

County: **Barnstable, ss.**

Case No: **Miscellaneous Case No. 115449 - Miscellaneous Case No. 114945**

Date: **November 19, 1986**

Parties: **[115449] EUGENE WEISS and ROSLYN L. WEISS vs. PETER KEVORKIAN and GEORGE E. VAN BUSKIRK -- [114945] EUGENE WEISS and ROSLYN L. WEISS vs. PETER KEVORKIAN, GEORGE E. VAN BUSKIRK and THE COMMONWEALTH OF MASSACHUSETTS**

Decision Type: **DECISION**

Eugene Weiss and Roslyn L. Weiss (the plaintiffs) own a home on Highland Street overlooking Lewis Bay in Yarmouth, Barnstable County. In front of their home and several feet beneath it there is a marginal beach, the use of which is in dispute in the two actions brought by the plaintiffs; the first having originated in the Superior Court for the County of Barnstable as an action of trespass which was transferred to this department, and the second, Miscellaneous Case No. 114945, filed by the plaintiffs for a declaratory judgment as to the ownership and rights in the beach. In both actions Peter Kevorkian of Wellesley in the County of Norfolk, and George E. Van Buskirk of said Yarmouth, are defendants and in the declaratory judgment action the Commonwealth of Massachusetts is also a

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defendant. The Messrs. Kevorkian and Van Buskirk and the Commonwealth of Massachusetts are collectively referred to herein as the defendants unless the context otherwise requires. All references to recording are to the Barnstable County Registry of Deeds. originally the plaintiffs pressed a count for slander of title and damages therefor against the individual defendants, but this was waived during the trial. The issues presented to the Court concern the ownership of the beach and more importantly the rights of others to use it.

The two cases were tried together at the Land Court on May 6 and 7, 1986 and June 18 and 19, 1986. A view was taken by the Court in the presence of counsel on November 8, 1985. At the trial a stenographer was appointed to record and transcribe the testimony. One hundred thirty-three exhibits were introduced into evidence of which several were multiple exhibits. There also were fourteen exhibits marked for identification of which Exhibits D and E are also a portion of Chalk A, the deposition of Eleanor Megathlin, Executive Assistant to the Barnstable County Commissioners. I continue to exclude as full exhibits the affidavit of Turbena C. Minucci, the certificate of opinion in Land Court Registration Case No. 15751 and the examiner's report in said case, and Exhibit N, a letter signed by Sidney Cohen, dated July 24, 1984. Exhibits J to M for identification ultimately were marked as Exhibit Nos. 122, 121, 129 and 128 respectively. The remaining exhibits which were marked for identification were photographs which I continue to exclude as not being sufficiently identified.

Fifteen witnesses testified at the trial. They were Christopher Pilavis, a member of the bar who owns a home in the Hyannis Park

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development in Yarmouth; John Fenton, whose grandparents were the persons who built the home now owned by the plaintiff; Albert Minucci, son of the party who conveyed the premises owned by the plaintiffs to them; Joseph R. Crimmins, owner of property on the opposite side of Highland Street from the plaintiffs whose home also overlooks Lewis Bay; Matthew J. Zurowick, a Deputy Assessor for the Town of Yarmouth; Robert Graveline, a property owner in Hyannis Park; Jean O'Connor, the owner of a parcel of registered land in Hyannis Park; Roslyn Weiss, the plaintiff; Richard Wade, a property owner in Hyannis Park; Charlotte Ness, Mr. Wade's aunt and predecessor in title; Arthur Belcher, Sidney Cohen and Leona Kevorkian, all owners of Hyannis Park homes; and the defendants George E. Van Buskirk and Peter Kevorkian.

The plaintiffs acquired title to Lots 147 to 151 at Hyannis Park by a deed from Turbena C. Minucci to Eugene Weiss dated June 21, 1979 and recorded in Book 2939, Page 069 (Exhibit No. 35).[1] At some time subsequent thereto, the controversy between the plaintiffs and certain of their neighbors at Hyannis Park developed, initially triggered by the use of the beach in question by a group of unidentified persons which led the plaintiff, Roslyn L. Weiss, to call the police. The controversy senselessly escalated fed by Mrs. Weiss' propensity for resorting to assistance of the police when others attempted to enjoy the beach in front of her home as distinguished from that adjacent thereto forty feet wide which is the seaward extension of the public way, Highland Street. This apparently was a first for the neighborhood since none of the many witnesses who had been familiar with the section for years mentioned a

[1] Mr. Weiss subsequently conveyed locus to himself and his wife, Roslyn L. Weiss, as tenants by the entirety, by deed dated September 18, 1979 and recorded in Book 2965, Page 326 (Exhibit No. 36).

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previous history involving intervention by Town authorities. In any event, the Town of Yarmouth subsequently decided to take no part in the controversy until it was resolved by the Courts, and the police no longer responded to complaints.

The principal dispute involves the ownership by the plaintiffs of the beach between Lots 147 and 148 at Hyannis Park and the waters of Lewis Bay, and the right, if any, of owners of properties in Hyannis Park to use this beach for usual beach purposes by reason of implication, prescription or necessity. I find and rule 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. More specifically, on all the evidence, I find and rule as follows:

1. The development which is referred to as Hyannis Park is shown on at least three recorded plans all bearing the date of December, 1892 and recorded in Plan Book 26, Pages 103, 105 and

113, with the plan at the latter page having been amended as of September, 1895 (Exhibit Nos. 4, 5 and 6). A reduced copy of Exhibit No. 4 is attached hereto as Appendix A in the interest of clarity, and the numbered lots owned by the plaintiffs are outlined thereon. The beach in front of this property also has been highlighted on the plan by court personnel.

2. Title to the tract was acquired from Augusta M. Crocker by John V. Scott, Leon Williams, Dennis B. Kelleher and L. Fisher Kent, by deed dated August 10, 1892 and recorded in Book 201, Page 562 (Exhibit No. 1). Three

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of the four owners transferred their interest to Frederick A. Hoyt, et al, as Trustees of the Security Investment Company, by deeds dated November 4, 1892 and June 1, 1893 and recorded in Book 206 at Pages 217 and 259 (Exhibit Nos. 7 and 8). One of the four owners of record, Dennis B. Kelleher, retained his undivided one-fourth interest apart from the Security Investment Company and joined in some, but not all, of the conveyances made by the developer. Nothing turns on this quirk in the record title since it seems clear that if the plaintiffs' title should be affected by the Kelleher glitch, adverse possession has resolved the problem as to any of the numbered lots.

3. Lots 147 to 151 were conveyed out by the Trustees to various grantees, there being three original conveyances; Lot 147 to David Frost (Exhibit No. 9), Lot 148 to Charles W. Gray, et al (Exhibit No. 13), and Lots 149 to 151 to Cyrus B. Kingman (Exhibit No. 10). The conveyance of the two waterfront lots, Lots 147 and 148, in each instance conveyed the numbered lot on the recorded plan and did not bound by Lewis Bay. The deeds in question are Exhibit Nos. 9 and 13 which were recorded respectively in Book 206, Page 278 and Book 222, Page 264. The latter deed did state that the lot was "situated on the waterfront on the southeast corner of Highland Street." Ultimately, title descended to Alva P. Poole (Exhibit Nos. 14, 15 and 16) and thereafter title to all five lots was acquired by Jessie Russell by deed dated March 31, 1925 and recorded in Book 406, Page 561 (Exhibit No. 28).

4. In 1906 the then Trustees of the Security Investment Company conveyed to Oliver P. Scudder certain lots at Hyannis Park by deed dated September 14, 1906 and recorded in Book 274, Page 569 (Exhibit No. 20).

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Included within the premises conveyed thereby was the area east of Lots 147, 149, 150 and 151. This area now appears to include a tidal creek and is not involved in the present controversy.

5. Hyannis Park Land Company, which did not hold title to any of the real estate, but which appears to have been a selling agent, voted on September 14, 1906 to dissolve, and the dissolution appears of record in Book 276, Page 441 (Exhibits Nos. 21A and 21B).

6. Many years thereafter and for reasons as to which it is only possible now to speculate, J. Porter Scudder, who described himself as "[t]he only surviving Trustee of Hyannis Park Land Company & The Security Investment Company" conveyed to Jessie Russell a certain lot or parcel of beach land bounded and described

as follows (sic):

Bounded and described as follows. Beginning at a bound at the South West corner of Lot # (148) as shown on a Plan of Lots at Hyannis Park, situated in West with quitclaim covenants Yarmouth Mass. Said Plan being on file at Barnstable County Registry of Deeds and dated December 1892. the land in 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 9 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 a point of beginning.

(Exhibit No. 29) (underlining in original).

7. Similar conveyances were made to the owners of other numbered lots which were closest to the water including a deed to George P. Williams dated July 12, 1929 and recorded in Book 466, Page 251 (Exhibit No. 51). This parcel now forms a portion of the land registered in Case No. 15751 which was located immediately to the east of the land of the plaintiffs on

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the opposite shore of a tidal creek. The question as to rights of others in the beach portion of the locus in the registration case was not litigated.

8. During the years when lots were being sold in the development, advertisements ran in the Brockton papers extolling the virtues of the development (Exhibit No. 110). In 1893 and 1894 and through the remainder of the 19th century, excursion trains were run from Brockton to Hyannis Park in an effort to sell the lots. In one such advertisement in the Brockton Daily Enterprise of June 29, 1893, the advertisement stated "3d -The Park overlooks Lewis Bay and Vineyard Sound and cool breezes from the water blow over it continually. 4th - 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 bath at all hours of the day. People come from miles around to this beach to bathe." A similar ad ran in the August 5, 1893 paper. In another advertisement the beach was described as "sandy gravel well calculated for bathing." The lots frequently were sold at auction for prices which today seem incomprehensible. In all the advertisements the theme is stressed as to the availability and excellence of the beach (Exhibit No. 110). No contention was made by the plaintiffs that the beach in question was not within the locus, but in fact was what is now a town beach without the limits of Hyannis Park.

9. Many of the owners of properties at Hyannis Park are descendants of some of the original purchasers, while others whose own roots do not go back as far nevertheless have owned homes in the area for many years.

10. Highland Street was one of the original private ways shown on the various recorded plans of Hyannis Park (See, e.g., Exhibit No. 4). It

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subsequently was taken by the Town of Yarmouth as a public way. The layout of January, 1932 was recorded in Plan Book 47, Page 97 and is Exhibit No. 43. The plan shows there to be approximately 65 to 70 feet at that time between mean high water and mean low water and indicates steps which lead from the top of the wood and stone bulkhead down to the beach. There is no disagreement that the forty foot wide extension of Highland Street to the water is a public beach of the Town of Yarmouth. The dispute concerns the rights of owners of homes in Hyannis Park to use the beach in front of the plaintiffs' home. Much of the testimony at the trial concerned the propensity of the residents of the Highland Street section of Hyannis Park to sit on the area between the stairs and the water as opposed to their practice of using the so-called beach northwesterly and southeasterly of the sidelines of the public beach.

11. The hurricane in the mid 1950's heavily damaged plaintiffs' home and ate away the embankment between the water and the house. As a result, the Commonwealth of Massachusetts, the County of Barnstable and the Town of Yarmouth awarded contracts for various shore protection projects, one of which was in the Hyannis Park section of Yarmouth and concerns the construction of three stone groins and the placing of sand fill. The estimated cost in 1955 was \$20,000.00 of which the county and the town were to pay twenty-five percent and the Commonwealth the remainder (Exhibit Nos. 113 and 114). The work which was to be done is shown on a plan entitled "Proposed Beach Development, Stone Groins and Sand Fill, Hyannis Park, Yarmouth, Department of Public Works of Massachusetts, Division of Waterways, November 1955" (Exhibit No. 115). The latter exhibit shows a proposed groin number 1 which was erected at the southeasterly corner of

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the plaintiff's property running southwesterly therefrom into Lewis Bay, the proposed sand fill from the bulkhead and riprap to the seaward of the mean low water mark. The plan still shows wooden stairs in the location where they have been replaced by those of a more permanent nature and a bulkhead at the front of the plaintiff's property. In some subsequent time, the earlier wooden bulkhead was replaced by the various land owners by a cement and stone wall which presently exists in front of most of the houses in this area of Hyannis Park westerly to the Town beach at the foot of Bay View Street which is shown on said Exhibit No. 115 and which lies without the Hyannis Park development. At the time of the improvement a permit was obtained by the Division of Waterways from the Army Corps of Engineers authorizing the construction and maintenance of three stone groins and the placement of sand fill on the beach area in question (Exhibit No. 116).

12. There was conflicting testimony as to whether the owners from time to time of what is now the plaintiffs' home requested those using the beach in front of the house to leave. Mr. Fenton and Mr. Minucci testified that as youngsters they were embarrassed by the insistence of their relatives that strangers be told to leave the beach. Other witnesses including Mr. Belcher, Mr. Cohen and Mrs. Ness testified that they have never been asked to leave the beach nor have they ever observed anyone else being asked to leave the beach. There also was evidence that a sign had been

placed between the Town's property and that of the plaintiffs' predecessors in title reciting that the latter was a private beach and that the sign continuously was destroyed. Most witnesses, however, testified that they had never seen such a sign and that it was not until Mrs. Minucci had

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placed the property on the market in 1978 that there was painted on the retaining wall the words "private beach." The number of people using the entire area between the Commonwealth's jetty and up to and including Mr. Crimmin's beach was only ten to twenty people daily with more, but not a great deal more, on a hot summer weekend. Most people who used the area would join their friends on the beach for brief periods of time, go in for a swim and then return home.

13. In addition to the Town beach at the foot of Highland Street, there is another public beach near Bay View Street which is outside of but adjacent to the Hyannis Park area, and is much larger than locus. One witness testified that the beach at the end of Highland Street was known as the "Step Beach" or the "Russell's Beach." The larger public beach is across from a well-known restaurant called the Captain's Chair and has a large paved parking lot. It is within easy walking distance of Highland Street.

14. There never have been any fences or other indicia of ownership erected on the beach to physically exclude other residents of Hyannis Park, and to do so now would require permission from the Department of Environmental Quality Engineering as well as the local Conservation Commission (See, e.g., G.L. c. 131, s.40 and c. 91).

15. Residents of Hyannis Park from time to time would anchor their boats at the groin or just off the beach, or occasionally leave them on the beach itself to the extent such activities were carried on below mean high water mark. In addition to use of a boat, defendant Kevorkian over the years and from time to time would spend several hours daily on vacation days or weekends on a float situated in the water off the shore. These

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were activities permitted by the old Colonial ordinance of 1641-1647. There also has been use of the Commonwealth's groin for some fishing, but it is said not to be good at this location and in any event is now barred for health reasons by the Town of Yarmouth. Prior to the hurricanes there was much eel grass where the beach and the tidal creek meet with a delta-like peninsula extending out to the ocean. After the Commonwealth built the groin and sand was brought in, the beach was much better.

16. Various plans before the Court show the changes in the mean high and low water marks from 1892 to 1955 (Exhibit Nos. 4, 43 and 115). No more recent information as to the present location was furnished to the Court. The location which appears on the original subdivision plan is very rough as is true of the plan itself (Exhibit No. 4). The filed plan in Registration Case No. 15751 (Exhibit No. 47) suggests that mean high water mark in 1934 cut across the southeasterly corner of Lot 147. The location of mean high water so far as it affected Lot 148 does not appear on that exhibit. The decree plan in Registration Case No. 15751 (Exhibit

No. 48) shows high water mark as proceeding across Lot 148 northwesterly to Highland Street where a bound is shown at the southwesterly corner of the plaintiff's land, then of Jessie Russell, and Highland Street. These plans strongly suggest that in 1934 a portion of Lot Nos. 147 and 148 were located below high water. The plan prepared by the Department of Public Works, dated November, 1955 (Exhibit No. 115) which was after the hurricanes, shows mean high water as at the top of the sand fill, but this appears to be due to artificial circumstances and not to the natural conditions. There was no expert testimony as to where mean high water falls in 1986, but from the testimony of the witnesses and the observations

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of the Court at the view it would appear to be close to the bulkhead or retaining wall at the embankment in front of many of the homes along the Hyannis Park shoreline. If a person stands on the beach in front of the plaintiffs' home, it is impossible to see into the rooms since the difference in grade is so pronounced.

17. Peter and Leona Kevorkian are the owners of Lot No. 190 on Highland Street by virtue of a conveyance from James H. O'Connor and Mary C. O'Connor[2] dated October 1, 1964 and recorded in Book 1278, Page 9 (Exhibit No. 111). Mr. Kevorkian had commenced to use the beach in the early 1950's prior to his acquisition of ownership in the stead of his landlords on Windmill Lane and Highland Street. The deed to Mr. Van Buskirk was not introduced into evidence, but no one doubts his ownership of Hyannis Park property.

The defendants have claimed the right to use the Hyannis Park beach area between the home of the plaintiffs and Lewis Bay for all usual beach purposes. They base their claim on both prescription and necessity as well as implication. The plaintiffs countered by arguing that neither Mr. Kevorkian nor Mr. Van Buskirk have shown twenty year's adverse use of the right to use the beach. I do not reach that question, however, for as I have set forth above, I have found that 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.[3]

[2] The O'Connors subsequently purchased the registered land referred to above; Mrs. O'Connor testified at the trial, but her husband is no longer alive.

[3] No other waterfront owners are parties to these actions, and accordingly rights in other beach areas of Hyannis Park cannot be conclusively

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Beach in a technical sense comprises the area of land between high and low water mark not over one hundred rods in width, over which the tide ebbs and flows, but in the colloquial sense with which we use it here and as customarily understood by residents of seashore resorts comprises the land above the ordinary high water

mark, 'more or less well defined by natural boundary, or in the rear by a sea wall, providing a convenient and safe access to the water for bathing or for sun baths either before or after going into the water.' Lund v. Cox, [281 Mass. 484](#), 491. Hewitt v. Perry, [309 Mass. 100](#), 104." Anderson v. DeVries, [326 Mass. 127](#), 133-134 (1950).

Since the Massachusetts Bay Colony took the extraordinary step of surrendering ownership of the area between high and low water to the upland owner, Butler v. Attorney General, 195 Mass. 79, 83-4 (1907); Opinion of Justices, [365 Mass. 681](#), 685-686 (1974) public rights therein have been limited to fishing, fowling and navigation which includes the right to swim and float upon public waters. It does not, however, include the right to use for bathing purposes that part of the shore above low water mark where the distance to high water mark does not exceed one hundred rods. This anomaly of the Commonwealth's law has led to extensive litigation and is increasingly under attack as the public seeks to enjoy the environment. The Colonial Ordinances of 1641-7, however, are not involved in this action. Rather we are concerned with the effect of the incorporation of a reference to the Hyannis Park plan in the deeds out. In Bacon v. Onset Bay Grove Association, [241 Mass. 417](#) (1922) the deed to the plaintiff described the property only as a numbered lot on the recorded plan, the same practice

decided here.

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followed in the instant case. We do have in some instances additional bounds, but none which make substantive additions to the descriptions. The Supreme Judicial Court in Bacon stated the rule as follows at page 423:

However, where land is conveyed by reference to a plan in the absence of an express grant no onerous servitude is created over other land of the grantor shown on the plan where such right is not necessary for the enjoyment of the premises unless shown to be intended by the parties to the deed. In determining the intent, the entire situation at the time of the conveyance must be considered. Prentiss v. Gloucester, [236 Mass. 36](#). Peck v. Conway, 119 Mass. 546. The necessity need not be an absolute physical one. Gorton-Pew Fisheries Co. v. Tolman, [210 Mass. 402](#), 410. Each case is to be decided by a determination of the intent as evidenced by the deed and the circumstances in which it was made. Lipsky v. Heller, [199 Mass. 310](#), 316, 317. Prentiss v. Gloucester, supra, at page 52.

Where the intent is doubtful, the construction of the parties shown by the subsequent use of the land may be resorted to, if such use tends to explain or characterize the deed, or to show its practical construction by the parties, providing the acts relied upon are not so remote in time or so disconnected with the deed as to forbid the interference that they had relation to it as parts of the same transaction or were made in explanation or characterization of it.' Hurd v.

General Electric Co., 215 Mass. 358, 361. Blais v. Clare, 7 Mass. 67. Jennison v. Walker, 11 Gray, 423. Reynolds v. Boston Rubber Co., 160 Mass. 240, 245.

The developers of Hyannis Park conveyed only the numbered lots on the subdivision plan. No reference was made in the deeds out to the land lying between the numbered lots and Lewis Bay until many years after the sales had been completed. At that time, it appears that the owners of ocean front lots wished to acquire any land subject to private ownership on the water and the last survivor of the developers was content to be rid of the burdens of ownership, and a deal was struck.[4] Nonetheless the rights of

[4] For purposes of this decision and in view of the long lapse of time, the Court assumes that he had the power to do so.

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the owners of the other landward lots in Hyannis Park already had vested, and they could not be adversely affected by these belated conveyances of the beachfront. What then were the rights of the other lot owners? The advertisements make it clear that the sponsors were selling a new beach colony and that among its most valuable attributes was the proximity to the white sand beach and the warm waters of Lewis Bay. It was not necessary that the plan denote the area in question as a beach. *Labounty v. Vickers*, 352 Mass. 337, 345 (1967). The conclusion is inescapable that the lots were sold and purchased with the intention that the homeowners have the right to use the beach. The "Johnny Come Lately" conveyances of the beach over thirty years later was ineffectual to bar the implied rights acquired by the Hyannis Park owners. The conduct of those frequenting the area from time to time generally is consistent with this interpretation, but there was evidence that over the intervening years the plaintiffs' predecessors in title had sought to confine their neighbors (or perhaps only residents of Yarmouth generally) to the Town beach. once acquired, however, the easements of those in Hyannis Park could only have been lost by grant, release, abandonment, estoppel or prescription. *Delconte v. Salloum*, 336 Mass. 184, 188 (1957); See Restatement of Property, s.s.497-506 (1944). The evidence here falls far short of establishing any such bar to the rights of the owners of lots in Hyannis Park and those claiming under them.

On all the evidence I therefore find and rule 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; that the rights

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stem from the development of Hyannis Park and the reference to the recorded plans in the deeds out of the lots therein; that the beach area claimed by the plaintiffs was not conveyed out until long after most of the numbered lots on the plans and was subject to rights theretofore accrued by implication; that the rights of the defendants have not been lost through grant, release, abandonment,

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estoppel or prescription; and that the defendants have not trespassed on the land of the plaintiffs.

Judgment accordingly.

Judge: **/s/ Marilyn M. Sullivan**
Chief Justice

End Of Decision