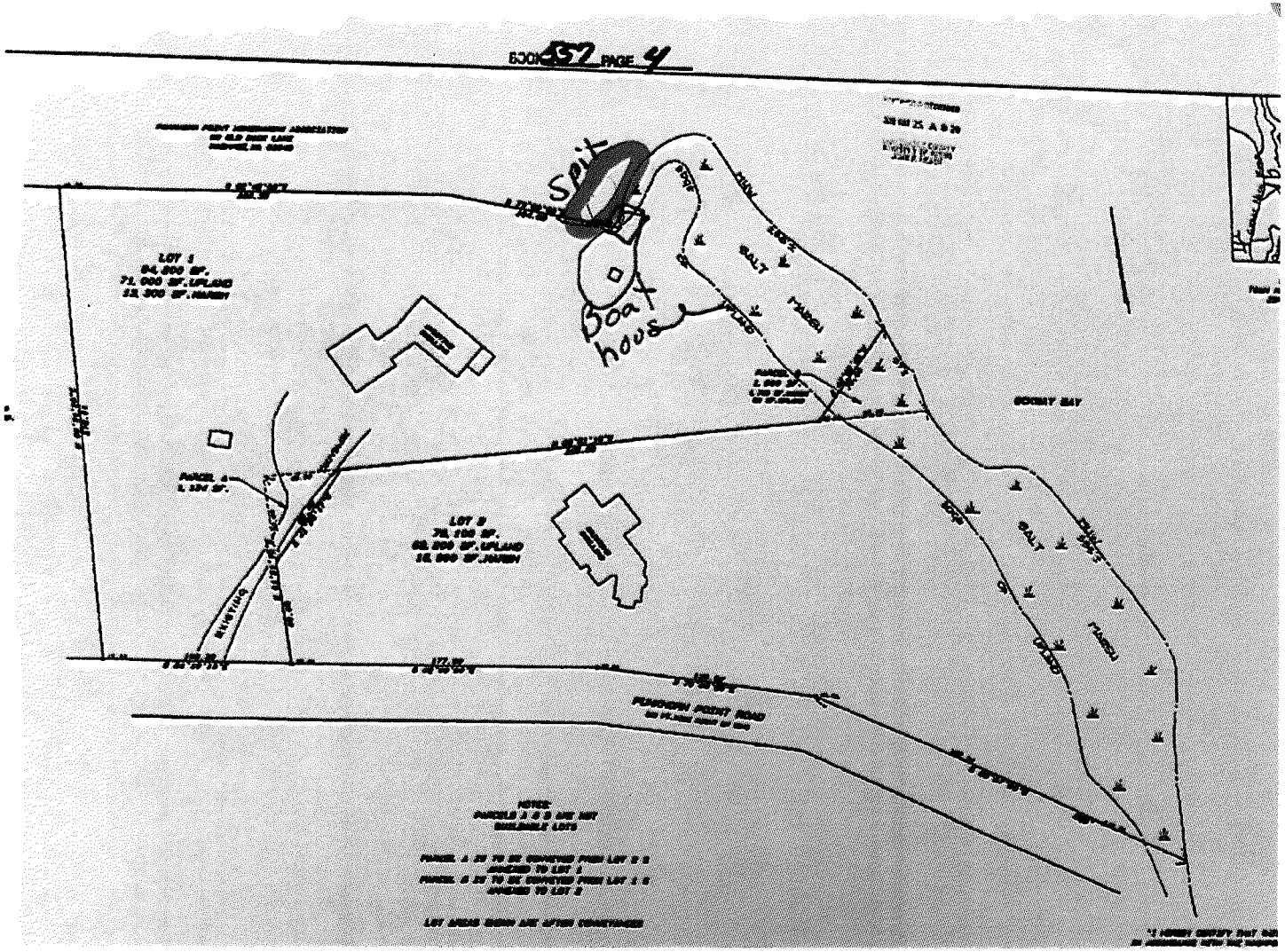


Wolpe et al. v. Haney, Trustee of SN Trust

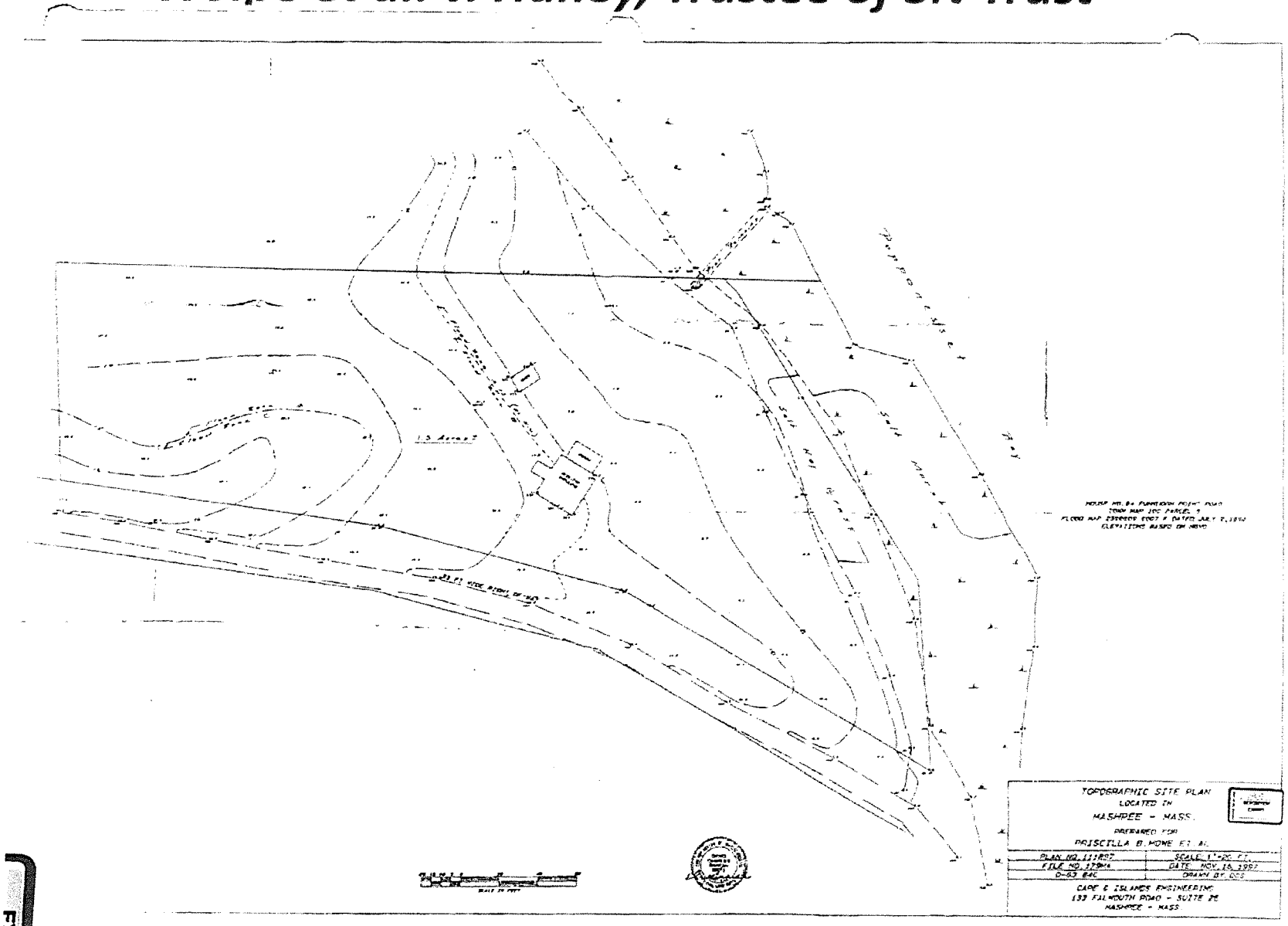
Adverse Possession: 80 Punkhorn Point Road

- The Spit
- Cement stairs
- Shed/boathouse
- Pathway
- Stakes
- Others' use

Wolpe et al. v. Haney, Trustee of SN Trust



Wolpe et al. v. Haney, Trustee of SN Trust



Wolpe et al. v. Haney, Trustee of SN Trust

Adverse Possession: 84 Punkhorn Point Road

- Wooden Walkway
- Blue box
- Others' use

Evans v. Jackson

24 LCR 328

(June 15, 2016)

Evans v. Jackson, 24 LCR 328 (June 15, 2016)

Michael and Jane Jackson, trustees of the Jackpot Trust, own a parcel by Chapoquoit Harbor in Falmouth that was once a tidal pond. The tidal pond was filled in the 1920s.

Nancy Evans, trustee of the NWW-2 Trust, owns an upland lot that abuts the Jackpot Trust property. Evans claimed that she has title to the filled flats of the pond abutting her property that are currently being used and occupied as part of the Jackpot Trust's property because title to those flats was conveyed along with her property by virtue of the Colonial Ordinance of 1641-1647.

The court determined that the flats were separated from the upland of the Evans property, so that the Jackpot Trust has title to the flats, and that, in addition, the Jackpot Trust has obtained title to this disputed area by adverse possession.

Facts Common to Title of Evans and the Jackpot Trust

Chapoquoit "Island" is a peninsula in Falmouth with Buzzards Bay to the west and West Falmouth Harbor wrapping around it to the north, east, and south. Chapoquoit consists of approximately 40 lots along Associates Avenue.

Both Evans and the Jacksons can trace their titles back to deeds recorded in the Barnstable County Registry of Deeds on December 10, 1872 at Book 113, Page 182-183, in which Daniel and Joshua Bowerman (Bowermans) conveyed a one-third interest a 36-acre parcel on Chapoquoit Island, then called Hog Island, to Nathaniel Coleman (Coleman), and two-thirds interest in the same parcel to Franklin King (King). In 1889, Coleman conveyed his one-third interest in the 36-acre parcel to Charles Jones. King and Jones acquired the land with the intention to subdivide it and develop it for the sale of residential lots.

In 1890, a plan was created showing 38 subdivided lots surveyed in 1890 and recorded in the registry on January 29, 1892. The 1890 Plan shows Buzzards Bay, Chapoquoit Harbor, and two ponds, the larger of which to the northeast is at issue in this case (the Pond). The high-water mark and low-water mark that surround Chapoquoit Island are depicted on the 1890 Plan and follow a curve into and around the Pond in front of the lots abutting the Pond.

King and Jones entered into a recorded agreement, in which they described themselves as "proprietors in equal shares" of Chapoquoit and agree to the imposition of certain restrictions to run with the land as shown on the 1890 plan. The agreement states that the land between the edge of the bank and low-water mark is open to any lot owner within the Chapoquoit subdivision, subject to the rights of the proprietors, Kings and Jones, to construct wharves, boathouses, and things of that nature.

In 1892, King conveyed to Jones his interest in Lot 11, as shown on the 1890 Plan. In 1893, King and Jones decide to divide the rest of the buildable lots between each other, mutually exchanging their partial interests so that each could become the sole owner in a number of lots. Jones conveyed to King all his shares and interests in Lots 1, 12, 13, 15, 19, 20 and 30-37, as shown on the 1890 Plan. King conveyed to Jones all his shares and interests in Lots 2-10, 14, 16, 24, and 38. The deeds used to record the conveyances are referred to as the "Division Deeds."

Through the conveyances, Jones acquired title to a series of lots that start on the south of Chapoquoit Harbor up around and abutting the Pond. The Division Deeds contain several agreements and the following language: "it is understood however that the shore lots next to Buzzards Bay and Chapoquoit Harbor extend to low water mark of said Bay and Harbor although their sidelines on said plan are drawn only to the edge of the bank." The same day the

Division Deeds were executed, Jones conveyed to King his interest in the westerly portion of Lot 22.

In February 1898, another plan of the land at Chapoquoit was prepared and recorded. The 1898 plan shows an unnumbered lot adjacent to Lot 11, with the boundary line extending to the low-water mark of the Pond.

In January 1899, Jones and the trustees of the estate of King conveyed to John Lathrop Wakefield (Wakefield) all their right, title and interest in the easterly portion of Lot 22 on both sides of the Avenue as shown on the 1890 Plan. The bounds of this portion of Lot 22 are described as "Northerly and Easterly by Chapoquoit Harbor; Southerly by said Chapoquoit Harbor, and by a pond." This conveyance was part of a larger conveyance of some of the flats at Chapoquoit along Buzzards Bay and Chapoquoit Harbor. This property was immediately re-conveyed to Jones, Samuel King, and Charles Baker, as trustees of Chapoquoit Associates.

A new plan of Chapoquoit, done in 1904, shows Buzzards Bay, Chapoquoit Harbor, and the Pond. The 1904 Plan shows Lots 8, 9, 10, and 11 (further subdivided into Lots 11A and 11B), around the Pond with boundary lines stopping at the edge of the bank. As in the 1898 Plan, the unnumbered lot next to Lot 11B contains a boundary line extending to the low-water mark.

Evans' Title

Evans, as trustee of the NWW-2 Realty Trust, is the present owner of a developed, residential lot on Chapoquoit, known as Lot 9 with the street number 131 Associates Road. On the 1890 Plan, Lot 9 is shown as bounded by an Avenue to the south and adjacent to the Pond to the north, with a feature designated as "edge of bank," which serves as the northerly boundary.

In 1898, Jones conveyed Lot 9 to Samuel King, heir of King. The 1898 deed recites the property's metes and bounds, including that it is bounded northwesterly by Lot 10 on the 1890

Plan, one hundred and forty-nine feet, northerly by the "edge of the bank" as shown on the 1890 Plan, and easterly by Lot 8 by one hundred and fifty four 5/10 feed. Overall Lot 9 contains approximately 43,125 square feet. The 1898 Deed also states that it is "subject to and with the benefit of all the rights, easements, restrictions and provisions in [the 1893 Division Deeds] contained or referred to so far as the same are not in force and applicable."

In January 1899, trustees of King conveyed to Jones the undivided two-thirds interest of King in the unnumbered lot with the building located thereon, shown on the 1898 Plan. The deed to the unnumbered lot refers to the 1898 Plan and recites that the plan is to be recorded "herewith." The deed describes the unnumbered lot as bounded "by the Pond." In May 1899, Jones conveyed the westerly part of Lot 11 (later shown as Lot 11A on the 1904 Plan) to Esther Hitchcock.

In June 1901, Samuel King conveyed Lot 9 to John Hitchcock (Hitchcock). The boundaries and descriptions of Lot 9 in the 1901 Deed are identical to those in the 1898 Deed, including that Lot 9 is bound "northerly by the edge of bank as shown on the 1890 Plan." In June 1901, Jones conveyed Lot 10 as shown on the 1890 Plan to Hitchcock.

In March 1912, executors of the estate of Hitchcock conveyed Lots 9 and 10 to Theodore E. Stephenson (Stephenson). The same day, Stephenson conveyed Lots 9 and 10 to Esther Hitchcock, individually. By virtue of this conveyance and the 1899 conveyance described above, Ester Hitchcock was the owner of Lots 9, 10, and 11A as shown on the 1904 Plan.

In May 1924, Jones conveyed 11B as shown on the 1904 Plan to Nancy and George Crompton (Cromptons). In October 1929, Esther Hitchcock conveyed Lots 9, 10, and 11A to Mabel A. Heald (Heald). The boundaries and descriptions of Lot 9 in this deed are identical to those in the 1898 Deed, as well as in the 1901 Deed, including that Lot 9 is bound "northerly by

the edge of the bank as shown on the 1890 Plan. In November 1930, Heald conveyed Lots 9 and 10 to the Cromptons. The boundaries and descriptions of Lot 9 in this deed are identical to those in Lot 9's chain of title, including that Lot 9 is bound "northerly by the edge of bank as shown on the 1890 Plan." In November 1943, George Crompton conveyed Lots 9, 10, and 11B to Nancy Jenney, formerly Nancy Crompton. The boundaries and descriptions of Lot 9 in this deed are identical to those in the 1898 Deed and 1901 Deed, including that Lot 9 is bounded "northerly by the edge of bank as shown on the 1890 Plan."

In July 1950, Paul Jones conveyed to Nany Jenney a portion of the unnumbered lot (Jenney parcel) shown on the 1898 Plan and 1904 Plan as abutting Lot 11B to the eat. The Jenney parcel can been seen on the 1958 Plan. In December 1968, Nancy Jenney conveyed Lots 9, 10, and 11B and the Jenney Parcel to her daughter Nancy Willard Wendell (Wendell). The boundaries and descriptions of Lot 9 in this deed are identical to those in the Lot 9's chain-of-title, including Lot 9 is bound "northerly by the edge of the bank as shown on the 1890 Plan."

In November 1994, Wendell conveyed Lots 10 and 11B and the Jenney parcel to herself, as trustee of the NWW-1 Realty Trust. Lot 11B and the Jenney parcel together now have the address of 73 Associates Road and are improved with a single-family dwelling. Lot 10 is an undeveloped wooded lot known as the "Middle Lot." In November 1994, Wendell also conveyed Lot 9 to herself, as trustee of the NWW-2 Realty Trust. The boundaries and descriptions of Lot 9 in this deed are identical to those in the chain-of-title, including that Lot 9 is bound "northerly by the edge of the bank as shown on the 1890 Plan." Lot 9 now has an address of 131 Associates Road.

Wendell died on November 30, 2004. She was survived by three daughters, one of which is the Plaintiff. The daughters became trustees of the NWW-1 and NWW-2 Realty Trusts. A plan

was prepared for division of ownership among the three daughters of Lots 9, 10, and 11B and the Jenney parcel, entitled "Existing Conditions Plan for Call Abdulrazak" dated January 6, 2006. Real estate appraisals of the properties were obtained. The size or area of each of the three lots and the Jenney parcel was a major component of the appraisals. Evans did not communicate any disagreement with the division plans' depiction of the property line along the Jacksons' property.

In October 2011, Evans became the sole trustee of NWW-2 Realty Trust, which holds title to Lot 9 (the Evans property). After becoming the sole trustee of NWW-2 Realty, Evans asserted that title to Lot 9 included the Disputed Area, filed tidelines of the prior Pond. Evans relies on the language in the 1893 Division Deeds describing the boundary of the shore lots as being extended to low-water mark of the Bay and Harbor, and on the 1898 Deed of Lot 9 from Jones to King that was subject to and with the benefits of all the rights, easements, and restrictions in the 1893 Division Deeds.

Jackpot Trust's Title

In April 1926, Jones conveyed an unnumbered lot (Jones parcel) to his heir Paul Jones. The Jones parcel abuts the Jenney parcel to the east, as shown on the 1904 Plan and 1958 Plan. The boundary line of the Jones parcel was extended from the low-water mark across the Pond "to the edge of the bank on the Northerly side of Lot 9," then running northwesterly along the edge of the bank to the southeasterly side line of Lot 10, forming the northeasterly boundary of Lot 10, then to the southeasterly corner of Lot 11B, forming the easterly boundary of Lot 11B, and up to the southerly boundary of the Avenue.

In March 1929, the Department of Public Works of the Commonwealth issued a Chapter 91 license to Jones authorizing dredging in West Falmouth Harbor and placement of the dredged materials "in tidewater in a pond tributary to said harbor, at Chapoquoit." At some point during

the late 1920's or early 1930's, the dredging and filling of the area shown on the 1929 license plan occurred.

In December 1933, the trustees of King executed a use deed to Willard Morse, conveying all of their "right, title and interest, if any, in and to any land or interest in land in the town of Falmouth, Barnstable County, Massachusetts, including flats or easements" to the use of Willard Morse and his heirs as described in the deed. The same day, the trustees of King granted to the trustees of Jones all of their "right, title, and interest, if any, in the land under or included within the limits of the Pond adjacent to Lots 8, 9, and 10" and in any flats and lands lying between low-water mark of said Pond as shown in the 1890 Plan and 1904 Plan. The two deeds executed on January 23, 1934, are referred to as the "1934 Deeds."

On July 10, 1934, trustees of Chapoquoit Associates conveyed the easterly portion of Lots 22, to Jones. In February 1935, the trustees of Jones conveyed to Paul Jones Lot 8 and "the land under or included within the limits of the pond adjacent to Lots 8, 9, and 10 as shown on the 1904 Plan, all flats or land laying between said Lots 8, 9, and 10, and low-water mark of said pond as shown on the 1904 Plan and a portion of Lot 22... lying to the southeasterly side of said Associates Road."

In 1950, a single-family residence was built by Paul Jones, the Jacksons' predecessor-in-interest, on a portion of the filled former Pond lying to the northeast of Lot 10 and north of Lot 9. In August 1958, the Falmouth Planning Board endorsed as approval not required under the Subdivision Control Law a plan entitled "Plan of Land at Chapoquoit West Falmouth to be conveyed by Paul Jones June 14, 1958" (1958 Plan). The 1958 Plan shows the location of the residence built by Paul Jones marked "house" in its current location on a 36,050 square foot parcel of land (the Jackson Property).

In August 1957, Paul Jones conveyed to his niece and her husband, Michael Jackson, Sr. and Leslie Jones Jackson, a 36,060 sq. ft. parcel of land, now known as the Jackson Property. The 1958 Deed describes the Jackson Property by metes and bounds and as "being shown on" the 1958 Plan. In December 1976, Michael Jackson, Sr. and Leslie Jones Jackson conveyed the Jackson Property to the Fiduciary Trust Company, as trustee of the Jackpot Trust. In November 2013, the Jacksons became the sole trustees of the Jackpot Trust, which is the present owner of the Jackson Property with the street address 85 Associates Road. The Jackson Property is on a portion of the Pond that was filled and abuts the now Evans Property. The Disputed Area is southeast and east of the Jackpot, and to the northeast of the Evans Property.

Title to the Disputed Area

The dispute centers on whether the Disputed Area was intended to be included in the conveyance of Lot 9, or whether the grantors did not intend to convey this additional area along with Lot 9. Evans asserts that her ownership of Lot 9 extends from (what was once) the "edge of bank" to the low-water mark of the former Pond, i.e. the Disputed Area. The Disputed Area is approximately a 5,300 square foot strip on filled tidelands where the Pond on the 1890 Plan was once located.

Bernard Kilroy testified on behalf of the Evans. He opined that it was his understanding of the common law that if the tidal flats were owned by the grantor, they are presumed to be conveyed with the conveyance of adjacent upland, and he discerned no intent to sever the Disputed Area from Lot 9 in the 1898 Deed from Jones to Samuel King. He detected no intent on the part of Jones and King to convey any of the lots bordering the Chapoquoit Harbor and Buzzards Bay differently than the lots bordering the Pond, with respect to the treatment of the tidal flats.

Kilroy did not testify as to whether any of the subsequent deeds in the chain of title, following the 1898 Deed, corroborated his interpretation of the grantors' intent. Although he did acknowledge that there is nothing in the 1890 Plan that indicates that the Pond should be transferred with Lot 9 and that according to the 1890 Plan, the edge of bank is the northern boundary of Lot 9.

Robert Moriatry testified on behalf of the Jacksons. He opined that when the 1893 Division Deeds used the term "shore lots," they were referring specifically to the shore lots abutting Chapoquoit Harbor and Buzzards Bay. He also testified to several other influential factors including:

- The 1898 Deed references the 1890 Plan, showing Lot 9 not including the Pond, and provides metes and bounds description. The language for the northerly bound is along the "edge of bank," indicating that Lot 9's boundary extended only to the edge of the bank, not beyond.
- The deeds in Evans' chain of title uniformly describe the northern boundary of her property as bounded by "the edge of the bank," just as the initial 1898 Deed described it.
- Other deeds for property on Chapoquoit Island differentiate between the Harbor, the Bay, and the Pond.

The 1934 Deeds were release deeds from the estate of King to the estate of Jones for any right title, or interest they may have had within the limits of the Pond. This was done to ensure that the Division Deeds did not leave out any residual interest in the King estate. The license obtained by Jones to fill the entire Pond was an indication that Jones believed he owned the entire Pond area.

Based on the documentary evidence and Moriarty's testimony, the court found that the Disputed Area was not intended by the original grantors to be transferred as part of Lot 9.

Adverse Possession

Aerial photographs from the 1950s and 1960s show the Jackpot was placed along the landward edge of a large open area that extended from within about the center of a loop of Associates Road, across Associates Road, to the shore of Chapoquoit Harbor. Several witnesses referred to this open area as the "Plains of Abraham." This area was created when the Pond was filled. It was initially maintained as an open area, but in the 1970's was cut less so trees and shrubs grew upon the northern and northeast portion of the Jackson Property. Defendant Michael Jackson, Jr. (Mr. Jackson) testified that his family acquired the Jackson Property in the late 1950s.

While trees or shrubs established themselves over the years in part of the Plains of Abraham outside the Disputed Area, the lawn area near and around the Jackpot remained substantially the same from the late 1950s to the present. This area was mowed and maintained as lawn by the Jacksons. The Jacksons and their predecessors-in-interest maintained a vegetated buffer along what they believed to be the property boundary between their property and the Evans Property. A portion of this boundary consists of a privet hedge that Mr. Jackson testified has been there since 1960's. Since the 1960s or 1970s, the Jacksons and their predecessors have placed brush trimmings from the hedges and other vegetation in piles in the southeast corner of the Disputed Area and along the boundary.

Every few years, Mr. Jackson's father checked the property boundary markers that indicated the ends of the boundary line that the Jacksons now contend is the correct boundary between the Jackson Property and Evans Property, up to the edge of the bank. The Jacksons and

their predecessors used a portion of the Disputed Area as a "laundry yard" from at least the early 1960's through the 1980's. Since at least the early 1960's until 2013, a hammock was hung in the Disputed Area, as well as chairs and picnic tables.

The Disputed Area was also used for the storage of boars and boat trailers since the 1960s. The Jacksons and their predecessors undertook a number of different family outdoor and recreational activities in the Disputed Area beginning in the late 1950s to the present. Caroline Abdulrazak, sister of Evans, testified to observing the Jackson family beginning in the 1950s using "every inch of the property" including the Disputed Area.

The portion of the Evans property closest to the Disputed Area was, until mid-2009, densely wooded. The vegetation was described as "impenetrable" and a "dense jungle." The Jacksons and their predecessors paid taxes assessed by the Town of Falmouth over the years. The assessors' map show the boundaries and shape of the Jackson Property as more or less the same that is shown on the 1958 Plan. The assessors' maps include the Disputed Area as within the Jackson Property, not the Evans Property.

Several witnesses testified on behalf of the Jacksons that they were not aware that Evans or her predecessors had ever told the Jacksons, their predecessors, or any tenants not to use any portion of the Disputed Area or otherwise protest the use of the Disputed Area. Evans admits that prior to filing this action, she did not believe the Disputed Area was part of her property. Evans presented no testimony on the issue of adverse possession.

Discussion

Evans sought a declaratory judgment that she owns the Disputed Area. Evans admits that while the Disputed Area is not explicitly included in Lot 9's deed descriptions in her chain of title, the Disputed Area's conveyance is presumed because the grantor owned the tidal flats at the

time or, alternatively, provisions in the 1893 Division Deeds were understood to also include conveyance of the land to the low-water mark for shore lots, including lots on the Pond, and the 1898 Deed's "subject to" language, the first deed in her chain of title, conveyed this area.

The Jackpot Trust argues that it has record title to the Disputed Area, consisting of the flats of the Pond, because the original grantors did not intend to convey the area between the edge of the bank and the low-water mark with the lots surrounding the Pond. If its claim of record title should fail, the Jackpot Trust asserts in its counterclaim that it nonetheless has acquired title to the Disputed Area through the principles of adverse possession.

Record Title to the Disputed Area

Evans acknowledges that no language in the 1898 Deed to Lot 9 includes the Disputed Area, but rather first rests her argument on the presumption under the Colonial Ordinance that title to the flats follows title to the adjacent uplands. This presumption can be overcome.

The Colonial Ordinance established that a person holding land adjacent to the sea shall hold title to the land out to the low water mark or 100 rods (1,650 feet).

The court found Moriarty's testimony to be more persuasive, that the language in the 1893 Division Deed is not applicable to Lot 9, since Lot 9 is not a "shore lot" located on the Bay or Harbor. Other deeds for land on Chapoquoit Island, such as the 1899 deed from King and Jones to John Lantrop Wakefield, make specific distinction between lots bordering the ponds and those abutting the Bay and Harbor.

Additionally, based on the documentary evidence in the record and Moriarty's testimony, the count that the record boundary of Lot 9 is the "edge of the bank" and does not extend to the low-water mark, and that, therefore, the Disputed Area, consisting of flats to the Pond between the bank and the low-water mark, is not part of Lot 9. Nothing in the 1890 Plan and 1898 Deed,

or in any subsequent deeds or plans, states or shows the boundaries of Lot 9 going down to the low-water mark. However, there is a clear description in both the 1890 Plan and 1898 Deed demonstrating that the northerly boundary of Lot 9 is the edge of the bank. Yet, deeds in the Jackpot Trust's chain of title reference the boundary of Lot 9 in their metes and bounds descriptions, as well as explicitly convey any flats and lands lying between the low-water mark of the Pond as shown in the 1890 Plan and 1904 Plan.

Adverse Possession of the Disputed Areas

In support of its claim, the Jackpot Trust introduced testimony from members of the Jackson family and tenants about activities that occurred on the Disputed Area. These activities demonstrate dominion and control over the Disputed Area, indicating to others in the neighborhood that the Jackpot Trust and its predecessors were acting as the owners.

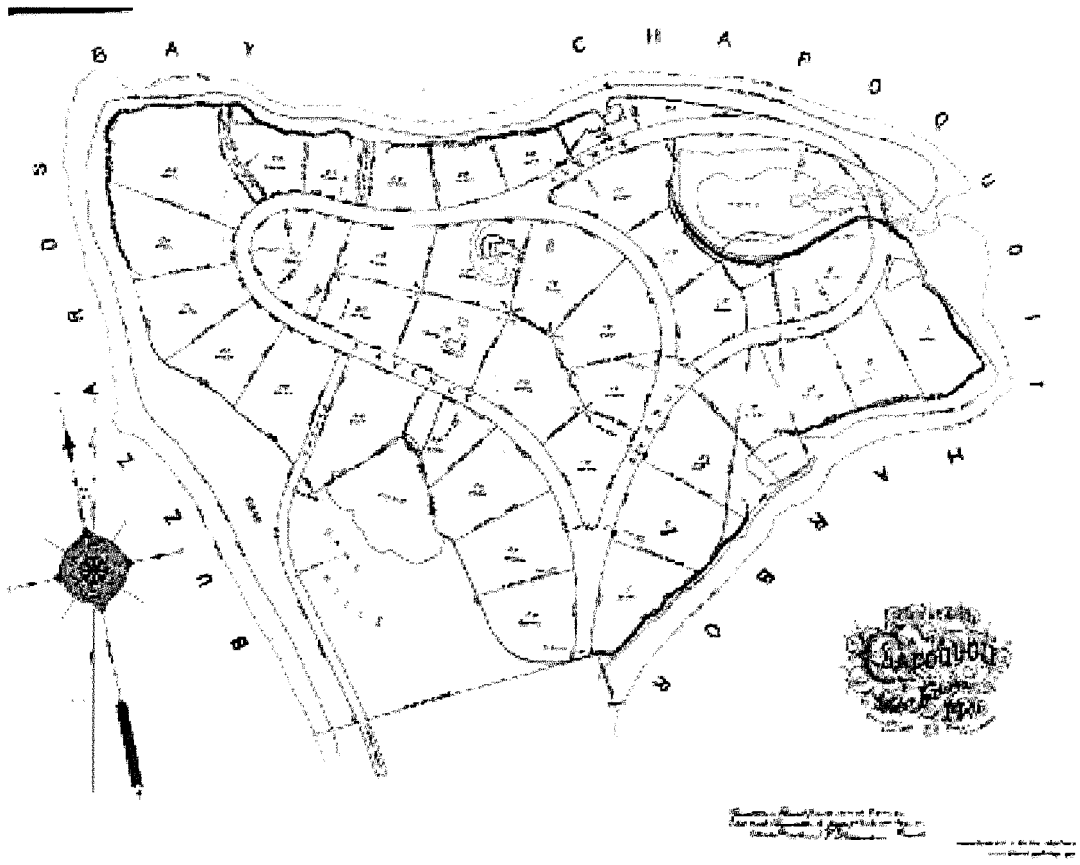
Additionally, they began using the Disputed Area in the late 1950s or early 1960s and continued to use it frequently until present. This is more than sufficient time to satisfy the statutorily required twenty year period for adverse possession. Based on the foregoing, the court found that the Jackpot Trust and its predecessors actually, openly, notoriously, adversely, and exclusively occupied the Disputed Area for over twenty years. Furthermore, the court found that the Jackpot Trust has title to entirety of the described parcel in its chain of title, including the Disputed Area, under the doctrine of adverse possession by color of title.

Evans v. Jackson

24 LCR 328

(June 15, 2016)

EXHIBIT A

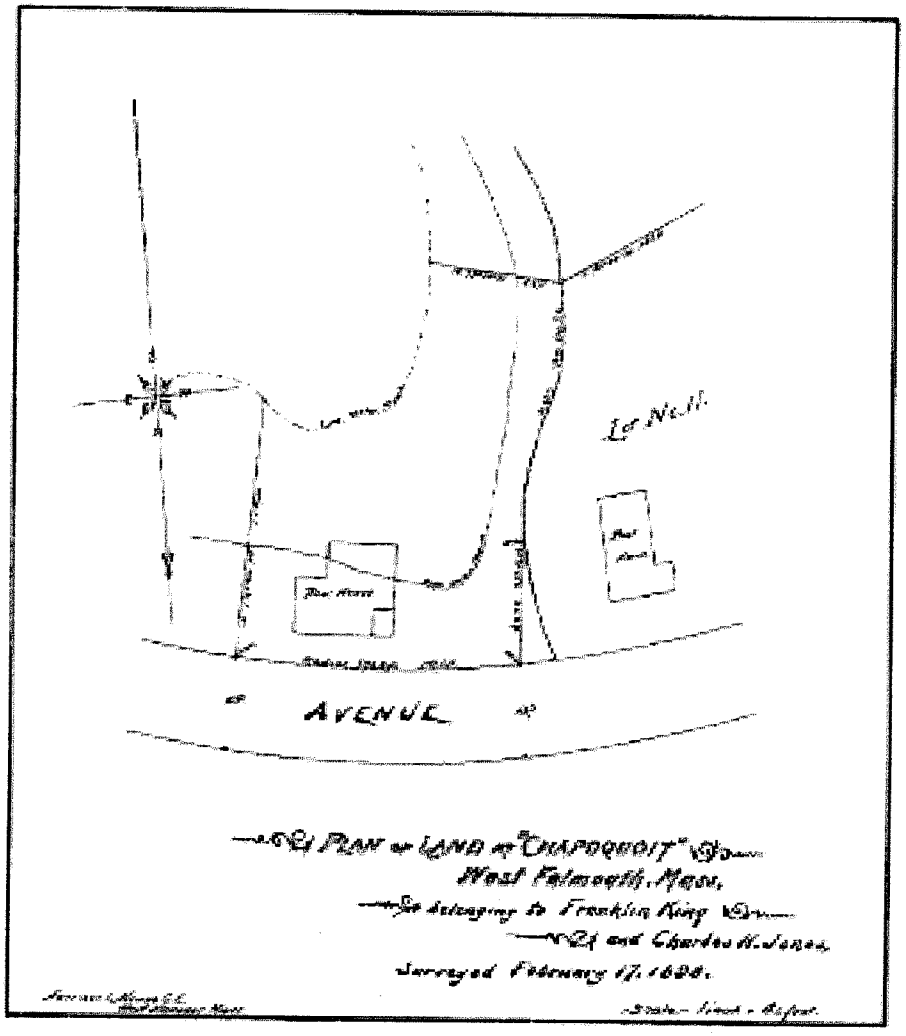


Evans v. Jackson

24 LCR 328

(June 15, 2016)

EXHIBIT B

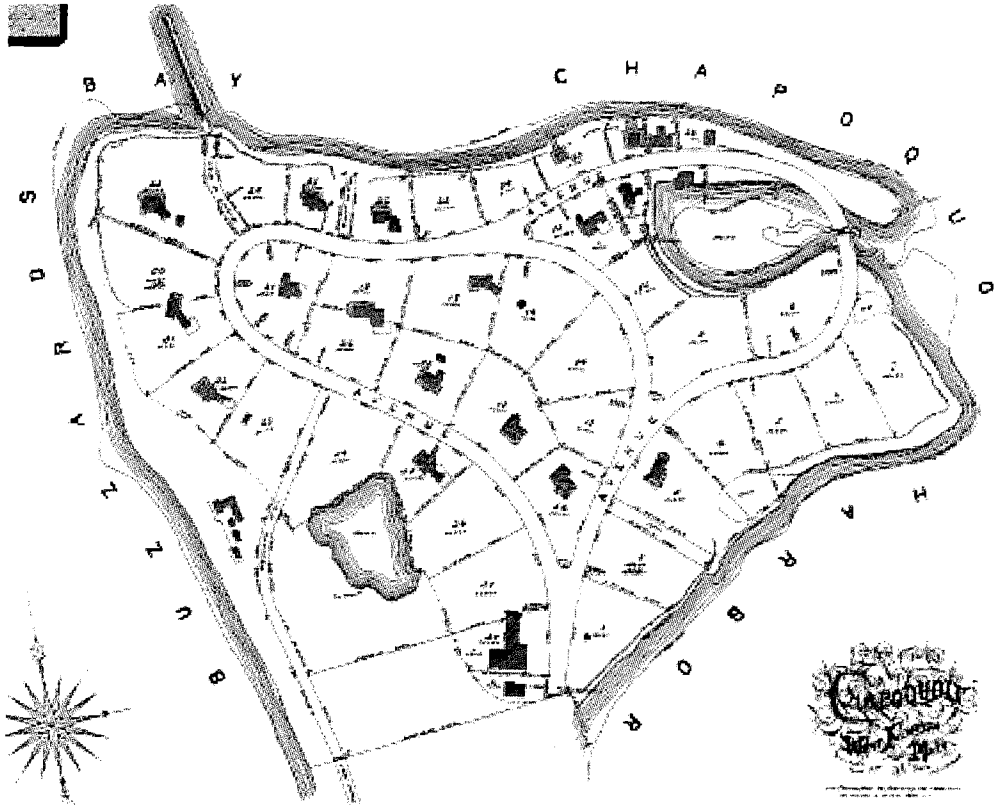


Evans v. Jackson

24 LCR 328

(June 15, 2016)

EXHIBIT C

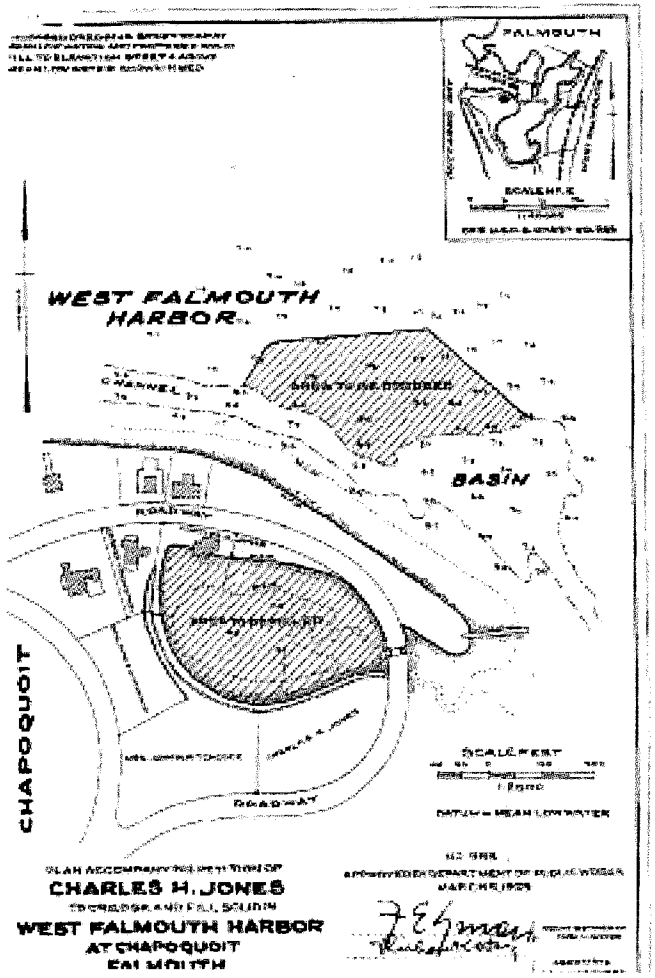


Evans v. Jackson

24 LCR 328

(June 15, 2016)

EXHIBIT D

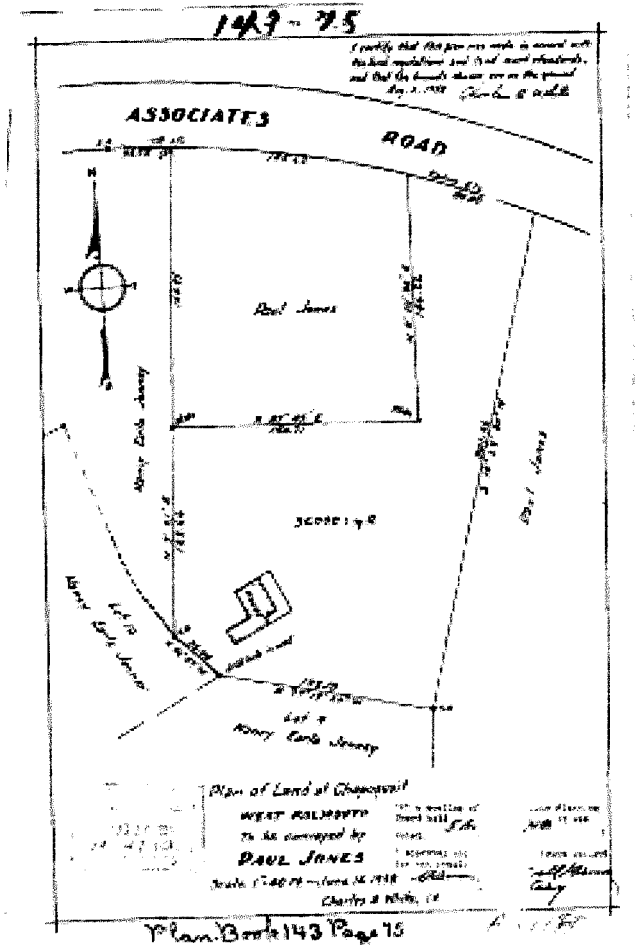


Evans v. Jackson

24 LCR 328

(June 15, 2016)

EXHIBIT E



Paine v. Sexton, 25 LCR 191 (March 31, 2017)

Robert L. Paine ("Paine") seeks to register the title to 1.544 acres of land located on Old King's Highway in Wellfleet ("Locus"). Respondent Chellise L. Sexton ("Sexton") objects to the registration. This case is related to Paine v. Sexton (Land Court Case No. 99 Reg. 43287) (the "Campground Case"). Sexton disputes the validity of Paine's chain of title and claimed that she held a recently obtained 1/12 fractional interest in Locus.

In May 2012, the court issued a decision in the Campground Case. The court held that the Trust had acquired title by adverse possession to a series of lots in the vicinity of Locus. In August 2013, the court issued a second decision in which it held that the Trust had established title by adverse possession under color of title theory over two additional adjacent lots, as well as portions of two others.

Paine's claim that the court's determination that the Trust had acquired title by adverse possession to one of the lots at issue in the Campground Case was determinative of Paine's adverse possession claims to Locus in this one under title theory of adverse possession. Paine filed a Motion for Summary Judgment; Sexton filed an opposition brief; and Paine filed a reply brief.

Physical Description of Locus

Locus is a four-sided lot abutting the property at issue in the Campground Case (the "Campground Property") to the north and east, Rama's Way to the south, and Old's King's Highway to the west. Locus was created by a 1998 approval not required plan entitled "Plan of Division of Land in Wellfleet, Mass. As prepared by Irene M. Paine. The 1998 ANR Plan depicts the land subdivided thereby as a long, narrow strip of land consisting of three lots running

northeasterly from Old King's Highway to the Cape Cod National Seashore, intersected by a perpendicular strip of land labeled "Smith Family Realty Trust."

Relevant Title History to Locus Relative to Paine's Claim

Bernice L. McKay purported to convey Lot 57m to Robert S. Paine and Cynthia M. Paine (who are Paine and Irene's parents) ("the Parents") in their individual capacity. Cynthia Coye, Elizabeth Masulla, and Susan Gray purported to convey Lot 58m to Irene and Stephen J. Mahan (Irene's ex-husband) ("Mahan"). Dorothy P. David also purported to convey Lot 58m to Irene and Mahan. These deeds are together herein referred to as the "1978 Deeds". Mahan purported to convey his interest in Lot 78a to Irene (the "1998 Irene Deed").

At the trial in the Campground Case, Irene testified that it had long been the intent of her family (for estate-planning purposes) to subdivide Lot 78a to create Locus as separate and distinct from the Campground Property, but that the family did not get around to doing so until the late 1990s. In or around late 1998, Irene's Parents created the Trust and together with Irene, retained Schofield Brothers to conduct a survey of the various properties owned (or claimed) by the Paine family, and to prepare the 1998 ANR Plan and the 1998 Land Court Plan.

The Parents (as individuals) conveyed to themselves (in their capacity as trustees of the Trust) their interest in Lot 57m (in addition to their interest in four other lots). The 1998 Parents/Trust Deed describes Lot 57m by reference to the 1971 Deed. Irene purported to convey Lots 78.1a and 178a to her Parents as trustees of the Trust, retaining Locus for herself (the "1998 Trust Deed")

Paine and Irene's mother passed away in 1999 and Paine succeeded his late mother as co-trustee of the Trust. Sheila L. Paine ("Sheila") (Paine's wife) was appointed as co-trustee of the Trust. It is undisputed that Paine and Sheila are currently the sole co-trustees of the Trust. Irene

purported to convey Locus to Paine in his individual capacity (the "2006 Deed"). Sexton claims an interest in a portion of Locus pursuant to a deed from Donna Lee Weber.

Activities on Locus

In the Campground Case, Irene testified that she had lived at the Campground Property seasonally since the 1950s when she was a child, and she and Mahan were living there with their two children as of the 1970s. During that period until 1978, camp sites operated by her family existed on Locus, and even further south.

In 1978, Irene and Mahan purchased a single family house (the "House") that was located off-sire and retained contractors to build a foundation and move the House onto Locus. From 1982 to 1992, Irene lived at the House seasonally but regularly visited Locus for recreation and maintenance purposes during the off season. In 1992, Irene moved back to the House full-time with one of her children. In 1998, Irene and her second husband moved into the House, where he and Irene lived together through 2001. From 2001 to 2006 (when she sold Locus to Paine), Irene used Locus as a full-time rental income property.

Active campsites operated by the Paine family continued to exist on Locus (to the north and east of the House) even after Irene and her family began to reside at Locus (in or around 1981). However, it is not known precisely where those campgrounds were located or when they were removed. It is known that all such campsites were cleared and relocated onto the Campground Property by (or before) 1998. In 1999, Paine and Irene arranged for the construction of a chain link fence on Locus's northerly and easterly boundaries, thus separating Locus from the Campground Property. They also abandoned an eight food wide path that had been located along the easterly boundary of Locus, and which ran north from Rama's Way to the Campground Property.

Since 1978, Paine and his predecessors in title have paid all property taxes for Locus, obtained and paid for all utilities services for Locus, and have held and obtained homeowner's insurance on the House.

In his Motion for Summary Judgment, Paine sought a ruling that he has established title to Locus by adverse possession under the same color of title theory that the court found to support a finding of adverse possession over Lot 178a. His theory here is that, because Lots 78.1a, 178, and Locus all previously comprised parts of Lots 57m and 58m (as to which Paine's predecessors in title held color of title deeds at the time of their acts of adverse possession), the acts of adverse possession of the portion of those lots now known as Lot 78.1a are sufficient to establish a title by adverse possession over Locus under a color of title theory, just as they established such title to Lot 178a.

Sexton disputes this claim, arguing that the facts of this case do not support the same finding of adverse possession over Locus as did the facts at issue in the Campground Case with respect to Lot 178a. In this context, the concept of color of title represents a particular subspecies of adverse possession claims, in which an adverse claimant carries out the usual acts of adverse possession under a defective claim of ownership.

Sexton urges the court to conclude that a disparity between who held recorded deeds to the properties forming locus and who actually used Locus should defeat Paine's claim of adverse possession under color of title. The court disagreed.

The undisputed evidence in the record clearly reflects that Irene and Mahan, in concert with the Parents, collaboratively occupied the properties in question while in possession of color of title deeds since at least 1978. At that time, Locus had not yet been carved out of the then existing Lots 57m and 58m, and there was no physical boundary dividing the land apparently

then owned by the Parents (Lot 57m) and that apparently owned by Irene and Mahan (Lot 58m). Irene, Mahan, and the Parents came to an understanding that Irene and Mahan would use the front portion of those lots (today Locus) for their family's residence, and that the remainder would continue to be used for campsites.

These practices continued from August of 1978 until November of 1998 (more than twenty years), when Lot 78a was officially subdivided (creating Locus, Lot 78.1a, and Lot 178a). At or around that time, a fence was constructed to separate Locus from the Campground Property. Irene continued in her use of Locus until 2006, when she sold it to Paine, who has continued to use it since then.

It was not until March of 2010 that Sexton filed her objection to this case- almost forty years after the Parents had color of title to Lot 57m (including the northerly portion of Locus) and more than thirty years after Irene and Mahan had color of title to Lot 58m (including the southerly portion of Locus).

Based upon these facts, the fact that Lot 57m (including the northerly portion of Locus) was technically owned by the Parent (rather than by Irene) does not operate to defeat Paine's adverse possession claims because it is obvious that Irene was permitted to occupy that portion of Locus on her Parents' behalf- just as her parents had occupied the southerly portion of Lot 78.1a on behalf of Irene and Mahan. This technical split in ownership did not defeat a finding of color of title as to Lot 178a, it likewise does not defeat the instant color of title claim as to Locus.

Sexton also argued that the actual conduct of Irene and Mahan, coupled with that of the Parents, defeats the adverse possession requirement of exclusive possession. However, the court did not agree. The purpose of doctrine of color of title is that Paine is not required to affirmatively demonstrate actual adverse use of Locus in order to establish adverse possession

over it, because the acts sufficient to establish possession over Lot 78.1a are deemed to apply constructively also to Locus.

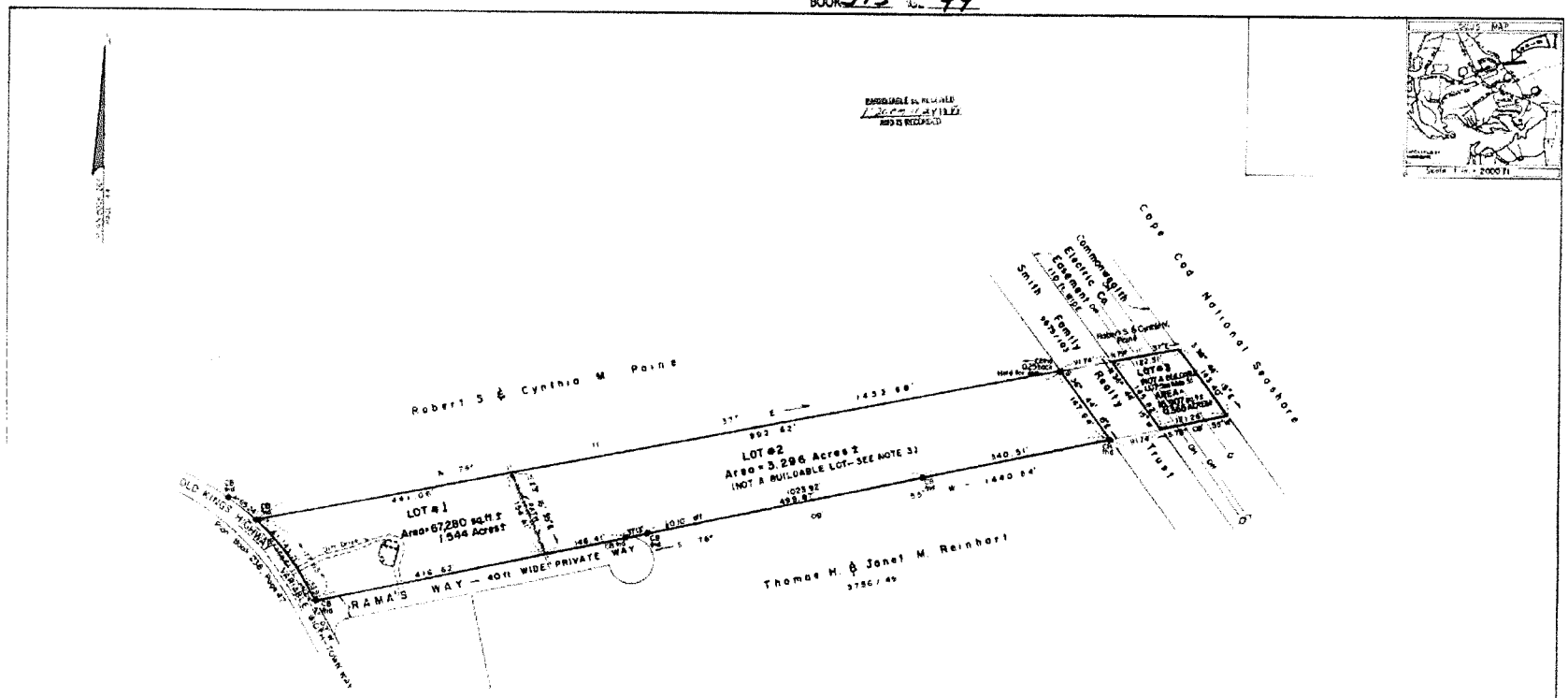
Therefore, the court found that Paine had acquired title to Locus by adverse possession under a color of title theory.

Paine v. Sexton

25 LCR 191

(March 31, 2017)

BOOK 545 PG 49



NOTES:
1. Owner of Record: Irene M. Paine
Deed Book 1046, Page 237
2. Town of Wellfleet Assessor's Map 29, Parcel 78 & 176
3. Lots 2 & 3 are to be conveyed to abutting property owners Robert S & Cynthia M. Paine

I certify that this plan was prepared in accordance with the Rules and Regulations of the Registers of Deeds effective January 1, 1978, as revised January 1988

Date: 4/6/17
Professional Land Surveyor

PLAN OF
DIVISION OF LAND
IN
WELLFLEET, MASS.
-AS PREPARED FOR-
IRENE M. PAINE

SCHOFIELD BROTHERS of N.E., Inc.
REGISTERED PROFESSIONAL ENGINEERS AND LAND SURVEYORS
ROUTE 6A-P.O. BOX 101-ORLEANS, MASS., 02653
(508) 255-2096
SCALE: 1in. = 80 ft. OCTOBER 20, 1986

D-9309

545-49

Melone v. Town of Lancaster, 24 LCR 354 (June 28, 2016)

At issue in this case is ownership of an undeveloped nine acre parcel (Nine Acre Parcel) located in Lancaster.

Plaintiff John W. Melone, Trustee of Ponakin Vale Realty Trust ("Plaintiff"), claims the Nine Acre Parcel was among several parcels of land conveyed to his predecessors-in-title, James L. Woodward and Deborah M. Woodward, by a 1968 deed from Frank J. Bateman and Mary Bateman (Batemans). Additionally, Plaintiff claims he has acquired title of the Nine Acre Parcel by Adverse Possession.

Defendant Town of Lancaster (Defendant or Town) alleges the Batemans did not convey their interest in the Nine Acre Parcel to Plaintiff's predecessor-in-title, but retained it, allowing Defendant to obtain title to the Nine Acre Parcel through a tax taking against the Batemans in 1983. Defendant also alleges the tax taking defeats Plaintiff's alternative claim of adverse possession by interrupting the required twenty-year period of continuous adverse use.

Chain of Title to the Nine Acre Parcel

Dennis E. Tully testified as an expert witness for Plaintiff. Attorney Tully's examination commenced with a source deed dated March 7, 1955, conveying four tracts of land from Charles J. Marean and Edna J. Schumacher to James Facey and Bertha Facey.

Elisha W. Erb testified as an expert witness for the Defendant. Attorney Erb's title examination starts with the earliest document found concerning the Nine Acre Parcel: a deed conveying the Nine Acre Parcel, among other parcels, from Lophar Sargent to Sewell Sargent. This description in the Sargent Deed does not describe a fully enclosed parcel. Attorney Erb adjusted the courses using Computer-Aided Design software to "close" the description.

Sewell Sargent conveyed the Nine Acre Parcel to Hannah S. Brooks. The same description of the Nine Acre Parcel from the Sargent Deed, with several scrivener's errors was used. Attorney Erb was unable to locate a document transferring the Nine Acre Parcel from Brooks to the Inhabitants of the Town of Lancaster, but the next recorded conveyance took place in 1892, from the Inhabitants of the Town of Leominster to William Powers. The same description was used.

Ellen Powers, as guardian of Charles Powers and Katherine Powers, minor children of William Powers, deceased, conveyed 1/6 interest in the Nine Acre Parcel to Fabius Arnold, using the description from the Leominster Deed that contained the scrivener's errors. Ellen Powers conveyed the Nine Acre Parcel to Fabius Arnold. Upon death of Arnold, his real property passed to his widow, Avis Arnold. The executrix of Mr. Avis' estate conveyed the following interests in the Nine Acre Parcel: 1/3 interest to S. Florette White; 1/3 interest to Estella A. Buckley; 1/6 interest to Charles H. Wood; and 1/6 interest to Eugena Wood Gaines, all as tenants-in-common. Attorney Erb could not find deeds conveying the interests to Buckley or Wood. Upon her death, White's estate was probated in 1925, and her real property passed to her husband, James White.

The North Parcel

The earliest instrument concerning the North Parcel is a mortgage, discharged on its margin, granted by Charlotte A. Wagner to Almon F. Nutting. Almon F. Nutting and Ada Nutting conveyed the North Parcel to Morris Boland. After Boland died, North Parcel passed to Minnie Fairbanks, Annie Lynch, Harry Doyle, Maurice Boland, John Doyle, and Thomas Doyle. They each conveyed their respective interest in the North Parcel to S. Florette White in 1914. Upon White's death, her real property passed to her husband, James White.

South Parcel

A Warrant of Partition, assigned the South Parcel to S. Florette White.

Common Ownership of the North, South, and Nine-Acre Parcel

In 1924, S. Florette White held the North Parcel, the South Parcel, and a 1/3 interest as a tenant in common in the Nine Acre Parcel. Upon her death, her interest got passed to her husband, James White. The other interests in the North Parcel were held in common with James White by Eugena Gaines, Charles Wood, each holding 1/6 interest, and Estella Buckley, holding a 1/3 interest. White conveyed to Gaines the North Parcel, the South Parcel, and an eight acre parcel of the land near Oak Hill Pond. The description of the North Parcel was generally the same description used in the Nutting Deed. This deed did not convey the 1/3 interest in the Nine Acre Parcel. Attorney Erb was unable to locate a deed conveying White's 1/3 interest in the Nine Acre Parcel. Sidney Burr and Michael Levy, as Trustees under the will of Gaines, conveyed to Charles Marean and Edna Schumacher four separate parcels. This deed conveyed the North Parcel, the South Parcel, a 22 acre parcel, and the Nine Acre Parcel. Marean and Schumacher conveyed to James Facey and Bertha Facey (the Faceys), the same four parcels described in the Gaines Deed: the Twenty-Two Acre Parcel, the Nine Acre Parcel, the North Parcel, and the South Parcel. The Faceys conveyed to the Batemans the same four parcels described in the Gaines Deed. The Batemans at this point owned the North Parcel, the South Parcel, the Twenty-Two Acre Parcel and at least 1/6 interest in the Nine Acre Parcel.

The Access Parcel

Laura Shepard conveyed to the Batemans, as tenants by the entirety, a parcel of land on the northeast side of Ballard Hill Road that included a fifty-foot wide strip of land extending from Ballard Hill Road to the Nine Acre Parcel. The fifty-foot strip of the land was subsequently

subdivided into a separate parcel. As a result of this conveyance, as of 1964, the Batemans owned the North Parcel, the South Parcel, the Access Parcel, the Twenty-Two Acre Parcel, and at least a 1/6 interest in the Nine Acre Parcel.

Conveyances to Plaintiff's Predecessor-in-Title

The Batemans conveyed to James L. Woodward and Deborah M. Woodward the South Parcel, the North Parcel, the Access Parcel. The Bateman Deed does not specifically reference the Nine Acre Parcel. The Bateman Deed describes the South Parcel first, "containing 73 acres of land, more or less." The second parcel described in the North Parcel "being the same premises described in deed from Almon Nutting and Ada Nutting to Maurice Boland" and "being the first and second tracts described in deed of James White and Eugena Gaines." The North Parcel is described as "containing seventy-five acres, more or less." The Bateman deed further describes the parcels conveyed as "being part of the premises conveyed to us by James Facey." The Bateman deed further describes the North and South Parcels as "said premises being shown on Lots 1 and Lots 2 on a plan entitled 'Plan of land in Lancaster, Mass., owned by Bateman' Survey by: MacCarthy Engineering Service, Inc. (MacCarthy Plan).

The MacCarthy Plan shows the North Parcel and the Nine Acre Parcel as a consolidated parcel, numbered Lot 2. The Nine Acre Parcel is not marked by separate boundary lines nor is it separately identified on the MacCarthy Plan. Together, the North Parcel and the Nine Acre Parcel comprise seventy-five acres, more or less.

Tax Taking

The Town recorded an instrument of taking against the Nine Acre Parcel in 1983, naming as assessed owners Frank Bateman and Mary Bateman. Notice of a Land Court petition to

foreclose the tax lien was recorded. A Land Court decree foreclosing the right of redemption was recorded.

Conveyance to Plaintiff

James Woodward and Deborah Woodward conveyed to Joseph Melone the same parcels conveyed to the Woodwards by the Bateman Deed, using the descriptions in the Bateman Deed. Joseph Melone then conveyed these parcels, using the same description used in the Bateman Deed to Joseph Melone and Maria Anna Melone, as Trustees of the Joseph and Maria Melone Trust. A declaration of trust for the Ponakin Vale Realty Trust, Anthony Melone and Daniel Melone, as Trustees was recorded. The MacCarthy Plan was recorded on the same day. Anthony Melone and Daniel Melone, as Trustees conveyed to Anthony Melone and Daniel Melone. Trustees of the Ponakin Vale Realty Trust, the same land conveyed in the Bateman Deed, using the same property description. Plaintiff John Melone became a trustee in 1999.

Assessors' Maps

In 1983, Mary Bateman contacted the assessors' office to inform the assessor she was billed for property she did not own, referring to the Nine Acre Parcel.

Plaintiff's Use of Nine Acre Parcel

John Melone purchased the property at issue in this case from Woodward in 1972 for use in the family's gravel and road construction business. At the point, Melone began using the Nine Acre Parcel for various work reasons.

The Effect of the Reference to an Unrecorded Plan in the Bateman Deed

The problem facing Plaintiff arises from the Bateman's subsequent conveyances of these parcels to Plaintiff's predecessor-in-title, the Woodwards. The Batemans conveyed to the Woodwards three parcels of land. It did not convey the Nine Acre Parcel. The Bateman deed also

conveyed a third parcel, containing 2.09 acres, this is the Access Parcel. The Nine Acre Parcel is neither explicitly excluded from nor referenced in the Bateman Deed.

The Bateman deed, however, does reference the MacCarthy Plan, and describes the premises being conveyed as Lots 1 and 2 on the MacCarthy Plan. Lot 2 is the North Parcel, the Nine Acre Parcel is included within the North Parcel, although the Nine Acre Parcel is not delineated or designated in any way. The MacCarthy Plan, although prepared for the Batemans in 1959 was not recorded until 1989. Defendant argues that, should the reference to the unrecorded MacCarthy Plan be deemed sufficiently property description conveying the land shown on the Plan, the depiction of Lot 2 on the MacCarthy Plan is inconsistent with the description of the North Parcel in the Bateman deed.

Attorney Erb concluded that the Bateman Deed did not convey the Nine Acre Parcel to Woodward, buy conveyed only the North Parcel, the South Parcel, and the Access Parcel. Therefore, the Batemans retained their interest in the Nine Acre Parcel, such interest being at least a one-sixth tenancy in common interest.

Here, the attendant circumstances are: the MacCarthy Plan, was referenced in the Bateman Deed showing the Nine Acre Parcel as part of Lot 2, but the title references to Lot 2 in the deed refer to deeds that conveyed the North Parcel without the Nine Acre Parcel; the stone walls and fences depicted on the MacCarthy Plan suggest boundaries that include the Nine Acre Parcel as part of Lot 2; the Batemans reserved no access to the Nine Acre Parcel in the Bateman Deed, suggesting the Nine Acre Parcel without any reservation of access would leave the Batemans with a landlocked parcel; and without also receiving the Nine Acre Parcel, the Woodwards purchased the Access Parcel without the parcel to which it provides access.

Tax Taking

Defendant recorded an Instrument of Taking against the Nine Acre Parcel. Notice of a Land Court petition to foreclose the tax lien was record and a Land Court decree foreclosing the right of redemption was subsequently recorded. However, at the time of the tax taking in 1983, the Batemans had no interest in the Nine Acre Parcel and notice should have been given to the trustees of the Joseph and Maria Melone Trust, record owner at the time. As a consequence, the court held that the Town's foreclosure of the Nine Acre Parcel was defective and insufficient to divest title from the Melone Family Trust. The court determined that the Plaintiff owns his interest in the Nine Acre Parcel free from any claims of the Town of Lancaster.

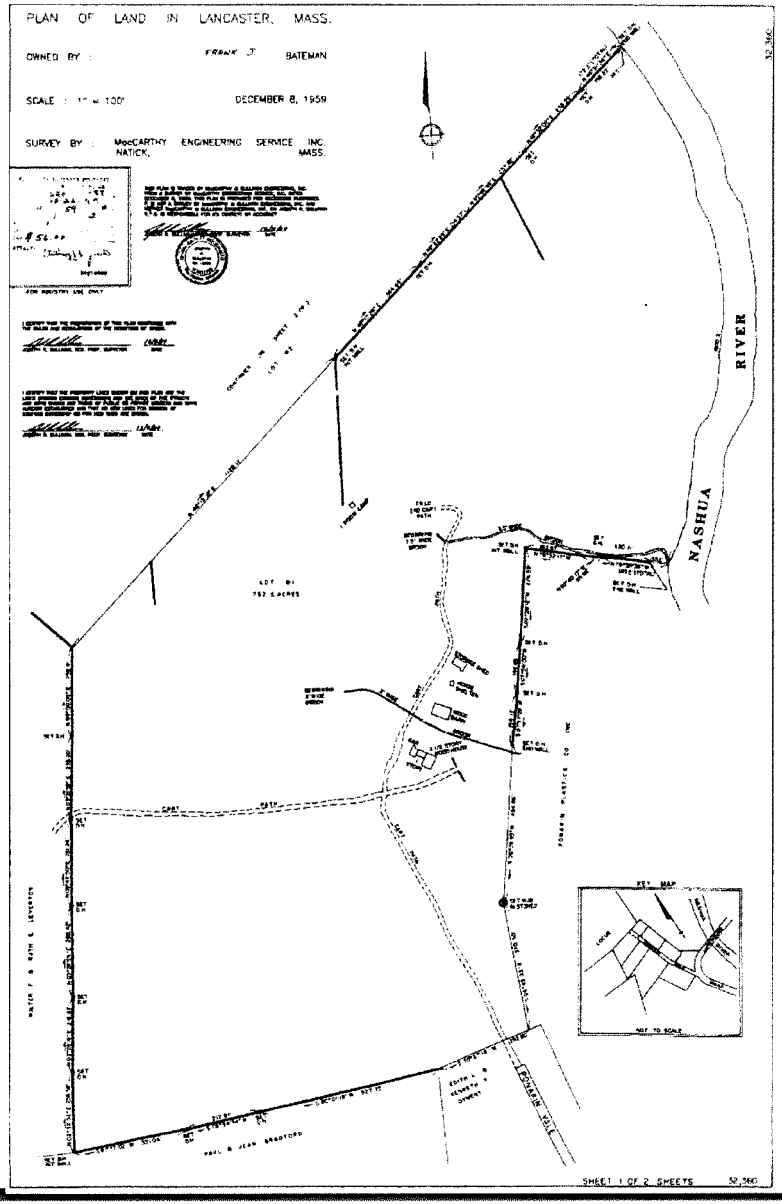
Plaintiff's Alternative Claim for Adverse Possession Fails Because Plaintiff Did Not Establish Twenty Years of Actual, Exclusive, Adverse, Open and Notorious use of the Nine Acre Parcel.

Plaintiff claimed that he, his family, and tenants, used the Nine Acre Parcel from 1972-2014. Plaintiff failed to carry his burden with respect to the Nine Acre Parcel. Plaintiff established only isolated incidents of clearing trees, extracting earth, and plowing snow in the late 1980s, specifically 1987-1989. These isolated incidents were not sufficient to establish adverse possession, even under a claim based on color of title by virtue of Plaintiff's chain of title.

Melone v. Town of Lancaster

24 LCR 354

(June 28, 2016)



Melone v. Town of Lancaster

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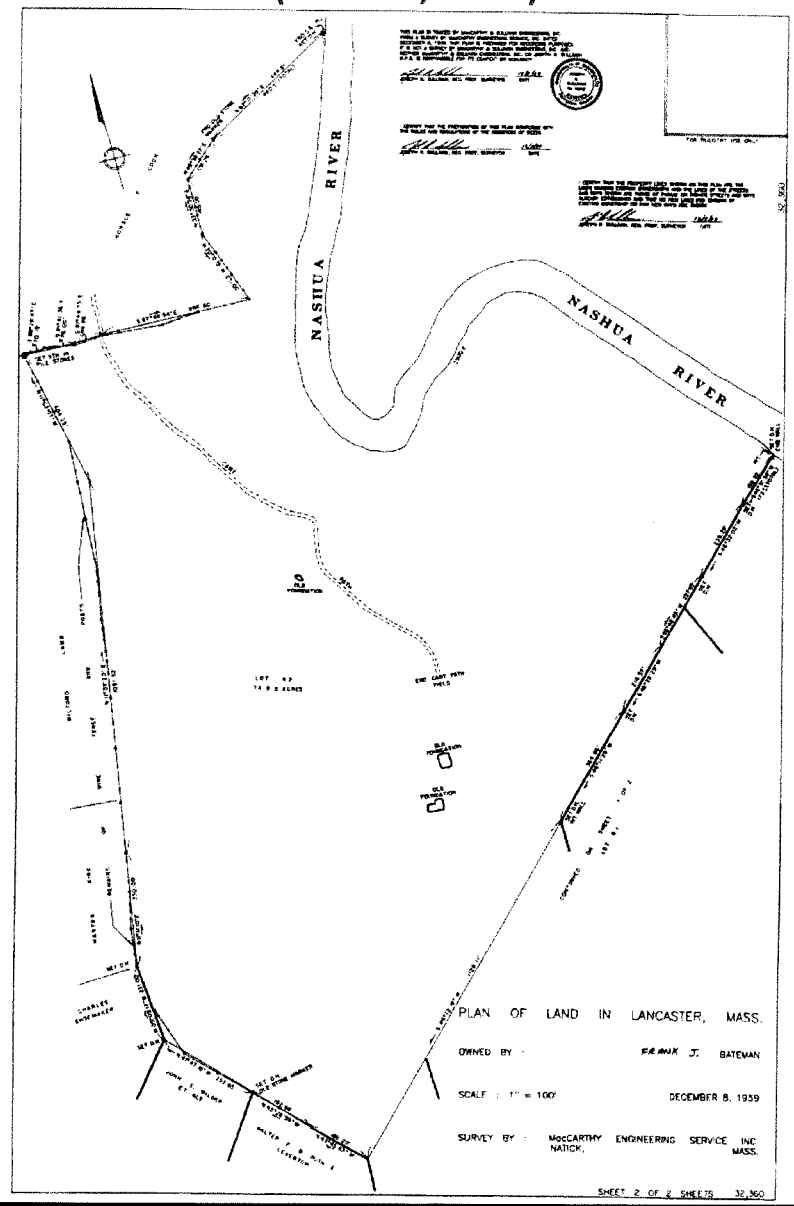

Melone v. Town of Lancaster

24 LCR 354

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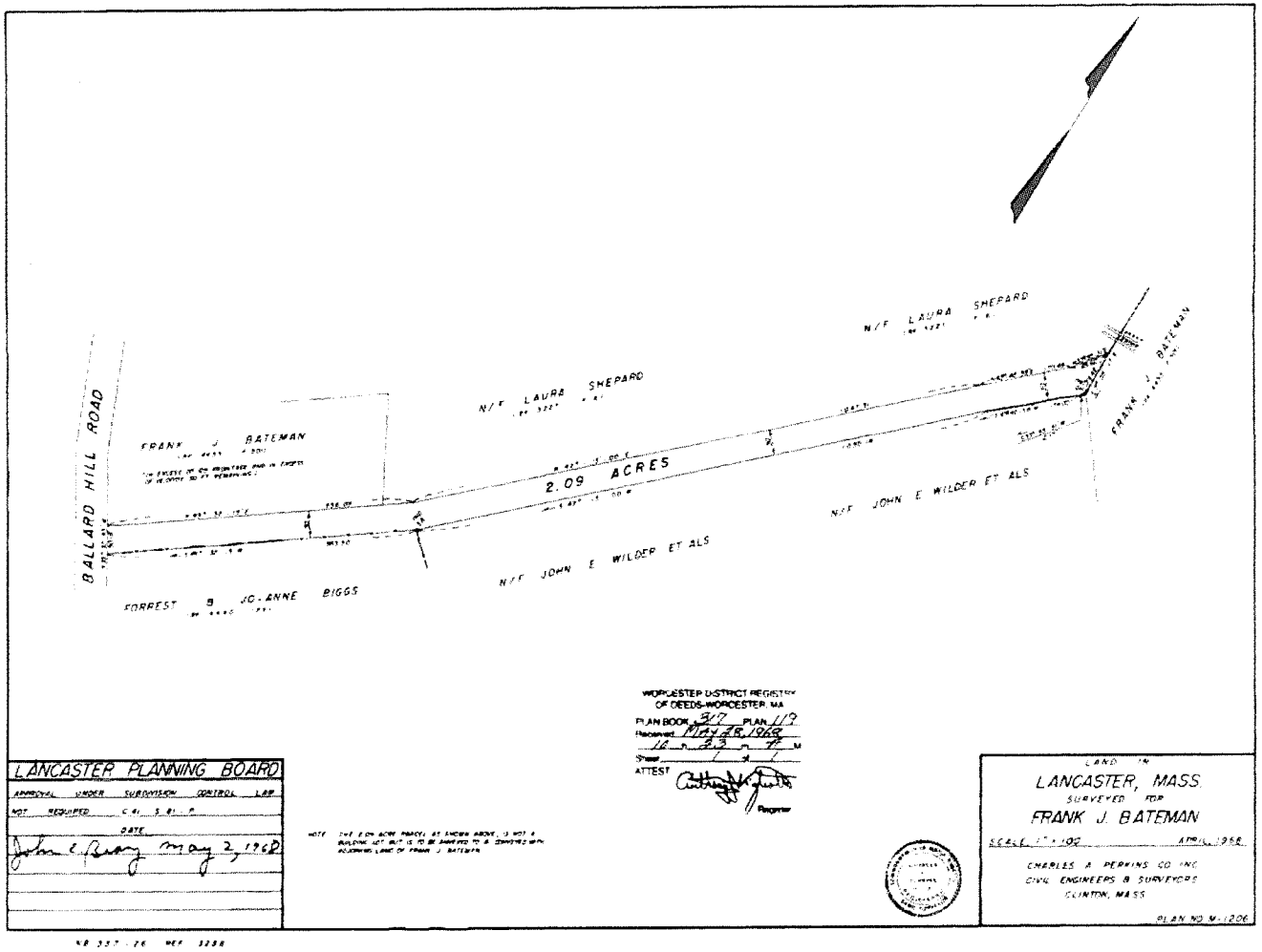


Evans v. Jackson

Massachusetts Land Court

June 15, 2016, Decided

MISCELLANEOUS CASE NO. 13 MISC 478683 (RBF)

Reporter
24 LCR 328 *; 2016 Mass. LCR LEXIS 76 **

NANCY EVANS, Trustee of the NWW-2 REALTY TRUST v. MICHAEL J. JACKSON, JR. and JANE L. JACKSON, Trustees of the JACKPOT TRUST

Syllabus

Filled pond tidelands in Falmouth were not conveyed along with uplands by an 1898 deed because the disputed area was never a "shore" lot abutting Buzzards Bay or Chapaquoit Harbor and so the presumption under the Colonial Ordinance that the tidelands would be conveyed with the uplands was overcome. Moreover, the Defendants in this declaratory judgment action were able to establish they had secured title by adverse possession with activities such as outdoor games, boat storage, lawn and landscape maintenance, and reading in a hammock.

Counsel: Edward W. Kirk, Esq., Osterville, MA, Appears for Plaintiff.

Kendra Kinscherf, Esq., Office of the Attorney General, Boston, MA, Appears for Defendant.

Nathaniel Stevens, Esq., McGregor & Legere, P.C., Boston, MA, Appears for Defendant.

Judges: [**1] Robert B. Foster, Justice.

Opinion by: Robert B. Foster

Opinion

[*328] **DECISION**

Michael and Jane Jackson, trustees of the Jackpot Trust, own a parcel by Chapoquoit Harbor in Falmouth that was once a tidal pond that was filled in the 1920s. Nancy Evans, trustee of the NWW-2 Realty Trust, owns an upland lot that abuts the Jackpot Trust property. Evans claims that she has title to the filled flats of the pond abutting her property that are currently being used and occupied as part of the Jackpot Trust's property because title to those flats was conveyed along with her property by virtue of the Colonial Ordinance of 1641-1647. After trial, I find that these flats were separated from the upland of the Evans property, so that the Jackpot Trust has title to the flats, and that, in addition, the Jackpot Trust has obtained title to this disputed area by adverse possession.

PROCEDURAL HISTORY

The plaintiff, Nancy Evans, Trustee of the NWW-2 Realty Trust (Evans), filed her verified complaint in this case on July 22, 2013. Evans' complaint seeks a Declaratory Judgment that she owns approximately 5,300 square feet of land (Disputed Area) on which the defendants, Michael Jackson, Jr. and Jane Jackson (the Jacksons) as trustees [**2] of the Jackpot Trust, plan to construct an addition to their single-family home. On November 4, 2013, the Jackpot Trust filed Defendant's Answer to Plaintiff's Complaint and Counterclaim. A case management conference was held on November 21, 2013, where the Court ordered Evans to give the [*329] Commonwealth of Massachusetts (Commonwealth) notice of this action. On December 26, 2013, the Reply of Nancy Evans, Trustee, to Counterclaim of Jackpot Trust was filed. A second case management conference was held on January 8, 2014, when the Commonwealth informed the court that it took no position on the proceedings and wished not to be a party in this matter. On February 27, 2015, the Jackpot Trust filed Motion by Defendants to Approve Stipulation by them and the Commonwealth but not Plaintiff or, in the Alternative, to Sever Trial of the Rights of Commonwealth Pursuant to Mass. R. Civ. P. 42(b). On March 2, 2015, the Commonwealth filed an Assent to Defendant's Motion to Approve Stipulation or Sever the Trial under Mass. R. Civ. P. 42(b). On March 17, 2014, Evans filed Plaintiff's Opposition to Defendant Jackpot Trust's Motion to Approve Stipulation or Sever Trial. On March 24, 2015, a hearing was held on Defendant's Motion in which the Court [**3] ruled that "[t]he Commonwealth is not a party to this matter and will not be required to appear. This case will not adjudicate the rights of the Commonwealth."

A view of the subject property was taken on June 8, 2015. A trial was held on June 9 and June 10, 2015. Testimony was heard from Bernard Kilroy, Joel Kubick, Katharine King, Caroline Abdulrazak, Thomas Bunker, Timothy Jackson, Robert Moriarty, Jr., Michael Jackson, Jr., and Seth Andrews. Exhibits 1-79 were marked. On the first day of trial, the Jackpot Trust filed Defendants' Motion for a Directed Verdict and Defendants' Memorandum of Law Relative to Doctrine of Color of Title. The Motion for a Directed Verdict was heard and the Court denied the motion without prejudice. On the second day of trial, Evans filed Plaintiff's Motion for Finding and Judgment on Issues of Adverse Possession, the motion was heard, and the Court denied the motion without prejudice. On August 7, 2015, the Jackpot Trust submitted their Proposed Findings of Fact, Rulings of Law, and a Post-Trial Memorandum of Law. On August 11, 2015, Evans filed the Plaintiff's Post-Trial Memorandum of Law on Claim of Title and a Post-Trial Memorandum of Law on Defendant's Counterclaim [**4] for Adverse Possession. Closing arguments were heard on September 3, 2015, and this case was taken under advisement.

For the reasons set forth below, I find that the Jackpot Trust is the record owner of the Disputed Area and alternatively, the Jackpot Trust has acquired title of the Disputed Area by adverse possession.

FINDINGS OF FACT

Based on the facts stipulated by the parties, the documentary and testimonial evidence at trial, and my assessment as the trier of fact of the credibility, I make factual findings as follows:

Facts Common to Title of Evans and the Jackpot Trust

1. Chapoquoit "Island" is a peninsula in Falmouth with Buzzards Bay to the west and West Falmouth Harbor wrapping around it to the north, east, and south. Chapoquoit consists of approximately 40 lots along Associates Avenue. Exh. 7; view.

2. Both Evans and the Jacksons can trace their titles back to deeds recorded in the Barnstable County Registry of Deeds (registry) on December 10, 1872 at Book 113, Page 182-183, in which Daniel and Joshua Bowerman (Bowermans) conveyed a one-third interest a 36-acre parcel on Chapoquoit Island, then called Hog Island, to Nathaniel Coleman (Coleman), and two-thirds interest in the same [**5] parcel to Franklin King (King). Exh. 1, ¶ 1; Exhs. 2-3.

3. On June 29, 1889, Coleman conveyed his one-third interest in the 36-acre parcel known as Chapoquoit to Charles Jones (Jones) by a deed recorded on July 9, 1889 in the registry at Book 181, Page 353, and by confirmatory deed recorded on September 3, 1890 in the registry at Book 188, Page 331. Exh. 1, ¶¶ 2-3; Exhs. 4-5.

4. As a result of the deeds from the Bowermans and Coleman, Jones was the owner of a one-third interest in Chapoquoit, and King was the owner of a two-thirds interest in Chapoquoit. King and Jones acquired this land with an intention to subdivide it and develop it for the sale of residential lots. Exh. 1, ¶ 4.

5. In 1890, a plan was created showing 38 subdivided lots (numbered Lots 1-38) surveyed in 1890 and recorded in the registry on January 29, 1892 now indexed at Plan Book 25, Page 24 (1890 Plan), attached here as Exhibit A. The 1890 Plan shows Buzzards Bay, Chapoquoit Harbor, and two ponds, the larger of which to the northeast is at issue in this case (the Pond). The high-water mark and low-water mark that surround Chapoquoit Island are depicted on the 1890 Plan and follow a curve into and around the Pond, in [**6] front of the lots abutting the Pond. Exh. 1, ¶¶ 6-7; Exh. 7.

6. King and Jones entered into an agreement dated October 20, 1891 (1891 Agreement) and recorded in the registry on January 11, 1892 at Book 199, Page 187. King and Jones describe themselves as "proprietors in equal shares" of Chapoquoit and agree to the imposition of certain restrictions to run with the land as shown on the 1890 Plan. The first provision contains the following language:

> "First: That for the free and convenient use of the shore of said Island by all persons in common who shall become the owners of any of the lots shown on said plan, that portion of land and shore, which lies between the line designated on said plan as 'Edge of the Bank' and the line of low-water mark shall be and remain open and subject to the use of each owner of one of said lots, for him and his family, to pass and repass in common with others entitled, and for such other use as shall not affect or impair the use of any of said lots for quiet, convenient and comfortable dwelling houses; and provided that the grant of such right of way shall not prevent or interfere with the erection and maintenance by said proprietors, for bathing houses, [**7] wharves, or such other improvements we shall decide upon, nor impose on us or our heirs or assigns any duty to construct or maintain said way, or any liability arising from the use thereof by any person." (Emphasis added).

Simply put, the 1891 Agreement states that the land between the edge of the bank and the low-water mark is open to any lot owner within the Chapoquoit subdivision, subject to the rights of the proprietors, King and Jones, to construct wharves, boathouses, and things of that nature. Exh. 1, ¶ 5; Exh. 6.

[*330] 7. On October 5, 1892, King conveyed to Jones his

interest in Lot 11 as shown on the 1890 Plan by a deed recorded in the registry on October 20, 1892 at Book 202, Page 529. Exh. 1, ¶ 8; Exh. 8.

8. In September 1893, King and Jones decided to divide the rest of the buildable lots between each other, mutually exchanging their partial interests so that each could become the sole owner in a number of lots. Jones conveyed to King all his shares and interest in Lots 1, 12, 13, 15, 19, 20, and 30-37, as shown on the 1890 Plan by a deed dated September 29, 1893 and recorded in the registry on November 23, 1893 at Book 209, Page 138. King conveyed to Jones all his shares and interests [**8] in Lots 2-10, 14, 16, 24, and 38 by a deed dated September 29, 1893 and recorded in the registry on November 23, 1893 at Book 209, 146. The two 1893 deeds are referred to as the "Division Deeds." Exh. 1, ¶¶ 9-10; Exhs. 9, 11.

9. Through the mutual conveyances, Jones acquired title to a series of lots that start on the south of Chapoquoit Harbor up around and abutting the Pond, including Lots 8, 9, 10, and 11. Exh. 1, ¶ 10; Exh. 7.

10. The 1893 Division Deeds contain several agreements and the following language:

> "It is understood however that the shore lots next to Buzzards Bay and Chapoquoit Harbor extend to low-water mark of said Bay and Harbor although their sidelines on said plan are drawn only to the edge of the bank."

Exh. 1, ¶ 11; Exhs. 9, 11.

11. The same day the Division Deeds were executed, Jones conveyed to King his interest in the westerly portion of Lot 22 by a deed dated September 29, 1893 and recorded in the registry on November 23, 1893 at Book 209, Page 140. Exh. 10

12. On February 17, 1898, another plan of the land at Chapoquoit was prepared and recorded in the registry at Plan Book 27, Page 33 (1898 Plan), attached here as Exhibit B. The 1898 Plan shows an unnumbered lot [**9] adjacent to Lot 11, with the boundary line extending to the low-water mark of the Pond. Exh. 1, ¶¶ 16, 20; Exh. 13.

13. King died in 1898. Exh. 1, ¶ 12.

14. On January 2 1899, Jones and the trustees of the estate of King conveyed to John Lathrop Wakefield (Wakefield) all their right, title and interest in the easterly portion of Lot 22 on both sides of the Avenue as shown on the 1890 Plan by a deed recorded in the registry on March 22, 1899 at Book 236, Page 266. The bounds of this portion of Lot 22 are described as "Northerly and Easterly by Chapoquoit Harbor; Southerly by said Chapoquoit Harbor, and by a pond." This conveyance was part of a larger conveyance of some of the flats at Chapoquoit along Buzzards Bay and Chapoquoit Harbor. This property was immediately re-conveyed to Jones, Samuel King, and Charles Baker, as trustees of Chapoquoit Associates, by a deed recorded in the registry on March 22, 1899 in Book 236, Page 270. Wakefield appears to have been a straw. Exh. 1, ¶ 21; Exhs. 16-17.

15. A new plan of Chapoquoit January 1, 1904, showing Buzzards Bay, Chapoquoit Harbor, and the Pond, was recorded in the registry in Plan Book 12, Page 81 (1904 Plan), attached here as Exhibit [**10] C. The 1904 Plan shows Lots 8, 9, 10, and 11 (further subdivided into Lots 11A and 11B), around the Pond with boundary lines stopping at the edge of the bank. As in the 1898 Plan, the unnumbered lot next to Lot 11B contains a boundary line extending to the low-water mark. Exh. 1, ¶ 24; Exh. 20.

Evans' Title

16. Evans, as trustee of the NWW-2 Realty Trust, is the present owner of a developed, residential lot on Chapoquoit, known as Lot 9 with the street number 131 Associates Road. Lot 9 is improved with a three-bedroom house, originally used as a "playhouse" and a guest house, a single car garage, and a shed. Exh. 1, ¶¶ 49-50, 55; view.

17. On the 1890 Plan, Lot 9 is shown as bounded by an Avenue to the south and adjacent to the Pond to the north, with a feature designated as "edge of bank," which serves as the northerly boundary. Exh. 7.

18. On October 31, 1898, Jones conveyed Lot 9 to Samuel King, heir of King, by a deed recorded in the registry on November 3, 1898 at Book 234, Page 230 (1898 Deed). The 1898 Deed recites the property's metes and bounds, including that it is bounded northwesterly by Lot 10 on the 1890 Plan, one hundred and forty-nine (149) feet, northerly by the "edge [**11] of the bank" as shown on the 1890 Plan, and easterly by Lot 8 by one hundred and fifty four 5/10 (154.5) feet. Overall Lot 9 contains approximately 43,125 square feet. The 1898 Deed also states that it is "subject to and with the benefit of all the rights, easements, restrictions and provisions in [the 1893 Division Deeds] contained or referred to so far as the same are now in force and applicable." Exh. 1, ¶¶ 13-15; Exh. 12.

19. On January 2, 1899, trustees of King conveyed to Jones the undivided two-thirds interest of King in the unnumbered lot with the buildings located thereon, shown on the 1898 Plan by a deed recorded in the registry on March 23, 1899 at Book 234, Page 384. The deed to the unnumbered lot refers to the 1898 Plan and recites that the plan is to be recorded "herewith." The

deed describes the unnumbered lot as bounded "by the Pond." Exh. 1, ¶¶ 17-19; Exhs. 13-14.

20. On May 12, 1899, Jones conveyed the westerly part of Lot 11 (later shown as Lot 11A on the 1904 Plan) to Esther Hitchcock by a deed recorded in the registry on June 3, 1899 at Book 234, Page 488. Exh. 15.

21. On June 1, 1901, Samuel King conveyed Lot 9 to John Hitchcock (Hitchcock) by a deed recorded in [**12] the registry on June 3, 1901 at Book 250, Page 113 (1901 Deed). The boundaries and descriptions of Lot 9 in the 1901 Deed are identical to those in the 1898 Deed, including that Lot 9 is bound "northerly by the edge of bank as shown on [the 1890 Plan]." Exh. 1, ¶ 22; Exh. 18.

[*331] 22. On June 1, 1901, Jones conveyed Lot 10 as shown on the 1890 Plan to Hitchcock by a deed recorded in the registry on June 26, 1901 at Book 250, Page 147. Exh. 1, ¶ 23; Exh. 19.

23. On March 20, 1912, executors of the estate of Hitchcock conveyed Lots 9 and 10 to Theodore E. Stephenson (Stephenson) by a deed recorded in the registry on March 27, 1912 at Book 314, Page 425. The same day, Stephenson conveyed Lots 9 and 10 to Esther Hitchcock, individually, by a deed recorded in the registry March 27, 1912 at Book 313, Page 184. For the description of Lot 9, these deeds refer to the 1901 Deed. By virtue of this conveyance and the 1899 conveyance described above, Esther Hitchcock was the owner of Lots 9, 10, and 11A as shown on the 1904 Plan. Exh. 1, ¶¶ 25-26; Exhs. 15, 21-22.

24. On May 20, 1924, Jones conveyed Lot 11B as shown on the 1904 Plan to Nancy and George Crompton (Cromptons) by a deed recorded on May 31, [**13] 1924 in the registry at Book 402, Page 463. Exh. 1, ¶ 27; Exh. 23.

25. On October 14, 1929, Esther Hitchcock conveyed Lots 9, 10, and 11A to Mabel A. Heald (Heald) by a deed recorded in the registry on October 21, 1929 at Book 467, Page 588. The boundaries and description of Lot 9 in this deed are identical to those in the 1898 Deed, as well as in the 1901 Deed, including that Lot 9 is bound "northerly by the edge of the bank as shown on [the 1890 Plan]." Exh. 1, ¶ 30; Exh. 24.

26. On November 3, 1930 Heald conveyed Lots 9 and 10 to the Cromptons by a deed recorded in the registry on November 7, 1930 at Book 475, Page 263. The boundaries and descriptions of Lot 9 in this deed are identical to those in Lot 9's chain of title, including that Lot 9 is bound "northerly by the edge of bank as shown on [the 1890 Plan]." Exh. 1, ¶ 31; Exh. 25.

27. On November 4, 1943, George Crompton conveyed Lots 9, 10, and 11B to Nancy Jenney, formerly Nancy Crompton, individually by a deed recorded in the registry on March 6, 1944 at Book 611, Page 266. The boundaries and descriptions of Lot 9 in this deed are identical to those in the 1898 Deed and 1901 Deed, including that Lot 9 is bounded "northerly by [**14] the edge of bank as shown on [the 1890 Plan]." Exh. 1, ¶ 38; Exh. 31.

28. On July 25, 1950, Paul Jones conveyed to Nancy Jenney by a deed recorded in the registry on July 31, 1950 at Book 758, Page 588, a portion of the unnumbered lot (Jenney parcel) shown on the 1898 Plan and 1904 Plan as abutting Lot 11B to the east. The Jenney parcel can be seen on the 1958 Plan (discussed later), attached here as Exhibit E. Exh. 1, ¶ 39; Exhs. 32-33.

29. On December 20, 1968, Nancy Jenney conveyed Lots 9, 10, and 11B, and the Jenney parcel to her daughter Nancy Willard Wendell (Wendell) by a deed recorded in the registry on December 26, 1968 at Book 1423, Page 454. The boundaries and descriptions of Lot 9 in this deed are identical to those in the Lot 9's chain-of-title, including that Lot 9 is bound "northerly by the edge of bank as shown on [the 1890 Plan]." Exh. 1, ¶ 45; Exh. 35.

30. On November 28, 1994, Wendell conveyed Lots 10 and 11B and the Jenney parcel to herself, as trustee of the NWW-1 Realty Trust, by a deed recorded in the registry on December 5, 1994 at Book 9469, Page 109. Lot 11B and the Jenney parcel together now have the address of 73 Associates Road and are improved with a single-family [**15] dwelling used as the Wendell family's main house. Lot 10 is an undeveloped wooded lot known as the "Middle Lot." Exh. 1, ¶¶ 47-48; Exh. 37; Tr. 1:112; view.

31. On November 28, 1994, Wendell also conveyed Lot 9 to herself, as trustee of the NWW-2 Realty Trust by a deed recorded in the registry on December 5, 1994 at Book 9469, Page 118. The boundaries and descriptions of Lot 9 in this deed are identical to those in the chain-of-title, including that Lot 9 is bound "northerly by the edge of bank as shown on [the 1890 Plan]." Lot 9 now has an address of 131 Associates Road and is improved by a three-bedroom residence, originally used as a "playhouse" and guesthouse after it was constructed in the 1920's or 1930's. The residential structure continues to be known as "the Playhouse." Exh. 1, ¶¶ 49-50; Exh. 38; Tr. 1:112-113; view.

32. Wendell died on November 30, 2004. She was survived by three daughters: Nancy Evans (the plaintiff), Gwendolyn Bryant, and Caroline Abdulrazak. Wendell's daughters became trustees of the NWW-1 and NWW-2 Realty Trusts. A plan was prepared for division of ownership among the three daughters of Lots 9, 10, and 11B and the Jenney parcel entitled "Existing Conditions [**16] Plan for Cally Abdulrazak" dated January

6, 2006. Real estate appraisals of the properties were obtained. The size or area of each of the three lots and the Jenney parcel was a major component of the appraisals. Evans did not communicate any disagreement with the division plan's depiction of the property line along the Jacksons' property. Tr. 1:117; Exh. 1, ¶¶ 51-54.

33. On or about October 29, 2011, Evans became the sole trustee of NWW-2 Realty Trust, which holds title to Lot 9 (the Evans Property). Evans and her two sisters became trustees and beneficiaries of NWW-1 Realty Trust for Lot 10. Evans' sisters became the trustees and beneficiaries of NWW-1 Realty Trust for Lot 11B and the Jenney parcel. Evans and her three daughters are the current beneficiaries of the NWW-2 Realty Trust. Exh. 1, ¶ 55.

34. After becoming the sole trustee of NWW-2 Realty, Evans asserted that title to Lot 9 included the Disputed Area, filled tidelines of the prior Pond (discussed below). Evans relies on the language in the 1893 Division Deeds describing the boundary of the shore lots as being extended to low-water mark of the Bay and Harbor, and on the 1898 Deed of Lot 9 from Jones to King that was subject [**17] to and with the benefit of all the rights, easements, and restrictions in the 1893 Division Deeds. Tr. 1:26-29.

35. Evans admits that prior to filing this action she did not believe the Disputed Area was part of her property. Exh. 1, ¶ 57.

Jackpot Trust's Title

36. On April 1, 1926, Jones conveyed an unnumbered lot (Jones parcel) to his heir Paul Jones by a deed recorded in the registry on May 2, 1931 at Book 481, Page 293 (1931 Deed). The Jones [*332] parcel abuts the Jenney parcel to the east, as shown on the 1904 Plan and 1958 Plan (discussed below). The boundary line of the Jones parcel was extended from the low-water mark across the Pond "to the edge of the bank on the Northerly side of Lot 9," then running northwesterly along the edge of the bank to the southeasterly side line of Lot 10, forming the northeasterly boundary of Lot 10, then to the southeasterly corner of Lot 11B, forming the easterly boundary of Lot 11B, and up to the southerly boundary of the Avenue, as shown on the 1890 Plan. Exh. 1, ¶ 33; Exh. 26.

37. On or about March 7, 1929, the Department of Public Works of the Commonwealth issued a Chapter 91 license to Jones authorizing dredging in West Falmouth Harbor and placement [**18] of the dredged materials "in tidewater in a pond tributary to said harbor, at Chapoquoit." No evidence was found that the license was recorded in the registry. At some point during the late 1920's or early 1930's, the dredging and filling of the area shown on a 1929 license plan (1929 Plan) occurred. The 1929 Plan is attached here as Exhibit D. Exh. 1, ¶¶ 28-29, 32; Exhs. 44-45.

38. Jones died on January 4, 1933. Exh. 1, ¶ 34.

39. On December 19, 1933, the trustees of King executed a use deed to Willard Morse, recorded in the registry on January 23, 1934 at Book 501, Page 63, conveying all of their "right, title and interest, if any, in and to any land or interest in land in the town of Falmouth, Barnstable County, Massachusetts, including any flats or easements" to the use of Willard Morse and his heirs as described in the deed; i.e. Franklin King, Margaret Farnsworth, Gelston King (an undivided half interest as tenants in common), and Anna Hall and Edith Baldwin (an undivided half interest as tenants in common). Exh. 1, ¶ 35; Exh. 27.

40. The same day, the trustees of King granted to the trustees of Jones all of their "right, title and interest, if any, in the land under or included [**19] within the limits of the Pond adjacent to Lots 8, 9 and 10" and in any flats and lands lying between low-water mark of said Pond as shown in the 1890 Plan and 1904 Plan, by a deed recorded in the registry at Book 501, Page 63. These two deeds executed on January 23, 1934, are referred to as the "1934 Deeds." Exh. 1, ¶ 36; Exh. 28.

41. On July 10, 1934, trustees of Chapoquoit Associates conveyed the easterly portion of Lot 22, the portion conveyed by the January 2, 1899 deed, to the trustees of Jones by a deed recorded in the registry on July 26, 1934 at Book 504, Page 186. Exh. 29.

42. On February 7, 1935, the trustees of Jones conveyed to Paul Jones Lot 8 and "the land under or included within the limits of the pond adjacent to Lots 8, 9 and 10 as shown on [the 1904 Plan], all flats or land lying between said Lots 8, 9, and 10, and low-water mark of said pond as shown on [the 1904 Plan] and a portion of Lot 22 . . . lying to the southwesterly side of said Associates Road" by a deed recorded in the registry on February 9, 1935 at Book 508, Page 537 (1935 Deed). Exh. 1, ¶ 37; Exh. 30; Tr. 2:23-24.

43. At some point in the late 1950's, a single-family residence was built by Paul Jones, [**20] the Jacksons' predecessor-in-interest, on a portion of the filled former Pond lying to the northeast of Lot 10 and north of Lot 9. Tr. 2:41; Exh. 1, ¶ 40.

44. On or about August 5, 1958, the Falmouth Planning Board endorsed as approval not required under the Subdivision Control Law a plan entitled: "Plan of Land at Chapoquoit West Falmouth to be conveyed by Paul Jones June 14, 1958" (1958 Plan), attached here as Exhibit E. The 1958 Plan was recorded at the registry at Plan Book 143, Page 75. The 1958 Plan shows

the location of the residence built by Paul Jones marked "house" in its current location on a 36,050 square foot parcel of land (the Jackson Property). The house, commonly referred to as "the Jackpot," is a two-story, four bedroom structure. Thereafter, a detached single car garage was built to the north of the Jackpot. Tr. 2:42; Exh. 1, ¶¶ 41-43; Exh. 33; view.

45. On August 25, 1958, Paul Jones conveyed to his niece and her husband, Michael Jackson, Sr. and Leslie Jones Jackson, a 36,060 sq ft parcel of land, now known as the Jackson Property, by a deed recorded in the registry on August 26, 1958 at Book 1013, Page 271 (1958 Deed). The 1958 Deed describes the Jackson Property [**21] by metes and bounds and as "being shown on" the 1958 Plan. Exh. 1, ¶ 44; Exh. 34.

46. On December 21, 1976, Michael Jackson, Sr. and Leslie Jones Jackson conveyed the Jackson Property to the Fiduciary Trust Company, as trustee of the Jackpot Trust, by a deed recorded in the registry on December 27, 1976 at Book 2446, Page 306. Exh. 1, ¶ 46; Exh. 36.

47. On or about November 1, 2013, the Jacksons became the sole trustees of the Jackpot Trust, which is the present owner of the Jackson Property with the street address 85 Associates Road. Tr. 2:42, 64; Exh. 1, ¶ 56.

48. The Jackson Property is on a portion of the Pond that was filled and abuts the now Evans Property. The Disputed Area is southeast and east of the Jackpot, and to the northeast of the Playhouse on the Evans Property. Exh. 1, ¶ 28; Exhs. 33, 55, 59, 60; view.

Title to the Disputed Area

49. At trial, ownership of the Disputed Area was at issue. The dispute centers on whether the Disputed Area was intended to be included in conveyances of Lot 9, or whether the grantors did not intend to convey this additional area along with Lot 9.

50. Evans asserts that her ownership of Lot 9 extends from (what was once) the "edge of bank" to the [**22] low-water mark of the former Pond, i.e. the Disputed Area. The Disputed Area is approximately a 5,300 square foot strip on filled tidelands where the Pond on the 1890 Plan was once located.

51. Bernard Kilroy (Kilroy), a Massachusetts real estate attorney with experience in title examination, and Land Court title examiner since 1971, testified on behalf of Evans. He opined that it was his understanding of the common law that if the tidal flats were owned by the grantor, they are presumed to be conveyed with the conveyance of adjacent upland, and that he discerned no intent to sever the Disputed Area from Lot 9 in the 1898 Deed [*333] from Jones to Samuel King. He testified that he detected no intent on the part of Jones and King to convey any of the lots bordering the Chapoquoit Harbor and Buzzards Bay differently than the lots bordering the Pond, with respect to the treatment of the tidal flats.

However, Kilroy did not testify as to whether any of the subsequent deeds in the chain of title, following the 1898 Deed, corroborated his interpretation of the grantors' intent. Kilroy failed to offer any explanation for deeds after the 1898 Deed that contradicted his interpretation. He acknowledged [**23] on cross-examination that there is nothing in the 1890 Plan that indicates that the Pond should be transferred with Lot 9 and that according to the 1890 Plan, the edge of bank is the northern boundary of Lot 9. Kilroy further conceded that, putting aside the "subject to" language in the 1898 Deed, there is nothing in the 1898 Deed that shows that the deed conveys any part of the Pond. Tr. 1:19-23, 33-35, 38, 41-42, 58, 60.

52. Robert Moriarty (Moriarty), a Massachusetts real estate attorney with a specialty in title examination, a member of Title Standards Committee of the Real Estate Bar Association since the 1980's, and a Land Court title examiner, testified on behalf of the Jacksons. He opined that when the 1893 Division Deeds used the term "shore lots," they were referring specifically to the shore lots abutting Chapoquoit Harbor and Buzzards Bay. He also testified that there were several significant factors to be considered in interpreting the 1898 Deed of Lot 9 from Jones to King. The 1898 Deed references the 1890 Plan, showing Lot 9 not including the Pond, and provides a metes and bounds description. The language for the northerly bound is along the "edge of bank," indicating [**24] that Lot 9's boundary extended only to the edge of the bank and not beyond. He testified that he reviewed the deeds in Evans' chain of title, and that they uniformly describe the northern boundary of her property as bounded by "the edge of the bank," just as the initial 1898 Deed described it. Moriarty attested to other deeds for property on Chapoquoit Island in which both King and Jones differentiated between the Harbor, the Bay, and the Pond. He further testified that the 1934 Deeds were release deeds from the estate of King to the estate of Jones for any right, title, or interest they may have had within the limits of the Pond. This was done, Moriarty said, to ensure that the Division Deeds did not leave out any residual interest in the King estate. Moriarty also stated that he checked the authority of those grantors to execute that deed, reviewed probate materials for each estate, and verified that the trustees were the proper trustees. Moreover, Moriarty stated that the license obtained by Jones to fill the entire Pond was an indication that Jones believed he owned the entire Pond area. I credit Moriarty's testimony as to the Evans' and the Jacksons' chain of title. Tr. 2:11-15, [**25] 17-22; Exhs. 12, 14, 16, 26-28, 44.

53. Based on the documentary evidence in the record and Moriarty's testimony, I find that the Disputed Area was not intended by the original grantors to be transferred as part of Lot 9. I accept and adopt Moriarty's view that there was no evidence in the 1898 Deed description of an intent to convey property to the low-water mark as part of Lot 9; in fact the language in the deed specifically referenced the northern boundary of Lot 9 as the "edge of bank." The 1891 Agreement, the Division Deeds, and subsequent deeds to the 1898 Deed all differentiate between the Harbor, the Bay and the Pond. Additionally, several deeds in the Jackpot Trust's chain of title, including the 1931 Deed and 1935 Deed, conveyed the Pond along with the Disputed Area. Tr. 2:11-15, 17-24; Exhs. 12, 14, 16, 26.

Adverse Possession

54. Aerial photographs from the 1950s and 1960s show the Jackpot was placed along the landward edge of a large open area that extended from within about the center of a loop of Associates Road, across Associates Road, to the shore of Chapoquoit Harbor. Several witnesses referred to this open area as the "Plains of Abraham." This area was created when the [**26] Pond was filled. It was initially maintained as an open area, but in the 1970's was cut less so trees and shrubs grew upon the northern and northeastern portion of the Jackson Property. Tr. 1:119-120, 144, 160-161; 2:57-58, 67; Exhs. 47-53.

55. Defendant Michael Jackson, Jr. (Mr. Jackson) testified that his family acquired the Jackson Property in the late 1950s. When he was growing up, his parents took him and his three siblings to stay at the Jackpot during the summer and occasionally in the spring and fall. I credit Mr. Jackson's testimony. Tr. 2:42-43.

56. While trees or shrubs established themselves over the years in parts of the Plains of Abraham outside the Disputed Area, the lawn area near and around the Jackpot remained substantially the same from the late 1950s to the present. This area was mowed and maintained as lawn by Michael Jackson, Sr., Mr. Jackson, and his brother Timothy Jackson. Tr. 1:96-99, 109, 121, 147; 2:48-56; Exhs. 50-54, 61, 65, 79; view.

57. Consistent with the homeowner association's guidelines, the Jacksons and their predecessors-in-interest maintained a vegetated buffer along what they believed to be the property boundary between their property and the Evans Property. [**27] A portion of this boundary consists of a privet hedge that Mr. Jackson testified has been there since his childhood in the 1960's. Since the 1960s or 1970s, the Jacksons and their predecessors have placed brush trimmings from the hedges and other vegetation in piles in the southeast corner of the Disputed Area and along the boundary. Tr. 1:146; Tr. 2:61, 72-75, 84-86; Exh. 61; view.

58. Mr. Jackson testified that every few years his father checked the property boundary markers that indicated the ends of the boundary line that the Jacksons now contend is the correct boundary between the Jackson Property and Evans Property, up to the prior edge of the bank. I credit this testimony. These monuments still exist. A drill hole in a stone wall monument marks the western end of the boundary, and a stone bound indicates the eastern end. Tr. 2:60-61, 80-81; Exh. 33; view.

59. The Jacksons and their predecessors used a portion of the Disputed Area as a "laundry yard" from at least the early 1960's through the 1980's. A large umbrella-style structure had multiple laundry lines strung from it. It was used to dry laundry, and, after [*334] the mid-2000s, just towels and bathing suits. Tr. 1:95-96, 107-108, 112, [**28] 144-46; 2:46-47, 66, 78-79, 82, 100; Exhs. 72, 79.

60. Since at least the early 1960's until 2013, a hammock was hung in the Disputed Area between two cedar trees, one of which was knocked down by a storm in the winter of 2013. The hammock was put to a full range of uses, from reading and resting to children horsing around, including trying to launch each other "into space." Chairs and a picnic table were placed and used near the location of the hammock. Tr. 1:95-96, 120, 145, 147; Tr. 2:48, 82-83, 96, 103; Exhs. 63-64; view.

61. The Disputed Area was also used for the storage of boats and boat trailers since the 1960s, such as Mr. Jackson's father's various boats including a 26-foot long sailboat. More recently, kayaks as well as Mr. Jackson's uncle Paul Jones' Sunfish sailboat have been stored in this area. Mr. Jackson testified that his great uncle's Sunfish has been stored there for 15 years, and I credit this testimony. Tr. 1:109-110, 146, 165; Tr. 2:59-60; Exh. 66; view.

62. The Jacksons and their predecessors undertook a number of different family outdoor and recreational activities in the Disputed Area beginning in the late 1950s to the present. Mr. Jackson and his brother testified at trial [**29] to spending childhood summers in the late 1950's and 1960's at the property with their family of six playing croquet, Frisbee, Jarts, badminton, kick-the-can, and throwing the ball for the family dog. There were cookouts, and for the adults, cocktail parties. It was their "fiefdom." Caroline Abdulrazak (Abdulrazak), sister of Evans, testified to observing the Jackson family beginning in the 1950s using "every inch of the property," including the Disputed Area. Abdulrazak recalled playing baseball, capture the flag, and having social events on the Jackson Property. Mr. Jackson's children have continued to play in the Disputed Area. I credit this testimony. Tr. 1:118-

120 143-144, 151, 162; Tr. 2:62-63.

63. From 1973 to 1983, Katherine King and her family of five rented the Jackson Property in August and September and undertook similar activities on the Jackson Property and in the Disputed Area. She testified that her family played games such as croquet, kick the can, and tag. She also recalled an umbrella style clothesline and a hammock that used to be in the Disputed Area where they hung laundry and bathing suits. Her family also had cookouts and ate in the Disputed Area. She visited the Jackson Property [**30] again recently prior to trial and she noted that the Disputed Area looked much the same today as it did when she rented, though missing a large cedar tree that had once held the hammock. I credit Ms. King's testimony. Tr. 1:93-99, 101-102; Exh. 61.

64. Mr. Jackson and his brother Timothy Jackson continued to use the Jackpot and Disputed Area as their families expanded. Starting in the 1980s, Mr. Jackson and his family would occupy the Jackpot during July and his brother's family would stay at the Jackpot during August. Mr. Jackson placed and maintained a jungle gym with a swing set in the northeastern part of the Disputed Area for his children to use. The jungle gym was there from the early 1990's through the early or mid-2000's. Tree forts were constructed and used by the children in the southeastern portion of the Disputed Area. The sharing of the Jackpot continued until around 2004, after which Mr. Jackson's family exclusively stayed at the Jackpot year-round as long as the weather is suitable. Tr. 1:143-144, 151, 162; Tr. 2:43-45, 62-63; Exh. 64.

65. The portion of the Evans Property closest to the Disputed Area was, until mid-2009, densely wooded. The vegetation was described as "impenetrable" [**31] and a "dense jungle." The area between the Playhouse and the Disputed Area could not be traversed. In May or June 2009, Evans cleared a sizeable portion of her property and installed a lawn and landscaping. Tr. 1:113; Tr. 2:70-71, 75-77, 87,106-107; Exh. 66; view.

66. Until winter of 2013, there were three cedar trees just off the eastern corner of the Jackpot. The southernmost one in the Disputed Area was knocked down in a winter storm and fell toward the Evans Property. The Jacksons left the fallen tree where it lay for over a year because it restored some of the privacy that Evans' clearing had removed. The Jacksons had the tree removed and equipment used tore up the lawn, which the Jacksons replanted. Tr. 2:65-71, 74; Exhs. 62, 66; view.

67. In 2014, survey crews came onto the Disputed Area and cut some of the privet hedge to create a sight line. A replacement privet hedge was installed shortly after and the Jackson planted a new Leyland cypress and mulch in the Disputed Area. Tr. 2:74-75; Exh. 61; view.

68. The Jacksons and their predecessors paid taxes assessed by the Town of Falmouth over the years. The assessors' maps show the boundaries and shape of the Jackson Property as more [**32] or less the same that is shown on the 1958 Plan. The assessors' maps include the Disputed Area as within the Jackson Property, not the Evans Property. Evans made no claim that she paid taxes on the Disputed Area or that taxes on the Disputed Area were assessed to her. Tr. 2:63-64; Exhs. 55-57.

69. Mr. Jackson testified that to his knowledge, the above activities in the Disputed Area were never objected to by Evans or her predecessors. Several witnesses testified on behalf of the Jacksons that they were not aware that Evans or her predecessors had ever told the Jacksons, their predecessors, or any tenants not to use any portion of the Disputed Area or otherwise protest the use of the Disputed Area. I credit this testimony. Evans admits that prior to filing this action she did not believe the Disputed Area was part of her property. Evans presented no testimony on the issue of adverse possession. Tr. 1:102, 120-121; Tr. 2:75, 77, 109; Exh. 1, ¶ 57.

DISCUSSION

Evans seeks a declaratory judgment that she owns the Disputed Area, on which the Jacksons plan to construct an addition to their single-family home, through her chain of title. She claims that her ownership of Lot 9, as shown on the 1890 Plan, [**33] extends from what was once "the edge of the bank" to the low-water mark of the former Pond. Evans admits that while the Disputed Area is not explicitly included in Lot 9's deed descriptions in her chain of title, the Disputed Area's conveyance is presumed because the grantor [*335] owned the tidal flats at the time or, alternatively, provisions in the 1893 Division Deeds were understood to also include conveyance of the land to the low-water mark for shore lots, including lots on the Pond, and the 1898 Deed's "subject to" language, the first deed in her chain of title, conveyed this area. The Jackpot Trust argues that it has record title to the Disputed Area, consisting of the flats of the Pond, because the original grantors did not intend to convey the area between the edge of the bank and the low-water mark with the lots surrounding the Pond. If its claim of record title should fail, the Jackpot Trust asserts in its counterclaim that it nonetheless has acquired title to the Disputed Area through the principles of adverse possession. As explained more thoroughly below, I find that the Jackpot Trust, not Evans, has record title to the Disputed Area and, alternatively, that the Jackpot Trust [**34] has adversely possessed the Disputed Area for at least twenty years.

A. Record Title to the Disputed Area

"The Colonial Ordinance of 1641-1647 established that a person holding land adjacent to the sea shall hold title to the land out to the low water mark or 100 rods (1,650 feet), whichever is less." *Pazolt v. Director of the Div. of Marine Fisheries*, 417 Mass. 565, 570, 631 N.E.2d 547 (1994); see *Boston Waterfront Dev. Corp. v. Commonwealth*, 378 Mass. 629, 635-637, 393 N.E.2d 356 (1979), quoting The Book of the General Laws and Liberties 50 (1649); *Storer v. Freeman*, 6 Mass. 435, 437 (1810); *Kane v. Vanzura*, 78 Mass. App. Ct. 749, 753, 943 N.E.2d 456 (2011). Evans bases her claim to ownership of the Disputed Area on two arguments: first, that under the Colonial Ordinance there is a presumption of law that title to the flats follows title to adjacent upland, and second, that Jones acquired title to the Disputed Area by the 1893 Division Deed that conveyed all interests of King to Jones and that the "subject to" language in the 1898 Deed of Lot 9 from Jones to Samuel King, Evans' predecessor in title, included title to the Disputed Area.

"The basic principle governing the interpretation of deeds is that their meaning, derived from the presumed intent of the grantor, is to be ascertained from the words used in the written instrument, construed when necessary in the light of the attendant circumstances." *Patterson v. Paul*, 448 Mass. 658, 665, 863 N.E.2d 527 (2007), quoting *Sheftel v. Lebel*, 44 Mass. App. Ct. 175, 179, 689 N.E.2d 500 (1998); *Town of Stoughton v. Schredni*, 7 LCR 61, 66 (1999) ("The general principle governing the interpretation of [**35] deeds is that they are to be construed so as to give effect to the intent of the parties."). "When a deed description is clear and explicit, there is no room for construction or for the admission of parol evidence to prove that the parties intended something different than what they expressed in writing and recorded in the deed language." *Black v. Klaetke*, 20 LCR 120, 122 (2012), citing *Cook v. Babcock*, 61 Mass. 526, 528, 7 Cush. 526 (1851).

Conversely, if a deed appears to be ambiguous and rules of construction are necessary to interpret a deed's description, "consideration of circumstances outside the express language of the deed is necessary, as the description itself is no longer sufficient to show the intent behind the conveyance." *Black*, 20 LCR at 122, citing *Murphy v. Mart Realty of Brockton, Inc.*, 348 Mass. 675, 680, 205 N.E.2d 222 (1965) (in considering a rule of construction, "the basic question remain[ed] one of ascertaining the intent of the parties as manifested by the written instrument *and the attendant circumstances*"). In situations of doubt or ambiguity, subsequent conduct and later deeds are sometimes helpful in resolving that uncertainty, because property owners' descriptions and actions may be indicative of the originally intended grant, and those of their successors may mirror and follow them. See *Jones v. Gingras*, 3 Mass. App. Ct. 393, 398, 331 N.E.2d 819 (1975), citing *Fulgenitti v. Cariddi*, 292 Mass. 321, 325, 198 N.E. 258 (1935) ("Acts of adjoining owners showing the practical construction [**36] placed by them upon conveyances affecting their properties are often of great weight"); see also *Ryan v. Stavros*, 348 Mass. 251, 259-260, 203 N.E.2d 85 (1964) (use of extrinsic evidence is helpful in resolving uncertainty created by deed descriptions).

Each party asserts that the rules of deed construction warrant an interpretation that favors them. "Rules of deed construction provide a hierarchy of priorities for interpreting descriptions in a deed. Descriptions that refer to monuments control over those that use courses and distances; descriptions that refer to courses and distances control over those that use area; and descriptions by area seldom are a controlling factor." *Paull v. Kelly*, 62 Mass. App. Ct. 673, 680, 819 N.E.2d 963 (2004). "The only exception recognized is where, by strict adherence to monuments, the construction is plainly inconsistent with the intention of the parties as expressed by all the terms of the grant." *Temple v. Benson*, 213 Mass. 128, 132, 100 N.E. 63 (1912). "A plan referred to in a deed becomes part of the contract so far as may be necessary to aid in the identification of the lots and to determine the rights intended to be conveyed." *Reagan v. Brissey*, 446 Mass. 452, 458, 844 N.E.2d 672 (2006), quoting *LaBounty v. Vickers*, 352 Mass. 337, 339, 225 N.E.2d 333 (1967).

Evans acknowledges that no language in the 1898 Deed to Lot 9 includes the Disputed Area, but rather first rests her argument on the presumption under the Colonial Ordinance that title to [**37] the flats follows title to adjacent uplands. This presumption can be overcome. *Kane*, 78 Mass. App. Ct. at 756. "[A]n owner may separate his upland from his flats, by alienating the one, without the other." *Valentine v. Piper*, 39 Mass. 85, 94, 22 Pick. 85 (1839); *Storer*, 6 Mass. at 439 ("[T]he owner may sell his upland without the flats, or any part thereof, without the upland."); see *Commonwealth v. City of Roxbury*, 75 Mass. 451, 9 Gray 451, 524-525 (1857).[1] "[T]he owner may convey the upland without the flats, or the flats without the upland." *Porter v. Sullivan*, 73 Mass. 441, 445, 7 Gray 441 (1856). The presumption can be rebutted by evidence, such as the specific language in deeds in the chain of title conveying the property that demonstrates the intent of the parties. *City of Roxbury*, 9 Gray at 525. Which party's chain of title includes the Disputed Area is ascertained, therefore, by studying the 1893 Division Deeds, [*336] the 1898 Deed, and the 1890

[1] The Court's opinion in *Commonwealth v. City of Roxbury* is followed by an extended Note by Horace Gray, then the Reporter of Decisions and later Associate Justice and Chief Justice of the SJC. Subsequent courts have relied upon Gray's Note as a statement of the law of the Colonial Ordinance. See *Boston Waterfront Dev. Corp.*, 378 Mass. at 636 n.3; *Kane*, 78 Mass. App. Ct. at 753 n.10, 754.

Plan, with ambiguities resolved by examining extrinsic evidence.

The 1893 Division Deeds each state, in relevant part: "It is understood however that the shore lots next to Buzzards Bay and Chapoquoit Harbor extend to low-water [**38] mark of said Bay and Harbor although their sidelines on said plan are drawn only to the edge of the bank." Exh. 1, ¶ 11. The 1890 Plan shows four bodies of water: Buzzards Bay, Chapoquoit Harbor, and two ponds. Exh. 1, ¶ 7; Exh. 7. Lot 9 is adjacent to the larger of the two ponds. It is not next to the Bay or the Harbor. I find persuasive Moriarty's testimony that the language in the 1893 Division Deeds is not applicable to Lot 9, since Lot 9 is not a "shore lot" located on the Bay or Harbor. Tr. 2:10. Other deeds for land on Chapoquoit Island, such as the 1899 deed from King and Jones to John Lathrop Wakefield, make specific reference to the Harbor, Bay, and the Pond, showing that the original grantors recognized a distinction between lots bordering the ponds and those abutting the Bay and Harbor. Exh. 1, ¶ 21; Exhs. 16, 26-28, 35. Though Kilroy testified that he detected no intent on the part of Jones and King to treat any of the lots bordering the Harbor and Bay differently than the lots bordering the Pond with respect to the treatment of the tidal flats, he provided no relevant evidence or surrounding circumstances supporting that conclusion.

The 1898 Deed from Jones to Samuel King [**39] describes the land conveyed as that shown as Lot 9 on the 1890 Plan. As conceded by Evans, the 1890 Plan does not include the Disputed Area as part of Lot 9. Both the 1898 Plan and the 1904 Plan show the unnumbered lot's boundary as extending to the low-water mark, suggesting that the grantors knew how to convey the tidal flats for certain lots if that was the desired intent. Lot 9's boundaries, however, stop at the edge of the bank, with no lines going down to the low-water mark. The 1898 Deed provides a precise metes and bounds description of the land conveyed, including distances and references to abutting lots. It specifies that Lot 9 is bounded northwesterly by Lot 10 on the 1890 Plan one hundred and forty-nine (149) feet, northerly by the "edge of the bank" as shown on said plan, and easterly by Lot 8 by one hundred and fifty four 5/10 (154.5) feet. It further states that Lot 9 contains 43,125 square feet. Exh. 1, ¶¶ 13-14; Exhs. 7, 12. Kilroy testified that conveyances "by the bank" typically indicates that tidal flats are not included and if a grantor intends to convey flats, it is common to say so specifically. Tr. 1:49-51, 60. Moreover, Moriarty testified that conveyancers [**40] at this time were "well aware of the use of the word 'edge' or 'line,'" and deeds stating boundaries to the "edge of the bank" meant to go to the edge of the bank and "not to include anything that went beyond." It was Moriarty's opinion that the 1898 Deed contained no such intent to convey the flats. Tr. 2:13. There is no specific language in the 1898 Deed, or any of the subsequent deeds of Lot 9, evidencing a contrary intent. In fact, the specific metes and bounds included in all the deeds in the chain of title to Lot 9 describe the northern boundary as the "edge of the bank." Exhs. 18, 21, 22, 24-25, 31, 38. Kilroy did not testify with respect to any of the deeds following the 1898 Deed.

The 1898 Deed also states that it is "subject to and with the benefit of all the rights, easements, restrictions and provisions in [the 1893 Division Deeds] contained or referred to so far as the same are now in force and applicable." Exhs. 11-12. As previously stated, I find that the provision in the 1893 Division Deeds regarding shore lots is inapplicable to Lot 9, since Lot 9 is not a "shore lot" abutting the Bay or Harbor. Additionally, Moriarty stated that the "subject to" language was a catchall [**41] provision that is "typical where you have a subdivision that has a set of restrictions and agreements intending to incorporate that." Moriarty did not believe that this provision intended to modify the metes and bounds description of Lot 9. Tr. 2:31-32. I agree with and credit Moriarty's testimony.

Based on the documentary evidence in the record and Moriarty's testimony, I find that the record boundary of Lot 9 is the "edge of the bank" and does not extend to the low-water mark, and that, therefore, the Disputed Area, consisting of the flats to the Pond between the bank and the low-water mark, is not part of Lot 9. Nothing in the 1890 Plan and 1898 Deed, or in any subsequent deeds or plans, states or shows the boundaries of Lot 9 going down to the low-water mark. To the contrary, there is a clear description in both the 1890 Plan and 1898 Deed demonstrating that the northerly boundary of Lot 9 is the edge of the bank. This is repeated over and over again throughout Evans' chain of title. Deeds in the Jackpot Trust's chain of title reference the boundary of Lot 9 in their metes and bounds descriptions, as well as explicitly convey any flats and lands lying between the low-water mark [**42] of the Pond as shown in the 1890 Plan and 1904 Plan. Exhs. 28, 30, 32-34, 36. This further corroborates that the boundary of Lot 9 ends at the edge of the bank. For the foregoing reasons, I find and rule that the Jackpot Trust, not Evans, is the record owner of the Disputed Area.

B. Adverse Possession of the Disputed Area

Though I find the Jackpot Trust is the record owner of the Disputed Area and need not reach the issue of adverse possession, I discuss the Jackpot Trust's counterclaim nonetheless.

"Title by adverse possession can be acquired only by proof of nonpermissive use which is actual, open, notorious, exclusive and adverse for twenty years." *Ryan*, 348 Mass. at 262. "All these elements are essential to be proved, and the failure to

establish any one of them is fatal to the validity of the claim. In weighing and applying the evidence in support of such a title, the acts of the wrongdoer are to be construed strictly, and the true owner is not to be barred of his right except upon clear proof of an actual occupancy, clear, definite, positive, and notorious." *Cook v. Babcock*, 65 Mass. 206, 209-210, 11 Cush. 206 (1853). "If any of these elements is left in doubt, the claimant cannot prevail." *Mendoca v. Cities Serv. Oil Co. of Pennsylvania*, 354 Mass. 323, 326, 237 N.E.2d 16 (1968). The test for adverse possession is the degree and nature of control [**43] exercised over a disputed area, the character of the land, and the purposes for which the land is adapted. *Ryan*, 348 Mass. at 262. The claimant must demonstrate that he or she made changes upon the land that constitute "such a control and dominion over the premises as to be readily considered acts similar to those which are usually [*337] and ordinarily associated with ownership." *Peck v. Bigelow*, 34 Mass. App. Ct. 551, 556, 613 N.E.2d 134 (1993), quoting *LaChance v. First Nat'l Bank & Trust Co. of Greenfield*, 301 Mass. 488, 491, 17 N.E.2d 685 (1938). "The burden of proof in any adverse possession case rests on the claimant and extends to all of the necessary elements of such possession." *Sea Pines Condo. III Ass'n v. Steffens*, 61 Mass. App. Ct. 838, 847, 814 N.E.2d 752 (2004). The Jacksons claims that the Jackpot Trust has acquired title to the Disputed Area through principles of adverse possession. The Jacksons' assertion, therefore, turns on what activities were conducted in the Disputed Area over the twenty years prior to the filing of this action in July 2013.

In support of its claim, the Jackpot Trust introduced testimony from members of the Jackson family and tenants about activities that occurred on the Disputed Area. The activities described and shown in several photographs are consistent with, and typical of, uses associated with a family's use of a yard. Such activities in the Disputed Area included, numerous games (croquet, Frisbee, Jarts, badminton, [**44] kick-the-can), mowing and maintaining the lawn, shrubs and a privet hedge, storage of boats, laundry drying, yard waste disposal, cookouts, and reading and relaxing in a hammock. Later, in the 1990s, a jungle gym was placed in the Disputed Area for Mr. Jackson's grandchildren, who also built tree forts in the southeastern portion of the Disputed Area. These activities demonstrate dominion and control over the Disputed Area, indicating to others in the neighborhood that the Jackpot Trust and its predecessors were acting as the owners. The Jacksons did not in any way conceal their activities. Neighbors Abdulrazak and Andrews both testified to witnessing such activities and believed the Disputed Area belonged to the Jackson family. The Jackson family and their tenants were the exclusive users of the Disputed Area. No testimony was presented showing that others had used this area, nor that Evans or her predecessors had granted permission to the Jacksons to use the Disputed Area. Evans admits that prior to filing this action, she did not believe that she was the owner of the Disputed Area. The trial testimony from several witnesses indicates that the Jackpot Trust and their predecessors [**45] began using the Disputed Area approximately in the late 1950s or early 1960s and continued to use it frequently to the present. This is more than sufficient time to satisfy the statutorily required twenty year period for adverse possession. Based on the foregoing, I find that the Jackpot Trust and its predecessors actually, openly, notoriously, adversely, and exclusively occupied the Disputed Area for over twenty years.

However, this court's inquiry into the Jackpot Trust's adverse possession claim does not end there. When a claim of adverse possession is accompanied by a "claim of title" or a "color of title," the possessor is asserting a claim of ownership based on an instrument, such as a deed, purporting to pass valid title, although it does not. *Norton v. West*, 8 Mass. App. Ct. 348, 351, 394 N.E.2d 1125 (1979). "It is settled that where a person enters upon a parcel of land under a color of title and actually occupies a part of the premises described in the deed, his possession is not considered as limited to that part so actually occupied but gives him constructive possession of the entire parcel." *Dow v. Dow*, 243 Mass. 587, 593, 137 N.E. 746 (1923); *Inhabitants of Nantucket v. Mitchell*, 271 Mass. 62, 68, 170 N.E. 807 (1930) (if adverse possession is established, the possessor's ownership extends to the entire parcel described in the instrument and not just the part [**46] actually used and possessed). A successful claim under color of title requires (1) a successful adverse possession claim, and (2) proof that the claim of ownership is based on a document or writing of title. *Long v. Wickett*, 50 Mass. App. Ct. 380, 382 n.3, 737 N.E.2d 885 (2000). This rule is grounded in the theory that it is the presumed intent of the grantee to assert such possession. See *Norton*, 8 Mass. App. Ct. at 351. The doctrine of color of title "traces its origin to cases in which deeds, leases or other similar title instruments were ruled admissible to prove occupancy of land claimed by adverse possession, and as evidence of the nature of the claim asserted by the adverse user," and determined that this doctrine "seems best suited to resolving the extent of a parcel claimed by adverse possession, where entry on land is made under an adverse claim and a deed or other title instrument is available to assist definition of the claim." *Turturro v. Cheney*, 6 LCR 293, 297 (1998).

As previously noted, the Jackpot Trust has successfully demonstrated adverse possession to portions of the Disputed Area, at a minimum. Pursuant to the 1958 Deed, Paul Jones conveyed the Jackson Property to the Jackpot Trust's predecessor in interest, Michael Jackson, Sr. and Leslie Jones Jackson. The 1958 Deed references the 1958 Plan as well [**47] as recites the metes and bounds shown on the plan in its description of the lot. In 1976, Michael Jackson, Sr. and

Leslie Jones Jackson conveyed the Jackson Property to the Fiduciary Trust Company, as Trustee of the Jackpot Trust. Again, the 1976 deed references the 1958 Plan and recites the metes and bounds shown on said plan in its description of the property. Evans does not contest that the descriptions of the Jackson Property's boundaries in these deeds describe the property claimed by the Jackpot Trust, including the Disputed Area. Furthermore, the Jackpot Trust and its predecessors paid taxes on the Jackson Property and the assessors' maps show the boundaries as including the Disputed Area. Accordingly, the Jackpot Trust entered the property under color of title and commenced their use upon the Jackson Property from around the late 1950s or early 1960s to the present. As such, I find that the Jackpot Trust has title to the entirety of the described parcel in its chain of title, including the Disputed Area, under the doctrine of adverse possession by color of title.

CONCLUSION

Judgment shall enter declaring that the Jackpot Trust is the record owner of the Disputed Area, and alternatively, [**48] the Jackpot Trust has acquired title to the entirety of the Disputed Area under the doctrine of color of title by adverse possession.

Judgment accordingly.

Robert B. Foster

JUDGMENT

The plaintiff, Nancy Evans, Trustee of the NWW-2 Realty Trust (Evans), filed her Verified Complaint on July 22, 2013. Evans' complaint seeks a Declaratory Judgment that she has record title to approximately 5,300 square feet of land (Disputed Area), a portion of the property held by the defendants, Michael Jackson, Jr. and Jane Jackson as trustees of the Jackpot Trust (Jackpot Trust). On November 4, 2013, the Jackpot Trust filed Defendant's Answer to Plaintiff's Complaint and Counterclaim (Counterclaim). The Counterclaim has two counts; count I seeks a declaration that the Jackpot Trust has record title to the Disputed Area and Count II is a claim that the Jackpot Trust has title to the Disputed Area by adverse possession. On March 24, 2015, the Court ordered that "[t]he Commonwealth is not a party to this matter and will not be required to appear. This case will not adjudicate the rights of the Commonwealth."

This case was tried on June 9 and 10, 2015. On August 7, 2015, the Jackpot Trust [**49] submitted their Proposed Findings of Fact, Rulings of Law, and a Post-Trial Memorandum of Law. On August 11, 2015, Evans filed the Plaintiff's Post-Trial Memorandum of Law on Claim of Title and a Post-Trial Memorandum of Law on Defendant's Counterclaim for Adverse Possession. Closing arguments were heard on September 3, 2015, and this case was taken under advisement. In a decision of even date, the court (Foster, J.) has made findings of fact and rulings of law.

In accordance with the court's Decision issued today, it is

ORDERED, ADJUDGED and DECLARED that, on Count I of the Counterclaim, the Jackpot Trust holds record title to the entire parcel of land described in the deed from Paul Jones to Michael Jackson, Sr. and Leslie Jones Jackson, dated August 25, 1958, and recorded in the Barnstable County Registry of Deeds (registry) on August 26, 1958 at Book 1013, Page 271, and as shown on the plan entitled: "Plan of Land at Chapoquoit West Falmouth to be conveyed by Paul Jones June 14, 1958" recorded at the registry at Plan Book 143, Page 75, a copy of which is attached hereto (the Jackpot Trust Property), and that Evans holds no record title to any portion of the Jackpot Trust Property. [**50] It is further

ORDERED, ADJUDGED and DECLARED that, on Count II of the Counterclaim, the Jackpot Trust holds title by adverse possession to the Disputed Area in the Jackpot Trust Property claimed by Evans. It is further

ORDERED AND ADJUDGED that the Verified Complaint is DISMISSED with prejudice. It is further

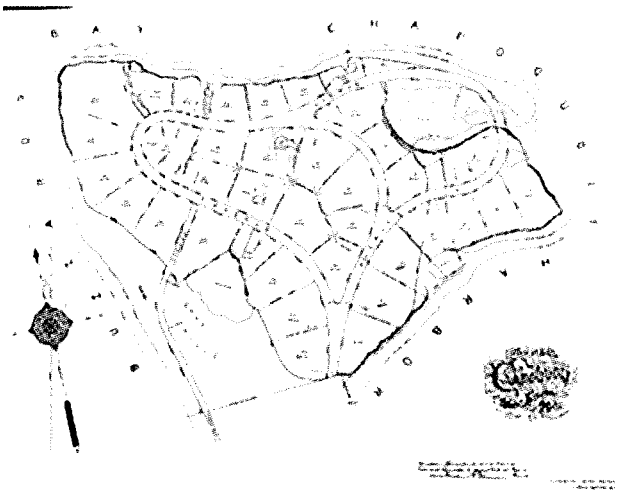
ORDERED, ADJUDGED and DECLARED that nothing in this Judgment adjudicates the rights of the Commonwealth of Massachusetts, if any, in the Jackpot Trust Property. It is further

ORDERED, ADJUDGED, and DECLARED that upon payment of all required fees, this Judgment or a certified copy of this Judgment may be recorded at the registry and marginally referenced on all relevant documents.

By the Court. (Foster, J).

Dated: June 15, 2016.

EXHIBIT A



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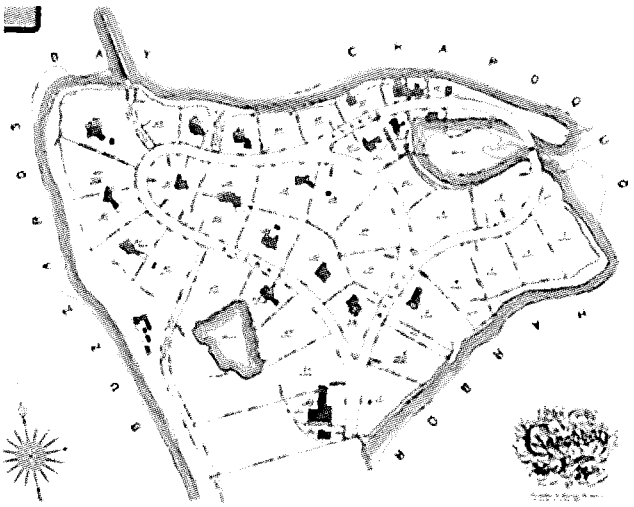

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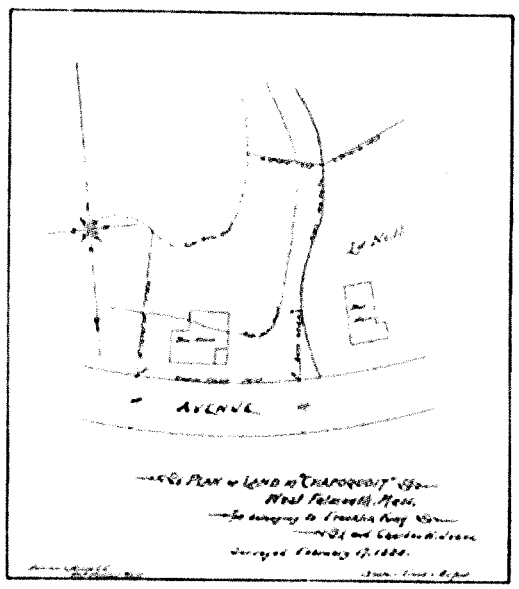

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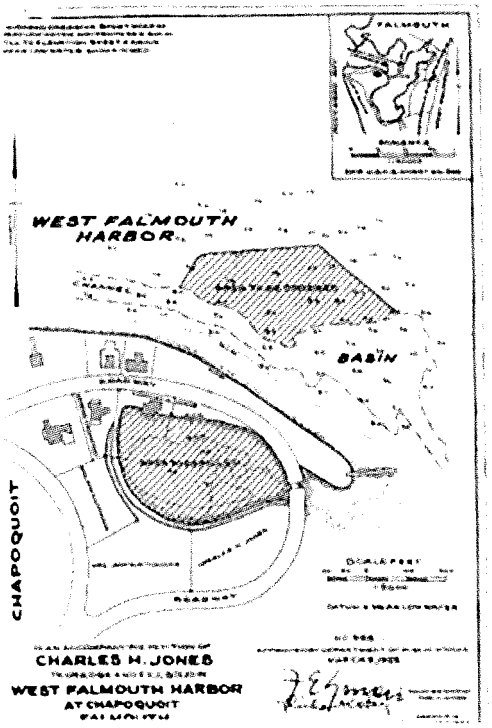
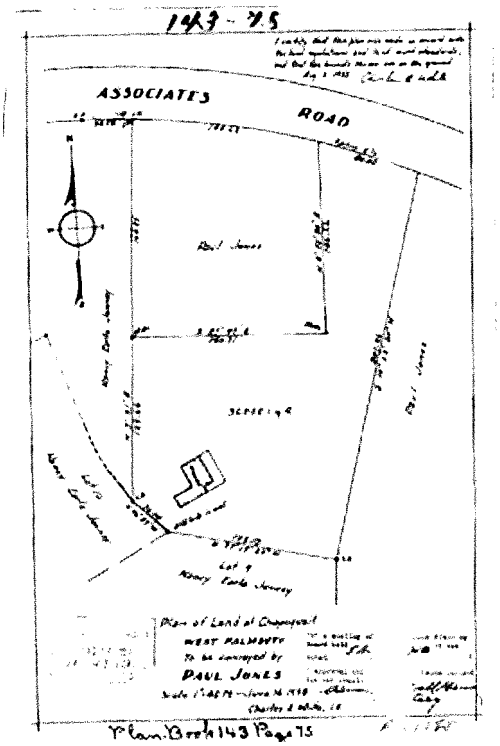


EXHIBIT I



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Paine v. Sexton

Massachusetts Land Court

March 31, 2017, Decided

99 REG 43286 (AHS)

Reporter
2017 Mass. LCR LEXIS 53 *; 25 LCR 191

ROBERT L. PAINE, Petitioner, vs. CHELLISE L. SEXTON, Respondent.

Prior History: Paine v. United States DOI - Cape Cod Nat'l Seashore, 2012 Mass. LCR LEXIS 61 (2012)

Judges: [*1] Alexander H. Sands, III, Justice.

Opinion by: Alexander H. Sands, III

Opinion

DECISION

In this case, Petitioner Robert L. Paine ("Paine") seeks to register the title to 1.544 acres of land located on Old King's Highway in Wellfleet ("Locus"), which is depicted as lot "1" on a plan of land dated October 30, 1998 prepared by Schofield Brothers of New England, Inc. ("Schofield Brothers"), filed with this court as Land Court Plan 43286-A (the "1998 Land Court Plan").[1] This case is related to, and was filed at the same time as, *Paine v. Sexton* (Land Court Case No. 99 REG 43287) (the "Campground Case"), which involves related parties and adjacent properties.[2] Respondent Chellise L. Sexton ("Sexton") objects to such registration, as she likewise did in the Campground Case. Sexton also had previously filed her own Registration case (Case No. 92 REG 42882), but never pursued it.

This case was initially commenced on February 10, 1999 by the filing of a Petition for Registration.[3] On May 12, 1999, the court (Trombly, Recorder) appointed James H. Quirk, Jr. (the "Title Examiner") as external title examiner for this case. The Title Examiner filed his title report on February 17, 2006. A citation for publication issued on [*2] May 1, 2008 with a return date of June 9, 2008. On May 29, 2008, Paine filed notice that publication was made in *The Cape Codder* on May 9, 16, and 23, 2008, and that notice of this case was sent to the Wellfleet Board of Selectmen, the Barnstable County Commissioner, and to all parties named in the citation.[4]

On March 15, 2010, Sexton moved for permission to late-file an Answer in this case, which I allowed over Paine's objections. In her Answer, Sexton disputed the validity of Paine's chain of title and claimed that she held a recently-obtained 1/12 fractional interest in Locus.[5] On June 14, 2011, this case was

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[1] By assented-to motion filed on June 26, 2006 and allowed on February 15, 2008, Paine replaced his sister, Irene M. Paine ("Irene"), as the Petitioner in this case after he succeeded to Irene's interest in Locus in 2006.

[2] Paine and his wife, Sheila, are Petitioners in the Campground Case in their capacities as trustees of the Land Steward Trust (the "Trust"). The properties at issue in the Campground Case are discussed below, and the land adjudged to be owned by the Trust is herein referred to as the Campground Property.

[3] On October 7, 1999, Paine moved to amend the Petition to add a claim to remove an eight foot wide path shown on the 1998 Land Court Plan from the final decree plan in this case. That motion was not previously acted upon, but is hereby **ALLOWED** without objection.

[4] Shortly after service, several parties filed objections to the registration of Locus, which objections were subsequently resolved and withdrawn. Specifically, on June 6, 2008, the Town of Wellfleet (the "Town") filed an objection to this case, which was later withdrawn on July 24, 2009 in connection with a settlement reached between the Town and Paine, whereby the Town agreed to withdraw its objections in both this case and the Campground Case in exchange for Paine's payment of certain back taxes.

On August 4, 2008, Paine moved to amend his Petition to withdraw his request that the certificate of title for Locus include rights to use an adjacent private way (Rama's Way). That request was allowed on August 7, 2008. As a result, on January 4, 2011, abutters Thomas and Janet Reinhart (who do not appear to have filed a formal objection) notified the court that they did not object to the registration of Locus.

[5] More specifically, Sexton claimed that two 1856 deeds in Paine's chain of title described property other than Locus. She further claimed

assigned to me. A status conference was held on July 14, 2011. On November 8, 2011, Paine moved to bifurcate the issues of adverse possession and record title (with the former to be adjudicated first), which I allowed on December 28, 2011 over Sexton's opposition.[6]

On May 30, 2012, after a trial in the Campground Case, I issued a Decision, *Paine v. Sexton*, 20 LCR 292, 2012 Mass. LCR LEXIS 61 (Mass. Land Ct. May 30, 2012) ("Campground Case Decision 1"), in which I held that the Trust had acquired title by adverse possession to a series of lots in the vicinity of Locus.[7] Thereafter, I directed the parties in the Campground Case to brief dispositive motions [*3] on the question of whether the Trust had also acquired title by adverse possession under a color of title theory over a series of additional adjacent lots as to which I had found, in Campground Case Decision 1, that the Trust had adduced insufficient evidence of actual, exclusive use.

On August 23, 2013, I issued a second Decision in the Campground Case, *Paine v. Sexton*, 21 LCR 481, 2013 Mass. LCR LEXIS 143 (Mass. Land Ct. Aug. 23, 2013) ("Campground Case Decision 2"), finding that the Trust had established title by adverse possession under a color of title theory over two additional adjacent lots, as well as portions of two others. Also on August 23, 2013, I issued a Judgment in the Campground Case (the "Campground Case Judgment"), which set forth my findings and rulings from Campground Case Decisions 1 and 2.[8]

On November 21, 2013, after several post-Judgment motions had been adjudicated, Sexton appealed Campground Case Decisions 1 and 2 and the Campground Case Judgment to the Appeals Court. On September 23, 2015, the Appeals Court affirmed Campground Case Decisions 1 and 2 and the Campground Case Judgment, and on December 22, 2015, the Supreme Judicial Court denied further appellate review. *Paine v. Sexton*, 88 Mass. App. Ct. 389, 37 N.E.3d 1103, *rev. denied*, 473 Mass. 1108, 47 N.E.3d 684 (2015). A Notice of Rescript was filed with this court on December [*4] 31, 2015, and the Campground Case was thereafter assigned to a Land Court internal title examiner for review. To date, a Decree of Registration has not yet issued in the Campground Case.[9]

Following the resolution of the Campground Case, the parties in this case appeared for a status conference on April 21, 2016 to address how this case should be adjudicated and what effect the Campground Case would have on this one. Because they could not agree on how to proceed, the court directed the parties to file briefs addressing that question. At a further status conference held on May 12, 2016, this court directed the parties to brief dispositive motions on the limited issue of

Paine's claim that this court's determination (in the Campground Case) that the Trust had acquired title by adverse possession to one of the lots at issue in that case was determinative of Paine's adverse possession claims to Locus in this one under the color of title theory of adverse possession. Paine filed his Motion for Summary Judgment on July 12, 2016.[10] Sexton filed an opposition brief to Paine's Motion for

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that she herself held a 1/12 fractional interest in the westerly portion of Locus (as well as an adjacent portion of the Campground Property) by virtue of an alternative chain of title tracing back to the grantee of an 1875 deed, from whose alleged heirs she obtained a release deed less than a week before filing her Answer. Subsequent to filing her Answer, Sexton recorded a number of additional deeds (from additional heirs of the grantee of the 1875 deed), and thus claimed additional fractional interests in Locus via the same alternative chain of title.

While she did not state as much in her Answer in this case, in the Campground Case, Sexton also claimed a separate interest in the easterly portion of Locus (as well as an adjacent portion of the Campground Property) via a different chain of title tracing back to the grantee of an 1836 deed, from whose alleged heirs Sexton obtained another release deed in 2010. Also of note, in the Campground Case, Sexton also alleged having obtained release deeds from two charitable organizations who, based on the Title Examiner's report, appear to represent two missing interestholders in Paine's chain of record title. However, Sexton alleged that this claim applied to a different portion of the Campground Property. She did not set forth this title claim in her Answer in this case.

It should be noted that Sexton's claim of title was not addressed or adjudicated on the merits in the Campground Case, nor is it adjudicated in this Decision. The court makes note of it solely for purposes of context.

[6] I also allowed bifurcation of these issues in the Campground Case. The reason for this approach was that the title issues (which were far more complex) would become moot if Paine could prove adverse possession.

[7] Following the issuance of Campground Case Decision 1, the parties jointly requested that this case be stayed pending the resolution of the Campground Case, which I allowed on October 30, 2012.

[8] My specific rulings as to which properties the Trust had acquired by adverse possession (and which it had not) are discussed in detail in the fact section below.

[9] The Campground Case has been assigned to Land Court Title Examiner James Bothwell for issuance of a final Decree. This resolution is currently pending, awaiting the submission of an updated A-2 plan by the Trust.

[10] Paine's motion was supported by a memorandum of law, a statement of material facts, and an appendix of nineteen exhibits, including an affidavit of registered land surveyor Robert J. Freeman ("Freeman") with Schofield Brothers, which included six additional exhibits. In his

Summary Judgment on August 12, 2016.[11] Paine filed a reply brief on August 22, 2016.[12] Oral argument was held on [*5] September 7, 2016, after which the court took Paine's Motion for Summary Judgment under advisement.[13]

Based upon the parties' briefs, as well as the court's prior findings of fact and rulings of law in the Campground Case,[14] I **FIND** that the following material facts are not in dispute:

Physical Description of Locus

1. Locus is a four-sided lot abutting the property at issue in the Campground Case (the "Campground Property") to the north and east, Rama's Way (a private way that provides access to lots to the south) to the south, and Old's King's Highway (a public way) to the west. Locus was created by an October 20, 1998 approval not required ("ANR") plan entitled "Plan of Division of Land in Wellfleet, Mass. as prepared for Irene M. Paine", which was prepared by Schofield Brothers and was recorded in the Barnstable County Registry of Deeds (the "Registry") at Plan Book 545, Page 49 (the "1998 ANR Plan"). The 1998 ANR Plan depicts the land subdivided thereby as a long, narrow strip of land consisting of three lots running northeasterly from Old King's Highway to the Cape Cod National Seashore, intersected by a perpendicular strip of land labeled "Smith Family Realty Trust" (the "Smith [*6] Parcel").[15] Locus is labeled lot "1" on the 1998 ANR Plan and is described as 67,280 square feet (1.544 acres) in area. The portion of the property on the 1998 ANR Plan running from the easterly boundary of Locus to the westerly boundary of the Smith Parcel (defined below as Lot 78.1a) is labeled on said plan as lot "2", and the portion thereof east of the Smith Parcel (defined below as Lot 178a) is labeled lot "3". The 1998 ANR Plan indicates that the lots labeled "2" and "3" thereon were each designated as "Not a Buildable Lot".

2. The property subdivided by the 1998 ANR Plan is depicted on Sheets 203-21 and 204-22 of the Town of Wellfleet Tax Assessor's Maps, dated November 2, 1964, revised through February 1988 (the "Assessor's Maps") as lots "57" and "58" (respectively, "Lot 57m" and "Lot 58m")[16], which are depicted thereon as adjacent narrow strips of land running from Old King's Highway on the west to the Cape Cod National Seashore on the east.[17]

3. Effective January 1, 1993, the Assessor's Maps were superseded and replaced by the Town of Wellfleet Assessor's Atlas, dated January 1, 1993, revised through March 31, 2010 (the "Assessor's Atlas"). Editions of the Assessor's Atlas issued [*7] prior to the 1998 ANR Plan depicted (on Sheet 23 thereof) the property subdivided by the 1998 ANR Plan (*i.e.*,

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affidavit, Freeman outlines his opinion (based upon his review of the first five exhibits to his affidavit, which were also exhibits in the Campground Case) regarding the relationships between the various lots at issue in this case. The sixth exhibit to his affidavit is essentially a chalk describing how he reached that conclusion.

[11] Sexton's opposition brief consisted of a memorandum of law, a response to Paine's statement of material facts, an appendix of five exhibits, and an affidavit of registered land surveyor Chester Nimitz Lay ("Lay") with Slade Associates, Inc. In his affidavit, which included four additional exhibits, Lay describes the area of the subject properties to which Sexton claims an interest. One of those exhibits is a sketch, prepared by Lay, depicting the lots in which Sexton has claimed various interests in both this case and in the Campground Case (the "Slade Sketch"). Lay's affidavit does not address in any way Paine's adverse possession (or color of title) claims presently at issue except insofar as it seeks to establish that Paine's chain of Title does not actually describe Locus.

[12] Paine's reply brief consisted of a memorandum of law and a supplemental appendix of five additional exhibits.

[13] Together with her opposition brief, Sexton also filed a motion to strike Freeman's affidavit, arguing that it had not been based on Freeman's own personal knowledge. Paine's opposition to this motion to strike (filed together with his reply brief) included a supplemental affidavit of Freeman attesting that his prior affidavit was based on his personal knowledge. Having reviewed Freeman's two affidavits, the court is satisfied that Freeman's statements are based on his personal knowledge, which he acquired based upon his review of relevant documents and his knowledge and familiarity with the properties at issue both in this case and in the Campground Case. Sexton's motion to strike is thus **DENIED**.

[14] As discussed more fully below, my findings in the Campground Case are binding on the parties to this case.

[15] In the Campground Case, Paine, as trustee of the Trust, claimed adverse possession over the Smith Parcel, which is a former railroad right of way running through the properties at issue. In Campground Case Decision 1, I held that the Trust had not demonstrated adverse possession of the Smith Parcel. The Trust thereafter withdrew its claim to the Smith Parcel after obtaining easement rights (see Registry at Book 26608, Page 301) therein from its record owner.

[16] In order to differentiate the lots depicted on the Assessor's Maps from those shown on the Assessor's Atlas (defined below), I will append the notation "m" to the numbering of lots shown on the Assessor's Maps and the notation "a" to the numbering of lots shown on the Assessor's Atlas. For example, lot "57" on the Assessors' Map will be referred to as Lot 57m and lot "78.1" on the Assessor's Atlas will be referred to as Lot 78.1a.

[17] This finding is based on Campground Case Decision 1, in which I held that "Lots 57[m] and 58[m] correspond to what would be today the area of [Lots 2 and 3 on the 1998 ANR Plan] and an adjacent lot that is the subject of another case, 99 REG 43286 [*i.e.*, Locus]." The Smith Parcel is not shown or labeled on the Assessor's Maps.

Lots 57m and 58m) as lot "78" (consisting of lots "1"—*i.e.*, Locus—and "2" on the 1998 ANR Plan) ("Lot 78a") and lot "178" (lot "3" on the 1998 ANR Plan) ("Lot 178a").[18][19] Editions of the Assessor's Atlas issued subsequent to the subdivision of Lot 78a, the Assessor's Atlas identified Locus (*i.e.*, lot "1" on the 1998 ANR Plan) as lot "78" and lot "2" on the 1998 ANR Plan as lot "78.1" ("Lot 78.1a").[20]

Relevant Title History to Locus Relative to Paine's Claim[21]

4. By deed dated October 4, 1971, and recorded in the Registry at Book 1540, Page 252 (the "1971 Deed"), Bernice L. McKay purported to convey Lot 57m to Robert S. Paine and Cynthia M. Paine (who are Paine and Irene's parents) (the "Parents") in their individual capacities. 5. By deed dated May 30, 1978 and recorded in the Registry at Book 2770, Page 196, Cynthia Coye, Elizabeth Masulla, and Susan Gray purported to convey Lot 58m to Irene and Stephen J. Mahan (Irene's ex-husband) ("Mahan"). By deed dated August 23, 1978 and recorded in the Registry at Book 2770, Page 195, Dorothy P. David also purported to convey Lot 58m to [*8] Irene and Mahan. These deeds are together herein referred to as the "1978 Deeds".[22][23]

6. By deed dated June 23, 1998 and recorded in the Registry at Book 11548, Page 223 (the "1998 Irene Deed"), Mahan purported to convey his interest in Lot 78a to Irene.[24][25]

7. At the trial in the Campground Case, Irene testified that it had long been the intent of her family (for estate-planning

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[18] Unlike the Assessor's Maps, the Assessor's Atlas does show the Smith Parcel, which it labels as lot "245".

[19] The copies of the Assessor's Maps in the record contain handwritten notations that appear to cross-reference the lot numbers on the Assessor's Atlas with those on the Assessor's Maps. Thus, Lots 57m and 58m contain handwritten notations of "79" and "78", respectively. The first edition of the Assessor's Atlas dated January 1, 1993 (in evidence in the Campground Case) did not show Lot 78a as a single lot, but rather as two lots (labeled lots "79" and "78") that appear to correspond to Lots 57m and 58m. At some point among the nineteen occasions between 1993 and 2010 when the Assessor's Atlas was revised, the two lots "79" and "78" were merged into one lot—*i.e.*, Lot 78a.

[20] Locus, Lot 78.1a, and Lot 178a are also depicted on the 1998 Land Court Plan. As noted above, Locus, on said plan, is shown as lot "1". Lots 78.1a and 178a are not separately labeled on the 1998 Land Court Plan. They form part of the land sought to be registered in the Campground Case (which, collectively, is labeled lot "2" on said plan). As discussed below, in Campground Case Decision 1, I held that the Trust had adversely possessed Lot 78.1a. Later, in Campground Case Decision 2, I held that the Trust, by virtue of its adverse possession of Lot 78.1a while apparently holding title to lots encompassing both Lot 78.1a and Lot 178a, also acquired title to Lot 178a by adverse possession under the theory of color of title. Paine now urges me to apply the same theory to Locus as I applied to Lot 178a, since the same deeds under which the Trust apparently owned Lot 78.1a and Lot 178a also included Locus.

[21] As noted above, I allowed the parties to adjudicate Paine's adverse possession claims prior to his record title claims, so the summary judgment record provides only the most recent title history to Locus (starting in 1971). As a review of the Title Examiner's abstract reveals, Paine's record title claims appear to be vastly more complex, and would involve a review of myriad deeds, probate records, and genealogical charts going back to before the Revolutionary War. Briefly put, the Title Examiner's opinion was that Paine's chain of title suffered from multiple missing fractional interests, and that his claim to registration of Locus would need to rely on his adverse possession claims. This opinion does not advance Sexton's title claims (as her title claim is not at issue in this registration action), nor does it benefit her opposition to Paine's claims.

[22] The testimony at trial in the Campground Case established that the grantors of the 1978 Deeds and the 1971 Deed were distant relatives of Paine and Irene.

[23] In his title report, the Title Examiner opined that the 1978 Deeds were effective to convey, at most, only a fractional interest in Lot 58m due to multiple missing heirs in the chain of title. In the Campground Case, Sexton alleged having received release deeds from two missing interest-holders, although she believed this title claim to apply to a different lot (which is shown on the Slade Sketch as lot "15"). Even if true, based on the Title Examiner's report, it would appear that at least an additional 1/6 interest in Lot 58m remains missing.

[24] The 1998 Irene Deed, which makes reference to the 1978 Deeds as the source of Mahan's title, contains several notable irregularities. First, because the 1978 Deeds, at best, could have conveyed an interest only in Lot 58m (*i.e.*, the southerly section of Lot 78a), it could not have conveyed any interest in the northerly section of Lot 78a (*i.e.*, Lot 57m), which was then owned by the Parents pursuant to the 1971 Deed. Second, although the 1998 Irene Deed specifically identifies Lot 78a as the property conveyed thereby, its metes and bounds description (which tracks language in the 1971 Deed and the 1978 Deeds) purports to include Lot 178a as well, in that it states that the property conveyed extends easterly to the Cape Code National Seashore (excepting the relevant portion of the Smith Parcel), rather than stopping at western edge of the Smith Parcel.

[25] Concurrently with the 1998 Irene Deed, Irene granted Mahan a mortgage secured by the same property purportedly conveyed by said deed (*i.e.*, Lot 78a and 178a). *See* Registry at Book 11548, Page 235. In November of 1998, Mahan granted Irene a partial release of said mortgage (as to Lots 78.1a and 178a only, not as to Locus) by reference to said lots as they are depicted on the 1998 ANR Plan. *See* Registry at Book 11916, Page 209. Mahan granted Irene a release for the lien on Locus in July of 2003. *See* Registry at Book 17580, Page 44.

purposes) to subdivide Lot 78a to create Locus as separate and distinct from the Campground Property, but that the family did not get around to doing so until the late 1990s. To that end, in or around late 1998, Irene's Parents created the Trust (*see* Declaration of Trust dated November 4, 1998 and recorded in the Registry at Book 11853, Page 156) and, together with Irene, retained Schofield Brothers to conduct a survey of the various properties owned (or claimed) by the Paine family, and to prepare the 1998 ANR Plan and the 1998 Land Court Plan.

8. By deed dated November 19, 1998 and recorded in the Registry at Book 11853, Page 173 (the "1998 Parents/Trust Deed") the Parents (as individuals) conveyed to themselves (in their capacity as trustees of the Trust) their interest in Lot 57m (in addition [*9] to their interest in four other lots). The 1998 Parents/Trust Deed describes Lot 57m by reference to the 1971 Deed.

9. By deed dated November 19, 1998 and recorded in the Registry at Book 11864, Page 220 (the "1998 Trust Deed"), Irene purported to convey Lots 78.1a and 178a to her Parents as trustees of the Trust, retaining Locus for herself.[26]

10. Paine and Irene's mother, Cynthia, passed away in 1999. By trustee's certificate dated June 23, 1999 and recorded in the Registry at Book 12367, Page 314, Paine succeeded his late mother as co-trustee of the Trust.

11. By trustee's certificate dated February 5, 2004 and recorded in the Registry at Book 18196, Page 219, Sheila L. Paine ("Sheila") (Paine's wife) was appointed as co-trustee of the Trust. It is undisputed that Paine and Sheila are currently the sole co-trustees of the Trust.[27]

12. By deed June 19, 2006 and recorded in the Registry at Book 21111, Page 79 (the "2006 Deed"), Irene purported to convey Locus to Paine in his individual capacity.[28]

13. Sexton claims an interest in a portion of Locus pursuant to a deed from Donna Lee Weber dated March 8, 2010 and recorded in the Registry at Book 24416, Page 105.[29]

Activities on Locus

14. In her testimony [*10] at the trial in the Campground Case, Irene testified that she had lived at the Campground Property seasonally since the 1950s when she was a child, and that she and her ex-husband (Mahan) were living there with their two children as of the 1970s. She stated that, during that period until 1978, camp sites operated by her family existed on Locus, and even farther south.

15. In 1978, Irene and Mahan purchased a single family house (the "House") that was located off-site, and retained contractors to build a foundation and move the House onto Locus.[30] In 1979, they contracted for the House to be plumbed and wired for electricity. In 1980, they contracted for the renovation of the House (to add two chimneys and a new kitchen) and the construction of a well and septic system servicing the House. They moved into the House with their two children during the summer of 1981. At or around that time, an unpaved access

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[26] The irregularities in this conveyance are twofold. First, because the Parents, as trustees of the Trust (not Irene) already owned the portion of Lots 78.1a and 178a that was formerly part of Lot 57m, Irene's purported conveyance of this land was both ineffective and redundant. Second, because the Parents, as trustees of the Trust (not Irene) owned the portion of Locus that was formerly part of Lot 57m, Irene had no interest in said portion of Locus to retain.

[27] There is nothing of record indicating when Paine's father ceased to be a trustee of the Trust.

[28] Because, as noted above, Irene never had any fee title interest in the (northerly) portion of Locus that was previously part of Lot 57m, the 2006 Deed, at best, conveyed to Paine only Irene's interest in the (southerly) portion of Locus, which was previously part of Lot 58m. However, in his capacity as trustee of the Trust, Paine already held an apparent title interest in the portion of Locus that Irene was incapable of conveying. Thus, effective as of the recording of the 2006 Deed, Paine (either in his capacity as trustee or his individual capacity) held an apparent record title interest in the entirety of Locus.

[29] As discussed above, Sexton claims that this 2010 deed granted her a 1/12 fee interest in a lot—shown as lot "6" on the Slade Sketch—composed of the westerly portion of Locus and an adjacent portion of the Campground Property. This claim derives from a different chain of title from Paine's. After filing her Answer, Sexton recorded several deeds purportedly granting additional fractional interests in the same lot. Paine argues that the property interests purportedly conveyed by these deeds pertain to a different lot, located to the northeast of the Campground Property.

As further noted above, in the Campground Case, Sexton also claimed an interest based upon a different chain of title in another lot—shown as lot "16" on the Slade Sketch—composed of the easterly portion of Locus and an adjacent portion of the Campground Property. Also, via yet another chain of title, Sexton allegedly obtained release deeds from what appear to be two missing interest-holders in Paine's chain of title to Lot 58m (and thus part of Locus), although she claimed this fee interest applied to a different part of the Campground Property—shown as lot "15" on the Slade Sketch.

None of these title issues was addressed in Campground Case Decisions 1 or 2.

[30] As shown on the 1998 ANR Plan, the House is set back from Old King's Highway approximately one-third of the way back on Locus (west to east) and straddles the boundary between the former Lots 57m and 58m, with most of the structure located to the south of that line.

drive (which is depicted on the 1998 ANR Plan) running from the House to Old King's Highway was created.[31]

16. From 1982 to 1992, Irene lived at the House seasonally (from April to November), but she regularly visited Locus for recreation and maintenance purposes during [*11] the off season.[32] In 1992, Irene moved back to the House full-time with one of her children. In 1998, Irene remarried, and her second husband, James Wolf, also moved into the House, where he and Irene lived together through 2001. From 2001 to 2006 (when she sold Locus to Paine), Irene used Locus as a full-time rental income property.

17. Based upon testimony in the Summary Judgment record and admitted into evidence in the Campground Case, it is clear that active campsites operated by the Paine family continued to exist on Locus (to the north and east of the House) even after Irene and her family began to reside at Locus (in or around 1981). However, it is not known precisely where those campgrounds were located or when they were removed. It is known that all such campsites were cleared and relocated onto the Campground Property by (or before) 1998. Shortly thereafter, in 1999, Paine and Irene arranged for the construction of a chain link fence on Locus's northerly and easterly boundaries, thus separating Locus from the Campground Property. In connection therewith, they also abandoned an eight foot wide path that had been located along the easterly boundary of Locus, and which ran north [*12] from Rama's Way to the Campground Property.[33][34]

18. Since 1978, Paine and his predecessors in title have paid all property taxes for Locus, obtained and paid for all utilities services for Locus, and have held and obtained homeowner's insurance on the House.

Relevant Holdings from the Campground Case

19. In Campground Case Decisions 1 and 2 and the Campground Case Judgment, this court held, *inter alia*, that:

> (a) "[The Trust has] established title by adverse possession over the entirety of [Lot 78.1a]".[35]
>
> (b) "[The Trust has] not established exclusive use or actual use of the [Smith Parcel] [or] . . . [Lot 178a] . . . , and, thus, [has] not established title by adverse possession to said parcels."
>
> (c) "[Lot 78.1a] . . . and [Lot 178a] can be considered one lot for color of title purposes."
>
> (d) "[The Trust] may rely on the Assessor's Maps to prove [its] color of title claims."
>
> (e) "[The Trust has] obtained color of title to . . . [Lot 178a]."

In sum, the Campground Case Judgment adjudged that the Trust had acquired title to Lot 78.1a by adverse possession, as well as title to Lot 178a by adverse possession under a color of title theory.[36]

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[31] As shown on the 1998 ANR Plan, this driveway appears to run along the boundary line between the former Lots 57m and 58m. The 1998 ANR Plan also depicts a second driveway running from the House to Rama's Way to the south. However, it is unclear whether that driveway was ever actually laid out. Possibly it was discontinued in connection with Paine's withdrawal of his claim of rights in Rama's Way. *See* note 4, *supra*. In any event, even if it ever did exist on the ground, it is clear that it is no longer used, as a 2012 plan (submitted in a prior filing in this case by Sexton) indicates that various improvements have been made in that area of Locus. *See* note 33, *infra*.

[32] Irene and Mahan divorced in 1984. It was not clear from her testimony whether their children lived with Irene when she was in occupancy of Locus after her divorce.

[33] A 2012 plan prepared by Schofield Brothers (annexed to a prior filing in this case by Sexton) shows a stockade fence enclosing the southerly boundary of Locus. It is unclear when this fence was constructed. The same plan also shows a number of additional improvements to Locus, including multiple wood piles, a mail box, a retaining wall, a driveway (connecting to Old King's Highway), a parking area, a deck, several gardens, a fenced-in yard, a fenced-in equipment storage area, multiple sheds, and a chicken coop. It is unknown when or by whom any of these improvements were made.

[34] Most of the activity on Locus appears to have been focused in the area of the House and its surrounding improvements. However, Paine also alleged that, after the campsites were removed from Locus, the area of Locus to the east of the House was used for foraging firewood and clearing of dead trees and brush. He also alleged that "No Trespassing" signs are posted throughout Locus, and that any trespassers found on Locus were asked to leave. These allegations (which were made by Paine in the parties' joint pre-trial memorandum in this case, filed on July 6, 2012, at which time this case appeared to be moving towards an eventual trial, and before the case was stayed pending the resolution of the Campground Case) are not agreed-to by Sexton, and thus will not factor into the court's reasoning.

[35] This holding was based on my finding of more than twenty continuous years of actual, open and notorious, exclusive, and adverse use from the 1950s to 2009.

[36] In addition to Lots 78.1a and 178a, I also found that the Trust had acquired title to Lots 80, 81.1 81.2, 81, 171S, 172S, and 173, as well as the portions of Lots 82 and 83S located south of the Iron Pipe Fence (as defined in Campground Case Decision 1)—all as depicted on the

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Summary judgment is appropriate only where there are no genuine [*13] issues of material fact, and where the summary judgment record indicates that the moving party should be granted judgment as a matter of law. *Cassesso v. Comm'r of Corr.*, 390 Mass. 419, 422, 456 N.E.2d 1123 (1983); Mass. R. Civ. P. 56(c). In so doing, the court is to consider the evidence presented and the inferences drawn therefrom in the light most favorable to the non-moving party. *Curly Customs, Inc. v. Bank of Bos., N.A.*, 49 Mass. App. Ct. 197, 198, 727 N.E.2d 1212 (2000).

Paine, in his Motion for Summary Judgment, seeks a ruling that he has established title to Locus by adverse possession under the same color of title theory that this court found to support a finding of adverse possession over Lot 178a. His theory here is that, because Lots 78.1a, 178a, and Locus all previously comprised parts of Lots 57m and 58m (as to which Paine's predecessors in title held color of title deeds at the time of their acts of adverse possession), the acts of adverse possession of the portion of those lots now known as Lot 78.1a are sufficient to establish title by adverse possession over Locus under a color of title theory, just as they established such title to Lot 178a. Sexton disputes this claim, arguing that the facts of this case do not support the same finding of adverse possession over Locus as did the facts at issue in the Campground Case with respect to Lot 178a. He [*14] also argues that Paine was not the proper party to have brought the claims at issue, since he is named in this action in his personal capacity, not in his role as trustee of the Trust.

"Title by adverse possession can be acquired only by proof of nonpermissive use which is actual, open, notorious, exclusive and adverse for twenty years." *Ryan v. Stavros*, 348 Mass. 251, 262, 203 N.E.2d 85 (1964); *see also Sea Pines Condo. III Ass'n v. Steffens*, 61 Mass. App. Ct. 838, 847, 814 N.E.2d 752 (2004); G. L. c. 260, § 21 (twenty-year period of limitations on actions for the recovery of real property). The claimant can satisfy the twenty-year period by tacking her use onto that of her predecessor(s) in title, *Ryan*, 348 Mass. at 264, and also by acts of possession authorized to act on her behalf, such as agents or tenants, *Lawrence v. Town of Concord*, 439 Mass. 416, 426, 788 N.E.2d 546 (2003). "The burden of proof in any adverse possession case rests on the claimant and extends to all of the necessary elements of such possession." *Holmes v. Johnson*, 324 Mass. 450, 453, 86 N.E.2d 924 (1949).

In this context, the concept of color of title represents a particular subspecies of adverse possession claims, in which an adverse claimant carries out the usual acts of adverse possession under a defective claim of ownership (such as an of record deed that is ineffective to convey valid title). *Long v. Wickett*, 50 Mass. App. Ct. 380, 393-94, 737 N.E.2d 885 (2000). Under this doctrine:

> Color of title, in the context of an adverse possession claim, is an assertion of a claim [*15] of ownership based on an instrument of title, such as a deed or lease, even though that instrument does not pass a valid title. The advantage which a person may gain from that doctrine is that the activities relied upon to establish adverse possession reach not only the part of the premises actually occupied, but the entire premises described in a deed to the claimant. For example, if the act of adverse possession were cultivating a half acre parcel of land, but the claimant held an invalid deed describing three acres, the claimant would have constructive possession of the three acres for the reason that it is the presumed intention of the grantee of the deed to assert such possession.

Norton v. West, 8 Mass. App. Ct. 348, 350-51, 394 N.E.2d 1125 (1970) (internal citations omitted); *see also* Campground Case Decision 2 at pp. 23-24. This principle applies only to a parcel on which an actual entry has been made; thus, an entry upon one parcel does not give constructive possession over any other parcel—even where multiple parcels are conveyed in the same deed. *Dow v. Dow*, 243 Mass. at 587, 591 (1923). It also applies only where the physical location of the parcel as to which the defective ownership claim pertains can be ascertained with reasonable certainty. *Id.* at 590.

Although the matter of preclusion [*16] was not briefed by the parties, it should be stated at the outset that my findings in the Campground Case are binding here on Sexton, who was also a defendant in that case. *Bellermann v. Fitchburg Gas & Elec. Light Co.*, 470 Mass. 43, 60, 18 N.E.3d 1050 (2014) ("Offensive issue preclusion 'does not require mutuality of parties, so long as there is an identity of issues, a finding adverse to the party against whom it is being asserted, and a judgment by *a court or tribunal of competent jurisdiction.'" (quoting Pierce v. Morrison Mahoney LLP, 452 Mass. 718, 730, 897 N.E.2d 562 (2008))); see also Matter of Brauer, 452 Mass. 56, 67, 890 N.E.2d 847 (2008)* ("[T]he determination of the issues for which preclusion is sought must have been essential to the underlying judgment."); *Bellermann*, 470 Mass. at 60 ("Once a plaintiff establishes these initial requirements, the central inquiry becomes whether the defendant had a full and fair opportunity to litigate the issue in the first action." (*quoting Pierce*, 452 Mass. at 730)).

Assessor's Atlas. References herein to the Campground Property shall refer to this group of properties found to be owned by the Trust in the Campground Case. As to all other lots at issue in the Campground Case, either I found them not to be owned by the Trust, or the Trust withdrew all claims to them.

As discussed above, in the Campground Case Decision 2, I determined that Lots 57m and 58m (as described in the 1971 Deed and the 1978 Deeds, and shown on the Assessor's Maps) encompassed all of the land between the parallel northerly and southerly boundary lines shared by Locus, Lot 78.1a and Lot 178a (as shown on the Assessor's Atlas) from Old King's Highway on the west to the Cape Cod National Seashore on the east (less the Smith Parcel). [*17] Thus, it followed (and I so held) that the land comprising Lots 57m and 58m, as depicted on the Assessor's Maps, is today shown on the Assessor's Atlas as Locus, Lot 78.1a, a small portion of the Smith Parcel,[37] and Lot 178a.[38] Moreover, on the basis of these findings, together with my finding that "[The Trust had] established title by adverse possession over the entirety of [Lot 78.1a]", I thus ruled, in Campground Case Decision 2, that because the Trust adversely possessed Lot 78.1a under color of deeds for the entirety of Lots 57m and 58m, "[The Trust has] obtained color of title to . . . [Lot 178a]."

There is no dispute that Sexton had a full and fair opportunity to litigate both the issue of adverse possession over Lot 78.1a and the application of the doctrine of color of title to Lot 178a. And, it cannot be said that Paine is a stranger to the Campground Case, as he was the active litigant in that case in his capacity as trustee of the Trust. Thus, I **FIND** that the findings in the Campground Case Judgment are binding on Sexton in this case to the same degree as in the Campground Case.

Accordingly, and based upon the reasoning underlying my findings regarding color of title to Lot 178a [*18] (*see* Campground Case Decision 2 at pp. 23-24), the same conclusion that I reached there now would appear necessarily to apply as to Locus; to wit: because I found adverse possession of Lot 78.1a under color of title to Lots 57m and 58m, such possession should be deemed to extend to the entirety of Lots 57m and 58m (less the Smith Parcel), including Locus.

Of course, color of title can support a claim of adverse possession only if there is no contrary evidence that would tend to defeat that claim. Here, Sexton urges me to conclude that a disparity between who held recorded deeds to the properties forming Locus and who actually used Locus should defeat Paine's claim of adverse possession under color of title. I disagree.

The undisputed evidence in the record clearly reflects that Irene and her husband, Mahan, in concert with the Parents, collaboratively occupied the properties in question while in possession of color of title deeds since at least 1978. At that time, Locus had not yet been carved out of the then existing Lots 57m and 58m, and there was no physical boundary dividing the land apparently then owned by the Parents (Lot 57m) and that apparently owned by Irene and Mahan (Lot 58m). [*19] At or around that time, Irene, Mahan, and the Parents came to an understanding that Irene and Mahan would use the front portion of those lots (today Locus) for their family's residence, and that the remainder would continue to be used for campsites. Doing so afforded Irene and Mahan a certain level of privacy to raise their children, while also enabling them to remain near and participate in the business of the family's operating campground.

These practices continued from August of 1978 until November of 1998 (more than twenty years), when Lot 78a was officially subdivided (creating Locus, Lot 78.1a, and Lot 178a). At or around that time, a fence was constructed to separate Locus from the Campground Property, and Irene received a deed from Mahan purporting to grant her exclusive title over Locus. Irene continued in her use of Locus until 2006, when she sold it to Paine, who has continued to use it since then. It was not until March of 2010 that Sexton filed her objection to this case—almost forty years after the Parents had color of title to Lot 57m (including the northerly portion of Locus) and more than thirty years after Irene and Mahan had color of title to Lot 58m (including the [*20] southerly portion of Locus).

Based upon these facts, the fact that Lot 57m (including the northerly portion of Locus) was technically owned by the Parents (rather than by Irene) does not operate to defeat Paine's adverse possession claims because it is obvious that Irene was permitted to occupy that portion of Locus on her Parents' behalf—just as her parents had occupied the southerly portion of Lot 78.1a on behalf of Irene and Mahan. This technical split in ownership did not defeat a finding of color of title as to Lot 178a (which I reached in the Campground Case Judgment, and which was then upheld twice on appeal); it likewise does not

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[37] The relevant portion of the Smith Parcel would have also been part of Lots 57m and 58m, but the Trust withdrew its adverse possession claims to the Smith Parcel after contracting for easement rights in it. Thus, in the Campground Case, I made no determination that the Trust had acquired title to the portion of the Smith Parcel that had been located within Lots 57m and 58m.

[38] This conclusion was not only warranted based on the record in the Campground Case, but is also supported here by the testimony of Freeman in his affidavit and the exhibits annexed thereto.

defeat the instant color of title claim as to Locus.[39][40]

Sexton next argues that the actual conduct of Irene and Mahan, coupled with that of the Parents, defeats the adverse possession requirement of exclusive possession. This argument, too, is unavailing. Indeed, the very purpose of the doctrine of color of title is that Paine is not required to affirmatively demonstrate actual adverse use of Locus in order to establish adverse possession over it, because the acts sufficient to establish adverse possession over Lot 78.1a are deemed to apply [*21] constructively also to Locus. *Norton*, 8 Mass. App. Ct. at 350-51.

Sexton is correct to note that, in assessing adverse possession claims, there is no legal presumption that the use of property by and between family members is permissive as between themselves. *Totman v. Malloy*, 431 Mass. 143, 146, 725 N.E.2d 1045 (2000).[41] Here, however, there is no need to rely on such a presumption, as the evidence in the record actually bears that out. For instance, the evidence indicates that Locus was used not just by Irene and Mahan, but also by the Parents for operating campgrounds, which existed on Locus until as late as 1998. Further, the affidavit testimony of Irene and her father clearly reflect a consensual, cooperative relationship under which it was understood that, despite who technically owned which sliver of adjacent land, each party was permitted to use "their" portion for their own particular use. That meant that, while Irene and Mahan technically held the deed to Lot 58m, she permitted her Parents to use the portion of that lot comprising the southerly portions of Lot 78.1a and Lot 178a. Conversely, while the Parents technically held the deed to the northerly portion of Locus, they permitted Irene and Mahan to use most of it for their House lot. These uses were clearly not adverse [*22] to each other, but were the consensual acts of family members who had reached an understanding as to how they would divvy up portions of this land that they believed they owned.[42] As such, this conduct does not defeat the adverse possession requirement of exclusive use.

In conclusion, based upon the foregoing discussion, I **FIND** that Paine has acquired title to Locus by adverse possession under a color of title theory.

Even if, however, the court had not reached this conclusion, the limited factual record before this court strongly suggests that Paine would have a valid adverse possession claim even without resorting to the theory of color of title. As noted, it is known that campsites existed on Locus as of 1978, and perhaps as early as the 1950s. In 1978 and in years following, the House (and various improvements) was built on a portion of Locus, with the remainder continuing to be used for campsites.[43] Irene and her family regularly used Locus (either themselves or for renters) until 2006, when they sold it to Paine, who has continued to use it without interruption. Even with this limited factual record, it thus appears that all of the elements of adverse possession could be met for Locus. [*23] [44]

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[39] Sexton's citation of *Macallister v. DeStefano*, 18 Mass. App. Ct. 39, 43, 463 N.E.2d 346 (1984), wherein the court held that "[a]pplication of the doctrine of color of title rests upon the deed to the claimants", does not undermine this conclusion. In *Macallister*, at issue was whether the description of property in a particular deed in a chain of title was sufficiently definite to give rise to a color of title claim. In that context, the court held that only the deed under which adverse possession was made (which contained the description of the property at issue) was relevant—not a prior deed in the chain of title containing an imprecise property description. Here, there is no dispute as to the definiteness of the property description at issue, as that issue was already decided in the Campground Case.

[40] It could be argued that the case for applying the color of title theory is perhaps even stronger as to Locus (as to which there was extensive evidence of actual, adverse use) as it was for applying the theory to Lot 178a (as to which there was little evidence of any use).

[41] Thus, one could adversely possess property owned of record by a member of her own family. This cuts both ways, however, because it means that Irene and Mahan could have adversely possessed the portion of Locus apparently owned of record by the Parents by their use thereof from 1978 to 1998—a possibility as to which neither party argued.

[42] Likewise, in the Campground Case, the fact that other members of the Paine family (including Irene) lived on the Campground Property at various times did not serve to disrupt the requirement of exclusive use. There, as here, it was clear that the Paine family's acts of possession were intentionally permissive and cooperative as between each other.

[43] As to any wooded portions of Locus, the same reasoning I applied in the Campground Case (*i.e.*, that uncleared wooded areas were "used" insofar as they served as screening between developed areas) would apply equally here.

[44] As noted, adverse possession requires "nonpermissive use which is [1] actual, [2] open [and] notorious, [3] exclusive and [4] adverse for twenty years." *Ryan*, 348 Mass. at 262. Satisfying the first element (actual use) requires demonstrating continuous (not intermittent) use "as the average owner would use it." *Brandao v. DoCanto*, 80 Mass. App. Ct. 151, 157, 951 N.E.2d 979 (2011). The facts needed to meet the second element (open and notorious use) may "vary with the character of the land, the purposes for which it is adapted, and the uses to which it has been put." *Ryan*, 348 Mass. at 262 (*quoting LaChance v. First Nat'l Bank & Trust Co.*, 301 Mass. 488, 490, 17 N.E.2d 685 (1938))."While the owner's actual knowledge of such use is not required, the use must be such that the owner should have known of it." *Sea Pines*, 61 Mass.App.Ct. at 847 (internal citations omitted). To meet the third element (exclusive use), the "use must encompass a 'disseisin' of the record owner . . . [and] all third persons to the extent

Sexton, for her part, did not come forward with (or, indeed, even *acquire*) her alleged interest in Locus (so as to effect an entry to interrupt Paine's adverse possession of Locus) until 2010, by which point (as with the Campground Property lots that Paine and his family adversely possessed) the period of limitations for asserting her title claims would have long since expired. *See* G.L. c. 260, § 21.

In sum, based upon these facts, it appears that the activities on Locus were as continuous, ongoing, and extensive as—if not more than—those performed on the remainder of the Campground Property, and thus would appear to give rise to a *prima facie* claim of adverse possession. However, while the facts strongly suggest this conclusion, I do not so rule, since that question was not presented in Paine's Motion for Summary Judgment.

Thus I come to Sexton's final claim—namely that, because Paine acquired Lot 78.1a (and Lot 178a) by adverse possession in his capacity as trustee of the Trust (not his individual capacity), he is not (in his individual capacity) the proper party to have asserted the instant color of title claims to Locus. It is unclear what Sexton seeks to gain by making this argument. Even [*24] if correct, at most it would mean that Paine would need to amend his pleadings to substitute himself in his capacity as trustee of the Trust as the Petitioner in this case. Perhaps he should—and leave for such an amendment would obviously be given, since it would not affect Sexton in any substantive way.[45] However, for purposes of ruling on the merits of the Motion for Summary Judgment, this court is unconvinced that this technicality (to the extent it is an issue at all) needs to be resolved now.

Having so ruled on the Motion for Summary Judgment, this case will forthwith be transferred to the Land Court Title Examination Department forthwith for completion of that Department's review of this file and the issuance of a Decree of Registration.

A final Decree shall issue upon the completion of all outstanding matters in this case.

Alexander H. Sands, III

Justice

Dated: March 31, 2017

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that the owner would have excluded them." *Peck v. Bigelow*, 34 Mass.App.Ct. 551, 557, 613 N.E.2d 134 (1993). To satisfy the fourth element (adverse, or non-permissive use), the claimant must show "lack of consent from the true owner." *Totman,* 431 Mass. at 145 (quotation omitted). Based upon the limited factual record before me, it appears that each of these elements could be satisfied, both with respect to the use of Locus for a campground (1950s to 1998) and for the House (August 1978 to November 1998).

[45] Notably, Paine has offered to do so, and, indeed, has advised that he intends to deed Locus into the Trust—a copy of which deed, in unrecorded form, was annexed to his reply brief.

Melone v. Town of Lancaster

Massachusetts Land Court

June 28, 2016, Decided

96 MISC 233029 (KFS)

Reporter
24 LCR 354 *; 2016 Mass. LCR LEXIS 82 **

JOHN W. MELONE, as TRUSTEE of the PONAKIN VALE REALTY TRUST v. TOWN OF LANCASTER

Syllabus

Where a plan reference clashed with title references in the chain of title for an undeveloped Lancaster parcel, Justice Karyn F. Scheier looked to the language of the deeds and attendant circumstances to rule in favor of the Plaintiffs' claims, thereby voiding a 1983 tax title taking that noticed the wrong parties. Lancaster argued that the 30 year delay in recording the plan led to an indefinite reference but Judge Scheier was unconvinced and sided with Plaintiff's expert examiner Elisha W. Erb, Esq. Plaintiff's alternative theory of adverse possession was rejected.

Counsel: Joseph Melone, Esq., Harnish Jenney Mitchell & Resh, LLP, Waltham, MA, Appears for Plaintiff.

Thomas M. Bovenzi, Esq., Bovenzi and Donovan, Leominister, MA, Appears for Plaintiff.

Jeffrey T. Blake, Esq., Kopelman and Paige, P.C., Boston, MA, Appears for Defendant.

Judges: [**1] Hon. Karyn F. Scheier, Associate Justice.

Opinion by: Karyn F. Scheier

Opinion

[*354] **DECISION**

At issue in this case is ownership of an undeveloped nine acre parcel (Nine Acre Parcel) located in Lancaster. Plaintiff John W. Melone, Trustee of the Ponakin Vale Realty Trust (Plaintiff), claims the Nine Acre Parcel was among several parcels of land conveyed to his predecessors-in-title, James L. Woodward and Deborah M. Woodward, by a 1968 deed from Frank J. Bateman and Mary Bateman (Batemans). Alternatively, Plaintiff claims he has acquired title of the Nine Acre Parcel by adverse possession. Defendant Town of Lancaster (Defendant or Town) alleges the Batemans did not convey their interest in the Nine Acre Parcel to Plaintiff's predecessor-in-title, but retained it, allowing Defendant to obtain title to the Nine Acre Parcel through a tax taking against the Batemans in 1983. Defendant also alleges the tax taking defeats Plaintiff's alternative claim of adverse possession by interrupting the required twenty-year period of continuous adverse use.

On October 29, 1996, Plaintiff filed a complaint to remove a cloud on title pursuant to G. L. c. 240, §§ 6-10. After minimal discovery activity, the case remained unassigned to a judge and dormant [**2] until February 2014, when counsel for Plaintiff moved to substitute a new trustee as Plaintiff, at which time the court assigned to a judge and the case and it was set for a status conference. The parties followed up with serious settlement discussions. Despite diligent efforts, the parties were unable to reach agreement, and the case was set for trial. The court viewed the property in the presence of all parties' counsel on September 11, 2015. Two days of trial took place on September 24 and October 16, 2015. On behalf of Plaintiff, the court heard testimony of Plaintiff John W. Melone; Debra Sanders, a principal assessor for the Town of Lancaster; and expert title witness Dennis E. Tully, Esq. On Defendant's behalf, the court heard testimony of expert title witness Elisha W. Erb, Esq. One hundred thirty-three exhibits were entered in evidence and both parties filed post trial briefs. Based on the agreed statement of facts, the credible testimony, exhibits, stipulations, and other evidence entered at trial and the reasonable inferences drawn therefrom, informed by this court's view of the property, this court finds the following material facts:

SUBJECT PARCELS[1]

[1] The expert witnesses used different terms to reference the Subject Parcels in their respective reports and analyses. The parties agreed at trial to adopt the terminology used by Defendant's expert when

1. The following five [**3] parcels of land are referenced in this case:

a. The North Parcel, shown on Chalk A and numbered Parcel 13 on current Town of Lancaster Board of Assessors' (Assessors) Map 19;

b. The South Parcel, shown on Chalk B and numbered Parcel 56 on the current Assessors' Map 24;

c. The Access Parcel, shown on Chalk C and numbered Parcel 83 on the current Assessors' Map 24;

d. The Nine Acre Parcel, shown on Chalk A and numbered Parcel 14 on the current Assessors' Map 19; and

e. The Twenty-Two Acre Parcel, numbered Parcel 14 on the current Assessors' Map 14.

2. The Twenty-Two Acre Parcel is the only parcel that is not contiguous to any other parcel in this case. It is located north of the Nashua River at a considerable distance from the other four parcels.

3. The Assessors' map numbering system has been in effect since 1982.

a. Prior to 1982, the Assessors used a different system. Between 1967 and 1982, the parcels of land at issue in this action were shown on Assessors' Map 58.

b. After a due and diligent search, the Assessors' office was unable to locate Map 58 and produce it during discovery or at trial.

c. The Assessors' office uses the terms "parcel" and "lot" interchangeably. Thus, there is no meaningful [**4] distinction between the terms "map and parcel" and "map and lot."

4. On or around March 3, 2014, Defendant's Open Space and Recreation Committee created a parcel protection list that includes the Nine Acre Parcel.

5. The Town currently classifies the Nine Acre Parcel as "Unprotected: Town Owned," on a map of the Open Space and Recreation Committee titled, "Lancaster, MA: Map 8: 7-Year Action Plan Map."

THE UNRECORDED PLAN

6. A Plan titled "Plan of Land in Lancaster, Mass. Owned By: Frank J. Bateman December 8, 1959," was prepared by MacCarthy [*355] Engineering Service, Inc. (MacCarthy Plan), but was not put on record when it was prepared.

7. The MacCarthy Plan was not recorded with the Worcester District Registry of Deeds in Plan Book 630, Plan 88 until December 26, 1989.[2]

CHAIN OF TITLE TO THE NINE ACRE PARCEL

8. Dennis E. Tully is a real estate attorney who has practiced in the Commonwealth since 1977 and has been a Land Court title examiner since 1981. Attorney Tully testified as an expert witness for Plaintiff.[3] Attorney Tully's examination commenced with a source deed dated March 7, 1955, conveying four tracts of land from Charles J. Marean and Edna H. Schumacher to James Facey and Bertha Facey, [**5] recorded in Book 3665, at Page 281 (Marean Deed) (see fact paragraph 33, *infra*).

9. Elisha W. Erb is a real estate attorney who has practiced in the Commonwealth for over fifty years. Attorney Erb testified as an expert witness for Defendant. Attorney Erb's title examination starts with the earliest document found concerning the Nine Acre Parcel: a deed conveying the Nine Acre Parcel, among other parcels, from Lophar Sargent to Sewell Sargent, dated November 6, 1832, recorded in Book 290, at Page 499 (Sargent Deed).[4]

10. The Sargent Deed describes the Nine Acre Parcel as follows:

"Also one other piece of land containing nine acres and thirty six rods near the House of Ebenezer Haven, it being the same land that Hannibal Laughton bought of Eliphalet Ballard bounded as follows, vis,

beginning at a stake and stones the East Southerly corner,

thence North 51° 30 West forty rods to a stake and stones,

thence North 14° West fourteen rods to a Chestnut stump,

thence North 3° 30 East twenty nine rods to a stake and stones,

thence South 66°East thirty rods to a stake and stones,

thence South 6° East forty seven rods to the first named bound of this piece."[5]

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referencing the various parcels.

[2] All recording references are to the Worcester County Registry.

[3] Land Court Title Examiners are appointed by the court, upon application, if deemed qualified to report on title examinations and provide opinions regarding title in certain Land Court cases including registration and confirmation, tax title, and "S" cases. In this case, Attorney Tully was testifying on behalf of Plaintiffs, and not in his capacity as a Land Court Examiner.

[4] Attached to Attorney Erb's report and analysis is an ownership chart of the North Parcel, the South Parcel, the Access Parcel and the Nine Acre Parcel.

[5] Various underlined terms were found in the recorded title

11. The above description in the Sargent Deed [**6] does not describe a fully enclosed parcel. Attorney Erb adjusted the courses using Computer-Aided Design (CAD) software to "close" the description.

12. Sewell Sargent conveyed the Nine Acre Parcel to Hannah S. Brooks by deed dated April 16, 1860, recorded in Book 634, at Page 104. The same description of the Nine Acre Parcel from the Sargent Deed, with several scrivener's errors was used.

13. Attorney Erb was unable to locate a document transferring the Nine Acre Parcel from Hannah S. Brooks to the Inhabitants of the Town of Lancaster, but the next recorded conveyance of the Nine Acre Parcel took place in 1892, from the Inhabitants of the Town of Leominster to William Powers, by deed dated April 16, 1892, recorded in Book 1406, at Page 542 (Leominster Deed). The same description of the Nine Acre Parcel from the Sargent Deed was used, with several scrivener's errors.

14. Ellen M. Powers, as guardian of Charles B. Powers and Katherine M. Powers, minor children of William Powers, deceased, conveyed a 1/6 interest in the Nine Acre Parcel to Fabius H. Arnold by deed dated November 10, 1914, recorded in Book 2074, at Page 343, using the description from the Leominster Deed that contained scrivener's [**7] errors.

15. Ellen M. Powers, as widow of William Powers, and Edward H. Powers, William E. Powers, John L. Powers, Mary F. Powers, Ellen E. Powers, and Francis R. Powers, children of William Powers, conveyed the Nine Acre Parcel to Fabius H. Arnold by deed dated October 10, 1914, recorded in Book 2086, at Page 315.

16. Upon the death of Fabius H. Arnold, his real property passed to his widow, Avis. A. Arnold. The executrix of Mr. Avis' estate conveyed the following interests in the Nine Acre Parcel, among other parcels, by deed dated September 24, 1924, recorded in Book 2349, at Page 281:

> 1/3 interest to S. Florette White;
> 1/3 interest to Estella A. Buckley;
> 1/6 interest to Charles H. Wood; and
> 1/6 interest to Eugena Wood Gaines, all as tenants-in-common.

17. Attorney Erb could not find deeds conveying the interests of Estella A. Buckley or Charles H. Wood.

18. Upon her death, S. Florette White's estate was probated in 1925, and her real property passed to her husband, James E. White.

THE NORTH PARCEL

19. The earliest instrument concerning the North Parcel is a mortgage, discharged on its margin, granted by Charlotte A. Wagner to Almon F. Nutting, dated November 29, 1870, recorded in Book 830, [**8] at Page 109, describing the North Parcel as follows:

> "[A] certain farm with all the buildings thereon situated in the westerly part of said Lancaster containing fifty acres more or less bounded
> southerly by land of James A. Arnold,
> easterly by the Nashua River,
> northerly by land of Charles L. Wilder and
> westerly by land of Charles Fairbanks and Sewell Sargent."

[*356] 20. Almon F. Nutting and Ada E. Nutting conveyed the North Parcel to Morris Boland on April 19, 1873, by deed recorded in Book 897, at Page 278 (Nutting Deed), describing the North Parcel as follows:

> "A certain farm situated in the westerly part of Lancaster lying northerly and adjoining the farm of James A. Arnold containing seventy five acres more or less, bounded as follows, vis:
>
> Beginning at the southeasterly corner by the Nashua River and a corner of said Arnold's land, thence [S]. 43° W. by said Arnold's land one hundred and forty two rods and thirteen links to a stone between two oak trees, a corner of S. Sargent's land; thence due North by said Sargent's land thirty seven rods and four links; thence N. 69° [W] by said Sargent's land [illegible] thence 9° E. by said Fairbank's land fifty six rods, thence N. 14° W. by Fairbank's land [**9] twenty four and a half rods; thence due East by Fairbank's land forty rods and ten links; thence N. 18° W. fourteen rods; thence N. 59° W. ten rods; thence N. 12° 30 E. nine rods; thence N. 31° 30 E. fourteen rods; thence N. 22° 30 E. twelve rods and fourteen links to the Nashua River; thence down stream by said river angling as said stream runs to the bound first named."

21. The Nutting Deed excepted two pieces of land located within the North Parcel, but the two parcels were subsequently conveyed to the then-owner of the North Parcel, reincorporating them into the parcel.

22. After Morris Boland died, his estate was probated with the Worcester County Probate Court in 1886, and the North Parcel passed to Minnie A. Fairbanks, Annie E. Lynch, Harry M. Doyle, Maurice H. Boland, John M. Doyle and Thomas L.

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instruments. Attorney Erb speculated the underline may indicate terms that the Register had difficulty reading when copying the deeds.

Doyle.[6]

23. Minnie A. Fairbanks, Annie E. Lynch, Harry M. Doyle, Maurice H. Boland, John M. Doyle and Thomas L. Doyle each conveyed their respective interests in the North Parcel by various deeds to S. Florette White in 1914.

24. Upon her death, S. Florette White's estate was probated in 1925, and her real property passed to her husband, James E. White.

THE SOUTH PARCEL

25. A Warrant of [**10] Partition dated April 24, 1911, recorded in Book 1984, at Page 46, assigned the South Parcel to S. Florette White.

COMMON OWNERSHIP OF THE NORTH, SOUTH AND NINE-ACRE PARCEL

26. As of 1924, after the probate of the estate of Avis A. Arnold (see fact paragraph 16, *supra*), S. Florette White held the North Parcel, the South Parcel, and a 1/3 interest as a tenant in common in the Nine Acre Parcel.

27. Upon the death of S. Florette White and the probate of her estate in 1925, her real property (the North Parcel, the South Parcel and a 1/3 interest as tenant in common in the Nine Acre Parcel) passed to her husband, James E. White, according to a deed recorded in Book 2482, at Page 41 (White Probate Deed).

28. The other interests in the North Parcel were held in common with James E. White by Eugena W. Gaines and Charles H. Woods, each holding a 1/6 interest, and Estella A. Buckley, holding a 1/3 interest.

29. By deed dated November 4, 1927, recorded in Book 2483, at Page 41, James E. White conveyed to Eugena W. Gaines the North Parcel, the South Parcel, and an eight acre parcel of land near Oak Hill Pond. The description of the North Parcel was generally the same description used in the Nutting [**11] Deed (see fact paragraph 20, *supra*). This deed did not convey the 1/3 interest in the Nine Acre Parcel.

30. Attorney Erb was unable to locate a deed conveying James E. White's 1/3 interest in the Nine Acre Parcel.

31. Sidney A. Burr and Maurice J. Levy, as Trustees under the will of Clara Eugena Gaines, conveyed to Charles J. Marean and Edna H. Schumacher by deed dated December 3, 1947, recorded in Book 3100, at Page 127, four separate parcels (Gaines Deed). This deed conveyed the North Parcel, the South Parcel, a 22 acre parcel (the Twenty-Two Acre Parcel described in fact paragraph 1, *supra*), and the Nine Acre Parcel.

a. The Nine Acre Parcel was described as follows in the Gaines Deed:

> "[a] certain tract of land containing nine acres and thirty-six rods more or less, situated in said Lancaster and near the house of the late Ebenezer Haven. Being the premises described in deed of Ellen M. Powers, et [al.] to Favius (sic) H. Arnold dated October 10th, 1914, and recorded in Worcester District Deeds, Book 2086, Page 315. See also deed of Ellen M. Powers, guardian of Charles B. Powers and Katherine M. Powers to Fabius H. Arnold recorded in said Worcester District Registry of Deeds, Book 2074, [**12] Page 343."

32. Clara Eugena Gaines owned a 1/6 interest as a tenant in common in the Nine Acre Parcel at the time of the above conveyance, although she may have acquired a greater interest through inheritance.

33. Charles J. Marean and Edna H. Schumacher conveyed to James Facey and Bertha Facey (the Faceys) by deed dated March 7, 1955, recorded in Book 3665, at Page 281 (Marean Deed), the same four parcels described in the Gaines Deed: the Twenty-Two Acre Parcel, the Nine Acre Parcel, the North Parcel and the South Parcel.

a. The Marean Deed describes the parcels as follows: the Twenty-Two Acre Parcel as "22 acres, more or less", the Nine Acre Parcel contains "nine acres and thirtysix rods more or less," the South Parcel contains "73 acres, more or less," and the North Parcel contains "seventy-five acres more or less," and also includes a "tract of about 2 1/4 acres."

34. By deed dated February 4, 1959, recorded in Book 4003, at Page 545, the Faceys, conveyed to the Batemans the same four parcels described in the Gaines Deed. The Batemans at this point [*357] owned the North Parcel, the South Parcel, the Twenty-Two Acre Parcel and at least a 1/6 interest in the Nine Acre Parcel.[7]

THE ACCESS PARCEL [**13]

35. By deed dated April 2, 1964, recorded in Book 4453, at Page 501, Laura Shepard conveyed to The Batemans, as tenants by the entirety, a parcel of land on the northeast side of Ballard Hill Road that included a fifty-foot wide strip of land extending from Ballard Hill Road to the Nine Acre Parcel. The fifty-foot strip of land was subsequently subdivided into a separate parcel, as shown on a plan recorded in Plan Book 317, at Plan 119 (Access Parcel).

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[6] Attorney Erb did not examine Probate Court records to confirm this.

[7] The interest of Clara Eugena Gaines.

36. As a result of this conveyance, as of April 2, 1964, the Batemans owned the North Parcel, the South Parcel, the Access Parcel, the Twenty-Two Acre Parcel, and at least a 1/6 interest in the Nine Acre Parcel.

CONVEYANCES TO PLAINTIFF'S PREDECESSOR-IN-TITLE

37. By deed dated May 20, 1968, recorded in Book 4853, at Page 196 (Bateman Deed), the Batemans conveyed to James L. Woodward and Deborah M. Woodward the following three parcels of land: the South Parcel, the North Parcel, and the Access Parcel.

a. The Bateman Deed does not specifically reference the Nine Acre Parcel.

b. The Bateman Deed describes the South Parcel first, "[c]ontaining 73 acres of land, more or less."

c. The second parcel described is the North Parcel, "[b]eing the same premises described [**14] in deed from Almon F. Nutting and Ada E. Nutting to Maurice Boland dated April 19, 1873, recorded with Worcester County Deeds, Book 897, Page 278," and "[b]eing the first and second tracts described in deed of James E. White to Eugena W. Gaines dated November 4, 1927 and recorded with said Deeds, Book 2483, Page 41."

d. The North Parcel is described as "containing seventy-five (75) acres, more or less."

i. Although the Bateman Deed describes the North Parcel as containing "seventy-five (75) acres, more or less," the actual dimensions of the North Parcel when combined with the Nine Acre Parcel more closely approximates seventy-five (75) acres.

e. The Bateman Deed further describes the parcels conveyed as "[b]eing part of the premises conveyed to us by James A. Facey, et ux, dated February 4, 1959 and recorded in said Deeds, Book 4003, Page 545" (underline added).

f. The Bateman Deed further describes the North and South Parcels as "[s]aid premises being shown as Lots 1 and 2 on a plan entitled 'Plan of land in Lancaster, Mass., owned by: Bateman' Survey by: MacCarthy Engineering Service, Inc., dated December 8, 1959" (referred to herein as MacCarthy Plan).

g. The Access Parcel is described as containing "according [**15] to said plan, 2.09 acres of land."

38. The Bateman Deed includes the following reservations: "[r]eserving however to ourselves, our heirs and assigns, as appurtenant to our adjoining estate, a fifty (50) foot right of way for the purpose of passing and repassing by foot and vehicular traffic and for use for the same purpose as streets and ways are used in the Town of Lancaster, in and through the granted premises for a distance of five hundred (500) feet from Ballard Hill Road, as shown on said plan aforesaid. Together with all rights to pass and repass over the existing right of way from Ponakin Road."

39. The MacCarthy Plan shows the North Parcel and the Nine Acre Parcel as a consolidated parcel, numbered Lot 2. The Nine Acre Parcel is not marked by separate boundary lines nor is it separately identified on the MacCarthy Plan. Together the North Parcel and the Nine Acre Parcel comprise seventy-five acres, more or less.

TAX TAKING

40. The Town recorded an Instrument of Taking against the Nine Acre Parcel in Book 7684, at Page 105 on January 13, 1983, naming as assessed owners Frank J. Bateman and Mary Bateman.

a. The Instrument of Taking describes the Nine Acre Parcel as follows: "[a] parcel of land [**16] only, containing 9.20 [a]cres, more or less, on Lunenburg Road, Lancaster, MA as recorded in the [Registry], South District, Book 4003, Page 545, being part of said deed, and shown on the Assessors' Map 19 and parcel 14."

41. Notice of a Land Court petition to foreclose the tax lien, dated June 20, 1984, was recorded in Book 8462, at Page 222.

42. A Land Court decree foreclosing the right of redemption, dated December 9, 1984, was recorded in Book 11046, at Page 134.

CONVEYANCE TO PLAINTIFF

43. James L. Woodward and Deborah M. Woodward conveyed to Joseph Melone (Plaintiff's father), by deed dated April 13, 1972, recorded in Book 5211, at Page 485, the same parcels conveyed to the Woodwards by the Bateman Deed (see fact paragraph 37, *supra*), using the descriptions from the Bateman Deed.

44. Joseph Melone then conveyed these parcels, using the same descriptions used in the Bateman Deed, to Joseph Melone and Maria Anna Melone, as Trustees of the Joseph and Maria Melone Trust, by deed dated June 24, 1974, recorded in Book 5532, at Page 130.[8]

45. Joseph Melone, individually, granted a two-hundred foot

[8] The Declaration of Trust for the Joseph and Maria Melone Trust, Joseph Melone and Maria Melone, Trustees, was recorded in Book 5532, at Page 113 on June 24, 1974.

wide power line easement to New England Power Company, by instrument dated August 20, 1974, recorded [**17] in Book 5774, at Page 54. Apparently to correct the erroneous grantor in the grant of easement, on February 21, 1975, Joseph Melone and Maria Anna Melone, as Trustees of the Joseph and Maria Melone Trust, granted a two-hundred foot wide power line easement to New England Power Company by instrument recorded in Book 5675, at Page 176.

[*358] 46. Joseph Melone died on May 9, 1979.

47. A declaration of trust for the Ponakin Vale Realty Trust, Anthony J. Melone and Daniel G. Melone, as Trustees, dated December 15, 1989, was recorded on December 26, 1989 in Book 12540, at Page 125. The MacCarthy Plan was recorded on the same date.

48. Anthony J. Melone and Daniel G. Melone, as Trustees, conveyed to Anthony J. Melone and Daniel G. Melone, Trustees of the Ponakin Vale Realty Trust, by deed dated December 15, 1989, recorded in Book 12540, at Page 130, the same land conveyed in the Bateman Deed, using the same property descriptions.

49. Plaintiff John W. Melone became a trustee in 1999.

ASSESSORS' MAPS

50. Debra A. Sanders is one of the principal assessors for the Town of Lancaster.

51. She testified the assessors' office provides the tax collector's office with a commitment setting forth the owners of particular [**18] pieces of real estate, its valuation, location, book and page reference, and acreage.

52. The assessors' office was unable to produce copies of the assessors maps used prior to 1981, but was able to produce a copy of the Assessors' map used in 1947.

a. The 1947 assessors' map depicts the Nine Acre Parcel as Lot 7, being "9 Acres & 36 rods" and labeled with the name "Schumacher."

53. In or around 1983, Mary Bateman, then known as Mary Gonthier, contacted the assessors' office to inform the assessors she was billed for property she did not own, referring to the Nine Acre Parcel.

54. The assessors' real estate valuation lists and the real estate tax commitments entered in evidence purport to establish the total acreage assessed to the Batemans and Melones at various times.[9] However, the court finds the information contained within these exhibits is inconclusive, as the acreage amounts varied over time without adequate explanation in the record.

PLAINTIFF'S USE OF THE NINE ACRE PARCEL

55. John Melone purchased the property at issue in this case from Woodward in 1972 for use in the family's gravel and road construction business, then called J. Melone & Sons.

56. At an undetermined point between [**19] 1973 and 1975, J. Melone & Sons placed two concrete blocks on either side of the dirt road on the Access Parcel with a chain strung between them. The concrete blocks, visible at the view, are located approximately where the Access Parcel abuts the Nine Acre Parcel.[10] The blocks do not require significant maintenance.

57. In 1988, the Melone family installed an eighteen-inch culvert on the Nine Acre Parcel at the point where it connects to the Access Parcel.[11]

58. In 1988, the Melone family used trucks and an excavator to extract earth from the northwest corner of the Nine Acre Parcel.

59. In or around 1987 and 1988, the Melone family hired a logging company to remove logs from the Nine Acre Parcel.

60. The Melone family plowed the Access Parcel, from Route 117 to the Nine Acre Parcel, in 1988.

61. From 1972 to 2014, Melone family members or their tenants occupied the house located on Lot 1 shown on the MacCarthy Plan.

62. The Melone family never erected fences or otherwise enclosed the Nine Acre Parcel.

* * *

I. THE EFFECT OF THE [**20] REFERENCE TO AN UNRECORDED PLAN IN THE BATEMAN DEED

[**21] After various conveyances stretching back to 1832, Bateman eventually acquired ownership interests in the five parcels relevant to this action by 1964. The Batemans first

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[9] The Town of Lancaster assessors' real estate valuation lists from 1956 to 1965, 1967 to 1968, and 1982 to 1984 were entered in evidence, without objection, as Exhibits 44 through 47, 49 through 54, 56 and 57, 84 through 87, 89 through 92, and 96 through 98 (in some years, valuation lists for both the Batemans and the Melones of the same year were entered in evidence). The Town collector's real estate tax commitments from 1959, 1966, and 1969 - 2000 were entered in evidence, without objection, as Exhibits 48, 55, 58 through 83, 86 through 88, 93 through 95, and 99 through 130.

[10] The blocks do not appear on any survey in evidence.

[11] Plaintiff John W. Melone testified regarding the actions taken by J. Melone & Sons, which is a family business, and the Melone family, interchangeably.

acquired the North Parcel, the South Parcel, the Twenty-Two Acre Parcel and a one-sixth interest in the Nine Acre Parcel by deed from James Facey and Bertha Facey, dated February 4, 1959. Five years later, on April 2, 1964, they acquired the Access Parcel from Laura Shepard. The problem facing [**22] Plaintiff in the instant action arises from the Bateman's subsequent conveyances of these parcels to Plaintiff's predecessors-in-title, James L. Woodward and Deborah M. Woodward.

By deed dated May 20, 1968, recorded in Book 4853, at Page 196 (Bateman Deed), the Batemans conveyed to the Woodwards three parcels of land. The first parcel, described as" [c]ontaining 73 acres of land, more or less," is the South Parcel. The second parcel, described as "[c]ontaining seventy-five (75) acres, more or less," is the North Parcel. The first and second parcels are further described as "[b]eing the first and second tracts described in deed of James E. White to Eugena W. Gaines dated November 4, 1927 and recorded with said Deeds, Book 2482, Page 41." The deed from James E. White to Eugena Gaines conveyed only the North and South Parcels, with the South Parcel being described first. It did not convey the Nine Acre Parcel. The Bateman Deed [*359] also conveyed a third parcel, containing 2.09 acres. This is the Access Parcel.

The deed further describes the parcels conveyed as "[b]eing part of the premises conveyed to us by James A. Facey, et ux., dated February 4, 1959 and recorded in said Deeds, Book 4003, Page 545" (underline added). The Nine [**23] Acre Parcel is neither explicitly excluded from nor referenced in the Bateman Deed.

The Bateman Deed, however, does reference the MacCarthy Plan,[12] and describes the premises being conveyed as Lots 1 and 2 on the MacCarthy Plan. Lot 2 is the North Parcel, and, as clearly shown on the MacCarthy Plan, the Nine Acre Parcel is included within the North Parcel, although the Nine Acre Parcel is not delineated or designated in any way. Although prepared in 1959, the MacCarthy Plan was not recorded until December 26, 1989, thirty years after the Bateman Deed was recorded.

G. L. c. 184, § 25 instructs:

> "[n]o indefinite reference in a recorded instrument shall subject any person not an immediate party thereto to any interest in real estate, legal or equitable, nor put any such person on inquiry with respect to such interest, nor be a cloud on or otherwise adversely affect the title of any such person acquiring the real estate under such recorded instrument if he is not otherwise subject to it or on notice of it. An indefinite reference means . . . (4) any other reference to any [**24] interest in real estate, unless the instrument containing the reference either creates the interest referred to or specifies a recorded instrument by which the interest is created and the place in the public records where such instrument is recorded[.]"

Defendant asserts the MacCarthy Plan constitutes an indefinite reference because it was not recorded at the time of the deed's recordation. Under the statute, an indefinite reference includes instruments that are not recorded in due course. Asian American Civic Ass'n v. Chinese Consol. Benev. Ass'n of New England, Inc., 43 Mass. App. Ct. 145, 149, 681 N.E.2d 882 (1997). The MacCarthy Plan, although prepared for the Batemans on December 8, 1959, was not recorded until December 26, 1989. Defendant argues that, should the reference to the unrecorded MacCarthy Plan be deemed a sufficient property description conveying the land shown on the Plan, the depiction of Lot 2 on the MacCarthy Plan is inconsistent with the description of the North Parcel in the Bateman Deed. Lot 2 on the MacCarthy Plan constitutes both the North Parcel and the Nine Acre Parcel, whereas the description of the North Parcel in the Bateman Deed does not include the Nine Acre Parcel. Attorney Erb concluded that the Bateman Deed did not convey the Nine Acre Parcel to Woodward, but conveyed only the [**25] North Parcel, the South Parcel and the Access Parcel. Accordingly, he concluded, the Batemans retained their interest in the Nine Acre Parcel, such interest being at least a one-sixth tenancy in common interest.

The basic principle governing the interpretation of deeds is that their meaning, derived from the presumed intent of the grantor, is to be ascertained from the words used in the written instrument, construed when necessary in the light of the attendant circumstances. Patterson v. Paul, 448 Mass. 658, 665, 863 N.E.2d 527 (2007), citing Sheftel v. Lebel, 44 Mass. App. Ct. 175, 179, 689 N.E.2d 500 (1998). "Rules of deed construction provide a hierarchy of priorities for interpreting descriptions in a deed. Descriptions that refer to monuments control over those that use courses and distances; descriptions that refer to courses and distances control over those that use area; and descriptions by area seldom are a controlling factor." Paull v. Kelly, 62 Mass. App. Ct. 673, 680, 819 N.E.2d 963 (2004).

While the words of the deed remain the most important evidence of intention, they must be construed in light of the attendant circumstances to interpret an ambiguous meaning. Hamouda v. Harris, 66 Mass. App. Ct. 22, 25, 845 N.E.2d 374

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[12] Referring to it as "Plan of land in Lancaster, Mass. owned by: Bateman, Survey by: MacCarthy Engineering Service, Inc., dated December 8, 1959."

(2006). Here, the attendant circumstances are: the MacCarthy Plan, prepared for the Batemans nine years prior to the Bateman Deed, was referenced in the Bateman Deed showing the Nine Acre Parcel as part of Lot [**26] 2, **but the title references to Lot 2 in the deed refer to deeds that conveyed the North Parcel without the Nine Acre Parcel**; the stone walls and fences depicted on the MacCarthy Plan suggest boundaries that include the Nine Acre Parcel as part of Lot 2; the Batemans reserved no access to the Nine Acre Parcel in the Bateman Deed, suggesting the Nine Acre Parcel was included in the conveyance, as retaining the Nine Acre Parcel without any reservation of access would leave the Batemans with a landlocked parcel; and, without also receiving the Nine Acre Parcel, the Woodwards purchased the Access Parcel without the parcel to which it provides access. While acreage is at the bottom of the hierarchy of principles of interpretation of deed descriptions, the court notes that the area of the North Parcel is described as approximately seventy-five acres, which equals the acreage of Lot 2, including the Nine Acre Parcel, as shown on the MacCarthy Plan. Without the inclusion of the Nine Acre Parcel, the North Parcel comprises approximately 65.9 acres.

Both expert witnesses ultimately agreed on the same chain of relevant deeds that resulted in the North Parcel, the South Parcel, the Twenty-Two Acre [**27] Parcel and (the interest in) the Nine Acre Parcel being conveyed to the Batemans.[13] Based on the evidence presented, the court agrees with Plaintiff's expert and finds that the Batemans intended to, and did, convey the Nine Acre Parcel to the Woodwards by the Bateman Deed on May 20, 1968, recorded in Book 4853, at Page 196, and interprets the deed as so doing based on the attendant circumstances and the language of the deed and the MacCarthy Plan, referenced therein.

II. TAX TAKING

Defendant recorded an Instrument of Taking against the Nine Acre Parcel with the Worcester Registry of Deeds in Book 7684, at Page 105 on February 18, 1983, in the name of assessed owners Frank J. Bateman and Mary Bateman. Notice of a Land Court petition to foreclose the tax lien, dated June 20, 1984, was recorded in Book 8462, at Page 222, and a Land Court decree foreclosing [*360] the right of redemption, dated December 9, 1984, was recorded in Book 11046, at Page 134.

As found above by the court, the Nine Acre Parcel was conveyed to the Woodwards through the Bateman Deed [**28] in 1968, and was subsequently conveyed to Plaintiff's father in 1972. Therefore, at the time of the tax taking in 1983, the Batemans held no interest in the Nine Acre Parcel, and notice should have been given to the trustees of the Joseph and Maria Melone Trust, record owner at the time. As a consequence, this court holds that the Town's foreclosure of the Nine Acre Parcel was defective and insufficient to divest title from the Melone family's trust. This court therefore determines that Plaintiff owns his interest in the Nine Acre Parcel free of any claims of the Town of Lancaster.

III. PLAINTIFF'S ALTERNATIVE CLAIM OF ADVERSE POSSESSION FAILS BECAUSE PLAINTIFF DID NOT ESTABLISH TWENTY YEARS OF ACTUAL, EXCLUSIVE, ADVERSE, OPEN AND NOTORIOUS USE OF THE NINE ACRE PARCEL

Since this court has found Plaintiff has record title to the Nine Acre Parcel, it is not necessary to address Plaintiff's alternative theory, but the court chooses to do so because the issue was fully tried. Plaintiff has asserted an alternative theory of adverse possession to establish title to the Nine Acre Parcel. In order to establish a claim of title by adverse possession, the party asserting such ownership must prove [**29] non-permissive use that is actual, open, notorious, exclusive and adverse for twenty years. Kendall v. Selvaggio, 413 Mass. 619, 622, 602 N.E.2d 206 (1992); Ryan v. Stavros, 348 Mass. 251, 262, 203 N.E.2d 85 (1964). The nature of the adverse use and occupancy of property must be sufficient so as to place the lawful owner on notice; with wild and unimproved land, such as in the instant case, a "more pronounced occupation" is needed. Sea Pines Condo. III Ass'n v. Steffens, 61 Mass. App. Ct. 838, 848, 814 N.E.2d 752 (2004). Cases suggest that with woodland parcels such as the Nine Acre Parcel, putative adverse possessors must establish that the land has been enclosed or reduced to cultivation. Sea Pines, 61 Mass. App. Ct. at 848 (2004); Senn v. Western Massachusetts Elec. Co., 18 Mass. App. Ct. 992, 993, 471 N.E.2d 131 (1984); *but see* Paine v. Sexton, 88 Mass. App. Ct. 389, 391, 37 N.E.3d 1103 (2015) (finding a claimant's extensive use of property as campground sufficient for adverse possession, despite the failure to enclose or cultivate the entire property). As the party claiming adverse possession, Plaintiff carries the burden of proof. Plaintiff claims he and his family or tenants have occupied a house shown on Lot 1 of the MacCarthy Plan and used the entire premises of Lots 1 and 2 on the MacCarthy Plan, including the Nine Acre Parcel, from 1972 until 2014. Plaintiff has failed to carry his burden. With respect to the Nine Acre Parcel, Plaintiff established only isolated incidents of clearing trees, extracting earth and plowing snow in the late 1980s, specifically 1987 through 1989. [**30] These isolated incidents are not sufficient to establish adverse possession, even under a claim based on color of title by virtue of Plaintiff's chain of title.

CONCLUSION

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[13] Attorney Tully, Plaintiff's expert, simply initiated his title examination with the Marean Deed in 1955, but arrived at the Bateman Deed as well.

Accordingly, this court finds that the Bateman Deed, dated May 20, 1968, recorded in Book 4853, at Page 196, conveyed the Nine Acre Parcel as part of Lot 2 shown on the MacCarthy Plan, to Plaintiff's predecessors-in-title, James L. Woodward and Deborah M. Woodward. As a result of the Woodwards' subsequent conveyance to John Melone in 1972, and his later conveyance to Joseph Melone and Maria Anna Melone, as Trustees of the Joseph and Maria Melone Trust, the Trustees held a one-sixth interest in the Nine Acre Parcel at the time of the tax taking and notice of the tax taking was incorrectly sent to the Batemans. Plaintiff now owns the Nine Acre Parcel free and clear of any claims of Defendant Town of Lancaster.

Judgment to issue accordingly.

Karyn F. Scheier

JUDGMENT

Plaintiff John W. Melone, as Trustee of the Ponakin Vale Realty Trust, initiated this action on October 29, 1996, seeking to remove a cloud on title to an undeveloped nine acre parcel (Nine Acre Parcel) in Lancaster. [**31] Plaintiff claims the Nine Acre Parcel was among several parcels of land conveyed to his predecessors-in-title, James L. Woodward and Deborah M. Woodward (Woodward), by a 1968 deed from Frank J. Bateman and Mary Bateman (Batemans). Alternatively, Plaintiff claims he has acquired title of the Nine Acre Parcel by adverse possession.

Defendant Town of Lancaster (Defendant or Town) alleges the Batemans did not convey their interest in the Nine Acre Parcel to Plaintiff's predecessor-in-title, but retained it, allowing Defendant to obtain title to the Nine Acre Parcel through a tax taking against Bateman in 1983. Defendant also alleges the tax taking defeats Plaintiff's alternative claim of adverse possession.

Two days of trial took place on September 24 and October 16, 2015. The court viewed the property in the presence of all parties' counsel on September 11, 2016. A decision of today's date has issued. In accordance with that decision, it is hereby:

> **ADJUDGED and ORDERED** the Nine Acre Parcel was part of the "North Parcel" shown on a plan of land titled "Plan of Land in Lancaster, Mass. Owned By: Frank J. Bateman December 8, 1959" (MacCarthy), subsequently recorded with the Registry in Plan [**32] Book 630, Plan 88 and it was conveyed by the Batemans to the Woodwards as part of Lot 2 on the MacCarthy Plan by deed dated May 20, 1968, recorded with the Worcester Registry of Deeds in Book 4853, at Page 196, it is further
>
> **ADJUDGED and ORDERED** that Defendant's foreclosure of the Nine Acre Parcel (Taking)[1] was defective and insufficient to divest title from Plaintiff's predecessor-in-title, due to lack of notice, and therefore Plaintiff's record title to the Nine Acre Parcel is not affected by any claims of Defendant pursuant to the Taking; and it is further
>
> **ORDERED** that an attested copy of this judgment may be recorded with the Worcester County Registry of Deeds upon payment of applicable recording fees.
>
> By the Court. (Scheier, J.)
>
> Dated: June 28, 2016

End of Document

[1] Pursuant to an Instrument of Taking recorded in Book 7684, at Page 105, and Decree of Foreclosure recorded in Book 11046, at Page 134.

STREETS, WAYS AND EASEMENTS

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CONTENTS

STREETS, WAYS AND EASEMENTS
BY
F. SYDNEY SMITHERS

1. DEFINITIONS AND CLASSIFICATION OF MASSACHUSETTS STREETS AND WAYS.

1.1 PUBLIC WAYS

"Public ways" as a generic term includes state highways, county highways, town ways and statutory private ways.

Generally speaking an existing way in a city or town in the Commonwealth is not a “public way” - that is, one which a city or town has the duty to maintain free from defects (see Massachusetts General Laws (“G.L.” hereafter) c. 84, §§1, 15 and 22 and First National Bank of Woburn v. Woburn, 192 Mass. 220 (1906)) - unless it has become public in character by one of three ways: (i) a laying out by public authority in the manner prescribed by statute (for example, M.G.L. c. 82, §§1-32); (ii) prescription; and (iii) prior to 1846, a dedication by the owner to public use, permanent and unequivocal (see Longley v. Worcester, 304 Mass. 580 at 587-589 (1939)), coupled with an express or implied acceptance by the public. McLaughlin v. Town of Marblehead, 68 Mass. App. Ct. 490, 495 (2007); Fenn v. Town of Middleborough, 7 Mass.App.Ct. 80, 83-84 (1979).

For the creation of a public way by prescription, see G.L. c. 187, §2, Carmel v. Baillargeon, 21 Mass.App.Ct. 426, 429-31 (1986); . Fenn v. Town of Middleborough, 7 Mass.App.Ct. 80, 83-84 (1979); Schulze v. Huntington, 24 Mass.App.Ct. 416, 417 (1987). For the creation of public ways by dedication, see G.L. c. 84, §23, 1846 Mass. Acts 203, §1; Loriol v. Keene, 343 Mass. 358, 360-61 (1961). Given the unavailability of dedication as a means of establishing a public way after the effective date of 1846 Mass.Acts 203, §1 and the difficulties in establishing a public way by prescription, most public ways now assume their public character by laying out by a public authority under statute.

Public ways in Massachusetts consist of state highways, highways/county ways, town ways and statutory private ways, each of which is governed by statute.

The manner of layout, alteration, acquisition of land and easements, discontinuance, construction, maintenance and repair of state highways is set forth in G.L. c. 81, which dates from 1893. G.L. c. 82 (which dates to 1693) governs the method of layout of town and county ways. Unlike the usual situation in state highways, a town or county way is usually a mere easement. This is so because of a long standing judicial doctrine that there will not be created a greater interest or estate than is essential for the public use. Thus an easement for travel is to be presumed unless otherwise stated.

> When a public street or highway is laid out and constructed under the general laws of this Commonwealth, the public acquires an easement in the land, which includes a right to occupy it for every kind of travel and communication of persons and every movement of property, that is reasonable and proper in the use of a public street. [Citation omitted]. Subject to this paramount right, the owner of the fee retains his ownership of every valuable interest in the land, and he may use it in any way that does not interfere with the right of the public to the enjoyment of its easement.
>
> Opinion of the Justices, 208 Mass. 603, 605 (1911).

It has been the presumption of the courts that a public way is limited to an easement. In City of Boston v. Richardson, 95 Mass. (13 Allen), 146, 159 (1866), the court made a declaration of public policy by stating:

> "the right of the public in a highway, even when so ancient that its origin is unknown, is ordinarily limited to an easement for the purposes of travel; and upon the taking of land for a highway by authority of the legislature, very clear words are necessary in order to vest in the public the fee in soil."

This theory of law was explained in Smith v. Slocomb, 75 Mass. (9 Gray), 36, 37 (1857) as follows:

> "in this commonwealth,...by taking land for a highway the public take an easement only, and not a fee; and that the fee must be in somebody, and not in abeyance, and remains in the abutter; and that the public easement so completely takes all that can be made serviceable to the owner, that what remains cannot be considered of much value;..."

It should also be noted that the term "highway" in Massachusetts is an expansive term, including not only the paved surfaces of a roadway but areas other than and outside of those surfaces, so long as the purpose of the area is to assist in travel.

> The term 'highway', as generally understood, does not have a restrictive or static meaning. It denotes ways laid out or constructed to accommodate modes of travel (and other related purposes) that change as customs change and as technology develops. [Citations omitted.] 'In the most primitive state of society the conception of highway was merely a footpath; in a slightly more advanced state it included the idea of a way for pack animals; and, next, a way for vehicles drawn by animals. . . And thus the methods of using public highways expanded with the growth of civilization until today our urban highways are devoted to a variety of uses not known in former times, and never dreamed of by the owners of the soil when the public easement was acquired.' [Citation omitted].
>
> Because of this view of the scope of the term 'highway', a footpath has been considered to be a part of a highway [citation omitted], and a sidewalk beside a roadway has been deemed part of that way [citation omitted] . . . The same reasoning has led to the inclusion of bicycle paths along roadways within the scope of those ways. [Citation omitted.]

Opinion of the Justices, 370 Mass. 895, 901-902 (1976). [This case held that highway trust fund moneys could be expended on the construction and maintenance of bicycle pathways in Massachusetts].

Thus, "the word 'highway' in a popular sense includes all public traveled ways, whether county or town ways [citation omitted]. So, of the word 'road.'" Clark v. Hull, 184 Mass. 164, 166 (1903). But see the technical distinction between "highways" and town ways in Newburyport Redevelopment Authority v. Commonwealth, 9 Mass. App. Ct. 206, 223 (1980) where it is stated:

> The distinction between highways and town ways, which has existed since at least 1693, lies in the fact that the former are and have been laid out under G.L. c. 82, Section 1, or its statutory predecessors, while the latter are and have been laid out under G.L. c. 82, Section 21, or its predecessors. [While now a city council or board of aldermen may, if their city charter so provides, lay out highways, previously G.L. c. 82] Section 1 provided for the laying out of highways by authorities having jurisdiction throughout a county [now county commissioners], while the predecessors of Section 21 provided for the laying out of town ways by a board of selectmen with the approval of the town meeting.

An important distinction between highways and town ways is that highways may not be discontinued without notice to towns and abutters and concurrence of the county commissioners (G.L. c. 82, Sections 1 and 3), while town ways may be discontinued by town meeting vote or vote of a city council without notice to abutters (G.L. c. 82, Section 21). Upon discontinuance, a state highway becomes a town way. As to the effect of a discontinuance, see Section 6 herein on Discontinuances and the discussion of Nylander v. Potter, 423 Mass. 158 (1996).

1.1.A STATE HIGHWAYS

A state highway, as distinguished from other streets and ways, is laid out and maintained by the Massachusetts Department of Transportation, Division of Highways ("DOT"). See G.L. c. 6C. The layout or assumption of maintenance of a state highway can be by petition of county commissioners or selectmen (G.L. c. 81, Section 4) or on DOT's own determination that the public convenience and necessity require the layout (G.L. c. 81, Section 5). Although DOT may abandon any land or rights in land which may have been taken or acquired by it provided that it follow the procedures required under G.L. c. 81, Section 12, after layout and construction of a state highway, DOT has no authority to abandon any portion of such highway once the same has been committed to the charge of the Commonwealth. See 2 Op.Atty. Gen. 378 (1902). See also, general discussion in Gillis v. Bonelli-Adams Co., 284 Mass. 176, 178-79 (1933).

The statute also provides for limited access ways (G.L. c. 81, Section 7C) and grants to the DOT very expansive powers, to acquire needed land outside the existing way (G.L. c. 81, Section 7), alteration of connecting ways, be they town or county ways (G.L. c. 81, Section 7A), to dispose of excess lands or rights in land (G.L. c. 81, Section 7E), to enter on private property for surveys and test borings (G.L. c. 81, Section 7F), to relocate public utilities and to acquire land and easements to do so (G.L. c. 81, Section 7G) and the right to acquire land to provide road building materials (G.L. c. 81, Section 11).

When the DOT lays out a limited access highway it is sometimes necessary, in order to provide access to a public way for abutting properties whose access has been cut off by the limited

access highway, for it to take land, not needed for the highway itself but rather to provide private access to a public way (G.L. c. 81, Section 7A). While originally not viewed as constitutional by some because such a taking was viewed as the expenditure of public funds for private benefit, a challenge to this aspect of the law failed in the case, Luke v. Massachusetts Turnpike Authority, 337 Mass. 304 (1958). In the Luke case, the Court acknowledged that the eminent domain power may not be exercised for private purposes but found that the public purpose was served by taking easements for private use, because to do otherwise the Turnpike might have had to be laid out "over a length of miles" to avoid a taking which would otherwise landlock a parcel of land.

Landowners who had frontage on a state highway have a cause of action for damages for diminution in value of their holdings if the highway is thereafter made a limited access highway. Petitioners in such a situation are entitled to recover the damage to what remains of their real estate after the appurtenant easement is taken away from them and as a result of losing the easement. G.L. (Ter. Ed.) c. 79, §12. Nichols v. Commonwealth, 331 Mass. 581 (1954). "Nothing turns on the fact that the petitioners' acreage was the same before the taking [citations omitted]." Wenton v. Commonwealth, 335 Mass. 78, 80-81 (1956).

Section 12 of G.L. c. 81 deals with discontinuances or abandonment, about which there is later discussion at Section 6 et seq of these materials.

Sections 13-21 of G.L. c. 81 set forth the obligation of the state to maintain its highways including snow removal, at its expense and, for the purposes of maintenance, "state highways" includes "such public roads in state forests, parks and reservations outside of the metropolitan parks district, and such public roads within the limits of any property [under the control of the Commonwealth] as may . . . be designated . . . as roads for public use . . . ." (G.L. c. 81, Section 13). The Commonwealth is liable to motorists damaged by its failure to maintain its highways (G.L. c. 81, Section 18). Section 21 of G.L. c. 81 was amended in 1975 to add a new provision, as follows:

> In the case of a driveway opening on a state highway, the said department shall not grant a permit for a driveway location or alteration if the board or department in a city or town having

authority over public ways and highways has notified the department by registered mail, return receipt requested, of their objection to the driveway; provided, that such objection shall be based on highway safety and accepted by the said department.

In April, 1988 G.L. c. 81, Section 21 was substantially revised, creating a further requirement for state highway access. Prior to such amendment, the section had provided that an abutting land owner wanting to build or expand a business or residential use which would generate a substantial increase in or impact on traffic, could be required to bear the expense of up to 75% of the cost of necessary highway improvements.

Now Section 21 of G.L. c. 81 requires an abutting landowner, whether intending to use an existing or a new access to a state highway ("curb cut"), to obtain a permit from the state before building or using the access and the landowner can be required to bear 100% of the cost of improvements installed by the department.

Depending upon the administration then in office, the DOT has on occasion had a very expansive view of its powers under this amendment to the extent of imposing a year long curb cut moratorium on at least one highway and strictly regulating the number and location of curb cuts in many other locations.

Section 22 of G.L. c. 81 was amended in 1985 and now provides in part: "No length of possession, or occupancy of land within the limits of a state highway, by an owner . . . of adjoining land shall give him any title thereto . . . [and any encroaching objects] other than a building used for residential purposes [may be removed by the state if not removed by the owner]." This amendment is designed, obviously, to protect dwellings against summary removal to the nearest DOT maintenance area; presumably a dwelling may be removed only after further process.

By G.L. c. 81, Sections 24-28 the DOT is given the right to expend public funds on town or county, as opposed to state, highways.

Under G.L. c. 85, Section 2, municipalities must seek the approval of DOT with reference to (1) a way which intersects a state highway; (2) any project which is or was federally aided, in whole or in part; (3) any traffic control signal or flasher in any city or town which does not employ a registered

professional engineer to design, redesign or change the timing and sequence of signal or flasher; (4) any sign excluding heavy commercial vehicles; (5) any school zone establishment or signing in relation to which a city or town intends to seek reimbursement from the Commonwealth; and (6) certain one-way street signs.

If any city or town installs and maintains any of the above control devices without requesting and obtaining the required approval, DOT may withhold or withdraw the unexpended balance of any funds assigned to the city or town for certain highway purposes.

G.L. c. 81A established the Massachusetts Turnpike Authority and authorized it to issue revenue bonds for the purpose of constructing a "toll express highway" from Boston to the New York State line and this was later amended to permit the take over of the Sumner Tunnel and the construction of the Callahan Tunnel, and now the Third Harbor Tunnel under Boston Harbor. Chapter 81A of the General Laws has been repealed by Chapter 3 of the Acts of 1997 and the operations formerly of the Turnpike Authority are now vested in the Department of Transportation.

Nowhere in G.L. c. 81 is it required that the state acquire the fee in land over which it lays out the state highway, and in earlier times, it may be some state highways were mere easements, where the fee remained in the land owner over whose land the highway was laid out. It is now usual, however, that the DOT makes an eminent domain (G.L. c. 79) taking of the underlying fee for the purpose of state highway construction.

1.1.B COUNTY WAYS/ HIGHWAYS

G.L. c. 82, Section 1 gives authority to the county commissioners, councils of government or other duly authorized councils, committees or boards to "lay out, alter, relocate and discontinue highways and order specific repairs thereon . . . ." Such highways are commonly known as “county ways”. Section 1 of c. 82 was amended to provide jurisdiction to additional entities as follows:

> "A council of governments shall have authority to designate the powers of the council with relation to county roads to a subgroup of the council, duly constituted under its charter. In counties abolished in Chapter 34B or by Section 567 of Chapter 151 of the Acts of 1996 where no council of governments exists, the designated regional planning agency shall create a regional adjudicatory board

> comprised of four members of the regional planning agency advisory board and the district highway director of the Department of Highways or his designee, to act as county commissioners under this Chapter. County roads in Berkshire County shall be exempt from the foregoing provisions and shall be subject to Section 364 of Chapter 159 of the Acts of 2000."

The commissioners may on their own motion (G.L. c. 82, Section 1) or on a petition by others (G.L. c. 82, Section 2), after hearing (G.L. c. 82, Section 3) and a view (G.L. c. 82, Section 4), adjudicate that public convenience and necessity requires the layout, alteration, relocation or discontinuance of a highway. Inhabitants of Pembroke v. County Commissioners of Plymouth, 66 Mass. 351 (1853). A court cannot overturn a factual determination of common convenience and necessity. Denman v. County of Barnstable, 346 Mass. 412, 415 (1963), citing Blackstone v. County Comm'rs., 108 Mass. 68, 69 (1871).

As is the case with state highways, specific statutory authority is given to the commissioners (G.L. c. 82, Section 11A) and their agents, including surveyors, to enter on private land without creating a trespass, for the purposes of "reconnaissances, surveys, soundings, inspections or examinations to obtain information for the layout and construction of highways".

G.L. c. 82, Section 1 highway construction is performed by towns, the county apportions the expense between the county and the town or towns within which the highway is constructed, or with the state as well (G.L. c. 82, Section 8).

Towns thereafter have the responsibility to maintain highways and can be required to make specific repairs (G.L. c. 82, Section 10) in addition to routine maintenance, repairs and snow removal.

If a town refuses to construct a highway laid out by the commissioners, the commissioners may contract with another party to have it constructed, at the expense of the town (G.L. c. 82, Section 14), and prior to 1917, commissioners could be compelled, in a mandamus action, to complete a highway laid out by them (Richards v. County Commissioners of Bristol, 120 Mass. 401 (1876)). Section 14 of G.L. c. 82 was subsequently amended to provide that the commission "may" complete a highway and mandamus will not lie (Marcus v. County Commissioners of Norfolk, 344 Mass. 749 (1962)) to compel construction of a highway.

Prior to Chapter 276, Acts of 1985, which repealed Sections 26 and 27 of G.L. c. 82, the county commissioners could override the refusal of the selectmen to lay out a town way (G.L. c. 82, Section 26) or the refusal of the town meeting to accept such a way (G.L. c. 82, Section 27). Interestingly, the county still has the power (G.L. c. 82, Section 30) to override the will of a town and discontinue a town way or statutory private way.

It should be noted that with the abolition of certain county governments pursuant to G.L. c. 34B, and in particular, Section 6(d) thereof, responsibilities for the maintenance, method of layout, relocation and discontinuance of ways laid out by those counties shifted to either a council of governments or, if none, to the towns within which such county way is located.

1.1.C TOWN WAYS

The selectmen of a town or city council of a city may lay out a town way in accordance with G.L. c. 82, Sections 21-23 and, upon acceptance by the city council or town meeting, the way becomes a city or town way. Only a town meeting may discontinue a town way (see further discussion, at Section 6 herein).

Each step of the process must be followed or the layout or acceptance is invalid. In Loriol v. Keene, 343 Mass. 358 (1961), Mrs. Loriol owned land at the end of a way known as Fairfax Street. The Keenes owned land adjoining Mrs. Loriol, on either side of Fairfax Street. The Keenes blocked off Fairfax Street so Mrs. Loriol could not use it to get to her property and she sued.

A map of Fairfax Street leading to plaintiffs' property had been recorded in 1913, and in 1929 the Town voted to "accept" Fairfax Street without stating which portions or whether all of it was to be accepted. No plan of Fairfax Street was filed with the town clerk prior to the acceptance vote in accordance with Section 23 and no "notice of intention" was given defendants in accordance with Section 22.

> The giving of notice and filing of a layout required by the provisions of G.L. c. 82, Sections 22 and 23 are not mere procedural technicalities. [Citation omitted]. The requirement that a layout be filed '. . . was manifestly not intended to prescribe a mere formality, but to lay down the indispensable conditions upon compliance with which the right of appropriating private property to public uses of this kind can lawfully be exercised. As one [safeguard . . . . against

> inconsiderate or capricious action on the part of municipal authorities, it establishes a rule to secure precision and exactness of description on the part of the selectmen as to the changes which they propose to make.
>
> Loriol v. Keene, 343 Mass. at 361 (emphasis supplied). But see, Reed v. Mayo, 220 Mass. 565 (1915), discussed below.

1.1.D STATUTORY PRIVATE WAYS

Note that Sections 21 through 24 of G.L. c. 82 refer as well to "private ways." Massachusetts is alone, so far as the authors know, in having this anomalous creature called a "private way" which is laid out by public authority. The existence, in the statutes, of this creature has been the cause of much litigation and uncertainty.

A statutory private way is open to use by the public. It is laid out by the selectmen by the same procedure as a town way, although usually on the petition of one or more persons to whom the way will be of most benefit. The costs of the layout, necessary land acquisition, construction, maintenance and repairs are chargeable to "the persons upon whose application such way is laid out, relocated, altered or discontinued or upon whose application specific repairs are made . . . ." (G.L. c. 82, Section 24). The town has no obligation to maintain a statutory private way and, while such a way is laid out upon the petition of individual(s), it is not only he (they) who have the right to use the way; the public likewise has an easement of passage over statutory private ways.

A private way laid out across land of Denham from a public way to land of Slade, which Denham alleged to be for the "use of a single individual, and not for any public use; that the effect [of the layout was] to compel them to sell an easement in their land [to Slade, and was therefore an unconstitutional action]" led to the Supreme Judicial Court in Denham v. County Commissioners of Bristol, 108 Mass. 202, 204 (1871) to say:

> It is true that ways of this description are denominated 'private ways' [by the predecessor statute, and they are allowed] to be laid out for the use of one person, who may be, and in this case is, ordered to pay the whole amount of land damages thereby incurred. It appears to us however that such a way is not distinguishable in any other respect from a town way, properly so called. The easement or right of passage, created by laying it out, is not the private right of the individual whose for special accommodation it may have been laid out, nor is it meant exclusively for his individual travel. It is laid out on his petition; but it is not his way,

> in the sense of belonging to him personally, or as one of the appurtenances or easements of the farm or estate with which it communicates. He has no power to close, alter, widen or control it; and he has no right in it, except in common with all others who have occasion to pass over it. The public easement is exactly the same as it is in all other ways laid out by public authority.
>
> All the different ways, which towns are authorized by law to lay out, are in truth public highways, for the public without discrimination has the right to use them. It is wholly immaterial by what name they are called [citation omitted]. Our system for the laying out and establishment of public roads recognizes three different kinds: 1. Highways, technically and properly so called, which are laid out by county officers, and in which the land damages are paid from the county treasury; 2. Town ways, which may be laid out by town authorities, and in which the town is required to pay the land damages; and 3. Private or particular ways, in which the selectmen (or in case of appeal, the county commissioners) may order the whole or part of the land damages, as they deem reasonable, to be paid by the persons or persons specially and peculiarly benefited by the laying out. In all these different kinds of ways, the towns are to pay all the expense of construction with their respective limits; and as has been shown, all are public roads.

A distinction has existed between three types of "public roads" since the laws of the Province of Massachusetts for the years 1693-94 and 1713-1714. It has been claimed that the statutory private way "descends" from the third of these type of ways.

> First, there were highways, laid out and paid for by the county. Prov. Laws 1693-1694 ch. 6 §3. Second, there were town ways, laid out and paid for by the town. Prov. Laws 1693-1694 ch. 6 §3. Third, there were certain "particular ways" necessary for access to "the lands of particular persons or proprietors". These were also laid out by the town, but they might be paid for by either the town or the "inhabitants or proprietors who desire and reap the benefit of the same". Prov. Laws 1713-1714 ch. 8 §1. Such a road is public in the sense of providing access, but its latter day descendant is the "statutory private way", a kind of road for which neither town, county nor Commonwealth bears upkeep responsibility.

United States v. 125.07 Acres of Land, More or Less, 707 F.2d 11, 14-15 (1st Cir. 1983).

Thus, a "statutory" private way is a way laid out by a town, but the land damages occasioned by the layout, are charged to the petitioner (G.L.c. 82, Section 24). In other words:

> The "private way" known to the modern statutes differs from a "town way" only in the fact that the selectmen may assess the whole or a portion of the damages of laying out, altering, or discontinuing such way upon the individuals for whose use it is laid out or altered, or by whose application it is discontinued. In other respects, it is a part of the system of town ways.

Butchers Slaughtering and Melting Ass'n v. Boston, 139 Mass. 290, 292 (1885), citing Flagg v. Flagg, 82 Mass. (16 Gray) 175, 178-179 (1860).

A "statutory" private way is not a "public way" or a way "maintained and used as a public way" for the purposes of the subdivision control law (G.L. c. 41, Sections 81L and 81P), Casagrande v. Town Clerk of Harvard, 377 Mass. 703 (1979), and hence the division of land abutting on a statutory private way requires compliance with the definitive subdivision process and frontage on a statutory private way does not qualify for an ANR endorsement.

In passing upon whether the legislature could pass a law permitting the expenditure of public funds to remove ice and snow from "private ways open to the public use" the Supreme Court said, in Opinion of the Justices, 313 Mass. 779 (1943) that while the words "'private' may occasionally be used in the statutes with a different meaning [citing G.L. c. 84, Sections 12-14], they commonly mean ways of a special type laid out by public authority for the use of the public [citing G.L. c. 82, Sections 21-32A and Denham]. Such 'private ways' are private only in name, but are in all other respects public." The Court then went on to discuss ways open to the public use by virtue of dedication (discussed infra) and then added to the confusion by saying:

> But the words 'private ways,' as commonly understood and as sometimes used in the opinions of this court, have a broader meaning than either of the meanings here mentioned [citations omitted]. The words may well mean or include defined ways for travel, not laid out by public authority or dedicated to public use, that are wholly the subject of private ownership, either by reason of the ownership of the land upon which they are laid out be the owner thereof [citations omitted] or by reason of ownership of easements of way over land of another person.
>
> Opinion of the Justices, 313 Mass. at 782.

1.2 DETERMINING WHETHER A WAY IS "PUBLIC"

As discussed at the outset of this chapter, a way does not become public unless (1) by layout by a public authority in the manner prescribed by statute, (2) by prescription, or (3) by

dedication, if prior to 1846. McLaughin v. Town of Marblehead, 68 Mass. App. Ct. 490, 495 (2007), Fenn v. Middleborough, 7 Mass.App.Ct. at 83-84 (1981). Determining whether a way has become public under the first of these three methods can require a great deal of circumstantial evidence where direct evidence only establishes that the way in question was laid out as a “highway” under the colonial laws.

The courts are unwilling to merely assume that ways are "public" and require a quantum of proof that such is the case to avoid the consequences attendant to a way being public, such as liability for failure to maintain, the expense of maintenance and snow removal and, not coincidentally, ready divisibility of land by ANR plans.

In Reed v. Mayo, which was a registration petition in the Land Court, there was no laying out of the way and no plan showing the boundaries and measurements of the way prior to the 1852 town meeting which voted to accept Mayo Road as petitioned by James Roy.

> It does not necessarily follow, however, that the provisions of the statute were not complied with. The main purpose of giving seven days' notice of the intention to lay out the way was to inform the landowner as to what portion of his land was to be taken. [Citation omitted.] In this instance the only owner interested was James Roy who had petitioned the town to lay out Mayo Road and had given the land needed for the purpose. Even though evidence of notice and filing does not appear in the town records, it may be presumed or inferred after 60 years that the statutory requirement was complied with. All reasonable presumptions are to be taken in favor of such ancient records.
>
> Reed v. Mayo, 220 Mass. at 568.

It should be noted that the Land Court found that since 1852 Mayo Road had been used by the public and had been maintained by the town. It may have been that uninterrupted adverse use of Mayo Road since 1852 was enough to establish a way by prescription.

The distinction between the Loriol case discussed earlier, and its requirement for exactly following the statutory scheme, and the Reed and Clark v. Hull cases, cited above, deserves mention here.

Both the Reed and Clark cases found a public way on evidence which would not now be sufficient. In Reed there was no evidence of notice and filing of the layout but its existence was "presumed." In Clark, based upon "ancient records" and "ancient deeds referring to the 'road'" the Court found a public way.

Loriol is the first case where strict evidence of compliance with the statute was required, but not the last. The burden of proof is on the party claiming a public way who must show that the way:

> has become public in character in one of three ways: (1) a laying out by public authority in the manner prescribed by statute (see G.L. c. 82, Sections 1-32); (2) prescription; and (3) prior to 1846, a dedication by the owner to public use, permanent and unequivocal [citations omitted], coupled with an express or implied acceptance by the public.
>
> Fenn v. Town of Middleborough, 7 Mass. App. Ct. 80, 83-84 (1979); See also Schulze v. Huntington, 24 Mass. App. 416, 417 (1987), and Rivers v. Town of Warwick, 37 Mass. App. Ct. 593, 594 - 95 (1994).

The trial lawyer in the Fenn case had obviously read the Clark case as he put into evidence the same type of evidence as had satisfied the Supreme Court, in 1903, that the "road leading to Jeffries Neck" was a public way. The same evidence was insufficient in 1979 to convince the Appeals Court that Tispaquin and Short Streets in Middleborough were public. The Court observed rather acidly that "[a]ge by itself is a neutral factor, there being ancient private, as well as ancient public ways . . . ." Fenn, 7 Mass. App. Ct. at 85.

Reference is made to a helpful small pamphlet by Attorney Alexandra Dawson, ANRs Ancient Ways and the cases selected therein at Appendix A. This helpful pamphlet is available at www.thetrustees.org/putnamconservationinstitute.cfm and was prepared for the Putnam Conservation Institute of The Trustees of Reservations

In reaching this finding, the court analyzed each of the forms of evidence submitted by the plaintiff. The first of such evidence discussed by the Court was actually evidence that the plaintiff had failed to submit; evidence addressing why the way had been laid out in the first place. This type of evidence can be shown, according to the Court in Moncy, by proving who paid for the layout. Id. at 716,

citing United States v. 125.07 Acres of Land, More or Less, 707 F.2d at 14. Without proof that damages were paid to anyone for the layout of the way, the Court in Moncy upheld the Land Court's conclusion that "it was just as probable that the 1725 layout was intended as a private way." Id. at 716.

Evidence that the Town had appointed someone in 1858 to ascertain if Bates Lane belonged to the Town and evidence that the Town assessed fees for the rental and use of Bates Lane during the 1800's were also pieces of circumstantial evidence that the Court found as being "inconsistent with its use as a public way." Id. at 717, citing Cohasset v. Moors, 204 Mass. 173, 176-177 (1910).

Because acceptance by the Town was required for both private and public ways under a 1718 Town meeting vote, the Town's acceptance of Bates Lane in 1726 was discounted by the Court as being insignificant evidence in proving whether the way was private or public. Id. at 717-718. The depiction of the way on a map, by itself, was also held by the Court as failing to prove that the way was public. Id. at 718.

The Court in Moncy further found that "the mere fact that the selectmen in the 1725 layout stated that they "laid out a high way in Scituate" does not in and of itself denote a public way….the term 'highway' is susceptible of many meanings. It can refer generally to a road or way, including a county, town or private way." Id. at 718, citing Jones v. Andover, 6 Pick 59, 60 (1827).

The application of the colonial laws in place at the time Bates Lane was laid out received much discussion in Moncy. The Land Court had stated in its

decision the it “consider[ed] Bates Lane to have been laid out as a ‘particular or private way’; now known as a statutory private way.” 6 LCR 322, at 326. The plaintiff in Moncy, on appeal, argued that a ”private way” did not exist before 1836, and that Bates Lane could not, therefore, have been laid out as a private way. The appeals court held, however, that because there was “no difference in the power granted to the selectmen to lay out town and private ways by the Revised Statutes of 1836, §§66-69, and by the Province Laws 1693-1694, c. 6, §4, and 1713-1714, c. 8, §1,” the Land Court could properly conclude that “Bates Lane constituted a private way, now known as a statutory private way.” Id. at 719-720.

Therefore, in order to establish that a way laid out prior to the enactment of the Revised Statutes of 1836 is public, several types of evidence should be shown. First, it should be proven that the way was laid out by the selectmen and accepted by a vote at a town meeting. If the actions taken by the selectmen and the town are ambiguous as to whether the intention was to lay out a public or private way, “evidence of use, construction, or repair, from which a court could infer whether the road was laid out as a town or private way” should be gathered. United States v. 125.07 Acres of Land, More or Less, 707 F.2d at 15. In addition to submitting maps depicting the way as a public way, survey work should be done to show the exact location of the way, identifying (a) owners of the land traversed by the way over its course during the time period in which the way was laid out, and (b) any important location likely to have been frequented by the public to which the way in question provides access. Such evidence would be

helpful in establishing why the way was laid out. Any evidence of attempts to discontinue the way could also be helpful in proving whether or not a way is private or public in nature.

In any event, the law has shown that it is wise for a party seeking to prove that a way is public to gather as much direct and circumstantial evidence as possible in its favor if that party hopes to establish that the party's land does in fact have frontage on a public way.

1.3 PRIVATE WAYS

In distinguishing the "statutory" private ways from the more commonly understood private way last referred to in the Opinion of the Justices, supra, it can be seen that there is also in Massachusetts a "private way" which is not available for public use.

In W.D. Cowls, Inc. v. Woicekoski, 7 Mass. App. 18 (1979), the plaintiff sought to enjoin the defendants from interfering with its use of Old Stage Road in Belchertown, claiming that Old Stage Road was a public way and defendants could not maintain a barrier across it.

> "If a road has never been dedicated and accepted, laid out by public authority, or established by prescription, such a road is private [citations omitted]. If any road could be made public solely by acts of the landowners, with no accompanying act by public authorities, the municipality would be responsible for the maintenance and repair of countless roads."
>
> W.D. Cowls, 7 Mass. App. Ct. at 19.

After reviewing the facts in the case including words in deeds describing the way as a "town road" and "the highway" and an 1830 map showing Old Stage Road, the Court held "no conclusive evidence was presented which would have shown that the road came, under the 'public', rather than the 'private' designations . . ." Id., at 20. See also Witteveld v. City of Haverhill, 12 Mass. App. Ct. 876 (1981).

The W.D. Cowls case and several of its progeny, including Fenn v. Town of Middleborough, 7 Mass. App. Ct. 80 (1979), Casagrande v. Town Clerk of Harvard, 377 Mass. 703 (1979), Rivers v. Town of Warwick, 37 Mass. App. Ct. 593 (1994), Moncy v. Planning Board of Scituate, 50 Mass.App.Ct. 715 (2001), and McLaughlin v. Town of Marblehead, 68 Mass. App. Ct. 490 (2007), make it clear that: (1) the burden of proof as to whether a way is public or private can no longer be met, as it was in 1915 in Reed v. Mayo, by a "presumption" that all necessary public actions were accomplished; (2) that there can be ancient private ways as well as public ways; (3) that the burden of proof as to the status of the way as public or not is on he or she who claims it is public (Rivers v. Town of Warwick, 37 Mass. App. Ct. 593 (1994), Witteveld v. City of Haverill, 12 Mass. App. 876 (1981)); (4) that the proponent that a way is public must prove it "conclusively"; and (5) that a statutory private way (G.L. c. 82, Section 21) is not a "public way" or a "way maintained and used as public way" under the Subdivision Control Law, G.L. c. 41, Sections 81K-81G.

Private ways most commonly known to us in our practice are subdivision ways; private ways are in all respects private, being laid out, constructed and

maintained by private individuals for their private purposes. The public uses such ways only with the consent of the owner, although such consent is so often given in the case of residential subdivisions it is often assumed by laymen that subdivision roads are "public" long before they area accepted by town meetings.

2. ESTABLISHMENT AND ACCEPTANCE OF STREETS AND WAYS

2.1 STATE HIGHWAYS

G.L. c. 81, Section 4, permits the county commissioners, aldermen or selectmen to petition the DOT to lay out a highway to be taken charge of by the Commonwealth," and Section 5 provides that the DOT may, on its own motion, lay out a state highway after a public hearing and a determination that the public necessity and convenience require it.

The DOT then files with the appropriate county commissioners' and town clerks' offices a certified copy of the highway plan and a certificate to the effect "that it has laid out and taken charge of said way" whereupon the proposed highway becomes a state highway. "[T]hereafter said way . . . shall be constructed at the expense of the Commonwealth [unless] abandoned or discontinued as provided in section twelve."

2.2 COUNTY HIGHWAYS

The procedure for layout of county highways is more cumbersome (see generally G.L. c. 82, Sections 1 through 7). The commissioners (G.L. c. 82, Section 1) or another party by petition in writing to the Commissioners (G.L. c. 82, Section 2) start the process to layout, alter, relocate or discontinue highways. If a petition commences the process the commissioners may require a suitable

bond to assure reimbursement of the county's expense if the petitioners do not prevail (G.L. c. 82, Section 2). The procedures by county commissioners can be exercised by other boards and commissioners. G.L. c.82, §1, G.L. c.34B.

The commissioners must hold a hearing regarding the layout to "adjudicate" whether common convenience and necessity require the layout (G.L. c. 82, Section 4). On their own motion, or if requested by any party interested, the commissioners will hold a "view" of the premises (G.L. c. 82, Section 4).

Notice of the hearing (and view, if applicable) must be given to the town clerk 15 days before the date of each, together with a copy of the petition, and also publish and post notice of the proceeding seven days before the hearing or view (G.L. c. 82, Section 3).

G.L. c. 82, Section 3 also requires notice by regular mail to the "recorded owners of land subject to a taking" seven days before the hearing, with copies of the layout plan, if prepared, or if not prepared, copies must be provided at least seven days before the final approval of plans.

After hearing, G.L. c. 82, Section 5 provides that if "no person interested objects, the commissioners may, within twelve months thereafter, lay out" the highway, but if such a person objects another hearing, with new notice, must be held.

Obviously, if the layout is the subject matter of private petition the expense, if the petitioners do not prevail, can be substantial.

If it is adjudicated that public convenience and necessity do require the layout, the commissioners must make the requisite takings (G.L. c. 82, Section 7) and determine the sharing of expenses thereof (G.L. c. 82, Sections 8 and 12) and shall order the construction to be undertaken by the respective towns within which the layout is made "unless other provision is made."

Finally, the commissioners must file with each town clerk description and a plan of the location and bounds of the highway (G.L. c. 82, Section 8).

2.3 TOWN WAYS AND STATUTORY PRIVATE WAYS

G.L. c. 82, Sections 21 through 24 set forth the manner in which selectmen (and certain other parties if authorized) lay out and have the town meeting accept town ways and statutory private ways, which can be on their own motion or upon petition.

Chapter 41, Section 81I provides (in towns not having adopted an official map) that "no public way shall be laid out, altered, relocated, or discontinued" unless the proposed action has been referred to the planning board for its report or the passage of 45 days without a report.

Seven days prior to adopting a layout the selectmen must give notice of their intention to do so to land owners whose land will be taken for such purpose (G.L. c. 82, Section 22).

After the selectmen vote to accept the layout, it is not established until the layout, with the boundaries and measurements of the way, if filed with the town clerk "not less than seven days thereafter", is accepted by the town meeting (G.L. c. 82, Section 23).

The town meeting vote to accept a layout requires only a majority vote, but if funds for construction are to be appropriated, or land taken, those votes require a two-thirds vote.

Section 24 of G.L. c. 82 requires that the selectmen adopt an order of taking for the layout within 120 days of the town meeting vote accepting the layout; obviously, this is not required if the way is to be given to the town as would be the case with a private subdivision way.

NOTE: There is no statutory requirement for the DOT, county or towns, to record highway plans at the registry of deeds!

2.4 PRIVATE WAYS

Private ways, if they are intended to constitute frontage for zoning purposes, must be laid out and constructed in accordance with the provisions the Subdivision Control Law, G.L. c. 41, Sections 81K-81GG, otherwise a landowner may create such private ways crossing his property as he wishes.

A landowner whose interests will be served by the layout and acceptance of a public way may make a voluntary gift of the land or an easement in the land over which the way is constructed or to be constructed. All governmental entities are authorized to accept gifts of land or interests in land, but must do so by some objective, overt act (such as accepting a deed of the land at the time the layout is accepted by the town meeting or city council); mere acquiescence to a purported gift is insufficient. A common form of voluntary transfer is the conveyance to a town of an approved subdivision way and the town's acceptance of the developer's layout of such way by town meeting vote.

A town clerk's certificate that a parcel of land is maintained and used as a way pursuant to G.L. c.41, §81L, twelfth par (of the subdivision control law), an endorsement, "subdivision approval not required" pursuant to c.41, §81P shall not be withheld unless the plan shows a subdivision. The word "subdivision" is defined to exclude a parcel if, inter alia, "every lot within the tract so divided has frontage on (a) a public way or a way which the clerk of the city or town certifies is maintained and used as a public way." A town clerk's certificate is not conclusive, irrebuttable evidence that a parcel is maintained and used as a public way for purposes of obtaining an ANR endorsement. Facts in the clerk's certificate may be genuinely disputed and susceptible of different interpretations; the clerk's records do not necessarily reflect how a particular parcel is maintained and used. Such a certificate is merely prima facie evidence that a parcel of land is so maintained. Matulewicz v. Planning Board of Norfolk, 438 Mass. 37 at 44 (2002).

3. MAINTENANCE

Public ways are maintained at public expense. Chapter 81 state highways must be maintained by the state and G.L. c. 82 highways and town ways must be maintained at town expense (some of which may be reimbursed by the state). For taking gravel for roads, see G.L. c. 82, Section 38; G.L. c. 81, Section 11.

Failure to maintain a state highway results in the imposition of liability on the state (G.L. c. 81, Section 13) and such is also the case as to G.L. c. 82 highways and town ways for a town (G.L. c. 84, Sections 1, 15, 22).

G.L. c. 84 sets the obligations of a town, not only to maintain, repair and remove snow and ice from highways and town ways, but also dedicated (see discussions infra) ways (G.L. c. 84, Sections 23-25) in certain circumstances.

Section 23 of G.L. c. 84 states in part: "A way opened and dedicated to the public use, which has not become a public way, shall not except as provided in the following two sections, be chargeable upon a town as a highway or town way unless laid out and established in the manner prescribed by statute."

G.L. c. 84, Section 24 imposes liability for failure to maintain dedicated ways where the town fails to maintain barriers between a public way and an unsafe dedicated way, and Section 25 imposes liability if it can be proven that the town maintained the dedicated way at any time within six years prior to the accident.

Private ways and statutory private ways are maintained at the expense of abutters (G.L. c. 84, Section 12 and see, United States v. 125.07 Acres of Land More or Less, 707 F.2d 11 (1st Cir. 1983); and see Popponesset Beach Association, Inc. v. Marchillo, 39 Mass. App. Ct. 586 (1996), review denied, 422 Mass. 1104 (1996), which suggests that c. 84, Section 12 is the proper and adequate legal remedy for a homeowners' association to collect road maintenance costs from reluctant non-members) but public monies may, if the town so votes, be expended on private ways for removal of snow and ice (G.L. c. 40, Sections 6C and 6D) and temporary repairs of private ways may be authorized in municipalities adopting a bylaw pursuant to G.L. c. 40, Section 6N. The expenditure of public funds to remove ice and snow does not make the

private way become public. Bruggeman v. McMullen, 26 Mass. App. Ct. 963 (1988), Rivers v. Warwick, 37 Mass. App. Ct. 593, 597 (1994).

United States v. 125.07 Acres of Land More or Less, 707 F.2d 11 (lst Cir. 1983) assists in understanding the distinctions among ways. There, the issue was whether the Town of Truro or private parties had the burden of maintenance of a way (the estimated cost of upgrading Pond Road was subtracted from an eminent domain damage award in a Cape Cod National Seashore taking). The Court said that the fact that Pond Road is public for purposes of access, does not show that Truro has an obligation to maintain it. The court observed that a statutory private way (G.L. c. 82, Section 21) is a kind of road for which neither town, county nor Commonwealth bears upkeep responsibility.

> The ancient statutes make clear that whether a road is public or private for upkeep purposes depends, not just upon whether it was laid out, but upon why it was laid out. The 'why' of it is best indicated by who paid for it, [the town or the private petitioner] . . . ."
>
> 125.07 Acres of Land, 707 F.2d at 14 (emphasis added).

The court went on to state:

> Whether the town has an obligation to pay for its upkeep, however, depends, at a minimum, upon whether the layout was made under [present G.L. c. 82 town and county ways statutory authority] and, if under the [latter] who was meant to pay for it. The landowners presented no . . . evidence [on this issue] [citations omitted]. Since the landowners had the burden of showing that the town had an upkeep obligation, the District Court correctly ruled against them.
>
> Id at 14.

4. INSTALLATION OF UTILITIES IN WAYS

The installation of utility lines in public ways is not often a matter of controversy as such installations have been made since the advent of such

utilities. Installations are governed by G.L. c. 82, §§40 through §40E governing installation of underground utilities, G.L. c. 166, §22, and §§22A through 22N relative to the removal of overhead lines and G.L. c. 166, §25 relative to underground utility lines and are largely under control of local government.

The matter of installation of utilities in private ways is governed by G.L. c. 187, §5 and the right to install utility lines in private ways depends upon how the parcel of land along the private way in question was conveyed to the property owner seeking such installation. Where a lot bounded on private ways is conveyed "together with the right to use 'Private Street' for all purposes for which streets or ways are now or may hereafter be used in the 'Town of Locus'", this conveys a perpetual, non-exclusive appurtenant easement to use the entire width and length of "Private Street" for the installation and maintenance of pipes, wires and lines for all commonly used utilities, including cable TV and cable modem. See Hovey, William V., Utility Lines In Private Ways: An Overview, Massachusetts Lawyers Weekly, September 25, 2000, p. B3, 29 MLW 215.

If the lot abutting a private way is simply conveyed with "a right of way to use 'Private Street'", the property owner would have to utilize G.L. c. 187, section 5 in order to get the necessary utility lines to the parcel. Section 5 of G.L. c. 187 provides, in relevant part, that:

> The owner or owners of real estate abutting on a private way who have by deed existing rights of ingress and egress upon such way or other private ways shall have the right by implication to place, install or construct in, on, along, under and upon said private way or other private ways pipes, conduits, manholes and other appurtenances necessary for the transmission of gas, electricity, telephone, water and sewer service.

G.L. c. 183, section 5 is retroactive in its application. Nantucket Conservation Foundation, Inc. v. Russell Management, Inc., 380 Mass. 212 (1980).

Therefore, in order for this statute to apply: (1) the rights of ingress and egress must be "by deed"; (2) the way must be a "private way"; and (3) the property must be "abutting" the private way.

The term "abutting" as used in the statute has been defined to mean "to touch at the end; … end at; … reach or touch with any end." Barlow v. Chongris, 38 Mass.App.Ct. 297, 299 (1995); quoting Black's Law Dictionary 11 (6th ed. 1990). Compare G.L. c. 183, Section 5 and Emery v. Crowley, 371 Mass. 489, 494 (1976), where the term "abutting" property means property abutting along the length of the way.

Accordingly, if an abutter to a paper street which is definitely laid out on a recorded plan is granted easement rights over such way in a deed then such abutter has the authority to install utilities in such way pursuant to G.L. 183, Section 5, provided that such utilities do not unreasonably obstruct or interfere with the way or are not inconsistent with the use thereof. See Ciejka, Gerald P., Paper Streets, Feb. 18, 1998. It also appears that a holder of an express driveway easement would likewise be entitled to the benefit of G.L. c. 187, Section 5. See Barlow v. Chongris, 38 Mass.App.Ct. 297 (1995).

As case law has developed to date, both an easement in a private way arising by implication or necessity (Adams v. Planning Board of Westwood, 64 Mass. App. Ct. 383, 392 (2005)) and by estoppel (Lane v. Zoning Board of Falmouth, 65 Mass. App. Ct. 434, 439 (2006), and Post v. McHugh, 76 Mass.

App. Ct. 200, 206-207 (2010)) have been held to be easements "by deed" as required by c.187, §5. Only an easement by prescription is not an easement "by deed." Cumbie V. Goldsmith, 387 Mass. 409 (1982).

Where a grantee of lots abutting on a private way has an easement by estoppel due to the fact that the lots were conveyed with a description bounding on a way, or by reference to a plan depicting a boundary on a way, such grantee would be deemed to have rights of access by deed whereby G.L. c. 187, Section 5 would apply to provide an implied easement for utility lines. See Hovey, Supra. Prescriptive access rights, however, can't be converted into "deeded rights" and accordingly cannot benefit from G.L. c. 187, Section 5. Id., see also Cumbie v. Goldsmith, 387 Mass. 409 (1982).

5. OBTAINING FEE TITLE OR EASEMENTS OF PASSAGE FOR PUBLIC WAYS

5.1 EMINENT DOMAIN

Usually, common convenience and necessity requires the lay out or alteration of a public way where a voluntary transfer is impossible, either because the landowner is unwilling to make a gift or because of the numbers of landowners who have to be dealt with. In this situation, the Massachusetts Constitution, Pt. 1, Art. 10, amend. Art. 39 authorizes takings for highway purposes:

> "Art. X. . . [A]nd whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

> "The legislature may be special acts for the purpose of laying out, including or relocating highways or streets, authorize the taking in fee by the commonwealth, or be a county, city or town, of more land and property than are needed for the actual construction of such highway or street . . . ."

G.L. c. 79 provides the mechanism by which a landowner is paid compensation for the taking. A landowner is entitled to recover the market value of the property taken at the highest and best use to which the land could reasonably be put. The Nantucket County Superior Court has found that damages may be awarded under G.L. c. 79 even where the plaintiff is unable to prove that she is the owner of a way taken by a town provided that the plaintiff has suffered "special and peculiar injuries" that differ from those "of the general public" as a result of such taking. Soeder v. DeSrocher, Sup. Ct. Civ. Action No. 97-018, J. Volterra, Sept. 1, 1999.

Although several plaintiffs who have had portions of their property taken have attempted to claim an easement by necessity over the taken portion where the remainder of their land has become landlocked due to a taking by eminent domain, the Massachusetts courts have essentially held that the only relief such a plaintiff may receive is in the form of monetary damages. See Darman v. Dunderdale, 362 Mass. 633 (1972); Morse v. Benson, 151 Mass. 440 and New England Continental Media, Inc. v. Town of Milton, 32 Mass.App.Ct. 374 (1992). See also Mugar v. Massachusetts Bay Transportation Authority, 28 Mass.App.Ct. 443, 445 (1990), where it was held that "[t]he principles of interpretation designed to give effect to the express or implied intent of parties

contracting for or acquiring an interest in land…are, in general, inapplicable to eminent domain proceedings."

But see, Flax v. Smith, 20 Mass.App.Ct. 149 (1985), further review denied, 396 Mass. 1102 (1985) where the court found that property adjacent to a parcel which has been taken for nonpayment of taxes was burdened by easements for water and sewer lines in favor of an adjacent parcel. The court in Flax stated that where there are such involuntary conveyances as those resulting from a taking, "the degree of necessity required must be greater than in the case of a voluntary conveyance." Id. at 154. Because the court believed that continued water and sewer services to occupants of residential property constituted the required higher degree of necessity, an easement of necessity was found despite the taking for nonpayment of taxes.

A full discussion of G.L. c. 79 and damages is beyond the scope of these materials, but it should be pointed out that there are restrictions on the taking of land already dedicated to other public purposes for highway purposes (G.L. c. 79, Section 5) and, fortunately, a taking cannot be made without recordation of the order of taking at the appropriate registry of deeds (G.L. c. 79, Section 3). (But see Boston Water & Sewer Commission v. Commonwealth, 64 Mass. App. Ct. 611 (2005) where special legislation authorized the University of Massachusetts to take land by eminent domain for its campus and "fulfill all other requirements of Chapter 79…." An order of taking of a parcel of land on Columbia Point, Boston, was not recorded with the Suffolk Registry of Deeds within thirty days of taking, but the Court found title had already vested in the

Commonwealth, Id., at 616-617.) The state's power of eminent domain as to state highways is set forth in G.L. c. 81, Sections 7, 7A, 7C, 7G and 7M. Where parcels of land are deprived of all or some means of access to an existing public way by construction of a turnpike, the taking authority has the power to take easements over other parcels for the purpose of access. See Luke v. Massachusetts Turnpike Authority, 337 Mass. 304 (1958). Damages can be awarded to the owner of a parcel of land not taken if there is "special and peculiar injury to such parcel" (G.L. c. 79, Section 12. Compare this statute with Nylander v. Potter, 423 Mass. 158, at 163, fn. 10 (1996), discussed infra).

G.L. c. 40, Section 14 permits municipalities to take land, not already appropriated to public use, for any municipal purpose. See also G.L. c. 82, Section 7 for authority for county commissioners to make eminent domain takings and G.L. c. 81, Section 24 for similar authority for towns. Under G.L. c. 40, Section 14, the taking must be approved by the city council or town meeting, the appropriation of money damages must be approved by a two-thirds majority of the city council or town meeting and a taking for highway purposes must be for the "public convenience and necessity."

5.2 DEDICATION

In Hemphill v. Boston, 62 Mass. 195 (8 Cush. 195) (1851), dedication was described as "the gift of land by the owner, for a way, and an acceptance of the gift by the public, either by some express act of acceptance, or by strong implication arising from obvious convenience, or frequent and long continued use, repairing, lighting or other significant acts, of persons competent to act for

the public in that behalf." Hemphill, at 196. The gift must also be permanent. Hobbs v. Lowell, 19 Pick. 405 (1837). The burden of establishing that a way is public as the result of a dedication by a land owner and acceptance by the municipality is upon he who avers the way is public. Witteveld v. City of Haverhill, 12 Mass. App. Ct. 876.

Since St. 1846, G.L. c. 203, now appearing as G.L. c. 84, Sections 23 and 24, "a public highway or town way cannot be created in this Commonwealth by dedication and acceptance." Longley v. Worcester, 304 Mass. 580, 585 (1939). The reason for the statute is to prevent municipalities from being charged with the responsibilities of maintenance of ways which may not be laid out and constructed in a manner prescribed by law.

Cases decided construing the state of the law prior to 1846 (Hemphill v. Boston, supra, and Morse v. Stocker, 83 Mass. 150 (1 Allen 150) (1861)), approved the dedication of land by a landowner where he prescribed terms and limitations on his gift and, if it were given for a special and limited use or purpose, as for a footway, it must be accepted and held for that purpose only. See Longley v. Worcester, supra, at 587.

Obviously such a set of circumstances would be unthinkable now, for to permit a landowner to subject the municipality to liability for failure to maintain a way (particularly where conditions limiting the way's usefulness to the public are present) would soon bankrupt municipalities.

But dedication is one of the means by which public ways can exist and, particularly with ancient ways, this should not be dismissed where one wishes to

prove, for ANR divisions of land or other purposes, that a way is "public". Unlike prescription, proof of a public highway by dedication requires no minimum period of time. Abbott v. Cottage City, 143 Mass. 521 (1887).

5.3 ADVERSE POSSESSION/PRESCRIPTION

> It is well settled that the creation of a public way by adverse use depends upon a showing of 'actual public use, general, uninterrupted, continued for [the prescriptive period].' Jennings v. Tisbury, 5 Gray, at 74 (1855) [other citations omitted]. It is sometimes said that 'to establish such a use the further fact must be proved, or admitted, that the general public used the way as a public right; and that it did must be proved by facts which distinguished the use relied on from a rightful use by those who have permissive right to travel over the private way. ' Bullukian v. Franklin, 248 Mass. 151, 155 (1924) [other citations omitted] . . . Other cases indicate that the necessary adversity and lack of permissiveness may be inferred by the finder of fact from the uninterrupted use by the public, unexplained for the prescriptive period. See, Bassett v. Harwick, 180 Mass. 585, 585, 587 (1902).
>
> Fenn v. Town of Middleborough, 7 Mass. App. Ct. 80 (1979).

The common law relating to prescriptive use is reviewed in detail in Edson v. Munsell, 92 Mass. 557 (1865).

The party seeking to establish that a way is public by virtue of prescriptive use of the way by the public has the burden of establishing the same. “When the fact of a public way is disputed, the burden of proof falls on the party asserting the fact. [citations omitted]” Witteveld v. City of Haverhill, 12 Mass. App. Ct. 876, at 877 (1981).

Establishing a public way by prescription is extraordinarily difficult: to meet her burden of proof a claimant must show not only that the use of the way was open, continuous and notorious for 20 years but also that the use was non-permissive and by the public generally - not simply by users who may have

gained their own prescriptive rights but whose use did not constitute a "public" use. See Rivers v. Warwick, 37 Mass. App. Ct. 593 (1994).

The public adverse use must constitute the corporate action of the municipality, which usually takes the form of some kind of ratification, expenditure of public funds for improvement, or other corporate acknowledgment that the way in question is public. See Cerel v. Framingham, 342 Mass. 17 at 21 (1961), Reed v. Inhabitants of Northfield, 30 Mass. 94 (1832) (maintenance and repair of the way) and Teague v. City of Boston, 278 Mass. 305 (1932) (maintenance of utilities within the way).

> That a highway may be proved by long and continued use and enjoyment by the public, upon the ground that a conclusive presumption arises from such use that it had been originally laid out or established by competent authority, is well settled in the Commonwealth.
>
> Commonwealth v. Coupe, 128 Mass. 63 (1880).

While St. 1846, c. 203 prevented the creation of public ways by dedication, that statute (now G.L. c. 84, Section 23) has no application to the creation of public ways by prescription. See Coupe, 128 Mass. 63.

It should be noted that in each of the cases of eminent domain, dedication and adverse possession/prescription, the quality of title, whether it is fee simple or a mere easement of passage, is a separate and distinct question.

As stated earlier, unless there is clear evidence to the contrary, an easement of passage (which comprehends within it expansive rights to use and occupy the way for every kind of travel) is to be presumed. In the Coupe case, cited above, it is clear that the Court focused on the distinction when it held that

"[w]ays by prescription . . . [are] established upon evidence of user by the public, adverse and continuous for a period of twenty years or more; from which use arises a presumption of a reservation or grant, and the acceptance thereof, or that it has been laid out by the proper authorities, of which no record exists." Id. at 65.

5.4 BOUNDARY ON A WAY

5.4.A Fee Interest In A Way

G.L. c. 183, Section 58, or the “derelict fee statute", was enacted as an aid in the construction of deeds bounding on a way (and water courses, walls, fences and other linear monuments). This statute provides that such conveyance will include any fee interest of the grantor in such way unless (a) the grantor retains other real estate abutting the way, in which case (i) if the retained real estate is on the same side of the way, the division line between the conveyed land and retained land extends into the way to the extent the grantor owns the fee, or (ii) if the retained estate is on the other side of the way between the division lines extended, the title conveyed shall be to the center line of the way, if the grantor owns so far, or (b) the instrument evidences a different intent by an express exception. The statute is retroactive. See e.g., Tattan v. Kurlan, 32 Mass. App. Ct. 239 (1992), review denied, 412 Mass. 1105, where the way was as yet unconstructed.

As subsequently amended, the derelict fee statute reads:

> Every instrument passing title to real estate abutting a way, whether public or private, watercourse, wall, fence or other similar linear monument, shall be construed to include any fee interest of the grantor in such way, water-course or monument, unless (a) the grantor retains other real estate

> abutting such way, watercourse or monument, in which case, (i) if the retained real estate is on the same side, the division line between the land granted and the land retained shall be continued into such way, water-course or monument as far as the grantor owns, or (ii) if the retained real estate is on the other side of such way, watercourse or monument between the division lines extended, the title conveyed shall be to the center line of such way, watercourse or monument as far as the grantor owns, or (b) the instrument evidences a different intent by an express exception or reservation and not alone by bounding by a side line.
>
> Section 2 of c. 684 provides in part:
>
> [The Derelict Fee Statute] shall apply to instruments executed on and after said effective date and to instruments executed prior thereto, except as to such prior executed instruments this act shall not apply to land registered and confirmed under the provisions of chapter one-hundred and eighty-five before said effective date or to the extent that any person or his predecessor in title has changed his position as a result of a decision of a court of competent jurisdiction.
>
> The Derelict Fee Statute is thus retroactive in its application, as well as prospective, governing the construction and interpretations of deeds whenever executed, with the exceptions noted.

The statute was adopted to end confusion which existed as a result of generations of judicial decisions construing the effect of deeds employing words such as “bounded by" a way and “bounded on" a way as contrasted with bounded on or by the "side line" of a way. The common law was that a parcel described as bounding "on" or "by" a way, without restricting words conveyed title to the center line of the way if owned by the grantor, but a parcel boundary on or by a "side line" of the way conveyed no fee interest in the way. Casella v. Sneierson, 325 Mass. 85, 89 (1949). The statue was also adopted to “clarify ownership and ease the difficulty of identifying the owners of the small strips of land that lay beneath highways, streams, walls, and other similar boundaries”

and to “quiet title to sundry narrow strips of land that formed the boundaries of other tracts.” Rowley v. Mass. Elec. Co., 48 Mass. 798, 799, 803 (2003).

The derelict fee statute constitutes a rule of construction of deeds and other instruments. As was said in Tattan v. Kurlan, 32 Mass. App. Ct. 239, at 242-243 (1992),

> “General Laws c. 183, §58, establishes an authoritative rule of construction for all instruments passing title to real estate abutting a way, whether public or private and whether in existence or merely contemplated (so long as it is sufficiently designated, see Murphy v. Mart Realty of Brockton, Inc., 348 Mass. 675, 677-678 (1965); Brennan v. DeCosta, 24 Mass. App. Ct. 1968 (1987) (Footnote and additional citations omitted). Section 58 mandates that every deed of real estate abutting a way includes the fee interest of the grantor in the way-to the center line if the grantor retains property on the other side of the way or for the full width if he does not-unless ‘the instrument evidences a different intent by an express exception or reservation and not alone by bounding by a side line.’ The statute incorporates the basic common law principle of presumed intent with regard to conveyed land abutting an actual or contemplated way owned by the grantor. The common law presumed that the grantor intended to pass title to the center of the way.”

Similarly, the effect of the derelict fee statute is to “strengthen ‘the common law … presumption that “a deed bounding on a way conveys the title to the centre of the way if the grantor owns so far.' (citations omitted.)" Hanson v. Cadwell Crossing, LLC, 66 Mass. App. Ct. 497, at 499 (2006).

In a case decided not long after the adoption of the derelict fee statute, the Supreme Judicial Court, Smith v. Hadad, 366 Mass. 106 (1974), was called upon to determine the beginning point of a deed of parcel of land excepted from a conveyance where the excepted parcel was bounded in part as follows:

> Thence turning southerly by Main Street to a point on Main Street distant eight hundred (800) feet north of the junction of Main and Short Streets; thence turning at a right angle to said Main Street and running westerly one hundred seventy five (175) feet; thence turning and running southerly

> and parallel to Main Street and distant one hundred seventy-five (175) feet therefrom, eight hundred (800) feet more or less to said Short Street.
>
> Nichols thus reserved a 175 foot-wide parcel fronting on Main Street to the east, which was later conveyed to the respondents' common predecessor in title. Left ambiguous in the deed was whether the 175 foot measurement begins at the western edge or in the center of Main Street. Since the street is sixty-six feet wide, the answer affects a 33-foot wide strip at the boundary between petitioners' and respondents' land. It is the dispute over the ownership of this strip has brought the issue to this court. Id.,at 107.

Main Street, a state highway, was taken as an easement and thus the fee to the underlying land remained in the adjoining private owners but, as the court observed, unless the way were discontinued, the fee ownership rights underlying the easement were "effectively useless".

The Court restated the common law as follows:

> The presumption has long been that, even where the specified boundary line is clearly at the side of the way (as where it runs between two stakes, each of necessity at the side rather than in the center), the deed was intended to transfer the abbreviated rights to the fee of the way as well [citations omitted]. The rationale of such decisions is apparently that the grantor is unlikely to want to reserve title to the fee of the way; if he does, he may avoid the effect of the presumption by contraindicating.
>
> The ultimate issue here the distinct question of the starting point for a measurement, which was dealt in Dodd v. Whitt, 139 Mass. 63, 65-66 (1885); 'A majority of the court is of the opinion, that it is a common method of measurement in the country, where the boundary is a stream or a way, to measure from the bank of the stream or the side of the way; and that there is a reasonable presumption that the measurements were made in this way, unless something appears affirmatively in the deed to show that they began at the centre of the stream or way.' We believe this is dispositive of the instant case. That a grantor probably had no intention to retain the fee under the adjoining way does not make it at all likely that he would therefore make a measurement from the center of the way affecting the placement of the boundary at the opposite end of the property….
>
> the Dodd case clearly implies that the presumption shall be operative in the absence [of evidence of the grantor's contrary intent.] It is significant that the Dodd case recognized that such a presumption was widely made.

> It has been ever since. To change it now would create chaos in land titles, defeat the reasonable expectations of conveyancers, and cause substantial financial hardship to may innocent landowners….
>
> Accordingly, we hold that in the absence of a clear showing of a contrary intent, a measurement given from a stream or a public or private way shall be presumed to begin at the side line of that stream or way. Id., at 437-438.

The derelict fee statute first came to the Supreme Judicial Court in the 1976 case of Emery v.Crowley, 376 Mass. 489 (1976). There the Emerys petitioned the Land Court to register title to three parcels of land in North Weymouth pursuant to G.L. c. 185, §1. The defendant Crowley took issue with the petitioners' claims with respect to two of the parcels sought to be registered and, when he lost at trial at the Land Court, took an appeal to SJC. His appeal required that the Court construe the derelict fee statute for the first time.

At issue were the property rights in a paper street running perpendicular to a public way, known as North Street. The paper street was labeled on one plan as "Parcel 2" and on another "Mount Vernon Road East." At the time of trial, plaintiff Crowley was the sole owner of land abutting the paper street and claimed that the derelict fee statute operated to give him fee ownership of the paper street.

Emery's predecessor in title had conveyed to Crowley's predecessor in title land abutting the paper street, but in the deeds of conveyance described the paper street not as a way or street but as "other land of the grantor" and "land of Elsie C. Emery."

Not only did Crowley's property abut the "other land of the grantor" and "land of Elsie C. Emery" but it abutted the paper street at its end and indeed,

Crowley owned the fee in an extension of the paper street labeled "Mount Vernon Road East" extending from the end of Parcel 2 easterly. The Court stated that the derelict fee statute "sets out an authoritative rule of construction for instruments passing title to real estate abutting a way" (Id. at 492) but pointed out that the statute didn't define the terms "abutting" and "way" so it turned to the established rules of judicial definition to do that.

The Court held:

> We conclude that parcel 2 did not constitute a 'way' in the instruments passing title to the property abutting its north and south boundaries from grantor Emery to [Crowley's predecessor in title]. Both the metes and bounds descriptions of the lots conveyed and the plans incorporated in the deeds clearly delineate the property now known as parcel 2 as belonging to the grantor or his spouse. The parties obviously intended and understood that this land was retained by the grantor….A prospective purchaser examining the deeds to the land abutting parcel 2 on its north and south boundaries would have no reason to think he would acquire any interest in parcel 2 beyond the express easements [stated elsewhere in the deeds]. Thus, §58 does not apply to those instruments.

One of the deeds to Crowley's predecessor in title conveyed land that abutted parcel 2, the paper street, at its end. The Court held:

> By its terms [the derelict fee statute] includes, in 'abutting' real estate, land 'on the same side' of the way in question, see G.L. c. 183, §58 (a)(i) and land 'on the other side of such way,' see G.L. c. 183, §58(a)(ii). The statutory silence with regard to real estate at the end of the way signifies that such real estate does not 'abut' the way in the traditional or statutory sense of the word. Indeed, logically the owner at the end of way cannot acquire any fee interest in the way without encroaching on the property rights, if any, of the abutting side owners. The term 'abutting' in the context of fee ownership of ways after conveyance of property bounded on a way, thus refers to property with frontage along the length of the way (emphasis supplied). Id., at 494.

See Boudreau v. Coleman, 29 Mass. App. Ct. 621, at 622, fn. 3. See also, McGovern v. McGovern, 77 Mass. App. Ct. 688 (2010).

Most important case construing the Derelict Fee Statute to date is Tattan v. Kurlan, 32 Mass. App. Ct. 239 (1992).

Tattan owned a substantial parcel of land which abutted two older subdivisions. The original subdivision developers had designated connector streets, as many subdivision regulations required, providing possible access from internal subdivision roads to adjacent properties which might be subdivided in the future. Tattan had acquired the two connector strips described in the opinion as they were described on plans of record, one being referred to as a "future roadway" and the second as a "prospective street", for $500.00 from the original subdivider. Shortly afterward Tattan informed the defendants that he intended to build connector streets over the reserved streets to connect his adjoining tract of land with the public way. In determining that the lot owners abutting the two "future streets" owned those future streets to the center line thereof the Court held, at 242-243:

> "General Laws c.183, § 58, establishes an authoritative rule of construction for all instruments passing title to real estate abutting a way, whether public or private and whether in existence or merely contemplated (so long as it is sufficiently designated [interior citations omitted]. §58 mandates that every deed of real estate abutting a way includes the fee interest of the grantor in the way…." (emphasis supplied)

In discussing the common laws presumption that in such circumstances a grantor intended to pass title to center of the way, the Court stated: "this presumption was strong but could be overcome by clear proof of a contrary intent of the parties….[interior citations omitted]

Section 58's mandate that title in the way is conveyed to the abutting grantee, however, is stricter than the common law rule which it codified and superceded. The statutory presumption is conclusive when the statute applies, unless (for the purposes of this case) the 'instrument passing title' evidencing a different intent (by an express…reservation.' Other 'attended' evidence of the parties' intent is no longer probative." Id., at 243-244.

A rescript opinion from the Appeals Court in Brennan v. DeCosta, 24 Mass. App. Ct. 968 (1987) arose in the context of a paper street and a dispute among neighbors abutting on the paper street as to who had the rights to use it. The Court stated "as a general rule, the title of persons who acquire land bounded by a street or way runs to the center line of the way, G.L. c.183, §58, and carries with it the right to use the way along its entire length. Goldstein v. Beal, 317 Mass. 750, 755 (1945). Casella v. Sneierson, 325 Mass. 85, 89 (1949). Murphy v. Mart Realty of Brockton, Inc., 348 Mass. 675, 677-678 (1965). The rule is applicable even if the way is not physically in existence, so long as it is contemplated and sufficiently designated. Id. at 968.

For many years Brennan occasioned some confusion among practitioners arising out of its brief statement of the law, quoted above.

Adams v. Planning Board of Westwood, 64 Mass. App. Ct. 383 (2005) put to rest confusion as to the effect of the Derelict Fee Statute on title and easement rights. In Adams, a confusing case arising out of the exchange of a number of deeds among three landowners adjoining a private way which created varying ownership rights in the way under the Derelict Fee Statute the parties contested

one lot owner's easement rights in the disputed way for the purposes of access to and utilities for his interior, otherwise landlocked, parcel. The Adams court held:

> "while it is true that since passage of the derelict fee statute…'extrinsic evidence may not be used to prove the grantor's intent to retain [a] fee in [a] right of way,' Rowley v. Massachusetts Elec. Co., 438 Mass. 798, 804 (2003), extrinsic evidence is available to determine the existence, nature, scope and extent of easement rights in a way; the Derelict Fee Statute pertains only to the question of ownership of the fee. With respect to the existence of an easement, we look, rather, to the intention of the parties regarding the creation of the easement or right of way, determined from 'the language of the instruments when read in light of the circumstances intending their execution, the physical condition of the premises, and the knowledge which parties had or with which they are chargable,' Boudreau v. Coleman, 29 Mass. App. Ct. 621, 629 (1990), to determine the existence and attributes of a right of way." (emphasis added)

See also BTR Ventures, LLC v. Raptopoulos 18 LCR 73 (2010), fn. 24, at 76, where Justice Sands observed:

> "I am aware of the general rules stated in Brennan v. DeCosta [citation omitted], stating that:
>
> > 'the title of persons who acquire land bounded by a street or way runs to the center line of the way, G.L. c.183, § 58, and carries with it the right to use the way along its entire length [citations omitted].
>
> I read Brennan's rule as two separate assertions based on two distinct doctrines. The first is grounded in Section 58, and relates only to the title of a street or way to its center line. The second assertion involves rights appurtenant to land bounded by a way or street and is grounded in the doctrine of easement by estoppel. It is noteworthy that Goldstein, Casella, and Mart Realty, as cited above in Brennan, all involve easements by estoppel and not easements by Derelict Fee. In some, I do not read Brennan as stating that Section 58 automatically confers easement rights. Rather, I agree with Adams, which states that Section 58 applies to fee ownership only.

Silva v. Planning Board of Somerset, 34 Mass. App. Ct. 339 (1993) involved the application of the derelict fee statute in the context of a definitive subdivision plan where the subdivider proposed to construct a definitive subdivision road over a strip of land title to one-half of which was in an abutter, Silva, who did not join in the definitive subdivision application. As such, he claimed that the Board's approval of the subdivision was a nullity because he was not an applicant or named as an owner of the premises being subdivided.

The Silva court found that Silva did indeed own to the center line of the strip of land proposed to be developed as a definitive subdivision road and as such he either should have been named in the application as a "subdivider" or the Planning Board should have waived strict compliance with its regulations requiring that all owners of record to the proposed site be subdivided be named in the application, which it did not do. That didn't mean that the subdivider couldn't use the strip of land for its proposed street. The Court held "[I]n this case, unlike the Bachelder case, where the abutter challenges the applicant's title to the entire locus, the plaintiff claims an interest only in the proposed street. Even if the plaintiff owns a fee simple interest in the proposed street, at the very least the [subdividers] as grantees of land abutting the proposed street would have an easement in the way and the right to make reasonable improvements in the way without the consent of plaintiff."

Rowley v. Massachusetts Elec. Co., 438 Mass 798 (2003) is another important case in the line of cases construing and applying the derelict fee statute.

In Rowley, the plaintiffs were owners of land abutting a former railroad location, later acquired by the defendant, Massachusetts Electric Company.

When Massachusetts Electric Company proposed to permit the railroad location be used as a bicycle trail, plaintiffs sued alleging ownership rights in the former railroad location and sought to prevent the use of the former railroad as a public bicycle path.

The former New Haven and New Hampton Railroad Company had obtained legislative authority to extend its tracks from New Hampton to Williamsburg, Hampshire County, and filed "location plans" with the County Commissioners identifying the location for its new tracks. The railroad acquired some of its track layout by deeds from abutters but most of the railway location was acquired by filing location plans for the County Commissioners which automatically result in the railroad obtaining an easement over the land required to extend the route with the fee interests in the land remaining in the owners of the parcels affected by the taking. Hazen v. Boston & M.M.R., 68 Mass. 574 (1854) and Agostini v. North Adams Gas Light Co., 265 Mass. 70, 72-73 (1928).

In the Rowley case, the determination of the case turned on two issues: whether a railway location is such a "way" or "other similar monument" as will implicate the application of the derelict fee statute and, secondly, whether the plaintiffs deeds, which would described their respective properties as either bounded by "land of the [railroad]" or as "land now or formerly of said [railroad]," is the same as deed descriptions describing the lands as bounded by the "railroad". Expressed another way, the Court stated: "the only issues we must

decide are whether G.L. c. 183, §58, applies to property which in fact abuts a 'way' or 'other similar linear monument' even if the language in the deed does not specifically describe it in those terms; and, if so, whether a railway is a 'way' or 'other similar monument' within the meaning of §58." After restating the Emery v. Crowley rule that "abutting" means "property with frontage along the length of the way" the Court stated, "a plain reading of the statute is that it applies to instruments that convey real estate that in fact that has frontage along the length of a way or other similar monument. There is nothing in the statutory language itself that suggests its effect is limited only to instruments that describe the real estate conveyed as bounded by 'way' or 'other similar linear monument'. If that was the legislative intent, the wording of the statute could have easily reflected it [fn. 9 Language such as '[e]very instrument passing title to real estate *described in such instrument as* abutting a way' would have been adequate to accomplish such a purpose (emphasis added).] It does not.

Stating again that the derelict fee statute embodies an even stronger presumption in favor of vesting title in ways in abutters than did the common law, the Court stated, at 804:

> "If we were to construe §58 not to apply to instruments conveying real estate parcels abutting ways or similar linear monuments that failed to describe their boundaries as such, the ownership of the small strips that make up such ways and linear monuments which would once again be derelict. In the present case, that would mean that the fee interests in the railway would reside with the unknown heirs of those who owned the parcels when the railroad filed its location plans more than 125 years ago. Such a result would defeat the very object of the statute and leave in place the imperfection it intended to remedy."

The Court went on to hold, at 805:

> "We conclude that the plain meaning of G.L. c.183, §58, consistent with the words used and considered in connection with the imperfection to be remedied, applies to real estate, such as the plaintiffs' that in fact abuts a 'public or private [way]…or other similar monument,' regardless of how it is described in the instrument of its conveyance."

The Court had little difficulty in determining that a railroad is a "way" or "other similar monument" for the purposes of the derelict fee statute, finding that railroads had long historically been akin to highways and turnpikes in Massachusetts providing for "similar means for linear travel along a defined course, for the convenience of the public and private parties alike." Id., at 805. See also, McGovern v. McGovern, 77 Mass. App. Ct. 688 (2010).

The case of Hanson v. Cadwell Crossing, LLC, 66 Mass. App. Ct. 497 (2006) discusses another variation on the Rowley theme, that is that the derelict fee statute applies to every deed conveying property which in fact is bounded by a way, "regardless of how it is described in the instrument of its conveyance."

In Hanson, a dispute arose as to the ownership of Lot A as shown on a definitive subdivision plan known as Falcon Heights in Wilbraham, Massachusetts. Lot A was a narrow strip of land between abutting Lots 3 and 4 on the subdivision plan extending from a cul de sac on that plan to the boundary line of an adjacent parcel of land later owned by Cadwell Crossing, LLC. The strip of land, 50 feet in width, was labeled on the plan "not a building lot."

The deeds of Lots 3 and 4 to abutting owners, conveyed those lots by reference to the lot number and subdivision plan of record and made no reference to Lot A.

Defendant Cadwell Crossing, LLC acquired title to Lot A and used it as a connector road from the Falcon Heights subdivision into its new subdivision for which it obtained definitive subdivision approval in August 2004. Immediately the plaintiffs filed suit claiming ownership to Lot A pursuant to the derelict fee statute.

Finding no ambiguity in the deeds and plans of record the Land Court held did not permit the plaintiffs to introduce extrinsic evidence that in fact Lot A was intended to be used as a street or way even though it was not so identified on the plan. The plaintiffs, had they been permitted to do so, would have introduced evidence from surveyors that Lot A had been shown as a connector road from the Falcon Heights subdivision to a new subdivision to the north on office work plans, that the chairman of the Planning Board had described Lot A as a strip "put there with the potential of becoming a road," and that the Wilbraham subdivision regulation required an inference that Lot A was intended to be a street because those regulations provided that satisfactory provision for access to property not yet subdivided shall be shown on each subdivision plan.

The Appeals Court upheld the Land Court's determination that extrinsic evidence should not be admitted, that there was no ambiguity in the relevant plans and documents, that none of the relevant plans and documents referred to Lot A as a proposed way and therefore the plaintiffs did not own Lot A under the Derelict Fee Statute and could not prevent its use as a connector road to a new subdivision road.

The plaintiffs claimed that the derelict fee statute applies to every deed conveying property which is in fact bounded by a way, "regardless of how it is

defined in the instrument of its conveyance." (Rowley, 438 Mass. at 805)

Quoting then from Rowley, the Hanson Court stated, at

> "a plain reading of the statute is that it applies to instruments that convey real estate that in fact has frontage along the length of a way or other similar monument. There is nothing in the statutory language itself that suggests that its effect is limited only to instruments that describe the real estate conveyed as bounding on a 'way' or other similar linear monument." Rowley, 438 Mass. at 802 (Hanson, at 501).
>
> "For G.L. c.183, §58, to apply, the way need not be in existence on the ground, as long as it is contemplated and sufficiently designated. Contrary to the plaintiffs' contention, it is not enough that the metes and bounds of a strip are described; 'the strip has [to be] sufficiently defined as a proposed street.' Murphy v. Mart Realty of Brockton, Inc., 348 Mass. 675, 678 (1965). In making that determination, 'reference may be made to the plan.' Ibid. In contrast to the record evidence in Rowley, the documents of record here (deeds and plan) designate no proposed way. They do not indicate that Lot A was intended as anything other than a small lot retained by the developer for any number of possible purposes such as open land, additional parking, a road, or other permissible use."
>
> Hanson, 66 Mass. App. Ct. at 502

That the derelict fee statute relates only to determination of title in streets, ways and other linear monuments, but not easement rights or compliance with zoning, is pointed out by the case of Sears v. Building Inspector of Marshfield, 73 Mass. App. Ct. 913 (2009).

There, Sears, the owner of a 4,800 square foot parcel of land, appealed the denial by the town's building inspector of his application for designation that his lot was a residential lot of record which, under the town's zoning bylaw, required a minimum lot area of 5,000 square feet. There was no doubt that Sears owned the fee to the center line of a private way abutting his land to the

southeast. If the land underlying the private way could be counted as his minimum lot area his lot would have totaled 5,700 square feet in area.

In holding that the Derelict Fee Statute could not operate to provide the plaintiff with additional buildable area the Court pointed out that ownership of the fee underlying a private way did not include the right to build thereon. Indeed, since there could be rights of passage in others to use the full width of the private way. Further, the Court held that the plaintiffs construction conflicted with the purpose of the statute which is to clarify ownership of small strips of land underlying highways, streams, walls and other similar boundaries. A statute designed to deal with enforcement of property rights was not intended by the legislature to apply to add lot area for zoning purposes. The Court held that the Marshfield Zoning Board of Appeals acted reasonably in construing the bylaw to exclude from the calculation of minimum lot size, fee ownership interest underlying private ways. The Court did not, but could have pointed to the definition of "lot" in G.L. c. 41, §81L, the Subdivision Control Statute, where a lot is defined as "an area of land in one ownership, with definite boundaries, used, or available for use, as the site of one or more buildings." The requirement that lot area be available to be used as the site of a building would obviously preclude lot area underlying private ways as being included in the calculation of minimum lot size.

G.L. c. 183, Section 58 is retroactive in its application and applied to paper street provided that the street has been sufficiently designated on a recorded plan. Tattan, 32 Mass.App.Ct. at 240, fn 2; Silva v. Planning Board of Somerset,

34 Mass.App.Ct. 339, 341-43 (1993); and Brennan, 24 Mass.App.Ct. at 968. This is true as long as the grantor has not reserved his or her right in the fee of the roadway. Note however that reference on a plan marked “reserved for a future roadway” does not constitute a sufficient reservation of rights to prevent the application of G.L. c. 183, Section 58. Tattan, 32 Mass.App.Ct. at 245. The reservation must be contained in the deed. Id. at 247.

Application of G.L. c. 183, Section 58 creates obvious difficulties in the event of a discontinuance. It is not at all certain that G.L. c. 183, Section 58 improves the situation too much, since the underlying title at the time of the layout and the extent of the property interest taken by the laying out authority will still have to be determined.

5.4.B Easements by Estoppel and by Implication

The early case, Farnsworth v. Taylor, 75 Mass. 162 (1857) stands for the proposition that an appurtenant right of way is created by necessary implication where a parcel of land is conveyed by a deed description bounding on a way or by reference to a plan which shows a boundary on a way. That case established the doctrine "that where land is conveyed which is situate on a street or way, and reference is made in the deed of conveyance to a plan on which said street is delineated, the plan exhibited at the sale, and subsequently recorded by the grantor in the registry of deeds, is made a part of the deed, and estops the grantor and those claiming under him to deny the existence of the street as delineated on the plan, is well maintained by authority and sound in principal." Farnsworth, 75 Mass. at 166.

Such an easement exists even if there are other streets or ways providing access to the land (Hill v. Taylor, 296 Mass. 107 (1936)), and there is created by implication, or estoppel, a perpetual easement appurtenant to the premises conveyed providing the owner of such premises with a right of passage over such streets or ways as shown on the plan for the entire distance of the way, as it is then actually laid out or clearly indicated and described. See Oldfield v. Smith, 304 Mass. 590 (1939). The easement by implication is created even if the way is not then in existence, so long as it was clearly contemplated and sufficiently designated. See Murphy v. Mart Realty of Brockton Inc., 348 Mass. 675 (1965). In the Murphy case, the way shown on the plan was, in fact, treed and overgrown, stoney and rocky; it was not passable by motor vehicle or on foot and was entirely undeveloped. The court found that the way had been sufficiently delineated as a proposed street on a plan and was thus "adequately designated" and the owner of the adjacent parcel had the right to develop the formerly unusable way for ingress and egress by blacktopping it.

Therefore, an easement by estoppel can apply where (1) a property description contains a course either bounding on a way or refers to a plan showing that the property bounds on a way; (2) the way is laid out or clearly indicated on a plan; (3) the chain of title is out of the same grantor; and (4) rights in the way are not reserved by the grantor.

A property description which describes the property bounding along “other land of the grantor” when such “other “ land is a paper street is not a sufficient course description to invoke the principle of easement by estoppel. Emery, 371

Mass. At 495. Easements in "paper streets" can be abandoned. See, e.g., Sindler v. William M. Bailey Co., 348 Mass. 589 (1965).

Not only may there arise an implied easement to use a street abutting upon a parcel of land, but by further implication a property owner can use other streets and ways shown on a plan to the extent that such use is necessary to reach a public way. See Fox v. Union Sugar Refinery, 109 Mass. 292 (1872). In a case which probably would not now be decided in the same way, the Supreme Judicial Court held in l909, in Downey v. H.P. Hood and Sons, 203 Mass. 4 (1909), that an owner whose property is bounded by a way which connects at each end with a road leading to the highway, is entitled to have access going in either direction if all roads appear on the plan. Later cases have limited the doctrine established by Downey which is, in essence, that a property owner, although having access (by virtue of an implied easement arising by conveyance of a lot by reference to a plan) can elect to take either of two means, including a less convenient one, to reach a public way. Now, it is the general rule that an implied easement of this type will be implied only to the extent necessary for the enjoyment of the land conveyed, in the absence of a clear intent to the contrary. See, e.g, Prentiss v. City of Gloucester, 236 Mass. 36 (1920) and, Wellwood v. Havrah Mishna Anshi Sphard Cemetary Corp., 254 Mass. 350 (1926)

More recent cases, Murphy v. Donovan, 4 Mass. App. Ct. 519, 527 (1976) and Boudreau v. Coleman, 29 Mass.App.Ct. 621, 628 (1990), have held, notwithstanding the doctrine of implied easements arising by virtue of conveyance by reference to a plan, that the intent of the parties is determined

from (1) the language of the instrument “when read in light of the circumstances attending” at the time the deed was given; (2) the physical condition of the premises; (3) knowledge of the parties; (4) reasonably necessity of the easement; and (5) whether there existed open and obvious use of the street prior to conveyance.

A mere reference in a deed to a plan and a lot number which bounds on a street or roadway does not give the grantee an easement in all ways shown on the plan. Walter Kassuba Realty Corp. v. Akeson, 359 Mass. 725, 727 (1971). Nor does it prevent the grantor of the property from utilizing his or her property or making changes as long as such use or changes are not inconsistent with the rights of the easement holders. Id.

Prentiss v. Gloucester also held that no easement can arise by implication where the rights of way appurtenant to the premises conveyed are expressly described and defined in the deed of conveyance. Further, an easement by implication, as it is appurtenant to the parcel conveyed, may not be used for the benefit of other land adjacent to the original tract without overloading the easement. See Murphy v. Mart Realty of Brockton Inc., 348 Mass. 675 (1965).

Anderson v. Healy, 36 Mass. App. Ct. 131 (1994) reveals an interesting dilemma for the defendant who abuts a town highway layout and had a right of access to the town way which, at that point was not wrought on the ground and existed only as an easement, on plaintiff's land; the defendant was found to have exceeded his easement rights in constructing a driveway to his land.

6. DISCONTINUANCE OF STREETS AND WAYS

6.1 STATUTORY

Section 12 of G.L. c. 81 sets forth the procedure for discontinuance of state highways as requiring concurrence of the county commissioners and the filing by the DOT of a plan of the way so discontinued and a certificate of discontinuance with the commissioners and town clerk; "and thereafter the way or section of way so discontinued shall be a town way."

Assume the Commonwealth had taken the fee in the way, then discontinued it. Does the fact that the way thereafter is a town way mean that the town now owns the fee? We think not; the town now has the maintenance obligation, but not the fee interest.

G.L. c. 81, Section 12 goes on to provide that the DOT "may also abandon any land or rights in land which may have been taken or acquired by it . . ." by the same filing of plans and certificates procedure, and also by filing in the registry of deeds "a description and plan of the land so abandoned; and said abandonment shall revest the title to the land or rights abandoned in the persons in whom it was vested at the time of the taking, or their heirs or assigns."

In the event of the discontinuance a state highway resulting from an alteration in the state highway layout, it would be better practice that the discontinuance be accompanied by an abandonment of the former layout if the two routes substantially parallel each other, as where the new layout straightens and widens the former layout. Many such new layouts, in our experience, are not coupled with an abandonment, however, which has the legal effect of leaving a town liable for maintenance of portions of the former layout. A town by its

meeting vote may discontinue a way which became a town way be virtue of a state highway discontinuance, and may do so without notice; it is not an "alteration" requiring a layout. See Boyce v. Town of Templeton, 335 Mass. 1 (1956).

Chapter 82, Section 1 gives authority to the county commissioners (and now other entities) to discontinue (note, not "abandon") highways, and G.L. c. 82, Section 21 gives the same authority to town meetings. In Mahan v. Rockport, 287 Mass. 34 (1934) where the Land Court judge found the Town of Rockport had taken an easement for layout of a highway forty years previously but never entered on the portion of the land in question nor constructed a way thereon, and consequently ruled the Town had abandoned its easement, the Supreme Judicial Court held,

> It is settled that a public way once duly laid out continues to be such until legally discontinued. . . A town way may be discontinued by vote of the town and not otherwise . . . The rights of the public in the whole width of the way as laid out by the selectmen, and accepted by the town in town meeting, were not lost by using less than the whole width of the way.
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> Mahan, 287 Mass. at 37. Contrast this holding with Perry v. Planning Board of Nantucket, 15 Mass. App. Ct. 144 (1983) discussed infra. Nylander v. Potter, 423 Mass. 158 (1996).

An alteration of a county highway or town way automatically constitutes a discontinuance of the portions of the former layout no longer needed. Inhabitants of Cohasset v. Moors, 204 Mass. 173 (1919)[1]; Commonwealth v. Westborough, 3 Mass. 406 (1807). The fact that specific portions of the old road are officially

[1] The Moors case cited above is one of only a very few cases holding that an individual can obtain title as against the Commonwealth or its political subdivisions by adverse possession. See generally G.L. c. 260, Section 31, as most recently amended by G.L. c. 654 of the Acts of 1987. Massachusetts is in the distinct minority on this rule.

discontinued by direct action of the county commissioners will not save the remaining portions of the old road from discontinuance as well. Recore v. Town of Conway, Land Court Misc. Case No. 248455 (Sept. 18, 2000) (Green, J.) upheld on appeal in Recore v. Town of Conway 59 Mass. Ct. 1 (2003).

In Recore, the plaintiffs attempted to meet the Town's frontage requirements by utilizing a certain road which they claimed was a public way. In 1845, a new road was laid out by the county commissioners which essentially replaced the portion of the road being utilized by the plaintiffs, and in 1847, other portions of the old road were officially discontinued by the county commissioners. The Land Court held that the "subsequent actions of the county commissioners to discontinue portions of the old road do not establish that it remained an active county highway at the time of such discontinuance," and that whether or not the portion of the old road utilized by plaintiffs was within the portion specifically discontinued by the 1847 discontinuance, the construction of the new road "just to the west of the locus effected a discontinuance of that portion of [the old road] by operation of law." Id. The Land Court further held that an official discontinuance action on the part of the county commissioners was not necessary to effect a discontinuance by law, that the old road could no longer be considered a public way, and that the plaintiffs could not employ the old road to meet frontage requirements. Id.

Better practice, however, would require an actual discontinuance of the unneeded portions.

It is obvious that there remains much confusion about the distinction between a "discontinuance" and an "abandonment." Many towns vote to "discontinue and abandon" town ways; some do one, some do the other. At least one Berkshire County town has voted to "close" town ways. The town which voted to "close" a town way, a 1946 vote of the Town of Hancock to close Tower Mountain Road from the driveway of Norman McVeigh to the Hancock-Pittsfield town line, was held by the Appeals Court, in an unpublished decision (Meudt v. Dus, 75 Mass. App. Ct. 1109 (2009)), not sufficient to discontinue the way as a town road. The Land Court trial judge had found the use of the word to "close" to be ambiguous and thus admitted extrinsic evidence in the form of other town meeting votes where the Town of Hancock voted properly to "discontinue" town roads pursuant to G.L. c.82, §21. Because the town had employed the word "discontinuance" in other votes, its vote to "close" the road was insufficient to discontinue Tower Mountain Road.

It is helpful to contrast three statutory sections, G.L. c. 81, Section 12, G.L. c. 82, Section 21 and G.L. c. 82, Section 32A.

G.L. c. 81, Section 12 relates to state highways reads as follows:

> Discontinuance or abandonment. The department, with the concurrence of the county commissioners, may discontinue as a state highway any way or section of way laid out and constructed under the provisions of section five by filing in the office of the county commissioners for the county and in the office of the clerk of the town in which such way is situated a certified copy of a plan showing the way so discontinued and a certificate that it has discontinued such way; and thereafter the way or section of way so discontinued shall be a town way. Said department may also abandon any land or rights in land which may have been taken or acquired by it by filing in the office of the county commissioners for the county and in the office of the clerk of the town in which such land is situated a certified copy of a plan showing the land so abandoned and a certificate that it has

> abandoned such land, and by filing for record in the registry of deeds for the county or district in which the land lies a description and plan of the land so abandoned; and said abandonment shall revest the title to the land or rights abandoned in the persons in whom it was vested at the time of the taking, or their heirs and assigns.

This section was originally enacted in 1900 and has not been amended since 1931; it speaks of discontinuing state highways as ways which the state is obliged to maintain and, secondarily (and not always) to the process of relinquishing the Commonwealth's interest in land.

G.L. c. 82, Section 21 reads as follows:

> Authority to lay out ways. The selectmen or road commissioners of a town or city council of a city may lay out, relocate or alter town ways for the use of the town or city, and private ways for the use of one or more of the inhabitants thereof; or they may order specific repairs to be made upon such ways; and a town, at a meeting, or the city council of a city, may discontinue a town way or a private way.

This section was originally enacted in 1693 and has not been amended since 1917; it speaks of laying out and discontinuing town ways, generally easements.

Section 32A of G.L. c. 82, prior to a 1983 amendment, read as follows:

> Discontinuance of public ways. Upon petition in writing of the board or officers of a town having charge of a public way, the county commissioners may, whenever common convenience and necessity no longer require such way to be maintained in a condition reasonably safe and convenient for travel, adjudicate that said way shall thereafter be a private way and that the town shall no longer be bound to keep the same in repair, and thereupon such adjudication shall take effect; provided, that sufficient notice to warn the public against entering thereon is posted where such way enters upon or unites with an existing public way. This section shall not apply to ways in cities.

I conclude that the words “private way” as used in this statute before 1983 meant “statutory private way.”

This section was adopted in 1924 and remained the same until amended, first in 1983, and then in 2006, so it now reads:

> The board or officers of a city or town having charge of a public way may, after holding a public hearing, notice of which shall be sent by registered mail, return receipt requested, to all property owners abutting an affected road and notice of which shall be published in a newspaper of general circulation in the city or town once in each of two successive weeks, the first publication to be not less than fourteen days before the day of hearing and by posting in a conspicuous place in the office of the city or town clerk for a period of not less than fourteen days before the day of the hearing, upon finding that a city or town way or public way has become abandoned and unused for ordinary travel and that the common convenience and necessity no longer requires said town way or public way to be maintained in a condition reasonably safe and convenient for travel, shall declare that the city or two shall no longer be bound to keep such way or public way in repair and upon filing of such declaration with the city or town clerk such declaration shall take effect, provided that sufficient notice to warn the public that the way is no longer maintained is posted at both ends of such way or public way, or portions thereof. Upon petition in writing of the board or officers of a city or town in which a county highway is located, the county commissioners, whenever common convenience and necessity no longer require such way to be maintained in a condition reasonably safe and convenient for public travel, after giving notice in the manner prescribed in section 3, and after viewing the premises and hearing the interested parties in the manner prescribed in section 4, may adjudicate that the town shall no longer be bound to keep the way in repair, and thereupon the adjudication shall take effect; provided, that sufficient notice to warn the public that the way is no longer maintained is posted at both ends of the way, or portions thereof.

The use of the word "abandonment" in the caption of G.L. c. 82, Section 32A may simply be a mislabelling of the statute.

Because of the presumption that only an easement for public passage is acquired by towns and counties (See Opinion of the Justices, 208 Mass. 603 (1911)), there is no provision in G.L. c. 82 (except for the misleading section

heading in Section 32A) relating to "abandonment." A discontinuance does three things: first, the public's easement of passage disappears and the underlying fee reverts to the owners thereof, free of such easement. Nylander v. Potter, 423 Mass. 158 (1996)). Second, the town's obligation of maintenance ceases. And third, abutting owners on the former highway have a cause of action for damages to the value of their land occasioned by the fact that they have lost a valuable bundle of rights (G.L. c. 82, Section 24. Rivers v. Warwick, 37 Mass. App. Ct. 593 (1994)). Damages consist, obviously, of the loss of subdivisability of land, the loss of assurance of town maintenance and snow plowing and the attendant increase in private expenditure and the probable loss of access by emergency vehicles, together with any particular loss which they may be able to show.

Coombs v. Board of Selectmen of Deerfield, 26 Mass. App. Ct. 379 (1988), review denied, 403 Mass. 1104 (1988) contains a helpful discussion of the statutory history and application of G.L. c. 82, Section 32A in holding that Section 32A does not permit the selectmen of a town to discontinue maintenance of county highways.

Prior to Nylander v. Potter, 423 Mass. 158 (1996), a practitioner had to assemble several cases to satisfy oneself that there was no private easement of passage over a discontinued road. Now we know, absent a private easement of passage in the road location which predates the layout of the way, by grant, prescription or implication, upon discontinuance of a way an interior landowner has no so-called "abutters easement" to travel over the discontinued road. Id. at 162.

In deciding Nylander the Court upheld long settled Massachusetts law and struck down a novel right of passage which was argued would have been very disruptive to real estate titles and, not unimportantly, to long settled municipal practice. In the latter connection, for example, it was pointed out in an amicus brief (Brief Amici Curiae, The Massachusetts Conveyancers Association, Inc. and the Abstract Club, p. 18), that if the Appeals Court was correct in finding an "abutters' easement" in a discontinued town way,

> municipalities now must do something more than a simple discontinuance if they wish to insure that what was a public way will not be used for passage by abutters. In the case of a new discontinuance, the municipality presumably must both discontinue the way (under M.G.L. c. 82, §21), and take, under M.G.L. c. 79, the subsisting private right of passage that otherwise still would exist in favor of the abutters. In the case of a discontinuance made years ago, the municipality may well need to act anew to take the abutters' right of passage, if the municipality desires to complete a process it felt it had been done with long ago. Doing so would reopen municipalities to damages for this later taking, a prospect few municipalities will have anticipated or contemplated in their budgets.

The novel right of passage fashioned by the Appeals Court in its decision, Nylander v. Potter, 38 Mass. App. 605, at 609 (1995), was that although a "discontinuance of a public way terminates the public easement of travel, we hold that the discontinuance does not terminate the private easement of travel which abutters enjoy."

The Supreme Judicial Court disagreed "and conclude[d] that Potter does not have an easement of travel over the Nylander stretch of [the discontinued] road. We reject both the Appeals Court's theory of a so-called 'abutters easement' and the Superior Court's theory of a 'public access' private way as contrary to settled Massachusetts law." Nylander, 423 Mass. at 162.

Although the Supreme Judicial Court's decision is viewed as a vindication of what had long been thought settled law, several features of the Court's decision leave a few questions unanswered. For example, in footnote 7 at 161 of the decision, the Court states in dicta that "a discontinuance of maintenance under [G.L. c. 82] §32A would create a 'public access' private ways" (emphasis added). However, it could be argued that a discontinuance under G.L. c. 82, Section 32A of maintenance does not change the status of the way as a public way, it merely avoids town liability for maintenance.

Although it is true that the Nylanders owned the fee in the first 100 foot stretch of the disputed Bachellor Road, they also owned the fee in the westerly half of the next 788 feet of the road (Nylander, 423 Mass. at 161)the Court's remand to the Superior Court, dealing as it does with only the first 100 feet of the road also appears to leave some issues unresolved. It may have been more helpful to have a clear enunciation of the principle that Potter couldn't travel over any part of Bachellor Road owned by Nylander.

Finally, the Court stated, again only in dicta in fn. 10, at 163 of the decision that "[a] claim for monetary damages is only available if a parcel is rendered landlocked by the discontinuance of a public way" (emphasis added). Under G.L. c. 82, Section 24 and G.L. c. 79, Section 12, it appears that an action for damages lies for a taking which does less than landlock a parcel.

While not explicitly holding that abutting landowners continue to have some easement of passage over a discontinued town way, the Land Court and later the Appeals Court in Schuffels v. Bell, 21 Mass. App. Ct. 76 (1985),

preserved for such landowners a right of access to parcels without other frontage on the ground that the plaintiff's predecessors in title had gained prescriptive rights to use "Old County Road" for access. The Land Court in its decision clearly reached very far to come to the conclusion; there was none of the usual detailed evidence of continuous and uninterrupted adverse use of the way discussed in Judge Randall's decision. The Appeals Court merely noted "in stating the facts, we avoid details. The opinion of the Land court, with which we agree in substance, has a fuller and more graphic statement." Id. at 77. It is probable that both courts were offended by the defendants efforts to impede plaintiff's efforts to reach their land and even though plaintiff's could not (and did not) prove adverse use by persons in the 1840s and '50s, the courts said they had. Contrast Lynch v. Town of Groton, 11 Mass. App. Ct. 1008 (1981).

If a town acquired the fee in the location of a town way or county highway prior to its discontinuance, and if the fee interest in land were considered surplus and unnecessary to the municipality after discontinuance, affirmative action by town meeting (M.G.L. c. 40, §15) is required before that interest in land can be abandoned and conveyed .

6.2 ADVERSE POSSESSION/PRESCRIPTION

The simple answer to a claim that a public highway can be lost by adverse possession or prescription is that such is not the law in Massachusetts, with the exception hereafter noted. See G.L. c. 81, Section 22 as to state highways, discussed above, and G.L. c. 86, Section 3 as to public ways, both providing in essence that if the boundaries of the way are known or can be established, no

length of possession within the limits of the way gives any title in the way to an abutter except in the case of a building used as a residence (G.L. c. 81, Section 22). It is interesting to note that there is no comparable exception for dwellings in c. 86, §3. We conclude that the residential exception in G.L. c. 81, Section 22 is not authority to continue to maintain the encroachment represented by the dwelling, but rather protection against summary removal.

A certain few cases arising before the 1917 enactment of the latter statute, and turning, it seems to me, more on a difficulty in determining the location of the way, did allow a claimant to establish a street line by the location of his abutting fence. See, e.g., Holt v. Sargent, 81 Mass. 97 (1860).

Another early case which permitted adverse possession of a "highway" as against a town, was Cohasset v. Moors, 204 Mass. 173 (1919). There, in the original division of lots in Cohasset in 1670 there was a reservation of land for highways in various places, and, among others, along the shore, between the nearest lot laid out for an individual, and the sea, which reservation covered locus. Cohasset sought to register title to locus (a thirty acre parcel described by the Court as being "the rough, rocky, irregular indented shore of the sea") while Mrs. Moors claimed title to it by adverse possession. In 1867 the county commissioners altered, improved and directed repairs on Jerusalem Road and defined it on a plan (containing much less than 30 acres of land). The court held that by so doing the county commissioners automatically discontinued so much of any highway as might have been reserved previously and that "at least since 1867, the title of the town [to the area reserved for a highway in 1670] has been

like that of any other private owner" and went on to hold that Mrs. Moors had disseized the Town.

6.3 DAMAGES FOR DISCONTINUANCE

Because a state highway discontinuance creates a town way, it is only upon the subsequent discontinuance of the town way that a right to damages vests in an abutter (G.L. c. 82, Section 24). An action for monetary damages is the exclusive remedy for a landowner damaged by the discontinuance of a public way. Nylander v. Potter, 423 Mass. at 163, n. 10. G.L. c. 82, Section 7 provides for damages in the event of the discontinuance of a county highway. Note that a person damaged by a G.L. c. 82, Section 24 discontinuance of a private way is entitled to damages and an indemnity can be required by the town prior to discontinuing.

Damages for discontinuance, like damages for a taking, are governed by G.L. c. 79 and vest upon recordation of the discontinuance order.

In the first instance, a determination must be made as to whether the public convenience and necessity requires that a way be discontinued as no longer needed for the public use or convenience. See Newburyport Redevelopment Authority v. Commonwealth, 9 Mass. App. Ct. 206 (1980), "the question whether to discontinue a town way is political or legislative rather than adjudicatory." (Emphasis supplied.) (we think a G.L. c. 82, Section 32A decision is adjudicatory in nature as certain findings must be made before maintenance can be discontinued).

Because the closing of a public highway is a "taking" of some portion of the value of an abutter's land he may become entitled to damages (G. L. c. 82, Section 24, G.L. c. 79, §12). It has been held that damages are not allowed if the plaintiff's land "does not abut on the portion of the way discontinued if there is access by any public way, because in such a case the damage suffered is only from loss of the enjoyment of a public right which is also suffered in greater or less degree by every member of the community." Harte v. Town of Dartmouth, 45 Mass.App.Ct. 779, 782 (1998); quoting Rand v. Boston, 164 Mass. 354, 363 (1895) (Knowlton, J., dissenting). Compensability in such cases turns on "the distinction between, on the one hand, impairment of access which if substantial may figure as a special and peculiar injury deserving compensation, and on the other hand, diversion of traffic which lies outside the compensable category even if it results in a decline in the property's market value." Harte, 45 Mass.App.Ct. at 781, quoting Malone v. Commonwealth, 378 Mass. 74, 78 (1979).The measure of damages is outside the scope of these materials.

6.4 TITLE TO DISCONTINUED PORTIONS

Since the beginning of reported cases in the Commonwealth, it has been black letter law that an easement for public travel over a person's land leaves the underlying soil in the individual. "By the location of a way over the land of any person, the public have acquired an easement, which the owner of the land cannot lawfully extinguish or unreasonably interrupt. But the soil and freehold remain in the owner although encumbered with a way." Perley v. Chandler, 6 Mass. 454, 455 (1810). Nylander v. Potter, 423 Mass. 158, 161 (1996).

A natural corollary to this proposition is that if the way is discontinued, the freehold, free of the encumbrance of the highway, reverts to the owner. Title revests in abutters to the center line of the way.

But if the authority laying out the way took the fee, upon discontinuance, title remains in the public. Hence the necessity, in G.L. c. 81, Section 12 for an abandonment by the state in the event of a discontinuance of a state highway.

A discontinuance relieves the laying out authority of its obligation to maintain a way; an abandonment relinquishes the interest of the authority in any rights to land.

It is curious that no words of "abandonment" are used in G.L. c. 82 relating to county highways and town ways except, as noted previously, in the section caption of Section 32A. An important distinction between highways and town ways is that highways may not be discontinued without notice to towns and abutters and the concurrence of county commissioners (G.L. c. 82, Sections 1 and 3), while town ways may be discontinued by town meet or city council vote without notice to abutters (G.L. c. 82, Section 21).

Before a town can discontinue a town way it must refer the contemplated action to its planning board for its recommendation and give the board 45 days to respond (G.L. c. 41, §81I). In those few municipalities that have not established a planning board under G.L. c. 41, Section 81A, and that have a board of survey, see G.L. c. 41, Section 73, which regulates the opening of private ways for public use.

Previously, a town way could be converted to a private way by the county commissioners by G.L. c. 82, Section 32A; as amended, I suggest that Section 32A leaves the way a public way, but absolves the town of its maintenance obligations.

Pursuant to G.L. c. 40, Section 15 a town may vote to abandon "any land, easement or right taken for such . . . town, otherwise than by purchase . . ." upon a two-thirds vote of the town, and authorize its conveyance upon such terms and conditions as the town may fix.

7. SEE 2018 SUPPLEMENT

In the case Miguel v. Fairhaven, 25 LCR 631 (2017) Justice Foster of the Land Court had to determine the status of a portion of a roadway in the town of Fairhaven known as North Street. As the court said in its first sentence, "[w]hether a way is private, or has been accepted by the city or town as public, is not a novel question in the Commonwealth." Id. at 631.

In Miguel the Town of Fairhaven insisted that because a Registration Plan filed by Miguel's predecessor in title had identified a portion of North Street as "Public-33.00 Wide" it was indeed a public way and Miguel was estopped from asserting otherwise. The Town, relying on its claim that North Street was a public way issued parking citations to Miguel for parking on the portion of North Street in controversy.

The records of the town clerk's office showed no acceptance of the contested portion of North Street as a public way. There was no record of any dedication to public use of the contested portion of North Street either.

Apparently offended by having received parking citations for parking on a way which he believed to be private, Miguel sued the town seeking a declaration that the contested portion of North Street was not a public way.

After reciting the law in Fenn v. Middleborough (7 Mass. App. Ct. 80 (1979) and its progeny, the court examined each of the three means by which a way can become public, that is by (a) laying out by public authority, (b) by prescription, and, (c) prior to 1846, a dedication by the owner to public use.

After finding that the town had presented no evidence that the contested portion of North Street had become public by any of those three means the court turned to examine the issue of the notation that the contested portion of North Street was "public" on a Registration Plan filed by Miguel's predecessor in title. The Town argued that Miguel was precluded or estopped from asserting that the contested portion of the street was private by virtue of his predecessor having shown it as "public" on the Registration Plan.

The court found "[t]hat the [contested] section of North Street… is shown as 'Public' on the Registration Plan is not determinative of the status of the way. Courts have held that plans or deeds referring to a way as 'public' or a 'town road', prior approval not required (ANR) plan endorsements, building permits issued by a planning board, or the beliefs of public officials, in and of themselves, do not constitute a legally binding precedent that the way is public. See Goldman v. Planning Board. of Burlington, 347 Mass 320, 324-325 (1964)." 25 LCR 633-634. Finding that the status of the road was not the subject of the Registration proceedings, Justice Foster found that the Land Court did not adjudicate the status of North Street as part of the Registration proceedings.

In summing up his decision Justice Foster made the point that I made a number of years ago to the effect that the present burden of establishing a public way has grown significantly greater over the years, comparing Reed v. Mayo, 320 Mass. (1915), and Clark v. Hall, 184 Mass. 164 (1903) on the one hand with Lorial v. Keene, 343 Mass. 358 (1961) and Fenn v. Middleborough. There are public policy reasons for imposing a stringent burden of proof on the party asserting that a way is public "in order to avoid the consequences attendant to a way being public, such as liability for failure to maintain, the expense of maintenance and snow removal and the divisibility of land by ANR plans." Id. at 634.

A recent important easement case decided by our Supreme Judicial Court in 2016 was Kitras vs. Town of Aquinnah, 474 Mass. 132 (2016).

In Kitras the SJC was required to decide whether an easement by necessity was created as a result of an 1878 partition of Native American common land in the Town of Gay Head, now Aquinnah, Martha's Vineyard, Massachusetts.

As stated by the court,

> [a]t the time of the 1878 partition, Gay Head was inhabited solely by members of the Wampanoag tribe of Gay Head [fn. omitted]. When two commissioners appointed by the probate court pursuant to statute partitioned the common land into hundreds of lots to be held in severalty by members of the Tribe, they did not include express easements providing rights of access, leaving the lots landlocked. The plaintiffs are owners of several lots created by this partition and are seeking, over one hundred years later, easements by necessity over the lots of the defendants.

> We conclude that the defendants presented sufficient evidence to rebut the presumption that the commissioners intended to include rights of access and, therefore, no easements by necessity exist. 474 Mass.133.

Before the partition at issue in the Kitras case, Gay Head consisted of about 2400 acres, of which about 450 acres were held in severalty and the remainder was held by the Tribe in common.

At that time (1862) "the prevailing custom of the Tribe admitted 'that any native could, at any time, appropriate to his own use such portion of the unimproved common land, as he wished, and as soon as he enclosed it, with a fence, of however frail structure, it belonged to him and his heirs forever' …[t]he Tribe had another custom that allowed each member access, as necessary, across the common land and lands held in severalty" Id. at 136.

In 1870 Gay Head residents petitioned a Dukes County probate judge to divide the common land for the residents to hold in severalty. "The commissioners completed the partition in 1878. The land was divided into more than 500 lots. Not one lot included an express easement of access. As a result, the majority of the lots divided from the common land were landlocked." Id. at 138.

> An easement is a limited, nonpossessory interest in the land of another that can be created expressly [citations omitted], by prescription [citations omitted], or by implication [citations omitted]. An easement by necessity is a type of implied easement. 'An implied easement is founded on the idea that it is the purpose of the parties that the conveyance shall be beneficial to the grantee,' even if it had not been expressed in the instrument of conveyance. Ward v. McGlory, 358 Mass. 322, 325, (1970), quoting Orpin v. Morrison, 230 Mass. 529, 533 (1918). An easement by necessity most often arises when a conveyance renders a parcel of land landlocked. It provides access over the parcel that is not landlocked, if the parties so intended. There is no public policy that creates an easement by necessity to make land accessible. [citations omitted] It is a purchaser's 'own folly' that he purchased land that had no access to some or all of the land 'and he should not burden another with a way over his land for his convenience' [citations omitted]. 'The law does not give a right of way over the land of other persons to every owner of land who otherwise would have no means of access to it' [citation omitted].
>
> The party claiming an easement by necessity has the burden of establishing that the parties intended to create an easement that is not expressed in the deed [citations omitted]. The law has devised a presumption to assist inquiry into the intent of the parties when a conveyance renders a parcel of land landlocked. It is the presumed intent of the parties that when a parcel of land becomes landlocked as a result of a conveyance the land conveyed included rights of access. [citations omitted] ('for when land is conveyed which is inaccessible without trespass, except by

> passing over the land of the grantor, a right of way by necessity is presumed to be granted; otherwise the grant would be practically useless'); [citations omitted]. It is a 'pure presumption raised by the law' that an easement by necessity exists, and this presumption is construed with strictness [citations omitted]. A presumption of easement by necessity arises upon a showing of the following elements: (1) unity of title; (2) severance of that unity by a conveyance; and (3) necessity arising from the severance, most often when the lot becomes landlocked [citation omitted]. The necessity must have existed at the time of the division [citation omitted].
>
> The parties opposing the easement may rebut the presumption by presenting evidence that at the time of conveyance the parties did not intend to create rights of access [citation omitted]. Id. at 139-140.

"The intent of the parties can be ascertained from the circumstances surrounding the conveyance, the language of the instrument, and the physical condition of the land. Dale v. Bedal, 305 Mass.102, 103 (1940)." [citations omitted] Id. at 140.

After determining that the first two elements of an easement by necessity were present in this case, that there had been a unity of title and a severance of that unity by conveyance, in this case by a partition, the court then sought to determine whether a necessity arose from the partition.

"The primary question in this case is whether, at the time of the partition, the parties intended to provide rights of access to the hundreds of lots divided from the common land." Id., at 141.

The Court went on to hold: "at the time of the partition, the tribal custom admitted free access over all the land, as necessary. It is likely that the commissioners did not think rights of access were necessary because it was provided by tribal custom…The commissioners partitioned the common land after a lengthy process that took into consideration the wants of the members of the Tribe…We infer that the commissioners, upon learning of this tribal custom, determined that it was not necessary to include access rights for the partitioned lots. Also, whether the tribal custom continued after the partition is not relevant. We look to the condition and circumstances at the time of the partition and not subsequent events" [citation omitted]. Id. at 142-143.

The Kitras decision is the result of a strict interpretation of the law and burden of proof and arguably, to some, a harsh result.

Another interesting case, also arising in the Aquinnah area of Martha's Vineyard, was the 2016 SJC case, Taylor, Trustee v. Martha's Vineyard Land Bank Commission, 425 Mass. 682 (2016). This is a case involving the doctrine of overloading an easement.

By way of background, the 1965 SJC decision in Murphy v. Mart Realty of Brockton, Inc., 348 Mass 675 (1965) restated and reinforced two long standing principles of Massachusetts easement law: a deed conveying a parcel of land describing the parcel as bounded by a way has an easement by estoppel to use the entire length and width of the way as appurtenant to the parcel conveyed; and, an easement of way appurtenant to the land conveyed cannot be used by the owner of the dominant tenement to pass to or from other land adjacent to or beyond that to which the easement is appurtenant. To use the easement to access land owned by the dominant owner to which the easement is not appurtenant, is to "overload" the easement. 348 Mass. 677-679.

Hugh Taylor, brother of the Berkshires' own James Taylor, owns, with his wife Jeanne, an inn called the Outermost Inn very near the Gay Head Cliffs and Gay Head Lighthouse at the western tip of Martha's Vineyard.

The Martha's Vineyard Land Bank Commission was charged with preservation of open space and the maintenance of a nature preserve in the Gay Head area and had assembled number of parcels into a nature preserve. The Commission had created a hiking trail which crossed over the land of the Outermost Inn on a 40 foot wide easement and then proceeded across three parcels of Commission land for whose benefit the easement was created, and then entered a fourth parcel, also owned by the Commission, but which was not benefited by the easement. The plaintiffs filed an action in Land Court to prevent the Commission from using the easement on Inn land as part of its hiking trail. They argued, among other things that it was improper, pursuant to Murphy v. Mart Realty, and an overload of the easement across the Inn property to continue on to the Commission's fourth parcel given that the easement was not intended to serve that parcel. On that ground the Land Court

Judge granted a partial summary judgment in favor of the Taylors which was appealed to the Supreme Judicial Court.

The court stated:

> We have long held that a right of way appurtenant to [a particular piece of] land…cannot be used by the owner of the dominant tenement to pass to or from other land adjacent to or beyond that to which the easement is appurtenant. [quoting from Murphy v. Mart Realty]. [citations omitted]. [A]bsent… consent [from the owner of the servient estate], use of an easement to benefit property located beyond the dominant estate constitutes an over[load]ing of the easement' (citation omitted). [citation omitted]. Taylor at 322.

The Commission argued for a relaxation of the strict Murphy rule.

At the end of the day, the SJC held firm on the so-called 'bright line" rule of Murphy v. Mart Realty to the effect that an easement appurtenant to one lot may not be used for access through that lot to other land to which the easement is not appurtenant. Because there had been recent changes in Massachusetts real estate law relating to easements, particularly in the case of M.P.M Builders, LLC v. Dwyer, 442 Mass. (2004), Infra, the defendant sought to have the court adopt a more a fact intensive inquiry as to whether or not it is appropriate in each case to permit access over an easement appurtenant to one lot to another lot beyond. Opting for predictability and certainty, the SJC upheld the bright line ruling of Murphy.

M.P.M Builders is a case which provided a marked development in the law of easements beyond Massachusetts common law.

M.P.M. Builders, LLC v. Dwyer, 442 Mass. 87 (2004) was a case which upended more than 150 years of settled Massachusetts law.

Mr. Dwyer owned a parcel of land in Raynham, Massachusetts abutting land owned by M.P.M. Dwyer had purchased his property in 1941 and it enjoyed an appurtenant easement of access described as a "right of way along the cartway to Pine Street" across M.P.M's land. The cartway branched into three separate access routes to Dwyer's land.

After M.P.M received definitive subdivision approval to develop its property as seven house lots it sought to relocate Dwyer's cartway easement to make its development more convenient. As described by the court:

> [b]ecause Dwyer's easement cuts across and interferes with construction on three of M.P.M.'s planned lots, M.P.M. offered to construct two new access easements to Dwyer's property. The proposed easements would continue to provide unrestricted access from the public street (Pine Street) to Dwyer's parcel in the same general areas as the existing cartway… M.P.M. has agreed to clear and construct the new access ways, at its own expense, so 'that they are as convenient [for the defendant] as the existing cartway [ ].' Dwyer objected to the proposed easement relocation, ' preferring to maintain [his] right of way in the same place that it has been and has been used by [him] for the past 62 years.' 442 Mass. 88.

After trial at the Land Court, the Land Court judge concluded that under "settled" common law once the location of an easement had been fixed it could not be changed except by agreement of the estate owners. He granted summary judgment in favor of defendant Dwyer.

On direct appellate review the Supreme Judicial Court reversed, holding that the owner of a servient estate should be entitled to change the location of an easement burdening his estate without the consent of the dominant estate owner, provided certain protections are afforded to the owner of the dominant estate.

The Supreme Judicial Court adopted a more modern rule proposed by the American Law Institute in its Restatement (Third) of Property (Servitudes) §4.8 (3) which provided in part:

> Unless expressly denied by the terms of an easement…the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owners's expense, to permit normal use or development of the servient estate, but only if the changes do not (a) significantly lessen the utility easements, (b) increase the burdens on the owner of the easement in its use and enjoyment, or (c) frustrate the purpose for which the easement was created. Id. at 90.

The SJC held:

> We are persuaded that § 4.8 (3) strikes an appropriate balance between the interests of the respective estate owners by permitting the servient owner to develop his land without unreasonably interfering with the easement holder's rights. The rule permits the servient owner to relocate the easement subject to the stated limitations as a 'fair trade-off for the vulnerability of the servient estate to increased use of the easement to accommodate changes in technology and development of the dominant estate' [citation omitted]. Therefore, under §4.8 (3), the able owner of the servient estate is to make the fullest use of his or her property allowed by law,

> subject only to the requirement that he or she not damage other vested rights holders' [citation omitted]. Id at 91.
>
> Regardless of what heretofore has been the common law, we conclude that §4.8(3) of the Restatement is a sensible development in the law and now adopt it as the law of the Commonwealth. Id at 91.

"So long as the easement continues to serve its intended purpose, reasonably altering the location of the easement does not destroy the value of it….A rule that permits the easement holder to prevent any reasonable changes in the location of an easement would render an access easement virtually a possessory interest rather than what it is, merely a right of way." Id. at 93.

In seeking the court's determination that an easement relocation meetings the requirements of §4.8 (3) the servient owner may not resort to self-help. Id. at 93.

While the Supreme Court states early in its decision that it permitted M.P.M.'s appeal to decide whether Massachusetts law should permit the owner of a servient estate to change the location of an easement without the easement holder's consent, the practical effect of the case is that the dominant estate owner has to ask permission of the servient estate owner to relocate the easement and if the servient estate owner declines, seek a judicial determination that it may relocate the easement. The relief sought by the easement holder in court will be a judicial determination that the three Restatement §4.8(3) criteria have been met at the expense of the dominant estate owner.

The M.P.M Builders case affords the prospect of much greater developability of land than before the decision; compare it to Murphy v. Mart Realty and Taylor v. Martha's Vineyard Land Bank Commissioner.

In a classic case of "beg for forgiveness rather than ask for permission" Weston, MA residential lot owners whose property was subject to a common driveway easement a benefiting a neighboring lot undertook "a major landscape and hardscape improvement project on their lot, which altered the location, dimensions, alignment, and grading of the then-existing driveway easement." Shajii v McDade 26 LCR 716 (2017).

Months after starting the major driveway improvement project, which, among other things, included the installation of a fountain in the middle of the driveway now to be surrounded by a circular drive of paving stones, the plaintiffs filed a suit in the Land Court pursuant to M.P.M. Builders seeking declaratory judgment that their modifications to the driveway were reasonable and authorized by an oral agreement between the parties.

After trial Chief Justice Cutler found that the owners of a parcel of land in Weston containing about 6.75 acres in 1989 divided that parcel into two separate house lots to be served by a proposed common driveway.

After division, the property at 161 Boston Post Road contained 3.31 acres and the property at 165 Boston Post Road contained 3.46 acres. The plaintiffs Shajii owned 165 Boston Post Road which was crossed by a common driveway providing access to Lots 1 and 2 and extending northerly through both lots from Lot 1's Boston Post Road frontage to the rear boundary of Lot 2 where it connected to a second easement, 30 feet wide, back to Boston Post Road. McDade became the owner of Lot 1 together with an appurtenant easement to cross Lot 2. The easement provided further that the owners of Lots 1 and 2 "shall share evenly in the reasonable cost associated with repair and maintenance of Grantee's Easement Area including repaving and removal of ice of snow and ice." Id. at 717.

In May 2013 plaintiffs commenced construction of substantial landscape and hardscape improvements to the area in front of their house on Lot 2 at a cost of almost $450,000. The defendant McDade used the common driveway for access to his house on Lot 1, and preferred the common driveway because direct access to Boston Post Road from Lot 1 was described as "difficult."

The construction project "significantly altered the dimensions, location, alignment and physical conditions of the [common driveway on Lot 2] as follows:

> a. …relocates the [common driveway] approximately 34 feet to the east of its original point of connection with the Lot 1 driveway…and at an elevation that is approximately 5

> feet higher than the Lot 1 driveway, thereby completely disconnecting the [common drive on Lot 2] from the Lot 1 driveway.
>
> b. …blocks of the original connection between the Lot 1 driveway and the [common driveway on Lot 2] by…installing a line of large boulders….
>
> c. …reduces the width of the [common driveway] at the point of connection with Lot 1 to…10.5 feet nearly half of its original width of 19 feet.
>
> d. ….
>
> e. In the area in front of Plantiffs' house, the Project replaces the relatively straight alignment of the [common driveway on Lot 2] with a 60+/- diameter circular driveway, encircling an approximately 16-foot diameter fountain, and bordered with a stone retaining wall on its eastern side….
>
> f. ….
>
> g. Where once there were no physical impediments to access between the 'common driveway on Lot 2] and the [30 foot easement to Boston Post Road], the Plantiffs have installed and propose to maintain control of a new electronic gate….Id. at 718-719.

In their Land Court complaint the plaintiffs seek "among other forms of relief, a declaration that, consistent with the holdings in M.P.M. Builders, and Martin v. Simmons Properties, LLC, 467 Mass. 1, 10 (2014), they had the right as the servient estate holder or holders to make all of the changes resulting from their Project." Id. at 719.

After trial Chief Justice Cutler found,

> "[t]hat the alterations made to the [common driveway on Lot 2] as result of the Project are, cumulatively, unreasonable. By completely disconnecting the [common driveway on Lot 2] from the driveway on Lot 1, by narrowing the width, steepening the grade, realigning the relatively straight driveway into a circular one with the added physical obstacles of the fountain and retaining wall, and by installing a narrow, electronic entrance gate, Plaintiffs have significantly lessened the utility of the [common driveway on Lot 2] as originally contemplated, increased the burdens on Defendant's use and enjoyment of the [common driveway on Lot 2], and frustrated the [common driveway on Lot 2's] purpose of connecting Lot 1 with [the 30 foot] easement. Accordingly, the changes are not consistent with the standard set forth in M.P.M. Builders…" Id. at 720.

The court found that the defendant was entitled to judgment, but before entering judgment she required the parties to consult and, "within 60 days, submit an agreed upon form of proposed judgment, including, but not limited to, the parameters and timing for the proposed restoration of the [common driveway on Lot 2]….alternatively, if the parties cannot agree on a form of proposed judgment….the court will proceed to enter

judgment consistent with this Decision, which will, at a minimum, include orders requiring restoration of the southern section of the original [common driveway on Lot 2] (including its original connection with Lot 1); requiring removal of the electronic access gate and attendant structural components from the northern end of the [common driveway on Lot 2]; [and] requiring removal of the fountain from the center section of the [common driveway on Lot 2]…." Id. at 723.

In a factually complicated case involving registered land the Supreme Judicial Court held, in Martin v. Simmons Properties, LLC, 467 Mass. 1 (2014), that the fact that the easement was over registered land and shown on a Land Court plan did not effect a determination as to whether the servient owner could modify the dimensions of the easement and, because the modifications to the width and certain other particulars of the easement made by the servient owner did not frustrate the purpose of the easement or lessen its utility to provide the dominant owner with access to and from his parcel of registered land, the court did not require the servient estate to remove certain encroachments (an entry foyer, parking spaces, a loading dock, utility poles or a pile of fill) from the easement.

Plaintiff's parcel of registered land had no means of access to a public way except over an easement over land of the defendant, Simmons Properties, LLC. The easement area is shown on the registered land plan but the legal description of the easement does not contain any recitation of its width or any requirement that it kept open at all times to the full extent, width and length of the easement area.

The defendant servient estate owner had installed an entrance foyer encroaching into the plaintiff's easement adjacent to an elevator shaft which had been attached to the building since before 1940. The entrance foyer extended no further into the easement area than did the elevator shaft. It also installed a depressed loading dock adjacent to the elevator shaft. The effect of the entrance foyer and loading dock was to reduce the effective width of the easement area appurtenant to plaintiff's registered land.

The Court first determined that the fact of land registration did not affect the rule laid down in M.P.M. Builders that the owner of the servient estate could alter or relocate an easement over its land if in doing so it complied with criteria of Restatement § 4.8 (3).

The defendant Simmons Properties, LLC made alterations in the easement area before the Court had adopted Restatement §4.8 (3) and thus did not use "self-help" in making changes to the width of plaintiff's easement.

The plaintiff asserted, and the Appeals Court (which had earlier ruled on the Martin v. Simmons Properties case), agreed, that because the easement was a registered easement on registered land shown on the registered Land Court plan the easement's width and other features were "immutable" and could not be varied from those features shown on the plan.

The Supreme Judicial Court, quoting from its decision in M.P.M. Builders to the effect that so long as the easement continues to serve its intended purpose a reasonable alteration of the location as permitted by Restatement § 4.8 (3) does not destroy the value of the easement. The Court went on to hold that this reasoning applies as well to circumstances such as those in the Martin case where there has been no relocation of the easement, but where the width of the unobstructed easement has been narrowed in some places, while still leaving travel by any existing or foreseeable vehicle unimpeded. Martin, 467 Mass. at 12.

"We discern nothing in the land registration act, G.L. c. 185, to support a different understanding of the law of easements concerning registered land as opposed to recorded land." Id. at 12.

"Martin's certificate of title, by contrast, does not contain any reference to the full width of the easement as drawn on the J-P Plan, or any language restricting a change in its dimensions, prohibiting other uses, or requiring that the easement be kept open throughout its full extent." Id. at 16.

"As they exist today, and given Martin's current use of his property, the encroachments into [the easement area] do not lessen its utility for passage of vehicles much larger than any in existence when the way was created, do

not increase the burden on Martin in his use of the way, and do not frustrate the purpose of travel to Martin's lot. See Restatement, *supra* at§ 4.8 (3). Thus, we affirm the judgment of the Land Court that the encroachments by Simmons, and by its predecessors in interest at some point no later than 1987, do not interfere with Martin's easement rights to passage over [the easement area], and Simmons is not liable for removal of any of the obstructions. As the judge noted, however, this matter may be revisited should Martin redevelop lot 3A in such a manner that these obstructions impede upon his use of the easement for its intended purpose." Id at 17.

The doctrine of estoppel describes a bar preventing a party from asserting a fact or making a claim inconsistent with the position that party previously took, either by conduct or words, especially where a representation has been relied upon by another to their detriment. Massachusetts has easements by estoppel which arise when one describes a parcel of land being conveyed as bounding on a way. The courts have held that the grantor is thereby estopped from denying the existence of the way or preventing the grantee of the parcel from having an easement to use the way. An easement by estoppel also arises when parcel is conveyed according to recorded plan showing the parcel as bounding on a street or way. Murphy v. Mart Realty is an estoppel case because there a parcel of land was conveyed by deed describing the land as bounding "westerly by a proposed street shown on said plan…." Murphy, at 676.

The Supreme Judicial Court case of Cater v. Bednarek, 462 Mass 523 (2012) is a case where the defendants argued that the plaintiff's easement was extinguished by estoppel.

The court held,

> [t]he facts are not materially in dispute. The Cater parcel was created in 1899 when Charles W. Cobb carved off and conveyed the northeast corner of his estate to Lorenzo D. Baker by deed dated September 7, 1899 …. [fn omitted]. Cobb's remaining estate…extended eastward to a 'proprietor's way' now known as Fisher Road, which at the time was the only road bordering the Cobb estate. In 1899 deed, Cobb granted to Baker and his successors a 'right-of-way… across my land on the east in the road now established' [fn omitted]. The 1899 deed does not include a more detailed description of either the location or the width of the right of way. No footpath or roadway existed in 1899 across land that had once been part of the Cobb estate to connect the Cater parcel to any street and none has been established.

> Over the next eighty years, the Cobb estate was further divided, transferred, and developed so that by 1976 the estate had been split into nineteen parcels of various sizes and shapes….
>
> In 1908, Cobb's widow conveyed a plot of land by warranty deed to Manuel Fisher…that was carved out of the Cobb estate and is adjacent to the Cater parcel, and includes the parcels now held by the defendants. The warranty deed stated on a printed form that the property was 'free from all encumbrances' and makes no reference to the easement in the 1889 deed [fn. omitted] Id. at 525-526.

Residences had been constructed on a number of properties which had previously been part of the Cobb estate and which were located between the Cater parcel and Fisher Road. There was one undeveloped parcel owned by the Truro Conservation Trust and then four developed properties owned by individual homeowners, each of which had had a residence constructed on it between 1931 and 1969. The Caters purchased their parcel in 1979 and their deed recited the right of way created in the 1899 deed.

"The judge recognized that the Caters and their predecessors in title had not sought to make use of the easement for ninety-eight years, until 1997, and only then informed the defendants of the easement." Id. at 527.

The judge found was no evidence the easement had been extinguished by express grant or release or that the Caters or their predecessors in title has abandoned the right of way noting that the only evidence of abandonment was nonuse and noting further that "the mere non-use of an easement, no matter how long the duration, will not work an abandonment of an easement." Id. at 538. The judge also found that the construction of houses on those parcels and the passage of time had caused the easement to be modified by prescription in that the easement now had to 'steer [ ] clear' of the houses. However, the judge found that the easement had not been extinguished by prescription because the development of those parcels was not "irreparably inconsistent with the continued existence of the right-of-way." Id. at 528.

Turning to the question as to whether or not the easement was extinguished by estoppel the Supreme Judicial Court, at the urging of the defendants, adopted the elements required for a finding of estoppel as set forth in Restatement (3rd) of Property (Servitudes) §7.06 (2000), which provides:

> A servitude is modified or terminated when the person holding the benefit of the servitude communicates to the party burdened by the servitude, by conduct, words, or *silence*, an intention to modify or terminate the servitude, under circumstances in which it is reasonable to foresee that the burdened party will substantially change position on the basis of that communication, and the burdened party does substantially and detrimentally change position in reasonable reliance on that communication (emphasis added). Id. at 531.

"The defendants argue that the silence of the Caters and their predecessors in title of the land between the Cater parcel and Fisher Road was developed 'clearly signifies a belief that the easement will not be used,' and defendants were reasonably permitted to rely on this silence in developing their properties and did so". Id. at 531.

The court went on to adopt the commentary in the Restatement that reflects the need for caution before modifying or in extinguishing an easement by estoppel:

> These policies [of estoppel] conflict with the policies underlying the Statute of Frauds and recording acts which require that transactions designed to modify or terminate servitudes be evidenced by formal written instruments. Although the balance is struck in favor of preventing injustice, courts should be cautious in applying estoppel, particularly where the servitude in question is of substantial value to the dominant estate. Id. at 532.
>
> Here, the defendants claim that they were misled by the silence of the owners of the dominant estate regarding the existence of an easement when the defendants built and improve their homes on the servient land. To prevail on a claim of estoppel based on silence, the defendants must prove that the silence of the owner of the dominant estate communicated an intention to modify or terminate the easement to the owner of the servient estate, which the latter reasonably relied on to its substantial detriment. Id. at 532.
>
> The judge did not err in finding that the easement was not extinguished by estoppel where the deed that created the easement did not specify a location, and where the judge found the defendants 'hard-pressed' to demonstrate detrimental reliance as to the entirety of their properties….the dominant owners' silence regarding the easement during construction of the houses could not reasonably be understood to communicate an intention to terminate the easement as long as a roadway that would not produce substantial detriment remained possible. Id. at 532-533.

While the SJC remanded the Cater case to the Land Court for further proceedings having to do with the configuration and width of road connecting Fisher Road to the Cater parcel, the Supreme Judicial Court's finding that the easement was not extinguished by estoppel remained the rule of the case.

Good Descriptions Make Good Neighbors

Kathleen M. O'Donnell, Esq.

Conservation Restrictions and Mixed Uses

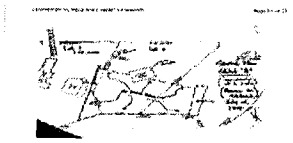
- No-Build Areas and Site Easements:

  Gosselin v. Pizzano - Land Court Misc Case 15-000265 (12/28/16)

  - Action brought by property owners to clear title by removing Site Easement and No-Build Restriction imposed by a common owner on three adjoining house lots
  - Sketch plan not attached to original grant of easement
  - No-build area described as "field", no dimensions, no boundary lines

Subdivision Plan

Sketch Plan



Declaration of Covenants and Restrictions

- Developers of subdivisions typically establish a homeowners association to take over the maintenance of private ways, drainage basins and common areas.
- Thompson v. White - Land Court Misc Case 06-327234 - 3/2/17

Decades long fight between neighbors over access to trails established in Declaration and shown on a sketch plan

Sketch Plans - Issues

- Are they legible? Not in this case
- Does the Declaration describe the details?
- Is the homeowner's association active?
- Why do people use them?

Agricultural Preservation Restrictions

- Established to protect and preserve agricultural lands, preserve natural resources, maintain active commercial agriculture and ensure resale of land at sustainable prices
- In return for sale of development rights, holder gets option to purchase at Fair Market Agricultural Value (FMAV)
- New structures - need approval from holder:
  - Submit approved farm plan
  - Must be authorized by restriction
  - Doesn't defeat or derogate from purposes of APR

Sale of Agricultural Land Subject to APR

Sale to bona fide purchaser

- Holder has option to purchase or assign option to purchase at Fair Market Agricultural Value
- FMAV includes agricultural improvements, business value, goodwill, and infrastructure
- FMAV determined by independent appraisal paid for by grantor
- Price is FMAV times inflation rate from date of appraisal at time of grant to date of P&S
- 120 days to exercise

Exclusions

- Sale to children, grandchildren, spouse
- Will or intestacy
- Sale to co-owner

Notice to Agricultural Lands Preservation Commission

- Notification on sale - if owner is selling both APR and non-APR land, owner must submit a written apportionment of values as stated in the P&S
- Submit Offer to Purchase, the P&S and all amendments, any appraisal prepared in connection with the proposed sale, and request for waiver of option to purchase

Mixed Use - Why?

- Acquisition of property by City or Town has several funding sources - e.g. Community Preservation Act Funds and General Fund
- CPA Land Purchase might include funding from different accounts for different purposes - e.g. Cable Mills in Williamstown - CPA funding for historic, open space and affordable housing
- Sketch plans showing uses - attached to Town Meeting Vote? Attached to Deed?

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