

October 17, 2018

**HAND DELIVERED**

Danielle Young, Clerk  
Business and Consumer Docket  
205 Newbury Street  
Portland, ME 04101

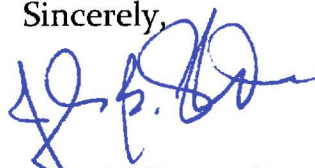
**RE: *Imad and Hulda Khalidi, et al. v. Town of Cape Elizabeth***  
***Docket No. BCD-RE-18-05***  
***Pilot Point, LLC v. Town of Cape Elizabeth***  
***Docket No. BCD-RE-18-06***

Dear Danielle:

Enclosed for filing in the above-referenced matter please find Plaintiffs' Memorandum in Opposition to Defendant's Motion to Join Indispensable Parties.

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: Durward Parkinson, Esq.  
Benjamin McCall, Esq.  
Susan Driscoll, Esq.  
David Soley, Esq.  
James Monteleone, Esq.  
Clients

STATE OF MAINE  
CUMBERLAND, SS

SUPERIOR COURT  
Docket Nos: RE-18-23  
RE-18-30

IMAD KHALIDI, DAVID LEOPOLD, )  
KARA LEOPOLD, ANDREW SOMMER, )  
SUSAN ROSS, STEWART WOODEN )  
and JULIE WOODEN, )

Plaintiffs, )

v. )

TOWN OF CAPE ELIZABETH, )

Defendant. )  
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PILOT POINT, LLC, )

Plaintiff, )

v. )

TOWN OF CAPE ELIZABETH, )

Defendant, )

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO  
DEFENDANT'S MOTION TO JOIN INDISPENSABLE PARTIES**

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This case involves a question regarding the Town of Cape Elizabeth's rights with respect to a portion of a paper street known as Surf Side Avenue. Surf Side Avenue was first laid out in 1911. Since its inception, Surf Side Avenue has never been accepted or used as a way. Plaintiffs seek no relief other than a declaration of the Town's rights, leaving no other parties indispensable from the Court's consideration of the Town's rights.

Surf Side Avenue crosses the rear of each of Plaintiffs' properties. In the decades since 1911, Plaintiffs and their predecessors in title have incorporated the portions of Surf Side Avenue on their properties into their backyards. They have built structures, maintained lawns, and otherwise taken multiple actions to confirm that this property is their own. Vegetation has grown and been maintained in a manner that makes it impossible to walk in some places along Surf Side Avenue. Portions of Surf Side Avenue run next to precipitous cliffs that falls dozens of feet down to rocks and ocean.

Until recently, the Surf Side Avenue "issue" was quiescent. The only people who walked on any portion of Surf Side Avenue were the owners of the abutting properties, who each walked only on the section abutting their own properties. Throughout the past five years, however, the Town has kept Surf Side Avenue in a state of limbo, alternately considering vacating the street and accepting the street solely to create a pedestrian recreational path. In the wake of the Town's inaction, neighbors have begun walking along Plaintiffs' backyards and cutting down vegetation while also confronting and yelling at Plaintiffs.

Plaintiffs filed this suit in an attempt to finally get some certainty concerning this issue. Plaintiffs deliberately framed the issue before the Court narrowly: the consolidated cases seek a determination by the Court as to the Town's rights in the portions of Surf Side Avenue that cross Plaintiffs' properties. Specifically, Count I seeks a declaration that the Town no longer has the right to accept Surf Side Avenue. Count II seeks a declaration that the Town's rights to Surf Side Avenue – to the extent they exist – do not allow the Town to construct a recreational trail along the portions of Surf Side Avenue on Plaintiffs' properties. In short, the consolidated actions present a simple dispute between the Town and Plaintiffs regarding the *Town's* rights.

The Town has now filed a Motion to Join Indispensable Parties. First, the Town requests that Plaintiffs amend their complaints<sup>1</sup> and join the developer that created Shore Acres in 1911 – the Shore Acres Land Company. Second, the Town requests that Plaintiffs join four additional, neighboring landowners to this case – Mark A. McNeil and Elaine Tremblay (collectively “McNeil”), Lynda Hastings and Ricardo L. Calderon (collectively “Hastings”), Susan R. Baskin, and the Frank J. Galos Trust (the “Trust”). Other portions of Surf Side Avenue beyond those at issue in this case cross the properties of those landowners.

As discussed in more detail below, the Town’s motion does not identify any actual indispensable parties to this action. Those potential parties can only be joined if Plaintiffs are first required to amend their complaints and add completely new claims beyond those that are currently before the Court. The Court should deny the Town’s motion in its entirety.

## **DISCUSSION**

### **I. ALL NECESSARY PARTIES ARE ALREADY JOINED**

#### **A. The Shore Acres Land Company is not a Necessary Party**

The Shore Acres Land Company, although relevant in the chronology of facts underlying this action, has no ongoing legal interest in the Town’s acceptance or vacation of public rights over Surf Side Avenue requiring its joinder. The Town alleges that the Shore Acres Land Company might possibly own a portion of Surf Side Avenue and therefore should be joined in this action. The Town’s argument that the Shore Acres Land Company must be joined rests upon a fundamental misunderstanding regarding the nature of this action.

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<sup>1</sup> As discussed in more detail below, the only way for Plaintiffs to actually join the Shore Acres Land Company would be to amend their complaints to allege new facts and legal theories.

This case is not about who owns Surf Side Avenue.<sup>2</sup> Plaintiffs' Complaints contain two counts. The first count seeks a declaration that the Town can no longer accept Surf Side Avenue. The second count seeks a declaration that to the extent the Town can still accept Surf Side Avenue, it must construct a road and cannot construct a recreational path along that road. Neither count seeks to litigate the actual fee ownership underneath Surf Side Avenue. Instead, both counts are directly and solely focused on the Town's rights in Surf Side Avenue.

The narrow focus of this litigation means Shore Acres Land Company is not necessary for any party to obtain "complete relief" on either count of Plaintiffs' Complaints. The only way in which the actual ownership of the fee underneath Surf Side Avenue matters is with respect to standing. The Town conceded that Plaintiffs own the fee to at least half of Surf Side Avenue, which is sufficient to give Plaintiffs standing to challenge whether or not the Town continues to have rights in Surf Side Avenue and the extent of those rights, if they exist.

In addition, there is no actual count in the current Complaint directed towards the Shore Acres Land Company. In other words, Plaintiffs would be required to amend their Complaints in order to add a completely new claim against the Shore Acres Land Company before it could actually be joined. If they were to do so, Plaintiffs would also need to amend their Complaints to allege new facts in order to support a claim of ownership against the Shore Acres Land Company. The question of whether a party is necessary must be evaluated in the context of the

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<sup>2</sup> The Town's entire argument rests upon a single sentence in Plaintiffs' Complaints. In their third prayer for relief, Plaintiffs ask the Court to "declare that Plaintiffs own the fee to that portion of Surf Side Avenue between Plaintiffs' easterly and westerly boundary lines." Khalidi Amended Complaint at p. 9; Pilot Point Complaint at p. 8. The Town simply reads too much into this single sentence. Plaintiffs agree that the prayer could be worded more precisely. Because the two counts in the Complaint focus solely on the Town's rights – if any – to Surf Side Avenue, the third prayer for relief is seeking only a declaration that as between the Town and Plaintiffs, the Town does not have any rights to impair Plaintiffs' interest in the land underneath Surf Side Avenue.

specific claims made and relief requested in the action before the Court. A party should not be added based on a hypothetical amended complaint.

That should be the end of the matter. However, to the extent the Court is concerned about the ownership issue, the Town has no basis for arguing that Shore Acres Land Company has any interest in Surf Side Avenue.

The Town's argument about Shore Acres Land Company ownership rests solely upon a narrow strip of land that may or may not exist between the edge of Surf Side Avenue and the Atlantic Ocean. The relevant part of the 1911 plan shows the lower boundary of Surf Side Avenue, with a number of lines set forth below that boundary:



See Exhibit A to Town Memorandum.

For further clarity, the area the Town is referring to is highlighted in green below:



It is not entirely clear what the 1911 plan intends to depict with those squiggles. To the extent there is actually any land between the boundary of Surf Side Avenue and the Atlantic Ocean, it is composed primarily of cliff and bare ledge.<sup>3</sup> It is undisputed, however, that this land – to the extent it even exists – is not included within the bounds of the disputed Surf Side Avenue paper street.

Moreover, this land cannot be developed in any meaningful manner. Thus, the Town’s motion is predicated on a rather suspect notion – specifically, that when the Shore Acres Land Company was developing Shore Acres, it intended to reserve a certain strip of what is effectively wasteland for itself.

<sup>3</sup> At the current time, there is at least one site along Surf Side Avenue where the ocean intrudes into Surf Side Avenue. In other places, the “land” shown on the 1911 plan might be said to exist, but is separated from Surf Side Avenue by an approximate 25 foot vertical drop.

Ultimately, however, it does not matter whether this land exists or not. Even if it did exist, the Town concedes that the Shore Acres Land Company “reserved title in that land to itself.” Town Memorandum at 5. That concession ends the matter.

Developers in Maine often do not subdivide their entire property. In such cases, Developers will retain a portion of their overall land for themselves. To the extent this land even exists, it is only retained land, held by the Shore Acres Land Company. As with all such retained land, it is therefore *not* a part of the Shore Acres subdivision.

This interpretation is in keeping with the 1911 plan. First, it is not clear that this land even exists. Second, to the extent this land does exist – and to the extent that Shore Acres even thought about this land – there is simply nothing on the 1911 plan to indicate that the land was intended to be a part of the subdivision. The land in question lies outside of the boundaries of the developed subdivision. The land is not given a lot number or even boundaries. The only logical conclusion is that the subdivision boundary ends at the edge of Surf Side Avenue.<sup>4</sup>

As a result, Plaintiffs’ property is bounded by “land that is not included in the subdivision.” 33 M.R.S.A. § 469-A(6-A). That land is either the Atlantic Ocean, or the land the Town claims to have identified in this motion. In either case, Maine law on this point establishes that Plaintiffs own to the outside edge of the subdivision – which is the ocean-side boundary of Surf Side Avenue.<sup>5</sup> To the extent that the ownership of Surf Side Avenue where it abuts Plaintiffs’ properties matters, Plaintiffs own the entirety of that street.

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<sup>4</sup> This conclusion is also consistent with the purpose of the statute, which was to clarify ownership of land under the roads.

<sup>5</sup> 33 M.R.S.A. § 469-A allows a developer to escape this outcome by filing a notice retaining ownership in a paper street. Although Shore Acres Land Company did reserve title in other streets within the Shore Acres subdivision, it did not make such a reservation with respect to Surf Side Avenue.



Nonetheless, as discussed at the outset of this section, this case is not about the ownership of the land under Surf Side Avenue. The issues are whether the Town can accept specific portions of Surf Side Avenue and whether the Town could do so, but only construct a recreational trail. Shore Acres Land Company is not necessary to provide complete relief in this case. The Court should deny the Town's motion to add the Shore Acres Land Company.

**B. Neighboring Surf Side Avenue Owners are not Necessary Parties**

The second part of the Town's motion seeks an order requiring that Plaintiffs join all neighboring property owners along one section of Surf Side Avenue to this action.<sup>6</sup> There are two problems with the Town's arguments on this point. First, the Town incorrectly claims that these additional landowners "have potential claims that are based on the same set of governing facts and legal principle as the instant matter." Town Memorandum at 7. That statement is not accurate.

One of the legal theories at issue in this case is whether the Town's right to accept Surf Side Avenue has lapsed under the common law. The Law Court has indicated that one of the ways an incipient dedication can lapse is when a property owner "exhibits ownership over the property in a manner that is inconsistent with the incipient dedication." *Ocean Point Colony Trust, Inc. v. Town of Boothbay*, 1999 ME 152, ¶ 9, 739 A.2d 382, 385. Acts of ownership in *Ocean Point* were assessed as to a single property owner – not an entire block of owners abutting that disputed paper street. *Id.*

The evidence regarding how a single party "exhibits ownership" over Surf Side Avenue will necessarily vary depending upon what part of Surf Side Avenue is being discussed. Thus, the

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<sup>6</sup> Owners on another section of Surf Side Avenue – which Plaintiffs refer to as the "Algonquin Section" in their Complaints – also potentially have standing to challenge the Town with respect to its ability to accept Surf Side Avenue. The Town does not ask that those parties be joined to this litigation.

facts regarding Plaintiffs' extensive use of the portions of Surf Side Avenue on their properties over the past several decades might be quite different from the way the alleged indispensable parties – McNeil, Hastings, Baskin, and the Trust – might have used the portion of Surf Side Avenue on their respective properties.<sup>7</sup>

Not only are the facts underlying the various claims different, but the Town has provided no explanation as to why Plaintiffs must take action to join the other property owners. The Town's sole argument in favor of joining the remaining landowners is that the Town would potentially face multiple claims from those other property owners. Town Memorandum at 6.

However, there is nothing that Plaintiffs can do in response to the Town's motion to alleviate that concern. Plaintiffs' Complaints seek only to adjudicate the Town's rights in those portions of Surf Side Avenue that cross Plaintiffs' properties.<sup>8</sup>

The only way for Plaintiffs to join Hastings, McNeil, Baskin, and the Trust would be to join them as parties-in-interest. Plaintiffs assert no claims against the other property owners with respect to Surf Side Avenue. Nonetheless, the issues in the case will continue to focus solely on the Town's rights in Surf Side Avenue with respect to Plaintiffs' properties. Hastings, McNeil, Baskin, and the Trust will be bound to the ultimate judgment on that point, but will still be free to make their own claims – based on their own specific facts – with respect to the portions of Surf Side Avenue that cross their properties.<sup>9</sup>

For this reason, the Court should deny the Town's motion with respect to McNeil, Hastings, Baskin, and the Trust.

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<sup>7</sup> For instance, the Trust properties are currently undeveloped.

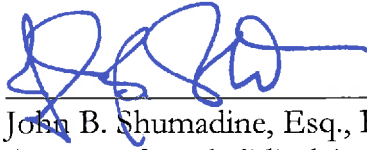
<sup>8</sup> Private rights, to the extent they exist, are not a part of the current action.

<sup>9</sup> The Town is free to file its own action against McNeil, Hastings, Baskin and the Trust to seek to resolve these issues. The Town, unlike Plaintiffs, could bring claims against those parties which could affect the portions of Surf Side Avenue that cross the McNeil, Hastings, Baskin and Trust properties.

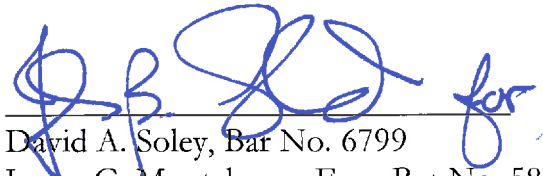
## CONCLUSION

For the reasons stated above the Court should deny the Town's Motion to Join Indispensable Parties in its entirety.

Dated at Portland, Maine, this 17<sup>th</sup> day of October, 2018.



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