

January 26, 2018

HAND DELIVERED

Julie Howard, Clerk
Cumberland County Superior Court
205 Newbury Street
Portland, ME 04101

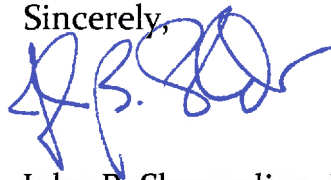
RE: *Imad and Hulda Khalidi, et al. v. Town of Cape Elizabeth*
Docket No. RE-18-

Dear Ms. Howard:

Enclosed for filing in the above-referenced matter please find Plaintiffs' Complaint for Declaratory Judgment, together with a Summary Sheet and our check in the amount of \$150.00 for the filing fee.

Thank you for your assistance. If you have any questions, please feel free to contact me.

Sincerely,



John B. Shumadine, Bar No. 8989

JBS/mfm
Enclosures
cc: Clients

This summary sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by the Maine Rules of Court or by law. This form is required for the use of the Clerk of Court for the purpose of initiating or updating the civil docket. (SEE INSTRUCTIONS ON REVERSE)

I. County of Filing or District Court Jurisdiction: Cumberland			
II. CAUSE OF ACTION (Cite the primary civil statutes under which you are filing, if any.) <i>Pro se</i> plaintiffs: If unsure, leave blank. 14 M.R.S.A. § 5954			
III. NATURE OF FILING			
<input checked="" type="checkbox"/> Initial Complaint <input type="checkbox"/> Third-Party Complaint <input type="checkbox"/> Cross-Claim or Counterclaim <input type="checkbox"/> If Reinstated or Reopened case, give original Docket Number _____ (If filing a second or subsequent Money Judgment Disclosure, give docket number of first disclosure)			
IV. <input checked="" type="checkbox"/> TITLE TO REAL ESTATE IS INVOLVED			
V. MOST DEFINITIVE NATURE OF ACTION. (Place an X in one box only) <i>Pro se</i> plaintiffs: If unsure, leave blank.			
<u>GENERAL CIVIL (CV)</u>			
Personal Injury Tort <input type="checkbox"/> Property Negligence <input type="checkbox"/> Auto Negligence <input type="checkbox"/> Medical Malpractice <input type="checkbox"/> Product Liability <input type="checkbox"/> Assault/Battery <input type="checkbox"/> Domestic Torts <input type="checkbox"/> Other Negligence <input type="checkbox"/> Other Personal Injury Tort Non-Personal Injury Tort <input type="checkbox"/> Libel/Defamation <input type="checkbox"/> Auto Negligence <input type="checkbox"/> Other Negligence <input type="checkbox"/> Other Non-Personal Injury Tort	Contract <input type="checkbox"/> Contract Declaratory/Equitable Relief <input type="checkbox"/> General Injunctive Relief <input type="checkbox"/> Declaratory Judgment <input type="checkbox"/> Other Equitable Relief Constitutional/Civil Rights <input type="checkbox"/> Constitutional/Civil Rights Statutory Actions <input type="checkbox"/> Unfair Trade Practices <input type="checkbox"/> Freedom of Access <input type="checkbox"/> Other Statutory Actions Miscellaneous Civil <input type="checkbox"/> Drug Forfeitures	<input type="checkbox"/> Other Forfeitures/Property Libels <input type="checkbox"/> Land Use Enforcement (80K) <input type="checkbox"/> Administrative Warrant <input type="checkbox"/> HIV Testing <input type="checkbox"/> Arbitration Awards <input type="checkbox"/> Appointment of Receiver <input type="checkbox"/> Shareholders' Derivative Actions <input type="checkbox"/> Foreign Deposition <input type="checkbox"/> Pre-action Discovery <input type="checkbox"/> Common Law Habeas Corpus <input type="checkbox"/> Prisoner Transfers <input type="checkbox"/> Foreign Judgments <input type="checkbox"/> Minor Settlements <input type="checkbox"/> Other Civil	
<input type="checkbox"/> Non-DHS Protective Custody			
<u>SPECIAL ACTIONS (SA)</u>			
<input type="checkbox"/> Money Judgment Request Disclosure			
<u>REAL ESTATE (RE)</u>			
Title Actions <input checked="" type="checkbox"/> Quiet Title <input type="checkbox"/> Eminent Domain <input type="checkbox"/> Easements <input type="checkbox"/> Boundaries	Foreclosure <input type="checkbox"/> Foreclosure for Non-pmt (ADR exempt) <input type="checkbox"/> Foreclosure - Other Trespass <input type="checkbox"/> Trespass	Misc. Real Estate <input type="checkbox"/> Equitable Remedies <input type="checkbox"/> Mechanics Lien <input type="checkbox"/> Partition <input type="checkbox"/> Adverse Possession	<input type="checkbox"/> Nuisance <input type="checkbox"/> Abandoned Roads <input type="checkbox"/> Other Real Estate
<u>APPEALS (AP) (To be filed in Superior Court) (ADR exempt)</u>			
<input type="checkbox"/> Governmental Body (80B)	<input type="checkbox"/> Administrative Agency (80C)	<input type="checkbox"/> Other Appeals	
VI. M.R.Civ.P. 16B Alternative Dispute Resolution (ADR):			
<input type="checkbox"/> I certify that pursuant to M.R.Civ.P. 16B(b), this case is exempt from a required ADR process because:			
<input type="checkbox"/> It falls within an exemption listed above (i.e., an appeal or an action for non-payment of a note in a secured transaction).			
<input type="checkbox"/> The plaintiff or defendant is incarcerated in a local, state or federal facility.			
<input type="checkbox"/> The parties have participated in a statutory prelitigation screening process with _____ (name of neutral) on _____ (date).			
<input type="checkbox"/> The parties have participated in a formal ADR process with _____ (name of neutral) on _____ (date).			
<input type="checkbox"/> This is a Personal Injury action in which the plaintiff's likely damages will not exceed \$30,000, and the plaintiff requests an exemption from ADR.			

VII. (a) **PLAINTIFFS (Name & Address including county)**
or **Third-Party**, **Counterclaim or Cross-Claim Plaintiffs**
 The plaintiff is a prisoner in a local, state or federal facility.

see attached

(b) Attorneys (Name, Bar number, Firm name, Address, Telephone Number) **If all counsel listed do NOT represent all plaintiffs, specify who the listed attorney(s) represent.**
(If *pro se* plaintiff, leave blank)

John B. Shumadine, Esq., Bar No. 8989
Murray Plumb & Murray
75 Pearl Street
Portland, ME 04101
207-773-5651

VIII. (a) **DEFENDANTS (Name & Address including county)**
and/or **Third-Party**, **Counterclaim or** **Cross-Claim Defendants**
 The defendant is a prisoner in a local, state or federal facility.

Town of Cape Elizabeth
320 Ocean House Road
Cape Elizabeth, ME 04107 (Cumberland)

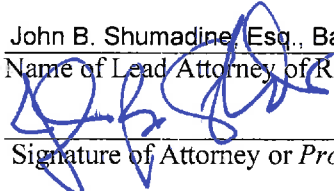
(b) Attorneys (Name, Bar number, Firm name, Address, Telephone Number) **If all counsel listed do NOT represent all defendants, specify who the listed attorney(s) represent.**
(If known)

IX. **RELATED CASE(S) IF ANY** _____

Assigned Judge/Justice _____ Docket Number _____

Date: January 26, 2018

John B. Shumadine, Esq., Bar No. 8989
Name of Lead Attorney of Record or *Pro se* Party


Signature of Attorney or *Pro se* Party

c:

Attachment to Summary Sheet

VII. Plaintiffs

Imad and Hulda Khalidi
19 Pilot Point Road
Cape Elizabeth, ME 04107 (Cumberland)

David and Kara Leopold
25 Pilot Point Road
Cape Elizabeth, ME 04107 (Cumberland)

Rock Dam Development, LLC
P.O. Box 484
Scarborough, ME 04074 (Cumberland)

Andrew Sommer and Susan Ross
29 Pilot Point Road
Cape Elizabeth, ME 04107 (Cumberland)

Stewart and Julie Wooden
33 Pilot Point Road
Cape Elizabeth, ME 04107 (Cumberland)

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. RE-18-_____

IMAD and HULDA KHALIDI,)
DAVID and KARA LEOPOLD,)
ROCK DAM DEVELOPMENT, LLC,)
ANDREW SOMMER and SUSAN ROSS)
STEWART AND JULIE WOODEN)
)
Plaintiffs)
)
v.)
)
TOWN OF CAPE ELIZABETH,)
)
Defendant)
)

COMPLAINT FOR DECLARATORY JUDGMENT
(Title to Real Estate is Involved)

Imad and Hulda Khalidi, David and Kara Leopold, Rock Dam Development, LLC, Andrew Sommer and Susan Ross, and Stewart and Julie Wooden (collectively “Plaintiffs”), by their undersigned counsel, complaints against Defendant Town of Cape Elizabeth as follows:

Parties and Venue

1. Plaintiffs Imad and Hulda Khalidi are residents of the Town of Cape Elizabeth, Maine, and own the real property located at 19 Pilot Point Road, Cape Elizabeth, Maine, and further identified as Lot 75 on Tax Map U12.

2. Plaintiffs David and Kara Leopold are residents of the Town of Cape Elizabeth, Maine, and own the real property located at 25 Pilot Point Road, Cape Elizabeth, Maine and further identified as Lot 71 on Tax Map U12.

3. Plaintiff Rock Dam Development, LLC is an LLC organized by virtue of the laws of the State of Maine, and owns the real property located at 15 Pilot Point Road, Cape Elizabeth, Maine and further identified as Lot 74B on Tax Map U12.

4. Plaintiffs Andrew Sommer and Susan Ross are residents of the Town of Westport, Connecticut and own the real property located at 29 Pilot Point Road, Cape Elizabeth, Maine and further identified as Lot 69 on Tax Map U12.

5. Plaintiffs Stewart and Julie Wooden are residents of the Town of Cape Elizabeth, Maine, and own the real property located at 33 Pilot Point Road, Cape Elizabeth, Maine and further identified as Lot 67 on Tax Map U12.

6. Defendant Town of Cape Elizabeth (the “Town”) is a municipal entity located in Cumberland, County, Maine, which owns and maintains public roadways within the Town’s boundaries, including certain roadways granted to the Town—and formally accepted—through the process of incipient dedication.

7. Venue is proper in this Court pursuant to 14 M.R.S.A. § 501.

Facts

8. The Shore Acres Land Company created Surf Side Avenue as a paper street on its development plan of the “Shore Acres” subdivision in 1911. A true and accurate copy of the Shore Acres Plan is recorded at the Cumberland County Registry of Deeds in Plan Book 12, Page 45 (the “Shore Acres Plan”).

9. The Shore Acres Plan designated Surf Side Avenue as a paper street available to be accepted by the Town of Cape Elizabeth as a public way and constructed within a reasonable period of time after the plan was recorded in 1911.

10. The Town took no action to accept—or even acknowledge—any portion of Surf Side Avenue within a reasonable period of time.

11. To date, the Town has not accepted any portion of Surf Side Avenue.

12. Surf Side Avenue, as placed on the Shore Acres Plan, has two separate sections, the “Pilot Point Section” and the “Algonquin Section.” An illustration of Surf Side Avenue, identifying the two distinct sections of the paper street, is attached hereto as

Exhibit A.

13. The Pilot Point Section of the paper street runs parallel with Pilot Point Road between Atlantic Place and the start of the Algonquin Section. The Pilot Point Section has never been utilized as a roadway, and is inaccessible from all established roads, including Atlantic Place.

14. The Algonquin Section of the paper street is a partially graveled path. The graveled path runs from Pilot Point Road, a public way, to Algonquin Extension Road, which is a private road maintained by abutting landowners. Algonquin Extension Road runs from Surf Side Avenue to Algonquin Road, a public way.

15. Although the Algonquin Section is a partially graveled path, the Town had no part in making those improvements. All of the improvements in the Algonquin Section were privately constructed. Those improvements have been privately maintained with no assistance from the Town.

16. In the early 1990s, owners of the properties abutting the Algonquin Section purchased the fee interest to that portion of the road from the original developers. After purchasing the fee, those owners offered easements in the Algonquin Section to all Shore Acres owners. Everyone in Shore Acres who responded to the offer was granted easements across the Algonquin Section. Upon information and belief, at that time, the Town affirmatively indicated that it had no interest in ever developing Surf Side Avenue as a public way.

17. Members of the Shore Acres community have routinely walked along the graveled way in the Algonquin Section with the consent of the abutting property owners.

18. The Pilot Point Section, by contrast, was developed as private yard space completely controlled and maintained by adjacent landowners. No navigable way was ever constructed by any party, and the Pilot Point Section was never utilized by anyone as a traveled way to reach any point.

19. Under the original Shore Acres plan, the land located between Pilot Point Road and Surf Side Avenue along the Pilot Point Section was originally divided into two series of lots. One series of lots fronted on Pilot Point Road, while the second series of lots fronted on Surf Side Avenue.

20. However, when the land along Pilot Point Road was developed, the land was developed as single lots that stretched from Pilot Point Road to the Atlantic Ocean. As a result, upon development there were no longer any lots that required Surf Side Avenue for access, and the Pilot Point Section of Surf Side Avenue was never developed as a way.

21. Pursuant to 33 M.R.S.A. § 469-A(6-A), the fee of Plaintiffs' properties extends down to the low water mark of the Atlantic Ocean. To the extent that the Pilot Point Section of Surf Side Avenue still exists, therefore, it crosses Plaintiffs' properties.

22. In the absence of use as a way, neighboring landowners—including Plaintiffs and their predecessors-in-title—occupied the portion of Surf Side Avenue adjacent to it as an extension of each landowner's backyard.

23. Plaintiffs and/or their predecessors in title openly and notoriously occupied and used the Pilot Point Section of Surf Side Avenue as their backyard in a manner that is hostile to the Town's inchoate interest in that paper street. Among other things, Plaintiffs and/or their predecessors in title constructed numerous obstructions and improvements within the purported bounds of the Pilot Point Section of Surf Side Avenue to the point where that section of the paper street cannot be used as a way.

24. Obstructions and improvements consistent with usage as a residential backyard include the construction of a wood deck and brick patio on Tax Map U12, Lot 69; construction of a fenced-in garden area on Tax Map U12, Lot 71; construction of lighting, an irrigation system and stairways on Tax Map U12, Lot 71; construction of rock landscaping adjacent to Tax Map U12, Lots 67, 72, 74 and 74B; construction of fencing adjacent to Tax Map U12, Lots 67, 73, 74, 74A and 74B; construction of a stone wall on Tax Map U12, Lot 73 bisecting the paper street; and planting of an established hedgerow completely across the paper street on the boundary between Tax Map U12, Lots 74 and 74A. A true and correct copy of a plan by Northeast Civil Solutions illustrating obstructions

and improvements that are located on Plaintiffs' properties and within the Pilot Point Section of Surf Side Avenue is attached hereto as **Exhibit B**.

25. Constructed obstructions and improvements have blocked access from both sides of the portion of Surf Side Avenue adjacent to Pilot Point's property for more than twenty years.

26. Natural obstructions have further prevented use of the Pilot Point Section as a navigable way, including the erosion of the rock ledge adjacent to Tax Map U12, Lots 69, 70, 71, and 74B, preventing Surf Side from being constructed as a road in the location where it was dedicated.

27. Additionally, the overgrowth of wooded areas and other dense natural vegetation has completely blocked access to the Pilot Point Section of Surf Side Avenue, and has prevented travel across the full length of the Pilot Point Section.

28. The Town has never taken any action to accept either side of Surf Side Avenue and has acquiesced to the private use of the paper street by abutting property owners, including by granting building permits for structures on Surf Side Avenue.

29. The earliest documented act of the Town *related* to consideration of Surf Side Avenue occurred on September 11, 1997, when the Town Council adopted an order attempting to reserve for twenty years its rights to "all proposed, unaccepted ways," with no specific mention of Surf Side Avenue.

30. The Town's reservation of rights was made pursuant to 23 M.R.S.A. § 3032.

31. The Town took no action to develop or accept Surf Side Avenue between 1997 and 2016 and acquiesced to its private use.

32. Then on October 5, 2016, the Town attempted to further extend its reservation of rights to accept certain proposed and unaccepted ways without taking *any* further action.

33. Section 3032 was never intended to provide municipalities unlimited rights to extend their rights over proposed and unaccepted ways for all time merely by recording a reservation of rights once every twenty years.

34. Section 3032 applies only to incipient dedications that have not already lapsed.

35. Despite the great passage of time from the incipient dedication of Surf Side Avenue, the Town has recently undergone a planning process with the stated intention of accepting Surf Side Avenue for use as a walking trail.

COUNT I: Declaratory Judgment Pursuant to 14 M.R.S.A. § 5954

36. Plaintiffs repeat and reallege each and every allegation set forth above in Paragraphs 1 through 35.

37. Under 14 M.R.S.A. § 5954, any person whose rights, status, or other legal relations are affected by a deed, statute, or other legal instrument may have determined any question of construction or validity arising under the deed, statute, or legal instrument and obtain a declaration of his or her rights, status, or other legal relations thereunder.

38. There is a real and substantial controversy between the parties in that Plaintiffs claim unrestricted ownership over the proposed paper street that was never accepted by Defendant Town of Cape Elizabeth.

39. Plaintiffs, as landowners abutting the Pilot Point Section of Surf Side Avenue, have standing to seek a declaratory judgment because they and their predecessors have asserted unrestricted ownership of the paper street.

40. An incipient dedication must be accepted within a reasonable time or the right to accept that dedication is lost.

41. The Town lost its right to accept the incipient dedication of the Pilot Point Section of Surf Side Avenue when it failed to accept the incipient dedication within the past 106 years.

42. Even if the Town's reservation of rights was sufficient to prevent automatic vacation of Surf Side Avenue, the Town's right to accept the Pilot Point Section of Surf Side Avenue lapsed when Plaintiffs, their predecessors-in-interest and other landowners abutting the Pilot Point Section possessed for more than twenty years the property over which Surf Side Avenue was intended to travel, exhibiting ownership over that property consistent with use as a private backyard, a manner that is inconsistent with the incipient dedication of a public way.

43. This Court has jurisdiction to determine the legal rights of the parties, concerning the incipient dedication of Surf Side Avenue, pursuant to Maine law, 14 M.R.S.A. §§ 5951 *et seq.*

COUNT II: Declaratory Judgment Pursuant to 14 M.R.S.A. § 5954

44. Plaintiffs repeat and reallege each and every allegation set forth above in Paragraphs 1 through 43.

45. Alternatively, even if Defendant Town of Cape Elizabeth's right to accept the proposed paper street has not lapsed, the Town may accept the incipient dedication only as originally proposed in 1911.

46. If the Town accepts Surf Side Avenue, it is prohibited from altering the location, construction or usage of the proposed roadway to become a trail or other type of public recreational space, because those usages were neither proposed nor intended in the 1911 incipient dedication.

47. Accordingly, if the Town accepts Surf Side Avenue, it may only do so as a public street.

WHEREFORE, Plaintiffs Imad and Hula Khalidi, David and Kara Leopold, Rock Dam Development, LLC, Andrew Sommer and Susan Ross, and Stewart and Julie Wooden, respectfully request that the Court: 1) declare that Defendant Town of Cape Elizabeth has no rights in or over the Pilot Point Section of Surf Side Avenue; (2) declare that the Town of Cape Elizabeth's rights to accept the Pilot Point Section of Surf Side Avenue lapsed when abutting owners possessed the paper street and exhibited ownership in a manner inconsistent with a public way for a period exceeding twenty years; (3) declare that Plaintiffs own the fee to that portion of Surf Side Avenue between Plaintiffs' easterly and westerly boundary lines; (4) declare, in the alternative, that the Town of Cape Elizabeth has no right to accept Surf Side Avenue to be used as a trail or other type of recreational space; (5) order the Town of Cape Elizabeth to reimburse Plaintiffs for their costs in this matter; and (6) grant such other and further relief as the Court deems just and proper.

Dated at Portland, Maine, this 26th day of January, 2018.



John B. Shumadine, Esq., Bar No. 8989
Attorney for Plaintiffs

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