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In Memoriam
C. Wesley Crowell
1955-2015

September 26, 2018

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HAND DELIVERED

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

Re: Imad and Hulda Khalidi, et al. v. Town of Cape Elizabeth
Docket No. RE-18-23

Pilot Point, LLC v. Town of Cape Elizabeth
Docket No. RE-18-30

Dear Ms. Howard:

Enclosed for filing in the above matter please find Defendants' Motion to Join Indispensable Parties and Proposed Order.

Thank you for your assistance.

Very truly yours,

Susan B. Driscoll

SBD/mb

Encl.

cc: David A. Soley, Esq.
James G. Monteleone, Esq.
John Shumadine, Esq.
Durward Parkinson, Esq.
Matthew Sturgis

collectively referred to as the “Abutting Parties”), as well as any and all mortgagees, as necessary and indispensable parties to this matter.¹

INTRODUCTION

These consolidated actions are brought by some but not all of the oceanfront homeowners of Pilot Point Road in Cape Elizabeth whose deeded lots abut a paper street known as Surf Side Avenue that lies between the back of their homes and the ocean.

The plaintiffs’ similar two-count Complaints for declaratory judgment assert alternative theories of relief in support of their claims that their properties should not be encumbered by the Town’s continued rights over the paper street. Count One asserts that the Town’s rights of incipient dedication in the Surf Side Avenue paper street were extinguished due to its failure to accept the street sooner and that its right to accept has now lapsed. Count II asserts that even if the Town accepts Surf Side Avenue, it cannot alter it or use it as a pathway or other type of recreational space. Part and parcel of the Plaintiffs’ claims is that they hold fee title to *all* of Surf Side Avenue and if the Town were found to have no rights in Surf Side Avenue, they would own in fee beyond their deeded boundaries and, indeed, all the way to the ocean. *See e.g.*, Khalidi Complaint at 9; Pilot Point, LLC Complaint at 8.

Because the Plaintiffs have asked the court to declare them the fee owners of real property which they may not own, all parties who may have interest in the property or who may be affected by the outcome of such a ruling must be joined in the litigation including Shore Acres, and the remaining owners of real property abutting Surf Side Avenue. As set forth more fully below, the Town respectfully requests that this Court order the absent parties including Shore Acres, the

¹ The Town believes these to be the true identities of the absent parties. Ownership of land owned by Shore Acres Land Company devolved to its shareholders when the corporate entity was dissolved through the Maine Secretary of State’s office in 1992. The burden rests with Plaintiffs to identify the absent indispensable parties including the shareholders or their heirs and the current abutting landowners and mortgagees, and to amend their Complaint(s) accordingly.

Abutting Parties and their mortgagees, to be joined as necessary and indispensable parties and to stay all further proceedings in this matter until such time as the absent parties are added.

ARGUMENT

I. M.R.Civ.P. 19(a) REQUIRES JOINDER OF INDISPENSABLE PARTIES AND THE PARTIES WHO HAVE AN INTEREST IN THIS LITIGATION MUST BE JOINED.

Rule 19(a) of the Maine Rules of Civil Procedure requires the joinder of all available persons who might have an interest in the underlying litigation so that the court's final judgment will "effectively and completely adjudicate the dispute." *Ocwen Federal Bank, FSB v. Gile*, 2001 ME 120, ¶ 14, 777 A.2d 275 (citing *Centamore v. Comm'r, Dept. of Human Servs.*, 634 A.2d 950, 951 (Me. 1993)); 7 C. Wright & A. Miller, *Federal Practice and Procedure* § 1604 (1972) at 36. This basic requirement ensures that the interests all parties – those included and those previously absent – will not be prejudiced due to their inability to participate, thereby avoiding unnecessary re-litigation of the underlying issues. *Centamore*, 634 A.2d at 951. Joinder of absent parties is imperative in cases involving the rightful ownership of real estate. *Gauthier v. Gerrish*, 2015 ME 60, ¶ 11, 116 A.3d 461 (holding that Rule 19(a) requires the joinder of a party holding a property interest that will be affected by the litigation).

When litigation involves the property rights of private parties vis-à-vis a municipality, the inclusion of all landowners abutting that land has been found to be necessary for a just and complete adjudication of the matter. *Almeder v. Town of Kennebunkport*, 2014 ME 139, ¶ 3 n. 3, 106 A.3d 1099; *Flaberty v. Muther*, 2011 ME 32, ¶ 88 n. 17, 17 A.3d 640 (both finding that the inclusion of all beachfront owners was necessary to resolve the issue of rightful ownership and use of land in the intertidal zone). When a person or entity's property interest may be affected by litigation, that person or entity is a necessary party. *Gauthier*, 2015 ME 60, ¶ 11, 116 A.3d 461.

In litigation that involves a public way, either accepted or reserved, the proper parties for such an action are the municipality and the fee-interest holders on *both* sides of the way itself. *See Efstathiou v. Payeur*, 456 A.2d 891, 892-93 (Me. 1983). Otherwise, any title vested in one party risks being unmarketable for any future transfer. *Gauthier*, 2015 ME 60, ¶ 13, 116 A.3d 461 (citing *Depositors Trust Co. v. Bruneau*, 144 Me. 142, 146-47, 66 A.2d 86 (1949)). Accordingly, all abutters including the currently absent parties, must be joined in the instant litigation.

II. PLAINTIFFS' CLAIMS OF TITLE TO ALL OF SURF SIDE AVENUE NECESSITATE JOINING THE SHORE ACRES LAND COMPANY TO THIS ACTION.

A. If Surf Side Avenue Were Vacated, Plaintiffs Would Only Be Entitled To Title To Its Centerline Since Shore Acres Land Company Has Title to Property On Surf Side Avenue's Southern Edge.

Pursuant to the Maine Paper Streets Act, “[a]ny person owning land in this State abutting a proposed, unaccepted way, whose predecessors in title had not reserved title in the way . . . is deemed to own to the center line of the way” 33 M.R.S.A. § 469-A(6). Alternatively, if the proposed, unaccepted way, “is bounded on the opposite side by land that is not included in the subdivision,” then the property owner “owns the entire width of the way.” *Id.* § 469-A(6-A).

Plaintiffs assert that if the Town’s rights to accept Surf Side Avenue have lapsed, then they own the entirety of Surf Side Avenue in fee, not just to the center line. Khalidi Complaint at 9; Pilot Point Complaint at 8. This assertion is premised on a number of legal and factual misconceptions. The Plaintiffs apparently claim ownership over all of Surf Side Avenue because they believe that any land lying southerly of Surf Side Avenue is outside of the Shore Acres Subdivision. *See* Plan of Shore Acres, attached hereto as **Exhibit A**. If this were so then Maine law might in fact grant Plaintiffs title to all of Surf Side Avenue, assuming it were vacated in the future.

However, this is not the case. Prior to its purchase by the Shore Acres Land Company, the land that now comprises Shore Acres (hereinafter the “Shore Acres Parcel”) was owned by Llewelyn

M. Leighton. Leighton later conveyed the Shore Acres Parcel to the Company by a deed dated October 14, 1902 and recorded in the Cumberland County Registry of Deeds in Book 724, Page 278. Prior to Leighton's ownership, the Shore Acres Parcel was owned by Dominicus Johnson, who had taken title pursuant to a deed from his father, John Johnson, dated September 16, 1845, and recorded in the Cumberland County Registry of Deeds in Book 194, Page 45. A plan of the Shore Acres Parcel as it existed during Johnson's ownership shows the extent of the parcel, most importantly the fact that the parcel stretched to the edge of the Atlantic Ocean. *See* Plan attached hereto as **Exhibit B**. Further, the Shore Acre Parcel's chain of title demonstrates that no owner ever reserved or excluded any portion of the Shore Acre Parcel in a subsequent conveyance. When it purchased, the Shore Acres Land Company took title to *all land* shown on the Plan upon Leighton's conveyance.

In contrast, while the so-called Plan of Shore Acres (**Exhibit A**) shows all the land conveyed to the Company by Leighton within the subdivision, it does not purport to convey all the displayed land to individual lot owners. Instead, the Plan of Shore Acres includes a swath of land between the ocean and the southerly edge of Surf Side Avenue, which is distinct and separate from both the roads of the subdivision and the individual lots. This distinction is confirmed by the deed descriptions of lots bordering Surf Side Avenue.² Also, the original deed from the Company to Pilot Point, LLC's predecessor-in-title only conveys up to the "northerly side line of Surf Side Avenue" and no further. *See* deed from Shore Acres Land Company to Dana E. Wescott and Fern Wescott dated July 14, 1938, recorded in Cumberland County Registry of Deed in Book 1556, Page 227, attached hereto as **Exhibit C**. Thus, when it was initially platted, the Shore Acres Land Company included land to the south of Surf Side Avenue *within* the subdivision, but reserved title in that land to itself.

² The presence of additional land to the south of Surf Side Avenue is also confirmed by the Plaintiffs' own consultant. *See* Pilot Point Complaint, Exhibit B.

Because Shore Acres (or its heirs) retains title to land abutting Surf Side Avenue, the Plaintiffs' request that the court grant them ownership of the *entire width* of Surf Side Avenue would necessitate defeating the rights of Shore Acres and that potential outcome makes Shore Acres an indispensable party to this litigation. Otherwise, pursuant to 33 M.R.S.A. § 469-A(6), if Plaintiff's somehow establish that the Town's rights of incipient dedication have lapsed, the Plaintiffs are only entitled to title in Surf Side Avenue up to its centerline.

III. ALL OF THE SIMILARLY SITUATED HOMEOWNERS WHOSE LOTS ABUT SURF SIDE AVENUE MUST BE JOINED IN THE LITIGATION.

A. The Inclusion of Abutting Parties McNeil, Hastings and the Trust is Necessary to Avoid Duplicate Litigation.

The doctrine of *res judicata* “prevents the relitigation of claims that were tried or could have been tried between the same parties or their privies in an earlier suit on the same cause of action.” *Town of Boothbay v. Jenness*, 2003 ME 50, ¶ 20, 822 A.2d 1169. However, the doctrine's preclusive effect cannot apply to parties that were not included, nor connected by privity, to those included in a previously-decided matter. *Id.* Rule 19(a) requires persons to be joined in circumstances where of the existing parties are left “subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.” Piecemeal litigation could result if the Abutting Parties, McNeil, Hastings, the Trust and their mortgagees, are not included in this action.

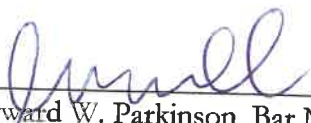
This case has been brought against the Town by some but not all of the property owners whose lots abut Surf Side Avenue. If the Abutting Properties are not joined, the Town would be exposed to the possibility of the litigating the *same case* in multiple actions, with the risk of differing, inconsistent outcomes, not to mention tremendous costs to the Town and duplication of judicial resources. This is exactly the scenario that necessitates the joining of the Abutting Parties pursuant to M.R. Civ. P. 19(a).

The Abutting Parties have standing to bring the same causes of action as the current Plaintiffs and have potential claims that are based on the same set of governing facts and legal principles as the instant matter. Their absence from this action exposes the Town to the possibility of additional litigation and the even greater risk of the possibility of inconsistent results that could result in confusion and uncertainty in the development of Maine's legal precedent affecting the public's rights of access, including along the coast. Accordingly, the Abutting Parties, McNeil, Hastings, the Trust and their mortgagees, should be joined as necessary parties to this action.

CONCLUSION

Based on the foregoing, the Defendant, Town of Cape Elizabeth respectfully requests that: (1) this court deem the Shore Acres Land Company, Mark A. McNeil and Elaine Tremblay, Lynda Hastings, Ricardo C. Calderon, Susan R. Baskin, and the Frank J. Galos Trust, and their mortgagees of record, to be joined as indispensable parties needed for just adjudication; (2) stay all proceedings in this action until such joinder has occurred, or the court has determined such joinder to be infeasible; and (3) grant Defendant such other relief that the Court deems just and proper under the circumstances.

Dated at Kennebunk, Maine this 26th day of September 2018.



Durward W. Parkinson, Bar No. 2691
Susan B. Driscoll, Bar No. 7689
Benjamin T. McCall, Bar No. 5780
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Town of Cape Elizabeth

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NOTICE

Pursuant to Maine Rule of Civil Procedure 7(b)(1)(A), any opposition to this Motion must be filed not later than 21 days after the filing of the Motion unless another time is provided by the Rules or set by the Court. Failure to file timely opposition documents will be deemed a waiver of all objections to the Motion, which may then be granted without further notice or hearing.

EXHIBIT

B

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Plan
of the

DOMINICUS JOHNSON FARM
IN
CAPE ELIZABETH, ME.

SCALE, 200 FT. TO 1 INCH.

E. C. Jordan, C.E.

M. Little, Del.

Explanations.
 The red lines represent survey lines
 The full black lines represent stone walls
 The two dots and dash black lines represent wooden fences.
 The area west of the division line is 55.37 Acres
 The area east of the division line is 52.56

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Know all Men by these Presents, That

Shore Acres Land Company, a corporation organized and existing under the laws of the State of Maine, and located at Portland, in the County of Cumberland and State of Maine,

EXHIBIT

in consideration of one dollar and other valuable consideration, paid by Dana E. Wescott and Fern Wescott, both of Cassopolis, in the County of Cass and State of Michigan,

tabbies

C

the receipt whereof it do hereby acknowledge, do hereby give, grant, bargain, sell and convey unto the said Dana E. Wescott and Fern Wescott, their heirs and assigns forever, a certain lot or parcel of land situated at Shore Acres, so called, in Cape Elizabeth, in said County of Cumberland, and bounded and described as follows: Beginning at a point in the southerly side line of Oak Grove Road, so called, which point is the northwesterly corner of lot numbered Eighteen (18) as delineated on a plan of Shore Acres made by Percy H. Richardson, C. E., and recorded in Cumberland County Registry of Deeds, Plan Book 12, Page 45; thence running southwesterly along said southerly side line of Oak Grove Road eighty (80) feet to a point; thence running southeasterly parallel to the westerly side line of lots numbered three (3) and eighteen (18) as delineated on said plan, two hundred nineteen (219) feet, more or less, to the northerly side line of Surf Side Avenue as delineated on said plan; thence running northeasterly along said northerly side line of Surf Side Avenue eighty (80) feet to a point and the southwesterly corner of lot numbered three (3) as delineated on said plan; and thence running northwesterly by the westerly side line of lots three (3) and eighteen (18) as delineated on said plan two hundred nineteen and seventeen hundredths (219.17) feet, more or less, to the point of beginning; containing seventeen thousand five hundred twenty (17,520) square feet, more or less; meaning and intending hereby to convey a strip of land eighty (80) feet in width from the easterly side of lots numbered four (4) and seventeen (17) as delineated on said plan.

The above described premises are hereby conveyed subject to the following restrictions, namely:

1. Only one house shall be erected on said premises.
2. No garage shall be erected or maintained on said premises which shall be more than fifteen feet distant from the house thereon and said garage shall be connected with said house by lattice work or other suitable structure.
3. No structure for business purposes or apartment house, so called, shall be erected or maintained on said premises.
4. The plans for any structure to be erected on said premises shall be submitted to Shore Acres Land Company or its architect prior to the construction thereof.
5. No building shall be erected on said premises nearer than twenty (20) feet to the line of Oak Grove Road or to the line of Surf Side Avenue as delineated on said plan.

To Have and to Hold the aforegranted and bargained premises, with all the privileges and appurtenances thereof, to the said Dana E. Wescott and Fern Wescott, their

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\$1.00
S.A.L.Co.
7/14/38

heirs and assigns, to said Grantees, their heirs and assigns, that it is except as aforesaid; their use and behoof forever. And the said Grantor, a covenant with the lawfully seized in fee of the premises; that they are free of all in cumberances;

that it has here good right to sell and convey the same to the said Grantees to hold as aforesaid; and that it and its successors, heirs, shall and will warrant and defend the same to the said

Grantees, their heirs and assigns forever, against the lawful claims and demands of all persons, except as aforesaid.

In Witness Whereof, the said Shore Acres Land Company has caused this instrument to be sealed with its corporate seal and signed in its corporate name by Harry E. Baker, its Treasurer, thereunto duly authorized,

had and-seal this 14th, day of July in the year of our Lord one thousand nine hundred and thirty-eight.

Signed, Sealed and Delivered in presence of
F. M. Wheelock

SHORE ACRES LAND COMPANY CORPORATE SEAL
By Harry E. Baker, Treasurer

County of Cumberland, ss. July 14, 1938. Then Personally appeared the above named Harry E. Baker Treasurer of said Grantor Corporation as aforesaid, and acknowledged the foregoing instrument to be his free act and deed in his said capacity, and the free act and deed of said corporation. Fred M. Wheelock Justice of the Peace Received July 19, 1938 at 11 o'clock 21 m. A. M., and recorded according to the original.

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STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
Docket Nos. RE-18-23, RE-18-30

IMAD and HULDA KHALIDI,
DAVID and KARA LEOPOLD,
ROCK DAM DEVELOPMENT, LLC,
ANDREW SOMMER and SUSAN
ROSS,
STEWART and JULIE WOODEN,

Plaintiffs

vs.

TOWN OF CAPE ELIZABETH,

Defendant

PILOT POINT, LLC,

Plaintiff

vs.

TOWN OF CAPE ELIZABETH,

Defendant

ORDER
(Proposed)

After consideration of Defendant's Motion to Join Indispensable Parties and any opposition thereto, the court hereby Grants the motion as follows:

I find that in accordance with M.R.Civ.P. 19(a), there are parties that must be added to the litigation for just adjudication of the issues before the Court. In the absence of those additional persons or entities as parties in this action as identified below, complete relief cannot be accorded among those already parties. Further, those absent parties have an interest relating to the subject of the action and are so situated that the disposition of the action in their absence may impair or impede their ability to protect their interest or leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the claimed interest.

Accordingly, it is hereby Ordered as follows:

Defendant's Motion pursuant to M.R.Civ.P. 19(a) is granted. Within 30 days, Plaintiffs shall file an Amended Complaint, naming the following additional indispensable parties as plaintiffs or defendants: the shareholders or their heirs of Shore Acres Land Company, Mark A. McNeil, Elaine Tremblay, Lynda Hastings, Ricardo L. Calderon, Susan R. Baskin, the Frank J. Galos Trust, and their mortgagees, if any.

All further proceedings in this consolidated action are hereby STAYED, until further notice from the court.

This Order shall enter upon the civil docket pursuant to M.R. Civ. P. 79(a).

DATE: _____

Justice, Maine Superior Court