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Massachusetts Land Court.
Department of the Trial Court.

John J. LEAHY, Martha A. Leahy, John J. Twomey, Margaret B. Twomey, William O. Bill, Elinor M. Bill, Joan Delmore, Barry E. Egan and Patricia Egan, as Trustees of Egan Realty Trust, William Henderson, Margaret Henderson, Janet Hunt, Sandra Kristiansen, Stuart Kristiansen, Albert F. Lenzi, Joan M. Lenzi, Cristin F. Luttazi, Sheila O. Luttazi, Brian J. Melia, Maureen Walsh-Melia, Tracy Ann Murphy, Bertha Narinian, Sandra Narinian and Greg Narinian, as Trustees of Narinian Realty Trust, Claire Nauen, Park Avenue Associates Inc., Donald Quinlan, Patricia Quinlan, Daniel R. Rosenthal, Elizabeth Wade Whitehead, as Trustee of Lansing Realty Trust, James S. Weaver and Harriet S. Weaver, Plaintiffs,
v.
Ann Marie T. BROWN, Charles V. Lynch, Jr., Kathleen E. Cavanaugh, Phyllis Timmins, Mary A. Crimmins, William J. Delaney, D. Delaney, Robert K. Lapoint, L. Lapoint, Lisa A. Douglas, as Trustee of Malfa Realty Trust, Richard F. Lyman, Ronald C. Mafera, Jeanne M. O'Connor, James J. Ryan, John Puglisi, Una Puglisi, Douglas J. Richards, Anne L. Richards, Robert H. St. Germain and Richard S. Small, as Trustees of Widmill Lane Realty Trust, Helen S. Shah, Ellen L. Shrago, Paul T. Souliotis and Burton L. Williams, as Trustees under the Will of Paul T. Souliotis, Donna Spadafora and Toni Ann Spadafora-Sadler, as Trustees of Windmill Lane Nominee Trust, R. Bergen Van Doren, Philip D. Wrin, Mary L. Wrin, and Monica T. Graveline, as Trustees of Monica T. Graveline Trust, Defendants.

No. 300916 (AHS). | Aug. 28, 2008.

Opinion

DECISION

ALEXANDER H. SANDS, III, Justice.

***1** Plaintiffs filed their unverified Complaint on July 30, 2004, seeking a declaratory judgment pursuant to G.L. c. 231A relative to a claimed easement by implication and easement by prescription in the Hyannis Park beach (the "Beach") located in Yarmouth, MA. Defendant Helen S. Shah ("Shah") filed her Answer on September 1, 2004. [1, 2] On September 7, 2004, Defendants Ronald C. Mafera, James J. Ryan and Richard Lyman ("Mafera") filed their Answer and Counterclaim alleging that none of Plaintiffs have a right to use Stone Avenue as access to the Beach, and Crossclaim against Defendant Linda Ellen Shrago ("Shrago"), alleging that they own land which is in Shrago's name located on the Beach. [3, 4] On September 30, 2004, Defendants Burton L. Williams and Paul T. Souliotis, Trustees under the will of Paul T. Souliotis ("Souliotis"), filed their Answer. [5] On October 26, 2004, separate Answers

were filed by Shrago, Defendants Douglas and Anne Richards (the "Richards"), and Defendants Robert H. St. Germain and Richard S. Small, Trustees of the Windmill Lane Realty Trust dated December 3, 1996 ("Windmill Trust I").[6] Defendants Ann Marie T. Brown and Charles Lynch, Jr. ("Brown/Lynch"), Kathleen Cavanaugh and Phyllis Timmins ("Cavanaugh/Timmins"), William J. Delaney and D. Delaney (the "Delaneys"), Robert K. LaPointe and L. LaPointe (the "LaPointes"), Jeanne M. O'Connor ("O'Connor"), John Puglisi and Una Puglisi (the "Puglisis") and Monica Graveline as Trustee of Monica T. Graveline Trust ("Graveline Trust") filed their Answer on October 28, 2004.[7] On October 29, 2004, Defendants Donna Spadafora and Toni Ann Spadafora-Sadler, as Trustees of the Windmill Lane Nominee Trust dated November 19, 2000 ("Windmill Trust II"), filed their Answer and Counterclaim, alleging termination of Plaintiffs' easement, if any, to use the Beach by adverse possession.[8] Plaintiffs filed their Response to Windmill Trust II's counterclaim on November 15, 2004. On December 20, 2004, Defendants Mary A. Crimmins (Crimmins"), Lisa A. Douglas as Trustee of Malfa Realty Trust ("Malfa Trust"), and R. Bergen Van Doren ("Van Doren") were defaulted. On December 20, 2004, Plaintiffs filed their Response to Mafera's counterclaim. On September 14, 2005, a Stipulation of Voluntary Dismissal was filed with respect to Plaintiffs Bertha Narinian, Sandra Narinian and Greg Narinian as Trustees of Narinian Realty Trust (the "Narinian Trust"), owners of property located at 51 Park Avenue, and James S. Weaver and Harriet S. Weaver (the "Weavers"), owners of property located at 5 Russo Road. Defendants Philip D. Wrin and Mary L. Wrin (the "Wrins") filed their Answer on October 6, 2005.

Plaintiffs[9] filed their Motion for Summary Judgment on November 15, 2006, together with supporting memorandum, claiming an implied easement in the Beach. The Wrins filed their Opposition on December 14, 2006, together with Affidavit of Michael B. Stusse. On December 15, 2006, Brown/Lynch, the Delaneys, the LaPointes, Windmill Trust I, Graveline Trust, and Windmill Trust II (the "Six Defendants") and O'Connor filed their separate Oppositions and Cross-Motions for Summary Judgment, together with Affidavits of Chester N. Lay, Robert Daylor and Andrea Graveline, and portions of Deposition Transcripts of Joan Delmore, Patricia Egan, Christine K. Greeley, Margaret Henderson, William Henderson, Janet L. Hunt, Sandra Kristiansen, Stewart Kristiansen, John J. Leahy, Albert F. Lenzi, Joan M. Lenzi, Sheila Luttazi, Cristin Luttazi, Brian Melia, Tracy Ann Murphy, O'Connor and Barbara Tessmer. On December 20, 2006, Reilly and Shah filed separate Cross-Motions for Summary Judgment. On January 12, 2007, Plaintiffs filed their Opposition to Cross-Motions of the Six Defendants, O'Connor, Reilly and Shah (together with the Wrins, the "Summary Judgment Defendants"). On the same day, Plaintiffs filed a Motion to Strike Affidavits of Robert Daylor and Chester Lay. On February 6, 2007, O'Connor and the Six Defendants filed their Replies to Plaintiffs' opposition. All motions for summary judgment were heard on February 16, 2007, and taken under advisement.

***2** Summary judgment is appropriate where there are no genuine issues of material fact

and where the summary judgment record entitles the moving party to judgment as a matter of law. *See Cassesso v. Commissioner of Correction,* 390 Mass. 419, 422 (1983); *Community Nat'l Bank v. Dawes,* 369 Mass. 550, 553 (1976); Mass. R. Civ. P. 56(c).

This court finds the following facts are not in dispute:

1. Plaintiffs and Defendants [10] are all owners of lots located in Hyannis Park, a beachfront subdivision in Yarmouth established in 1892 ("Hyannis Park"). The Hyannis Park lots are shown on three plans titled "Plan of Lots at Hyannis Park situated in Yarmouth, Mass. December, 1892" prepared by Hayward and Howard, Civil Engineers (the "1892 Plans"): the first (the "1892 Plan 1") marked "for sale by John V. Scott" and recorded at Barnstable County Registry of Deeds (the "Registry") in 1892 at Plan Book 26, Page 103; the second (the "1892 Plan 2") marked "for sale by Hyannis Park Land Co Brockton Mass" and recorded at the Registry in 1894 at Plan Book 26, Page 105; and the third, revised September 1895 (the "1892 Plan 3"), marked "for sale by Hyannis Park Land Co Brockton Mass" and recorded at the Registry in 1895 at Plan Book 26, Page 113. The 1892 Plan 1 shows 315 small lots (mostly rectangular and comprising approximately 4,000 to 4,500 square feet each), twenty-six of which are waterfront lots, and five significantly larger irregularly shaped areas of open space dispersed throughout the subdivision, one labeled "Park" and one lying between the oceanfront lots and the low water line of Lewis Bay. The 1892 Plan 1 shows a number of streets throughout the subdivision and seven streets which run to the waterfront. The 1892 Plan 2 shows eighteen new lots (marked A-R) and a resulting reduction in the open space labeled "Park." [11] The 1892 Plan 3 shows eleven new lots (marked 316-321 and S-W), four of which are waterfront lots, a resulting reduction of another of the open spaces, and a new road called Stone Avenue running from Brockton Avenue to the waterfront. Thirty of the 344 lots as shown on the 1892 Plan 3 are waterfront lots.

2. John V. Scott, Leon Williams, Dennis B. Kelleher ("Kelleher") and L. Fisher Kent were the original owners of Hyannis Park as tenants in common pursuant to a deed from Augusta F. Crocker dated August 10, 1892 and recorded with the Registry at Book 201, Page 562. [12] The Security Investment Company ("Security") took a three-fourths interest in Hyannis Park by deeds from John V. Scott, Leon Williams and L. Fisher Kent dated November 4, 1892 and June 1, 1893, and recorded with the Registry at Book 206, Page 217 and Book 206, Page 259. Kelleher retained his one-quarter interest in Hyannis Park. Security was the developer of Hyannis Park. [13] Hyannis Park Land Co ("Land Company") appears to have been a selling agent for Hyannis Park.

3. There were thirty-two original Plaintiffs, all of whom own inland lots in Hyannis Park and who are successors in interest to owners of lots which were originally conveyed by Security and Kelleher. [14] John J. Leahy and Martha A. Leahy (the "Leahys") own property located at 11 Park Avenue; [15] John J. Twomey and Margaret B. Twomey (the "Twomeys") own property located at 44 Park Avenue; William O. Bill and Elinor M. Bill (the "Bills") own property located at 1 Lansing

Lane; [16] Joan Delmore ("Delmore") is a part owner of property located at 20 Grove Street; Barry E. Egan and Patricia Egan, as Trustees of Egan Realty Trust (the "Egan Trust") own property located at 20 Russo Road; [17] William Henderson and Margaret Henderson (the "Hendersons") own property located at 37 Highland Street; Janet Hunt ("Hunt") is a part owner of property located at 30 Grove Street; Stewart Kristiansen and Sandra Kristiansen (the "Kristiansens") own property located at 52 Highland Street; Albert F. Lenzi and Joan M. Lenzi (the "Lenzis") own property located at 15 Park Avenue; Cristin F. Luttazi and Daniel R. Rosenthal ("Luttazi/Rosenthal") own property located at 22 Park Avenue; Sheila O. Luttazi ("Luttazi") owns property located at 18 Park Avenue and resides there with Plaintiff Tracey Ann Murphy ("Luttazi/Murphy"); Brian J. Melia and Maureen Walsh-Melia (the "Melias") own property located at 31 Grove Street; Claire Nauen ("Nauen") owns property located at 36 Park Avenue; Park Avenue Associates, Inc. ("Associates") owns property located at 28 Park Avenue; Donald Quinlan and Patricia Quinlan (the "Quinlans") own property located at 11 Grove Street and 24 Grove Street; Elizabeth Wade Whitehead, as Trustee of the Lansing Realty Trust ("Lansing Trust") owns two properties located on Arlington Street.

***3** 4. There were thirty original Defendants, all of whom own property adjacent to the tidal flats of Lewis Bay. [18] The Wackrows (formerly Brown/Lynch) own property located at 5 Glenwood Street; Cavanaugh/Timmins own property located at 11 Windmill Lane; [19] the Delaneys and the Lapointes ("Delaney/LaPointe") own property located at 15 Windmill Lane; Reilly (formerly Mafera) owns property located at 7 Stone Avenue; O'Connor owns property located at Grove Street; the Puglisis own property located at 7 Windmill Lane; the Richards own property located at 63 Park Avenue; Windmill Trust I owns property located at 1-2 Windmill Lane; Shah owns property located at 2 Highland Street; the Windsong Trust (formerly Windmill Trust II) owns property located at 17 Windmill Lane; the Wrins own property located at 4 Glenwood Street; and the Graveline Trust owns property located at 7 Grove Street.

Beachfront lots (owned by Defendants).

5. Lots 147 and 148, known as 2 Highland Street, are owned by the Shah Trust by deed dated October 8, 2003, and recorded with the Registry at Book 17778, Page 259. Lot 147 was the first lot of Hyannis Park deeded out by deed of Security and Kelleher dated June 6, 1893, and recorded with the Registry at Book 206, Page 278. [20] The deed stated as follows:

> "A certain lot of land situated in Yarmouth in said Barnstable County and being lot numbered one hundred forty-seven as shown on [the 1892 Plans]. The south side of said lot measuring 50 feet, the east line 85.2 feet, the north line 50 feet and the west line 81.5 feet." [21]

The first deed out for Lot 148 was dated June 12, 1896, recorded with the Registry at Book 222,

Page 264, and stated as follows:

> "Said lot is situated *on the waterfront,* on the southeast corner of Highland St., the south

line of said lot measures fifty (50) feet, the west line measures seventy seven and 7/100 (77.7) feet, the north line fifty (50) feet, and the east line eighty one and 5/100 (81.5) feet ... Together with a right of way from said lot to the public streets." (Emphasis supplied).

6. Lots 13 and 45, known as 4 Glenwood Street, are owned by the Wrins by deed dated May 16, 1985, and recorded with the Registry at Book 4541, Page 126. The first deed out for Lot 45 was dated July 26, 1893, recorded with the Registry at Book 206, Page 295, and stated as follows:

"Said parcel of land is bounded and described as follows viz. Northerly on lots fourteen and forty-four forty-five feet, westerly by lot number forty-six eighty feet, southerly *by land of the grantors* forty-five feet and easterly by lot number thirteen, eighty feet.... Together with a right of way from said lot to the public streets." (Emphasis supplied).

The first deed out for Lot 13 was dated June 5, 1895, recorded with the Registry at Book 217, Page 239, and stated as follows:

"Said parcel of land is bounded and described as follows viz. The southeasterly side of lot numbered thirteen measures eighty-one and four tenths (81.4) feet, the southwesterly side measures forty-two and nine tenths (42.9) feet, the northwesterly side measures eighty (80) feet and the northeasterly side measures fifty-seven and eight tenths (57.8) feet ... Together with a right of way from said lot to the public streets."

***4** 7. Lots 109, 110 and 111, known as 7 Grove Street, are owned by the Graveline Trust by deed dated April 26, 2001, and recorded with the Registry at Book 13908, Page 303. The first deed out for Lot 111 was dated June 6, 1894, recorded with the Registry at Book 256, Page 115, and stated as follows:

"Said parcel of land is bounded and described as follows, viz: The east line of lot numbered one hundred eleven measurers 80 ft., the south line 53 ft., the west line 80 ft., and the north line 53 ft.... Together with a right of way from said lot to the public streets."

The first deed out for Lot 109 was dated August 10, 1894, recorded with the Registry at Book 374, Page 84, and stated as follows:

"Said parcel of land is bounded and described as follows, viz: Southeasterly by Vernon Street eighty (80) ft., southwesterly *by land of Grantors* fifty three (53) ft northwesterly by Lot No. 110 eighty (80) ft. and northeasterly by lot No. 108 fifty three (53) ft.... Together with a right of way from said lot to the public streets." (Emphasis supplied).

The first deed out for Lot 110 was dated September 20, 1897, recorded with the Registry at Book 328, Page 23, and stated as follows:

> "Said parcel of land is bounded and described as follows, viz: Beginning at a point fifty three (53) feet south-east on the southeast corner of Grove street, *on the water front*, thence continuing in the same line fifty four (54) feet, thence northeasterly eighty (80) feet, thence northwesterly fifty four (54) feet, thence southwesterly eighty (80) feet to the point of beginning.... Together with a right of way from said lot to the public streets." (Emphasis supplied).

8. Lot 138, known as a parcel on Grove Street, is owned by O'Connor by deed dated February 28, 1969, and shown on Certificate of Title No. 44976.[22] The first deed out for Lot 138 was dated August 10, 1894, recorded with the Registry at Book 211, Page 437, and stated as follows:

> "Said parcel of land is bounded and described as follows, viz: Southeasterly by Grove Street one hundred and thirty feet (130 ft.) Westerly *by land of the grantors* one hundred forty-eight (148) ft. and northeasterly by lot No. 137 seventy and three tenths (70.3) ft.... Together with a right of way from said lot to the public streets." (Emphasis supplied).

9. Lots 202 and 203, known as 1-2 Windmill Lane, are owned by Windmill Trust I by deed dated December 3, 1996, and recorded with the Registry at Book 10571, Page 327. The first deed out for lot 202 was dated August 10, 1894, recorded with the Registry at Book 211, Page 496, and stated as follows:

> "Said parcel of land is bounded and described as follows viz. Easterly by lot No. 201 one hundred and forty-six (146) ft., southerly *by land of the grantors* forty (40) ft., westerly by lot No. 203 one hundred fifty -one and four tenths (151.4) ft. and northerly by private way leading to Bay View Street fifty (50) ft.... Together with a right of way from said lot to the public streets." (Emphasis supplied).

***5** The first deed out for lot 203 was dated November 28, 1896, recorded with the Registry at Book 255, Page 278, and stated as follows:

> "Beginning at a point eighty-five and five tenths (85 5/10) feet more or less from the southwest corner of lot numbered 204, *on the water front*, thence running northerly one hundred and sixty (160) feet, thence easterly fifty (50) feet, thence south one hundred and fifty one and four tenths (151 4/10) feet, thence westerly *along the water front* forty (40) feet to point of beginning." (Emphasis supplied).

10. Lot 196 and half of Lot 195, known as 17 Windmill Lane, are owned by Windsong Trust by deed dated October 4, 2006, and recorded with the Registry at Book 21408, Page 259.[23] The first deed out for Lot 196 was dated September 20, 1894, recorded with the Registry at Book 211, Page 466, and stated as follows:

> "Said parcel of land is bounded and described as follows viz. Northerly by lot No. 193, 54.9 feet; easterly by lot No. 195 87.5 feet, southerly *by land of the grantors*

50 ft., and westerly by lot No. 198 92.2 ft.... Together with a right of way from said lot to the public streets." (Emphasis supplied).
The first deed out for Lot 195 was dated August 13, 1895, recorded with the Registry at Book 222, Page 10, and stated as follows:

> "The southeasterly line of lot numbered one hundred and ninety-five measures eighty-six and seven tenths feet (86.7), the southwesterly line fifty (50) feet, the northwesterly line eighty-seven and five tenths (87.5) feet and the northeasterly line fifty-five (55) feet ... Together with a right of way from said lot to the public streets."

11. Lot 46, known as 63 Park Avenue, is owned by the Richards by deed dated May 19, 2000, and recorded with the Registry at Book 13017, Page 229. The first deed out for lot 46 was dated November 10, 1894, recorded with the Registry at Book 217, Page 396, and stated as follows:

> "Said parcel of land is bounded and described as follows viz. The southeast side of lot numbered forty six measures (80 ft.) eighty feet, the southwest line forty five feet (45 ft.), the northwest line eighty feet (80 ft.) and the northeast line forty-five feet (45 ft.) ... Together with a right of way from said lot to the public streets."

12. Lots 200 and 201, known as 7 Windmill Lane, are owned by the Puglisis by deed dated August 20, 1987, and recorded with the Registry at Book 6371, Page 143. The first deed out for lot 200 was dated July 1, 1895, recorded with the Registry at Book 217, Page 298, and stated as follows:

> "Said parcel of land is bounded and described as follows, viz. The easterly line of said lot numbered two hundred (200) measures one hundred forty-three and eight tenths (143.8) feet, the southerly line forty (40) feet; the westerly line one hundred forty three and five tenths (143.5) feet and the northerly line fifty (50) feet.... Together with a right of way from said lot to the public streets."

***6** The first deed out for lot 201 was dated July 1, 1895, recorded with the Registry at Book 217, Page 374, and stated as follows:

> "Said parcel of land is bounded and described as follows viz. The easterly line of said lot numbered two hundred and one measuring one hundred and forty three and five tenths (143.5) feet, the southerly line forty (40) feet, the westerly line one hundred and forty-six (146)

> feet and the northerly line fifty (50) feet.... Together with a right of way from said lots to the public streets."

13. Lot 197, known as 15 Windmill Lane, is owned by Delaney/LaPointe by deed dated June 19, 1997, and recorded with the Registry at Book 10816, Page 69. The first deed out for Lot 197 was dated July 1, 1895, recorded with the Registry at Book 217, Page 297, and stated as follows:

> "Said parcel of land is bounded and described as follows, viz: The easterly line of said lot numbered one hundred and ninety seven measures one hundred sixty three and five tenths (163.5) feet, the southerly line forty (40) feet, the westerly line one hundred fifty three and nine tenths (153.9) feet and the northerly line fifty one and seven tenths (51.7) feet.... Together with a right of way from said lot to the public streets."

14. Lots S and T, known as 7 Stone Avenue, are owned by Reilly by deed dated October 5, 2006, and recorded with the Registry at Book 21411, Page 177. [24] The first deed out for Lot S was dated June 23, 1898, recorded with the Registry at Book 235, Page 294, and stated as follows:

> "Said parcel of land is bounded and described as follows, vis. Beginning at a point one hundred and thirty feet southeast of the southwest corner of Lot # 71, thence running northeast one hundred feet, thence southeast fifty feet, thence southwest of the west line of Stone Avenue one hundred feet, thence northwest fifty feet to the point of beginning.... Together with a right of way from said lot to the public streets."

The first deed out for Lot T was dated September 14, 1906, recorded with the Registry at Book 274, Page 569, and stated as follows:

> "Beginning at a stake at the south corner of lot # 71, thence northeasterly 100 feet to a stake, thence southeasterly 50 feet to a stake, thence southwesterly 100 feet to a stake, thence northwesterly 50 feet to point of beginning."

15. Lots 11 and 12, known as 5 Glenwood Street, are owned by the Wackrows by deed dated February 24, 2006, and recorded with the Registry at Book 20768, Page 38. [25] The first deed out for Lot 11 was dated September 1, 1906, recorded with the Registry at Book 278, Page 303. The deed stated as follows:

> "A certain parcel of land situated in Yarmouth in said Barnstable County, and comprising lot numbered eleven, as shown on [the 1892 Plans]. Said parcel of land is bounded and described as follows: Beginning at a stake at the south corner of lot # 10 in the line of an old fence, thence southwesterly in the line of said fence 93.39 feet to a stake *at high water mark*, thence northwesterly 45.8 feet to a stake, thence

northeasterly 101.75 feet to a stake, thence southeasterly 45 feet to point of beginning.... Together with a right of way from said lot to the public streets." (Emphasis supplied).

***7** The first deed out for Lot 12 was dated September 14, 1906, recorded with the Registry at Book 274, Page 569, and stated as follows:

> "Beginning at a stake in the south line of Glenwood Street at the southwest corner of Lot # 10, thence southerly 45 feet to a stake, thence westerly 101.75 feet to a stake, thence southwesterly 45.8 feet to a stake in the south line of Glenwood Street, thence easterly in the south line of said street 110.12 feet to point of beginning ... Together with a right of way from said lots to the public streets."

16. There was no deed put into evidence for Cavanaugh/Timmins, who reside at 11 Windmill Lane.

Deeds to back lots (owned by Plaintiffs).

17. The Leahys own property located at 11 Park Avenue (Lots 134, 135 and 139 on the 1892 Plans), by deeds dated January 7, 1983, and recorded with the Registry at Book 3648, Page 235, and March 27, 2000, and recorded with the Registry at Book 13012, Page 30. The original deeds for these three lots are dated October 10, 1894, October 21, 1895, and August 10, 1894, and reference the 1892 Plans, give a metes and bounds description of the lots, and state as an appurtenant right, "[t]ogether with a right of way from said lot to the public streets."

18. The Twomeys own property located at 44 Park Avenue (Lots 35 and 34, and the westerly half of 33 on the 1892 Plans) by deed dated December 28, 1979, and recorded with the Registry at Book 3038, Page 123. [26] The original deeds for those lots dated April 4, 1894, July 18, 1893 and April 13, 1894, reference the 1892 Plans, give a metes and bounds description of the lots, and state as an appurtenant right, "[t]ogether with a right of way from said lot to the public streets."

19. The Bills own property located at 1 Lansing Lane (Lots 225-228, 232 and 233 on the 1892 Plans) by deed dated February 7, 1949, and recorded with the Registry at Book 714, Page 333. The original deeds for Lots 225-228 and 232 dated April 6, 1896, and January 31, 1895, reference the 1892 Plans, and state as an appurtenant right, "[t]ogether with a right of way from said lot to the public streets." [27]

20. Delmore is a part owner of property located at 20 Grove Street (Lot 131 on the 1892 Plans) by deed dated July 2, 1996, and recorded with the Registry at Book 10321, Page 242. The original deed from John V. Scott dated December 26, 1896, references the 1892 Plans.

21. The Egan Trust owns property located at 20 Russo Road (a portion of Lots 82-89 on the 1892 Plans) by deed dated February 12, 1993, and recorded with the Registry at Book 8455, Page 8. The original deed for those lots dated June 22, 1898, references the 1892 Plans, gives a metes and bounds description of the lots, and

states as an appurtenant right, "[t]ogether with a right of way from said lot to the public streets."

22. The Hendersons own property located at 37 Highland Street (Lots 180, 181, 182 and 183 on the 1892 Plans) by deed dated September 29, 1988, and recorded with the Registry at Book 6495, Page 265. The original deed for these lots dated January 31, 1895, references the 1892 Plans, and states as an appurtenant right, "[t]ogether with a right of way from said lot to the public streets ."

***8** 23. Hunt is a part owner of property located at 30 Grove Street (Lots A and C on the 1892 Plans) by deed dated November 17, 2005, and recorded with the Registry at Book 20505, Page 75. The original deed for Lot A dated August 10, 1893, references the 1892 Plans, gives a metes and bound description of the lots, and states as an appurtenant right, "[t]ogether with a right of way from said lot to the public streets." [28]

24. The Kristiansens own property located at 52 Highland Street (Lot 167 on the 1892 Plans) by deed dated May 14, 1999, and recorded with the Registry at Book 12269, Page 164. The original deed for this lot dated September 3, 1896, references the 1892 Plans, gives a metes and bounds description of the lot, and states as an appurtenant right, "[t]ogether with a right of way from said lot to the public streets."

25. The Lenzis own property located at 15 Park Avenue (Lots 134 and 135 on the 1892 Plans) by deed dated November 22, 1999, and recorded with the Registry at Book 12708, Page 289 and shown on Certificate of Title No. 20350. The original deeds for these lots dated October 10, 1894, and October 21, 1895, reference the 1892 Plans, give a metes and bounds description of the lots, and state as an appurtenant right, "[t]ogether with a right of way from said lot to the public streets."

26. Luttazi/Rosenthal owns property located at 22 Park Avenue (Lot 118 and parts of Lot 119 and 120 on the 1892 Plans) by deed dated June 17, 2004, and recorded with the Registry at Book 18727, Page 30. The original deeds for these lots dated January 31, 1895, and October 12, 1895, reference the 1892 Plans, give a metes and bounds description of the lot (Lot 129), and state as an appurtenant right, "[t]ogether with a right of way from said lot to the public streets."

27. Luttazi owns property located at 18 Park Avenue (Lots 132, 133, 140, 141 and part of 142 on the 1892 Plans) by deed dated October 10, 1980, and recorded with the Registry at Book 3187, Page 176. The original deed for these lots dated January 31, 1895, references the 1892 Plans, and states as an appurtenant right, "[t]ogether with a right of way from said lot to the public streets ."

28. The Melias own property located at 31 Grove Street (Lot 125 on the 1892 Plans) by deed dated July 14, 1999, and shown on Certificate of Title No. 154077. The original deed for this lot dated January 1, 1897, references the 1892 Plans, gives a metes and bounds description for the lot, and states as an appurtenant right, "[t]ogether with a right of way from said lot to the public streets ."

29. Nauen owns an undivided fifty percent interest in the property located at 36 Park Avenue (Lot 37 and part of 38 on the 1892 Plans) by deed dated October 1, 2001, and recorded with the Registry at Book 14430,

Page 176. The original deed for Lot 37 dated April 26, 1897, references a plan of Hyannis Park but does not describe it, and gives a metes and bounds description for the lot. [29] The original deed for Lot 38 dated January 31, 1895, references the 1892 Plans and states as an appurtenant right, "[t]ogether with a right of way from said lot to the public streets ."

***9** 30. Associates owns property located at 28 Park Avenue (Lots 101, 102, 103, 117, parts of 119 and 120 on the 1892 Plans) by deed dated October 3, 1985, and recorded with the Registry at Book 4773, Page 215. The original deeds for Lot 101 dated January 17, 1894, Lot 102 dated April 4, 1894, and Lot 120 dated October 12, 1895, reference the 1892 Plans, give a metes and bounds description for the lots, and state as an appurtenant right, "[t]ogether with a right of way from said lot to the public streets." The original deed for Lots 103, 117 and 119 dated January 31, 1895, references the 1892 Plans, and states as an appurtenant right, "[t]ogether with a right of way from said lot to the public streets."

31. The Lansing Trust owns property located at 9 Lansing Lane (Lots 209-215 and 220-223 on the 1892 Plans) by deed dated December 15, 1987, and recorded with the Registry at Book 6065, Page 179, and deed dated May 29, 1996, and recorded with the Registry at Book 10295, Page 188. The original deed for Lots 209-211 and 222-223 dated January 31, 1895, references the 1892 Plans, and states as an appurtenant right, "[t]ogether with a right of way from said lot to the public streets." The original deeds for Lot 212 dated June 18, 1898, and Lots 213-215 dated June 2, 1898, reference the 1892 Plans, give a metes and bounds description for the lots, and state as an appurtenant right, "[t]ogether with a right of way from said lot to the public streets." The original deed to Lots 220 and 221 dated September 14, 1906, references the 1892 Plans, gives a metes and bounds description, and states as an appurtenant right, "[t]ogether with a right of way from said lot to the public streets."

32. The Quinlans own property located at 11 Grove Street and 24 Grove Street. [30]

Deeds of unnumbered parcels.

33. The area bordered northerly by Somerset Street, westerly by Bay View Street, easterly by Lots 184-191 and southerly by Windmill Lane was conveyed by Security and Kelleher to Harry W. Dudley by deed dated June 3, 1898 and recorded with the Registry at Book 234, Page 102.

34. A portion of the area originally designated as Park on the 1892 Plan 1 (bordered by Park Street, Grove Street, Brockton Avenue, and Lots 128, 146, and 155-170) and shown as an unlabeled parcel on the 1892 Plan 3 (bordered by Park Street, Lots M-R, Brockton Avenue and Lots 155-170) was conveyed by Security to Harry W. Dudley by deed dated June 18, 1898, and recorded with the Registry at Book 234, Page 106. [31]

35. The area bordered westerly by Lots 147-154, northerly by Brockton Avenue, easterly by Lots 136-139, and southerly by another unnumbered parcel (the Beach) was conveyed by Security to Oliver P. Scudder by deed dated September 14, 1906, and recorded with the Registry at Book 274, Page 569. [32] This area is shown as the Tidal Creek on the 1934 Plan.

36. There is nothing in the summary judgment record to indicate a conveyance of the area bounded westerly by Stone Avenue, northerly by Lot 321 easterly by Lots 317-319, and southerly by another unnumbered parcel (the Beach).

1929 Deeds of Tidelands lots (the "1929 Deeds").

***10** 37. Scudder (stated as being the only surviving member of the Board of Trustees of Land Company and Security [33]) granted to George P. Williams by deed dated July 11, 1929, a parcel of land described as follows (area seaward of Lot 71, and area seaward of Lot 138 and portion of open area):

> "Beginning on Grove Street at the most southerly point of lot 138, continuing in the same direction one hundred fifty (150) feet, more or less, *to low water line* as shown on said plan; thence westerly *by said low water line* seventy (70) feet, more or less, to a corner; thence northerly by a line parallel to the first line herein mentioned one hundred twenty (120) feet, more or less, to a lot of land, now or formerly owned by Eugene F. Russell; thence in an easterly course across stream seventy (70) feet, more or less, to the most southerly point of lot numbered 138 as shown on said Plan and to the point of beginning. Also another certain lot or parcel of beach land lying between high and low water and adjoining lot 71, on its southerly boundary as shown on [the 1892 Plans], bounded and described as follows:-Beginning on Vernon Street at the south-west corner of lot 71, as shown on said Plan, thence south-westerly eighty (80) feet, more or less, *to low water line;* thence easterly *by low water line* eighty (80) feet, more or less, to a corner; thence in a northeasterly direction by a line parallel to the first described line, eighty (80) feet, more or less, to the south-east corner of said lot 71 on said Plan; thence north-westerly by lot 71, on said Plan eighty (80) feet, more or less, to the point of beginning. It being understood by all parties concerned that this property must be kept open, and no buildings or structures shall shall (sic) be allowed to exist on this property." (Emphasis supplied).

38. Scudder granted to William E. Howes by deed dated July 12, 1929, a parcel of land described as follows (area seaward of Lot 111):

> "BEGINNING AT THE SOUTH EAST CORNER of GROVE STREET at the SOUTH WEST CORNER OF LOT (111) THENCE CONTINUING THE WEST LINE OF LOT (111)(100) FEET MORE OR LESS *TO LOW WATER MARK* AS SHOWN ON SAID PLAN. THENCE EASTERLY *BY LOW WATER LINE* (60) FEET MORE OR LESS THENCE NORTHERLY IN A LINE PARALLEL WITH LINE FIRST NAMED (90) FEET MORE OR LESS TO THE SOUTH EAST CORNOR (sic) OF LOT (111) THENCE WESTERLY IN THE SOUTH LINE OF LOT (111) TO POINT OF BEGINNING. It being understood at this time that this shall always be kept open for the use of the public and that no buildings or structures of any kind shall be allowed to exist on this property." (Emphasis supplied).

39. Scudder granted to Olive G. Howes by deed dated July 12, 1929, a parcel of land described as follows (area seaward of Lot 110):

> "Beginning at a point (53)-West from the South West corner of Vernon Street. Thence Southerly in a line parallel with Vernon Street (80) feet (more or less) *to low water line* as shown on said plan. Thence westerly *by said low water line* (54) feet (more or less) thence Northerly in a line parallel to the first line herein mentioned (90) feet (more or less) to the South West corner of of (sic) Lot (110) thence Easterly in the South line of Lot (110) to point of beginning. It being understood at this time that this land shall always be kept open for the use of the public. And that no buildings or structures of any kind shall be allowed to exist on this property." (Emphasis supplied).

***11** 40. Scudder granted to F.A. Russo by deed dated July 17, 1929, a parcel of land described as follows (area seaward of Lots 47, 58 and 59, and area seaward of Lots 316-317):

> "Beginning at the South West corner of Waverly St (Hyannis Park) Thence Southerly in the West Line of Waverly St' (80) feet more or less *to low water mark* as shown on plan of Hyannis Park. Thence Westerly *by low water mark* (160) feet Thence Northerly (80) feet more or less to the South East corner of Monroe St' Thence Easterly (160) feet to point of beginning. Also another lot beginning at the South West corner of Monroe St' Thence Southerly in the West line of Monroe St' (70) feet more or less *to low water mark* as shown on Plan of Hyannis Park. Thence Westerly *by low water mark* (80) feet more or less. Thence Northerly in a line parallell (sic) with Monroe St (60) feet more or less to the front line of beach lots as shown on said plan. Thence Easterly (80) feet to point of beginning. No structures of any kind shall be put on this land at any time. But it shall be kept open at all times for the accommodation of the public." (Emphasis supplied).

41. Scudder granted to Jessie Russell by deed dated July 26, 1929, a parcel of land described as follows (area seaward of Lots 147, 148 and portion of Tidal Creek):

> "Beginning at a bound at the South West corner of Lot # (148) as shown on [the 1892 Plans] Thence Southerly in a line which is a continuance of the East line of Highland St' (125) feet more or less *to Low Water Line* as shown on said Plan. Thence Easterly *by said Low Water Line* (175) feet more or less Thence Northerly (125) feet (more or less) to a point in the Creek and land of said Jessie Russell Thence Westerly along the south line of said unnumbered strip and the South line of Lots (147) & (148) to point of beginning ." (Emphasis supplied).

42. Scudder granted to Walter L. Benson by deed dated August 5, 1929, a parcel of land described as follows (area seaward of Lot 204):

> "Beginning at a stake at the South East corner of Lot # (204) Thence Southerly in a line which is a continuance of the East line of Lot # (204) Thence Southerly (60) feet more or less *to low water mark* (85) feet more or less. Thence Northerly (60) feet more or less to the South West corner of Lot-(204) Thence Easterly in the South line of Lot # (204)(85) feet to point of beginning." (Emphasis supplied).

43. Scudder granted to M. Florence Small by deed dated August 5, 1929, a parcel of land described as follows (area seaward of Lot 196 and portion of Lot 195):

> "Beginning at a bound at the South West corner of Lot # (196) Thence Southerly in a line which is a continuance of the West line of Lot # (196)(125) feet more or less *to low water line* as shown on said plan. Thence Easterly *by said low water line* (75) feet more or less. Thence Northerly (125) feet more or less to a point in the South line of Lot # (195) said point being (25) feet West from the South East corner of Lot # (195) Thence Westerly in the South line of Lots-(195 & 196) 75 feet to point of beginning." (Emphasis supplied).

***12** 44. Scudder granted to Louis T. Golding by deed dated August 16, 1929, a parcel of land described as follows (area seaward of Lot 197):

> "Beginning at a bound at the South West corner of Lot (197) as shown on [the 1892 Plans] Thence Southerly in a line which is a continuance of the West line of Lot # (197) (50) feet more or less *to low water mark* in Lewis Bay as shown on said Plan. Thence South Easterly *by said low waterline* (50) feet more or less, Thence Northerly (80) feet more or less to the South East corner of Lot # (197) Thence Westerly in the South line of Lot # (197)(40) feet to point of beginning." (Emphasis supplied).

45. Scudder granted to Hersilia B. Bassett by deed dated August 19, 1929, a parcel of land described as follows (area seaward of Lots 198-199):

> "Beginning at the South East corner of Lot # (198). Thence Southerly in a line which is a continuance of the East line of said Lot-(198)(60) feet (more or less) *to low water line.* Thence *by low water line* (80) feet (more or less) in a Westerly Direction. Thence Northerly (50) feet (more or less) tp (sic) the South West corner of Lot # (199) Thence Easterly in the South line of Lots-198 & 199(80) feet to point of beginning." (Emphasis supplied).

46. Scudder granted to Josephine M. Preble by deed dated August 19, 1929, a parcel of land described as follows (area seaward of Lots S and T):

> "Beginning at a bound at the south east corner of Lot SEVENTY-ONE Thence southerly in a line which is a continuance of the east line of LOT SEVENTY ONE (60) feet (MORE OR LESS) *to LOW WATER LINE*, as shown on said plan. Thence easterly *by low water line* (100) FEET (MORE OR LESS) Thence northerly (50) feet (MORE OR LESS) to land of said JOSEPHINE M. PREBLE Thence westerly in the south line of said JOSEPHINE M. PREBLE (100) FEET TO POINT OF BEGINNING." [34] (Emphasis supplied).

47. Scudder granted to Robert Grant by deed dated August 20, 1929, a parcel of land described as follows (area seaward of Lots 11 and 12):

> "Beginning at the South East corner of Lot # 11. Thence south westerly in a line which is a continuance of the east line of lot # 11 (50) feet more or less *to low water line*

as shown on said plan. The same being dated December 1892. Thence northwesterly *by said low water line* (100) feet more or less. Thence northeasterly (60) feet more or less to the south west corner of lot # 12. Thence south easterly in the south line of lots 11 and 12(90) feet to point of beginning." (Emphasis supplied).

48. Scudder granted to Dorothy W. VanBuskirk by deed dated August 20, 1929, a parcel of land described as follows (area seaward of Lot 109):

"BEGINNING AT THE SOUTH EAST CORNER OF LOT # (109) THENCE SOUTHERLY IN A LINE WHICH IS A CONTINUANCE OF THE EAST LINE OF LOT # (109)(75) FEET MORE OR LESS *TO LOW WATER LINE* IN LEWIS BAY AS SHOWN ON SAID PLAN. THENCE WESTERLY *BY SAID LOW WATER LINE* (55) FEET (MORE OR LESS) THENCE NORTHERLY (80) FEET MORE OR LESS TO THE SOUTH WEST CORNER OF LOT # (109). THENCE EASTERLY IN THE SOUTH LINE OF LOT # (109)(53) FEET TO POINT OF BEGINNING." (Emphasis supplied).

***13** 49. Scudder granted to William P. Prebble by deed dated January 3, 1930, a parcel of land described as follows (Stone Avenue and area seaward of Stone Avenue):

"Beginning at a point on Brockton Avenue at the northeast corner of lot numbered sixty-four (64) as shown on said Plan and the north-west corner of the granted premises at land of the grantee, thence south-westerly by said lot sixty-four (64) and other lots owned by the grantee *across the beach* three hundred and eighty (380) feet, more or less, *to low water line* in Lewis Bay as shown on said Plan; thence south-easterly *by said low water line* forty (40) feet; thence north-easterly *across the beach* and by the westerly line of land of A.E. VanDoren three hundred eighty (380) feet, more or less, to said Brockton Avenue; thence north-westerly by said Brockton Avenue forty (40) feet, more or less, to land of grantee and the point of beginning." (Emphasis supplied).

50. Scudder granted to Jessie C. VanDoren by deed dated April 3, 1930, a parcel of land described as follows (area seaward of the vacant lot next to Stone Avenue):

"Beginning at the southwest corner of land of said VanDoren; thence southwesterly sixty (60) feet more or less *to low water mark* as shown on [the 1892 Plans]; thence southeasterly *by said low water mark* ninety (90) feet more or less; thence northeasterly sixty (60) feet more or less to the southeast corner of said VanDoren's land; thence northwesterly by said VanDoren's land ninety (90) feet more or less to point of beginning. This land being sold with the understanding that no buildings of any kind shall be erected on the same." [35] (Emphasis supplied).

51. A Topographic Sketch Plan dated July 27, 2005 (the "2005 Plan"), shows the mean high water line of Lewis Bay in the vicinity of the waterfront lots in the Hyannis Park subdivision; the 2005 Plan shows no upland between the high water line and the waterfront lots between Waverly Street and Glenwood Street at the easterly end of the Beach. The 2005 Plan also

shows the Observed Water Line at low tide on June 22, 2005.

52. Advertisements were placed in the Brockton Daily Enterprise for sale of lots in the Hyannis Park subdivision over a period of years. The first ad dated May 20, 1893, advertised 315 lots as “Some of the Best Shore lots in New England,” and stated “Cool breeze all the time, good bathing, boating and fishing, nice beach, no undertow, shade trees on several of the lots ...” The next ad dated June 29, 1893, advertised “50 Choice Lots” and stated, “The facilities for bathing are unsurpassed. The water is warm. Good sandy beach with no undertow. It is perfectly safe for ladies and children to bathe at all hours of the day. People come from miles around to this beach to bathe.” An ad dated May 26, 1894, stated that 200 lots had been sold and advertised “50 Choice House Lots” and “Being on the South Shore, the water is very warm and for bathing cannot be excelled. A smooth beach, perfectly safe for ladies and children to bathe, good fishing ...” Four years later the ads continued. An ad dated May 14, 1898, advertised “85 Desirable Lots;” an ad dated May 21, 1898, advertised “Shore Lots” and stated, “We have 65 lots left;” an ad dated May 24, 1898, advertised the final 65 lots.

***14** 53. There are public beaches at the end of Bay View Street, Highland Street, Grove Street, Vernon Street, Malfa Road (formerly Monroe Street), Waverly Street and Glenwood Street. The Town of Yarmouth made a taking of the Bayview Beach by Order of Taking dated July 16, 1929.

There were several motions to strike which must be addressed. Plaintiffs filed a Motion to Strike Affidavits of Robert Daylor and Chester Lay. With respect to the affidavit of Chester Lay (“Lay”), Plaintiffs argue that Lay is not qualified to testify as an expert, Lay's testimony is irrelevant to the issue of implied easement, and O'Connor did not comply with the expert witness disclosure requirements of Mass. R. Civ. P. 26. With respect to disclosure, O'Connor pointed out that even though she did not initially disclose Lay as an expert witness, he was identified as an expert witness in O'Connor's December 14, 2006, filing of her Cross-motion for Summary Judgment, and at the January 16, 2007, status conference this court gave Plaintiffs until January 24, 2007, to determine if they needed their own expert. By letter dated January 23, 2006, Plaintiffs did not avail themselves of this opportunity. As a result, this argument has no merit. Lay, however, qualified himself as a registered land surveyor and testified as to aerial photographs, but did not divulge any experience in analyzing aerial photographs. Moreover, his analysis of photographs dated between 1958 to 2001 is not relevant to the intent of the parties with respect to beach rights during the period 1892-1895. As a result, I shall strike the Affidavit of Lay in its entirety.

With respect to the Affidavit of Robert Daylor (“Daylor”), Plaintiffs argue that Daylor is not qualified to testify as an expert, the Six Defendants did not comply with the expert witness disclosure requirements of Mass. R. Civ. P. 26, and the testimony amounts to an impermissible legal conclusion relative to implied easement rights. With respect to the argument of the testimony giving legal conclusion, I agree that Daylor was not qualified to do that. *See Mattoon v. City of Pittsfield*, 56 Mass.App.Ct. 124, 137 (2002)

("[l]ay and expert witnesses are precluded from giving an opinion, for the most part, that involves a conclusion of law or in regard to a mixed question of fact and law") (citing *Perry v. Medeiros,* 369 Mass. 836, 842 (1976); *Commonwealth v. Brady,* 370 Mass. 630, 635 (1976)). Moreover, Daylor's itemized expertise as a registered professional engineer and professional land surveyor does not go to issues of interpretation of deeds.[36] As a result, I will strike so much of the affidavit that gives such legal conclusion or legal opinion, specifically paragraph 9. With respect to disclosure, the Six Defendants point out that even though they did not initially disclose Daylor as an expert witness, he was disclosed in the December 15, 2007, filing of the Cross-motion for Summary Judgment, and at the January 16, 2007, status conference, this court gave Plaintiffs until January 24, 2007, to determine if they needed their own expert. By letter dated January 23, 2007, Plaintiffs declined to do so.[37] As a result, this argument has no merit. Based on the foregoing, I will leave intact the balance of the affidavit in which Daylor points out factual issues relevant to the case.[38]

***15** The central issue in these summary judgment motions is whether Plaintiffs have an implied easement to use the Beach for usual beach purposes.[39] The record is clear that there are no deeded easement rights for Plaintiffs to use the Beach. Plaintiffs argue that they have an easement by implication in the Beach because each of their predecessors' deeds references the 1892 Plans, which show the Beach (although not titled as such). The Summary Judgment Defendants argue that there is no easement by implication because Plaintiffs' deeds granted certain easement rights but not others, suggesting that there was no intent on the part of the original grantors to include implied easement rights in the Beach, and that the 1929 Deeds granted Defendants the fee interest in the Beach.

Implied easements have been recognized when

> " 'land was formerly in common ownership, when use of one part of the land was made for the benefit of another part up until the time of the severance of ownership, and when the use of one part is both reasonably ascertainable and reasonably necessary for the enjoyment of the other part.' 'The implied easement arises not so much from necessity alone as from the presumed intention of the parties ...' The presumed intention is 'to be gathered from the language of the instruments when read in the light of the circumstances attending their execution, the physical condition of the premises, and the knowledge which the parties had or with which they are chargeable.' '[T]he presumption of intent in such cases is a presumption of law which 'ought to be and is construed with strictness.' " *Zotos v. Armstrong,* 63 Mass.App.Ct. 654, 656-657 (2005) (citations omitted).

As the party asserting the implied easement, Plaintiffs have the burden of proof to show such easement. *See Reagan v. Brissey*, 446 Mass. 452, 458 (2006). However, "[t]he burden is heavier for a grantor asserting the right to an easement by implied reservation than for a grantee asserting such an easement by implied grant." *Boudreau v. Coleman*, 29 Mass.App.Ct. 621, 629 (1990).

Both Plaintiffs and the Summary Judgment Defendants rely heavily on *Reagan* relative to Plaintiffs' claim of implied easement rights in the Beach, so an analysis of that case is in order. In *Reagan*, an 1872 subdivision created 917 similar-sized, numbered lots and several large, irregularly shaped unnumbered lots designated as "parks." The individual deeds did not grant easements in the parks, but they did reference the plan which showed the parks. The subdivision plan showed ways leading to the parks. The developers marketed the lots for several months with ads which did not mention the existence of the parks but suggested recreational amenities. The developers never sold the parks. The Supreme Judicial Court (the "SJC") found a common scheme in the subdivision and concluded that the individual lot owners had an easement by implication in the parks.

***16** In the case at bar, the 1892 subdivision created 344 similar-sized, numbered lots and five large, irregularly shaped unnumbered lots, one of which was designated as "park," three of which were waterfront areas, and one of which abutted Lewis Bay. The individual deeds did not grant easements in the park or the other unnumbered lots, but they did reference the plan which showed the unnumbered lots. The subdivision plan showed ways leading to the park and other unnumbered lots, including seven ways leading to the Beach. The developers marketed the lots for a number of years with ads which continued to specifically mention the Beach as one of the major selling points. The developers eventually sold off portions of two of the unnumbered lots, but not the Beach. [40]

Additionally, in the case at bar, every original deed of one of the waterfront lots references the 1892 Plans; such deeds, however (except for Lots 11, 110, 148 and 203) designate as their southerly boundary a metes and bounds description without a reference to either Lewis Bay or any monument. [41] Moreover, five of the original deeds of the waterfront lots (Lots 45, 109, 138, 196 and 202) reference the boundary abutting the Beach as "by land of the grantors," clearly indicating an intent not to deed an interest in the Beach. Every original deed of each of Plaintiffs' lots also makes reference to the 1892 Plans. [42] None of the original deeds (for either Plaintiffs' lots or the Summary Judgment Defendants' lots) grants any easement rights to the Beach, or access to the Beach. [43] The 1892 Plans show a large unnumbered parcel (the Beach) between the waterfront lots and the low water line of Lewis Bay. [44] Based on these deeds and plans, there did not appear to be an intent on the part of the developer to grant ownership of the Beach to the waterfront lot owners at the time of the original conveyances. [45] , [46]

Moreover, the 1892 Plans indicated five vacant parcels of land. "A plan referred to in a deed becomes a 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,* 446 Mass. at 458 (quoting *Labounty v. Vickers,* 352 Mass. 337 (1967); and *Jackson v. Knott,* 418 Mass. 704 (1994)). Like the situation in *Reagan,* Plaintiffs' deeds reference the plan which shows the recreational areas at issue, and the recreational areas are unnumbered, in large irregularly shaped areas, and dispersed throughout the subdivision. [47] The Beach, however, which is the largest of the unnumbered lots, is the only area at issue in the case at bar.

The advertisements used for selling the lots at Hyannis Park all put strong emphasis on the Beach, and they do not mention the other open areas. It is clear from the 1892 Plans that the long unnumbered area between the oceanfront lots and Lewis Bay was a beach or tidelands area. Moreover, in the words of the *Reagan* court,

> ***17** "[i]t is entirely reasonable ... to infer that the existence of the [Beach] was an important feature in [Security's] attempt to sell the lots ... These subdivisions were all seaside vacation resorts, designed essentially as communities, with small lots on which individuals and individual families could lodge, and with related parks and plazas on which the entire subdivision community could congregate for social, recreational, and religious purposes." *Reagan,* 446 Mass. at 459.

It should also be noted that whereas Security and Kelleher eventually sold off several of the unnumbered lots to private individuals by 1906, they never attempted to sell the Beach to private individuals prior to 1929. Moreover, as they were developing two of the unnumbered lots, they continued to advertise the Beach and ocean areas as a part of their selling tactic. Furthermore, the ads relative to the sale of lots in Hyannis Park did not advertise the other open areas. In 1929 Scudder attempted (on behalf of Security) to sell most of the Beach to the private owners of the waterfront lots. Whether he was successful is irrelevant; the bottom line is that, at the time of the original deeds, Security and Kelleher did not intend to convey any of the unnumbered lots. [48] As a result, I find that Security and Kelleher, as the original grantors, intended to grant rights in the Beach to all lot owners in Hyannis Park.

The Six Defendants argue that the express deeded right of way in Plaintiffs' deeds for access from Plaintiffs' respective lots to the public streets, "negatives, we think, any intention to create easements by implication." *Joyce v. Devaney,* 322 Mass. 544, 549 (1948). *See also Boudreau,* 29 Mass.App.Ct. at 630 ("[h]aving expressly reserved some easements, failure to reserve others must be regarded as significant"). *Joyce* and *Boudreau,* however, are distinguishable from the case at bar. In *Joyce,* plaintiffs' deed contained an express easement providing vehicle access to their garage over a common driveway across defendants' property. Such easement was specifically delineated on a recorded plan referenced in plaintiffs' deed. The problem arose when plaintiffs constructed their house and garage in such a manner that made it impossible to access the garage without crossing defendants' land outside of the easement as it was described in the deed and shown on the plan. As such, plaintiffs claimed, based on their reasonable necessity,

that they had an easement by implication to cross defendants' land outside of the deeded easement to access their garage. Because the plaintiffs' deed expressly provided an easement for the same purpose for which plaintiffs claimed an easement by implication, the trial judge found, and the SJC affirmed, that the grantor did not intend to convey any rights other than those expressly provided in the deed. *See Joyce*, 322 Mass. at 549-550. Similarly, in *Boudreau*, the Appeals Court declined to find an implied easement from defendants' property over certain ways shown on the subdivision plans where the fee in most of the subdivision ways over which the implied easement was claimed had been deeded out prior to the deed to defendants' property; where the subdivision plans did not show all of defendants' property or any proposed extension of the ways to defendants' property; and where "most of the instruments conveying lots shown on the 1911 and 1912 plans contain[ed] *carefully defined references to reserved easements* " (emphasis supplied). *Boudreau*, 29 Mass.App.Ct. at 630-631. While, as the Appeals Court stated in *Boudreau*,"[h]aving expressly reserved some easements, failure to reserve others must be regarded as significant," the existence of such an express easement alone was not determinative of the issue of the presumed intention of the parties. *Id.* at 630. Unlike the express easements found in the deeds in *Joyce*, which were "unambiguous and definite" and specifically delineated and labeled on the plans referred to in the deeds, and the "carefully defined references to reserved easements" in *Boudreau*, in the case at bar, the express "right of way" from Plaintiffs' respective lots to the public streets is not at odds with an implied easement to use the Beach. The implied easements claimed in both *Joyce* and *Boudreau* directly conflicted with express easements contained in the deed or reserved to other parties. Furthermore, as discussed, *supra*, the fact that the grantors reserved ownership of the Beach and advertised the sale of the lots in the subdivision as part of a beach community illuminates the circumstances attending the executions of the deeds and the knowledge with which the grantors (as the parties responsible for the advertisements) were chargeable. [49] As a result, I find that the express right of way contained in the deeds to Plaintiffs does not negate the intention of Security and Kelleher, as the original grantors, to grant rights in the Beach to all lot owners in Hyannis Park.

***18** The Summary Judgment Defendants put much weight on *Houghton v. Johnson*, 14 LCR 442 (2006), a recent Land Court case which distinguished *Reagan* and found that plaintiffs did not have an implied easement in a beach which they had used for a number of years. This case was upheld by the Appeals Court in *Houghton v. Johnson*, No. 06-P-1400 (Mass.App.Ct. May 30, 2008). In *Houghton*, plaintiffs (backlot owners in a subdivision which fronted on a beach) argued that the 1924 subdivision plan showing the beach indicated a presumed intent of the original grantor to create an easement in the beach for all subdivision lot owners. The Appeals Court found that the factors relied on in *Reagan* did not apply, that there were no advertisements or other express intent of the original grantor to indicate a desire to grant beach rights, the grantor did not own portions of the beach shown on the subdivision plan because the grantor had already conveyed out portions of the beach before granting deeds to predecessors

of plaintiffs, thereby precluding any attempt at a common scheme to create a "community beach." In the case at bar, however, many of the *Reagan* factors are present. The developers owned the entire Beach and had not deeded any part of it out prior to their deeds to the back lots. When they attempted to sell portions of the Beach through the 1929 Deeds, the consideration was minimal, in one deed being for "one dollar," and in all the deeds there were no documentary stamps; this was in sharp contrast to the deeds for the individual lots. It appears that the attempts to deed the Beach were for nominal consideration, indicating that it had little independent market value. *Cf. Reagan,* 446 Mass. at 461 (where the parks at issue were sold, together with the avenues, for five dollars and the SJC noted that "[t]his conveyance demonstrates not only that the parks and avenues were of little market worth as developable land, but also that Luce [the developer] had intended to treat, and did so treat, the park lands as separate and distinct from the buildable lots").

The Summary Judgment Defendants (except for Reilly and Shah) argue that they received deeds to the Beach in 1929. The 1929 Deeds, however, appear to be nullities. The legal title to Hyannis Park was held 75% by Security and 25% by Kelleher. As of 1929 there had been no deed out of the Beach from the owners. When Scudder executed the 1929 Deeds as the only surviving member of the Board of Trustees of Land Company and/or Security, he was incorrect in his facts. Scudder had retired as Trustee of Security in 1898, so he had no authority to execute any document on behalf of Security. Moreover, Hoyt and Jones, apparently valid Trustees of Security, were still alive. Land Company had no legal interest in Hyannis Park. The record does not indicate whether Kelleher was still alive. Based on the foregoing, it is clear that the 1929 Deeds are not valid. [50] As such, it appears that the heirs of Security and Kelleher are the current owners of the Beach. [51]

***19** The issue of what rights owners of back lots in the Hyannis Park subdivision have in the Beach has been addressed by the Land Court in the past. In 1986, in *Weiss v. Kevorkian,* No. 115449. slip op. at 4 (Mass. Land Ct. Nov. 19, 1986), [52] Chief Justice Sullivan found

> "that Hyannis Park was a grandiose concept conceived by several businessmen from the Brockton area who sold lots on recorded plans pursuant to numerous advertisements which touted the beautiful beach in the area and that each of the lots on the recorded plans carried the appurtenant right by implication to use the streets shown on said plans and the beach which formed a part of the development ... there is appurtenant to the lots in Hyannis Park the right to use the area shown on the recorded plans of the development between the numbered lots and Lewis Bay for usual beach purposes and that the defendants have not lost such right by abandonment or by adverse possession of the plaintiffs and their predecessors in title ."
>
> In that case, plaintiffs were the owners of beachfront Lots 147 and 148 on the 1892 Plans (currently owned by the Shah Trust), and defendants were owners of an interior lot (Lot 190) on the same plan. The holding in that case only applied to the parties to that case. [53] *Weiss* also found that the 1929 Deeds, if not void, did not grant exclusive rights to those grantees to use the Beach

as such rights had already vested in the lot owners on the 1892 Plans by implication. Plaintiffs argue that, as a result of the *Weiss* case, the Shah Trust is precluded from arguing that Plaintiffs do not have a right to use the portion of the Beach which abuts Lots 147 and 148.[54] Based on the principles of res judicata, however, *Weiss* is only applicable to the Shah Trust (Lots 147 and 148) and the owner of Lot 190, who is not a party to this case. While Chief Justice Sullivan found that "the owners of lots at Hyannis Park and those claiming under them have the right to use the beach in front of the plaintiffs' property for usual beach purposes as that phrase is generally used in the seashore communities of Cape Cod in addition to the rights they have as members of the public," *Weiss,* slip op. at 15, the owners of all of the lots at Hyannis Park were not parties to the *Weiss* case and cannot benefit from that decision.[55]

The Summary Judgment Defendants also argue that the original developers had an intent to keep the open areas for their own use, because over the course of several years they used several of the open areas to develop more lots. A look at the 1892 Plans, however, shows that although changes were made to two of the five open areas between 1892-1895 (lots were added), no changes were made to the open areas since 1895, and no changes were made to the Beach at all since the 1892 Plan 1 was filed.[56]

The Wrins argue that there is no Beach opposite their lots (Lots 13 and 45) based on the 2005 Plan, and that the high water line extends onto their property. They also argue that the 1929 Deeds do not include any Beach area adjacent to their property, indicating that this was because the developers knew that there was no beach in existence to grant title to. As a result, they argue, there could be no intent for the developers to grant an easement by implication to the Beach adjacent to their lots. This argument, however, holds no water. The 2005 Plan does not reflect the high and low water lines from 113 years before (1892). There is no evidence where those lines were in 1892, or in 1929. Moreover, I have found that the intent of the developers in 1892 was to provide access to the Beach as a whole, as shown on the 1892 Plans, and not specific sections of the Beach. As evidence, the 1892 Plans shows a wide open area (approximately eighty feet wide) between the Wrins' property line and the low water line. A look at the Wrins' deed also indicates that the legal description is not bounding by Lewis Bay, as discussed, *supra.* The Wrins also argue that if an easement ever existed in this portion of the Beach, it has been extinguished because the area in front of their property is not usable today as a beach. But the Wrins reference deposition testimony that indicates that the area in front of their property is used by Plaintiffs for walking purposes. Finally, the Wrins misconstrue G.L. c. 260, § 21 (Actions for the Recovery of Land), which is the statute for preventing adverse possession. In this case, if Plaintiffs were making an argument for prescriptive rights on the Beach, which they are not doing for purposes of this motion, the burden would have been on the Wrins to take some action or commence a suit prior to the running of Plaintiffs' twenty year period of use.

***20** O'Connor argues that because of the unique character of her property (Lot 138), namely the shape of her lot (triangular) and the fact that it is adjacent to the Tidal Creek, the

fact that the area seaward of her lot is marsh and not upland beach and is constantly changing (the same argument that the Wrins used), there could be no implied easement. I have addressed these issues, *supra;* there is no evidence in the summary judgment record to indicate that in 1892 the area seaward of the O'Connor property was below the mean high water line.[57] The O'Connor property was registered in 1934, after the 1929 Deeds which purported to grant her predecessor in title the fee interest in tidelands adjacent to her property, subject to the rights of the general public to use the Beach. O'Connor, citing *Jackson*, argues that no easement shows up on her certificate of title relative to rights of others in the Beach, and therefore any easement by implication that may have existed is no longer valid. As no easements in favor of Plaintiffs are listed on O'Connor's certificate of title, the issue becomes whether Plaintiffs' implied easement to use the Beach meets one of the exceptions discussed in *Jackson.* The SJC in *Jackson* described the exceptions to the rule that holders of a certificate of title take free from all encumbrances except those noted on the certificate as follows:

> "If an easement is not expressly described on a certificate of title, an owner, in limited situations, might take his property subject to an easement at the time of purchase: (1) if there were facts described on his certificate of title which would prompt a reasonable purchaser to investigate further other certificates of title, documents, or plans in the registration system; or (2) if the purchaser has actual knowledge of a prior unregistered interest." *Id.* at 711.
>
> Because there is no evidence in the summary judgment record that O'Connor had actual knowledge of Plaintiffs' implied easement to use the Beach, in order to determine whether Plaintiffs' implied easement to use the Beach is valid against the O'Connor property the issue becomes whether there are facts described in O'Connor's "certificate of title which would prompt a reasonable purchaser to investigate further other certificates of title, documents, or plans in the registration system." O'Connor's certificate of title references the right of the public to use the Beach, but there is no mention of any private rights to use the Beach. More importantly, however, is that the deeds into George Percy Williams, who registered lots 135-139 and the Tidal Creek, all referenced the lots as shown on the 1892 Plans and such deeds would have been part of the original registration file, along with the 1892 Plans.[58] As discussed, *supra*, the 1892 Plans show hundreds of lots, abutting ways that provide access to the Beach. The reference to the public's right to use the Beach together with the reference to the 1892 Plans in the deeds to George Percy Williams would have alerted O'Connor that the inland lot owners in Hyannis Park may have rights in the Beach.[59] As a result, I find that the O'Connor property is subject to Plaintiffs' implied easement to use the Beach.[60]

***21** Additionally, the Six Defendants argue that Plaintiffs have not met their burden to show that the developers of Hyannis Park had an intention to create an implied easement in the Beach. In support of their argument, they offer the Affidavit of Robert Daylor ("Daylor"), their expert engineer. As discussed, *supra*, I have struck the portions of the Daylor Affidavit relative to his legal conclusions.[61]

The Six Defendants also argue that none of the waterfront lot owners took title to their lots with knowledge of any implied easement, and as a result they were bona fide purchasers without notice. This argument, however, if valid, presumes actual notice of the easement to the lot owner and would preclude a finding of an implied easement in most cases as there is rarely actual notice to the servient owner that the easement exists. By its very nature, notice of an implied easement is determined through the same factors used to determine whether an easement was intended: "the language of the instruments when read in the light of the circumstances attending their execution, the physical condition of the premises, and the knowledge which the parties had or with which they are chargeable." *Zotos,* 63 Mass.App.Ct. at 656-657 (citations omitted). As discussed, *supra,* Defendants, through the recorded deeds and plans, were put on notice that Plaintiffs may have rights in the Beach. As a result, I find that Defendants were not bona fide purchasers without notice of Plaintiffs' implied easement in the Beach.

Finally, Mafera, who Reilly replaced as a defendant, brought a counterclaim seeking a declaration that Plaintiffs did not have any rights to access the Beach over Stone Avenue because Stone Avenue was not shown on a plan until the 1892 Plan 3, which was revised from the 1892 Plan 2 in September 1895, and therefore the original developers could not have intended to include rights in Stone Avenue for all of the lots in Hyannis Park.[62] Although this issue was not argued in Reilly and Shah's Cross-Motion for Summary Judgment or at oral argument, it is a legal issue related to implied easements which was not precluded from summary judgment (as prescriptive rights were) and can be decided on the undisputed facts in the summary judgment record. It is well settled in Massachusetts that "where land situated on a street is conveyed according to a recorded plan on which the street is shown, the grantor and those claiming under him are estopped to deny the existence of the street for the entire distance as shown on the plan." *Goldstein v. Beal,* 317 Mass. 750, 755 (1945). As a result, there is no question that every lot shown on the 1892 Plan 3 that abuts Stone Avenue would have the right to use Stone Avenue for its entire length. The question remains whether the rest of the back lot owners in Hyannis Park would have a right to use Stone Avenue to access the Beach. Case law holds that "[e]very right necessary for the enjoyment of an easement is included in it by implication." *Mt. Holyoke Realty Corp. v. Holyoke Realty Corp.,* 298 Mass. 513, 514 (1937) (citing *Sullivan v. Donohue,* 287 Mass. 265, 267 (1934)). As such, because this court has found that the original developers of Hyannis Park intended for all lots to have a right to use the Beach, the right to access the Beach is also implied. As raised in Mafera's Counterclaim, however, there could have been no implied intent to grant access to the Beach over Stone Avenue prior to the September 1895 revision of the 1892 Plans and all of the lots deeded out prior to September 1895 would not include the right to use Stone Avenue to access the Beach. As a result of the foregoing, I find that Plaintiffs who own lots originally deeded out prior to the September 1895 revisions to the 1892 Plans do not have a right to use Stone Avenue to access the Beach.

***22** As a result of the foregoing, I ALLOW Plaintiffs' Motion for Summary Judgment and

DENY the Summary Judgment Defendants' Cross-Motions for Summary Judgment. As discussed, *supra*, the issues relative to Plaintiffs' prescriptive rights in the Beach do not need to be addressed as this court has found that Plaintiffs have implied easement rights in the Beach. [63] Furthermore, this court has determined that there are disputed facts with respect to the Six Defendants' (with Windsong Trust substituted for Windmill Trust II) and O'Connor's claims that any implied rights in the Beach have been abandoned or extinguished by adverse possession, and such issues will therefore require a trial. [64] The parties shall attend a status conference scheduled for Thursday, October 9, 2008 at 10:00 A.M. to discuss the issues going forward to trial.

Judgment shall enter upon resolution of all remaining issues.

Footnotes

1 Shah filed her Motion to Amend Answer to Complaint on December 29, 2006, seeking to add the affirmative defenses of laches and statute of limitations. The Motion to Amend Answer to Complaint was not filed until after the filing of the cross-motions for summary judgment which are the subject of this decision and were not argued at oral argument. The cross-motions for summary judgment were supposed to cover all legal issues with respect to Plaintiffs' claim of implied easement rights in the Beach. Because these affirmative defenses relate to Plaintiffs' claim of implied easement rights, this court will DENY Shah's Motion to Amend Answer to Complaint.

2 Shah was not the owner of her property on the date of the filing of the Complaint. Shah deeded her property to Helen Shah, as Trustee of the Helen Shah Revocable Living Trust Agreement dated September 2, 2003, by deed dated October 8, 2003, and recorded with the Registry, as hereinafter defined, at Book 17778, Page 259 (the "Shah Trust"). Plaintiffs shall amend the Complaint in this regard.

3 Mafera sold Lot S to Martin T. Reilly ("Reilly") by deed dated October 5, 2006. On December 19, 2006, Mafera filed a Motion to Substitute Reilly as a Defendant, which was allowed on December 21, 2006.

4 Shrago filed a Motion to Dismiss Crossclaim on April 25, 2005, and both parties filed a Stipulation of Dismissal of the Crossclaim on July 20, 2005.

5 A Stipulation of Voluntary Dismissal as to Souliotis was filed on February 23, 2006.

6 On May 26, 2006, Plaintiffs and Shrago filed a Consent Decree relative to all issues between them. *See also Philbrook, Trustee v. Shrago*, Land Court Misc. Case No. 280523 (Scheier, C.J.), in which plaintiffs claimed an ownership interest in the tidelands seaward of Lots S, T and Stone Avenue. This case was dismissed on May 16, 2007.

7 Brown/Lynch sold their property to Ronald W. Wackrow and Jean Wackrow (the "Wackrows") on February 24, 2006, and they filed an assented-to motion to substitute the Wackrows as Defendants on December 26, 2006.

8 On November 14, 2006, a Stipulation of Voluntary Dismissal was filed as to Windmill Trust II. On December 26, 2006, Windmill Trust II filed an assented-to motion to substitute Theresa Sprino, Trustee of Windsong Realty Trust ("Windsong Trust") as a Defendant (Windmill Trust II sold their property to Windsong Trust on October 4, 2006). As such, the Answer and Counterclaim filed by Windmill Trust II will be treated as if it were filed by Windsong Trust.

9 Plaintiffs shall be defined as all named parties to the Complaint except for the Narinian Trust and the Weavers, who have been dismissed from the case.

10 Defendants shall be defined as all named Defendants in the Complaint except Mafera, Souliotis, Shrago, Brown/Lynch, Windmill Trust II, Crimmins, Malfa Trust and Van Doren; added as Defendants are Reilly, the Wackrows and Windsong Trust.

11 The 1892 Plan 2 also shows an extension of Park Street in the open space labeled "Park."

12 The deed to John V. Scott, Leon Williams, Kelleher and L. Fisher Kent dated August 10, 1892, contained a description of the property which was bounded by Lewis Bay and contained the fee to the tidelands.

13 Security was an association formed under a Declaration of Trust dated January 28, 1893, and recorded with the Registry at Book 205, Page 216. The original trustees of Security were A.V. Lyons ("Lyons"), J.P. Scudder ("Scudder"), Francis C. Kingman ("Kingman"), F.A. Hoyt ("Hoyt") and Charles S. Jones ("Jones").

14 The Narinian Trust and the Weavers have been dismissed as Plaintiffs from the case.

15 Park Avenue is the same as Brockton Avenue as shown on the 1892 Plans.

16 Lansing Lane is the same as Arlington Street as shown on the 1892 Plans.

17 Russo Road is the same as Linwood Street as shown on the 1892 Plans.

18 See footnote 10, *supra.*

19 Windmill Lane is the same as an unnamed lane adjacent to Lots 191 and 197-203 on the 1892 Plans.

20 The grantors on all of the original deeds for lots at issue in this case (except Lots 11, 12, 37, 220, 221, T, the unnumbered lot to the south of Brockton Avenue bordered by Lots 136-138, 147 and 149-154 as shown on the 1892 Plan 3, and the unnumbered lot to the north of Brockton Avenue bordered by Lots M-R and 155-170 as shown on the 1892 Plan 3) were Security and Kelleher. The original deeds for Lots 11, 12, 220, 221, T, the unnumbered lot to the south of Brockton Avenue bordered by Lots 136-138, 147 and 149-154 as shown on the 1892 Plan 3, and the unnumbered lot to the north of Brockton Avenue bordered by Lots M-R and 155-170 as shown on the 1892 Plan 3 were signed by Security, but not Kelleher. The earliest deed in the summary judgment record for Lot 37 was dated April 26, 1897, and signed by W.H. Morton and Emma E. Morton. None of the parties, however, raise any issues with respect to the title to individual lots within Hyannis Park.

21 Every deed of a beachfront lot referenced the 1892 Plans.

22 On December 26, 1935, George Percy Williams registered Lots 135, 136, 137, 138, 139, the portion of the open area (the "Tidal Creek") to the west of these lots to low water, and the area southerly of Lot 138 and the Tidal Creek to mean low water. The deeds into George Percy Williams all reference the lots as shown on the 1892 Plans. These were registered as part of Parcel A as shown on Plan 15751A dated November 12, 1934 (the "1934 Plan"). The Certificate of Title describes one of the boundaries of Parcel A as "[s]outhwesterly by a line in Lewis Bay seventy and 25/100 (70.25) feet." On the 1934 Plan such line appears to be seaward of the low water line and is therefore incorrect. The Certificate of Title, however, states that the title is subject "to any and all public rights legally existing in and over the same below mean high water mark." The 1934 Plan shows Parcel A as abutting Lewis Bay. The 2003 Plan shows the boundary of Lewis Bay as significantly different from the 1934 Plan. Hyannis Harbor was dredged in 1999, impacting the shoreline and increasing the area above the high water line. Parcel A was later subdivided into three parcels owned by O'Connor, Leahy and the Lenzis.

23 Windmill Trust II owned 17 Windmill Lane at the time this action was brought, by deed dated December 9, 2000, and recorded with the Registry at Book 13441, Page 330. The October 4, 2006, deed from Windmill Trust II to Windsong Trust is not in the summary judgment record.

24 Mafera owned 7 Stone Avenue at the time this action was brought.

25 The February 24, 2006, deed from Brown/Lynch to the Wackrows is not in the summary judgment record. The recording information for the Wackrows deed was taken from Brown/Lynch's assented-to motion to substitute the Wackrows as Defendants. This court notes that Lots 10-12 were registered in 1948 on Certificate of Title No. 7218. Neither the original certificate of title nor any subsequent certificates of title showing ownership in Brown/Lynch or the Wackrows are in the summary judgment record. The deed from Lynch to Brown/Lynch dated August 2, 1988, and recorded with the Registry at Book 6532, Page 259, conveying Lot 9 (which is unregistered) and Lot E-1 (which is the registered parcel consisting of Lots 10-12 on the 1892 Plans) is in the summary judgment record and describes the seaward boundary of Lots 11 and 12 as "by the high water mark in Lewis Bay." None of the parties challenge the validity of these deeds.

26 The Twomeys also were deeded a parcel known as Parcel B, but it is unclear if this parcel is a part of Hyannis Park.

27 There is no original deed in the summary judgment record for Lot 233.

28 The summary judgment record does not show an original deed for Lot C.

29 The grantor of Lot 37 was not Security or Kelleher.

30 The Quinlans' deeds are not in the summary judgment record.

31 *See* footnote 20, *supra.*

32 *See* footnote 20, *supra.*

33 In some of the 1929 deeds, Scudder identified himself as the surviving member of Land Company; in other deeds he identified himself as the surviving member of both Security and Land Company. Scudder had resigned as a trustee of Security by instrument dated July 26, 1898, and recorded with the Registry at Book 233, Page 417. Land Company was disbanded by instrument dated September 17, 1906, and recorded with the Registry at Book 276, Page 441. The summary judgment record does not reflect a document which created Land Company or what the interest of Land Company was in Hyannis Park. The signers of the instrument to disband Land Company were Lyons, Hoyt, Scudder, Kingman and Erastus W. Gorham ("Gorham"), the trustees of Security. Although not part of the summary judgment record, it appears that Gorham replaced Jones as a trustee of Security at some point between August 1893

and April 1894. Lyons died on February 20, 1917; Kingman died on January 10, 1928; Jones died on March 3, 1946; and Hoyt died on October 27, 1950. The summary judgment record does not indicate when Gorham died.

34 The 1892 Plans shows the southern boundary of lots S and T as 160 feet rather than 100 feet, but appearances indicate that the boundary is 100 feet.

35 The consideration stated in this deed was "one dollar and other valuable considerations." All of the other 1929 Deeds stated only "for consideration paid." None of the 1929 Deeds showed any documentary stamps attached.

36 Daylor states that his practice includes many developments in the littoral zone, but that does not make him an expert in interpreting deeds. Moreover, such testimony does not involve scientific, technical or other specialized knowledge.

37 The letter is dated January 23, 2006, but it is clear that this is a typographical error.

38 Plaintiffs correctly point out that Daylor misinterprets certain statutes and case law relative to littoral rights. See discussion, *infra.*

39 The parties agree that prescriptive rights in the Beach are not a part of the summary judgment action, and will require a trial at a later date, if necessary.

40 See discussion of the 1929 Deeds, *infra.*

41 The legal description for Lot 148 in deed dated June 12, 1896, starts as follows: "[s]aid lot is situated *on the waterfront* ..." The legal description for Lot 110 in deed dated September 20, 1897, starts as follows: "[s]aid parcel of land is bounded and described as follows, viz: Beginning at a point fifty three (53) feet south-east on the southeast corner of Grove Street, *on the water front* ..." The legal description for Lot 203 in deed dated November 28, 1896, starts as follows: "[b]eginning at a point eighty-five and five tenths (85 5/10) feet more or less from the southwest corner of lot numbered 204, *on the water front*, thence running northerly one hundred and sixty (160) feet, thence easterly fifty (50) feet, thence south one hundred and fifty one and four tenths (151 4/10) feet, thence westerly *along the water front* forty (40) feet to point of beginning." The legal description for Lot 11 in deed dated September 1, 1906, states as follows: "[s]aid parcel of land is bounded and described as follows: Beginning at a stake at the south corner of lot # 10 in the line of an old fence, thence southwesterly in the line of said fence 93.39 feet to a stake *at high water mark* ..." The deeds for Lots 148, 110 and 203 define the lot as being on the waterfront, but none of the boundaries delineate any line as bounding on the water. *See Commonwealth v. Roxbury*, 9 Gray 451, 524 (1857) ("[t]he general principal is, that a boundary by the tide water passes the flats, but a boundary by the land under the water excludes them"). The fact that a lot is on the waterfront does not mean that the lot abuts the tidelands; there could be upland between the lot and the tidelands which would prevent the inclusion of the tidelands as a part of the lot. Lot 11 is more troublesome, as it references the high water mark. However, the legal description does not state that any of the boundaries abut the high water mark, and it appears that the one stake at high water mark is only a reference point. Moreover, Lot 11 was not deeded out until 1906 (it was one of the last waterfront lots to be deeded), and it was the most easterly lot in Hyannis Park.

42 The deed to Lot 37 references a plan but does not describe it.

43 It should be noted, however, that the 1892 Plans, which are referenced in each of the Plaintiffs' deeds (except lot 37), show seven roads leading to the Beach within the subdivision, five of which traverse the entire width of the subdivision.

44 There is no high water line shown on the 1892 Plans.

45 Reilly and Shah argue that since none of the original deeds to Defendants contained any reservation of the beach or flats, it is presumed that such deeds contained a conveyance of the tidelands as well. Reilly and Shah, however, miss the point. The deeded southerly boundary did not bound on Lewis Bay. The unnumbered parcel along the waterfront separated the lots from the water. Moreover, cases in the early 1800s emphasize this point. "Since the passage of the ordinance [Colonial Ordinance of 1641-47], a grant of land *bounding on the sea shore* carries the flats in the absence of excluding words" (emphasis supplied). *City of Roxbury*, 75 Mass. at 524. Reilly and Shah also argue that the derelict fee statute leads to the same result, but this argument also misses the mark for the same reason that the unnumbered parcel along the waterfront separates the lots from Lewis Bay.

46 The Summary Judgment Defendants argue that their lots border the tidelands and that the Beach is really the tidelands between high and low water, and point out that the 1892 Plans define the line in Lewis Bay as the "low water line," leaving the inference that the lots abut the high water line. None of the deeds, however, refer to the bounding description as Lewis Bay.

47 There are several dissimilarities with the situation in *Reagan.* In the case at bar, none of the unnumbered lots were designated with a name, two of the unnumbered lots were further developed with lots as shown on the 1892 Plan 2 and the 1892 Plan 3, and three of the five unnumbered lots were sold to private owners by 1906. The development and sale of several of the unnumbered lots, however, is irrelevant because none of these lots involved the Beach.

48 Reilly and Shah point out that all owners in Hyannis Park have the right to use two public beaches in the subdivision, Bayview Beach at the end of Bay View Street, and a town landing at the end of Grove Street. Plaintiffs point out that Bayview Beach was not established as a public beach until the Town of Yarmouth made an eminent domain taking in 1929. Moreover, the eventual establishment of two public beaches is immaterial to the intent of the grantors in the 1800s.

49 It is interesting to note that the Summary Judgment Defendants' deeds point out the same problem, as all of the Summary Judgment Defendants' original deeds granted the Summary Judgment Defendants rights to use the public streets but none of the Summary Judgment Defendants' original deeds granted the Summary Judgment Defendants a right to use the Beach.

50 Moreover, a number of the 1929 Deeds contained a provision that stated the Beach was to be left undeveloped and kept open for public use. There are also uncontested affidavits for a number of Plaintiffs that indicate that the Beach was in fact used for recreational purposes.

51 There is nothing in the summary judgment record to indicate who these heirs are.

52 This decision was affirmed by the Massachusetts Appeals Court in *Weiss v. Kevorkian,* 27 Mass.App.Ct. 1405 (1989).

53 The *Weiss* decision stated that, "[n]o other waterfront owners are parties to these actions, and accordingly rights in other beach areas of Hyannis Park cannot be conclusively decided here."

54 Reilly and Shah argue that *Weiss* should not be controlling on the remainder of the lots because "new" facts have been presented that would change the picture. None of these new facts, however, were unavailable to Judge Sullivan and, moreover, they are not relevant to the fact that the original deeds of the waterfront parcels did not convey rights in the tidelands. Most of the "new" facts dealt with the validity of the 1929 Deeds, and these deeds are irrelevant to the interpretation of the original deeds. If the 1929 Deeds are not valid, then the successors to Kelleher and Security still own the Beach, subject to the rights of those with implied easements. The other "new" fact was that some of the unnumbered lots were subsequently deeded out by 1906, but this is irrelevant to the fact that the Beach has not been deeded out.

Reilly and Shah also argue that the derelict fee statute applies to the original conveyances and as a result the Beach was included as a part of the conveyance. G.L. c. 183, § 58, states in part as follows:

> "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, watercourse or monument, unless ... the instrument evidences a different intent by an express exception or reservation and not alone by bounding by a sideline."

The problem with such analysis is that there is no evidence that the waterfront lots abutted the ocean, as the bounding description does not so indicate. *See* discussion, *supra.* Moreover, there is no case law to indicate that the derelict fee statute has been applied to tidelands. The term "watercourse" generally applies to rivers and the like. Black's Law Dictionary defines "watercourse" as "[a] body of water flowing in a reasonably definite channel with bed and banks." Black's Law Dictionary 1585 (7th ed.1999).

55 This court notes, however, that although the Shah Trust is not precluded by the decision in *Weiss* from arguing that Plaintiffs do not have rights in the Beach and this court is not bound by the reasoning in that decision, the *Weiss* decision is still instructive on the issues in the case at bar.

56 In addition, this argument is inconsistent with the Summary Judgment Defendants' first argument that the original developers intended to grant the fee in the Beach in the initial deeds out.

57 O'Connor has supplied the Affidavit of Chester Lay to interpret seven aerial photographs dated between 1958 and 2001. This affidavit has been struck, as discussed, *supra.*

58 *See* footnote 22, *supra.*

59 Plaintiffs argue that the implied easement is seaward of the registered parcel, referencing Land Court Plan 15751D, and is therefore not affected by O'Connor's certificate of title. This argument is not convincing as O'Connor's certificate of title includes the land to the low water mark and there is no evidence in the summary judgment record that any significant accretion of land occurred seaward of the O'Connor property between the creation of the 1892 Plans and Land Court Plan 15751D. The evidence indicates that all of the Beach is subject to changing high and low water lines, and there is no evidence to suggest that any easement rights would be gained or lost because of this.

60 O'Connor also argues that if Plaintiffs have an implied easement to use the Beach, it has been extinguished through merger and by her family's open, notorious and exclusive dominion and control of the portion of the Beach along her property since 1964. I note, however, as discussed in footnote 39, *supra,* that it was clear that the parties did not intend to argue prescriptive rights on summary judgment. Moreover, like Plaintiffs' claim of prescriptive rights, O'Connor's claim to have extinguished rights by adverse possession is not appropriate for summary judgment as there are disputes of fact relative to the parties' use of the Beach and a trial will be required.

61 I have struck paragraph 9 of the Daylor Affidavit. Moreover, as a basis for his opinion, Daylor states, "For the past three hundred and fifty (350) years, the Colonial Ordinances have confirmed that a shore front property owner' (sic) property interest extends to 'the low water mark where the Sea doth ebb above a hundred rods, and not more wheresoever it ebbs further' regardless of whether the property lot line description in deed or plan extends only to the high water line or some other seaward boundary." The issue in the case at bar is that the property description for the oceanfront lots (except for four lots) does not bound by the ocean or any monument related to the ocean, but instead by a bounding line (example, the oceanside boundary for one lot states, "[t]he south side of said lot

measuring 50 feet.") It is not stated that the boundary is on the ocean, and as a result there is no intent to indicate a boundary on the water. The 1892 Plans shows the low water line but not the high water line, and the distance from the low water line to the lot lines in various deeds is often eighty to one hundred feet. Furthermore, cases have indicated that a seaward boundary of "on the beach," "by the beach," "by the flats," "on the shore," and "by mean high water mark" do not include tidal flats. *See Litchfield v. Ferguson*, 141 Mass. 97 (1886) (property boundary described as "north-westerly on the beach" "necessarily excluded the shore"); *Castor v. Smith*, 211 Mass. 473, 474 (1912) ("a conveyance of land describing the beach as its boundary does not include the beach, but extends to the line of mean high-water mark"); *Jackson v. Boston & Worcester Railroad Corp.*, 1 Cush. 575, 580 (1837) ("generally there is no doubt that a lot bounded by flats would be construed so as to exclude the flats"); *Haskell v. Friend*, 196 Mass. 198, 201 (1907) ("It is settled that a boundary 'on the shore' does not include the space between high and low water mark"); *Sheftel v. Lebel*, 44 Mass.App.Ct. 175, 179 (1998) (deed language describing an easement as extending to "mean high water" mark "unambiguously terminate[s] the easement at the mean high water line and do[es] not authorize its extension to the mean low water line"). As a result, the premise for the Daylor Affidavit is faulty, and I do not give credibility to the Daylor Affidavit.

62 The summary judgment record does not indicate the date on which the 1892 Plan 3 was recorded.

63 The parties may wish to discuss whether prescriptive rights in the Beach may become an issue if this decision is appealed.

64 Windmill Trust II, which has been substituted by Windsong Trust, alleged termination of any implied easement rights by adverse possession in its Counterclaim. The rest of the Six Defendants and O'Connor raised the issues of abandonment and adverse possession as affirmative defenses. Richards, Cavanaugh/Timmins and Puglisi, who are not Summary Judgment Defendants, also raised the issues of abandonment and adverse possession as affirmative defenses.

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