

STATE OF MAINE
YORK, ss.

SUPERIOR COURT
Civil Action
Docket No. RE-09-0111

ROBERT F. ALMEDER et al.,

Plaintiffs,

v.

TOWN OF KENNEBUNKPORT

Defendant.

MEMORANDUM OF
DECISION and
FINAL JUDGMENT
ON FEE TITLE CLAIMS
(Title to Real Estate Involved)

I. Introduction	1
II. Background.....	4
III. Parties.....	5
IV. Findings of Fact.....	10
A. Goose Rocks Beach.....	10
B. History of Land Transactions.....	15
C. Sources of Title.....	36
Western Beach Properties.....	36
Middle Beach Properties.....	71
Eastern Beach Properties.....	102
V. Plaintiffs' Title Claims.....	178
VI. Town's Title Claim.....	249
VII. Conclusion and Order.....	269

I. Introduction

Robert F. and Virginia S. Almeder and 22 other owners of beachfront property on Goose Rocks Beach in Kennebunkport brought this action against the Town of Kennebunkport and all persons unascertained seeking to quiet title to, and declare their

exclusive rights in, the beach in front of their respective upland residential lots down to the water, subject to limited public use rights in the intertidal zone portion of the beach. The Town of Kennebunkport filed nine counterclaims in response, one of which asserts fee simple title to the beach. The State of Maine and approximately 200 owners of non-beachfront property in the vicinity of the beach intervened.

Litigation over rights to tidal property in Maine has been ongoing since before its independence from Massachusetts. It is not uncommon for cases of this nature to involve extensive factual records and arcane legal issues. In an early 19th century dispute over rights to tidal flats in Portland, the Supreme Judicial Court of Massachusetts observed: “The whole evidence was reported by the judge and is exceedingly voluminous, and not capable of being much abridged.” *Codman v. Winslow*, 10 Mass. 146, 147 (1813). The instant case is no exception, particularly since it actually consists of twenty-four quiet title/declaratory judgment actions rolled into one. The court heard 11 days of testimony; and parties presented an “exceedingly voluminous” written record consisting of nearly 700 exhibits, which included hundreds of deeds and thousands of pages. To consider and address fully the issues presented, the court’s decision, unfortunately, is lengthy and proved “not capable of being much abridged.”

Plaintiffs’ claims of title are based upon their current deeds together with more recent deeds in their respective title chains that purport to include the beach. Earlier grants or deeds in the chains of title, however, did not include the beach. Over time, deeds began to reference the ocean and/or the beach—some in general terms and others with greater specificity. This first began to occur in the late 19th century when individuals acquired oceanfront land with deeds that either did not include the beach or had property descriptions different from earlier source deeds. As land was subdivided, and then transferred and re-transferred over the years, deeds began

referencing the beach or describing the water as a seaward boundary. In other instances, deeds have been modified in the context of intra-family or other transfers to add language inclusive of the beach. This practice has carried forward throughout the last century and into this one, with the most recent instance in 2007, two years prior to the filing of this litigation. In the end, after full consideration of the evidence, the court has concluded that only one Plaintiff has established title.

Close examination of sources of title is warranted in a case such as this one. In dispute are discrete, “postage stamp-like” pieces of land—the dry and wet sand portions of the beach in front of 23 non-contiguous oceanfront residential lots. As was stipulated, none of the parties to this case claim exclusive use or possession of the disputed properties, which form part of a larger whole that has been used over the years not only by Plaintiffs but by others, including members of the public.

The Town’s claim of fee title to the beach is based upon a 1684 deed from Massachusetts to the town of Cape Porpus, its predecessor, and upon records showing a history of public land grants from the town going back to its earliest years. The 1684 deed is a unique element of this case but is not an independent basis for title in the Town. Although early town records confirm that public grants of unclaimed land were regularly made at town meetings, the evidence establishes that ultimately it was the town proprietary—an entity related to but distinct from the town itself and comprised of land-owning inhabitants of the town—that controlled and held title to the “common and undivided land” within the town.

In the unique circumstances presented, where only one beachfront property owner was able to establish title, the court concludes that the Town has title to all other disputed properties because the town proprietary held title to town common land, including the beach; the record does not establish that the proprietors conveyed out the

beach or properly concluded their affairs; and thus title has passed to the Town by operation of law.

II. Background

The relevant procedural history of this action is set out in *Almeder v. Town of Kennebunkport*, 2014 ME 139, ¶¶ 3-6, 106 A.2d 1099. In sum, the trial court with agreement of counsel previously bifurcated the case and conducted a trial on two of the nine counts in the Town’s counterclaim—the prescriptive easement claim (count IV) and the easement by custom claim (count VI). Following trial, the court issued partial judgment determining that the Town of Kennebunkport and others, including the public, had a public prescriptive easement as well as an easement by custom to engage in recreational activities in both the intertidal zone and the dry sand portion of the beach. The court further concluded under the public trust doctrine that the traditional public use rights in the intertidal zone (fishing, fowling and navigation) encompassed the right to engage in certain “ocean-based” activities. *See Almeder v. Town of Kennebunkport*, 2012 Me. Super. LEXIS 195 (Me. Super. Ct. Oct. 16, 2012) (*Brennan, J.*).

The Law Court vacated the trial court’s partial judgment, *Almeder*, 2014 ME 12, and, after entertaining and denying a motion for reconsideration, re-issued its decision and remanded the case with instructions to “conduct proceedings and issue a decision on the remaining causes of action that were the second part of the bifurcated trial, to the extent the parties wish to continue to assert those claims.” *Almeder*, 2014 ME 139, ¶ 37, 106 A.2d 1099. The Court expressly directed that on remand the parties must “present evidence as to the location of each Beachfront Owner’s specific parcel,” and

“the court must determine, with the presentation of additional evidence, the boundaries of each Beachfront Owners’ parcel.”¹ *Id.* ¶ 27 n.17.

Consistent with the Law Court’s mandate, and with agreement of the parties, the court conducted a trial on the record title claims only, namely counts I and II of the complaint and count I of the counterclaim. Consideration of the remaining use-based claims was deferred by agreement, to be addressed in future if necessary and/or requested.² The court’s findings of fact, conclusions of law and judgment with respect to the claims of record title to the property are set out below.

III. Parties

A. Plaintiffs

1. Robert F. and Virginia S. Almeder, Trustees of the Almeder Living Trust (“Almeder”), 113 Kings Highway, Goose Rocks Beach, Kennebunkport, County of York, State of Maine, the current deed to which is recorded in the York County Registry of Deeds, Book 15659, Pages 864-65.

2. John T. and Priscilla M. Coughlin, Trustees of the P.M.C. Realty Trust (“Coughlin”), 115 Kings Highway, Goose Rocks Beach, Kennebunkport, County of York,

¹ The Law Court also stated:

“Beyond that, the court may hear additional argument on the sufficiency of the parcel-by-parcel evidence but the parties may not introduce any new or additional evidence as to the uses giving rise to the prescriptive easement claim, and must rely on the evidence as already presented to support that cause of action. They may, however, introduce evidence relevant to the title- and deed-based claims on which the court has yet to issue a decision, i.e., those remaining causes of action that the parties agreed would be tried in the second portion of the bifurcated trial, if the parties wished to go forward with those claims.”

Id. ¶ 27 n.17.

² The remaining counts of the Town’s counterclaim—counts II (adverse possession), III (acquiescence), IV (prescription), V (dedication and acceptance), VII (public easement), and VIII (implied quasi-easement)—were deferred by agreement, to be heard, if necessary, in conjunction with any further trial on the easement and public trust claims if the Town or State elected to go forward on those claims. *But see* § VII, *infra*.

State of Maine, the current deed to which is recorded in the York County Registry of Deeds, Book 3085, Pages 5-6.

3. Mark E. Celi and William E. Brennan, Jr., Trustees of the Celi Kennebunkport Real Estate Trust No. 1 (“Celi”), 123 Kings Highway, Goose Rocks Beach, Kennebunkport, County of York, State of Maine, the current deed to which is recorded in the York County Registry of Deeds, Book 11798, Pages 290-91.

4. Goose Rocks Beach Holdings, LLC (“GRB Holdings”), 149 Kings Highway, Goose Rocks Beach, Kennebunkport, County of York, State of Maine, the current deed to which is recorded in the York County Registry of Deeds, Book 15048, Pages 714-21.

5. Susan Flynn (“Flynn”), 161 Kings Highway, Goose Rocks Beach, Kennebunkport, County of York, State of Maine, the current deed to which is recorded in the York County Registry of Deeds, Book 1935, Pages 460-62.

6. Aaron and Emily Cooper, Trustees of the Emily Cooper Revocable Trust Agreement (“Cooper”), 165 Kings Highway, Goose Rocks Beach, Kennebunkport, County of York, State of Maine, the current deed to which is recorded in the York County Registry of Deeds, Book 16888, Page 920.

7. Jule C. Gerrish (“Gerrish”), 173 Kings Highway, Goose Rocks Beach, Kennebunkport, County of York, State of Maine, the current deed to which is recorded in the York County Registry of Deeds, Book 1819, Pages 32-34.

8. Richard M. Vandervoorn, Lawrence W. Vandervoorn and Robert O. Clemens, Trustees of The Cornelius J. Vandervoorn Qualified Personal Residence Trust (“Vandervoorn”), 177 Kings Highway, Goose Rocks Beach, Kennebunkport, County of York, State of Maine, the current deed to which is recorded in the York County Registry of Deeds, Book 15718, Page 584.

9. Robert M. Davis, Successor Trustee of the Eugene R. Gray Qualified Personal Residence Trust (“Gray”), 183 Kings Highway, Goose Rocks Beach, Kennebunkport, County of York, State of Maine, the current deeds to which are recorded in the York County Registry of Deeds, Book 14656, Page 916, and Book 16257, Pages 341-42.

10. Linda M. Rice (“Rice”), 193 Kings Highway, Goose Rocks Beach, Kennebunkport, County of York, State of Maine, the current deed to which is recorded in the York County Registry of Deeds, Book 7955, Pages 127-28.³

11. Terrence G. O’Connor and Joan M. Leahey (“O’Connor/Leahey”), 195 Kings Highway, Goose Rocks Beach, Kennebunkport, County of York, State of Maine, the current deed to which is recorded in the York County Registry of Deeds, Book 13253, Page 87.

12. Beth G. Zagoren (“Zagoren”), 215 Kings Highway, Goose Rocks Beach, Kennebunkport, County of York, State of Maine, the current deed to which is recorded in the York County Registry of Deeds, Book 5931, Pages 340-42.

13. John O. Gallant and Sharon A. Gallant (“Gallant”), 219 Kings Highway, Goose Rocks Beach, Kennebunkport, County of York, State of Maine, the current deed to which is recorded in the York County Registry of Deeds, Book 8413, Pages 198-99.

14. Edwina D. Hastings, Trustee of the Edwina D. Hastings Revocable Trust UTA (“Hastings”), 221 Kings Highway, Goose Rocks Beach, Kennebunkport, County of York,

³ A supplemental notice filed prior to trial confirmed that Linda Rice, 193 Kings Highway, “remains a Plaintiff asserting quiet title claims and declaratory judgment claims against the Town of Kennebunkport.” See Supplement to Notice of Present Plaintiffs and Parties Defending Counterclaims, dated November 23, 2016. The notice also identified Linda Rice separately as a Party-in-Interest with respect to another property as follows: “Linda Rice, heir of Anne E. Clough, is the beachfront homeowner at 191 Kings Highway by virtue of a Personal Representative’s Deed of Distribution recorded in the York County Registry of Deeds at Book 16701, Page 79.”

State of Maine, the current deed to which is recorded in the York County Registry of Deeds, Book 14999, Pages 766-67.

15. Sherman/Kinney Properties II, LLC ("Sherman/Kinney"), 223 Kings Highway, Goose Rocks Beach, Kennebunkport, County of York, State of Maine, the current deed to which is recorded in the York County Registry of Deeds, Book 16965, Pages 833-35.

16. William D. Forrest, Nancie M. Julian and The SIP SIP NORTH Condominium Association, 239 Kings Highway ("Forrest/Julian") and 241 Kings Highway ("Julian"), Goose Rocks Beach, Kennebunkport, County of York, State of Maine, with current deed recorded in the York County Registry of Deeds at Book 14091, Pages 315-16 and Book 16673, Pages 715-32 (239 Kings Highway) and Book 14855, Pages 111-12, and Book 16673, Page 715 (241 Kings Highway).

17. Kristen B. Raines ("Raines"), 249 Kings Highway, Goose Rocks Beach, Kennebunkport, County of York, State of Maine, the current deed to which is recorded in the York County Registry of Deeds, Book 14147, Pages 614-16.

18. Leslie A. Josselyn-Rose, Trustee of LAJR Trust ("Josselyn-Rose"), 251 Kings Highway, Goose Rocks Beach, Kennebunkport, County of York, State of Maine, the current deed to which is recorded in the York County Registry of Deeds, Book 15587, Pages 491-92.

19. Michael J. Sandifer and Alice B. Sandifer, Co-Trustees of the Alice B. Sandifer Trust ("Sandifer"), 253 Kings Highway, Goose Rocks Beach, Kennebunkport, County of York, State of Maine, the current deed to which is recorded in the York County Registry of Deeds, Book 14627, Page 144.

20. Donna K. Lencki, Trustee of The Donna K. Lencki Trust of 1993 ("Lencki"), 256 Kings Highway, Goose Rocks Beach, Kennebunkport, County of York, State of

Maine, the current deed to which is recorded in the York County Registry of Deeds, Book 14985, Pages 760-61.

21. 291 Rear King's Highway, LLC ("Scribner"), 291 Kings Highway (Rear), Goose Rocks Beach, Kennebunkport, County of York, State of Maine, the current deed to which is recorded in the York County Registry of Deeds, Book 16960, Pages 406-10.

22. Christopher B. Asplundh ("Asplundh"), 17 Sandpoint Road, Goose Rocks Beach, Kennebunkport, County of York, State of Maine, the current deed to which is recorded in the York County Registry of Deeds, Book 1979, Pages 551-52.

23. Lisa Babette Temerlin Gottesman, Trustee of The LTG Maine Management Trusts ("Temerlin"), 29 Sandpoint Road, Goose Rocks Beach, Kennebunkport, County of York, State of Maine, the current deeds to which are recorded in the York County Registry of Deeds, Book 16497, Pages 351, 353-59.

B. Defendant

24. The Town of Kennebunkport, a municipal corporation organized under the laws of the State of Maine and situated in the County of York, State of Maine (the "Town").

C. Intervenor

25. The State of Maine was granted intervenor status in this action.

D. Parties-in-Interest

The following Parties-in-Interest have no affirmative claims in the case but are defending against the Town's counterclaims:

26. David L. Eaton and Jennifer L. Scully-Eaton ("Scully-Eaton") of 225 Kings Highway, Goose Rocks Beach, Kennebunkport, Maine, the current deed to which is recorded in the York County Registry of Deeds, Book 14078, Page 834.

27. Heather Vicenzi, Trustee of the George A. Vicenzi Trust (“Vicenzi”) of 250 Kings Highway, Goose Rocks Beach, Kennebunkport, Maine, the current deed to which is recorded in the York County Registry of Deeds, Book 12516, Page 170.

28. Sea Rose Family Limited Partnership Trust (“Sea Rose”) of 252 Kings Highway, Goose Rocks Beach, Kennebunkport, Maine, the current deed to which is recorded in the York County Registry of Deeds, Book 15938, Page 282.

29. Mary L. Emmons, Trustee, Emmons Family Realty Trust (“Emmons”) of 258 Kings Highway, Goose Rocks Beach, Kennebunkport, Maine, the current deed to which is recorded in the York County Registry of Deeds, Book 11465, Page 261.

30. John A. Parker (“Parker”) of 287 Kings Highway, Goose Rocks Beach, Kennebunkport, Maine, the current deed to which is recorded in the York County Registry of Deeds, Book 16119, Page 153.

IV. Findings of Fact

A. Goose Rocks Beach

Property in Dispute

1. Goose Rocks Beach is a two-mile long beach on the Atlantic Ocean located in Kennebunkport, Maine. There are approximately 110 lots fronting on the beach. See *Almeder*, 2014 ME 139, ¶ 2, 106 A.2d 1099. Twenty-three lots are owned by the current Plaintiffs in this action, identified above; five by the parties-in-interest named above; and nine by the Town or by the Kennebunkport Conservation Trust.

2. The parties have stipulated as follows: (i) There is no dispute as to Plaintiffs’ title to the upland, residential lots, and Plaintiffs have, and have had, “possession and ownership of that property”; and (ii) as to “both the intertidal zone [of the beach] and if there’s any dry sandy beach in between the intertidal zone and the vegetation or a man-made seawall, that that area has been used by the Plaintiff upland owners as well as

members of the public.” Stipulation (Tr. VI 42:11-20). Neither party claims or has enjoyed exclusive possession or use of the disputed property.

3. The Town and the majority of other beachfront property owners at Goose Rocks Beach reached an agreement that transfers the Town’s claimed ownership interest to the beachfront owner and grants rights to the public for use of the beach. The agreement is recorded in the York County Registry of Deeds, Book 16397, Page 492, with additional joiners recorded in the York County Registry of Deeds thereafter (the “Beach Use Agreement”). Def. Exs. 58, 58-A; *see also* Def. Ex. 51 (properties subject to the Beach Use Agreement shown in green).

4. The real property in dispute in this case consists entirely of portions of the sand beach seaward of Plaintiffs’ upland properties, and specifically: the intertidal zone of the beach, which is the wet sand part of the beach between the mean low tide line and the mean high tide line; and the dry sand portion of the beach lying between the mean high tide line and the upland lots. See Def. Exs. 51, 53.

Physical Features of the Beach

5. The Goose Rocks Beach area consists of sand beach, tidal rivers and upland, including marsh land. Over time there have been changes in the beach’s terrain, including changes occurring from natural causes such as accretion, reliction or erosion as well as from man-made causes such as the construction of seawalls, bulkheads, and similar structures. See Pl. Ex. 515.

6. Shifting of sands, and resulting changes in the contours, shape, and depth of the beach seaward of the upland lots, have been primarily the result of such natural causes. It is more likely than not that the most significant shifts in the contours of the beach have occurred at the mouths of the two rivers, the Batson River at the western end of the beach and the Little River at the eastern end of the beach, where natural

forces of erosion or accretion have been strongest. Although changes in the beach's terrain likely have occurred over time, the record does not establish that those changes have been substantial or material insofar as the claims in this case are concerned. Maps going back to as early as 1770 "indicate no gross changes in shoreline configuration." Pl. Ex. 515, at 165; *see* Buisman Test. (Tr. V 119:13-15); Yarumian Test. (Tr. VII 47:21 – 49:16; Tr. IX 159:19 – 160:6) *see also* Pl. Ex. 146 (minor shift of natural seawall over 70-year period).

7. Along the entire length of Goose Rocks Beach there are distinct elevations of land and mean tide or water levels. The elevation of the mean low water line is -4.5'. The mean high water line, which is landward of the mean low water line, has an elevation of +4.6'. The mean "higher high water line," which is landward of the mean high water line, has an elevation of +7'. The mean higher high water line at elevation +7' represents the average of where the highest tides occur periodically during the year at certain events, such as a full moon. Yarumian Test. (Tr. VII 41:6-12); Def. Ex. 55.

8. Landward from the mean higher high water line along the entire beach the land rises in elevation, and then descends to a lower elevation where the current-day residences are located. Yarumian Test. (Tr. VII 41:13 – 42:2; Tr. IX, 99:16 – 100:10). Robert Yarumian, a licensed surveyor in the State of Maine who served as the Town's expert, described this physical feature as a natural seawall. Yarumian Test. (Tr. IX 99:13-25, 100:1-19, 101:19-20, 104:3-7; Tr. VII 41:3-25, 42:1-2). Its approximate location on the face of the earth is depicted along the length of the beach on Defendant's Exhibits 51 and 53 as a thick, dark line, and it is roughly located in line with the man-made seawalls in many sections of the beach on those exhibits.⁴

⁴ Defendant's Exhibits 51 and 53 were prepared by utilizing mathematical information acquired from a variety of sources including a recent GIS tax map prepared for the Town, aerial photos of Goose Rocks Beach taken in 2010 under Mr. Yarumian's direction, aerial photo mapping

9. The base (or lowest point of elevation on the seaward side) of this physical feature on the face of the earth is landward of the mean higher high water line. Yarumian Test. (Tr. VII 48:1-13; Tr. IX 99:12-21); Def. Ex. 46. To the extent that the location of this physical feature on the face of the earth has shifted closer to or farther from the water over time, it would have been the result of natural causes. Yarumian Test. (Tr. VII 22:20 – 23:6); *see also* Buisman Test. (Tr. V 119:13-15). From a surveyor’s perspective, if this feature served as a deed monument and its location changed as a result of natural causes such as erosion or accretion, it would still serve as the present-day monument even though its location on the face of the earth may have shifted. Yarumian Test. (Tr. VII 49:17 – 50:14).

10. The extent of the rise in elevation from the base to the top of this physical feature varies along the beach from west to east. Yarumian Test. (Tr. IX 99:16-25, 105:1-4); Def. Ex. 46 (Profile 1).⁵ At the western end of Goose Rocks Beach, seaward of the Almeder and Coughlin upland lots, as one proceeds inland from the higher high water line, this physical feature of land rises to a maximum elevation of over 15 feet. Moving further landward from its highest elevation, the land descends to an elevation

information prepared by Bradstreet regarding various contour lines on the beach, and LIDAR technology for geo-referencing aerial photographs to locate monuments. *See* Yarumian Test. (Tr. VI 75:4-25, 77:16-25, 78:1-25, 79:1-2; Tr. VII 32:3-10, 36:1-9, 27:15-25, 45:12-18; 143:8 - 144:21).

⁵ Defendant’s Exhibit 46 is a cross-sectional analysis of elevations of various features of Goose Rocks Beach prepared by Mr. Yarumian from information collected by aerial photographs and other sources. The exhibit includes a “Typical Profile,” a generalized, composite profile of the beach, as well as three additional profiles at specific locations on the beach—one at the western end, one in the middle section and a third at the eastern end of the beach. These profiles illustrate the approximate elevations of the beach’s topography and relevant physical features (vertical axis) as they run from the mean low water mark landward (horizontal axis). Because the distance scale of the horizontal axis is relatively compressed, the elevations depicted on the vertical axis of the exhibit appear more exaggerated than is actually the case on the face of the earth. Even though the exhibit’s representations are exaggerated, based on the record evidence as a whole the court finds it more likely than not that there is a rise in elevation landward from the mean higher high water line along the beach that forms an embankment rising up from the dry sand portion of the beach and separating it from the upland.

of approximately 10 feet where the residences are located. Yarumian Test. (Tr. IX 99:13 – 100:10). This physical feature constitutes a natural seawall. There is no man-made seawall in front of the Almeder and Coughlin properties. Yarumian Test. (Tr. IX 99:16-25); Def. Ex. 46 (Profile 2).

11. Moving eastward along the beach, there is a man-made seawall in front of the Celi lot, in front of and to the easterly side of the GRB Holdings lot, and in front of the Flynn and Cooper lots. Yarumian Test. (Tr. VII 42:7-13); Def. Exs. 51, 53, 55 (Plot 2). The man-made seawalls on the face of the earth are in approximately the same location as the natural seawall. *Id.*

12. The land in front of the Celi, GRB Holdings, Flynn, Cooper, Gerrish, Vandervoorn, Gray, and O'Connor/Leahey lots also rises in elevation from the higher high water line to the area where residences have been built; then, moving further inland from there, there is or was dune grass, pines and a salt water marsh. Yarumian Test. (Tr. IX 103:14–21); Def. Ex. 46 (Profile 1). There are man-made seawalls in front of the Gerrish, Vandervoorn, Gray, and O'Connor/Leahey lots on or immediately proximate to the natural seawall. *See* Yarumian Test. (Tr. VII 43:3-4); Def. Ex. 55 (Plot 3).

13. In front Gerrish and Vandervoorn, there is slightly more distance between the mean high water line and the man-made seawalls, and elevation 7' (mean higher high water line) falls between the seawalls and the mean high water line. Yarumian Test. (Tr. VII 43: 9-10); Def. Ex. 55. If there were no man-made seawalls in this area, a physical feature of land constituting a natural embankment or seawall would be landward of elevation 7' as shown on Defendant's Exhibit 53. Yarumian Test. (Tr. VII 42: 11-14).

14. The Zagoren lot is east of O'Connor/Leahey and abuts the Dyke Road. Here the land rises in elevation from the mean higher high water line to a peak of

approximately 13 feet before gradually descending to dune grass and then residential property. Def. Ex. 46 (Profile 3). There is a man-made seawall in front of the Zagoren lot. Def. Exs. 53, 55.

15. There is no man-made seawall at the point where the Dyke Road enters onto the beach. Yarumian Test. (Tr. IX 101: 22). Here, there is a rise in elevation of the land of approximately five feet from the mean higher high water line (elevation 7'). Yarumian Test. (Tr. IX 101:14 – 102:6).

16. Further eastward, in front of the Lencki lot, the beach widens a little. Inland from elevation 7' there is dune grass and a vegetation line; the line of vegetation is on a natural rise which may be considered the natural seawall in this area of the beach. Yarumian Test. (Tr. VII 43:20 – 44:11).

17. Moving eastward, in front of the Scribner lot there is dune grass landward of the mean higher high water line (elevation 7') and then a rise in the land's elevation where there currently exists a man-made seawall. The physical feature created by the rise in elevation could have been considered a natural seawall before construction of the man-made structure. Yarumian Test. (Tr. IX 107:11-24), Def. Ex. 46 (Profile 4).

18. The eastern end of Goose Rocks Beach is bounded by the Little River. There is a narrow stone seawall landward from the high tide line and an area of dune grass between the seawall and the residential upland. Yarumian Test. (Tr. VII 45:5-11); Def. Ex. 55 (Plot 6).

B. History of Land Titles and Transactions in the Cape Porpus Area

Original Sources of Land Titles

19. Land tenure and titles in the New England colonies evolved out of the feudal proprietary system in England in which the Crown was the source of both “legal title to the soil” as well as “limited powers of government, in and over the lands thus granted.”

Commonwealth v. Roxbury, 75 Mass. 451, 478 (1857). Churchill Test. (Tr. XI, 60:12-19, 61:1-4).

20. Between 1620 and 1639, the Crown issued royal charters or patents to entities and individuals (“primary proprietors”) including the Council for New England; the Massachusetts Bay Company; and Sir Ferdinando Gorges. These were plenary grants of rights in and to the lands within the territory of New England, including territory in the Province of Maine (also known as Lygonia). Churchill Test. (Tr. XI 61:19 – 62:8, 63:9–22); Def. Exs. 5, 6. *See also Commonwealth v. Roxbury*, 75 Mass. at 479 (grantees “invested with the ordinary right of property in lands for cultivation and settlement, and the extraordinary right of government, subject only to their allegiance and subordination to the parent government, including herein a power over all sea shores and tide waters.”). The 1639 Charter of the Province of Maine issued by Charles I did “give, grant and confirm unto the said Sir Ferdinando Gorges, his Heirs & Assigns” territory including land from the Piscataqua River “along the sea coast” to the Kennebec River, and inland therefrom to a depth of 120 miles. Def. Ex. 5.

21. Primary proprietors conveyed land to others, including “secondary proprietors,” in the form of leases or outright grants. Churchill Test. (Tr. XI 61:15, 68:5-10). Secondary proprietors acquired and then subdivided large tracts of land, establishing settlements that eventually organized as individual townships.⁶ Churchill Test. (Tr. XI 66:19 – 24).

22. In the Cape Porpus area there were a limited number of known, recorded grants of land from primary proprietors or their agents. *See* Def. Ex. 42, p. 1; *see also*

⁶ Wells is one example. In 1643 in the Plantation of Wells, three individuals—John Wheelwright, Henry Boade and Edward Rishworth—acquired from Sir Ferdinando Gorges, through his agent, Thomas Gorges, lands with “full and absolute power to allot, bound and sett forth any lotts or bounds unto any man that shall come to inhabit in their Plantation.” Def. Ex. 8. *See* Churchill Test. (Tr. XI 66:3-9).

Pl. Exs. 539, 540, 541, 542. Land grants in this area tended to be smaller in size and were made (and re-granted) directly to individuals who settled the land. These settlers acted collectively to govern the settlement as well as to oversee and grant out unclaimed, unoccupied lands within the bounds of the township after its incorporation. Churchill Test. (Tr. XI 68:17 – 69:23, 103:18-19, 114:13 – 115:2). *See generally* Def. Ex. 3.

Massachusetts Oversight and Establishment of Town of Cape Porpus

23. As early as the mid-17th century, the Massachusetts Bay Colony (subsequently the Province of Massachusetts and herein, “Massachusetts”) had “laid claim to the western part of Maine as belonging to her jurisdiction and sent commissioners to compel inhabitants to submit to her authority.” Pl. Ex. 544. Political turmoil in England facilitated this claim, but also created uncertainty in colonial land titles, which had their source in royal grants. *See id.*; Churchill Test. (Tr. XI 72:18 – 73:19).

24. The Massachusetts General Court enacted a series of laws purporting to extinguish the old proprietorial claims; establish freehold ownership of land; and decree inhabitants of towns as freemen with authority to govern town affairs and dispose of common and undivided land within the town. *See* Churchill Test. (Tr. XI 74:20-75, 75:22 – 77:8); Pl. Ex. 544; Def. Ex. 11. *See also Lynn v. Nahant*, 113 Mass 433, 448 (1873) (“freemen of every town” given power to dispose of land, grant lots, lay out lots and “make such orders as may concern the well order of their own towns”); *Springfield v. Miller*, 12 Mass. 415, 418 (1815) (“[a]uthority was given to the freemen of any town to dispose of their lands, to grant title &c.”); Def. Ex. 19.

25. Cape Porpus incorporated as a town in 1653 under Massachusetts authority. Pl. Ex. 544. Town inhabitants appeared at court in Wells and “acknowledged themselves subject to the government of Massachusetts;” and “for the settling of government

amongst them,” it was granted that “Cape Porpus shall be a township by itself, . . . and shall enjoy . . . the privileges of a town, as others of the jurisdiction have and do enjoy, with all other liberties & privileges granted to other inhabitants in our jurisdiction.” *Id.* It was further declared that “every inhabitant shall have and enjoy all their just proprieties, titles, & interests in the houses & lands which they do possess, *whither by grant of the towns, possession, or of the former general court.*” Pl. Ex. 544 (emphasis added); *see also* Pl. Ex. 545.

Land Transactions in Cape Porpus—1653 to 1681

26. Town records reflect the first meetings held and actions taken by inhabitants to govern the newly organized town of Cape Porpus. The Kennebunkport Clerks Record (hereinafter, “Clerks Record”) was the official record of town meetings. Def. Ex. 3.

27. Entries in the Clerks Record during this time show that business conducted at town meetings (recorded as either “legal town meetings” or “general town meetings”) involved activities typical of local governance, such as appointment or election of various town officers (“Constable”, “Grand Jury Man”, and “Townsmen”), *see e.g. id.* at 1, as well as the oversight and disposition of “land that belongs to the town” or “Town Commons,” which included unoccupied and unclaimed land within the boundaries of the town. *E.g., id.* at 1, 4.

28. During these early years, public grants of common lands were regularly made by vote at town meetings, as recorded in the Clerks Record by the town clerk.⁷

⁷ The following grants were recorded:

- “Given and granted unto William Frost Privilege for to build a Saw Mill . . . with one hundred acres of upland and twenty acres of Meadow in any Place that is not yet granted and liberty for *to cut timber on any land that belongs to the Town.* . . .” Def. Ex. 3, at 1 (February 17, 1678) (emphasis added).
- “Those names are underwritten being Inhabitants of the Town of Cape Porpus at a legal Town meeting legally warned and voted: Having well considered and consulted with ourselves do hereby *give and grant, and by these presents have given and granted* unto

29. The Clerks Record also reflects entries of reports made by “lot layers” or surveyors, officials elected at town meetings to conduct surveys of land granted by private deed or public grant. Results of layouts were recorded in the Clerks Record as part of the official town record. Title to land granted by vote at town meeting did not vest until confirmed by layout. *See Williams v. Ingell*, 38 Mass. 288, 289 (1838) (Grants did not vest title “until examined, located and confirmed by a locating committee.”).

30. The York Book of Deeds⁸ contains recorded entries of public grants and layouts of land. Def. Ex. 42-B, at 15, 19. A relatively small number of private deeds from this period are also recorded in the York Book of Deeds. Def. Ex. 42-A.

Uncertainties as to Land Holdings & Titles

31. By 1680 conflicts with native tribes and epidemics had disrupted, and depopulated, settlements in Maine. Because the Cape Porpus settlement was small and

Joseph Littlefield & Edmund Littlefield *one hundred acres of upland on the North East Side of Kennebunk River* or joining as near as may be to the upper Falls near the Indian Planting Ground. . . . to them and their assigns forever” *Id.* at 2-3 (April 9, 1680) (emphasis added).

- “[G]rant unto John Badson & Isaac Cole and sons . . . free Liberty for to build a Saw Mill upon the Little River . . . with all privileges for the cutting of any Pine Timber for the use of the said mill upon the Town Commons” *Id.* at 4 (January 4, 1681).
- “[G]ave and granted” to
 - “John Miller One Hundred Acres of upland to be laid out by the Town . . . to him and his heirs forever;”
 - “William Thomas One Hundred Acres of land . . . to be laid out as the Town shall see meet to him and his heirs forever;” and
 - “William Burton One Hundred Acres of land between the Great Marsh and the Little [River] upon the North Side of John Miller’s to him and his heirs forever.” Def. Ex. 3, at 3 (June 23, 1681).
- “Given and granted unto:”
 - “John Purington Junior twelve acres of Meadow anywhere that is not yet granted, as convenient to his now Dwelling House as it may be had to him & his heirs forever;” and
 - “Richard Randall one Hundred acres of *upland* on the north side of the *Kennebunk River* . . . to him and his heirs forever.” Def. Ex. 3, at 4 (March 11, 1681).
- “Given and granted unto John Badson free Liberty for to build a Saw Mill at the third falls in the River that goeth in between the two upper Falls at the Salt Water” Def. Ex. 3, at 4 (December 13, 1681).

⁸ The York Book of Deeds is a record of the earliest deeds recorded in the York County Registry of Deeds during this period. *See Yarumian Test.* (Tr. VII 67:11-14, 68:4-8, 69:6-14).

remote, it was more susceptible to these forces. Much of the settlement was abandoned. When re-settlement began, there was confusion and uncertainty about rights to land possession and title, even with respect to lands formerly held by private or town grant. Churchill Test. (Tr. XI 83:5-8).

32. Developments in England compounded uncertainty with respect to land titles. The newly restored monarchy had a renewed interest in the colonial territories and was preparing to reassert its claim. There were also competing claims to land rights in territories under previously granted royal patents. The dispute led to litigation, which resulted in a 1677 judgment declaring the Gorges Patent to be the sole, legitimate claim to “rights of soil” in the territory of the Province of Maine and reaffirming the claim of the successors-in-interest under the Gorges Patent. Churchill Test. (Tr. XI 78:2 – 80:4); Def. Ex. 15.

33. Because it viewed these developments as a potential threat to its claim of authority over the Province of Maine, Massachusetts arranged to acquire the rights to the Gorges Patent. In March 1678 its agent, John Usher, purchased the Gorges Patent from the successors-in-interest who had prevailed in the lawsuit and then transferred those rights to Massachusetts. Churchill Test. (Tr. XI 78:4 – 79:13, 80:2 – 10); Pl. Exs. 546, 547; Def. Exs. 16, 17, 18, 22.

34. By virtue of its acquisition of the Gorges patent, Massachusetts considered itself to be the sole, “Lord Proprietor” of the Province of Maine, and to hold exclusive “rights of soyle” therein. See Def. Ex. 20.

35. The Massachusetts General Court concluded that the continuing uncertainty to land holdings, “necessitated some action on the part of Massachusetts that would insure protection of paramount rights in the purchased possessions.” It considered the “necessity of a speedy establishing a government in the Province of Maine;” the

appointment of a President; and the establishment of a system in which towns would manage their own affairs, including disposition of common, undivided lands. See Def. Ex. 15; Def. Ex. 22 at 4; Churchill Test. (Tr. XI 80:20 – 22, 83:12-17).

The Danforth Deed

36. In 1681, Massachusetts appointed Deputy Governor Thomas Danforth, Esq. as President of the Province of Maine, and authorized him to issue indentures to confirm title to lands. Def. Exs. 15, 20. In 1684, Danforth, acting on behalf and with the authority of the Massachusetts General Court, issued indentures pertaining to land located in five towns in the Province of Maine—including Cape Porpus, North Yarmouth, Scarborough, Falmouth (Portland), York. Def. Exs. 20, 80, 81, 82, 83. The five indentures bear the same date, July 26, 1684, and are identical except with regard to the named grantees and the property described.

37. The “Danforth to the Town of Cape Porpus” deed (“Danforth Deed”) was recorded in 1731 in the York Book of Deeds at Book XVI, Fol. 209-10. Def. Ex. 42, at 79-80. The Danforth Deed stated that Danforth did “clearly and absolutely give, grant and confirm . . . All that Tract or parcell of Land within the Township of Cape Porpus in said Province according to the Bounds & Limitts of the said Township to them formerly granted by Sir Ferdinando Gorges or his Agents or by the General Assembly of the Massachusetts.” Def. Ex. 20. On the face of the earth, this would have included Goose Rocks Beach down to the low water mark, not previously granted out. Def. Ex. 20; Yarumian Test. (Tr. X 126:1-4).

38. The deed named three grantees—John Barrett, Sr., John Burrington, and John Badson—as “Trustees on the Behalf and for the sole use and benefit of the Inhabitants of the Town of Cape Porpus.” Def. Ex. 20. The named grantee/trustees were landowners in Cape Porpus and/or residents of Cape Porpus active in town affairs.

See Pl. Ex. 532 (1666 deed from M. Howell to John Barrett), Pl. Ex. 537 (1670 deed from J. Bush to John Barrett); Def. Ex. 42, at 1, Def. Ex. 3 (John Badson named in a number of deeds and grants in the relevant time period); Def. Ex. 3 (a John “Purinton” was town clerk during this time).⁹

39. Danforth’s deed to Falmouth did likewise “give, grant and confirm . . . All that Tract or parcell of Land within the Township of Falmouth,” to the grantee/trustees named therein, including Captain Edward Tyng. The Falmouth grantees “did proceed to lay out many lots of land, and gave, granted and confirmed the same to sundry persons who builded [sic] thereon.” Def. Ex. 22, at 10. Tyng also subsequently filed with the government of Massachusetts a petition on behalf of the inhabitants of the Province of Maine to abate the quit rents imposed, which “lye heavy upon the Inhabitants there residing.” Def. Ex. 21. The petition stated:

“The late Governmt of the Massachusetts Company having purchased the land and Title of Sr fferdinando Gorges in the Province of Mayne and upon such Purchas designeing and intending to give all incouragemt to all persons that inclined to goe and Set downe, and Setle them selves and famalyes in, and upon the said Province of Mayne, The said late Governmt did by Commission under the Seale of the late Govermt Impower Thomas Danforth Esqr to lay out and appoint places for Townships in the said Province: and *also to grant power unto such Townships or Inhabitants or the Select men of all such Townships to give and grant lands to any persons whatsoever that would settle themselves and famalayes, in the said Province.*”.”

Def. Ex. 21 (emphasis added).

40. A controversy developed 35 years later between grantees named in the 1684 Danforth-to-Falmouth deed (the “ancient proprietors”) and another group of more recent

⁹ The relatively small number of inhabitants at the time, the looseness of grammar and spelling apparent in the Clerks Record, and the closeness in both sound and spelling of the two names make it more likely than not that other references to John “Barrat”, John “Batson” and John “Purington” or “Purinton” therein were the same Barrett, Badson, and Burrington, respectively, referenced in the Danforth Deed.

settlers who arrived pursuant to incentives by the Massachusetts General Court in the wake of the wars with native tribes (the “new proprietors”). Def. Ex. 22, at 8-10.

41. A 1731 judgment upheld the priority of rights of the “ancient proprietors,” and confirmed the establishment of a proprietary “distinct from the town.” Def. Ex. 22, at 11. “Previous to the organization of the proprietors, all grants of land had been made by a vote of the town, and a standing committee was appointed to lay out lots, and their proceedings were recorded in town records. After this establishment of the proprietary distinct from the town, the records of grants were made by them, and were recorded in books kept by their own clerk separate from the town records.” *Id.* As discussed below, Cape Porpus followed the same pattern.

42. A February 1884 report from John T. Hull to the Mayor of Portland shed further light on the meaning of and historical significance of the Danforth indenture to Falmouth (Portland):

“The execution of this deed shows two things; first,--That Massachusetts had a rightful claim and a good title to land in Falmouth; not previously granted, including islands in Casco Bay that had not previously been conveyed by Gorges or his agent. Second,--That in accordance with these rights they had given and conveyed by good deed to the inhabitants of Falmouth, as described in said deed, intending that the inhabitants should have a good title to, and full possession to the lands granted.”

...

The investigation of this part of the question seems to be conclusive as to these facts: That in 1684 Massachusetts had granted to the town of Falmouth all the unsold and ungranted territory; that it has not claimed any of it since; and that the State of Maine as succeeding to the right of Massachusetts has no valid claim to any of the ungranted islands in Casco Bay.”

Def. Ex. 22, at 9 (emphasis added).

43. There is no evidence that Massachusetts granted out any lands in Cape Porpus after the issuance of the Danforth Deed in 1684. By contrast, Massachusetts did continue granting rights to land in other townships in the Province of Maine over the course of the 18th century and up to the time that Maine achieved independence. *E.g.*, *Mayo v. Libby*, 12 Mass. 339 (1815) (Bangor, Hampden); *Shapleigh v. Pilsbury*, 1

Me. 271 (1821) (Shapleigh); *Sargent v. Simpson*, 8 Me. 148 (1831) (Sullivan); *Chamberlain v. Bussey*, 5 Me. 164 (1827) (Frankfort, Hampden); *Dolloff v. Hardy*, 26 Me. 545 (1847) (Rumford).

Land Transactions in Cape Porpus—1684 to 1719

44. In the years immediately following issuance of the Danforth Deed, settlements in Cape Porpus and elsewhere again were decimated by renewed hostilities with native tribes; and the status of land tenure and titles was impacted. Churchill Test. (Tr. XI 125:4-15); Pl. Ex. 549, at 4. Records of land transactions during this period are scarce, and presumably were either not kept or have since been lost. See Def. Ex. 22, at 7; see generally Def. Exs. 3, 42.¹⁰

45. To restore order and clarity to land possession and titles, and to encourage re-settlement, the Massachusetts General Court established the Eastern Claims process by which inhabitants, claimants and returning settlers could register their land claims and confirm their titles. Churchill Test. (Tr. XI 98:8 – 24); Def. Ex. 23. Those who did not reestablish their claims and reassert their rights within the stated time (which was often extended) risked having them extinguished. Churchill Test. (Tr. XI 98:2 -9).¹¹

46. Beginning in the late 17th century, the Massachusetts General Court enacted a series of measures to clarify and reinforce the authority of local land grants. An Act of 1692-93 reaffirmed that “proprietors of the undivided and common lands in each

¹⁰ One transaction during this time period is recorded in the Clerks Record and York County Book of Deeds. Def. Ex. 42-B, at 52-53 (In January 1687, “the Inhabitants of Cape Porpus have given & granted unto Nicholas Moorey of said Place one hundred acres of Land joining to John Rennals Land at the Kennebunk River . . . with Liberty to Cutt and haul any Pine Trees or Timber that is on said Commons for ye use of said Moorey’s Mill and on ye land being ungranted. At a Legall Meeting at Cape Porpus aforesaid with ye full Consent of the Inhabitants of said Place do Grant ye Same to ye said Moorey, his Heirs, Assigns . . . for ever.”) See also Def. Ex., at 5.

¹¹ Title claims to land relevant to this matter, namely the Jeffery and Scadlock lands, were registered and confirmed under the Eastern Claims. Def. Ex. 23, at 2, 3-4; Yarumian Test. (Tr. IX 72:23-24).

Town or Precinct in this Province . . . shall and hereby are empowered to manage, improve, divide up or dispose of the same” An Act of 1693-94 clarified that meetings may be called by one-third vote of the proprietors. A March 1713 Act addressed and clarified procedural requirements for proprietors’ meetings, including requirements for calling meetings, issuing warrants, choosing officers, etc.” These actions recognized, confirmed and reinforced the authority of local landholders to form a proprietary to manage, improve, divide up and dispose of common and undivided town lands independent of town government. See Def. Ex. 22, at 10-11; Churchill Test. (Tr. XI 103:19 – 104:10).

47. Collectively these measures are considered to have established a “dividing line” of sorts by around 1715 separating the informal proprietaries that emerged during the early years of town formation from the formal, authorized proprietaries that became successors in interest to the common and undivided lands at the time. *Copelas v. Miskell*, 5 LCR 203, 205, 1997 Mass LEXIS 69; Churchill Test. (Tr. XI 117:9-15). As set out below, in Cape Porpus, this division of function and authority did not become fully realized until 1726.

48. In June 1719, the town of Cape Porpus was re-named Arundel. Churchill Test (Tr. XI 93:16); Yarumian Test. (Tr. X 49:25 – 50:1); Def. Ex. 32.

Land Transactions in Arundel—1719 to 1726

49. From 1719 to 1726, the Clerks Record begins to reflect entries of two distinct types of meetings: “general” or “legal” town meetings; and meetings of “proprietors, freeholders and inhabitants.” See Def. Ex. 3. This marks the beginning of the transition in Arundel (formerly Cape Porpus) to separate town and proprietary, and vest the proprietary with exclusive authority to manage, oversee and make grants of common and undivided land in the town.

50. A November 5, 1719 entry in the Clerks Record reflects the following notice:

“The inhabitants of this Town are to take note that there is to be a Town meeting on Wednesday the eighteenth day instant at ten of the clock in the morning at the house of Mr. James Tyler *to Rectify and Reform some things that have been acted in said Town* and some other things which may be for the benefit of said Town by order of Andrew Brown & Joseph Bailey, Selectmen.”

Def. Ex. 3, at 11 (emphasis added).

51. The meeting noticed above was held on November 18, 1719 and entered into the Clerks Record as a “Legal Town meeting of the proprietors, freeholders.” This was the first entry of this type of meeting. The “proprietors,” now considered “qualified as the law Directs,” acknowledged that previous grants of land by the Town “were not so legal as we would have them:”

“[T]he meeting proceeded under consideration of several grants lately pretended to be granted by said Town to several of the Inhabitants and other of having fifty acres of land and finding that them *grants were not so Leagall as we would have them to be and no record made there of this meeting passes a vote and do disannuls all the old papers and being at this meeting to confirm and grant lands to the several Inhabitants whose names are hereafter entered* allways allowing to ourselves convenient highways to be laid out as the selectmen sees meet.”

Def. Ex. 3, at 11 (emphasis added).

52. The “proprietors, freeholders and inhabitants” made numerous “grants and confirmations” of “Town Commons.”¹² In addition, they granted (or relinquished) the

¹² The grants and confirmations included:

- Fifty acres of land apiece “*anywhere that may be convenient on the Town commons to be laid out (no way infringing upon any former grant)*” were “[g]iven and granted” to James Mussey, Samuel Littlefield, Andrew Brown, John Storer, Nicholas Barttoe, Mary Cole, James Tyler and Walter Pennewell and their “heirs forever”. Def. Ex. 3, at 12-15 (emphasis added).
- One hundred acres were “[g]iven and granted” to James Mussey “*any where that may be convenient on the Town commons within two miles of Cape Porpus sault watter . . . to be laid out (no ways infringing on any former grant)* to him and his heirs forever.” (James Mussey also made this entry into the Clerks Record, but attested by Humphrey Dearing and Joseph Bailey, Selectmen.) *Id.* at 12 (emphasis added).
- Fifty acres of land “apiece” was “given and granted” to 11 named individuals “provided they do build and settle in said Town within one year next after this date and so continue in said Town for ye space of five years next . . . but if not to be void & of no effect.” *Id.* at 26. The land that was the subject of these 11 grants “*is on the Town Commons not to infringe on any former grants.*” *Id.* (emphasis added).

town rights in parcels of land that were in possession of a resident who may or may not have had a claim to the land based on prior deeds or otherwise.¹³

53. In March 1720, a call was made for confirmations of previous grants:

“[W]here as *Diligent search and Enquiry has been made for the ancient Records of this Town and nothing of them are to be found*, where by severall are or may lose their Rights for prevention where of a vote passed and the affirmative given that the successors of the Ancient Settlers belonging to this Town should have all our Right and title or interest that we have unto the severall settlements or sales of land or ancient grants or possessions which was sold

-
- “[T]hen Given and Granted unto Steven Accerman & John Wyatt fifty acres of land apeece *on the town’s common (not infringing on any former grants)* provided [they] build and settle in this town with their families within twelve months next after this grant and continue within the said town of Arondel for the space of five years.” *Id.* at 27 (emphasis added).
 - “Then was given & granted Fifty Acres of Land apeece to . . . Jonathon Sherman, Joseph Averel, Samuel Averel and their heirs “Provided they do build and settle in said Town within one [year] next after this Date & continue in said Town for a Space of Five years next.” This grant recorded in the York Deeds Book, and the land surveyed and laid out in July 1720. Def. Ex. 42, at 58, 59, 78.

¹³ For example:

- “[T]he Town then Gave and Granted unto John Barton & Ebenezer Barton all that Right & Title to the land & marsh that their Father William Barton was in ye possession of in fee simple.” Def. Ex. 3, at 25.
- “[T]he Town gave and granted all their right & Title to Ensign John Watson & Jabiz Dorman to ye land and marsh that is within ye bounds of ye deed of ye Mr. Nicholas Mars of freetown to James Tyler and Tyler to them.” *Id.* at 26.
- “[T]he Town gave & Granted all those Right and title unto same Andrew Brown to the land that ye said Andrew Brown is not in ye possession of by his deed according to ye bounds of it from Mr. Samuel Hill.” *Id.* at 26.
- “[T]hen given and granted unto Thomas Huff all the Town’s Right & Title to ye land of said Huff [as] is now in the possession of to him, his heirs or assigns forever.” *Id.* at 26
- “[T]hen given and Granted unto Thomas Perkins *all their Right to all the land & marsh that the said Thomas is not in the Possession of in the Town of Arondel* by deeds according to the bounds there of to him and his heirs for Ever.” *Id.* (emphasis added).
- “[T]hen ye Town Gave and Granted unto Steven Harden now of Wells all their Right Privileg Interest in ye Feary of Kennebunk that is ye lower Part near the mouth of the said River together with Fifty acres of land in ye Township of Arondel as convenient to the feary as may be not Infringing on any former grants to him and his heirs forever provided the above named Steven Harding [and] his heirs or assigns do well and truly from time to time and at all times for Ever hereafter keep and maintain a good feary boat in said power” *Id.* at 27
- “[T]hen ye Town gave & Granted unto James Mussey all their Right & title to the land he now lives on namely all that was bought by his father Thomas Mussey of Margery Kendall both upland and marsh lying between old Stephen Badson’s and John Sanders.” *Id.* at 28.

or conveyed or granted att or before the year one thousand six hundred eighty one 1681: *Even to as many as can make it appear either by deed, grant, or by sufficient witness or any other lawful conveyance from the ancient possessors of this Town and are to be laid out according to their deeds, grants, or according to the common course or custom of other lots.*”

Def. Ex. 3, at 18-19 (emphasis added).

54. A follow-up meeting of “proprietors, freeholders and other inhabitants” on May 12, 1720 further clarified the requirements for such confirmations:

“[W]here as a vote passed March ye 29th 1720 that all the old grants was confirmed unto the Several successors of ye ancient Inhabitants it is now declared & voted that that vote shall extend no further than to such as were Inhabitants of Cape Porpus at the time when it was granted to them and such of their heirs as shall come and settle on said lands within one year next after this vote and so continue in said Town.”

Id. at 23.

55. Land relevant to this case was subsequently laid out by town lot layers and recorded in the Clerks Record—the Downing layout in 1720; the Jeffrey layout in 1727; and the Emmons layout in 1777. *Id.* at 21-22, 44-45, 72.

56. Grants of land continued to be made at regular town meetings during this period, indicating that there had not yet been a complete separation of town and proprietary functions, as would later occur. At an October 17, 1720 “legall Town meeting” a number of grants were made.¹⁴ The following October (1721), James Arch

¹⁴ At an October 17, 1720 “legall Town meeting”:

- “[T]he *Town voted to give* to the Reverend Mr. John Eveleth thirty pounds money and *fifty acres of land.*” Def. Ex. 3, at 29 (emphasis added).
- “[T]his *Town gave and granted unto Capt. John Downing and his son John Downing 50 each acres of land apiece any where on ye Town Commons not Infringing on any former grant* provided they build and settle in said Town in one year next after this grant themselves or sum other persons in their stead as the other grants be then this grant to stand or else to be void and of no effect.” *Id.* at 29 (emphasis added).
- “[T]hen given and granted unto Stephen Harden all the right the Town of Arondel have unto John Runnell’s lot of land lying by Kennebunk River Joyning to the feary (*Provided the said land be not forfeited unto the said Town*) to him and his heirs forever.” *Id.* at 29 (emphasis added).

and Thomas Perkins were “chosen to bring in a list of the Persons [that] had forfeited their grants of land which was given them by the Town to the next Town Meeting,” and at the next “legal Town Meeting” in November 1721 a number of grants were voted “void and forfeited to the Town.” Def. Ex. 3, at 33, 34. It was also voted at the same meeting that there should be “no fifty acre grants of land that are yet to be laid out upon no meadow land that is clear or that may be easily cleared where there is any quantity of it together that it may be preserved for the Town’s use.” *Id.*

57. The Clerks Record during this time period reflects numerous entries of layouts or surveys of lands previously granted. Entries describe the date of the survey, the names of the surveyor(s), the name of the grantee, and the property conveyed by reference to specific monuments on the face of the earth. *E.g.*, Def. Ex. 3, at 16-17, 19-22, 24-25, 28, 30-34, 36, 39. With the exception of the Downing layout in 1720, the Clerks Record does not reflect layouts of any other land proximate to or included within the disputed property in this case during this period.

Land Transactions in Arundel—1726 to 1803

58. Consistent with the enactments made by the General Court over a decade earlier, the formal division in Arundel between town and proprietary occurred in 1726. This was the culmination of the transition that had begun over the previous five years. The delayed implementation of this formal separation was not unique to this town. *See, e.g. Rehoboth v. Hunt*, 1 Pick. 224 (1822). From this point forward the “Proprietors of Arundel” held separate meetings, and kept separate records known as the Kennebunkport Proprietors Record (“Proprietors Record”). Def. Ex. 4. Portions of the Proprietors Record have been entered into evidence; some of the pages are difficult to read.

59. On February 14, 1726, the “Proprietors of Arundel,” also referred to as the “Proprietors of the Common and Undivided Lands,” (“Proprietors”) held an inaugural meeting. At the meeting, the Proprietors chose officers who had standing to call an official meeting “so often as they shall so call or think it necessary.” Pl. Ex. 552. At their next meeting on March 7, 1726, they elected individuals as “Proprietors of the Common or undivided land in Arundel” and adopted rules governing voting eligibility and procedures. Votes were tied to the amount of land owned (fifty acres, half a vote; one hundred acres, one vote; two hundred acres, two votes; etc.); and “no Person shall have liberty to vote in a Proprietors meeting in Arundel by virtue of this vote, no longer than while he is an Inhabitant in said Town.” *Id.*

60. After 1726 the Proprietors oversaw and managed the common and undivided lands within the town. The Proprietors Record reflects their general activities and operations, which included: (i) electing members and officers of the proprietary at multiple meetings, Def. Ex. 4. at 2, 4, 8, 19; (ii) being sworn in by Justice of the Peace John Gray at a proprietary meeting in the 1730’s, *id.* at 4; (iii) appointing agents to “sue, eject and put out of possession” those who may have “illegally entered into any land [of] the Proprietors in the Town of Arundel,” Def. Ex. 4-A, at 2, *see also* Def. Ex. 4, at 5, 9, 16; (iv) regulating timber harvesting on common lands, *id.* at 6, 7, 21; Def. Ex. 4-A, at 3-4; (v) appointing agents to determine who, if anyone, had forfeited grants by failing to settle on common lands laid out to them, Def. Ex. 4, at 5, 7; (vi) establishing committees to determine if there were any individuals in possession of land infringing on the rights of another and to prosecute or settle accordingly, *id.* at 6, 7, 14, 17, 20, 22; (vii) voting to raise eight pounds to eject those who may have settled on land illegally, *id.* at 16; (viii) appointing attorneys with the authority to represent the Proprietors in suits brought by or against them, *id.* at 8, 18; (ix) voting to authorize a committee to sell 50 acres of

common land, or as much as necessary to prosecute those who had settled on more land than they had a right to occupy, *id.* at 22; (x) appointing a committee to examine all the rights which the Proprietors had in common lands, to take an account of what lands had been laid out infringing on other grants, and to make a report to the Proprietors “without going in to the Law to [resolve] the matter”, *id.* at 4; (xi) appointing a committee in 1780, near the end of the Proprietors’ operation, to search the records to see how much more land there was laid out than there was granted to support the lay out, *id.* at 19; and (xii) voting at a January 14, 1783 meeting “to lot out the Common Land in said township into fifty acre lots . . .”, *id.* at 21; Def. Ex. 4-A, at 10.

61. The Proprietors granted lands and laid out lands confirming previous grants.¹⁵ They also invalidated prior grants where the land granted and laid out had not been settled. Def. Ex. 4-A, at 2 (persons who had not yet settled prior grant “have forfeited their grants of land to the Proprietors”, but have liberty to settle on said land any time between this last day of May next coming, and whatsoever man to whom said land was granted and laid out unto is not settled on said land by last day of May aforesaid, shall forfeit said land out to him or them to said use of ye said Proprietors.”)

¹⁵ Grants and layouts:

- At a January 18, 1728 meeting: “Then the Reverend John Eveleth had his grant confirmed to him and his heirs for ever.” Def. Ex. 4, at 1.
- An October 23, 1733 entry in the Proprietors Record reflects confirmation of a 1728/9 grant from the Proprietors of Arundel to Jeremiah Springer and then laid out to Joseph Averill & Jacob Wildes of “two acres & a half of marsh and meadow land in the Township of Arundel.” Def. Ex. 4-A, at 5.
- At an October 1735 meeting, the Proprietors granted “one hundred acres of land to Joshua Purinton . . .” Def. Ex. 4, at 4.
- At a July 14th, 1737 meeting, the Proprietors laid out nine acres of fresh meadows to Robert Smith. *Id.* at 8.
- At a 1740 meeting, the Proprietors voted that a committee would lay out two hundred acres of land and sell it to the highest bidder. *Id.* at 9.
- At a November 17th, 1749 meeting, the Proprietors voted to lay out two parcels, a forty-acre parcel and a seven-and-a-half-acre parcel, to Walter Goodwin. *Id.* at 10.
- The Proprietors laid out an island to Thomas Perkins adjoining “to the Sea on the south.” *Id.* at 15.

62. The “two acres & a half of marsh and meadow land” laid out to Averill and Wildes in 1733, above, was upland property near Goose Rocks Beach. Yarumian Test. (Tr. VII 88:25 – 89:6). This “marsh and meadow” land did not include the beach; and from its description, appears to be north of the river. *See id.*; Def. Ex. 4-A, at 5 (“beginning at a stake on the northeast side of Batsons River, so running northeast twenty rods to a stake, then running northwest by west to Thomas Huff’s marsh, then running by said Huff’s marsh to said River, and down said River to the stake first mentioned.”)

63. The Downing layout, and the subsequent layouts of the Jeffrey land in 1727, and the Emmons land in 1777 involved land proximate to Goose Rocks Beach; and the Averill/Wildes layout in 1733 involved land in the same vicinity. Neither the Clerks Record nor the Proprietors Record reflect a discernible grant or layout of land referencing or consisting of the beach itself. *See also* Yarumian Test. (Tr. VII 89:4-5).

64. After 1726 there no entries in the Clerks Record reflecting a vote to grant out common land at a regular town meeting.¹⁶ The Clerks Record continued to record the

¹⁶ There are two entries reflecting consideration of conflicting claims to common land. One is an entry of a “lawful meeting of the Proprietors of the Common and undivided Land in Arundel” made in the Clerks Record after 1726—a March 25, 1735 meeting of the Proprietors at which a committee was formed to investigate conflicting claims to land, and two individuals, John Fairfield and Jacob Wildes, were appointed to “run out all the lots of land where the owners are dissatisfied about them by reasons of their infringing upon one another” Def. Ex. 3, at 94. Thomas Perkins, Clerk of the Proprietors, made the entry, attested to by William Smith, Town Clerk, as “a true entry as it is recorded in the proprietors Book of records.” *Id.* In addition, at a January 8, 1732/33 town meeting, officials addressed a claim by eight “Gentlemen from Boston,” and it was “agreed upon and voted” that if the gentlemen “Do sett off to the Proprietors and Inhabitants of the Town of Arundel a straight line South West from the first falls in the Little River to the Kennebunk River” and running “eight miles into the Country from that line northwest; that then upon the aforesaid Gentlemen giving of a quit claim of their Interest and Right to all the lands between the said line and the Sea Excepting one thousand acres of land at the northwest end of said Town. To the Inhabitants of the Town of Arundel or their agents for them the Town.” Def. Ex. 3, at 54. The nature of the transaction is unclear from this entry. The land described and quitclaimed potentially could have included land in the Goose Rocks Beach area. There is no other reference to this event or transaction in the record.

business conducted at regular town meetings involving typical of municipal government.¹⁷ *See generally* Def. Ex. 3, at 40-108.

65. Town officials (as opposed to Proprietors) continued to oversee limited activities on common town lands, such as protecting some resources and laying out or repairing of public ways and highways. *See* Def. Ex. 3, at 50, 67, 93, 97 (“horses going or feeding on this the Common land” or cattle and sheep “running at large in all parts of the Town below or southeastward of the Post road;” unauthorized cutting of pines “near Batsons river” or overseeing “Clam Beds in Arundel . . . and Prosecut[ing] any Person or Persons that should Dig any Clams in Arundel that is not a Resident of said Town in Behalf of the Town”; and laying out or repairing public roads and “High ways”).

66. In addition, elected town lot layers continued to survey granted lands and enter in the Clerks Record a description of the metes and bounds of the property laid out *See* Def. Ex. 3, at 45,46,48-59, 61,62, 64-68,72-79, 85, 86, 90, 94, 95. The last survey or layout of land that appears in the Clerks Record was done at the request of John Miller and entered on December 2, 1815 by Seth Burnham, Surveyor, with regard to a 28-acre parcel of land.

67. Layouts of land were also recorded in the Proprietors Records. The lands laid out were the subject of previous grants, by private deed, from the town/proprietors by actions prior to 1726, or by Proprietors of Arundel after 1726. *See generally* Def. Ex. 4, 4-A.

68. A June 1746 entry in the Proprietors Record reflects a layout of land to Thomas Perkins pursuant to a quitclaim deed from the heirs of John Barrett, Sr., one

¹⁷ Electing town officials, such as selectmen, moderators, constables, lot layers; appointing special officers, such as jurors, grand jurors, agents to collect rents and fees as well as to prosecute trespassers on common lands; authorizing assessments for various purposes, including building a meeting house, building a school, paying the town parson; and voting for regional and federal offices. *E.g.*, Def. Ex. 3, at 46, 78, 79, 82, 84, 85.

of the named grantees in the Danforth Deed. Perkins had purportedly acquired “all the said John Barret’s rights in the Land in said county of York” from Barrett’s heirs. Pl. Ex. 164. The layout reflected in this entry pertained to land north and east of the Jeffrey lands, and not in the vicinity of Goose Rocks Beach. *See Yarumian Test.* (Tr. VII 93:22 – 99:2).

69. From earliest colonial times and into the 18th century, beaches were used as a way for public travel and passage. *See Pl. Ex. 570*, at 529. Before inland roads or “high ways” were cleared and secured, beaches were “the main, often the only, road for travel along Maine’s coast.” Pl. Ex. 570, at 17-18. In 1673 surveyors reported difficulties with a proposed “high way from Wells unto Cascoe, the upper way by Sacoe Falls” due to “soe many bridges to bee made over the Swamps & Rivers” and the “ways being soe exceedingly bad.” Pl. Ex. 585, at 479. *See also Pl. Ex. 585*, at 255, 281 (references to “passage . . . [and] travel Eastward or from Wells to Cascoe” in the mid-17th century as being by the “lower way,” which was “usually obstructed by a Compulsed observance of the Tyds”); Pl. Ex. 570, at 19 (November 1681 Council of Province order to Town of Wells to “make that hyer way no Made use of, a sufficient roade for strangers & travelers . . . from Wells to the Kennebunk River, so far as the bounds of the Town extends”; and Towns of Sacoe & Cape Porpus to “make a good passable way through Kennebunk swamp for horse & man . . .”).

70. Beaches were also used for driving cattle, a practice that continued well into the 18th century, and was the subject of oversight and regulation for public order and protection of the surrounding marshes. *See Pl. Ex. 570*, at 29. Even after inland roads had been established, towns were still concerned about proper use of the beaches for this purpose. Def. Ex. 3, at 74 (At a March 10, 1783 town meeting, it was voted “that the Selectmen be a Committee to Petition the General Court for an act to Prevent the

Cattle and all other [livestock?] Going at Large on the Beaches in said Town.”); Def. Ex. 3, at 83-84 (At an April 6, 1795 Town Meeting, it was again “voted to Choose a Committee to Prepare a Petition to the General Court praying for an act thereof to prevent cattle & horses from running on the beach and marsh between Badsons & Little Rivers from the last day of November til the first day of April. Voted that John Hovey & Jacob Wildes be a Committee for the purpose aforesaid.”)

71. At a January 14, 1783 meeting, the Proprietors “voted to lot out the Common Land in said township into fifty acre lots & that the former Committee be empowered to do the same” Def. Ex. 4-A, at 10. Almost two years later there still remained undivided common lands held by the Proprietors. Def. Ex. 4-A, at 11 (“it was then put to vote to see if the Proprietors Committee should have liberty to sell fifty acres of said Proprietor’s land or as much as may pay the charge that they have been at already at, [sic] or may be at in prosecuting any person or persons who may have ingrost [?] more of said Proprietor’s land than they had a right to do, or got within their bounds more than should have of said Proprietor’s land”)

72. The record does not contain a legible entry of the Clerks Record or Proprietors Record reflecting an account of a formal dissolution of the Arundel Proprietors. Nor does the record reflect a discernible entry of a final accounting of the lands that the Proprietors had granted out or how much, if any, common and undivided land had not been granted and confirmed.

73. The final entry in the Proprietors Record in evidence was made on April 3, 1790 by Thomas Perkins. Def. Ex. 4, at 23; Yarumian Test. (Tr. VII 78:25 – 79:2).

74. Although the Proprietors ostensibly had concluded their affairs around 1790, in 1794 questions remained as to title and ownership of land in the town, including potentially land in the Goose Rocks Beach area. At an April 4, 1796 town meeting, it

was voted “that Mr. Seth Burnham and Capt. Daniel Walker be a Committee for to see whose property the Pines is, whether the towns [sic] or Individuals [sic].” Def. Ex. 3, at 89. Parts of the upland in the western and middle section of the Goose Rocks Beach area were known as the “Pines.” Pl. Ex. 569, § C; Yarumian Test. (Tr. IX 60:15 – 61:5).

75. Grants of land from the Town were recorded up to the late 19th century. Yarumian Test. (Tr. XI 3:17 – 4:11).

C. Sources of Title to Plaintiffs’ Properties

For purposes of this decision, the properties in issue are grouped into the following sections of Goose Rocks Beach: the western section, the middle section, and the eastern section, as set out below.

Western Section of Goose Rocks Beach

76. The Almeder, Coughlin, Celi, GRB Holdings, Flynn, and Cooper properties are situated in the western section of Goose Rocks Beach. See Def. Exs. 51, 53. These properties were part of subdivisions created in the early 20th century by three individuals—Warren Emmons, Ivory Emmons, and George Piper. Almeder, Coughlin, and Celi had been part of the Emmons Heirs Subdivision; GRB Holdings and Flynn, the Ivory Emmons Subdivision; and Cooper, the George Piper Subdivision.

77. Land in this area was predominantly marshland; and prior to the 20th century, it was sparsely settled. Yarumian Test. (Tr. XI 6:11-21). Much of this land was likely common and undivided land granted out by Proprietors.¹⁸ See Def. Ex. 3, at 72;

¹⁸ Plaintiffs included a number of ancient deeds in the title chains to some of the western beach properties. See, e.g., Pl. Exs. 39-43. It is unclear from the record that the land described in the deeds was, on face of the earth, located in this area of the beach; that the deeds were otherwise in the title chains of these properties; or that they included the beach or have a call to the water. The 1648 Cleave/Rigby-to-Bush deed (Pl. Exs. 43, 542), for example, more likely than not describes land in the eastern section of the beach, as found below. The 1663 Cape Porpus order to lay out land to Morgan Howell (Pl. Ex. 42) appears to involve land “on the other side of the River” (Batson or Little River) from Bush’s land, which was “upland” and “marsh.” The 1663

Pl. Ex. 34; Pl. Ex. 569, § A (land laid out for John Emmons from the Arundel Town Commons). *See also* Def. Ex. 63.

78. Title to properties in the western section trace back to land owned by the Emmons family, and in particular land laid out to John Emmons based on a 1730 grant to Humphrey Dearing and/or land subsequently held by Eliakim Emmons. Dearing had been an inhabitant of and landowner in Cape Porpus (later Arundel); his name appears in early town records. There is no independent record of the 1730 grant. Based on the description in the 1777 layout it was likely a grant of common land from the Proprietors similar to the types of grants commonly reflected in the official record of the times, as found above. *See generally* Def. Exs. 3, 4. *See also* Yarumian Test. (Tr. VII 75:1-7).

79. In 1777, at the request of John Emmons, town surveyors laid out the following property:

“By the request of John Emmons I have sirvayed [sic] and laid out fifteen acres of land on Arundel Town Commons butted and bounded as followeth: Beginning at a Pitch Pine Tree marked on four sides then South west Eighty five Rods to a Pitch Pine tree marked on four sides standing by the marsh of Rich Downing which he bought of Thomas Huff ***then South East to the sea wall then North East by the sea wall Eighty five Rods then Nor West to the Bounds mentioned.*** By virtue of a Grant granted to Humphrey Dearing in the year 1730 as will appear by the Town Record, Arundel, March 30th 1777. Gideon Merrill, Sirvayer. Recorded in arundel Town Book april ye 1st 1777, per Benjamin Downing, Town Clerk.”

Def. Ex. 3, at 72; Pl. Ex. 34; Pl. Ex. 569, § A (emphasis added).¹⁹

80. In 1777, “the marsh of Richard Downing which he bought of Thomas Huff” was behind (and landward) of the areas laid out by the Town, and there are pine trees growing today near that location. Def. Exs. 40, 41, 63, 64.

Bush-to-Pendleton grant appears to involve the same upland and marsh, “the bounds of which land is not at present perfectly known.” (Pl. Ex. 41).

¹⁹ Language that is both bolded and italicized highlights for ease of reference the metes and bounds or other description of the seaward side of the relevant property in the deed.

81. In describing the metes and bounds of the property granted, the Emmons Layout makes reference to physical monuments on the face of the earth observed by the lot layers at the time, including marked pine trees on one side of the parcel and a “seawall” on the other side, and distance measurements of the boundaries. Def. Ex. 3, at 72; Pl. Ex. 34; Pl. Ex. 569, § A.

82. On the face of the earth, the land laid out was located between the marshes and beach. Yarumian Test. (Tr. IX 52:21 – 58:17).

83. By the early 19th century, this land as well as other land identified in the 1830 will of Eliakim Emmons was held by the Emmons family. See Def. Ex. 48, 51; Pl. Ex. 569, §§ A, B.

84. Under his 1830 will recorded along with the appointment of executors and acceptance of the will by the Court of Probate dated September 6, 1830 in the York County Registry of Deeds in Book 41, Page 234-235, Eliakim Emmons devised to his sons Moses Emmons, Israel Emmons, and John Emmons:

“all my homestead farm that I now live on together with all the said marsh adjoining the same and also one other lot in Kennebunkport containing about *twenty five acres called the head of the marsh lot, one fourth part of fifteen acres in common with others, near the north pond so called*, two and a half acres of marsh bed adjoining sand point, one other lot upland in Biddeford called Dyer’s Neck.”

Pl. Ex. 31 (emphasis added). The “twenty five acres called the head of the marsh lot” was more likely than not upland.²⁰

²⁰ The description of “twenty five acres of called the head of the marsh lot,” is taken from the typewritten transcription of a copy of the original, handwritten document that was recorded in the York County Registry of Deeds, Book 41, Page 234. See Pl. Ex. 31. The handwritten copy is only partially legible, and the particular language referencing the “twenty-five acre” lot is obscured. *Id.* The handwritten Probate Court records of the estate of Eliakim Emmons are slightly more legible. See Pl. Ex. 44. What appears to the same lot in question is described differently in the probate record, namely as a lot “containing about *twenty acres of upland* called the head of the Marsh Lot.” Pl. Ex. 44 (emphasis added).

85. Moses and John Emmons to Isreal Emmons. Moses and John Emmons conveyed their interests in the property devised to them under the will to their brother, Isreal Emmons. Pl. Exs. 1, 46, 56, 80, 103.

86. Isreal Emmons to Jacobs Emmons. By warranty deed dated February 11, 1833 and recorded in the York County Registry of Deeds at Book 144, Page 157, Isreal Emmons granted to Jacob Emmons:

“certain pieces or tracts of land in Kennebunkport [including] one piece of land containing twenty five acres, more or less, which was purchased by Eliakim Emmons deceased, of Wm Pepperell, December 17 A.D. seventeen hundred and seventy four. Also lot No. 3 of a wood lot agreeable to a plan of the same taken by Seth Burnham, October 25, eighteen hundred and thirty one, containing seventeen acres, be it more or less bounded on the east side by salt marsh, and on the west by lot No. 2 which now belongs to Moses Emmons. Also a lot of land in Biddeford called Dyer’s Neck containing ten acres more or less. Also five and one half acres of thick bed adjoining the point near the mouth of Little river. Also one fourth of fifteen acres of land in common with the heirs of John Emmons, deceased, near the rush pond, so called.”

Pl. Ex. 28 (emphasis added). Jacob Emmons, in turn, granted to Isreal Emmons by warranty deed dated February 22, 1833, property of the same description, as recorded in the York County Registry of Deeds at Book 154, Page 88. Pl. Ex. 27.

87. The 1833 conveyances referenced the 25-acre parcel “purchased by Eliakim Emmons deceased, from Wm Pepperell in 1774” and the “one fourth of fifteen acres of land in common with the heirs of John Emmons.” Pl. Ex. 27. The deed reflecting conveyance of the 25-acre parcel is dated December 22, 1774 and recorded in the York County Registry of Deeds at Book 46, Page 50, and states that Pepperell did “give[], grant, bargain, sell, alien, convey and confirm unto him the said Eliakim Emmons his Heirs and Assigns” the following:

*“Twenty five acres of Land more or less – bounded as follows viz Beginning at a Stake in the head of the Marshes so called running from said Stake North East twenty two Rods to Land of John Jeffrey **thence South East by said Jeffreys Land to the Sea Wall thence South West by the Sea Wall to Land now belonging to the Heirs of Jacob Wildes** late of Arundel Dec 8 thence North West until it comes to a piece of Marsh called the fourteen acres thence by the said fourteen acres to the bounds first mentioned.”*

Pl. Ex. 33 (emphasis added).²¹

88. John Emmons to Oliver Emmons. By warranty deed dated June 20, 1862, John Emmons granted to his son, Oliver Emmons: “the dwelling house and out buildings where I now live together with the land under & adjoining the same as well as all the real estate I possess in said Kennebunkport excepting so much thereof as I have this day deeded to my other son Eliakim Emmons of Biddeford” and is recorded in the York County Registry of Deeds at Book 340, Page 515. Pl. Ex. 30. According to the abstract of the will of Oliver Emmons, as recorded in the York County Registry of Deeds at Book 490, Page 319 on August 4, 1897, Oliver Emmons left his wife, Sarah Amanda Emmons, all his property, including all real estate. *See* Pl. Exs. 29, 30.

89. Upon the death of Isreal W. Emmons, his estate distributed his interest in properties relevant in this case to two devisees: Charles Tanner and Ivory Emmons. Pl. Exs. 1, 46, 56, 80, 103, 110.

90. Emmons to Tanner. As to Charles Tanner, the abstract of the will of Isreal W. Emmons, dated August 21, 1888 and recorded at Book 423 Page 341 in the York County Registry of Deeds, reflects that the will devised and bequeathed “all my estate both real and personal however and wherever situated” in a manner that authorized his executor:

“to use such portion of my estate as may be necessary for the comfortable support & clothing of Charles V. Tanner, now living with me and who is now of an age of four years and also to use such portion of my said estate as may be necessary to give said Charles a good and sufficient business education according to the judgment of my said Executor. And I hereby authorize and empower my said Executor to sell any part or portion of any real estate that he may deem necessary

²¹ The 1774 Pepperell-to-Emmons deed is labelled as a “Reference” deed rather than a “Title” deed in Plaintiffs’ exhibits for these western properties. *See* Pl. Ex. 33. Later deeds in the title chains of various Plaintiffs including deeds from George Piper, however, directly reference this deed as a source of title. *See, e.g.*, Pl. Ex. 23 (Almeder title chain); Pl. Ex. 55 (Coughlin title chain). Other evidence places the land described in the 1774 Pepperell-to-Emmons upland of the eastern section of the beach. *See, e.g.*, Def. Ex. 48, § F.

and expedient to raise money for said purposes mentioned and to give a good and sufficient deed or deeds for that purpose.”

Pl. Ex. 26.

91. The record does not reflect any deed from the executor of the estate of Isreal W. Emmons to Charles Tanner conveying an interest in real property.

92. Tanner to Piper. In 1905, by warranty deed dated March 3, 1905 and recorded in the York County Registry of Deeds at Book 550, Page 276, Charles V. Tanner granted to George F. Piper:

“A certain parcel of property in Kennebunkport in said County at that part known as Goose Rocks, and **bounded by the sea**; *Batson’s River; the Marshes, and by land formerly of John Littlefield; being the same premises formerly belonging to the late Isreal Emmons, deceased. Meaning and intending to convey hereby only such interest as I may have, if any, in the above described premises.*”

Pl. Ex. 24 (emphasis added).

93. George Piper’s property is in the chain of title to properties of Almeder, Coughin, Celi and Cooper. See Pl. Exs. 1, 46, 56, 110. Ivory Emmons’ property is in the chain of titles to properties of GRB Holdings and Flynn. See Pl. Exs. 80, 103.

Almeder—113 Kings Highway

94. The Almeder property was part of lot 11 of the “Emmons Heirs Subdivision,” which was first drawn up in 1905. Pl. Ex. 23. The subdivision consisted of 14 lots with a combined frontage on the beach of approximately 1,400 feet. Pl. Ex. 569, § A. The Emmons Heirs Subdivision land was more likely than not the property laid out in 1777 for John Emmons. *Id.*

95. Warren Emmons, George Piper, and other Emmons relatives had interests in this property by virtue of marriage, descent or acquisitions. See Pl. Ex. 1.

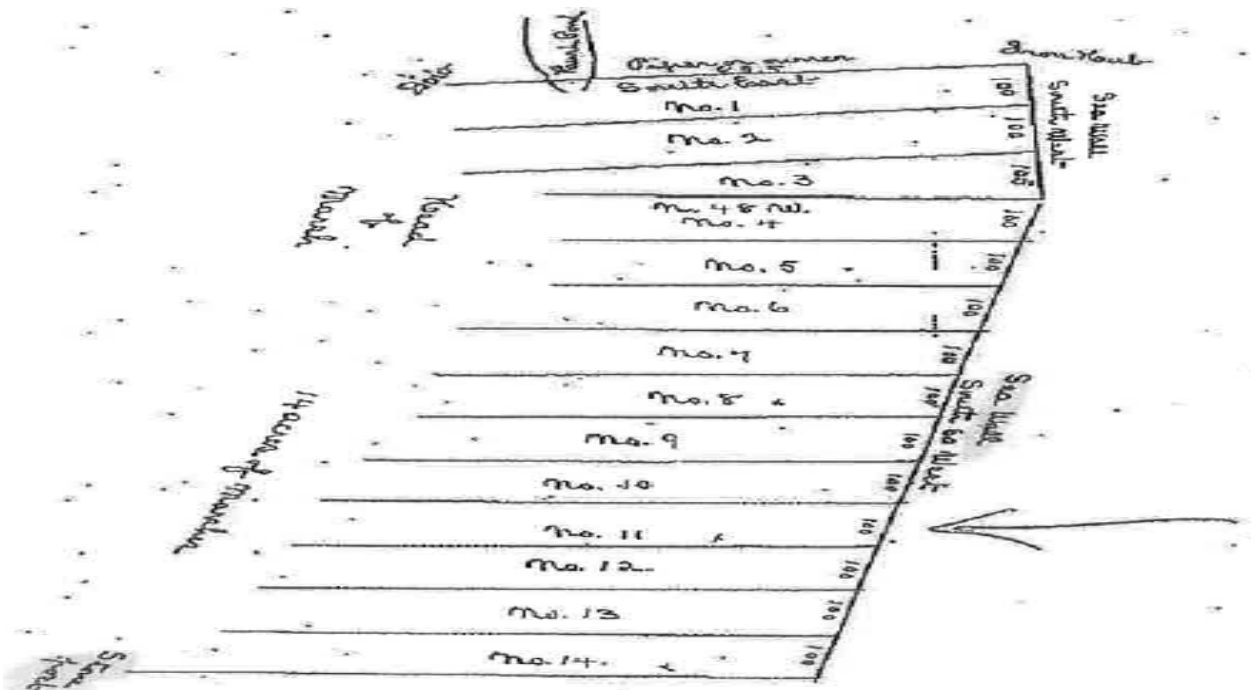
96. In 1905, Piper and Emmons divided the lots in the subdivision, with Piper receiving lots 5, 8, 11, and 14; and Warren Emmons receiving lots 4, 7, 10, and 13; and lots 1 & 2 being held in common. Pl. Exs. 1, 23, 46, 55.

97. Emmons to Piper. By warranty deed dated October 30, 1905 and recorded in the York County Registry of Deeds at Book 555, Page 254, Warren Emmons, Sarah Emmons and Eugenie M. Smith granted to George F. Piper:

“all our right, title, and interest in and to certain pieces of land situated in said Kennebunkport at Beechwood, so called, and *being a part of the same property described in deed from Wm Pepperell to Eliakim Emmons Dec. 22nd 1774 and Recorded Book 46, Page 50.* Said described property having been divided into fourteen lots, **each lot containing one hundred feet along the Sea Wall** excepting lot no. 3 which contains one hundred and five feet and this deed is to include and convey Lots numbered five (5), eight (8), eleven (11) and fourteen (14). Lots numbered one (1) and two (2) are held by us in common.”

Pl. Ex. 23 (emphasis added).

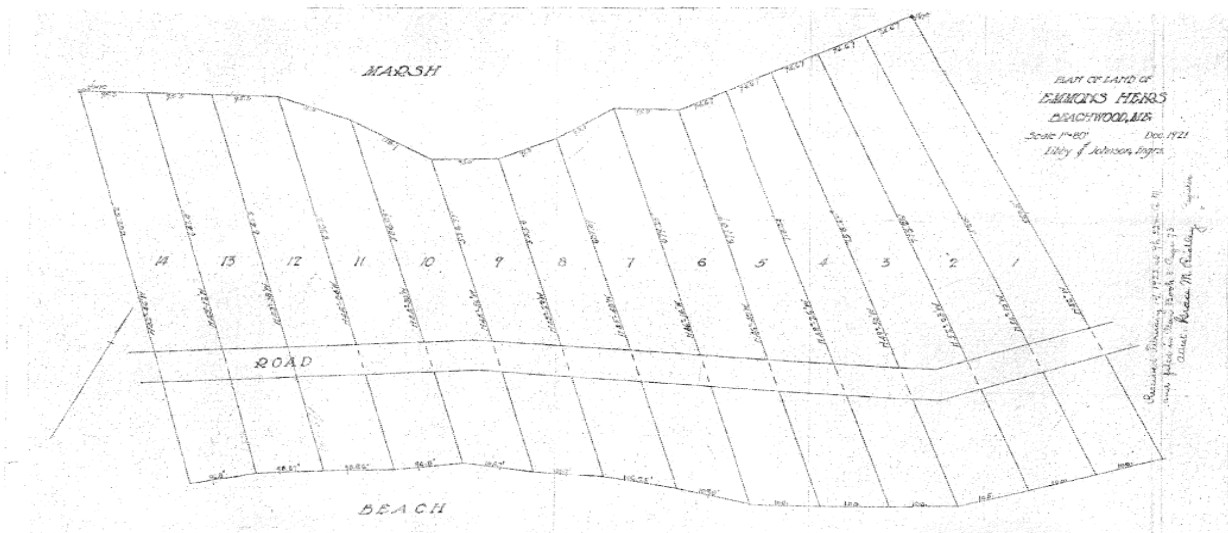
98. This deed includes a drawing showing the parcel subdivided into 14 lots, each with 100-foot frontage depicted as a continuous, solid line landward of the “Sea Wall,” beginning at an “iron hub” in the southeasterly corner of Lot 1 and running to the southwesterly corner of Lot 14. The southwestern side boundary line (bottom line as shown below) extended back to a stone (post?). The side lot lines did not have distance measurements. The drawing on page three of the deed is as follows:



Pl. Ex. 23, at 3.

99. Another sketch of the same subdivision was prepared in October 1921 showing the same 14 lots by number and owner or owners (Piper, Emmons, etc.). Pl. Ex. 21 (not depicted here). It also shows a solid line along the “sea wall”, beginning at an “iron hub” at the southeast corner of lot 1; each lot measures 100 feet on the “sea wall;” and the southwestern side boundary line of lot 14 runs “about 900 feet” from the “sea wall” to a “Rock set in the ground” near the marsh. This drawing was not included in a deed nor recorded in the registry.

100. Both the October 1921 sketch and the earlier sketch reflected in the 1905 Emmons-to-Piper deed were precursors to the final subdivision plan, which was drawn up by Libby & Johnson in December 1921 and recorded in the York County Registry of Deeds in 1922 as the “Plan of Land of Emmons Heirs, Beachwood, ME,” at Book 8, Page 73 (“Emmons Heirs Plan”). Pl. Ex. 19. The Emmons Heirs Plan depicts the same 14 rectangular lots with solid lines on all four sides. Each lot is approximately 100’ wide. The area labeled “BEACH” is outside the lot lines depicted, as shown below:



Pl. Ex. 19. Though difficult to read on the above copy, the final Emmons Heirs Plan

shows the southwesterly (left) boundary line of the subdivision starting at the solid line between the road and the beach and running a distance of 666.63 feet on North 42° – 46' West course to a “stone” in the upper left corner on the marsh side of the parcel. All of the other side lot lines have distance measurements and courses that correspond to this one and corroborate the correct distance of approximately 666 feet (as opposed to the estimated “about 900 feet” stated in the preliminary, unrecorded October 1921 sketch). All three drawings depict a continuous, solid line along the seaward side of the lots in approximately the same place on the face of the earth; two of the drawings show an “iron hub” at the point where this line meets the easterly side lot line of Lot 1.

101. It is unlikely that an iron hub or pin would be placed in the intertidal zone at the low tide line or elsewhere in the intertidal zone or even high dry sand of a beach. See Scannell Test. (Tr. II 133:14 – 134:12).

102. As found above, today the topography of the beach in this area is such that the land rises up in elevation from the high dry sand before descending in elevation to where the residential upland is located; this constitutes a natural seawall. The natural seawall may have been a more prominent feature in this area of the beach in the past. See § IV(A), *supra*, ¶¶ 7-10; Def. Ex. 76 (discussed below).

103. Given the likely topography of the beach, it is more likely than not that the use of an “iron hub” as a marker to establish a point of reference for drawing and siting the lot lines of the subdivision means that this marker would have been placed landward of the dry sand part of the beach at or near this rise in the land’s elevation that comprises a natural seawall. The Town’s expert located the solid line shown in these subdivision drawings as close to where the natural seawall is today on the face of the earth. Yarumian Test. (Tr. VII 143: 1-5); (Tr. XI 122:16-22).

104. The present boundary lines of a number of lots originally created as part of the Emmons Heirs Subdivision have been plotted by subsequent surveys and marked by iron rods on the face of the earth. See Pl. Exs. 15, 60, 61, 73; Def. Ex. 39 page 13, 16, 22, 23; Def. Exs. 56-1, 76. See, e.g., Pl. Ex. 15, a 1976 survey of Lots 10 (Plaintiff Coughlin), 11 (Plaintiff Almeder) and 13 (Sherman).

105. A 1999 boundary survey prepared in connection with the property that had been part of lot 13 of the same Emmons Heirs Subdivision shows the seaward boundary as a solid lot line between two iron rods; labels as “N/F Owner Unknown” the beach area seaward of this boundary line; and states: “The locus parcel and other lots shown on Plan Reference 2 [Emmons Heirs Subdivision] are bounded by the sea wall (no longer visible) on the southeast and do not extend to the ocean. An earlier source deed (Bk. 46, Pg. 50) which conveys a 20 acre base tract to Eliakim Emmons also describes the parcel as being bounded on the southeast by the sea wall.” Def. Ex. 76.

106. Piper to Cummings. By deed dated February 10, 1923 and recorded in the York County Registry of Deeds at Book 718, Page 201, George F. Piper et al. granted to George W. Cummings “certain lots or parcels in Kennebunkport in the County of York and State of Maine, and being lots numbered 5, 8, 11, and 14 as delineated on a plan of land of the Emmons heirs drawn by Libby & Johnson, Engineers, and duly recorded in York County Registry of Deeds.” Pl. Ex. 18.

107. Cummings to Towne. In a warranty deed dated August 18, 1928 and recorded in the York County Registry of Deeds at Book 788, Page 14, George W. Cummings granted to Helen Towne:

“a certain lot or parcel of land in that part of Kennebunkport, York County, State of Maine, known as Beachwood, and *being as shown as Lot No. 11 on a Plan of Land of Emmons Heirs*, Beachwood, Maine, dated December, 1921, Libby and Johnson, Engrs., recorded in the Registry of Deeds of said York County.”

Pl. Ex. 17 (emphasis added).

108. Towne Estate to Almeder. By an executor's deed dated October 11, 1978 and recorded in the York County Registry of Deeds at Book 2437, Page 189, the estate of Helen M. Towne granted to Robert F. Almeder and Virginia S. Almeder as joint tenants:

"All our right, title and interest in and to a certain lot or parcel of land, together with any improvements thereon, situated at Goose Rocks Beach, so-called . . . and being that portion of lot 11, lying on the Southeasterly side of Batson River Road, so-called, sometimes referred to as King's Highway, as shown on Plan of Land of Emmons Heirs dated December 1921 and recorded in the York County Registry of Deeds in Plan Book 8, Page 73."

Pl. Ex. 10 (emphasis added). The property conveyed was the portion of lot 11 on the seaward side of the road.

109. Campbell/Gillespie to Almeder. By warranty deed dated October 23, 1978 and recorded in the York County Registry of Deeds at Book 2437, Pages 186-87, Marjorie K. Campbell and John F. Gillespie, Helen M. Towne's life tenant and remainderman, released and confirmed title to the **same described premises** to Robert F. Almeder and Virginia S. Almeder as joint tenants. Pl. Ex. 11.

110. Almeder to Almeder. In October of 1994, by quitclaim deeds with covenants recorded in the York County Registry of Deeds, Book 7258, Page 179-181, Virginia S. Almeder granted to Robert F. Almeder and Robert F. Almeder granted to Virginia S. Almeder a one-half undivided interest, as tenants in common, in the land described as:

"all our right, title and interest in and to a certain lot or parcel of land, together with any improvements thereon, situated at Goose Rocks Beach, so-called, in the Town of Kennebunkport, in the County of York and State of Maine, and being that portion of lot 11, lying on the Southeasterly side of Batson River Road, so-called, sometimes referred to as King's Highway, as shown on Plan of Land of Emmons Heirs dated December, 1921, and recorded in the York County Registry of Deeds in Plan Book 8, Page 73."

Pl. Exs. 7, 8 (emphasis added).

111. Between October 2007 and June 2009, the Almeders have made a number of intra-family transfers and transfers into a trust of this same property. The deeds

conveyed the same property, but the description of the property in the deeds beginning in 2007 was amended.

112. A quitclaim deed dated October 3, 2007 from Virginia S. Almeder and Robert F. Almeder to Lisa M. Almeder, recorded in the York County Registry of Deeds at Book 15274, Page 118-119, conveyed the following:

“A certain parcel of land together with any improvements thereon and all rights appurtenant thereto, located in Kennebunkport, York County, Maine, in the area thereof known as Goose Rocks Beach, being bounded and described as follows:

Beginning at a point on the southeasterly sideline of Batson River Road, also known as Kings Highway, which is shown on the Plan of Land of Emmons Heirs, dated December, 1921 and recorded in the York County Registry of Deeds in Plan Book 8, Page 73, and which point is the westerly corner of that portion of Lot 10 as shown on said Plan which lies southeasterly of said Road; ***thence S 44° 30' E along the sideline of Lot 10 and on a straight line to the low water mark of the Ocean; thence southwesterly, along said low water mark, 99 feet, more or less, to a point; thence N 44° 04' W on a straight line and along the sideline of Lot 12 as shown on said Plan,*** which may have been or may be the sideline of a pedestrian way, to the southeasterly sideline of Kings Highway (Batson River Road); thence northeasterly along said southeasterly sideline of Kings Highway to the point of beginning.”

Pl. Ex. 6 (emphasis added). The highlighted language appears for the first time in the Almeder deed chain.

113. Almeder to Almeder. By quitclaim deed dated the same day, October 3, 2007, as recorded in the York County Registry of Deeds at Book 15274, Page 120-121, Lisa M. Almeder conveyed back to Virginia S. Almeder and Robert F. Almeder, as tenants in common and not as joint tenants, **the same property using the same amended description** reflected in Plaintiffs' Exhibit 6. Pl. Ex. 5.

114. Almeder to Trust. By quitclaim deed dated October 28, 2008 and recorded in the York County Registry of Deeds at Book 15532, Page 60-61, Virginia S. and Robert F. Almeder conveyed the same property and using the amended property description in Plaintiffs' Exhibits 5 and 6, to Robert F. Almeder and Virginia S. Almeder, trustees, or

their successors in trust under the Almeder Living Trust dated October 28, 2008. Pl. Ex. 4.

115. Trust to Almeder. A quitclaim deed dated May 20, 2009 granting the **above described property** from Robert F. Almeder and Virginia S. Almeder, trustees under the Almeder Living Trust dated October 28, 2008 to Robert F. Almeder and Virginia S. Almeder, as joint tenants with rights of survivorship, was recorded in the York County Registry of Deeds in Book 15636, Page 478-479. Pl. Ex. 3.

116. Almeder to Trust. The current deed for this property was recorded in the York County Registry of Deeds at Book 15659, Pages 864-65, dated June 5, 2009, and is a conveyance from Robert F. and Virginia S. Almeder to a Robert F. and Virginia S. Almeder, as trustees of the Almeder Living Trust dated October 28, 2008. Pl. Ex. 2. This deed uses the same description of the property's boundary first adopted in 2007 (Pl. Ex. 6) and reflected in all subsequent deeds (Pl. Exs. 5, 4, & 3), namely:

“A certain parcel of land together with any improvements thereon and all rights appurtenant thereto, located in Kennebunkport, York County, Maine, in the area thereof known as Goose Rocks Beach, being bounded and described as follows:

Beginning at a point on the southeasterly sideline of Batson River Road, also known as Kings Highway, which is shown on the Plan of Land of Emmons Heirs, dated December, 1921 and recorded in the York County Registry of Deeds in Plan Book 8, Page 73, and which point is the westerly corner of that portion of Lot 10 as shown on said Plan which lies southeasterly of said Road; *thence S 44° 30' E along the sideline of Lot 10 **and on a straight line to the low water mark of the Ocean; thence southwesterly, along said low water mark, 99 feet, more or less, to a point**; thence N 44° 04' W on a straight line and along the sideline of Lot 12 as shown on said Plan, which may have been or may be the sideline of a pedestrian way, to the southeasterly sideline of Kings Highway (Batson River Road); thence northeasterly along said southeasterly sideline of Kings Highway to the point of beginning.*”

Pl. Ex. 2 (emphasis added).

Coughlin—115 Kings Highway

117. The Coughlin property is part of what was lot 10 in the Emmons Heirs Subdivision. Lot 10 was one of the lots that Warren Emmons received in 1905 in the

transaction with George Piper. The chain of title up to that point is the same as the Almeder title chain. *Compare* Pl. Ex. 1 *with* Pl. Ex. 46. See § IV(C), *supra*, ¶¶ 76-89.

118. Piper et al.²² *to Emmons*. By warranty deed dated October 30, 1905 and recorded in the York County Registry of Deeds at Book 550, Page 278, George F. Piper, Sarah Emmons (widow) and Eugene F. Smith conveyed to Warren Emmons:

“all our rights, title, and interest in and to certain pieces of land situated in said Kennebunkport at Beechwood, so called, and being a part of the same property described in deed from Wm Pepperell to Eliakim Emmons Dec. 22nd 1774 and recorded Book 46, Page 50. Said described property having been divided into fourteen lots, ***each lot containing one hundred feet along the Sea Wall*** excepting lot no. 3 which contains one hundred and five feet and this deed is to include and convey Lots numbered four (4), seven (7), ten (10) and thirteen (13). Lots numbered one (1) and two (2) are held by us in common.”

Pl. Ex. 55 (emphasis added).

119. Emmons et al.²³ *to Towne*. By warranty deed dated August 8, 1923 and recorded in the York County Registry of Deeds at Book 719, Pages 475-476, William Emmons, Clarence G. Emmons, Wright F. Emmons, Roscoe Emmons, and Albion Emmons, the heirs of Warren Emmons, granted to Winfield C. Towne:

“a certain lot or parcel of land situated at Beachwood, so called, in the town of Kennebunkport, York county and state of Maine *being lot No. 10 on a Plan of Land of Emmons Heirs* as made by Libby & Johnson, Engineers, and recorded in York County Registry of Deeds, ***said lot being one hundred feet on the sea wall.***”

Pl. Ex. 52 (emphasis added).

120. Winfield Towne to Helen Towne. A warranty deed dated December 24, 1938 granted property of the following description, among other parcels, from Winfield C. Towne to his wife, Helen M. Towne, as recorded in the York County Registry of Deeds at Book 915, Page 25:

²² Sarah Emmons (widow of Oliver Emmons) and Eugene Smith were releasing any rights they held in the same property as part of this conveyance.

²³ William Emmons, Clarence G. Emmons, Wright F. Emmons, Roscoe Emmons, and Albion Emmons were the heirs of Warren Emmons, from whom they inherited the property. Pl. Ex. 54.

*“A certain lot or parcel of land with the building thereon, situated at Goose Rocks Beach so called, in the Town of Kennebunkport, York County, State of Maine, being Lot No. Ten (10) on a Plan of Land of Emmons Heirs, as made by Libby and Holman, Engineers and recorded in York County Registry of Deeds, Plan Book Eight (8) Page Seventy Three (73), **said lot being one hundred four and seven tenths – (104.7) feet on the sea wall.** Also another certain lot or parcel of land five (5) feet wide adjoining the Easterly side of said Lot No. ten (10) on said Plan of Land of Emmons Heirs between Kings Highway and the Atlantic Ocean and being a part of Lot No. nine (9) on said Plan of Land, and situated at said Goose Rocks Beach, in said Town of Kennebunkport, York County, State of Maine, and being the same premises conveyed to me by Edward M. Martin by deed recorded in York County Registry of Deeds Book 794 Page 411.”*

Pl. Ex. 51 (emphasis added).

121. The second parcel described in the 1938 Towne-to-Towne deed above is a five-foot strip of land taken out of lot 9, which abuts lot 10 to the east. Lot 9 was also part of the Emmons Heirs Subdivision. The Martin deed referenced in the property description is not in evidence.

122. Two predecessor deeds in the chain of title for Lot 9 are in evidence. The first is an April 25, 1923 deed (Bk. 715, Pg. 475) from Eugenie M. Benson to Frank and Emma Littlefield, granting “subject to the payment of taxes for the year 1925” the following:

*“[A] certain lot of land situated at Beachwood, so-called, in Kennebunkport, County of York, and State of Maine, on both sides of the Kings Highway, and being lot numbered nine upon a plan of land of the Emmons Heirs drawn up by Libby & Johnson, in December 1921, and said plan being recorded in the York County Registry of Deeds, Plan Book 8, Page 75, to which reference is had for a full and complete description of said premises, **said lot having a frontage on the sea wall of 101.7 feet** and a width on the marsh of 95 feet.”*

Pl. Ex. 53 (emphasis added). The second is an April 21, 1924 deed (Bk. 744, Pg. 477) from Frank and Emma Littlefield to Ralph W. and Blanch Edith Littlefield conveying that part of lot 9 southeast or seaward of the Kings Highway, described as follows:

*“[A] certain lot of land situated at Beachwood, so-called, in Kennebunkport, County of York, and State of Maine, and being that part of lot numbered nine, upon a plan of land of the Emmons Heirs drawn up by Libby & Johnson, in December 1921, and said plan being recorded in the York County Registry of Deeds, **which is between the Kings Highway and the beach,** and reference is made to said plan for a full and complete description of the premises herein conveyed.”*

Def. Ex. 62 (emphasis added).

123. Towne to Campbell. By an executor's deed dated January 23, 1979 and recorded in the York County Registry of Deeds at Book 2469, Page 325, the estate of Helen M. Towne granted to Marjorie K. Campbell the same property described above in Plaintiffs' Exhibit 51 with respect to (i) lot 10 and (ii) the five-foot strip from lot 9; and with respect to the five-foot strip, the following additional description:

“Said strip of land hereby conveyed is more particularly described as follows: Westerly by lot numbered 10 on said Plan formerly owned by Winfield C. Towne; Northerly by said “Kings” Highway about five (5) feet; Easterly by other land formerly of Edward M. Martin, and by a line parallel with and five (5) feet distant from the dividing line between said lot numbered 10 and said lot numbered 9 on said Plan **Southerly by said Atlantic Ocean about five (5) feet.**”

Pl. Ex. 50 (emphasis added).

124. Campbell to Kennebunkport Industries, Inc. By warranty deed dated June 22, 1981 and recorded in the York County Registry of Deeds in Book 2808, Page 88-89, Marjorie K. Campbell granted to Kennebunkport Industries, Inc. **the same property as described** in the 1938 Towne-to-Towne deed, the 1979 Towne-to-Campbell deed, and the contemporaneous 1981 Gillespie-to-Campbell deed.²⁴ Pl. Ex. 48.

125. Kennebunkport Industries, Inc. to Coughlin Trust. By warranty deed dated May 6, 1983 and recorded in the York County Registry of Deeds in Book 3085, Pages 5-6, Kennebunkport Industries, Inc. granted to John T. Coughlin and Priscilla M.

²⁴ A contemporaneous transaction was undertaken in order to complete conveyance of title to the grantee. By warranty deed dated June 22, 1981 and recorded in the York County Registry of Deeds in Book 2808, Page 86-87, John F. Gillespie, a/k/a John T. Gillespie granted to Marjorie K. Campbell, “the same premises conveyed by deed of Charles W. Smith, Executor of the Will of Helen M. Town to Marjorie Campbell dated January 23, 1979 and recorded in the York County Registry of Deeds, Book 2469, Page 325.” Pl. Ex. 49. The property description in the 1981 Gillespie-to-Campbell deed was identical to the property description in the 1979 Towne-to-Campbell and 1981 Campbell-to-Kennebunkport Industries, Inc. deeds. A similar conveyance was made by Campbell and Gillespie to Almeder to unify the title after Helen Towne's death. *Compare* Pl. Ex. 11 *with* Pl. Ex. 48.

Coughlin, Trustees of the P.M.C. Realty Trust the same property described in the previous conveyance, namely:

“a certain parcel of land, together with any improvements thereon situated at Goose Rocks Beach so-called, in the Town of Kennebunkport, in the County of York and State of Maine, and *being that portion of lot 10, lying on the Southeasterly Side of Batson River Road, so-called, sometimes referred to as King’s Highway, as shown on Plan of Emmons Heirs dated December, 1921 and recorded in the York County Registry of Deeds in Plan Book 8, Page 73.*

Also a certain strip of land five (5) feet wide, between the “Kings” Highway and the Atlantic Ocean along the Westerly side of a certain lot of land formerly owned by Edward M. Martin, situated in Beachwood, so-called, in Kennebunkport, Maine. Said strip of land being part of lot number 9 upon a Plan of Land of the Emmons Heirs, drawn by Libby and Johnson in Dec. 1921 and Emmons Heirs, drawn by Libby and Johnson in Dec. 1921 [sic] and recorded in York County Registry of Deeds, Plan Book 8, Page 73.

Said strip of land hereby conveyed is more particularly described as follows: Westerly by lot numbered 10 on said Plan formerly owned by Winfield C. Towne; Northerly by said “Kings” Highway about five (5) feet; Easterly by other land formerly of Edward M. Martin, and by a line parallel with and five (5) feet distant from the dividing line between said lot numbered 10 and said lot numbered 9 on said Plan *Southerly by said Atlantic Ocean about five (5) feet.*”

Pl. Ex. 47 (emphasis added). This is the current deed to the Coughlin property. It describes that portion of lot 10 lying seaward of the Kings Highway as well as the portion of the five-foot strip carved out of lot 9 as had been previously conveyed to the grantor.

Celi—123 Kings Highway

126. The Celi property is part of what was lot 7 of the Emmons Heirs Subdivision as shown in the Emmons Heirs Plan. Lot 7, like lot 10 (Coughlin), was one of the lots Warren Emmons received in the 1905 transaction with George Piper. See Pl. Exs. 46, 55, 56. Coming forward in time from that point, the chain of title to the Celi property is as follows.

127. Emmons et al.²⁵ to Clark. By warranty deed dated August 22, 1922 and recorded in the York County Registry of Deeds at Book 710, Pages 13-14, William

²⁵ Heirs of Warren Emmons, from whom they inherited the property. Pl. Ex. 54.

Emmons, Clarence G. Emmons, Wright F. Emmons, Roscoe Emmons, and Albion Emmons granted to George W. Clark and his heirs and assigns:

“a certain lot or parcel of land *being lot numbered seven (7) on a plan of lots situated at Beachwood, ‘so-called’*, in the town of Kennebunkport, in York County, state of Maine, said plan being recorded in York County Registry of Deeds, Plan Book No. 8, Page No. 73. The lot hereby conveyed is bounded Northeasterly by grantees land being lot numbered (6) six on said plan.”

Pl. Ex. 77 (emphasis added). The “plan of lots situated at Beachwood” referenced in the deed is the Emmons Heirs Plan.

128. H. Clark to M. Clark. By quitclaim deed dated May 16, 1934 and recorded in the York County Registry of Deeds at Book 843, Page 330, Howard E. Clark, son and heir of George Clark, granted to Maud L. Clark, his mother, the same parcel, namely:

“a certain lot or *land with the buildings thereon situated at Beachwood* in the Town of Kennebunkport, said York County *being the same premises conveyed to George W. Clark by William E. Emmons and others* by their Warranty Deed dated Augusta [sic] 22, 1922 and recorded in said Registry of Deeds book 710 page 13 and Walter A. Clark to George W. Clark Warranty Deed dated August 23, 1928 recorded in Book 804 Page 441.”²⁶

Pl. Ex. 75 (emphasis added).

129. Clark to Jacobson. By warranty deed dated July 1, 1946 and recorded in the York County Registry of Deeds at Book 1078, Page 583, Maud L. Clark granted to Israel Jacobson the portion of lot 7 southeasterly (seaward) of King’s Highway, namely:

“a certain lot or parcel of land with the buildings thereon situated—Kennebunkport, York County, State of Maine *on the Southerly side of Kings Highway so-called, being a portion of lot numbered seven (7) on a plan of lots situated at Beachwood, so-called*, in the town of Kennebunkport York County, State of Maine, said plan being recorded in the York County Registry of Deeds Plan Book No. 8, Page 73, bounded and described as follows: Beginning at a point on Kings Highway which is the northeast corner of the lot herein conveyed: **thence Southeasterly along Lot No. 6 as shown on said plan to the Beach; thence Southwesterly along said Beach 109.8’ feet to lot No. 8 as shown on said plan;** then Northwesterly to Kings Highway; thence Easterly along said Kings Highway to the point begun at.”

²⁶ In August 1928 Walter A. Clark granted to George W. Clark his interest in a portion of lot 7 located on the northwesterly side of the Kings Highway. See Pl. Ex. 76. It is not clear from the record how Walter Clark had acquired that interest.

Pl. Ex. 74 (emphasis added). The plan referenced is the Emmons Heirs Plan.

130. In the early 1970s there were a series of intra-family conveyances within the Jacobson family, none of which altered or affected the highlighted boundary of the subject property (Lot 7) as described in the 1946 Clark-to-Jacobson deed above. Pl. Exs. 67-72. A 1970 plan prepared for an owner of neighboring lots depicts this same 109.8-foot, solid boundary line of the Jacobson property as part of a shared boundary with other lots in the subdivision (the Emmons Heirs Subdivision) running between the upland lots and the “Beach.” Pl. Ex. 73.

131. Jacobson to McGrory. A deed dated April 27, 1973 and recorded at Book 1990, Pages 409-16 of the York County Registry of Deeds from Priscilla A. Jacobsen, Guardian of Israel Jacobsen, grants to John T. McGrory and Lorna T. McGrory:

“[a] certain lot or parcel of land with the buildings thereon situated in Kennebunkport, York County, State of Maine, being located on the southerly side of Kings Highway, so-called, and *being a portion of Lot No. 7 on a plan of lots of Beachwood* recorded in York County Registry of Deeds in Plan Book 8, Page 73, bounded and described as follows: Beginning at a point on Kings Highway which point is the northeast corner of the land herein conveyed; *thence southeasterly along Lot No. 6 as shown on said Plan to the Beach; thence Southwesterly along said Beach one hundred nine and eight tenths (109.8) feet to lot No. 8 a shown on said Plan;* thence Northwesterly one hundred one and sixty hundredths (101.60), more or less, to the southwesterly corner of a parcel of land conveyed by even date herewith to Woodrow Cataldo, et al., thence northeasterly by said land of Cataldo sixty-three (63) feet to a point; thence northwesterly by said Cataldo land sixty-six feet (66) to a point in the southerly sideline of said Kings highway; thence westerly thirteen and forty-seven hundredths (13.47) feet to the point of beginning.”

Pl. Ex. 64 (emphasis added).

132. Angela Jacobson, to whom Israel Jacobson had conveyed a joint tenancy interest in the property in 1971 (Pl. Ex. 67) also conveyed her rights in and to the **same property described above** to John and Lorna McGrory in a March 19, 1973 deed recorded at Book 1990, Pages 411-12. Pl. Ex. 66.

133. McGrory to Celi. In an August 4, 1978 warranty deed recorded at Book 2394, Page 121, John and Lorna McGrory granted to M. Joseph Celi and Lorraine C.

Celi the same property, with the same description used in the Jacobson-to-McGrory deed (Pl. Ex. 66), above; and in particular, with reference to “Lot No. 7 on a plan of lots of Beachwood,” the boundaries of which were described as follows:

“Beginning at a point on Kings Highway which point is the northeasterly corner of the land herein conveyed; *thence southeasterly along Lot No. 6 as shown on said Plan **to the Beach; thence southwesterly along said beach one hundred nine and eight tenths (109.8) feet to lot No. 8 as shown on said plan;*** thence Northwesterly one hundred one and sixty hundredths (101.60) more or less, to the southwesterly corner of a parcel of land conveyed by Jacobson to one Cataldo, et al., thence northeasterly by said Cataldo land sixty-three (63) feet to a point; thence Northwesterly by said Cataldo land sixty-six feet (66) to a point in the southerly sideline of the Kings highway; thence Easterly thirteen and forty-seven hundredths (13.47) feet to the point of beginning.”

Pl. Ex. 63 (emphasis added).

134. Further, the same 1978 McGrory-to-Celi deed added the following:

“Said premises are also conveyed together with *all grantors [sic] right, title and interest, however, acquired in and to any land lying between the side lines of said lot extended Southeasterly to low water mark of the Atlantic Ocean. The Warranty covenants of this deed shall not apply to any such land, which is conveyed with quit claim only.*”

Id. (emphasis added). This is the first instance in which quitclaim language purporting to include the beach in front of lot 7 down to the low water mark appears in the Celi deed chain.

135. In 1984, M. Joseph Celi granted to his wife, Lorraine C. Celi, by warranty deed dated September 28, 1984 and recorded at Book 3389, Pages 189-90, all of his “right, title and interest” in and to the same property, described as a certain lot or parcel of land with the buildings thereon, situated in Kennebunkport . . . and being a portion of Lot No. 7 on a plan of lots of Beachwood recorded in York Registry of Deeds in Plan Book 8, Page 73,” and which was bounded and described in relevant part as:

“[b]eginning at a point on the Kings Highway which point is the northeasterly corner of the land herein conveyed; *thence southeasterly, along Lot No. 6 as shown on said Plan **to the beach; thence southwesterly along said beach one hundred nine and eight tenths (109.8) feet to Lot No. 8;*** thence Northwesterly one hundred one and sixty hundredths (101.60) more or less, to the southwesterly corner of a parcel of land conveyed by Jacobson to one Cataldo, et al., thence northeasterly by said Cataldo land sixty-three (63) feet to a point; thence

northwesterly by said Cataldo land sixty-six feet (66) to a point in the southerly sideline of the Kings highway; thence Easterly thirteen and forty-seven hundredths (13.47) feet to the point of beginning.”

Pl. Ex. 62 (emphasis added). This deed also included the quitclaim grant to “whatever title grantor may now possess in and to the beach and tidal flats between the sidelines of said lot extended to low water mark of the Atlantic Ocean.” *Id.*

136. In June 2002, The Celi Kennebunkport Real Estate Trust No. 1 (“Celi Trust”) was established. M. Joseph and Lorraine Celi were appointed co-trustees. Pl. Ex. 59. In April 2008, the Trust was amended. Lorraine Celi was removed as trustee. Mark E. Celi and William E. Brennan, Jr., were appointed co-trustees. Pl. Ex. 58.

137. Celi to Trust. The current deed to the Celi property is the warranty deed dated June 18, 2002 and recorded at Book 11798, Pages 290-91, in which Lorraine C. Celi conveyed to M. Joseph Celi and Lorraine C. Celi, trustees of the Celi Trust the same property, described as follows:

“A certain lot or parcel of land with buildings thereon, situated in Kennebunkport in the County of York and State of Maine and being located on the Southerly side of King’s Highway, so-called, and being a portion of Lot No. 7 on a plan of lots of Beachwood recorded in York Registry of Deeds in Plan Book 8, Page 73, bounded and described as follows: Beginning at a point on the Kings Highway which point is the Northeasterly corner of the land herein conveyed; *thence Southeasterly along Lot No. 6 as shown on said **Plan to the beach, thence Southwesterly along said beach One Hundred Nine and Eight Tenths (109.8) feet to Lot No. 8 as shown on said plan***; thence Northwesterly One Hundred One and Sixty Tenths (101.60) feet more or less, to the Southwesterly corner of a parcel of land conveyed by Jacobson to one Cataldo; thence Northeasterly by said Cataldo land Sixty-three (63) feet to a point; thence Northwesterly by said Cataldo land Sixty-six (66) feet to a point in the Southerly sideline of the Kings Highway, thence Easterly by said highway Thirteen and Forty-seven (13.47) feet to the point of beginning.”

Pl. Ex. 57 (emphasis added). This deed includes the quitclaim clause added in 1978 referencing “whatever title grantor may now possess in and to the beach and tidal flats between the sidelines of said lot extended to low water mark of the Atlantic Ocean.” *Id.*

GRB Holdings—149 Kings Highway

138. This property is part of what was lot 13 of the “Ivory Emmons Subdivision” established by the Plan of Land of Ivory Emmons Beachwood, Kennebunkport, Maine drawn by H.W. Libby, Eng’r, Saco, Maine, December 3, 1925 and recorded in York County Registry of Deeds, Book of Plans 10, Page 36 (“Ivory Emmons Plan”). Pl. Ex. 97. The Ivory Emmons Subdivision consisted of 19 lots with a combined frontage on the beach of about 965 feet. Pl. Ex. 569, § B. Prior deeds in the chain of title to the properties comprising this subdivision, including lot 13, trace back to the will of Eliakim Emmons; are identical with the Almeder, Coughlin, and Celi chain of deeds coming forward to Isreal W. Emmons; and then separate from that deed chain with the conveyance from the executor of the estate of Isreal W. Emmons to Ivory Emmons in 1891. Pl. Ex. 25. *Compare* Pl. Exs. 1, 46, 56 *with* Pl. Ex. 80. *See* § IV(C), *supra*, ¶¶ 76-89. The chain of title to the GRB Holding property coming forward from that point to the present is as follows.

139. Isreal Emmons to Ivory Emmons. As to Ivory Emmons, by an executor’s deed dated August 18, 1891 and recorded at Book 445, Page 369 of the York County Registry of Deeds, the estate of Isreal W. Emmons conveyed to Ivory Emmons:

“all the right title and interest which said Isreal W. Emmons had at the time of his decease in fifteen acres of land situated near the Rush Pond so called in said Kennebunkport owned in common with heirs of John Emmons deceased and supposed to be some five acres of land be the same more or less and embracing the same land conveyed by deed of John Emmons and Moses Emmons to said Isreal Emmons dated this twenty second day of November 1832 in its last clause in these words, Also one fourth part of fifteen acres of land in common with the heirs of John Emmons deceased near the Rush Pond so called.”

Pl. Ex. 25.

140. I. Emmons to G. Emmons. By deed dated July 5, 1894 and recorded in the York County Registry of Deeds at Book 463, Page 23, Ivory Emmons granted to George T. Emmons:

“a certain lot or parcel of land situated in said Kennebunkport and described in deed dated Aug. 18, 1891 and Recorded Book 445, page 369 to wit: *all the right title and interest which Isreal W. Emmons had at the time of his decease in fifteen Acres of land situated near the ‘rush Pond’ so called* in said Kennebunkport owned in common with heirs of John Emmons deceased and supposed to be same five acres of land be the same more or less and embracing the same land conveyed by deed of John Emmons and Moses Emmons to said Isreal W. Emmons dated the 22d day of November 1832 in its last clause in these words ‘Also one fourth part of fifteen acres of land in common with the heirs of John Emmons deceased near the Rush Pond so called’ It being hereby understood that I convey to said grantee all the land which was conveyed to me by said deed dated Aug. 18, 1891 signed by Samuel W. Lugnes and recorded Book 445, page 369.”

Pl. Ex. 102 (emphasis added).

141. G. Emmons to I. Emmons. By deed dated May 3, 1898 and recorded in the York County Registry of Deeds at Book 493, Page 319, George T. Emmons granted to Ivory Emmons:

“a certain parcel of marsh and wood land, situated in said Kennebunkport, ***near the ‘Goose Rocks’ so called, bounded Southeasterly by the Sea***, Northeasterly by land of Abram Dennett, Northwesterly by land of heirs of Eldridge Proctor et. als, and Southwesterly by heirs of Isiah Emmons et. als. *same containing about twenty acres and further described in deeds from said Ivory Emmons to said George T. Emmons.*”

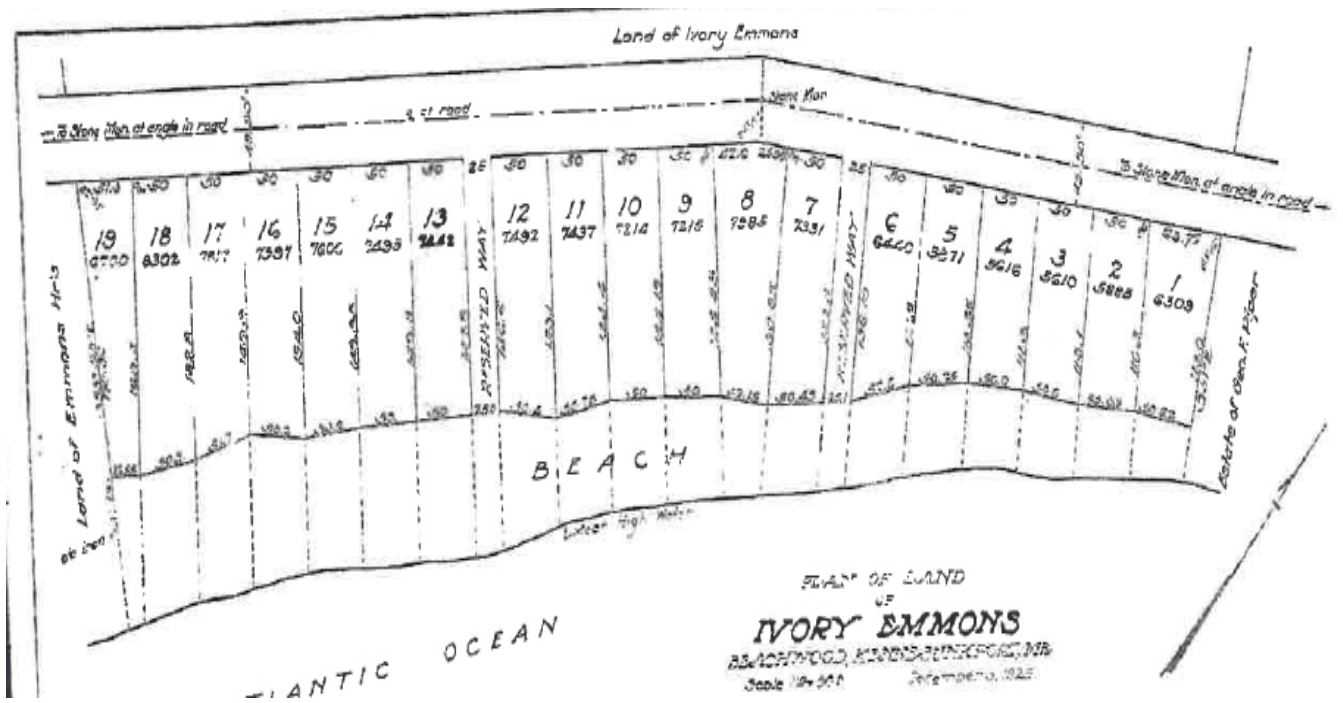
Pl. Ex. 101(emphasis added). This is the first call to the water that appears with regard to this property.

142. In 1925 the Ivory Emmons Plan was drawn up and recorded. Pl. Ex. 97. The land comprising the Ivory Emmons Subdivision as reflected in the plan was adjacent to and immediately east of land included in the Emmons Heirs Plan. *See id.* (“Land of Emmons Heirs” as referenced in the Ivory Emmons Plan).

143. The Ivory Emmons Plan depicts 19 lots. Each lot is drawn with four solid lines; each solid line is marked in feet. Dotted lines extend seaward from the solid side lot lines of each parcel. The dotted lines are not measured, and extend over an area labeled “BEACH” until reaching another solid line labeled “Mean High Water,” which separates the area labeled “BEACH” from the “ATLANTIC OCEAN.” Pl. Ex. 97.

144. Surveyors often use dotted lines to indicate areas where ownership is uncertain. Yarumian Test. (Tr. X 43:11 – 44:18).

145. The solid lot lines parallel to and bordering the beach area are also measured in feet and are not labeled as “tie lines.” Just below these same solid lot lines between lots 7 and 10 are the words, “Top of the Bank,” with arrows pointing to the same solid lines (although this does not appear on the scaled-down copy reproduced below). Pl. Ex. 97:



146. The plan shows near the southwest corner of lot 19 a monument marked, “old iron,” and just above this is written, “Land of Emmons Heirs.” Lot 19 in the Ivory Emmons Plan is contiguous to, and shares the same side line boundary with, Lot 1 in the Emmons Heirs Subdivision. Compare Pl. Ex. 97 with Pl. Exs. 19, 21. The “old iron” shown at the far western (left) side of the Ivory Emmons Plan corresponds to, and is more likely than not the same monument as, the “iron hub” depicted at the far eastern

(right) side in the Emmons Heirs Plan. As depicted in the 1905 drawing of the Emmons Heirs Subdivision, that “iron hub” is adjacent to the words, “sea wall;” and as depicted in the Ivory Emmons Plan, the “old iron” is proximate to the solid lot line separating the upland lots from the beach, and labelled, “Top of the Bank.” Pl. Exs. 21, 97. The solid lines separating the numbered lots in from the area labeled “Beach” on both subdivision plans, therefore, line up to form a continuous, solid line running west to east along the beach.

147. There is a natural embankment on the face of the earth in the same vicinity today. It is more likely than not that the “old iron” monument was placed on the face of the earth on or in the vicinity of an embankment, the precise location of which may have shifted over the years. In any event, this embankment is now, and more likely than not was in the past, landward of both the “Mean High Water” and the “Beach.”

148. Emmons to Phelps. By warranty deed dated December 26, 1930 and recorded in the York County Registry of Deeds at Book 821, Page 363, Ivory H. Emmons granted to Anastacia W. Phelps:

“two certain lots or parcels of land, situated at Beachwood, so-called, in Kennebunkport, in the county of York, and State of Maine, and being lots numbered thirteen (13) and fourteen (14) upon a Plan of Land of Ivory Emmons, Beachwood, Kennebunkport, Me., drawn by R. W. Libby, Engineer, December 3, 1925, and recorded in York County Registry of Deeds, Book 10, Page 36, to which Plan reference is herein had for a description of the premises; said lots having such frontage on the Atlantic Ocean of fifty (50) feet, and extending back therefrom to the Highway and having frontage on said Highway of fifty (50) feet each.”

Pl. Ex. 100 (emphasis added).

149. Phelps to Jeffrey. By warranty deed dated March 10, 1932 and recorded in the York County Registry of Deeds at Book 826, Page 196, Anastacia W. Phelps granted to Charles Ellsworth Jeffrey **property of the same description** as found above in the grant from Ivory H. Emmons to Anastacia W. Phelps (i.e. lots 13 and 14 on the 1925 Plan of Ivory Emmons) altering only the first sentence of the description as follows: “two

certain lots or parcels of land, situated at Goose Rocks Beach, formally [sic] called Beachwood, in Kennebunkport....” The deed referenced the plan for a description of the property, and also noted the “lots having each a frontage on the Atlantic Ocean of fifty (50) feet.” Pl. Ex. 99 (emphasis added).

150. Jeffrey to Phelps. By warranty deed dated July 6, 1946 and recorded in the York County Registry of Deeds at Book 1129, Page 77, Charles Ellsworth Jeffrey granted to Anastacia W. Phelps the same lots 13 and 14 on the 1925 Plan of Ivory Emmons, describing the property by specific reference to the plan, and also noting the “lots having each a frontage on the Atlantic Ocean of fifty (50) feet;” and **property of the same description** as found above in the grant from Anastacia W. Phelps to Charles Ellsworth Jeffrey altering only the first sentence of the description of the prior Phelps-to-Jeffrey deed to correct the misuse of the word “formally” in the prior deed. Pl. Ex. 98

151. Kroeger (formerly Phelps) to Coppola. By warranty deed dated September 24, 1963 and recorded in the York County Registry of Deeds at Book 1567, Pages 286-88, Anastacia W. Kroeger (formerly Phelps) granted to Frank J. Coppola and Pauline V. Coppola the same lots 13 and 14 on the 1925 Plan of Ivory Emmons, using the **identical language to describe the property** as in the 1946 Jeffrey-to-Phelps deed, altering only the first sentence of the description to add a reference to the grant of the buildings thereon: “two certain lots or parcels of land, with the buildings thereon, situated at Goose Rocks Beach, formerly called Beachwood, in said Kennebunkport” Pl. Ex. 96.

152. Coppola to Sotir. By warranty deed dated November 8, 1972 and recorded in the York County Registry of Deeds at Book 1977, Pages 669-70, Frank J. Coppola and Pauline V. Coppola granted to Thomas Sotir and Beverly Sotir Lot 13 on the 1925 Plan of Ivory Emmons, further described as:

“a certain lot or parcel of land, with the buildings, situated in Kennebunkport, in the County of York and State of Maine, at Goose Rocks Beach, and *being Lot No.*

13 as shown on 'Plan of Land of Ivory Emmons, Beachwood, Kennebunkport, Me.' Drawn Dec. 3, 1925, by R.W. Libby, C. E. and recorded in York Registry of Deeds in Plan Book 10, Page 36. Said Lot No. 13 is more particularly bounded and described as follows:

Beginning on the southeasterly side of Kings Highway at the northerly corner of Lot No. 14 on said plan; thence northeasterly by said highway fifty (50) feet to a twenty-five (25) foot wide reserved way shown on said plan; **thence southeasterly by said reserved way one hundred forty-seven and 9/10 (147.9) feet to a point; thence southwesterly by the beach fifty (50) feet to said Lot No. 14;** thence northwesterly by said Lot No. 14 one hundred forty-nine and 8/10 (149.8) feet to the point of beginning.

Together with all Grantor's right, title and interest in and to the land lying between the sideline of said lot extended southeasterly to low water mark of the Atlantic Ocean, or so far as Grantors may own."

Pl. Ex. 95 (emphasis added). This conveyance added specific distances for the lot lines as well as the quitclaim clause granting "right, title and interest in and to the land" seaward of the lot to low water line "or so far as Grantors own."

153. Sotir to Sotir Trust. By warranty deed dated December 14, 1992 and recorded in the York County Registry of Deeds at Book 6500, Pages 141-46, Thomas Sotir and Beverly Sotir granted to Tracy A. Ramsey, Marc R. Sotir, Matthew J. Sotir, and Luke T. Sotir, trustees of the Thomas and Beverly L. Sotir Irrevocable Trust the **same property**, Lot 13, granted by Coppola to Sotir in 1972 **with the identical description**, except that in the final paragraph of the description, "Grantor" was replaced with "Frank J. Coppola and Pauline V. Coppola," and reads: "Together with all Frank J. Coppola and Pauline V. Coppola's right, title and interest in and to the land lying between the sideline of said lot extended southeasterly to low water mark of the Atlantic Ocean, or so far as Frank J. Coppola and Pauline V. Coppola may own." Pl. Ex. 93. Lot 13 is parcel V in this deed.

154. Sotir Trust to Goose Rocks Beach Holdings LLC. By warranty deed recorded on December 28, 2006 in the York County Registry of Deeds at Book 15048, Pages 714-21, Tracy A. Ramsey, Marc R. Sotir, Matthew J. Sotir, and Luke T Sotir, trustees of the

Thomas and Beverly L. Sotir Irrevocable Trust granted to Goose Rocks Beach Holdings LLC property of the same description as that found in the 1992 Sotir-to-Ramsey et al. deed, namely:

“a certain lot or parcel of land, with the buildings, situated in Kennebunkport, in the County of York and State of Maine, at Goose Rocks Beach, and *being Lot No. 13 as shown on ‘Plan of Land of Ivory Emmons, Beachwood, Kennebunkport, Me.’* Drawn Dec. 3, 1925, by R.W. Libby, C. E. and recorded in York Registry of Deeds in Plan Book 10, Page 36. Said Lot No. 13 is more particularly bounded and described as follows:

Beginning on the southeasterly side of Kings Highway at the northerly corner of Lot No. 14 on said plan; thence northeasterly by said highway fifty (50) feet to a twenty-five (25) foot wide reserved way shown on said plan; ***thence southeasterly by said reserved way one hundred forty-seven and 9/10 (147.9) feet to a point; thence southwesterly by the beach fifty (50) feet to said Lot No. 14;*** thence northwesterly by said Lot No. 14 one hundred forty-nine and 8/10 (149.8) feet to the point of beginning.

Together with all Frank J. Coppola and Pauline V. Coppola’s right, title and interest in and to the land lying between the sideline of said lot extended southeasterly to low water mark of the Atlantic Ocean, or so far as Grantors may own.”

Pl. Ex. 92 (emphasis added). Lot no. 13 is parcel V in this deed. This is the current deed to the GRB Holdings property.

Flynn—161 Kings Highway

155. The Flynn property consists of three lots that had been part of the Ivory Emmons Subdivision—lots 4, 5, and 6 delineated on the Ivory Emmons Plan. Prior deeds in the chain of title are identical with GRB Holding’s up through the deed to Ivory Emmons from George Emmons in 1898. See Pl. Exs. 80, 103. Upon his death, Ivory Emmons devised to his widow, Olive Emmons, lots 4, 5, and 6, as described below.

156. Emmons to Sutch. By warranty deed dated October 15, 1948 and recorded in the York County Registry of Deeds at Book 1116, Pages 515-18, Olive H. Emmons granted to Emery H. Sutch and Nancy S. Sutch as joint tenants:

“three certain lots or parcels of land situated at Goose Rocks Beach, so-called, in said Kennebunkport, on the South-easterly side of the King’s Highway and *being lots #4, #5, and #6 as delineated upon a “Plan of land of Ivory Emmons” Beachwood, Kennebunkport, Maine drawn by H.W. Libby, Eng’r, Saco, Maine,*

December 3, 1925 and recorded in York County Registry of Deeds, Book of Plans 10, Page 36, to which plan reference is herein had . . . “

Pl. Ex. 103, 108 (emphasis added). The deed described the three parcels as follows:

"PARCEL ONE OR LOT #4 Beginning at a point on the Southeasterly side of the King's Highway, so-called, at the juncture of said lot #4 and lot #5 on said plan; thence at nearly right angles *from said Highway in a general Southeasterly direction along said lot #5 one hundred thirteen and thirty-five hundredths (113.35) feet, more or less, to the top of the bank of the Atlantic Ocean; thence at nearly right angles in a general Northeasterly direction along the top of said bank fifty (50) feet, more or less, to lot #3 on said plan;* thence at nearly right angle in a general Northwesterly direction along said lot #3 one hundred eleven and three-tenths (111.3) feet, more or less, to said Highway; thence at nearly right angles in a general Southwesterly direction along said Highway fifty (50) feet, more or less, to the point of beginning. *Also conveyed herein is so much of the land Southeasterly of the above described lot and southeasterly of the top of the bank and from thence Southeasterly to the Atlantic Ocean as lies between the sidelines of the above described parcel if produced Southeasterly to the Ocean.*

PARCEL TWO OR LOT #5 Beginning at a point on the Southeasterly side of the King's Highway, so-called, at the juncture of said lot #5 and lot #6 on said plan; thence at nearly right angles from said Highway in a general Southeasterly direction along said lot #6 one hundred twenty-one and five-tenths (121.5) feet, more or less, ***to the top of the bank of the Atlantic Ocean; thence at nearly right angles in a general Northeasterly direction along the top of said bank fifty and seventy five hundredths (50.75) feet more or less, to lot #4 on said plan;*** thence at nearly right angles in a general Northwesterly direction along said lot #4 one hundred thirteen and thirty-five hundredths (113.35) feet, more or less, to said Highway; thence at nearly right angles in a general Southwesterly direction along said Highway fifty (50) feet, more or less, to the point of beginning. *Also conveyed herein is so much of the land Southeasterly of the above described lot and southeasterly of the top of the bank and from thence Southeasterly to the Atlantic Ocean as lies between the sidelines of the above described parcel if produced Southeasterly to the Ocean.*

PARCEL THREE OR LOT #6 Beginning at a point on the Southeasterly side of King's Highway, so-called, at the juncture of said lot #6 and a reserved way on said plan; thence at nearly right angles from said Highway in a general Southeasterly direction along said reserved way one hundred thirty-six and ten hundredths (136.10) feet, more or less, ***to the top of the bank of the Atlantic Ocean; thence at nearly right angles in a general northeasterly direction along the top of said bank fifty-two (52) feet, more or less, to lot #5 on said plan;*** thence at nearly right angles in a general Northwesterly direction along said lot #5 one hundred twenty-one and five-tenths (121.5) feet, more or less, to said Highway, thence at nearly right angles in a general Southwesterly direction along said Highway fifty (50) feet, more or less, to the point of beginning. *Also conveyed herein is so much of the land Southeasterly of the above described lot and southeasterly of the top of the bank and from thence Southeasterly to the Atlantic Ocean as lies between the sidelines of the above described parcel if produced Southeasterly to the Ocean."*

Pl. Ex. 108 (emphasis added).

157. Sutch to Schaltenbrand. By warranty deed dated August 21, 1950 and recorded in the York County Registry of Deeds at Book 1165, Pages 1-3, Emery H. Sutch and Nancy S. Sutch granted to Alfred L. Schaltenbrand and Alice G. Schaltenbrand **property of the same description** conveyed in the 1948 Emmons-to-Sutch deed, above. Pl. Ex. 107.

158. Schaltenbrand to Prescott. By warranty deed dated September 9, 1952 and recorded in the York County Registry of Deeds at Book 1221, Pages 63-65, Alfred L. Schaltenbrand and Alice G. Schaltenbrand granted to William E. Prescott **property of the same description** conveyed in the 1950 Sutch-to-Schaltenbrand deed, above, adding only the word “adjacent” to the initial sentence of the description so that it read: “three certain adjacent lots or parcels of land situated at Goose Rocks Beach, so-called, in said Kennebunkport....” Pl. Ex. 106.

159. Prescott to Flynn. By warranty deed dated September 27, 1954 and recorded in the York County Registry of Deeds at Book 1296, Page 153, William E. Prescott granted to Simon A. Flynn and Virginia Mary Flynn **property of the same description** as conveyed in the 1952 Schaltenbrand-to-Prescott deed, above. Pl. Ex. 105.

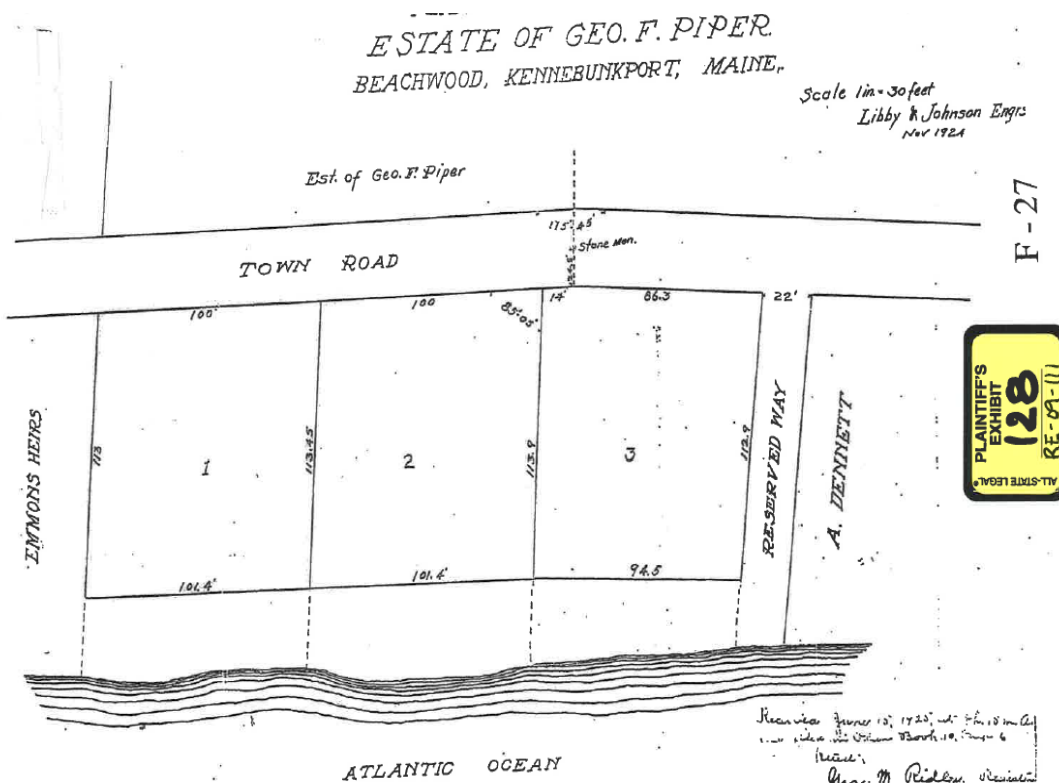
160. Flynn to Susan Jane Flynn, Simon A. Flynn, Jr., Moira M. Flynn,²⁷ Gregory M. Flynn, Robert Clyde Paul Flynn, and Virginia Mary Rodriguez. By warranty deed dated January 26, 1972 and recorded in the York County Registry of Deeds at Book 1935, Pages 460-62, Simon A. Flynn and Virginia M. Flynn granted to Susan Jane Flynn, Simon A. Flynn, Jr., Moira M. Flynn, Gregory M. Flynn, Robert Clyde Paul Flynn, and Virginia Mary Rodriguez as joint tenants **property of the same description**

²⁷ Moira Flynn passed away on November 13, 1992.

conveyed in the 1954 Prescott-to-Flynn deed, above. Pl. Ex. 104. This is the current deed to the property.

Cooper—165 Kings Highway

161. The Cooper property was lot 1 in Plan No. 1 in a subdivision established by the estate of George F. Piper ("Piper Subdivision") as delineated in Plan No. 1 of Cottage Lots, Estate of Geo. F. Piper, Beachwood, Kennebunkport, Maine, drawn by Libby and Johnson, Engr's in November 1924 and recorded in Plan Book 10, Page 6 on June 15, 1925 ("Piper Plan"). Pl. Exs. 127, 128. A relevant portion of the subdivision plan is as follows:



Pl. Ex. 128.

162. The Piper Subdivision was created around the same time as the Ivory Emmons Subdivision. The former was dated November 1924 and recorded in June

1925; the latter, dated December 1925 and recorded in February 1926. *Compare* Pl. Ex. 97 *with* Pl. Ex. 128 (dated 11/1924). On the face of the earth, the Piper Subdivision abutted the Ivory Emmons Subdivision immediately to the east, such that the western side lot boundary line of lot 1 in the Piper Subdivision is also the eastern side lot boundary line of lot 1 in the Ivory Emmons Subdivision; and both subdivision plans reference the other. *Id.*

163. The respective plans show that the distance of this shared boundary for each lot is measured as 113 feet from the road to the solid line that separates the numbered lot from the beach. *Id.* Thus, the solid line on the seaward side of each lot is in line with each other on the plans; and, on the face of the earth, it is more likely than not that this solid seaward line of Lot 1 of the Piper Subdivision plan falls on or near the “top of the bank”, meaning on the natural embankment separating the upland from the beach, even though the Piper Plan does not include the labels “Beach” or “Mean High Water.”

164. A man-made seawall above the high dry sand has been constructed in line with these seaward lot lines in front of what were lots 1, 2, and 3 of the Piper Subdivision. Def. Exs. 51, 53.

165. Piper had acquired property along Goose Rocks Beach (then known as Beachwood) in the 1905 deed from Charles V. Tanner, whose chain of title extended back to Eliakim Emmons, as found above. Upon Piper’s death, title to lot 1 was passed down in the following deeds and instruments.

166. Piper Heirs to Wilson. By warranty deed dated June 12, 1925 and recorded in the York County Registry of Deeds at Book 754, Pages 33-34, the heirs of George F. Piper—George F. Piper, Jr., Luther W. Piper, Emma W. Piper, Addie D. Piper, Nellie G.

Norwood, Florence N. Piper, Lizzie M. Piper, and Lydia J. Emerson—granted to Herbert

T. C. Wilson:

“[A] certain lot or parcel of land, situated at Beachwood, in the town of Kennebunkport, York County, Maine, and *being lot number 1, as delineated on plan number 1 of cottage lots estate of George F. Piper Beachwood Kennebunkport, Maine, drawn by Libby and Johnson, Engineers November 1924*, which plan is to be duly recorded in the York County Registry of Deeds.”

Pl. Ex. 129 (emphasis added). The property is further described:

“Said lot is bounded and described as follows; Commencing at a point on the Southeasterly side of the town road so-called said point being at land of Emmons’ heirs and the Westerly corner of the lot herein conveyed, thence Northeasterly by said town road one hundred feet to a lot number two on said plan; thence Southeasterly by lot number 2 on said plan one hundred thirteen and forty-five hundredths feet **to a stake on the beach; thence Southwesterly by the beach one hundred one and four tenths feet to land of said Emmons’ heirs**; thence at a right angle or nearly a right angle by land of said Emmons’ heirs one hundred and thirteen feet to the aforesaid town road and the point of beginning.

Together with all rights of the grantors in and to the beach in front of said lot.”

Id. (emphasis added). The plan referenced in the deed was the Piper Plan. The metes and bounds described in the deed are reflected on the plan. See Pl. Exs. 127, 128.

167. Wilson to Davis. By warranty deed dated September 14, 1946 and recorded in the York County Registry of Deeds at Book 1050, Page 273, Herbert T. C. Wilson granted to Eleanor L. Davis the same property, described as follows:

“Commencing at a point on the southeasterly side of the town road, so-called, said point being at land of Emmons’ heirs and the westerly corner of the lot herein conveyed, thence northeasterly by said town road one hundred (100) feet to a lot number two (2) on said plan; **thence Southeasterly by lot number two (2) on said plan one hundred thirteen and forty-five hundredths feet (113.45) to a stake and the beach; thence southwesterly by the beach one hundred one and four tenths (100.4) feet to land of said Emmons’ heirs**; thence at a right angle or nearly a right angle by land of said Emmons’ heirs one hundred and thirteen (113) feet to the aforesaid town road and the point of beginning.

Together with all rights of the grantors in and to the beach in front of said lot.”

Pl. Ex. 125 (emphasis added). The deed references the Piper Plan.

168. The property was conveyed multiple times as follows from 1946 to 2008 in various intra-familial transfers, and each deed uses the same description of the property conveyed.

169. Davis to Wilson. By warranty deed dated September 14, 1946 and recorded in the York County Registry of Deeds at Book 1050, Page 274, Eleanor I. Davis granted to Carolyn P. Wilson and Herbert T. C. Wilson, as joint tenants, **property of the same description** as that granted that same day from Herbert T. C. Wilson to Eleanor I. Davis. Pl. Ex. 124. Herbert T. C. Wilson passed away on November 6, 1948.

170. Wilson to Davis. By warranty deed dated February 17, 1950 and recorded in the York County Registry of Deeds at Book 1142, Page 301, Carolyn P. Wilson granted to Eleanor I. Davis **property of the same description** as was granted by Eleanor I. Davis to Carolyn P. Wilson and Herbert T. C. Wilson. Pl. Ex. 122.

171. Davis to Wilson. By warranty deed dated February 21, 1950 and recorded in the York County Registry of Deeds at Book 1142, Page 302, Eleanor I. Davis granted to George W. Wilson, II, and Carolyn P. Wilson as joint tenants **property of the same description** as was granted to Eleanor I. Davis that same day by Carolyn P. Wilson. Pl. Ex. 121.

172. G. Wilson to C. Wilson. By warranty deed dated August 7, 1956 and recorded in the York County Registry of Deeds at Book 1310, Page 452, George W. Wilson, II, granted to Carolyn P. Wilson his interest in the **same property as described** in the deed from E. Davis to G. Wilson, II, and C. Wilson. Pl. Ex. 120.

173. C. Wilson Estate to Twombly Family Trust. By Deed of Distribution dated September 1, 1994 and recorded in the York County Registry of Deeds at Book 7182, Page 26, George W. Wilson, II, in his capacity as personal representative of the estate of Carolyn W. Twombly (formerly Carolyn P. Wilson) granted to John T. Collins and George

W. Wilson, II, trustees U/A of Carolyn W. Twombly **property of the same description** as was granted to Carolyn P. Wilson by George W. Wilson, II, in 1956 (Pl. Ex. 120). Pl. Ex. 117.

174. The two trustees of the Revocable Living Trust Agreement of Carolyn W. Twombly—John T. Collins and George W. Wilson, II,—were subsequently replaced by Shawn B. McCarthy and Steven H. Wilson, respectively, by instruments duly recorded in the York County Registry of Deeds. Pl. Exs. 115, 116.

175. In October 2008, by trustee’s deed dated October 7, 2008 and recorded in the York County Registry of Deeds at Book 15516, Pages 112-13, Steven H. Wilson and Shawn B. McCarthy, co-trustees of the Revocable Living Trust Agreement of Carolyn W. Twombly granted to Steven H. Wilson and Shawn B. McCarthy, co-trustees of the Twombly Family Trust property of the same description as is found in the deed from George W. Wilson, II, in his capacity as personal representative of the estate of Carolyn W. Twombly to John T. Collins and George W. Wilson, II, as trustees U/A of Carolyn W. Twombly, with the one change that the mention of grant of any interest of the grantor to the beach was altered to read as follows: “*all rights of Carolyn W. Twombly in and to the beach in front of said lot as was conveyed by deed recorded at Book 7182, Page 26 at the York County Registry of Deeds.*” Pl. Ex. 112 (emphasis added) (highlighted reference is to the 1994 Wilson-to-Twombly Family Trust deed).

176. Twombly Family Trust to Cooper Trust. By trustee deed dated September 12, 2014 and recorded in the York County Registry of Deeds at Book 16888, Pages 920-21, Steven H. Wilson as authorized co-trustee of the Twombly Family Trust granted to Aaron Cooper and Emily Cooper as trustees of the Emily Cooper Revocable Trust Agreement property so described:

“A certain lot or parcel of land, with building and improvements thereupon, situated in the Town of Kennebunkport, County of York, and State of Maine,

bounded and described as follows: BEGINNING at a set #5 rebar w/ cap on the southeasterly sideline of Kings Highway at the northerly corner of land of John R. & Roberta C. Gorny, being the westerly corner of the parcel herein described; THENCE N50°53'44"E along the southwesterly sideline of Kings Highway 100.00 feet to a set #5 rebar w/ cap at land now or formerly of The Green Realty Trust; **THENCE S33°06'34"E along the southwesterly line of land now or formerly of The Green Realty Trust 113.47 feet to a set #5 rebar w/ cap; THENCE S51°15'01"W 101.40 feet to a set #5 rebar w/ cap at the easterly corner of land of John R. & Roberta C. Gorny;** THENCE N32°22'16"W along land of John R. & Roberta C. Gorny to the point of beginning; *Together with all rights of Grantor in and to the beach in front of said lot as was conveyed by deed recorded at Book 7182, Page 26 at the York County Registry of Deeds.*"

Pl. Ex. 111 (emphasis added). This is the current deed to the property, and it describes the same parcel conveyed in the chain of deeds set out above.

Middle Section of Goose Rocks Beach

177. The Gerrish, Vandervoorn, Gray, Rice, and O'Connor/Leahey properties are situated in the middle section of Goose Rocks Beach. *See* Def. Ex. 51.

178. The topography of the land in this area consisted primarily of marshland and pine groves, with a large open area toward its eastern side known as "the opening." Yarumian Test. (Tr. IX, 34:22 – 35:10). Part of the land in this area was formerly known as "the Pines." Pl. Ex. 569, § C.

179. The dry sand part of beach in this section is relatively narrow, with the higher high water line closer to the upland lots than on either end of the beach. There are currently man-made walls in front of the residential lots. The record does not establish when they were constructed. It is more likely than not that these walls were built on or immediately proximate to the rise in elevation of the land between the beach and upland lots that has been described as natural seawall. *See* Yarumian Test. (Tr. VII 42:1 – 43:10); Def. Exs. 53, 55 (Plots 3, 4), 68.

180. The properties in the middle section of the beach were originally part of land owned and subdivided by Mary (Littlefield) Porter in the late 19th century. The source of titles prior to this time is disputed and unclear, and the parties have presented

alternate pathways into Mary Porter's predecessors in title, Benjamin Adams and John Littlefield (her father).

181. Bush to Barrett. Plaintiffs include a 1670 deed from John Bush to John Barrett as a source deed to properties in this section of the beach. That deed, recorded at Book II, Fol. 94-95, conveyed "Tenn Acres of sault Marsh lying on the South side of the Little River Joyneing to ye Town which tenn Acres formerly bought of Roger Willine hee was one of the first Inhabitants of this place, payd all dues and dutys for It." Pl. Ex. 165. Consideration for the grant was specified as seven pounds of "Merchantable Corne, wheat, and Indean Corne to be payd at or before the Twentieth of December next Insueing." *Id.* The record does not indicate if the consideration was paid, and therefore whether the transaction completed. The property described was marshland; no call to the water or seaward boundary was mentioned. The Willine-to-Bush deed is not in evidence and is presumed lost.

182. Barrett Heirs to Perkins. In 1724 heirs of John Barrett ("Barrat") of Cape Porpus conveyed to Thomas Perkins by quitclaim (Book II, Fol. 164L) all "Right, Title and Interest of [what] Sort soever we have by any means whatsoever coming or belonging to use from our Grandfather John Barrat of Cape Porpus now Arundel deceased his Estate that is to say anywhere to the Eastward of Piscataqua River" Pl. Ex. 164.

183. It is just as likely that land in this area was common land overseen and granted out by the town proprietary. A grant of 100 acres was made to John Miller at a town meeting in 1672. Def. Ex. 3, at 3. This parcel and other land was the subject of a 1720 layout by the Town of Arundel "to Captain John Downing in ye right of John Miller [Downing's father-in-law] late of Capeporpus" Def. Ex. 42, at 37; Pl. Ex. 569, § C. The May 4, 1720 layout, which was recorded in the York County Registry of Deeds at Book 10, Page 59 (the "1720 Downing Layout"), described the property as follows:

“Two hundred acres of *upland* and ye Marsh at ye End of ye upland Joyning Millers Creek and ye upland Lyeth along the brook on both Sides Viz 240 poles or rods [3,960'] on the North Side of said brook and forty poles or rods [660'] in breadth beginning at a Great Rock on ye west Side of Said Creek then on a East and by North point the 40 poles [660'] then up ye brook ye Two hundred forty poles [3,960'] on a North west and by west point until 50 acres be Completed and on ye west Side of ye brook the other hundred and fifty Acres beginning at ye Marsh and Joyning ye sd brook and Eighty poles or rods in breadth then on a Northwest and by west point up ye brook 280 poles or rods [4,620].”

Def. Ex. 42, at 37; Pl. Ex. 569, § C (emphasis added). *See also* Def. Ex. 3, at 21-22.

184. Upon John Downing’s death, this property passed to his son, Benjamin Downing in 1725. Pl. Ex. 569, § C.

185. The land was the subject of litigation involving Benjamin Downing and John Jeffrey in 1728. Jeffrey prevailed in the case and was awarded the rights in 150 acres of the 200-acre parcel, with Downing holding title to the remaining 50 acres. *Id.*; Def. Ex. 3, at 215.

186. In 1797 there still remained questions about ownership of portions of this area. At an April 1797 town meeting it was voted that a committee be formed “to see whose property the Pines is whether the towns or Individuals.” Def. Ex. 3, at 89; Pl. Ex. 569, § C. Although the record does not reflect the result of the committee’s efforts, if any, to settle this matter, Benjamin Downing’s remaining lands in this area may have been conveyed to Thomas Perkins. *See* Pl. Ex. 569, § C, *also citing* 1817 Deed Book 112, Page 143 (“pine plains land partly belonging to the estate (Thomas Perkins) . . . and partly to the Emmons.”)

187. Perkins Estate to Adams. An inventory of the estate of Thomas Perkins includes marshland that was conveyed to Benjamin Adams by a deed recorded on May 26, 1817 at Book 112, Page 143R in the registry of deeds, and describing the properties as follows:

“a certain parcel of *salt and fresh marsh* lying in said Arundel called the cove and pond marshes, containing ten and a half acres²⁸ of marsh and pond, or be it more or less said marsh is bounded northeasterly by Jacob Wildes marsh southeasterly by pine plains land partly belonging to the estate of said deceased and partly to the Emmons and northwesterly by pine plains land and southwesterly by pine [illegible] land. I also sell and convey as aforesaid to the said Benjamin Adams *all the pine plains land adjoining the said marsh on the southeast side thereof* which belonged to said estate of said Thomas Perkins the third esq. deceased, containing six acres be it more or less *all said marsh and all the land* which said Perkins had a title to when he died, *that is adjoin said marsh and no more.*”

Pl. Ex. 162 (emphasis added); Pl. Ex. 569, § C; Yarumian Test. (Tr. IX 47:4–11). The six-acre parcel referenced in the deed is more likely than not the parcel involved in subsequent conveyances that relate to the middle beach properties in issue in this case. See Yarumian Test. (Tr. IX, 47:4–11); Def. Exs. 65, 66.

188. Generally, the grants or deeds up to this point, whether in the Plaintiffs’ or the Town’s title chain, describe the land in this area as “upland,” “marsh” or “pine plains land.”

189. Adams to Littlefield. On February 29, 1828, by a deed recorded at Book 380, Page 450 in the York County Registry of Deeds, Benjamin Adams conveyed to John Littlefield parcels of property for a combined total of 13 acres, described as follows:

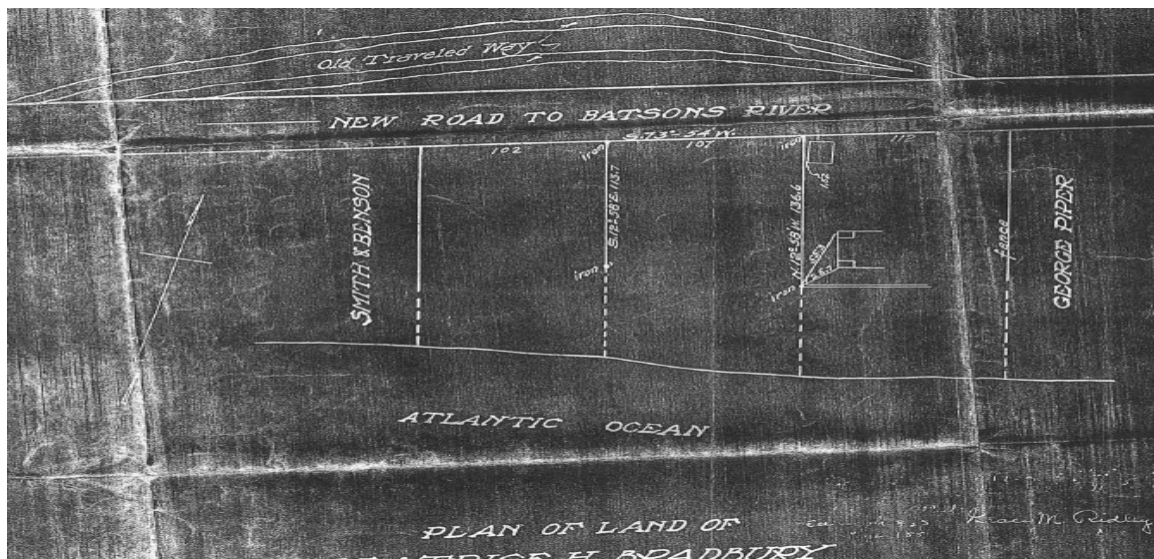
“Beginning at John Emmons’ corner and running North easterly by the marsh road to a spruce tree, thence to the cove lying between William Wilds and my marsh, thence running by the Southern side of said cove to the Rush pond, so-called; thence to the bounds first mentioned; thence beginning at Samuel Gilpatrick’s marsh at a pitch pine tree, thence to the Southern end of the Rush pond, thence running on the Western side of said Rush pond and cover to William Wilds marsh; thence by said Wilde’s marsh to Nathaniel Leach’ marsh; thence by the woods to said Gilpatrick’s corner, it being what is commonly called the Pines.”

Pl. Ex. 160 (emphasis added). The underscored language above describes a parcel that is more likely than not the same 6-acre parcel conveyed to Adams by the Perkins estate. See Yarumian Test. (Tr. IX, 37: 4 – 11; 39: 1 - 7).

²⁸ Although the typed version of Plaintiffs’ Exhibit 162 represents this as “ten and a half acres,” the copy of the handwritten deed in evidence is barely legible and appears to read, “two and a half acres.”

190. “John Emmons corner” as referenced in the 1828 Adams-to-Littlefield deed was more likely than not located on the face of the earth on or near the boundary between what was then the Emmons and Littlefield lands, at the southwestern corner of the John Littlefield parcel depicted in Defendant’s Exhibit 67. Yarumian Test. (Tr. IX 37:11 – 38:2).

191. The “marsh road” referenced in the 1828 Adams-to-Littlefield deed no longer exists. It was more likely than not landward of the present-day road, the natural seawall and the beach. See Pl. Ex. 154 (property in 1881 Porter-to-Knox deed begins at a hub on beach wall, then running landward, reserves “right to cross the same in the travelled road which adjacent owners may have thereto.”); Pl. Ex. 192 (survey showing “old traveled way” in 1932):



Pl. Ex. 192.

192. After John Littlefield’s death in or around 1878, an inventory of his estate included a “piece of Marsh [known] as the ‘Beach Lot,’ so-called upon the Eastern side of said “Eastern Branch” [of Batson’s River] supposed to contain about 12 acres bounded by lands of Jacob Smith and unknown persons.” Pl. Ex. 158, at 1 (G-44). The source of title to this additional parcel is unclear and may also have been Benjamin

Adams. It was subsequently devised to John Littlefield's son, Henry. *See id.* at 7 (G-51).

193. Hutchins/H. Littlefield to M. Porter. On April 5, 1881, by deed recorded in the York County Registry of Deeds at Book 380, Page 455, Stephen Hutchins, Guardian of Henry Littlefield, conveyed whatever interest Henry Littlefield owned in several tracts of land to John Littlefield's daughter, Mary A. Porter, including the "piece of Marsh" known as the "Beach Lot," described as the second parcel (italicized) as follows:

"One lot situate near Goose Rocks in said Kennebunkport and being a part of the tract known as the pines; beginning at the corner of Owen Burnham's marsh and running thence Easterly to the Rush pond; thence by said pond to the marsh of Jacob Smith, thence of land lately owned by Joseph F. Littlefield to land formerly owned by Nathaniel Leach; thence by the marsh to the first mentioned bounds. Also one other tract situate near the above. ***Beginning at John Emmon's corner and running thence to and including the sea wall, and thence by the sea-wall to land of Owen Burnham, and thence by land of said Burnham to Clive Nason's marsh; and thence by said Nason's marsh and by that of Jacob Smith to the first mentioned bounds.***"

Pl. Ex.155; Pl. Ex. 569, § C (emphasis added). The first lot described as "near the Goose Rocks in Kennebunkport" and part of a tract "known as the pines" does not refer to the beach or the ocean; and is more likely than not the land bordering the marsh road or "Old Traveled Way" depicted in Plaintiffs' Exhibit 192, above. The second lot—the "Beach Lot" so-called "situate near the above"—begins at John Emmons corner and runs "thence to and including the sea-wall and thence by the sea-wall to land of Owen Burnham." The "Beach Lot" more likely than not was the land between the marsh road and the natural seawall. *See Yarumian Test.* (Tr. IX 29:24 – 37:3).

194. Mary Porter conveyed out several of the "Beach Lots" in 1881 and 1882 before she conveyed the remaining land to George Piper and George Hutchins in 1883 as follows. The out-conveyances included lots that are now owned by Gerrish, Vandervoorn, Rice, and O'Connor/Leahey.

195. Porter to Piper/Hutchins. By warranty deed dated June 4, 1883 and recorded in the York County Registry of Deeds at Book 393, Page 508, Mary Porter conveyed to George F. Piper and George F. Hutchins “a certain piece of land or Beach and Cottage lots on the westerly end of the Goose Rocks beach” described as follows:

“Beginning on the Beach Wall at a hub in the sand, thence by the undivided lands of Emmons heirs N. 40° W. 29-48/100 rods to a hub or as far as the lot extends, thence by the marsh lands of J.W. Smith, J.H. Benson, Ed Hutchins, B.S. Nason, Owen E. Burnham or, others unknown, in all about 95 rods, the course being generally about northeast as the marsh is, **thence round the corner of the lot I sold Mrs. Knox, and across, the beach road about 21 ½ rods to a hub on the beach wall, thence on the beach wall as far down as I own southwesterly twenty [ninety] six 30/100 rods, or to the hub or land of the Emmons heirs**, but excepting therefrom one acre sold Mrs. A.S. Knox in Sept. 1881, and 145 rods sold her Aug 27th 1882, one acre and 101 rods sold W. Smith & D. S. Benson Nov 29, 1881 and one fourth of an acre sold Fred Dow, Aug 8th 1882, the same being the land of my late father John Littlefield and by me of the guardian of my brother Henry, and supposed to contain about twelve acres to the sea wall at high water mark including the 3 & 126/160 acres sold therefrom as above; also reserving therefrom a road way through the same in one place about where now travelled for the use of the above named owners. . . . “

Pl. Ex. 150 (emphasis added). See also Def. Exs. 67, 68.²⁹ The metes and bounds description of “to a hub on the beach wall, thence on the beach wall as far as I own southwesterly twenty [ninety] six 30/100 rods” and to the beginning point of a “hub in the sand” “on the Beach Wall” would more likely than not have fallen on the face of the earth landward of the higher high water line and parallel to the sea along the natural

²⁹ Defendant’s Exhibits 67 and 68 were among a group of exhibits (Def. Exs. 63-70) that had initially been identified and offered for demonstrative purposes only but the Town’s counsel subsequently sought their admission generally and “beyond just demonstrative” purposes. Plaintiffs objected based in part upon timing (offered prior to witness testimony) and in part upon their descriptive titles (e.g. “Town Commons before 1777” in Def. Ex 63). See Yarumian Test. (Tr. IX 25:2 – 29:13). Plaintiffs’ counsel later consented to admission of “the ones we’ve heard testimony about.” *Id.* at 26:23; and previously had not objected to the admission of other deed sketches provided the related, underlying deeds were in evidence. See Yarumian Test. (Tr. VIII 61:6-20) (certain deed sketches of Jeffrey lands on Def. Ex. 48 admitted on basis that related deeds were in evidence). The Town’s expert, who created the exhibits, did offer additional, independent testimony and evidence to support all portions of these exhibits relevant to the court’s decision in this matter; and where applicable, the relevant deeds or grants are also in evidence. The exhibits were admitted with the understanding that the captions (meaning titles and general labels) would not be given weight in the absence of other independent, supporting, record evidence.

seawall, including the lots previously conveyed out. See Yarumian Test. (Tr. IX 13:6 – 14:25) (reference to “twenty-six” more likely than not should be “ninety-six”).

Gerrish—173 Kings Highway

196. The Gerrish property was part of land owned by Mary (Littlefield) Porter acquired in April 1881 from Henry Littlefield by the 1881 Hutchins/Littlefield-to-Porter deed. In September 1881, Mary Porter conveyed a portion of this property to Abby Knox.

197. Mary Porter to Abby Knox. By warranty deed dated September 30, 1881 and recorded in the York County Registry of Deeds at Book 383, Page 274, Mary A. Porter granted to Abby S. Knox:

“[A] certain piece of land and building lot on the Westerly end of Goose Rocks Beach in said Kennebunkport and bounded as follows: **Beginning at a hub in the sand on the beach wall, thence on the beach wall South westerly twelve and one half rods to a hub**, thence by compass course of N. 30 1/2 ° West twelve rods and twenty links by hubs and spotted trees to a stake, thence North westerly by a new marked line about 12 ½ rods to a stake, thence South 30 1/2° East twelve rods and twenty links by a new spotted line to the hub commenced at, and containing about one acre. But reserving therefrom any right to cross the same in the travelled road which adjacent owners may have thereto.”

Pl. Ex. 154 (emphasis added).

198. Knox to Dennett. By warranty deed dated April 25, 1891 and recorded in the York County Registry of Deeds at Book 443, Page 156, Abby Knox granted to Abel Bennett **property of the same description** as is found in the foregoing deed from Mary Porter to Abby Knox. Pl. Ex. 149

199. Dennett to Libby (one-half interest). By warranty deed dated June 3, 1891 and recorded in the York County Registry of Deeds at Book 443, Page 327, Abel Dennett granted to Daniel D. Libby a one-half undivided interest in:

“[A] certain lot or parcel of land with the buildings thereon situated in Kennebunkport in said County of York, on the westerly end of “Goose Rocks Beach, so called, and bounded as follows: **Beginning at a hub in the sand on the beach wall; thence on the beach wall southwesterly twelve and one-half rods to a hub**; thence by compass-course (taken from deed dated April 25, 1891 and later referred to) N. 30 ½° West, twelve rods and twenty links to a stone;

thence northeasterly by a marked line about twelve and one-half rods to a stone; thence South 30 ½° East, twelve rods and twenty links to the point of beginning”

Pl. Ex. 148 (emphasis added).

200. Dennett to Haley/Libby (one-half interest). By warranty deed dated October 29, 1920 and recorded in the York County Registry of Deeds at Book 685, Page 312, Abel Dennett granted to Eliza F. Haley and Orrin C. Libby, as tenants in common, his remaining one-half interest in the same **property with the identical description** as he had granted to Daniel D. Libby 29 years prior.³⁰ Pl. Ex. 147.

201. Libby to Haley/Libby (one-half interest). By will, which apparently was not properly filed or executed, Daniel D. Libby devised to his children Eliza F. Haley and Orrin C. Libby “to be divided equally between them, all of my household goods, furniture and effects, and all other personal estate of which I may be possessed at the time of my decease” and “my homestead place on Elm street, said Biddeford, in common and undivided, to them their heirs, forever.” Daniel D. Libby passed away on December 28, 1954. Pl. Ex 143. Title to the whole parcel was reunited in and held by Eliza F. Haley and Orran C. Libby as tenants in common, each holding a one-half undivided interest therein.

202. Haley to Clark/Gerrish (Haley’s one-half undivided interest in whole). As declared in a filing to the Probate Court dated August 9, 1955, following the death of Eliza Haley on December 28, 1954, Edwina Clark and Barbara Gerrish, were the daughters and only heirs of Eliza Haley. In seeking to clarify Eliza Haley’s property holdings for purposes of inheritance and record title, Edwina Clark and Barbara Gerrish sought to have the unprobated will of Eliza Haley’s father, Daniel D. Libby, made part

³⁰ Although it appears more likely than not that this deed conveyed the other one-half undivided interest in the property, the deed itself does not so specify.

of the public record. Edwina Clark and Barbara Gerrish hold a one-half undivided interest in the property. Pl. Exs. 133, 143, 144.

203. Orran C. Libby to Orran D. Libby (Orran C. Libby's remaining interest). By warranty deed dated May 20, 1954 and recorded in the York County Registry of Deeds at Book 1261, Page 309, Orran C. Libby granted to Orran D. Libby a one half undivided interest in **property of the same description** as is found in the 1920 Dennett-to-Haley/Libby (Pl. Ex. 147) and the 1881 Knox-to-Dennett deed (Pl. Ex. 154). Orran D. Libby now held the other one-half undivided interest in the property. Pl. Ex. 145.

204. Gerrish to Clark/Libby. By deed dated September 18, 1956 and recorded in the York County Registry of Deeds at Book 1320, Page 58, Barbara Gerrish granted to Edwina Clark a one-third undivided interest and Oran D. Libby a two-thirds undivided interest as tenants in common in and to her one-half undivided interest in the property which she acquired from her mother, Eliza Haley, in 1954. This deed described the property as follows:

“[A] certain tract or parcel of land together with the buildings thereon situate in Kennebunkport, County of York, and State of Maine, **on the shore of the Atlantic Ocean**, at Goose Rocks, so-called, bounded and described as follows: beginning at a stone bound set in the ground at the Northeasterly corner of the tract herein conveyed at a point approximately sixty (60) feet Northwesterly from the roadway which runs roughly parallel to the shore, *thence running South twenty-eight (28) degrees thirty (30) minutes East to and across said road in the same compass direction to the Atlantic Ocean; thence turning and running Southwesterly by said Atlantic Ocean to land this day conveyed by said Grantees to said Grantor*; thence turning and running North twenty-eight (28) degrees and thirty (30) minutes West by said Grantor's land to and across said roadway to a point sixty (60) feet North fifty-five (55) degrees thirty (30) minutes East of a stone bound; thence turning and running North fifty-five (55) degrees and thirty (30) minutes East one hundred and forty-six (146) feet, more or less, to the point of beginning.”

Pl. Ex. 140 (emphasis added). The highlighted language in the deed above was new and does not appear in any prior instruments in the chain of title. Plaintiffs did not present evidence to establish where on the face of the earth the metes and bounds described fall.

205. Libby to Clark. By warranty deed dated August 17, 1962 and recorded in the York County Registry of Deeds at Book 1505, Page 319, Orran D. Libby granted to Edwina H. Clark and Richard I. Clark, as joint tenants not as tenants in common, “all my right title and interest in and to a certain lot or parcel of land situated in the Town of Kennebunkport, County of York and State of Maine, in that part thereof known as Goose Rocks Beach bounded and described as follows:

“BEGINNING at the westerly corner of the parcel of the land described in a certain deed dated August 22, 1962 from the within Grantees to the within Grantor to be recorded, said corner being located seventy-six and twenty five hundredths (76.25) feet southwesterly of the stone bound set in the ground at the northerly corner of said parcel of land described in said deed from the within Grantees to the within Grantor as aforesaid, thence Southeasterly by said land described in said deed from the within Grantees to the within Grantor as aforesaid and crossing the road leading to Batson’s River, so-called, commonly known as King’s Highway, two hundred sixty (260) feet, more or less, **to the Atlantic Ocean; thence Southwesterly by said Ocean** seventy (70) feet to land now or formerly of Barbara H. Gerrish; thence Northwesterly on a line which is parallel to the first above described line, by said Gerrish land and crossing said King’s Highway to land now or formerly of the heirs of George Piper at an iron pipe set in the ground, said iron pipe being located seventy (70) feet southwesterly of the point of beginning; thence Northeasterly by said Piper heirs land seventy (70) feet to the point of beginning.”

Pl. Ex. 137 (emphasis added).

206. Clark to LaRue. By warranty deed dated August 14, 1967 and recorded in the York County Registry of Deeds at Book 1781, Pages 68-70, Edwina H. Clark and Richard I. Clark granted to John P. LaRue **property of the same description** as was granted to Edwina H. Clark and Richard I. Clark by Orran D. Libby, with language referring to the deed “from the within Grantees to the within Grantor” replaced with language referring to the deed “from the Grantors herein to one Libby.” Pl. Ex 136.

207. LaRue to Gerrish. By warranty deed dated September 26, 1968 and recorded in the York County Registry of Deed at Book 1819, Pages 32-34, John P. LaRue granted to Jule C. Gerrish and Everett H Gerrish as joint tenants, **property of the same description** as was granted by Edwina H. Clark and Richard I. Clark to John P. LaRue,

with language referring to the deed “from the Grantors herein to one Libby” with language referring to the deed “from Edwina H. Clark, et al, to one Libby.” Pl. Ex 135. This is the current deed to the Gerrish property. Everett H. Gerrish passed away December 7, 1990. Pl. Ex. 134.

Vandervoorn—177 Kings Highway

208. The Vandervoorn property was one of the Mary Porter out-conveyances in 1881, namely the lot conveyed to Smith and Benson.

209. Porter to Smith/Benson. By warranty deed dated November 29, 1881 and recorded in the York County Registry of Deeds at Book 383, Page 436, Mary Porter granted to Dixey S. Benson and Woodbury Smith:

“a certain piece of land or building lot on the Westerly end of Goose Rocks Beach in said Kennebunkport and bounded as follows: **Beginning on the beach wall at a hub marking the Easterly corner of a lot recently sold by me to Mrs. Abby S. Knox**, thence by the Knox lot about N. 30° West, by a spotted oak timber and 4/5 rods to a hub, thence by a new spotted line N. 50 1/2° East nineteen rods and five links to a hub, **thence South 23 1/2° East eighteen rods and seven links to a hub on the sea wall, thence by the sea wall South 69° W. or as the high water line is seventeen rods to the Knox corner commenced at** and containing one acre and about one hundred and one square rods but reserving to the owners of land Westerly of the above who have any right to pass over this lot, their rights of crossing in one specified road way which is to be kept open for the use of myself and the owners of other lots I have or may dispose of.”

Pl. Ex. 153 (emphasis added).

210. Smith to Smith/Adams (one-half interest). By warranty deed dated December 28, 1883 and recorded in the York County Registry of Deeds at Book 400, Page 358, Woodbury Smith granted to Walter Smith and Charles B. Adams an undivided one-half interest:

“of a certain piece of beach land upon the Westerly end of Goose Rocks Beach in said Kennebunkport bounded as follows, **Beginning on the beach wall at a hub marking the East corner of the one acre lot Mary A. Porter sold to Abby J. Knox**, thence by the Knox lot at 30° W. twelve and 4/5 rods to a hub, **thence by land said Porter subsequently sold to Piper and Hutchins**, N. 50 1/2° East nineteen rods and five links, and **South 23 1/2° East eighteen rods and seven links or as far on the sea wall and beach as we own, thence on the wall as far down as our rights extend as it measures on the high sand seventeen rods about South 69° W. to the Knox corner commenced at**

intending to convey my half of all the premises and privileges said Mary A. Porter sold to me and Dixey S. Benson as per our deed from her dated Nov. 29th 1881 and containing within the above --- one acre and about 101 square rods.”

Pl. Ex. 179 (emphasis added).

211. Smith to Adams (one-quarter interest). By warranty deed dated September 7, 1915 and recorded in the York County Registry of Deeds at Book 637, Page 170, Walter Smith granted to Charles B. Adams his undivided one-fourth interest in **property of the same description** as is found above in the deed from Woodbury Smith to Walter Smith and Charles B. Adams. Pl. Ex 178.

212. Charles Adams to Chester Adams (one-half interest). By warranty deed dated May 21, 1931 and recorded in the York County Registry of Deeds at Book 821, Page 411, Charles B. Adams granted to Chester T. Adams a one-half undivided interest in **property of the same description** as was granted by Woodbury Smith to Walter Smith and Charles B. Adams and by Walter Smith to Charles B. Adams. Pl. Ex. 177.

213. Benson to Stone (one-half interest). By warranty deed dated February 1, 1938 and recorded in the York County Registry of Deeds at Book 922, Page 300, Lydia S. Benson, Ruth A. Stone, and Granville Benson³¹ granted to Elvin M. Stone a one-half undivided interest in **property of the same description** as was granted by Charles B. Adams to Chester T. Adams. P. Ex. 176.

214. With the foregoing two conveyances, Elvin M. Stone and Chester T. Adams jointly owned the property.

215. Stone/Adams to Amon/Phinney. By warranty deed dated October 11, 1952 and recorded in the York County Registry of Deeds at Book 1220, Page 344, Elvin M. Stone and Chester T. Adams granted to Dorothy Amon and Virginia B. Phinney:

³¹ Lydia S. Benson, Ruth A. Stone, and Granville Benson apparently acquired Dixie S. Benson's interest in the property by devise.

“Five certain adjacent lots or parcels of land situated at Goose Rocks Beach, so-called, in Kennebunkport southeasterly of the Town Road, so-called, *all fronting on the Atlantic Ocean*; being lots numbered one (1), two (2), three (3), four (4), and five (5) as *delineated upon ‘Plan showing land of Elvin M. Stone & Chester T. Adams, Goose Rocks, Kennebunkport, Maine’* drawn by Libby & Dow, Eng’rs, August 4, 1949, and recorded in York County Registry of Deeds Book of Plans 15, Page 30, [Pl. Ex. 146, below] to which plan and the lot designations thereon reference is herein had; and said parcels being collectively bounded and described as follows:

PARCELS I, II, III, IV, and V Beginning on the southeasterly side of said Road at a point marked by an iron pipe driven into the ground at the westerly corner of land of Ilsley and Marsh, said point of beginning being the same as the beginning point of the property line established by the following two deeds: Deed of quit-Claim from Emily S. W. Ilsley, et al, to Elvin M. Stone and Chester T. Adams, dated September 30, 1949, and recorded in said Registry, Book 1142, Page 1, and Deed of Quitclaim from Elvin M. Stone and Chester t. Adams to Emily S. W. Ilsley, et al, dated September 30, 1949 and recorded in said Registry, Book 1110, Page 600; thence at nearly right angles from said Road in a southeasterly direction by said land of Ilsley and Marsh ninety-two and sixty-three hundredths (92.63) feet **to the top of the bank of the Atlantic Ocean; thence at nearly right angles in a southwesterly direction along the top of said bank two hundred seventy-six and thirty hundredths (276.39) feet, more or less, to an iron pipe driven into the ground and to a certain right of way designated on said Plan**, said last mentioned point being six (6) feet from land of Libby and Haley; thence at nearly right angles in a northwesterly direction by said right of way eighty-five and twenty-five hundredths (85.25) feet to an iron pipe driven into the ground and to said Road; thence at nearly right angles following along said Road two hundred ninety-one and thirty-one hundredths (291.31) feet, more or less, to the point of beginning.

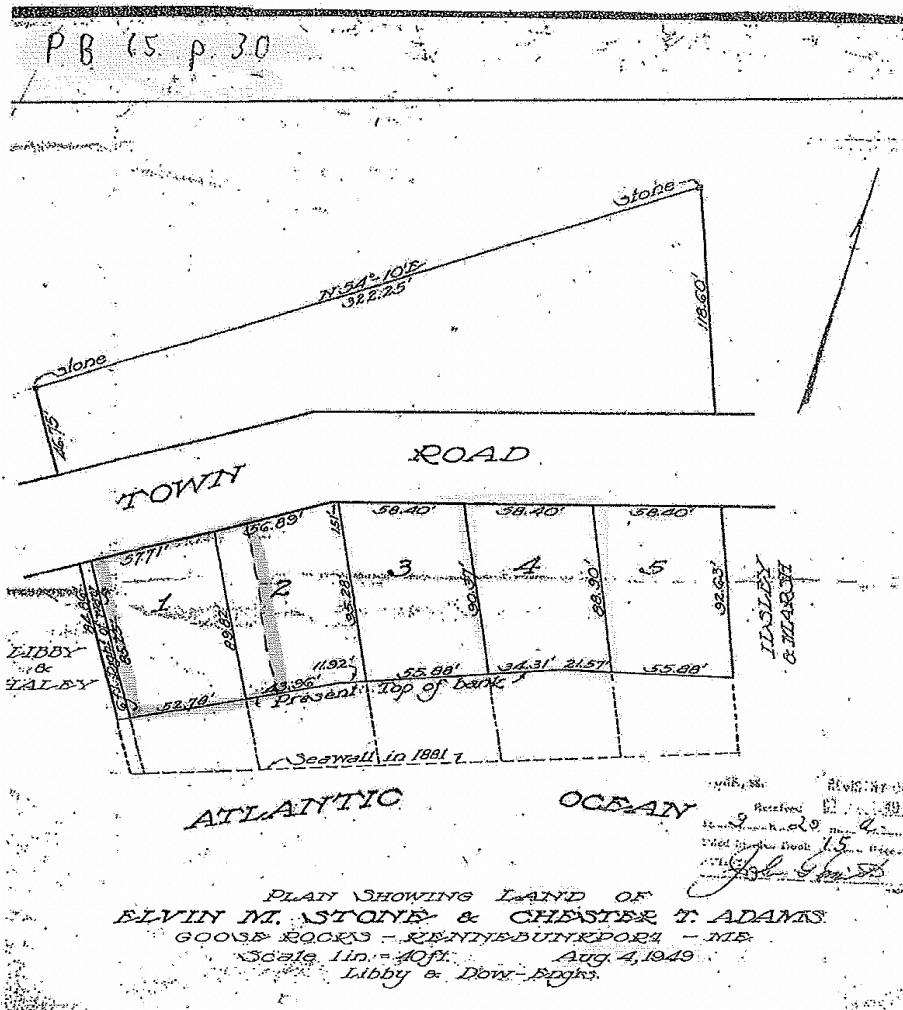
Also conveyed herein is all the right, title, and interest of the Grantors in and to a strip of land six (6) feet wide southwesterly of and adjacent to Lot number one (1) on said Plan, said strip being designated thereon as “6 ft. Right of Way”.

Further conveyed herein is *all right, title, and interest of the Grantors in and to so much of the land southeasterly of the five (5) above described lots and right of way and southeasterly of the top of said bank and from thence southeasterly to the Atlantic Ocean as lies between the northeasterly and southwesterly boundary lines of the above described properties if produced southeasterly to the Ocean.*”

Pl. Ex. 175 (emphasis added).

216. A copy of the 1949 plan of Libby & Dow referenced in the 1952 Stone/Adams to Amon/Phinney deed is as follows:

[NEXT PAGE]



Pl. Ex. 146. It appears from the scale of the plan that the distance between the “Present Top of the Bank” and the “Seawall in 1881” was roughly less than or equivalent to the width of the town road. The depiction of the lots in the plan and their position vis-à-vis the beach and water, in light of other record evidence, support an inference that over the 68-year period between 1881 and 1949, minor erosion of the beach may have occurred, causing the natural seawall to move incrementally landward.

217. Amon/Phinney to Turner. By warranty deed dated September 25, 1955 and recorded in the York County Registry of Deeds at Book 1296, Pages 418-21,³²

³² The deed was executed on September 25, 1955 in Suffolk County, Massachusetts, but was not recorded in the York County Registry of Deeds until November 3, 1955 at 9:30 a.m., just prior to

Dorothy Amon and Virginia B. Phinney granted to Ann M. Turner **property of the same description** as was granted to Dorothy Amon and Virginia B. Phinney by Elvin M. Stone and Chester T. Adams. Pl. Ex. 173.

218. Turner to Phinney. By warranty deed dated November 2, 1955 and recorded in the York County Registry of Deeds at Book 1296, Pages 414-16, Ann M. Turner granted to Virginia B. Phinney “a certain lot or parcel of land situated as Goose Rocks Beach, so-called, in Kennebunkport in the County of York and State of Maine, southeasterly of Town Road, so-called, and fronting on the Atlantic Ocean” and a “portion of the land delineated on the plans to which reference is hereinafter had;” and described as follows:

“Beginning on the southeasterly side of said Road at a point marked by an iron pipe driven into the ground at the westerly corner of land conveyed simultaneously herewith by the grantor herein to Dorothy Amon; thence from said point of beginning in a southeasterly direction by said land of Amon ninety-three and forty hundredths (93.40) feet **to the top of the bank of the Atlantic Ocean; thence in a southwesterly direction along the top said bank forty-one and forty-one hundredths (41.41) feet to a point; thence in a southwesterly direction by a line making an excluded angle of one hundred seventy-two degrees forty-six minutes (172° 46') with the last described line and still along the top of the bank, ninety-six and seventy-four hundredths (96.74) feet to a point marked by an iron pipe driven into the ground** to a certain right of way designated on both aforesaid plans, and last mentioned point being six (6) feet from land of Libby and Haley; thence in a northwesterly direction, by a line making an included angle of eighty-one degrees four minutes (81° 4') with the last described line and by aforesaid right of way, eight-five and twenty-five hundredths (85.25) feet to a point marked by an iron pipe driven into the ground and to said Road; thence in a northeasterly direction, by a line making an included angle of ninety-three degrees thirty-six minutes (93° 36') with the last described line and by said Road, one hundred fourteen and sixty hundredths (114.60) feet to a point marked by an iron pipe driven into the ground; thence in a northeasterly direction, by a line making an included angel of one hundred sixty-three degrees eleven minutes (163° 11') with the last described line and still by said Road, thirty-one and sic hundredths (31.06) feet to the point of beginning.

Also conveyed herein is all the right, title, and interest of the grantor in and to a strip of land six (6) feet wide southwesterly of and adjacent to the southwesterly boundary of the hereinbefore specifically described property, said strip being designated on said plans as a ‘6 ft. Right of Way.’

the recording of the Turner-to-Phinney deed, which was executed on November 2, 1955 and recorded on November 3, 1955 at 9:31 a.m. Pl. Ex. 174.

Further conveyed herein is *all the right, title and interest of the grantor in and to so much of the land southeasterly of the above described lot and right of way and southeasterly of the top of the bank and from thence southeasterly to the Atlantic Ocean as lied between the northeasterly and southwesterly boundary lines of the combined area of the above described lot and right of way if produced southeasterly to the Ocean.*

Title reference—being a portion of the premises conveyed to the grantor herein by Deed of Warranty of Dorothy C. Amon and Virginia B. Phinney, dated September 25, 1955, heretofore delivered, and intended to be recorded in said Registry of Deeds prior to the recording of this deed.

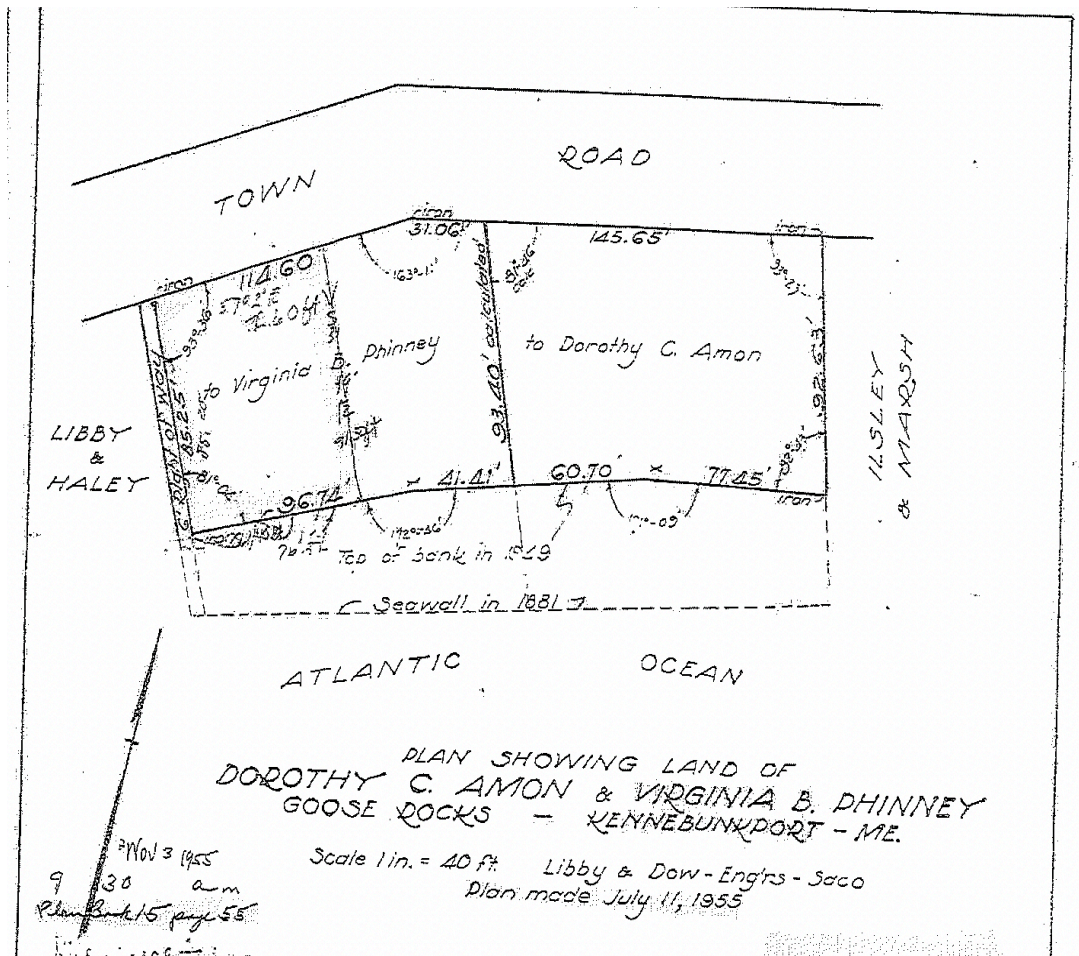
The land or interest in land conveyed being comprised of lots numbered one (1), two (2), and a portion of three (3), and the 6 ft. right of way, delineated upon 'Plan Showing Land of Elvin M. Stone & Chester M. Adams, Goose Rocks, Kennebunkport, Maine,' drawn by Libby & Dow, Eng'rs, August 4, 1949, and recorded in the York County Registry of Deeds, Book of Plans 15, Page 30, and also any interest of the grantor in and to the land lying between said properties and the Atlantic Ocean.

As disposition of the lots of land on said plan recorded in said Registry Book of Plans 15, Page 30, has not been made as anticipated at the time of said plan was drawn, it is understood and agreed that said plan shall be superseded as to that portion thereof showing land situated southeasterly of aforesaid Town Road by “Plan Showing Land of Dorothy C. Amon and Virginia B. Phinney, Goose Rocks, Kennebunkport, Maine” drawn by Libby & Dow, Eng'rs, Saco, Maine, dated July 11, 1955, which latter plan is intended to be recorded in said Registry simultaneously herewith; the land herein specifically described and conveyed being the lot of land designated “to Virginia B. Phinney” as delineated on said latter plan.”

Pl. Ex. 174 (emphasis added).

219. A copy of the “Plan Showing Land of Dorothy C. Amon and Virginia B. Phinney, Goose Rocks, Kennebunkport, Maine’ drawn by Libby & Dow, Eng'rs, Saco, Maine, dated July 11, 1955” which is referenced in the foregoing Ann Turner to Virginia Phinney deed is as follows:

[NEXT PAGE]



Pl. Ex. 142.

220. Phinney to Vandervoorn. By executor's deed dated June 10, 1971 and recorded in the York County Registry of Deeds at Book 1907, Pages 470-71, A. Waldo Phinney, Jr. a/k/a Allison W. Phinney, Jr., executor under the will of Virginia B. Phinney (d.o.d.4/10/1970), granted to Cornelias (sic) J. Vandervoorn "a certain lot or parcel of land situated in Kennebunkport, in the County of York and State of Maine, in that part known as Goose Rocks Beach," and described as follows:

"Beginning at a point formed by the Southeasterly sideline of the Town Road, so-called, and the Northeasterly boundary line of a certain right of way 6 feet wide, which right of way is shown on "Plan Showing Land of Dorothy C. Amon and Virginia B. Phinney, Goose Rocks, Kennebunkport, Maine", which Plan is recorded in the York County Registry of Deeds in Plan Book 15, Page 55; thence North 57° 2' East and along the Southeasterly sideline of said Road 72.60 feet to a point; **thence South 31° 49' East 91.30 feet to a point; thence South 61°**

40' West 76.37 feet to the Northeasterly sideline of said right of way;
thence North 29° 22' West 85.28 feet to the point and place of beginning.

Also conveying hereby all of the Grantor's right, title and interest, if any, in and to a 6 foot strip of land as delineated on said Plan as the right of way, hereinbefore mentioned.

Further conveyed herein is *all the right, title, and interest of the Grantor in and to so much of the land Southeasterly of the above described lot and right of way and from thence Southeasterly to the Atlantic Ocean as lies between the Northeasterly and Southwesterly boundary lines of the combined area of the above described lot and right of way if produced Southeasterly to the Ocean.*"

Pl. Ex. 172 (emphasis added).

221. Jacquelin Vandervoorn recorded an affidavit in the York County Registry of Deeds at Book 3184, Page 256, dated October 14, 1983, which stated:

"I, Jacquelin Vandervoorn, being duly sworn, do hereby depose and say that my husband, Cornelius J. Vandervoorn, owns property located on King's Highway, Goose Rocks Beach, Kennebunkport, Maine. The property is the same conveyed to him June 10, 1971 and which transfer is recorded in Book 1907 at Page 470 on June 11, 1971. We are presently in the midst of an action for dissolution of marriage and this property is marital property subject to disposition by the Court."

Pl. Ex. 170.

222. J. Vandervoorn to C. Vandervoorn. By release deed dated January 17, 1989 and recorded in the York County Registry of Deeds at Book 4971, Page 346, Jacquelin Vandervoorn released to Cornelius J. Vandervoorn **property of the same description** as was granted to Cornelius J. Vandervoorn by A. Waldo Phinney, Jr. a/k/a Allison W. Phinney, Jr., executor under the will of Virginia B. Phinney. Pl. Ex. 169.

223. Vandervoorn to Vandervoorn Trust. By quitclaim deed dated July 6, 2009 and recorded in the York County Registry of Deeds at Book 15718, Page 584, Cornelius J. Vandervoorn granted to Richard M. Vandervoorn, Laurence W. Vandervoorn, and Robert O. Clemens, Trustees of The Cornelius J. Vandervoorn Qualified Personal Residence Trust the following:

"All my right, title and interest in and to a certain lot or parcel of land, situated in Kennebunkport, in the County of York and the State of Maine, in that part

known as Goose Rocks Beach, and being more particularly bounded and described as follows:

Beginning at a point formed by the Southeasterly sideline of the Town Road, so-called, and the Northeasterly boundary line of a certain right of way 6 feet wide, which right of way is shown on “Plan Showing Land of Dorothy C Anon [sic] and Virginia U. [sic] Phinney, Goose Rocks, Kennebunkport, Maine”, which Plan is recorded in the York County Registry of Deeds in Plan Book 15, Page 55, thence North 57 degrees 2’ East and along the Southeasterly sideline of said Road, 72.60 feet to a point; **thence South 31 degrees 49’ East 91.30 feet to a point; thence South 61 degrees 40’ West 76.37 feet to the Northeasterly sideline of said right of way;** thence North 29 degrees 22’ West 85.28 feet to the point and place of beginning.

Also conveying hereby all of the Grantor’ right, title and interest, if any, in and to a 6 foot strip of land delineated on said Plan as the right of way, hereinbefore mentioned.

Further conveyed herein is *all the right, title and interest of the Grantor in and to so much of the land Southeasterly of the above described lot and right of way and from thence Southeasterly to the Atlantic Ocean as lies between the Northeasterly and Southwesterly boundary lines of the combine [sic] area of the above described lot and right of way if produced Southeasterly to the Ocean.*

Being the same premises described in a Deed from Jacquelin Vandervoorn to Cornelius J. Vandervoorn dated January 17, 1989 and recorded in the York County Registry of Deeds in Book 4971, Page 346.”

Pl. Ex. 167 (emphasis added).

Gray—183 Kings Highway

224. The Gray property also had been part of the land acquired by Mary Porter from Henry Littlefield by the 1881 Hutchins/Littlefield-to-Porter deed. By 1883 she had conveyed out two lots to Abby Knox (Gerrish and O’Connor/Leahey), one lot to Smith and Benson (Vandervoorn); and one lot to Fred Dow (Rice). See Pl. Ex. 150. In June 1883, Mary Porter conveyed the remaining portion of this property to George Piper and George Hutchins.

225. Porter to Piper/Hutchins. By warranty deed dated June 4, 1883 and recorded in the York County Registry of Deeds at Book 393, Page 508, Mary Porter granted to George F. Piper and George F. Hutchins:

“a certain piece of land or Beach and Cottage lots on the westerly end of Goose Rocks beach in said Kennebunkport and bounded as follows: **Beginning on the**

Beach Wall at a hub in the sand, thence by undivided lands of --- Emmons heirs N 40° W. 28 – 48/100 rods to a hub or as far as the lot extends, thence by the marsh lands of J.W. Smith and J.H. Benson, Ed Hutchins, B.S. Nason, Owen E. Burnham or, others unknown, in all about 95 rods, the courses being generally about northeast as the marsh is, **thence round the corner of the lot I sold to Mrs. Knox, and across the beach road 21 ½ rods to a hub on the beach wall, thence on the beach wall as far down as I own southwesterly twenty six & 39/100 rods, or to the hub or land of Emmons heirs,** but excepting therefrom one acre and 101 rods sold W. Smith & D.S. Benson Nov 29, 1881 and one fourth of an acre sold to Fred Dow, Aug 8th 1882, the same being the land of my late father John Littlefield and by me had of the guardian of my brother Henry, **and supposed to contain about twelve acres to the sea wall at high water mark** including the 3 & 126/160 acres sold therefrom as above”

Pl. Ex. 150 (emphasis added).

226. Piper to Hutchins. By warranty deed dated May 1, 1892 and recorded in the York County Registry of Deeds in Book 528, Page 345, George F. Piper granted to George F. Hutchins “all my right title and interest in and to a certain lot or parcel of land situated at ‘Goose Rocks,’ so-called, at said Kennebunkport.” Pl. Ex. 194. The lot conveyed was “one half of a tract purchased from Mary Porter jointly by myself and said Hutchins and being owned in common with said Hutchins,” and this conveyance was “for the purpose of dividing said entire tract so that said Hutchins may enjoy his part in severalty.” *Id.* The deed describes the property as follows:

“Beginning at a point on the town way recently layed out in the rear of said tract at the northerly corner of Smith and Benson’s land; thence **by said Smith and Benson’s land to the Sea; thence easterly by the Sea two hundred fourteen feet (or half the distance of the length of the entire tract at its sea boundary);** thence northwesterly to the Town Way hereinbefore referred to, at a point thereon half way between said Smith and Benson’s land and at a point on said town way where the westerly side line of land of the late Lewis Emery, if extended would join said way; thence by said Way to the point begun at.”

Pl. Ex. 194 (emphasis added). The italicized and bolded language above departs from the metes and bounds description in the prior deed (Pl. Ex. 150) and carries forward in subsequent deeds. There is no evidence of any other prior conveyance to Piper or Hutchins of land seaward of the seawall described in this deed.

227. Hutchins to Bradbury. By warranty deed dated September 6, 1921 and recorded in the York County Registry of Deeds at Book 693, Page 319, George F. Hutchins granted to Beatrice H. Bradbury “a certain lot or parcel of land:

“situated at Beachwood so-called, (formerly known as Goose Rocks) in said Kennebunkport, said parcel of land being the westerly half of a tract of land purchased by myself and George F. Piper from Mary Porter, by deed dated June 4th, 1882 and recorded in the York Registry Book 393 Page 508, to which reference is herein had. The parcel herein conveyed is bounded and described as follows: Beginning at a point on the Town way layed out in the rear of said tract at the northerly corner of Smith and Benson’s land; ***thence by said Smith and Benson’s land to the Sea; thence easterly by the Sea two hundred fourteen (214) feet (or half the distance of the length of the entire tract at its sea boundary) thence northwesterly to the Town Way*** hereinbefore referred to a point thereon half way between said Smith and Benson’s land and at a point on said Town Way where the westerly side line of land of the late Lewis Emery if extended would join said way; thence by said Way to the point begun at.”

Pl. Ex. 193 (emphasis added).

228. Seidel (formerly Bradbury) to Marsh. By warranty deed dated August 22, 1936 and recorded in the York County Registry of Deeds at Book 885, Page 89, Beatrice H. Seidel granted to Sophronia P. Marsh, Emily S. W. Ilsley, and Frederick R. Ilsley as joint tenants the following:

“A certain lot or parcel of land situated at Goose Rocks Beach in said Kennebunkport, bounded and described as follows: Beginning on the southerly side of the Town Road leading from Goose Rocks Beach to Batson’s River ***at an iron stake and the westerly corner of land of Marion C. Cameron thence running south 12 degrees 58 minutes east one hundred thirteen and seven-tenths feet by land of said Cameron to an iron stake at the top of the bank by the ocean, thence by the same course to the ocean, thence westerly by the ocean one hundred and two feet to land now or formerly of Smith & Benson, thence northerly by said Smith & Benson land to an iron stake at the top of the bank by the ocean,*** thence by said Smith & Benson land in the same course to the road at an iron stake driven into the ground, thence easterly by said road to the point of beginning.

Also all land owned by said grantor, if any, which may be included by an extension of the lines in this description running northerly and southerly and extending to the Old Town Way mentioned in deed of George F. Piper to George F. Hutchins, dated May 1, 1892, and recorded in the York County Registry of Deeds in Book 528, page 345.

Both of said lots are part of the premises conveyed by George F. Hutchins to said grantor by the name of Beatrice H. Bradbury by warranty deed dated September 6, 1921 and recorded in said Registry of Deeds in Book 693, page 319. The description in the first lot of land above described is in accordance with a plan

made April 21, 1932 by Libby and Dow, which plan is recorded in said Registry of Deeds.”

Pl. Ex. 191 (emphasis added).

229. The 1932 Libby & Dow plan referenced in the foregoing deed depicts the side lot boundaries of the subject parcel as a solid line running from an “iron” on the corner of “New Road to Batsons River” to a point labelled, “iron,” and then continuing as a dotted line to another solid line (“Atlantic Ocean”) running perpendicular to the dotted line and roughly parallel to the solid line boundary along the road. Pl. Ex. 192.

230. Marsh to Gray. By warranty deed dated August 25, 1959 and recorded in the York County Registry of Deeds at Book 1407, Page 548, Sophronia P. Marsh granted to Constance Sheedy Gray property of the same description as was granted by Beatrice H. Seidel to Sophronia P. Marsh, Emily S. W. Ilsley, and Frederick R. Ilsley in Plaintiffs’ Exhibit 191, namely:

“A certain lot or parcel of land situated at Goose Rocks Beach in said Kennebunkport, bounded and described as follows: Beginning on the southerly side of the Town Road leading from Goose Rocks Beach to Batson’s River **at an iron stake and the westerly corner of land of Marion C. Cameron thence running south 12 degrees 58 minutes east one hundred thirteen and seven-tenths feet by land of said Cameron to an iron stake at the top of the bank by the ocean, thence by the same course to the ocean, thence westerly by the ocean one hundred and two feet to land now or formerly of Smith & Benson, thence northerly by said Smith & Benson land to an iron stake at the top of the bank by the ocean**, thence by said Smith & Benson land in the same course to the road at an iron stake driven into the ground, thence easterly by said road to the point of beginning.

Also all land owned by said grantor, if any, which may be included by an extension of the lines in this description running northerly and southerly and extending to the Old Town Way mentioned in deed of George F. Piper to George F. Hutchins, dated May 1, 1892, and recorded in the York County Registry of Deeds in Book 528, page 345.”

Pl. Ex. 188 (emphasis added).

231. Upon Constance Gray’s death (d.o.d. 2/23/2005), all of her interests in real estate, including the foregoing parcel, were devised to her surviving spouse, Eugene R. Gray. Pl. Ex. 187. By personal representative’s deed of distribution dated October 31,

2005, recorded in the York County Registry of Deeds at Book 14656, Pages 918-19, David E. Hunt, acting as personal representative for the estate of Constance S. Gray, granted to Eugene R. Gray, as trustee of the Eugene R. Gray Qualified Personal Residence Trust,

“All real estate and improvements thereon, including appurtenances thereto, described in deed from Sophronia P. Marsh to Constance Sheedy Gray, which is dated August 25, 1959, and recorded in the York County Registry of Deeds in Book 1407 at Page 548; and also described in a deed from David E. Hunt in his capacity as personal representative of the estate of Constance S. Gray, deceased, to Eugene R. Gray, which deed was executed prior to the execution of this deed and is to be recorded in the said Registry of Deeds.”

Pl. Ex. 184. *See also* Pl. Ex. 185.

232. A corrective deed dated February 2, 2012 and recorded in the York County Registry of Deeds on February 6, 2012 at Book 16257, Pages 341-42. The deed acts “to convey and properly vest title to the property in Eugene R. Gray, as Trustee of the Eugene R. Gray Qualified Residence Trust,” and describes the property as follows:

“A certain lot or parcel of land situated at Goose Rocks Beach in said Kennebunkport, York County, Maine, bounded and described as follows: Beginning on the southerly side of Town Road leading from Goose Rocks Beach to Batson’s River **at an iron stake and the westerly corner of land of Marion C. Cameron thence running south 12 degrees 58 minutes east one hundred thirteen and seven-tenths feet by land of said Cameron to an iron stake at the top of the bank by the ocean, thence by the same course to the ocean, thence westerly by the ocean one hundred and two feet to land now or formerly of Smith & Benson, thence northerly by said Smith & Benson land to an iron stake at the top of the bank by the ocean,** thence by said Smith & Benson land in the same course to the road at an iron stake driven into the ground, thence easterly by said road to the point of beginning.

Also all land owned by said grantor, if any, which may be included by an extension of the lines in this description running northerly and southerly and extending to the Old Town Way mentioned in deed of George F. Piper to George F. Hutchins, dated May 1, 1892, and recorded in the York County Registry of Deeds in Book 528, page 345.”

Both of said lots being the same premises conveyed by deed of Beatrice H. Seidel to Sophronia P. Marsh et al., dated August 22, 1936, and recorded in the York County Registry of Deeds in Book 885, Page 89. Reference is also made to the deed of Sophronia P. Marsh et al., to Elvin M. Stone, et al., dated September 30, 1949 and recorded in the York County Registry of Deeds in Book 1142 Page 1 and the deed of Elvin M. Stone, et al., to Sophronia P. Marsh et al., dated September 30, 1949 and recorded in the York County Registry of Deeds in Book

1110, Page 600 which two deeds establish the westerly boundary line of the first described premises.”

Pl Ex. 182 (emphasis added).

Rice—193 Kings Highway

233. The Rice property was also a lot conveyed out the land acquired by Mary Porter from Henry Littlefield in 1881, namely the quarter-acre parcel Porter conveyed to Fred Dow in August 1882.

234. Mary Porter to Dow. By warranty deed dated August 8, 1882 and recorded in the York County Registry of Deeds at Book 390, Page 85, Mary A. Porter granted to Fred H. Dow:

“a certain piece of land or Cottage Lot, on the westerly end of Goose Rocks Beach in said Kennebunkport, bounded as follows:

Beginning at the southerly corner of the lot deeded yesterday to Abby S. Knox, thence south westerly on the sea wall four rods to a hub, thence north nineteen degrees west and parallel with the Knox lot, ten rods, thence north 71° east four rods, thence by the Knox lot, ten rods to the sea wall or as far as I own, and containing about one fourth acre, together with the right to go on the same by the usual traveled road over my land that recently sold by me.”

Pl. Ex. 152 (emphasis added). Several years later, the Town acquired the same property from Fred H. Dow for failure to pay taxes. See Pl. Ex. 528.

235. Town to Welch. According to the grant dated January 12, 1889 and recorded in the York County Registry of Deeds at Book 430, Page 256, the Town of Kennebunkport auctioned off the property formerly held by Fred H. Dow for failure to pay taxes assessed. The property was described as “a certain parcel of real estate situated in said Kennebunkport” described as: “A Lot of land at Goose Rocks one fourth of an acre being four rods upon the sea wall, and running back ten rods following a lot now or formerly of Abby A. Knox.” Pl. Ex. 528. The property was purchased at auction by Albert M. Welch and granted to him by the Town of Kennebunkport.

236. Welch to Dow. By warranty deed dated July 16, 1890 and recorded in the York County Registry of Deeds at Book 436, Page 417, Albert M. Welch granted to Kate D. Dow:

“a certain piece of Land at Goose Rocks Beach in said Kennebunkport containing one fourth of an acre **the same being four rods upon the sea wall, and running back ten rods** following a lot Mary A. Porter sold to Abby S. Knox Aug. 7th 1882, and upon the other end, and side following land said M. A. Porter sold to Piper and Hutchins intending to convey all my interest in the lot conveyed to me by the town of Kennebunkport as per deed of Jan. 12th 1889.”

Pl. Ex. 527 (emphasis added).

237. Dow to Emery/Staples. By warranty deed dated July 30, 1895 and recorded in the York County Registry of Deeds at Book 463, Page 363, Kate D. Dow granted to Louis N. Emery and Matt S. Staples:

“a certain lot of land situated at Goose Rocks Beach in the town of Kennebunkport, and bounded as follows. **Beginning on the Sea Wall and the Southerly corner of Abbie S. Knox lot, thence Southwesterly on the Sea Wall four rods to a hub**, thence north nineteen degrees west and parallel with the Knox lot five rods, thence north 71° east four rods, thence by the Knox lot five rods to the sea wall and place of beginning, containing about one eighth of an acre together with the right to go on to the same by the usual traveled road over land sold by Mary A. Porter.”

Pl. Ex. 562 (emphasis added).³³

238. Upon the death of Louis N. Emery several transactions involving the subject property ensued. There was a partition of the lot between his widow and successor, Albertina Emery, and Matt E. Staples. Upon the death of Matt E. Staples in 1949, his property was devised to his sister, Lulie Staples, and upon her death, that property passed to Hazel Clough. See Pl. Ex. 221 and the following six paragraphs.

239. Emery Estate to Richards. By executor’s deed dated December 5, 1898 and recorded in the York County Registry of Deeds at Book 479, Page 169, Albertina Emery,

³³ The record contains a second deed dated July 30, 1895 from Kate Dow to Matt E Staples pertaining to “a certain lot of land situated in Goose Rocks Beach in the Town of Kennebunkport.” From the property description it appears as if this second 1/8-acre parcel does not have a seaward boundary and abuts the Emery /Staples parcel to the north. See Pl. Ex. 561.

as administratrix of the estate of Louis N. Emery, granted to Joseph B. Richards “the small cottage house and lot of said Emery deceased situated at Goose Rocks so called in Kennebunkport in said County subject to the right of dower therein of the widow of said deceased.” Pl. Ex. 195.

240. Richards to Emery. By quitclaim deed dated December 12, 1898 and recorded in the York County Registry of Deeds at Book 500, Page 579, Joseph B. Richards granted to Albertina F. Emery “the small cottage and lot of land on which the same stands formerly owned [by] Louis N. Emery of said Biddeford deceased situated at Goose Rocks so called in Kennebunkport in said County and which was conveyed and sold to me by said Albertina F. Emery as administratrix of the estate of said Louis N. Emery under license granted to her by the Judge of Probate of said County of York.” Pl. Ex. 45. Albertina Emery and Matt E. Staples then partitioned the property, and the grant from Emery to Staples (below) is the deed in the Rice chain of title. Pl. Ex. 221.

241. Staples to Emery. By warranty deed dated October 19, 1900 and recorded in the York County Registry of Deeds at Book 510, Page 152, Matt E. Staples granted to Albertina F. Emery:

*“all my right, title and interest in and to a certain lot or parcel of land situated at Goose Rocks so called, (now known as “Beachwood”), together with the buildings thereon and bounded and described as follows, viz: **on the front thirty three and one third (33 1/3) feet by the sea,** on the westerly side by land of Frank Piper; on the Northerly side by land of Grantor thirty three and one-third (33 1/3) feet; and on the Easterly side by land of Grantor being the same land conveyed to me by Albertina F. Emery by her deed bearing even date with these presents. This deed is given for purpose of making partition of the lot of land of which the portion herein conveyed forms one half, said lot of land being held hitherto by said Matt E. Staples and Albertina F. Emery as tenants in common and being the same land conveyed to Louis N. Emery and Matt S. Staples by Kate D. Dow by her deed bearing date July 30, 1895 and recorded in York County Registry of Deeds Book 463, Page 363. Together with a right of way to the rear of within described lot meaning same right of way described in said deed of Kate D. Dow to me and said Louis N. Emery.” “Emery Cottage” 34-1-25B*

Pl. Ex. 236 (emphasis added). This deed and the following deed (Pl. Ex. 235) operated to partition the lot.

242. Emery to Staples. By warranty deed dated October 19, 1900 and recorded in the York County Registry of Deeds at Book 510, Page 153, Albertina F. Emery granted to Matt E. Staples:

*“all my right, title and interest in and to a certain lot or parcel of land situated at Goose Rocks so called, (now known as “Beachwood”), together with the buildings thereon and bounded and described as follows, viz: **on the front thirty three and one third (33 1/3) feet by the sea**; on the westerly side by land of grantor being the same land conveyed to me by said Matt E. Staples by his deed bearing even date with these presents; on the Northerly end by land of said grantee thirty-three and one third (33 1/3) feet; and on the Easterly side by land of A. Smith.”*

Pl. Ex. 235 (emphasis added) (continues with the same language found in prior deed from Matt E. Staples to Albertina F. Emery beginning: “This deed is given for purpose ...”– “Staples Cottage” 34-1-25A).

243. M. Staples to L. Staples. As detailed in a certificate of administrator, Matt E. Staples passed away on July 4, 1949, leaving his estate, including his interest in the real property in question, to his sister and sole heir Lulie A. Staples. Pl. Ex. 232.

244. Staples Estate to Clough. In her will, as evidenced by the abstract of the will recorded in the York County Registry of Deeds at Book 1751, Page 351, Lulie A. Staples bequeathed all of her property to Hazel Clough. The inventory filed with the York County Probate Court describes Lulie A. Staples’ interest in the property as follows:

*“A lot of land situated at Goose Rocks Beach in Kennebunkport, with the buildings thereon and bounded as follows: - **Beginning on the sea wall and the southerly corner of a lot formerly known as the Abbie L. Knox lot; thence running southwesterly on the seawall two (2) rods, more or less, to land of Hazel V. Clough**; thence northwesterly by said Clough land and parallel with said Knox lot five (5) rods to the northerly corner of said Clough land; thence southwesterly by said Clough land two (2) rods to a corner and land of Clooney, thence North 19” West parallel with said Knox lot and by said Cooney land five (5) rods; thence northwesterly seven (7) feet, more or less, by said Cooney land to the Kings Highway; thence easterly along the Kings Highway to land now or formerly of one Smith; thence southerly by said Smith land seven (7) feet more or less; **thence southerly by said Abbie L. Knox lot ten (10) rods to the sea wall and point begin at**. Containing about three-sixteenths (3/16ths) of an acre and four hundred and sixty-two (462) square feet.”*

Pl. Exs. 229, 230 (emphasis added).

245. Clough Estate to McCormick. By deed of distribution dated December 29, 1989 and recorded in the York County Registry of Deeds at Book 5286, Pages 248-50, John D. Bradford, acting as personal representative pursuant to the will of Hazel E. Clough, granted to Pauline C. McCormick the estate's property at Goose Rocks Beach described as:

"A certain lot or parcel of land, together with the buildings and improvements thereon, (which buildings are generally known as "The Staples Cottage") situated at Goose Rocks Beach, in the Town of Kennebunkport, County of York and State of Maine, bounded and described as follows:

Beginning at a granite monument found set in the ground on the Southeasterly side of the Batsons River Road at the northwesterly corner of land described in a deed to Charles LaBrecque et al dated June 1, 1983 and recorded at the York County Registry of Deeds in Book 3097, Page 213;

THENCE Southeasterly by said land, now or formerly, of Charles LaBrecque and forming an included angle of 88°13' with said southeasterly side of the Batsons River Road, 94.66 feet to a granite monument set in the ground;

THENCE ***Southeasterly by said land, now or formerly of Charles LaBrecque, 76.7 feet to the easterly corner of an old wooden bulkhead situated under a stone bulkhead;***

THENCE ***Southwesterly by said stone bulkhead***, 35.6 feet, more or less;

THENCE Northwesterly by a line parallel with, and 33.00 feet southwesterly of, when measured perpendicular to, the first above described line and by land this day conveyed by this grantor in another deed of distribution to Anne E. Clough, 166. feet, more or less.

THENCE Northeasterly by said southeasterly side of the Batsons River Road and forming an included angle of 91°47' with the last described line, 33.02 feet to the point of beginning. Containing 5,650 square feet, more or less.

Together with all the right, title and interest in and to any land lying between the sidelines of said lot extended Southeasterly to low water mark of the Atlantic Ocean.

Together with all the right, title and interest of said estate in and to any land lying between the sidelines of said lot extended Southeasterly to low water mark of the Atlantic Ocean."

Pl. Ex. 225 (emphasis added). A November 10, 1989 plan made for the Clough estate depicts the monuments referenced, including the "corner of old wooden bulkhead" and a "rock bulkhead" with a traverse line measuring its distance. Pl. Ex. 226.

246. McCormick Estate to Rice/Towle. By deed of distribution dated July 29, 1996, as recorded in the York County Registry of Deeds at Book 7955, Pages 127-28,

Linda M. Rice, acting as personal representative for the estate of Pauline C. McCormick, granted to herself, Linda M. Rice, and Robert E. Towle **property of the same description** as is found in the deed of distribution from John D. Bradford, acting as personal representative of the estate of Hazel E. Clough to Pauline C. McCormick. Pl. Ex. 222

O'Connor/Leahey—195 Kings Highway

247. This property was the other lot conveyed by Mary Porter to Abby Knox out of the land acquired in the 1881 Hutchins/Littlefield-to-Porter deed.

248. Mary Porter to Abby Knox. By warranty deed dated August 7, 1882 and recorded in the York County Registry of Deeds at Book 390, Page 313, Mary A. Porter granted to Abby S. Knox:

“a certain *piece of wood, grass and Beach wall land* or cottage lots upon the Westerly end of Goose Rocks Beach in said Kennebunkport and bounded as follows:

Beginning at a slab in the edge of the marsh of Oliver Benson (or unknowns), thence by the rim of marsh N.77° E. five rods and eight links to an old post hub thence round the corner of the growth Southeasterly about three and one half rods to a hub or stake marked D., **thence across the road South 16° East 18 rods and 8 links or as far towards the Ocean as I own, thence about South 75 1/4° West on the Sea wall six rods and five links to a hub on the Beach wall**, thence across the roadway N. 19° W. 21 rods and 12 links or to the marked slab by the marsh at the point commenced at and containing about one hundred forty five rods, reserving to the persons owning Westerly of this lot the right to cross these premises in one road way as usually travelled.

Pl. Ex. 151 (emphasis added).

249. Knox to Smith. By warranty deed dated August 21, 1891 and recorded in the York County Registry of Deeds at Book 446, Page 147, Abby S. Knox granted to Stephen M. Smith and Edwin L. Smith **property of the same description** as was granted to Abby S. Knox by Mary A. Porter. Pl. Ex. 212.

250. S. Smith to E. Smith. By warranty deed dated November 23, 1921 and recorded in the York County Registry of Deeds at Book 781, Page 509, Stephen M. Smith

granted to Edwin L. Smith his “one half part in common and undivided in another lot or parcel of land in said Kennebunkport together with the undivided part of the buildings thereon and being the interest that was conveyed to me under the deed of Abby S. Knox to the said Grantee and myself by deed dated August 21, 1891 and recorded in the York County Registry of Deeds in Book 446, Page 147 to which deed and the record thereof reference is made for a further description of the premises.” Pl. Ex. 211.

251. E. Smith to R. Smith (devise). By the last will and testament of Edwin L. Smith, signed on September 3, 1946, probated at docket number 71672, and subsequently recorded in the York County Registry of Deeds at Book 1080, Page 4, Edwin L. Smith devised to his daughter, Ruby Smith, “land and buildings and contents of buildings situated at Goose Rocks Beach in said Kennebunkport, and *being the same premises which I purchased from one Knox, and bounded: northerly by the road leading to Batson’s River; westerly by land of Lou A. Staples; **southerly by the ocean**; and easterly by land of Larrabee.*” Pl. Ex. 207 (Emphasis added). The “same premises . . . purchased from one Knox” is a reference to the property described in 1882 deed from Mary Porter to Abby Knox.

252. Smith to Wormwood (devise). As detailed in the abstract of the will of Ruby M. Smith dated July 3, 1962 and recorded in the York County Registry of Deeds at Book 1530, Page 326, Ruby M. Smith devised to her niece Eleanor Wormwood “my cottage and contents, located therein, situated at Goose Rocks Beach, Kennebunkport, Maine, **together with all land on the shore side of the main road.**” Pl. Ex. 206 (emphasis added).

253. Wormwood to LaBrecque. By warranty deed dated June 1, 1983 and recorded in the York County Registry of Deeds at Book 3097, Page 213, Eleanor S. Wormwood granted to Charles LaBrecque and Rosalie J. LaBrecque:

“A certain lot or parcel of land with buildings thereon, situated in the Town of Kennebunkport, in the County of York and State of Maine, in that part thereof known as Goose Rocks Beach, on the Southeasterly side of the road leading to Batson’s River, so-called bounded and described as follows:

Beginning at a stone set in the ground at the Northwesterly corner of land now or formerly of one Stackpole; **thence Southeasterly by said Stackpole land, 268 feet, more or less, to the Atlantic Ocean; thence Southwesterly by said Ocean 105 feet, more or less, to land now or formerly of one Staples**; thence about Northwesterly by said Staples land, 314 feet, more or less, to another stone post set in the ground at the Southerly sideline of said road above mentioned; thence about Northeasterly by said road, 108 feet more or less, to the point of beginning.”

Pl. Ex. 204 (emphasis added).

254. LaBrecque to O’Connor/Leahey. By warranty deed dated July 31, 2003 and recorded in the York County Registry of Deeds at Book 13253, Page 87, Charles LaBrecque and Rosalie J. LaBrecque granted to Terrence G. O’Connor and Joan M. Leahey **property of the same description** as was granted to Charles and Rosalie J. LaBrecque by Eleanor S. Wormwood (Pl. Ex. 204). Pl. Ex. 203. This is the current deed to the O’Connor/Leahey property.

Eastern Section of Goose Rocks Beach

255. The Zagoren, Gallant, Hastings, Sherman/Kinney, Forrest/Julian, Raines, Josselyn-Rose, Sandifer, Lencki, Scribner, Asplundh, and Temerlin properties are situated along the eastern half of Goose Rocks Beach, beginning with the lot bordering the west side of Dyke Road and running east to the Little River. See Def. Ex. 51. All of these properties except one (Temerlin) originally had been part of the Jeffrey³⁴ land, which was first acquired by Gregory Jeffrey in the mid-17th century by grants from George Cleave, agent for Alexander Rigby, one of the early proprietors holding under the Lygonia Patent. Eight of the properties (Gallant, Hastings, Sherman/Kinney,

³⁴ Throughout the record in this case, the surname “Jeffrey” is spelled in a variety of ways—“Jeffrey”, “Jeffery”, “Jeffreys”, “Jefferies”, “Jefferds”, “Gefferey”, “Gefferie”, etc. Unless otherwise specifically indicated, all versions of the surname refer to the same individual or family, as the case may be, and spellings herein are used interchangeably.

Forrest/Julian, Raines, Josselyn-Rose, Sandifer, and Lencki) derive from a portion of the Jeffrey land subsequently acquired and then subdivided by Benjamin Fuller and Orlando Dow beginning in the late 19th century. The following is the known deed chain coming forward from the foundational deeds up to Fuller and Dow.

256. Cleave/Rigby to Bush and Moore. In 1648 deeds from George Cleave, agent for Alexander Rigby, John Bush and Richard Moore were granted (and Bush subsequently assigned his rights therein to Moore) 400 acres described as follows:

“to begine at the south west side of the little River betwixt Cape Porpus, & Saco: & ye easternmost River towards **Saco to begine at the poynt of the goave [grove] of pine trees neare unto ye sea & adjoining unto the sd River, & from thence to runne upon a streight line to the sea banke southwest, & from thence southwest towards Cape Porpus, eight scoore poole, accounting 16 foote & ½ to ye poole**, & soe to runne in that breadth a streite line North west ffour hundreth poole, being 400c acers *to have & to hould all ye sd land & marsh, & Tymber within the sd boundary . . .*”

Pl. Exs. 541, 542 (emphasis added). See also Pl. Ex. 540.

257. Cleave/Rigby to Gefferey [Jeffrey]. In a 1651 deed from George Cleave, agent for Alexander Rigby, Gregory Jeffrey was granted a 200-acre parcel of land contiguous to and west of the 400 acres previously conveyed to Bush and Moore consisting of two hundred acres of land described as follows:

“**to begine at the south west side of the Lott of Land granted to Jon Bush, & now assured & Confirmed to Ric: Moore, & from the south west side of that lott to runne ffoure scoore poole breadth Southwestwardly towards Cape Porpus, & from the sea banke** is to runne Norewestwardly ffoure hundred pooles *all the marsh ground in the sd ffour hundred pooles in breadth between the sea & the wood side, to be contayned in this Grant, . . .*”

Pl. Ex. 539 (emphasis added). See Def. Ex. 71.³⁵ The foregoing describes a line on the face of the earth on the southeast or sea side of the parcel that is a continuation of the same line described in the earlier, 1648 Cleave/Rigby-to-Bush/Moore deeds.

³⁵ Defendant’s Exhibits 71, 72 and 73 were admitted on the same basis as Defendant’s Exhibits 63 to 70, including the understanding that exhibit titles (*e.g.*, in Defendant’s Exhibit 72, “1727 Town to Jeffrey”) and general captions (*e.g.*, “Sea Banke”) would not be given independent weight. (Tr. IX 127:13 – 128:14). See § IV(C), *supra*, ¶195, n. 29. The Town’s expert presented

258. “Marsh ground” is not sandy beach, dry or wet.

259. Moore subsequently conveyed his interest in the 400-acre parcel to Gregory Jeffrey, who, upon his death, devised both parcels to his son, John Jeffrey.

260. In 1720, “proprietors, freeholders and other inhabitants” of Arundel put out a call for confirmation of lands that had been the subject of “ancient deeds.” Def. Ex. 3, at 18-19. In 1727, the 600-acre Jeffrey parcel was laid out and confirmed by town lot layers. Pl. Exs. 242, 543; Def. Ex. 3 at 44. This land encompassed roughly the eastern half of the upland along Goose Rocks Beach. Yarumian Test. (Tr. VII, 102:21 – 113:3). See Def. Ex 72.

261. The survey or layout described the property as follows:

By virtue of a deed from George Cleves unto Richard Moore of Cape Porpus of four hundred acres of *land and marsh* situating and lying in the township of Cape Porpus and also two hundred acres from said Cleves to Gregory Jeffreys on the South west side of said 400 acres... and also ten acres of marsh, I underwritten have surveyed and run & laid out unto Samuel Avery and Jacob Wildes as attorneys to John Jeffrey, son of Gregory Jeffreys the said land is buting & bounded as followeth, ***beginning at the north east corner at the point of ye grove of pines trees near the lot adjoining the Little River and there marked a tree on four sides and from thence south west two hundred & forty rods and there marked a pitch pine tree and from the sea shore on a north west course on both sides 400 rods which compleats the whole of 600 acres.*** The ten acres of marsh lies on ye south west side of said 600 acres of land between the Little River and the north west side and the pine on the south east side, beginning at the north east end on the south west side of said 600 acres and running on a south course 118 rods as will appear by a marked tree and stakes set in the marsh. Arundel July 27, 1727, Samuel Wheelwright, surveyor of land.

Def. Ex. 3, at 44-45 (emphasis added). The layout used the phrase, “sea shore,” instead of “sea banke.”

uncontroverted testimony based upon review of deeds and other documents as to the approximate location of these and other boundaries on the face of the earth relative to the upland properties in issue. See Yarumian Test. Tr. (VII 99:20 – 114:10).

262. Upon John Jeffrey's death, the 600-acre parcel of land laid out by the town in 1727 was split into three 200-acre parcels and devised to his three heirs. Def. Ex. 79; Pl Ex. 569, §§ E-1, E-2, G, H. *See also* Def. Ex. 73.

263. His widow, Joanna Jeffrey, received the eastern-most parcel, consisting of 200 acres described as follows:

“beginning at a Pitch pine Tree on the northeast-side of sd Farm, running southwest Eighty Rods to a pitch pine Tree standing on the Sea Wall marked four sides, then running norwest four hundred Rods to a Hemlock Tree marked four Sides, Then northeast Eighty Rods, Then South east to the first Bounds first mentioned.”

Pl. Ex. 284 (emphasis added). *See also* Pl. Ex. 569, §§ G, H.

264. His son, Benjamin Jeffrey, received the second (middle) of the three 200-acre parcels abutting Joanna Jeffrey's parcel to the west. Benjamin Jeffrey's parcel, referred to as the “Second Division” was described as running:

“southwest Eighty Rods from the Widow's Part, by the sea Wall to a pitch pine Tree marked four sides then running northwest four hundred Rods to a maple Tree marked four sides, then northeast to the Hemlock Tree above mentioned, then southeast by the Widow's Third to the Pitch Pine where we first began.”

Id. (emphasis added). *See also* Pl. Ex. 569, § E-2.

265. His other son, Joseph Jeffrey, received the third of the 200-acre parcels, abutting Benjamin Jeffrey's parcel to the west. Joseph Jeffrey's parcel is described as:

“in breadth Eighty Rods from the Pine tree which is marked on four Sides to a Pitch Pine Tree which is marked on four sides and is the southwest Bounds of said Farm and running from said tree four hundred Rods northwest, Then nor East Eighty, Then Southeast to the maple Tree aforementioned and to the bounds as here we begun for the last part.”

Pl. Ex. 284 (emphasis added). *See also* Pl. Ex. 569, § E-2.

266. There is no evidence that pine trees grow in the high dry sand or in the intertidal zone of a beach.

267. As found above, on the face of the earth today, in this section of the beach as well there is a rise in the elevation of land that effectively represents a natural seawall

or bank separating the upland from the beach above the high water line. Man-made seawalls have been built on or immediately proximate to the natural seawall or embankment in front of all relevant properties in this section except Lencki. The record does not indicate when the manmade seawalls were first constructed; nor does it establish that the topography of the beach has materially changed with respect to properties in issue over the relevant time period, even though the precise location on the face of the earth of the seawall or bank may have shifted due to erosion. See § IV(A), *supra*; see also Pl. Exs. 146 (Plan in Vandervoorn showing “Seawall in 1881” as seaward of the “Present Top of the Bank” in 1949), 142 (1955 plan showing same).

268. Jeffrey to Wildes/Foster. Joseph Jeffrey conveyed his 200-acre parcel to Jacob Wildes and Moses Foster in 1734. The deed (Book 17, Fol. 78R-79L) described the property conveyed as follows:

“Two hundred Acres of *Upland and Salt Marsh* more or less in Arundel aforesaid being the Third Division of the Estate of my Father John Jeffrey Deed bounded as follows ***beginning at a Pitch Pine Tree mark IF on Four Sides which is also a bound of the second Division thence running South Westerly Eighty Rods to another Pitch Pine marked IF*** & from these two Pines running North West Four Hundred Rods back into the woods holding the same breadth through Excepting a Small Parcel of Salt Marsh belonging to the ***Second Division which Falls within these Lines or however otherwise the same may appear to be Butted & Bounded by the Return of ye before mentioned Committee*** with all and singular the ways Easements waters Watercourses Flatts rights Members profits Privileges to the premises belonging”

Pl. Ex. 282 (emphasis added). See also Pl. Ex. 569, § E-1.

269. “Upland and Salt Marsh” does not include tidal flats. There is no evidence of any other deeds or grants into Joseph Jeffrey conveying rights to the “Flatts”.

270. Jeffrey to Wildes/Foster. In 1735, Benjamin Jeffrey conveyed to Wildes and Foster his 200 acres, the middle parcel, which lay between Joseph Jeffrey and Joanna Jeffrey’s parcels and was described as follows:

“A certain Tract or Parcel of *Upland & Salt Marsh* . . . containing Two hundred acres more or less . . . being part of ye farm that was John Jefferds . . . Bounded as followeth ***Beginning at a pitch pine tree marked at the South Easterly***

End a Bounds in the first Division of said Farm South Westerly Eighty rods (1320.00) to a Pitch Pine Tree marked the Bound of the Second Division of said Farm thence running North Westerly into the Country four hundred [rods] (6,600 feet) keeping said breadth of eighty rods from End to End throughout . . . Also a piece of Marsh containing twelve acres more or less, laide out to me in by brother Joseph's division . . . excepting and reserving about fourteen acres of Marsh set off to the Widow on the Northerly side of said two hundred acres above said with all Appurces Privileges & Commodities to the same belonging . . .”

Pl. Ex. 569, § E-2 (emphasis added). The metes and bounds description matches the description of the property devised to Benjamin Jeffrey eight years earlier. Pl. Ex. 284. From this point forward, the record is less clear about the progression of deeds and title.

271. Upon the death of Jacob Wildes, there was an assignment of the dower rights of his widow, Ruth Wildes, pursuant to Probate Court Order, No. 20391 (10/13/1774) recorded at Book 13, Page 45, in two parcels of land described as follows:

(1) a 15-acre parcel:

“Beginning at a hemlock [tree/grove?] which is in the south west bounds of land now in the possession of Ephraim Wildes which tree stands by the edge of the Mill pond running from sd tree down to the Brook 22 Rods to the Road then northeast 120 rods or to Land belonging to the Jeffries then northwest 22 rods to sd Ephraim's land thence southwest to the bounds first mentioned.”

and

(2) Also:

“*Eight acres of salt Marsh* bounded as follows: Beginning at a slab standing near a large [red?] oak which is the Bounds of Jefferies fourteen acres of marsh so called then southeast by sd Jeffries marsh to the Creek then along the Creek as the Creek runs to the Marsh of Capt Jacob Wildes and then northwest to the upland then east to the bounds first mentioned.”

Pl. Ex. 281. There is no mention of the ocean in these descriptions.

272. Other than the foregoing assignment of dower rights to Ruth Wildes, there is no evidence of a deed or devise from Jacob Wildes regarding real property, including the property conveyed to him and Moses Foster by Joseph Jeffrey. Nor is there evidence of any conveyance of said property by Moses Foster.

273. Wildes to Wildes. By a deed dated February 2, 1826 (Book 123, Page 93R), Solomon L. Wildes conveyed to his brother, William Wildes, two parcels, one of which consists of 300 acres, described as being bounded:

“northerly on land of Benjamin Wildes, & on land of Clophos Smith, easterly on land of Ebenezer Jeffrey, & on lands of James Jeffries, & on lands of Eliakim Emmons & others, **southerly on the sea** and Miller’s Creek, & on meadow of Isaac Perkins, westerly on said meadow and on undivided land of Thomas Perkins, deceased.”

Pl. Ex. 280 (emphasis added). This deed does not reference the lands, deeds or titles of Joseph Jeffrey, Benjamin Jeffrey, Jacob Wildes, Ruth Wildes, or Moses Foster. The record establishes that the land held by Solomon Wildes was more likely than not a subset of, and situated on the face of the earth within the bounds of, the Jeffrey lands laid out in 1727 and subsequently granted to Joseph Jeffrey and to Benjamin Jeffrey. Def. Ex. 70. The court infers, therefore, that title in Solomon Wildes to the relevant property in issue traces back to Joseph or Benjamin Jeffrey. There is no record evidence of other conveyances into Solomon Wildes that included land or rights additional to what had been previously held by Joseph Jeffrey and/or Benjamin Jeffrey and conveyed to Jacob Wildes and Moses Foster.³⁶

274. Wildes to Littlefield. By a warranty deed dated February 27, 1832 and recorded in the York County Registry of Deeds at Book 305, Page 100, Solomon L. Wildes and Sophie Wildes conveyed to John Littlefield a:

³⁶ In May 1828 a petition was submitted to the Court of Sessions for the layout of a road over the land “lately owned” by, among others, Ruth Wildes and Solomon Wildes. Pl. Ex. 532. The road to be laid over the western part of this land would extend “to the beach, or seawall, and is necessary and would be very convenient.” *Id.* As noted above, Solomon Wildes conveyed a portion of this land to William Wildes in 1826, and a portion to John Littlefield in 1832. The layout contains specific courses, measurements and directions, leading across “said William Wildes’ land to the seawalls.” *Id.* Given these references, it is more likely than not that there was a natural seawall between the upland and the beach, and that a road would have been laid out to the seawall and not over the dry and wet sand of the beach beyond that point. See Yarumian Test. (Tr. X 191:20 – 195:12); Def. Ex. 70.

*“lot of wood [?] called the Eastern Pines lying in Kennebunkport . . . bounded North Westerly By land granted by William Wildes, Mary Lovell and Henry Wildes Northeast by heirs of Eliakim Emmons deceased his Lott bounds begin at an old maple [tree] **Southeast to a pitched pine that stands near the callway thence to the sea & Southeast by the sea** & Southwest by the New Adam road so called containing about twenty acres be the same more or less.”*

Pl. Ex. 279 (emphasis added). The deed from Solomon Wildes to John Littlefield does not reference lands, deeds, or titles of the Jeffreys, Jacob Wildes or Moses Foster. The record establishes that the land conveyed by Solomon Wildes to John Littlefield was more likely than not also a subset of, and thus situated on the face of the earth within the bounds of, the Jeffrey land laid out in 1727 and subsequently granted to Joseph Jeffrey or Benjamin Jeffrey. Def. Ex. 70. There is no record evidence that any other conveyances into Solomon Wildes or John Littlefield included land or rights additional to what had been previously held by Joseph Jeffrey or Benjamin Jeffrey and subsequently conveyed to Jacob Wildes and Moses Foster.

275. Littlefield to Fuller. By a warranty deed dated October 7, 1878 and recorded in the York County Registry of Deeds at Book 375, Page 349, Joseph F. Littlefield and Mary A. Littlefield conveyed to Benjamin F. Fuller a 29/36th interest in:

*“a certain piece of Wood Land, Beach and [undecipherable] of Kennebunkport formerly owned by now deceased father John Littlefield adjoining and now being a part of what is known as ‘Goose Rocks Beach’ and bounded as follows: upon the South Westerly side by the ‘Dyke Land’ of Silas Perkins and others and running Northeasterly to land now of Alexander Jeffrey and to where an ‘old maple’ formerly stood and **thence South easterly by said Jeffrey land ‘to the pitch pine that stands near the callway’ thence to the sea thence southerly by the sea and upon the South West by the so called new Adams road** containing in all twenty acres be the same more or less.”*

Pl. Ex. 278 (emphasis added).

276. Littlefield to Fuller. By a deed dated October 7, 1878 and recorded in the York County Registry of Deeds at Book 376 Page 258, Mary A. Littlefield, Guardian of Henry Littlefield, conveyed to Benjamin F. Fuller a 7/36th interest in a:

“certain piece of Wood Land and Beach in said town of Kennebunkport adjoining and being a part of what is known as ‘Goose Rocks Beach’ and bounded as follows:

*upon the Northwesterly side by the Dyke Land of Silas Perkins and others and running North Easterly to land of Alexander Jeffrey to where an 'old maple' formerly stood **thence South Easterly by said Jeffrey land to a pitch pine that stands upon the callway thence to the sea then Southerly by the sea and upon the South West by the new adams road so called** containing in all about twenty acres; meaning to convey all said Ward's interest in the premises our said father bought of Solomon Wildes . . ."*

Pl. Ex. 277 (emphasis added).

277. Fuller to Dow (one-quarter interest). By a warranty deed dated September 30, 1881 and recorded in the York County Registry of Deeds at Book 440, Page 318, Benjamin F. Fuller conveyed to William L. Dow a one fourth interest in

*"a certain tract of Wood Land, Building Lots, Beach and Sea Shore on and adjoining Goose Rocks Beach in the town of Kennebunkport, Maine—said premises being bounded on the S.W. side by the 'Dyke Land' of Silas Perkins and there on the S.E. side principally by the lands of Alex Jeffrey and **upon the S.E. side by the Atlantic Ocean** supposed to contain in all about 25 acres and further described in the deeds of one J.F. Littlefield to me of Oct. 7, 1878 and in deeds of Alexander Jeffrey to me and said Dow—one dated August 21, 1877 and the other dated Sept. 16, 1880"*

Pl. Ex. 276 (emphasis added).

Zagoren—215 Kings Highway

278. The Zagoren property was part of the Jeffrey lands. The chain of title traces back to the 1651 Cleave/Rigby-to-Gregory deed, the devise to John Jeffrey, and the 1727 layout of John Jeffrey's land. Zagoren identifies the 1729 Curtis-to-Smith deed as the next deed in the chain of title coming forward but does not connect this deed back to Jeffrey. See Pl. Exs. 243, 260.³⁷

279. Curtis to Smith. By warranty deed dated February 16, 1729 and recorded at Book 13, Fol. 266, Isaac Curtis granted to Robert Smith:

"a certain Parcel of Marish [sic] in Arundel abovesaid containing two Acres & a Half Butted & bounded as followeth viz by Marish of Jacob Courtis on ye West

³⁷ The Town's expert concluded from an examination of references in pertinent deeds that the property, as situated on the face of the earth, more likely than not was marsh land that had been part of the Jeffrey lands; and that title then tracked forward to Jacob Wildes, then Selina Wildes, and then to William Smith, who in 1854 conveyed the property to Joseph Bailey. Both parties agree that the 1854 Smith-to-Bailey deed is in the Zagoren chain of title.

side & on ye North with Marish of John Murphey & on the South East with a Ditch and so in Breadth at each End alike ***until two Acres & a Half be completed Running South East toward ye Sea Wall.***”

Pl. Ex. 260 (emphasis added).

280. Robert Smith devised the property to John Smith, who in turn granted to William Smith all rights that John Smith “had or ought to have in or to Certain tracts or Parcels of Marsh and Land in Arundel aforesaid containing three acres of said Marsh which was purchased of Isaac Curtis by a Deed dated February 16th 1729.” Pl. Ex. 259.

281. Smith to Bailey. By warranty deed dated September 13, 1854 and recorded in the York County Registry of Deeds on February 15, 1855 at Book 239, Page 308, John and Sarah Smith granted to Joseph S. Bailey:

“a certain lot of land, situated between the Goose Rock, so-called; and a piece of *Salt Marsh*, owned by me, in the said Town of Kennebunkport and bounded as follows, viz: beginning at a stone post near the road that runs to the beach, thence running North 75° West twenty two rods to a stone post on the ridge of sand to the south of a road that runs by the Marsh to the mouth of Batson’s river; ***thence South 14° East to the sea wall 12 rods & 11 links, thence by the sea wall to the road that comes on to the beach*** 14-1/2 rods; thence North 26° East 13 ½ rods by said beach road to the stone post begun at, containing about one & half acres, more or less, *meaning to convey all the land between the above named marsh road and the water.*”

Pl. 258 (emphasis added).

282. Charles B. Bailey acquired the same property by descent from Joseph S. Bailey. See Pl. Exs. 256, 257.

283. Bailey to Emmons (one-half undivided interest). By a deed dated December 23, 1911 and recorded in the York County Registry of Deeds on the same date at Book 605, Page 450, Charles B. Bailey granted to Charles Emmons a one-half undivided interest in:

“a certain lot of land lying in said Kennebunkport between the Goose Rocks, so-called, and a salt marsh formerly of Wm. Smith, beginning at a stone post on or near the road running to the beach, thence running north 75° West 22 rods to a stone post on the ridge of sand to the south of a road that runs by the Marsh to the mouth of Batson’s river, so-called; ***thence South 14° East to the sea wall 12 rods and 11 links; thence by the sea wall to the road that comes on to the beach*** 14 ½ rods to the road that comes on to the beach; thence north 26°

East 13 ½ rods by said beach road to the stone post begun at, containing one and one half acres more or less, *being all the land between the above named marsh road and the water, being the same land conveyed by William Smith to J. S. Bailey of Portland, deed Sept. 10, 1854 recorded in York Registry, Book 239, Page 308, to all of which records reference is hereby made for a more complete description said Charles B. Bailey herein grantor, deriving title to the said five parcels by descent and by foreclosure of which notice was recorded Oct. 5, 1895 recorded in said Registry in Book 477, Page 170.*”

Pl. Ex. 257 (emphasis added). *See also* Pl. Ex. 255.

284. Bailey to Smith (one-half undivided interest). By warranty deed dated December 23, 1911 and recorded in the York County Registry of Deeds at Book 605, Page 452, Charles B. Baily granted to William E. Smith and Almon J. Smith a one-half divided interest in:

“a certain lot of land lying in said Kennebunkport *between Goose Rocks, so called, and a salt marsh formerly of Wm. Smith*, beginning at a stone post on or near the road running to the beach, thence running north 75° West 22 rods to a stone post on the ridge of sand to the south of a road that runs by the marsh to the mouth of Batson’s river, so-called; **thence South 14° East to the sea wall 12 rods and 11 links; thence by the sea wall 14 ½ rods to the road that comes to the beach**; thence north 26° East 13 ½ rods by said beach road to the stone post begun at, containing one and one half acres more or less, *being all the land between the above named marsh road and the water.*”

Pl. Ex. 256 (emphasis added). *See also* Pl. Exs. 255, 257.

285. Emmons to Smith (one-half undivided interest). By warranty deed dated April 11, 1917 and recorded in the York County Registry of Deeds at Book 650, Page 418, Charles Emmons granted to Almon J. Smith a one-half undivided interest in the above described **property with the same description** as granted from Charles B. Baily to William E. Smith and Almon J. Smith and Charles B. Bailey to Charles Emmons. Pl. Ex. 255.

286. Smith to Smith (whole). By warranty deed dated August 2, 1917 and recorded in the York County Registry of Deeds in Book 651, Page 374, Almon J. Smith and William E. Smith granted to Alice D. Smith:

“a certain lot or parcel of land located at Beachwood, so-called, in the Town of Kennebunkport in said County, and lying on the Westerly side of the road leading from the Main highway to the beach, bounded and described as follows:

Beginning on the Westerly side of said road at an iron post on the sea wall, thence by said sea wall South 75° West eighty-five (85) feet to an iron post; thence North about ten degrees east one hundred and fifteen (115) feet to a cast iron post at the side of said road heading to the beach, thence South about ten degrees West by said road one hundred and fifteen (115) feet to said oak post and the point of beginning. *Also as much of the beach as is in front of said lot and contained between said seawall and the side lines of said lot extended to the water.”*

Pl. Ex. 254 (emphasis added).

287. Smith to Traugh. By warranty deed dated October 17, 1945 and recorded in the York County Registry of Deeds at Book 675, Pages 207-08, Alice D. Smith granted to Paul O. Traugh and Marion I. Traugh as joint tenants “a certain lot or parcel of land with buildings thereon, situated at Goose Rocks Beach, so called, in Kennebunkport, in said County of York, and lying on the Westerly side of a road leading from the main highway to the beach,” described as follows:

“Beginning on the West side of said road at an iron pin on the sea wall; thence by said sea wall South 75° West eighty-five (85) feet to an iron pin and land formerly of one Glennie; thence North about 10° East one hundred and fifteen (115) feet to an iron pin set in the ground; thence North 75° East to an iron pin set in the ground on the West side of the road leading to the beach aforesaid; thence South about 10° West by said road one hundred and fifteen (115) feet to the point of beginning.

Also conveying herein all my right, title and interest in and to the beach in front of said premises and contained between said sea wall and the ocean and the side lines of said lot as extended to the water.”

Pl. Ex. 253 (emphasis added).

288. Traugh to Gilpatric. By warranty deed dated May 3, 1963 and recorded in the York County Registry of Deeds at Book 1547, Page 83 Paul O. Traugh and Marion I. Traugh granted to Helen L. Gilpatric and Paul H. Gilpatric as joint tenants, **property of the same description** as was granted by the 1945 Smith-to-Traugh deed. Pl. Ex. 252. A strip of land that attaches to the easterly side of the above described lot was granted by Paul O. Traugh and Marion L. Traugh to Helen L. Gilpatric and Paul H. Gilpatric was

similarly transferred on May 3, 1963 and may be found in the York County Registry of Deeds at Book 1547, Page 458. Pl. Ex. 251.

289. Paul H. Gilpatric passed away on November 4, 1990. Helen L. Gilpatric passed away on May 30, 1991. Edwin G. Walker, personal representative for the estate of Helen L. Gilpatric disclaimed the rights of the estate to any property that would pass to the estate by right of survivorship. The disclaimer is dated June 19, 1991 and recorded in the York County Registry of Deeds at Book 5756, Page 10. Pl. Ex. 250.

290. Gilpatric Trust to Gilpatric and Zagoren (each ½ interest). By quitclaim deed dated December 16, 1991 and recorded in the York County Registry of Deeds at Book 5931, Pages 337-39, Warren E. Carley, trustee of the Helen L. Gilpatric 1980 Trust, granted to Robert L. Gilpatric and Beth G. Zagoren **property of the same description** as was granted by the 1963 Traugh-to-Gilpatric deed. Pl. Ex. 245.

291. Gilpatric Estate to Gilpatric and Zagoren (each ½ interest). By deed of distribution dated December 9, 1991 and recorded in the York County Registry of Deeds in Book 5931, Pages 332-34, Edwin G. Walker, personal representative for the estate of Paul H. Gilpatric, granted to Robert L. Gilpatric and Beth G. Zagoren as tenants in common **property of the same description** as was granted by the 1991 Gilpatric Trust-to-Gilpatric/Zagoren deed. Pl. Ex. 246.

292. Gilpatric to Zagoren. By warranty deed dated December 20, 1991 and recorded in the York County Registry of Deeds in Book 5931, Pages 340-42, Robert L. Gilpatric granted to Beth G. Zagoren his one-half undivided interest in the same property, described in relevant part as follows:

“A certain lot or parcel of land with the buildings thereon situated at Goose Rocks Beach . . . lying on the westerly side of a road leading from the main highway to the beach and bounded and described as follows:

Beginning on the West side of said road at an iron pin on the sea wall [then] by the sea wall South 75° West eighty-five (85) feet to an iron pin and land formerly of on Glennie

. . . .

Also conveying herein all right, title and interest in and to the beach in front of said premises and contained between said sea wall and the ocean and the side lines of said lot as extended to the water.”

Pl. Ex. 244 (emphasis added).

Gallant—219 Kings Highway

293. This property was part of the land conveyed to Gregory Jeffrey by the 1651 Cleave/Rigby-to-Jeffrey deed. From that deed, title traced through the chain of deeds outlined above, see § IV(C), *supra*, ¶¶ 246-67, leading into the 1878 Littlefield-to-Fuller and 1881 Fuller-to-Dow deeds and then forward as follows.

294. Fuller/Dow to Whittemore. By warranty deed dated August 15, 1898 and recorded in the York County Registry of Deeds at Book 493, Page 254, Benjamin F. Fuller, Orlando Dow, and Francis H. Dow granted to Horace P. Whittemore:

“a certain lot or parcel of land situated at ‘Beachwood’ so called in Kennebunkport in the County of York and State of Maine bounded and described as follows:

Commencing at a hub driven in the ground on the front of the sea wall fifty feet westerly from the westerly corner of land of Jelleson and Boston: thence running one hundred feet Northerly parallel with the westerly line of said Jelleson and Boston land to a hub driven in the ground; thence westerly one hundred feet to a hub driven in the ground and to a reserved way: **thence southerly by said reserved way to a hub driven in the ground one hundred feet, and continuing same course to the sea: thence easterly by the sea to the point formed by the intersection of the first described bound line being extended:** thence Northerly on said extended line to the point of beginning.”

Pl. Ex 275 (emphasis added).

295. Whittemore to Donovan. By warranty deed dated March 23, 1905 and recorded in the York County Registry of Deeds at Book 548, Page 269, Horace P. Whittemore granted to Helen A. Donovan **property of the same description** as was granted by the 1898 Fuller/Dow-to-Whittemore deed. Pl. Ex. 274.

296. Donovan to Whittemore. By quitclaim deed dated March 23, 1905 and recorded in the York County Registry of Deeds at Book 548, Pages 270-71, Helen A. Donovan granted to Carrie P. Whittemore **property of the same description** as was granted by the 1905 Whittemore-to-Donovan deed. Pl. Ex. 273.

297. Fearing and Dow to Whittemore. By warranty deed dated October 4, 1921 and recorded in the York County Registry of Deeds at Book 694, Page 171, A. Isabelle Fearing and Orlando Dow granted to Carrie P. Whittemore “a certain lot or parcel of land situated at Beachwood, so-called in Kennebunkport” bounded and described as follows:

“Northerly by the Highway commonly called the Kings highway one hundred fifteen feet (115) more or less; easterly by land of Benjamin F. Cleaves sixty-five (65) more or less; southerly by other land of grantee one hundred five (105) feet, more or less; *westerly one hundred feet, more or less by a thirty foot passage way running from said Kings Highway to the Sea*. Said passage way being between the land herein conveyed and other land of grantee on the east and land of one Palmer on the west.”

Pl. Ex. 272 (emphasis added). This “top parcel” or “rear lot” is between the lot conveyed by the preceding deeds and the King’s Highway. The record is unclear as to the source of title of this parcel, which was subsequently conveyed by Horace P. Whittemore and Carrie P. Whittemore to Minnie H. James by deed dated October 14, 1921 and recorded in the York County Registry of Deeds at Book 694, Page 197. See Pl. Ex. 271; Pl. Ex. 296 (Hastings).

298. Whittemore to Whittemore. The abstract of the will of Carrie P. Whittemore, recorded on July 31, 1952 in the York County Registry of Deeds at Book 1219, Page 134, indicated that Carrie P. Whittemore left to her daughter, Ethel C. Whittemore: “All of my estate of every name and nature whether real, personal or mixed and wherever the same may be situated to my daughter-in-law, Ethel C. Whittemore to her own use and behoof forever.” Pl. Ex. 270.

299. Whittemore to Mitchell. By warranty deed dated September 8, 1959 and recorded in the York County Registry of Deeds at Book 1407, Page 545, Ethel C. Whittemore granted to Stella Mitchell “a certain lot or parcel of land, with the buildings thereon, situated in the Town of Kennebunkport County of York, and State of Maine, in that part thereof known as ‘Beachwood’, bounded and described as follows:

“BEGINNING at the southwesterly corner of a parcel of land conveyed by Carrie P. Whittemore to Minnie H. James by deed dated October 6, 1921, recorded in the York County Registry of Deeds, Book 695, Page 269 said corner being one hundred (100) feet westerly from the westerly corner of land now or formerly of one Jelleson, thence northerly by said above mentioned land conveyed to said James and other land conveyed by said Carrie P. Whittemore to said James by deed dated October 14, 1921 recorded in said York Registry Book 694, Page 197, to the highway commonly referred to as the “King’s Highway”; thence Westerly by said highway (60) feet, more or less to a thirty foot passageway, so-called: **thence Southerly by said passageway two hundred (200) feet, more or less to a hub set in the ground; thence continuing on the same course to the Atlantic Ocean or so far as I may own; thence Easterly by said ocean to a point formed by the intersection of this line with the southerly extension or prolongation of the first above described boundary line**; thence Northerly by said extension or prolongation of said first above described boundary line to the point of beginning.”

Pl. Ex. 269 (emphasis added). By this deed, Whittemore conveyed to Mitchell the western portion of the lot received from Fuller and Dow in 1898, having previously granted out the eastern portion of that lot to Minnie James (Hastings) in 1921. See Pl. Exs. 275, 296.

300. Mitchell to Mitchell. By warranty deed dated November 19, 1989 and recorded in the York County Registry of Deeds at Book 4552, Pages 305-06, Stella D. Mitchell granted to Linda A. Mitchell **property of the same description** as granted by the 1959 Whittemore-to-Mitchell deed. Pl. Ex. 267.

301. Mitchell to Gallant. By warranty deed dated August 25, 1997 and recorded in the York County Registry of Deeds at Book 8413, Pages 198-99, Linda A. Mitchell granted to John O. Gallant and Sharon A. Gallant **property of the same description** as was granted to Linda A. Mitchell by Stella D. Mitchell. Pl. Ex. 262. Specifically, with

regard to the seaward boundary, the deed describes the upland, northern and western boundaries as running from the King's Highway westerly to a 30-foot passageway:

“thence Southerly by said passageway two hundred (200) feet, more or less to a hub set in the ground; thence continuing on the same course to the Atlantic Ocean or so far as I may own: thence Easterly by said ocean to a point formed by the intersection of this line with the southerly extension or prolongation of the first above described boundary line”

Id. (emphasis added).

Hastings—221 Kings Highway

302. The Hastings lot was also originally part of the Gregory Jeffrey land, and title to the property follows the same chain of deeds as Gallant, up to and including the conveyances into Horace and Carrie Whittemore. Pl. Exs. 261, 285. *See also* Pl. Exs. 271-75, 297-299. Title coming forward from that point proceeds as follows.

303. Whittemore to James (“Rear lot” on highway). By warranty deed dated October 14, 1921 and recorded in the York County Registry of Deeds at Book 694, Page 197, Horace P. Whittemore and Carrie P. Whittemore granted to Minnie H. James: “a certain lot or parcel of land situated at Beachwood, so called, in Kennebunkport,” described as follows:

“Commencing at the northeast corner of the within granted premises at a point on the Kings Highway, at the dividing line between land of Cleaves and the within granted premises, thence running westerly by the Kings Highway fifty-five (55) feet; thence turning and running southerly by other land of the grantor by a straight line to the northwesterly corner of premises conveyed by the grantor to the grantees by deed dated October 6th, 1921; thence turning and running easterly by the northerly line of the premises above mentioned as having been conveyed by the grantor to the grantee fifty (50) feet more or less to land of Cleaves; thence turning and running northerly by land of Cleaves sixty-five (65) feet more or less to the point of beginning.”

Pl. Ex. 296.

304. Whittemore to James (“front lot” on beach). By warranty deed dated October 6, 1921 and recorded in the York County Registry of Deeds at Book 695, Page 269,

Horace P. Whittemore and Carrie P. Whittemore granted to Minnie H. James: “a certain lot or parcel of land situated at ‘Beachwood’ so called” described as follows:

“Commencing at a hub driven in the ground on the front of the sea wall fifty (50) feet westerly from the westerly corner of land now or formerly of Jelleson and Boston: thence running one hundred (100) feet northerly parallel with the westerly line of said Jelleson and Boston land to a hub driven in the ground; thence westerly fifty (50) feet; thence turning and running southerly by other land of the said Carrie P. Whittemore by a line parallel with and fifty (50) feet distant westerly from the first described boundary line one hundred (100) feet; and continuing the same course to the sea; thence easterly by the sea to the point formed by the intersection of the first described boundary line and the line of the sea boundary; the said first boundary line being extended; thence northerly on said extended line to the point of beginning.”

Pl. Ex. 295 (emphasis added). Whittemore owned the entirety of the property described prior to granting a portion of it to Minnie H. James. See Pl. Exs. 261, 285.

305. James to James, Davis, and Wetter. The abstract of the will of Minnie H. James, as recorded in the York County Registry of Deeds at Book 1530, Page 581, on October 8, 1962, reflects that she devised to her grandchildren, Nelson P. James, Mary N. Davis, Stanley P. James, and Elizabeth Newcomb Wetter, the remainder of her estate, including the real estate. Pl. Ex. 294.

306. Wetter to Davis. By warranty deed dated March 19, 1963 and recorded in the York County Registry of Deeds at Book 1546, Pages 172-74, Elizabeth Newcomb Wetter granted to Mary N. Davis her one-quarter interest in two parcels of **property of the same description** as those parcels of property granted by Horace P. Whittemore and Carrie P. Whittemore to Minnie H. James. Pl. Ex. 292.

307. James to Davis. By warranty deed dated March 19, 1963 and recorded in the York County Registry of Deeds at Book 1546, Pages 175-77, Nelson P. James granted to Mary N. Davis his one-quarter interest in two parcels of **property of the same description** as those parcels of property granted by Horace P. Whittemore and Carrie P. Whittemore to Minnie H. James. Pl. Ex. 290.

308. James to Davis. By warranty deed dated March 19, 1963 and recorded in the York County Registry of Deeds at Book 1546, Pages 169-71, Stanley P. James granted to Mary N. Davis his one-quarter interest in two parcels of **property of the same description** as those parcels of property granted by Horace P. Whittemore and Carrie P. Whittemore to Minnie H. James. Pl. Ex. 291. Mary N. Davis now owned the two lots outright.

309. The Abstract of Decision and Order Relative to Real Estate, dated December 11, 1992, as issued by the Maine Superior Court and recorded in the York County Registry of Deeds at Book 6373, Pages 249-50, established the boundary between the property of Mary N. Davis and Linda A. Mitchell. Pl. Ex. 289.

310. Davis to Davis Trust. By quitclaim deed dated December 11, 2000 and recorded in the York County Registry of Deeds at Book 10352, Pages 92-93 Mary N. Davis granted to herself as trustee of the Mary N. Davis Qualified Personal Residence Trust:

“Land and buildings located along King’s Highway in the Goose Rocks area (formerly known as the Beachwood area) of the Town of Kennebunkport, in the County of York and State of Maine described in a warranty deed of Carrie P. Whittemore to Minnie H. James dated October 6, 1921 recorded in the York County Registry of Deeds at Book 695 at Page 269 and a warranty deed of said Carrie P. Whittemore to said Minnie H. James dated October 14, 1921 recorded in said Registry of Deeds in Book 694 at Page 197.”

Pl. Ex 288.

311. Davis Trust to Hastings. By trustee’s deed dated December 15, 2005 and recorded in the York County Registry of Deeds at Book 14706, Pages 235-36, Mary N. Davis as trustee of the Mary N. Davis Qualified Personal Residence Trust granted to Edwina D. Hastings **property of the same description** as was granted by the 2000 Davis-to-Davis Trust deed. Pl. Ex. 287.

312. Hastings to Hastings Trust. By quitclaim deed dated August 25, 2006 and recorded in the York County Registry of Deeds at Book 14999, Pages 766-67, Edwina D. Hastings granted to herself as trustee of the Edwina D. Hastings Revocable Trust UTA **property of the same description** as was granted to Edwina D. Hastings by Mary N. Davis, trustee of the Mary N. Davis Qualified Personal Residence Trust, namely:

“a certain parcel of land, with the buildings thereon, situated along King’s Highway in the Goose Rocks area (formerly known as the Beachwood area) . . . described in the deed of Carrie P. Whittemore to Minnie H. James dated October 6, 1921 recorded in said Registry at Book 695, Page 269 [front lot], and a Warranty deed of said Carrie P. Whittemore to said Minnie H. James dated October 14, 1921, recorded in said Registry of Deeds in Book 694, Page 197 [rear lot].”

Pl. Ex. 286.

Sherman/Kinney—223 Kings Highway

313. The Sherman/Kinney property also originally had been part of the Gregory Jeffrey land, and title to this property tracks the same deed chain as Gallant and Hastings up to the 1878 Littlefield-to-Fuller and 1881 Fuller-to-Dow deeds. Coming forward from that point to the present, the chain of title is as follows.

314. Fuller/Dow to Jellison/Boston. By warranty deed dated May 28, 1897 and recorded in the York County Registry of Deeds at Book 492, Page 412, Benjamin F. Fuller, Orlando Dow, and Francis A. Dow granted to Charles E. Jellison and Ralph O. Boston:

“a certain lot or parcel of land situated in Kennebunkport afore said at the “Goose Rocks” so called and bounded and described as follows ***beginning on the easterly side of the thirty feet reserved way or avenue extending from Kings Highway to the ocean along the westerly side line of land sold to one Whittemore and at high water mark***; thence northerly by said avenue to a stake driven in the ground in the westerly side line thereof; thence on same course and on said line of said avenue ninety feet to a corner and stake driven in the ground; thence westerly fifty-two feet or more to a stake driven in the ground in a line parallel with said line of said avenue and fifty two feet therefrom; thence Southerly on said line parallel with said avenue and fifty two feet therefrom ninety feet to stake driven in the ground; ***thence continuing on same course to the ocean; thence by the ocean easterly to point of beginning.***”

Pl. Ex. 314 (emphasis added).

315. Jellison/Boston to Cleaves (2/5), Piper (2/5), and Foss (1/5). By warranty deed dated May 17, 1902 and recorded in the York County Registry of Deeds in Book 521, Page 143, Charles E. Jellison and Ralph O. Boston granted a 2/5 share to Benjamin Cleaves, a 2/5 share to Silas T. Piper, and a 1/5 share to William A. Foss of **property of the same description** as was granted to Jellison and Boston by the 1897 Fuller/Dow-to-Jellison/Boston deed. Pl. Ex. 313.

316. Piper to Piper (2/5 interest). According to the abstract of the will of Silas T. Piper, dated April 4, 1907 and recorded in the York County Registry of Deeds at Book 567, Page 264, Silas Piper did “give bequeath and devise to [his] beloved wife, Susan N. Piper, all the property, real, personal or mixed wherever found and however situated” of which he “die[d] seized and possessed.” Pl. Ex. 311.

317. Piper to Cleaves (one-half interest, common and undivided). By warranty deed dated October 10, 1919 and recorded in the York County Registry of Deeds at Book 670, Page 194, Susan E. Piper granted to Retta L. Cleaves a one-half, common and undivided interest in a “lot or parcel of land, with buildings thereon, situate (sic) in that part of Kennebunkport in said county of York known as Goose Rocks” and described as:

“Beginning at the edge of King’s Highway, so called, at a point sixty-seven feet southwesterly from a stone set in the ground, in the center of what was formerly a thirty foot avenue or right of way between lot of Arthur Whittemore and lot of Cleaves, Piper and Foss, said point of beginning to be marked by an iron pipe and stone; **thence along the southwesterly side line of lot formerly of Cleaves, Piper and Foss to the sea; thence southwesterly by the sea fifty-five feet more or less**; thence northwesterly on a course parallel with line first mentioned and fifty-five feet therefrom to said King’s Highway; thence northeasterly to point of beginning.”

Pl. Ex. 310 (emphasis added).

318. Foss to Cleaves. By warranty deed dated May 3, 1906 and recorded in the York County Registry of Deeds at Book 550, Page 297, William A. Foss and Ida Foss granted to Retta L. Cleaves “all our right title and interest in and to a certain lot of land

with buildings thereon, situated in Kennebunkport in said county of York, *bounded by the sea*, by land of Arthur L. Whittemore, and by land formerly of Elisha E. Clark, being the same premises purchased of Jellison & Boston. Our said interest in said premises being two-thirds of a one-fifth interest in said property owned by the late William A. Foss.” Pl. Ex. 312 (emphasis added).

319. Through the foregoing conveyances and, presumably, by descent from Benjamin Cleaves, Retta L. Cleaves held all interests in the property. See Pl Ex. 300.

320. Cleaves Estate to Waterhouse. By deed of distribution dated March 20, 1944 and recorded in the York County Registry of Deeds in Book 1009, Pages 595-96, Burton H. Cleaves as administrator of the will of Retta L. Cleaves, and as her sole heir at law, granted to Bessie M. Waterhouse:

“A certain lot or parcel of land, with the buildings thereon and the contents therein, situated in that part of Kennebunkport, in the County of York and State of Maine, known as Goose Rocks, bounded and described as follows, to wit: Beginning at the edge of the Kings Highway, so called, at a point sixty-seven feet southwesterly from a stone set in the ground in the center of what was formerly a thirty foot avenue or right of way between the lot of Arthur Whittemore and land formerly of Susan N. Piper, later of Joseph Byron, said point being marked by an iron pipe and stone; thence along the northwesterly sideline of lot formerly of Cleaves, Piper and Foss, now of Minnie James, **to the Sea; thence southwesterly by the Sea fifty-five feet, more or less**; thence northwesterly on a course parallel with the line first mentioned and fifty-five feet therefrom to the Kings Highway; thence northeasterly to the point of beginning.”

Pl. Ex. 309 (emphasis added).

321. Waterhouse to Kinney, Waterhouse, and Raines. By quitclaim deed dated January 2, 1952 and recorded in the York County Registry of Deeds at Book 1200, Page 507, Bessie M. Waterhouse granted to Homer Waterhouse, Lois W. Kinney, and Christine W. Raines **property of the same description** as was granted by the Cleaves Estate to Bessie M. Waterhouse in 1944. Pl. Ex. 308.

322. Waterhouse /Raines to Kinney. By quitclaim deed dated June 11, 1956 and recorded in the York County Registry of Deeds in Book 1310, Page 294, Homer

Waterhouse and Christine W. Raines granted to Lois W. Kinney their two-thirds interest in common and undivided to:

“A certain lot or parcel of land with the buildings thereon situated at Goose Rocks Beach in Kennebunkport in the County of York and State of Maine, southeasterly of the King’s Highway, and being bounded and described as follows:

Beginning on the southeasterly side of said King’s Highway at a point sixty-seven (67) feet southwesterly from a stone set in the ground on the same side of said highway, said stone being in the center of what was formerly a thirty (30) foot avenue or right of way between land formerly of Arthur Whittemore and land formerly of Susan N. Piper, later of one Byron, and said point of beginning being marked by an iron pipe and stone; thence in a southeasterly direction along the southwesterly sideline of said land of Byron **to the ocean; thence in a southwesterly direction by the ocean fifty-five (55) feet therefrom**, by land of Minnie James, to said King’s Highway thence in a northwesterly direction by said highway to the point of beginning.”

Pl. Ex. 307 (emphasis added).

323. Kinney to Sherman/Kinney (Parcel 3). By quitclaim deed dated December 3, 1976 and recorded in the York County Registry of Deeds at Book 2169, Pages 691-93, Lois W. Kinney granted to Carolyn K. Sherman and Deborah J. Kinney **property of the same description** as was granted to Lois W. Kinney by the 1956 Waterhouse/Raines-to-Kinney deed. Pl. Ex. 304.

324. Sherman to Kinney. By quitclaim deed dated October 6, 1999 and recorded in the York County Registry of Deeds at Book 9721, Pages 278-80, Carolyn K. Sherman granted to Deborah J. Kinney all of her interest in, among other properties,

“[a] certain lot or parcel of land nearly rectangular in form and with all the buildings and improvements thereon, situated on the Southeasterly side of King’s Highway in the Goose Rocks Beach section of Kennebunkport, County of York and State of Maine, the perimeter description of said certain lot, **having both highway and ocean frontages**, being as follows:

Beginning on the southeasterly side of said King’s Highway at a point 67 feet southwesterly from a stone set in the ground on the same side of said highway, said stone being in the center of what was formerly a thirty (30) foot avenue or right of way between land formerly of Arthur Whittemore and land formerly of Susan N. Piper, later of one Byron, and said point of beginning being marked by an iron pipe and stone; **thence in a southeasterly direction along the southwesterly sideline of said land now or formerly of Byron to the ocean; thence in a southwesterly direction by the ocean 55 feet, more or less, to land now or formerly of Minnie James**; thence in a northwesterly direction on

a course parallel with the first described line herein and 55 feet therefrom, by land now or formerly of Minnie James, to said King's Highway; thence in a northeasterly direction by said highway to the point of beginning." *This property was quitclaimed to Deborah J. Kinney "subject to such rights as any person as a member of the public may have to use the shore of the Atlantic Ocean".*

Pl. Ex. 303 (emphasis added).

325. Kinney Estate to Sherman. By deed of distribution dated December 22, 2014 and recorded in the York County Registry of Deeds at Book 16946, Pages 116-18, Carolyn K. Sherman as personal representative to the estate of Deborah J. Kinney granted to Jonathan C. Sherman and Jeffrey F. Sherman **property of the same description** as was granted to Deborah J. Kinney by in the 1999 Sherman-to-Kinney deed. Pl Ex. 302 (Parcel III).

326. Sherman to Sherman/Kinney Properties II, LLC. By warranty deed dated January 14, 2015 and recorded in the York County Registry of Deeds at Book 16965, Pages 833-35, Jonathan C. Sherman and Jeffrey F. Sherman granted to Sherman/Kinney Properties II, LLC **property of the same description** as was granted to them by the Kinney estate in the 2014 deed of distribution, namely in relevant part:

"a certain lot or parcel of land . . . situated on the Southeasterly side of King's Highway . . . the perimeter description of said certain lot, having both highway and ocean frontage, being as follows:

Beginning on the southeasterly side of said King's Highway at a point 67 feet southwesterly from a stone set in the ground on the same side of said highway, said stone being in the center of a what was formerly a thirty (30) foot avenue or right of way between land formerly of Arthur Whittemore and land formerly of Susan N. Piper . . . **thence in a southeasterly direction along the southwesterly sideline of said land now or formerly of Byron to the ocean; thence in a southwesterly direction by the ocean 55 feet, more or less, to land now or formerly of Minnie James, thence in a northwesterly direction . . .**"

Pl. Ex. 301 (emphasis added).

Forrest/Julian—239 & 241 Kings Highway

327. A condominium comprising both Forrest/Julian parcels was created in 2013 under the name of the "The SIP SIP NORTH Condominium." Pl. Exs. 316, 317. The

current deeds to the Forrest/Julian properties located at 239 and 241 Kings Highway, Kennebunkport, are Plaintiffs' Exhibits 318 and 331, respectively, and are described below.

328. The Forrest/Julian properties also had been part of the Gregory Jeffrey lands, and trace back to land conveyed to Jeffrey in the 1651 Cleave/Rigby-to-Jeffrey deed. Title tracks forward in the same deed chains as Gallant, Hastings, and Sherman/Kinney to the 1878 Littlefield-to-Fuller and 1881 Fuller-to-Dow deeds and then as follows.

---239 Kings Highway

329. Fuller/Dow to Bartlett. By warranty deed dated August 15, 1890 and recorded in the York County Registry of Deeds at Book 433, Page 376, Benjamin F. Fuller and Orlando Dow granted to William Bartlett:

“a certain parcel of Land (illegible) and Beach at Goose Rocks Beach in the town of Kennebunkport in said York County, and bounded as follows:

Beginning at the easterly corner of a lot 100 feet square which we sold to said Grantee (on or about) Sept. 14, 1889, ***thence about South or in line with the east side of said square lot three hundred feet or to the sea (more or less), thence by the sea one hundred feet, thence north or parallel with the first described course by our land three hundred feet, more or less, to the Southwesterly corner of said square lot***, thence east by the square lot one hundred feet to ‘Bartlett Avenue’ at the point begun at.

But excepting and reserving therefrom an Avenue or street forty five feet wide along the south end of the square lot; and the Town road supposed to be one and one half row wide, which crosses this conveyed lot between the square lot and the sea.”

Pl. Ex. 329 (emphasis added). Upon his death, William Bartlett devised the same property to his widow, Henrietta Bartlett. See Pl. Ex. 315.

330. Bartlett to Downing. By warranty deed dated April 2, 1937 and recorded in the York County Registry of Deeds at Book 951, Page 209, Henrietta Bartlett granted to Alice M. Downing and J. Robert Downing:

“a certain lot or parcel of land, with buildings thereon, situated at Goose Rocks Beach, so-called, in Kennebunkport, in the County of York, and State of Maine, and bounded and described as follows:

Beginning at a point on the Town Way, known as King’s Highway, at the northeasterly corner of land of the Grantees herein; **thence in a generally southwesterly direction, by land of said within grantees, to the Sea; thence in a generally southeasterly direction, by the Sea, to a Private Right of Way, known as Bartlett Avenue**, between land of this Grantor and land now or formerly of one Burnham; thence in a general northeasterly direction, by the westerly side line of said Private Way, to the Kings Highway aforesaid; thence in a general northwesterly direction by the said Kings Highway to the point of beginning.”

Pl. Ex. 328 (emphasis added).

331. Downing to Brackett. By warranty deed dated July 31, 1944 and recorded in the York County Registry of deeds at Book 1024, Page 302, Alice M. Downing and J. Robert Downing granted to Frances K. Brackett:

“a certain lot or parcel of land with the buildings thereon, situated at Goose Rocks Beach, so-called, in Kennebunkport, County of York, and State of Maine, and bounded and described as follows:

Beginning at a point on the Town way known as King’s Highway at an iron pin and other land of grantors; **thence in a general southeasterly direction by other land of grantors to an iron pin in the sea wall and which pin is in the middle line of the stone wall between the land hereby conveyed and other land of grantors; thence on in the same course to the sea; thence in a general northeasterly direction by the sea one hundred feet, more or less, to a private way known as Bartlett Avenue** between the land herein conveyed and the land now or formerly of one Burnham; thence in a general northwesterly direction by said private way to the King’s Highway; thence southwesterly by said King’s Highway eighty-five feet, more or less, to the point of beginning.”

Pl. Ex. 327 (emphasis added).

332. Brackett to Hill. By warranty deed dated September 2, 1961 and recorded in the York County Registry of Deeds at Book 1476, Page 26, Francis K. Brackett granted to John D. Hill and Suzanne M. Hill as joint tenants:

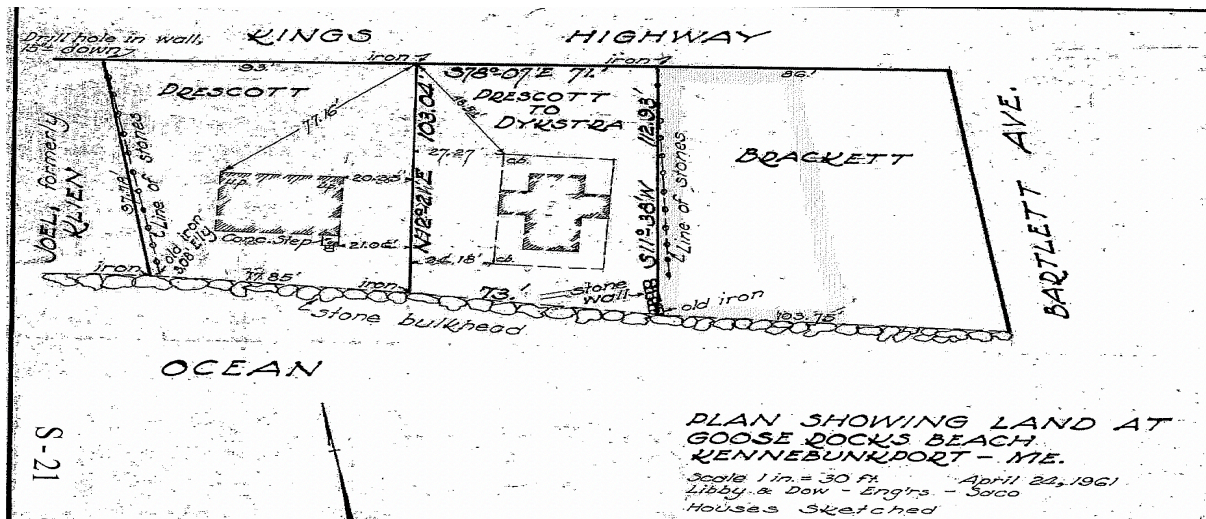
“a certain lot of parcel of land, with buildings thereon, situated at Goose Rocks Beach, so-called, in Kennebunkport, County of York and State of Maine, bounded and described as follows:

Beginning on the southerly side of the Kings Highway, so-called, at an iron pipe driven into the ground marking the northeasterly corner on said Highway of land recently conveyed by one Prescott to on Dykstra, said iron pipe being located south 78°07’ east, seventy-one (71) feet from another iron pipe marking the

northwesterly corner of said Dykstra premises; **thence running south 11°38' west, one hundred twelve and 93/100 (112.93) feet by said Dykstra land to an old iron set in the ground at the sea wall; thence running southeasterly by said sea wall one hundred three and 75/100 (103.75) feet, more or less, to Bartlett Avenue;** thence running northerly by said Bartlett Avenue one hundred twenty (120) feet, more or less, to the junction of said Bartlett Avenue and said Kings Highway; thence running north 78°07' west, eighty-six (86) feet, more or less, to the point of beginning.

Said premises are conveyed together with any and all right, title and interest which I have in and to the land lying between said sea wall and the Atlantic Ocean and between the easterly and westerly sidelines of the above described premises projected to said ocean.”

Pl. Ex 324 (emphasis added). An April 24, 1961 survey is referenced in the deed as the source of the “courses and distances which are given with exactness.” *Id.* A copy of the survey is as follows:



Pl. Ex. 326. There is a man-made seawall on the property today, and it is more likely than not located where there is a natural rise in elevation of land, a physical feature that was a natural seawall. The “stone bulkhead” depicted in the foregoing exhibit constitutes the seawall today. *See also* Def. Ex. 53.

333. Hill to Bliss. By warranty deed dated September 5, 1968 and recorded in the York County Registry of Deeds at Book 1828, Pages 574-75, John D. Hill and

Suzanne M. Hill granted to Joyce D. Bliss **property of the same description** as was granted by the 1961 Brackett-to-Hill deed. Pl. Ex. 323.

334. Bliss to Hill. By warranty deed dated September 9, 1968 and recorded in the York County Registry of Deeds at Book 1828, Pages 576-77, Joyce D. Bliss granted to Suzanne M. Hill **property of the same description** as was granted to Joyce D. Bliss by John D. Hill and Suzanne M. Hill. Pl. Ex. 322.

335. Hill to Stedman. By warranty deed dated September 10, 1968 and recorded in the York County Registry of Deeds at Book 1852, Pages 443-45, Suzanne M. Hill granted to John H. Stedman and Virginia C. Stedman as joint tenants:

“a certain lot or parcel of land, together with buildings thereon, situated in that part of the town of Kennebunkport known as Goose Rocks Beach, bounded and described as follows:

Beginning at an iron pipe driven into the ground on the southerly side of King’s Highway at the northeasterly corner of land of one Dykstra; thence S 78°07’E by said Highway fifty-five (55) feet to an or on pipe driven into the ground and remaining land of this Grantor; thence S 11°44’W by said remaining land of this Grantor and by a line which passes ten and 96/100 (10.96) feet easterly of the cornerboard at the northeasterly corner of the closed in piazza of the house standing on land herein described and *passes fourteen and 69/100 (14.69) feet easterly of the cornerboard at the southeasterly corner of the piazza attached to said house and **one hundred sixteen and 09/100 (116.09) feet to an iron pipe driven into the ground near the top of the bank of the ocean; thence N 74°50’ W by said top of the bank fifty-five (55) feet to an iron pipe driven into the ground and said land of Dykstra;*** thence N 11°38’E by said land of Dykstra one hundred twelve and 98/100 (112.93) feet to the point of beginning.

Also all my right, title and interest in and to the land situated at said Goose Rocks Beach in said Kennebunkport lying southerly of and adjoining the above described land and lying between the southerly prolongations of the easterly and westerly sidelines described above and extending from said southerly sideline described above to said ocean or so far southerly as this Grantor may own.”

Pl. Ex. 321 (emphasis added). Upon John H. Stedman’s death, the property was devised to Virginia C. Stedman; and upon her death, conveyed to a trust (Trust B) previously established by John Stedman. Pl. Ex. 315.

336. Trust B to Stedman. By trustee’s deed dated August 2, 1990 and recorded in the York County Registry of Deeds at Book 5494, Pages 63-64, Bank of New England

West, trustee of Trust B granted to Richard S. Stedman **property of the same description**. Pl. Ex. 319.

337. Stedman to Forrest and Julian. By warranty deed dated May 19, 2004 and recorded in the York County Registry of Deeds at Book 14091, Pages 315-16, Richard S. Stedman granted to William D. Forrest and Nancie M. Julian **property of the same description**, and in particular with a seaward boundary described as:

“an iron pipe driven into the ground near the top of the bank of the ocean; thence N 74°50’ W by said top of the bank fifty-five (55) feet to an iron pipe driven into the ground and said land of Dykstra

Also all my right, title and interest in and to the land situated at said Goose Rocks Beach in said Kennebunkport lying southerly of and adjoining the above described land and lying between the southerly prolongations of the easterly and westerly sidelines described above and extending from said southerly sideline described above to said ocean or so far southerly as this Grantor may own.”

Pl. Ex. 318 (emphasis added).

338. By the condominium declaration for The SIP SIP NORTH Condominium, dated August 12, 2013 and recorded in the York County Registry of Deeds at Book 16673, Pages 715-32, William D. Forrest and Nancie M. Julian established a condominium on the property granted to them by Richard S. Stedman. Pl. Ex. 316.

---241 Kings Highway

339. The property at 241 Kings Highway has the identical deed chain as 239 Kings Highway up to and including the 1968 Bliss-to-Hill conveyance recorded in the York County Registry of Deeds at Book 1828, Page 576. Pl. Ex. 330, 335. Suzanne M. Hill divided the property, granting rights therein to John H. Stedman and Virginia C. Stedman in 1968, which later became the Forrest/Julian property, and granting rights therein to Joanne M. Fenn in 1976. Pl. Ex. 330.

340. Wilson (formerly Hill) to Fenn, Trustee. By warranty deed dated December 6, 1976 and recorded in the York County Registry of Deeds at Book 2162, Pages 711-

12, Suzanne M. Wilson (formerly Hill) granted title to Joanne M. Fenn, as trustee under the declaration of trust, in “[a] certain lot or parcel of land, with buildings thereon, situated at Goose Rocks Beach, so-called, in Kennebunkport County of York and State of Maine, bounded and described as:

“Beginning on the southerly side of the Kings Highway, so-called, at an iron pipe driven into the ground marking the northeasterly corner on said Highway of land recently conveyed by one Prescott to one Dykstra, said iron pipe being located South 78°07’ East, seventy-one (71) feet from another iron pipe marking the northwesterly corner of said Dykstra premises; **thence running South 11°38’ West, one hundred twelve and 93/100 (112.93) feet by said Dykstra land to an old iron set in the ground at the sea wall; thence running southeasterly by said seawall one hundred three and 75/100 (103.75) feet, more or less, to Bartlett Avenue;** thence running northerly by said Bartlett Avenue one hundred twenty (120) feet, more or less, to the junction of said Bartlett Avenue and said Kings Highway; thence running 78°07’ West, eighty-six (86) feet. More or less, to the point of beginning.

Said Premises are conveyed together with any and all right, title and interest which I may have in and to the land lying between said sea wall and the Atlantic Ocean and between the easterly and westerly sidelines of the above described premises projected to said ocean.”

Pl. Ex. 334 (emphasis added)

341. Fenn, Trustee to Wilson. By a trustee’s deed dated December 18, 1978 and recorded in the York County Registry of Deeds at Book 2463, Pages 82-83, Joanne M. Fenn as trustee under the declaration of trust dated December 6, 1976 granted to Suzanne M. Wilson **property of the same description** as was granted by the 1976 Hill (Wilson)-to-Fenn/Trustee deed. Pl. Ex. 333.

342. Wilson to S.M. Wilson Trust. By quitclaim deed dated April 29, 2002 and recorded in the York County Registry of Deeds at Book 11601, Pages 147-48, Suzanne M. Wilson granted to Suzanne M. Wilson, trustee of the S. M. Wilson Trust **property of the same description** as was granted to Suzanne M. Wilson by Joanne M. Fenn as trustee under the declaration of trust dated December 6, 1976. Pl. Ex. 332.

343. S. M. Wilson Trust to Julian. By warranty deed dated March 26, 2006 and recorded in the York County Registry of Deeds at Book 14855, Pages 111-12, Suzanne

M. Wilson, trustee if the S. M. Wilson Trust granted to Nancie M. Julian **property of the same description** as was granted by the 2002 Wilson-to-S.M. Wilson Trust. Pl. Ex. 331.

344. As with the Forrest/Julian property, this property became part of The SIP SIP NORTH Condominium by the condominium declaration dated August 12, 2013 and recorded in the York County Registry of Deeds at Book 16673, Page 715. Pl. Ex. 316.

Raines—249 Kings Highway

345. The Raines property came out of the Gregory Jeffrey and Joseph Jeffrey lands; traces title back to the 1651 Cleave/Rigby-to-Jeffrey deed; and from that deed coming forward tracks the same chain of deeds as Gallant, Hastings, Sherman/Kinney, and Forrest/Julian up to the 1878 Littlefield-to-Fuller and 1881 Fuller-to-Dow deeds. The deed chain coming forward from that point to the present is as follows.

346. Fuller/Dow to Estey. By warranty deed dated January 11, 1886 and recorded in the York County Registry of Deeds at Book 409, Page 546, Benjamin F. Fuller, Orlando Dow and William H, Dow granted to Mary M. Estey:

“the following described real estate situated upon the Southerly side of a highway running along Goose Rocks Beach, so called, in the Town of Kennebunk, York County in the State of Maine, bounded as follows, beginning at the Southwesterly corner of the lot or parcel of land hereby conveyed at a hub so called, **thence running South 9° West by land of Gertrude E. Day to the Sea, thence running westerly fifty feet by the sea;** thence running North 9° East to said Highway (illegible), thence Easterly by said Town road to the place of beginning at the hub.”

Pl. Ex. 353 (emphasis added).

347. Estey to Potter. By warranty deed dated March 2, 1897 and recorded in the York County Registry of Deeds at Book 482, Pages 115-16, Mary E. Estey granted to James E. Potter **property of the same description** as was granted to Estey by the 1886

Fuller/Dow-to-Estey deed (“to the Sea, thence Westerly by the Sea fifty feet”). Pl. Ex. 352.

348. Potter to Emerson. By warranty deed dated September 28, 1911 and recorded in the York County Registry of Deeds at Book 602, Page 189, James E. Potter granted to John S. Emerson **property of the same description** as was granted to Potter by the 1897 Estey-to-Potter deed. Pl. Ex. 351.

349. Emerson to Joel. By warranty deed dated August 20, 1918 and recorded in the York County Registry of Deeds at Book 661, Page 56, John S. Emerson granted to Coleman J. Joel **property of the same description** as was granted by Emerson by the 1911 Potter-to-Emerson deed. Pl. Ex. 350.

350. Joel Estate to Lunge. By deed of distribution dated October 20, 1933 and recorded in the York County Registry of Deeds at Book 839, Pages 516-18, Annie M. Joel, Juliet Joel Ross, and Minnie E. Joel as Executrices of the last will and testament of Coleman J. Joel granted to Katherine L. Lunge **property of the same description** as was granted to Joel by the 1918 Emerson-to-Joel deed. Pl. Ex. 349.

351. Lunge to McClanahan. By warranty deed dated November 15, 1956 and recorded in the York County Registry of Deeds at Book 1337, Page 423, Katherine L. Lunge granted to Alva F. McClanahan and Myra E. McClanahan a parcel of land depicted in a “Sketch Showing a Study of Property Lines at Goose Rocks, Kennebunkport, Me.” as the parcel “to be sold Lunge to McClanahan” and described more fully as:

“Beginning on the Southerly side of Kings Highway at a point marked by an iron pipe driven into the ground at the Northwesterly corner of land of Lynde, said corner and point of beginning having been established by an exchange of quitclaim deeds between the grantor herein and said Lynde heretofore delivered, and said beginning point being twenty five and twenty-seven hundredths (25.27) feet Northeasterly from the underpinning at the Northwesterly corner of the garage standing on the land hereby conveyed and thirteen and sixty-nine hundredths (13.69) feet Northwesterly from the underpinning at the Northwesterly corner of the garage standing on said land of Lynde, passing two and twelve hundredths

(2.12) feet easterly from the underpinning at the Northeasterly corner of the garage first mentioned herein, passing one and twenty-eight hundredths (1.28) feet easterly from the underpinning at the Southeasterly corner of said last mentioned garage, passing one and forty-four hundredths (1.44) feet easterly from the corner board at the Northeasterly corner of the main part of the house standing in the land hereby conveyed, *passing one and sixty-one hundredths (1.61) feet easterly from the baseboard at the Southeasterly corner of the piazza on the front or Southerly side of said house, a distance of one hundred fifty-five and forty-three hundredths (155.43) feet to a point marked by an iron pipe driven into the ground at the top of the bank of the Atlantic Ocean, said last mentioned point being eighteen and seventy-two hundredths (18.72) feet Southerly from said baseboard at the Southeasterly corner of said piazza and being ninety and thirty hundredths (90.30) feet westerly from the bottom course of the siding shingles at the Southeasterly corner of the piazza on the Southerly side of the house standing on said land of Lynde; thence on the same course to the Atlantic Ocean; thence in a general Westerly direction by the Ocean to a point marking the most Westerly corner of the land herein conveyed and to other land of the grantor herein, said last mentioned point being in a line or course bearing South eleven degree fifty three minutes West (S 11° 53' E) from an iron pipe driven into the ground at the top of said bank, and the distance between the two aforesaid iron pipes driven into the ground on the top of said bank being seventy seven and seven hundredths (77.07) feet*; thence by land of grantor herein North eleven degrees fifty-three minutes East (N 11° 53' E) to the top of said bank and to an iron pipe aforesaid; thence on the same course by land of the grantor herein, passing thirty and seventy hundredths (30.70) feet Easterly from the baseboard at the Southeasterly corner of the piazza on the house now occupied by the grantor herein, passing twenty-eight and eighty-seven – (28.87) feet Easterly from the corner board at the Northeasterly corner of said last mentioned house, a distance of one hundred forty and seven hundredths (140.07) feet to a point marked by a six (6) inch wooden gatepost and to said highway; thence by said highway on a course of South seventy-eight degrees seven minutes East (S 78° 07' E) and at right angles to the last described line seventy-one and twenty-five hundredths (71.25) feet to the point of beginning.

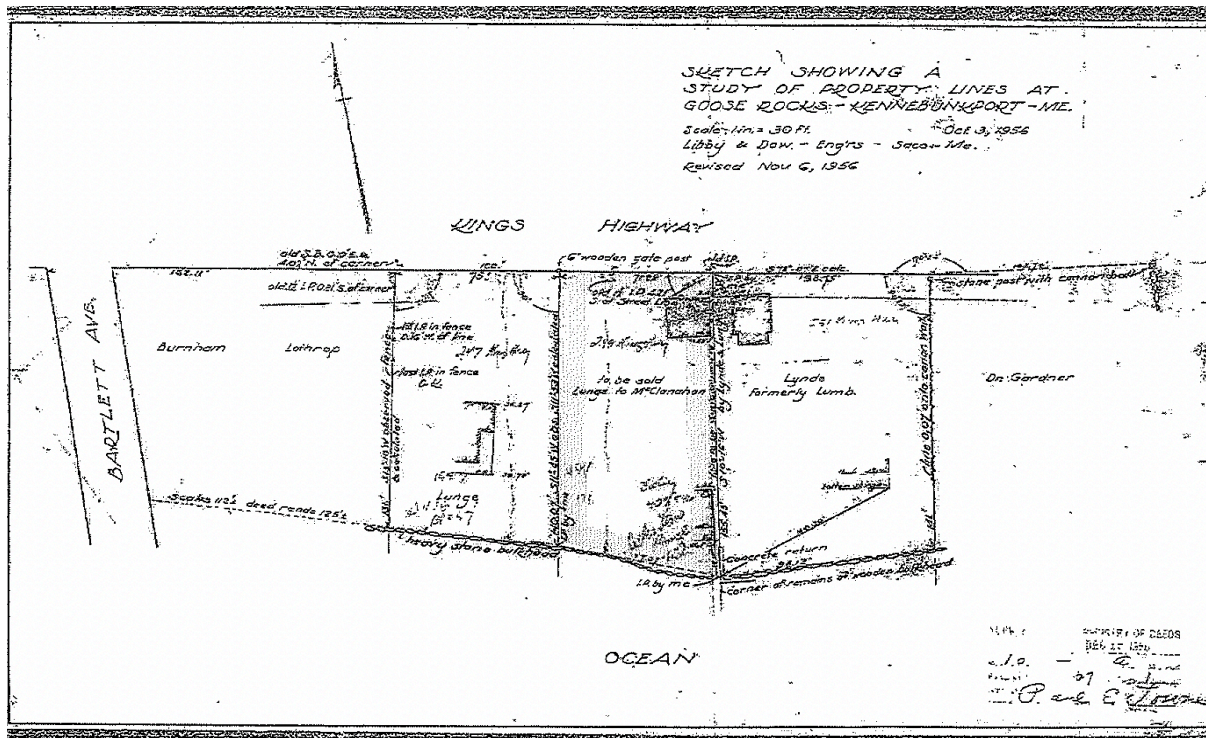
...

This grant is subject to any right the public may have to use the beach lying between the bulkhead shown on said plan and the Atlantic Ocean”

Pl. Ex. 344 (emphasis added).

352. The “plan” referenced in the above deed is Plaintiffs’ Exhibit 348, recorded on October 3, 1956 at Plan Book 27, Page 1:

[NEXT PAGE]



Pl. Ex. 348.

353. The plan shows at the southeast corner of the lot the “corner remains of wooden bulkhead.” Pl. Ex. 348. Although the plan does not show an “iron pipe driven into the ground at the top of the bank of the Atlantic Ocean” as referenced in the deed description, it is more likely than not the two iron pipes are in the approximate location of the intersection of the solid lines depicting the side boundaries and the solid line separating the “Ocean” from the “lot to be sold Lunge to McClanahan.”

354. It is more likely than not that this latter solid line depicts the “top of the bank” as referenced in the deed, or natural seawall separating the upland from the beach, which is one of the narrowest stretches of the shore along Goose Rocks Beach. See Def. Ex. 51, 53. As depicted in the plan, there is a man-made seawall along that latter solid line on the face of the earth today. Pl. Ex. 348. See also Def. Ex. 53.

355. McClanahan to Monroe/Bryles. By four separate warranty deeds (1) dated December 18, 1973 and recorded in the York County Registry of Deeds at Book 2022,

Pages 111-15, granting a one-quarter interest; (2) dated January 2, 1974 and recorded in the York county Registry of Deeds at Book 2023, Pages 144-48, granting a one-third interest of grantors remaining interest; (3) dated January 3, 1975 and recorded in the York County Registry of Deeds at Book 2063, Pages 763-67, granting a one-half interest in grantors remaining interest, and (4) dated January 2, 1976 and recorded in the York County Registry of Deeds in Book 2113, Pages 334-38, granting all of grantors' remaining interest, Alva F. McClanahan and Myra E. McClanahan granted to Mary Lou Monroe and Myra Kathleen Bryles, as tenants in common, **property of the same description** as was granted by Katherine L. Lunge to Alva F. McClanahan and Myra E. McClanahan. Pl. Exs. 340-343.

356. Monroe/Bryles to Raines. By warranty deed dated August 20, 1976 and recorded in the York County Registry of Deeds at Book 2145, Page 462-65, Mary Lou Monroe and Myra Kathleen Bryles granted to Christine W. Raines the same parcel of land ("irregular in form") and described by reference to the 1956 plan (called "The McClanahan Plan") as well as by metes and bounds in the deed, including the seaward boundary as follows:

"an iron pipe driven into the ground at the top of the bank of the Atlantic Ocean; thence continuing on the same course to the Atlantic Ocean; thence in a general Westerly direction by the Atlantic Ocean to the extended Easterly boundary line of the lot of land bearing designation "Lunge" on The McClanahan Plan; thence by the extended Easterly boundary line of said lot designated "Lunge" on a course of North eleven degrees fifty-three minutes East (N 11° 53' E) to an iron pipe driven into the ground at the top of said bank, said last mentioned iron pipe being seventy-seven and seven hundredths (77.07) feet distant from the other herein previously mentioned iron pipe driven into the ground at the top of said bank; thence continuing on the same course of North 11 degrees fifty three minutes East (N 11° 53' E) by said land once of Lunge a distance of one hundred forty and seven hundredths (140.07) feet to a point marked by a 6" wooden gate post and to the Kings Highway; thence by the Kings Highway on a course of South seventy-eight degrees seven minutes East (S 78° 07' E) and at right angles with the preceding course a distance of seventy-one and twenty-five hundredths (71.25) feet to the point of beginning."

Pl. Ex. 339 (emphasis added).

357. Raines to Raines Trust. By quitclaim deed dated January 1, 2000 and recorded in the York County Registry of Deeds in Book 9891, Pages 197-99, Christine W. Raines granted to Kristen B. Raines, trustee of the Christine W. Raines Qualified Personal Residence Trust, **property of the same description** as was granted by Mary Lou Monroe and Myra Kathleen Bryles to Christine W. Raines. Pl. Ex. 337.

358. Raines Trust to Raines. By trustee's deed dated January 21, 2004 and recorded in the York County Registry of Deeds in Book 14147, Pages 614-16, Kristen B. Raines, trustee of the Christine W. Raines Qualified Personal Residence Trust granted to Kristen B. Raines **property of the same description** as was granted in the quitclaim deed from Christine W. Raines to Kristen B. Raines, as trustee of the Christine W. Raines Qualified Personal Residence Trust (Pl. Ex. 337) and with the seaward boundary described as:

“an iron pipe driven into the ground at the top of the bank of the Atlantic Ocean; thence continuing on the same course to the Atlantic Ocean; thence in a general Westerly direction by the Atlantic Ocean to the extended Easterly boundary line of the lot of land bearing designation “Lunge” on The McClanahan Plan; thence by the extended Easterly boundary line of said lot designated “Lunge” on a course of North eleven degrees fifty-three minutes East (N 11° 53' E) to an iron pipe driven into the ground at the top of said bank, said last mentioned iron pipe being seventy-seven and seven hundredths (77.07) feet distant from the other herein previously mentioned iron pipe driven into the ground at the top of said bank;”

Pl. Ex. 336 (emphasis added).

Josselyn-Rose—251 Kings Highway

359. The Josselyn-Rose property was also part of the Gregory Jeffrey and Joseph Jeffrey lands, tracing back to the 1651 Cleave/Rigby-to-Jeffrey deed. There is a gap in the deed chain coming forward from Joseph Jeffrey, and it appears that by 1850 the property was still in the Jeffrey family. See Pl. Ex. 357.

360. James Jeffrey to Jeremiah Jeffrey. By warranty deed dated December 21, 1857 and recorded in the York County Registry of Deeds at Book 256, Pages 47-48,

James Jeffrey granted to Jeremiah Jeffrey several parcels “situated in Kennebunkport” described as follows.

“a certain lot bounded as follows: beginning on the line of Ames Proctors land & running N. W. to the south side of the lower road leading from the village of Kennebunkport to Biddeford, thence crossing said road on the same course to land formerly owned by Ebenezer Jeffrey, thence N. East by said Jeffreys land, thence N. West by the same to land of William Jeffrey, thence N. East by said William’s land, to land owned by heirs of Joseph Jeffrey thence S. East by land of said heirs to the road above named, thence crossing of said road southerly & running by land of the before mentioned Ames Proctor to the end of a stone wall; thence S. West by said Proctors land to the bounds first mentioned; said lot being the homestead on which I now reside containing about thirty acres.

Also another lot containing about ten acres being the same which was conveyed to be by Israel & Olive Emmons in a deed bearing date December seventh 1833 & recorded in the 89th page of the 159th book of records for York County, to which deed reference is made for a more particular description.

Also another lot containing twelve acres more or less together with two & a half acres of thatch, both of which last named were conveyed to me by said Israel & Olive Emmons in a deed dated October ninth 1841 and recorded on pages 114 & 115 of the 237th book of records [illegible] a more particular description. Also a certain piece of dyked marsh containing about three acres, being the same which was conveyed to me by Ebenezer Jeffrey in a deed dated September 30th 1850 & recorded in pages 116 & 117 of the 237th book of records for the York County, to which deeds reference is made for a more particular description. Also another certain lot of land containing about twenty acres being the same which was conveyed to me by Jonathon S. Jeffrey & others in a deed dated April 26th 1839 & recorded on pages 113 & 114 of the 237th book of records for York County, to which deed reference is made for a more particular description.”

Pl. Ex. 380. There is no discernable reference to the sea or a seaward boundary in this deed; nor is there other evidence placing the property described on the face of the earth. The reference deeds cited for a “more particular description” were not included in the collection of deeds for the Josselyn-Rose deed chain. See Pl. Exs. 357, 358-380.

361. Jeremy Jeffrey to James Jeffrey. By warranty deed dated December 26, 1859 and recorded in the York County Registry of Deeds at Book 266, Page 180, Jeremy Jeffrey granted to James Jeffrey:

“the homestead lot with the buildings thereon now occupied by said James and containing about thirty acres, also another lot containing about ten acres formerly owned by Isreal Emmons, also another lot containing about twelve acres, together with about two + ½ acres of thatch (illegible) by said James of Isreal Emmons. Also a piece of (illegible), containing about three acres, formerly owned by Eleanor

Jeffrey. Also another lot containing about twenty acres, formerly owned by Jonathan L. Jeffrey, all lying in said Kennebunkport.”

Pl. Ex. 379.

362. James Jeffrey to Alexander Jeffrey. By warranty deed dated January 5, 1860 and recorded in the York County Registry of deeds at Book 266, Page 181, James Jeffrey granted to Alexander Jeffrey **property of the same description** as was granted by Jeremy Jeffrey to James Jeffrey in the 1859 deed. Pl. Ex. 378.

363. Jeffrey to Fuller. By warranty deed dated August 21, 1879 and recorded in the York County Registry of Deeds at Book 369, Page 384, Alexander Jeffrey granted to Benjamin Fuller:

“A certain piece of wood land and Beach wall at Goose Rocks Beach in said town of Kennebunkport and bounded as follows: ***Beginning upon the Beach wall at a hub in the sand, thence North 36 ½ ° West*** (and where it crosses the town road is sixty two feet Southwesterly from the lot I deeded to Wm. A. Littlefield in Dec. 1876) one hundred and sixty feet to a hub thence South 33 1/2 ° West by a spotted line that day made dividing this lot from my growth and running to the land said Fuller lot of Jas. Littlefield and ***thence by the said Littlefield land Southeasterly to the beach wall so far as I own, thence Northeasterly by the beach wall to the point commenced at Excepting therefrom the town way crossing the South Easterly end thereof.***”

Pl. Ex. 376 (emphasis added).

364. Benjamin Fuller had also acquired interests in land conveyed by Solomon and William Wildes to John Littlefield and then from John Littlefield through I. F. Littlefield to Benjamin Fuller. See Pl. Ex. 357. This is the same land/title chain discussed above generally in connection with the other eastern beach properties.

365. Fuller/Dow to Day. By warranty deed dated September 2, 1882 and recorded in the York County Registry of Deeds at Book 390, Page 84, Benjamin F. Fuller, Orlando Dow, and William H. Dow granted to Gertrude E. Day:

*“a certain piece of land or sea wall upon the southerly side of the town way along Goose Rocks Beach in the town of Kennebunkport, York County, Maine, and bounded as follows: Beginning by the southerly line of said town road at a hub, thence south 9° west **about one hundred feet to a hub near a Barbery bush and the same course to the sea or so far as we own, thence by the sea fifty***

feet easterly; thence north 9° east upon the sea wall to a hub this day drive in the sand, and the same course to the southerly line of the town road nearly one hundred feet be the distance from the sea to the town road, more or less.”

Pl. Ex. 370 (emphasis added). Fuller and Dow also conveyed to Gertrude Day by a second deed dated September 13, 1888 and recorded in the York County Registry of Deeds at Book 425, Page 66:

a “***certain piece of Land and Sea Wall*** upon the southerly side of the town road along Goose Rocks Beach: Beginning at the northerly corner of the lot we sold Grantee Sept 2nd 1882 as the [illegible] road as recently [illegible] by the selectmen ***thence by lot about South 9° West about [illegible] hundred feet to the Sea or as far as we own thence by the sea easterly fifty feet, thence parallel with said lot before sold [illegible] and over the Sea Wall to the Southerly side of said town road,*** be the distance one hundred feet more or less, thence Westerly as the town road is now located fifty feet to her corner begun at.”

Pl. Ex. 369 (emphasis added).

366. Day to Clark. By warranty deed dated August 26, 1901 and recorded in the York County Registry of Deeds at Book 515, Page 150, Gertrude E. Day granted to Elisha E. Clark:

“a certain lot or parcel of land situated on the southerly side of ‘Kings Highway’ so called at Beachwood in Kennebunkport in said York County bounded as follows: Beginning on said highway at westerly corner of land of Henry Goodwin; thence westerly by said highway one hundred feet to land of James E. Potter; ***thence southerly by said Potter land about one hundred feet to a hub and continuing same course to the sea or so far as my title extends; thence by the sea easterly one hundred feet to land of said Goodwin; thence by said Goodwin land northerly one hundred feet more or less to point of beginning.***”

Pl. Ex. 368 (emphasis added).

367. Clark to Arnold. By warranty deed dated August 18, 1913 and recorded in the York County Registry of Deeds at Book 627, Page 194, Marcia A. Clark³⁸ granted to Harry C. Arnold **property of the same description** as was granted to Elisha E. Clark by the 1901 Day-to-Clark deed. Pl. Ex. 367.

³⁸ Although there is no will, deed of distribution or other probate record in evidence, Elisha Clark apparently devised the property to Marcia Clark. See Pl. Ex. 357.

368. Arnold to Lumb. By warranty deed dated January 21, 1923 and recorded in the York County Registry of Deeds at Book 711, Pages 312-13, Harry C. Arnold granted to William A. Lumb **property of the same description** as was granted to Harry C. Arnold by the 1913 Clark-to-Arnold deed. Pl. Ex. 366.

369. Lumb to Lynde. By warranty deed dated June 17, 1946 and recorded in the York County Registry of Deeds at Book 1078, Page 358, William A. Lumb granted to Leslie E. Lynde and Alberta S. Lynde, as joint tenants **property of the same description** as was granted to William A. Lumb by the 1923 Arnold-to-Lumb deed. Pl. Ex. 365.

370. Lynde to Lynde. By quitclaim deed with covenant dated June 11, 1982 and recorded in the York County Registry of Deeds at Book 2938, Pages 344-45, Leslie E. Lynde granted to Alberta S. Lynde “[a]ll my right, title and interest in and to a certain lot or parcel of land together with the buildings thereon situated at Goose Rocks Beach, so-called,” described as follows:

“BEGINNING on the Southerly side of King’s Highway, so-called, at an iron pipe driven into the ground on the Southerly side of said Highway said pipe being 13.69 feet Northwesterly from the underpinning at the Northwesterly corner of the garage standing on the land herein conveyed; thence running South 10° 16’ West (1956 Magnetic Meriden) 155.43 feet **to an iron pipe driven into the ground at the top of the bank or sea wall; thence continuing the same course to the sea; thence by the sea in a general Easterly direction to a point of intersection with the second line hereinafter described;** thence again commencing at the point of beginning and running by said King’s Highway South 78°7’ East 98.75 feet to a stone post and land formerly of one Gardner now of one Baston; **thence Southerly and making an included angle with said King’s Highway of 91° 25’; thence by said Baston land 141 feet, more or less, to the top of the bank or sea wall; thence continuing the same course to the sea at which point said line intersects with the second course herein.**

Being the same premises conveyed to the Grantor and grantee herein as joint tenants by William Lumb by deed dated June 17, 1946 and recorded in said registry in Book 1078, Page 358.

The first line herein described is that established by exchange of Quit Claim deeds between Katherine L. Lunge and said Lyndes, simultaneously recorded in said registry of deeds and that from Lunge to Lynde being recorded in said registry in Book 1338, Page 440, said Lunge premises being currently owned by one Raines. Further reference is made to survey done by Libby & Dow, Engineers, of Saco,

Maine, on October 3rd and November 6, 1956, from which survey the above description is derived.”

Pl. Ex. 364 (emphasis added). The plan referenced is Plaintiffs’ Exhibit 348, discussed above in connection with Raines.

371. Lynde Estate to Leslie E. Lynde (life estate). By deed of distribution dated August 14, 1986 and recorded in the York County Registry of Deeds at Book 3992, Pages 41-42, Barbara Lynde Rencurrel and Baybank Valley Trust Company, acting as personal representative of the estate of Alberta S. Lynde, granted to Leslie E. Lynde, a life estate in the same property, which was as described in the grant from Gertrude E. Day to Elisha E. Clark (Pl. Ex. 368), as follows:

“a certain lot or parcel of land situated on the southerly side of ‘King’s Highway’, so called, at Beachwood in Kennebunkport in the County of York County and State of Maine, bounded and described as follows: Beginning on said Highway at westerly corner of land of Henry H. Goodwin; thence westerly by said Highway one hundred feet (100) more or less, to land now or formerly of James E. Potter; **thence southerly by said Potter land, one hundred (100) feet to a hub and continuing same course to the sea or so far as my title extends; thence by the sea easterly, one hundred (100) feet to land of said Goodwin; thence by said Goodwin land northerly, one hundred (100) feet, more or less to point of beginning.**”

Pl. Ex. 363 (emphasis added).

372. Lynde Estate to Rencurrel (remainder interest). By deed of distribution dated June 18, 1993 and recorded in the York County Registry of Deeds at Book 6606, Pages 305-07, Barbara Lynde Rencurrel and Baybank Valley Trust Company, acting as personal representative of the estate of Alberta S. Lynde, granted to Barbara L. Rencurrel, the remainder interest in the property granted in life estate to Leslie E. Lynde by the 1986 deed from the Lynde estate, above. Pl. Ex. 361.

373. Rencurrel to B.L.R. Trust. By warranty deed dated November 12, 1998 and recorded in the York County Registry of Deeds at Book 9154, Pages 50-51, granted to the B.L.R. Qualified Personal Residence Trust **property of the same description** as

was granted to Barbara L. Rencurrel by the 1993 deed from the Lynde estate. Pl. Ex. 360.

374. B.L.R. Trust to Josselyn-Rose. By trustee's deed of distribution dated December 10, 2008 and recorded in the York County Registry of Deeds at Book 15532, Pages 47-48, Barbara Lynde Rencurrel, Kenneth L. Josselyn, and Leslie Josselyn-Rose, as trustees of the B.L.R. Qualified Personal Residence Trust, granted to Leslie Josselyn-Rose **property of the same description** as was granted to the B.L.R. Qualified Personal Residence Trust by the 1998 deed from Barbara L. Rencurrel. Pl. Ex. 359.

375. Josselyn-Rose to LAJR Trust. By warranty deed dated March 12, 2009 and recorded in the York County Registry of Deeds at Book 15587, Pages 491-492, Leslie A. Josselyn-Rose granted to Leslie A. Josselyn-Rose as trustee of the LAJR Trust **property of the same description** granted by the 2008 B.L.R. Trust deed, namely:

*“a certain lot or parcel of land situated on the southerly side of ‘Kings Highway’ so called at Beachwood in Kennebunkport in said York County bounded as follows: Beginning on said highway at westerly corner of land of Henry Goodwin; thence westerly by said highway one hundred feet to land of James E. Potter; **thence southerly by said Potter land about one hundred feet to a hub and continuing same course to the sea or so far as my title extends; thence by the sea easterly one hundred feet to land of said Goodwin; thence by said Goodwin land northerly one hundred feet more or less to point of beginning.**”*

Pl. Ex. 358 (emphasis added).

376. No evidence was presented regarding the location on the face of the earth of the “hub” referenced in the relevant deeds, or where the distances of the boundaries fell.

Sandifer—253 Kings Highway

377. The Sandifer property was also originally part of the Gregory Jeffrey and Joseph Jeffrey land; follows the same deed chain coming forward from Joseph Jeffrey to Fuller and Dow as Gallant, set out above; and proceeds forward from that point as follows.

378. Fuller/Dow to Flagg. By warranty deed dated August 27, 1889 and recorded in the York County Registry of Deeds at Book 443, Page 532, Benjamin F. Fuller, William H. Dow, and Orlando Dow granted to Christopher F. Flagg:

“a certain lot or parcel of land situated in Kennebunkport in the County of York and State of Maine, and bounded and described as follows, viz: **Beginning at a hub by the Sea at land of Gertrude E. Day; thence running Northerly** by land of said Gertrude E. Day to a highway formerly called the King’s Highway; thence Easterly by said highway one hundred feet to a hub; **thence Southerly on a line parallel with the first mentioned course to a hub by the sea; thence Westerly by the sea one hundred feet to the point of beginning**. Said lot is situated at ‘Goose Rocks Beach’ so called.”

Pl. Ex. 396 (emphasis added).

379. Flagg to Goodwin. By warranty deed dated February 13, 1894, recorded in the York County Registry of Deeds at Book 465, Pages 171-72, Christopher F. Flagg granted to H. H. Goodwin **property of the same description** as was granted to Christopher F. Flagg in the 1889 deed from Fuller and Dow. Pl. Ex. 395. Henry H. Goodwin passed away on August 14, 1920. According to probate documents, he was survived by his wife, Jennie M. Goodwin, his son Henry M. Goodwin, and his daughter, Isabel S. Goodwin. Pl. Ex. 395.

380. Goodwin Heirs to Patenaude. By warranty deed dated October 22, 1920 and recorded in the York County Registry of Deeds at Book 684, Pages 250-51, Jennie M. Goodwin, Isabel S. Goodwin, and Henry M. Goodwin granted to Samuel Patenaude **property of the same description** as was granted to H. H. Goodwin in the 1894 Flagg-to-Goodwin deed. Pl. Ex. 393.

381. Patenaude to Fairburn. By warranty deed dated May 22, 1926 and recorded in the York County Registry of Deeds at Book 759, Pages 313-14, Samuel Patenaude granted to George C. Fairburn “a certain lot or parcel of land together with the buildings thereon situated in Kennebunkport” described as follows:

“Beginning at a hub by the sea at land formerly of Gertrude E. Day, now supposed of one Arnold; thence northerly by land of Arnold to a highway

formerly called King's Highway; thence easterly by said highway one hundred (100) feet more or less to a hub; ***thence southerly on a line parallel with the first mentioned course to a hub by the sea; thence westerly by the sea one hundred (100) feet more or less to the point of beginning***, said lot is situated at Goose Rocks Beach, so called ...”

Pl. Ex. 392 (emphasis added).

382. Fairburn to Sturtevant. By warranty deed dated October 16, 1928 and recorded in the York County Registry of Deeds at Book 793, Pages 110-11, George C. Fairburn granted to Charles S. Sturtevant **property of the same description** as was granted to George C. Fairburn in the 1926 Patenaude-to-Fairburn deed. Pl. Ex. 391.

383. Sturtevant to MacPhie. By warranty deed dated July 31, 1929 and recorded in the York County Registry of Deeds at Book 804, Page 336, Charles S. Sturtevant granted to Elmore I. MacPhie **property of the same description** as was granted by George C. Fairburn to Charles S. Sturtevant. Pl. Ex. 390.

384. MacPhie to Gardner. By warranty deed dated August 13, 1929 and recorded in the York County Registry of Deeds at Book 804, Page 337, Elmore I. MacPhie granted to Archibald R. Gardner **property of the same description** as was granted by Charles S. Sturtevant to Elmore I. MacPhie. Pl. Ex. 389.

385. Gardner Estate to Gardner. An abstract of an authentic copy of the will of Archibald R. Gardner, recorded in the York County Registry of Deeds on December 6, 1965, at Book 1691, Page 437, indicates a devise to Goldie M. Gardner and Hazel A. Gardner as joint tenants all of Archibald R. Gardner's real estate, wherever situated. Pl. Ex. 388. *See also* Certificate of Discharge of Inheritance Tax, concerning **property of the same description** as was granted by Elmore I. MacPhie to Archibald R. Gardner, recorded in the York County Registry of Deeds at Book 2054, Page 639. Pl. Ex. 387. Goldie Gardner passed away on October 1, 1973.

386. Gardner to Sandifer and Bastos. By warranty deed dated January 9, 1981 and recorded in the York County Registry of Deeds at Book 2744, Pages 281-82, Hazel Gardner granted to Alex Bastos and Michael Sandifer “a certain lot or parcel of land, with the buildings thereon, situated between the Atlantic Ocean and the King’s Highway, so-called, at Goose Rocks Beach, Kennebunkport” and described as follows:

“Beginning at a hub by the sea at land formerly of Gertrude E. Day, now supposed of one Arnold; thence northerly by land of Arnold to a highway formerly called King’s Highway; thence easterly by said highway one hundred (100) feet more or less to a hub; **thence southerly on a line parallel with the first mentioned course to a hub by the sea; thence westerly by the sea one hundred (100) feet more or less to the point of beginning**, said lot is situated at Goose Rocks Beach, so called ...

Meaning and intending to convey and hereby conveying the premises which Archibald R. Gardner, received by deed of Elinore I. McPhie dated August 13, 1929, and recorded in the York County Registry of Deeds, Book 804, Page 337.”

Pl. Ex. 386 (emphasis added).

387. Sandifer and Bastos to Sandifer, Sandifer, Bastos and Bergen. By warranty deed dated May 15, 1997 and recorded in the York County Registry of Deeds at Book 8265, Pages 267-68, Michael Sandifer and Alexander Bastos granted to Michael Sandifer, Alice B. Sandifer, Alexander Bastos, and Kathleen Bergen as joint tenants **the same property with the same description** as was granted by Hazel Gardner to Michael Sandifer and Alexander Bastos in the 1981 Gardner-to-Sandifer/Bastos deed. Pl. Ex. 384.

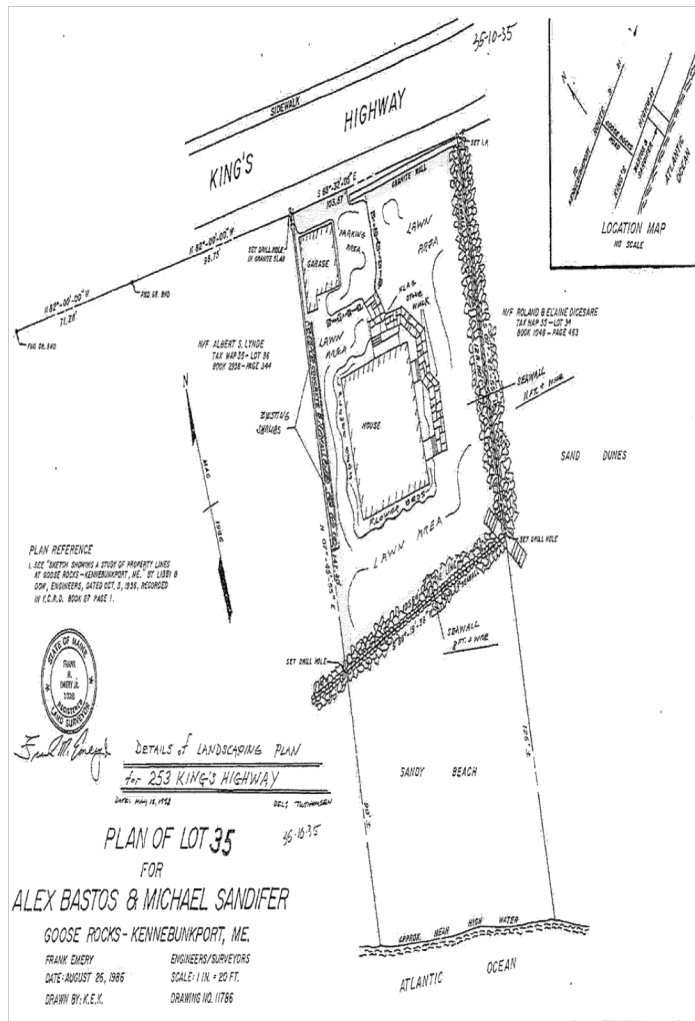
388. Sandifer to Sandifer Trust. By warranty deed dated August 31, 2005 and recorded in the York County Registry of Deeds at Book 14627, Page 144, Michael Sandifer and Alice B. Sandifer granted to Michael J. Sandifer and Alice B. Sandifer as co-trustees of the Alice B. Sandifer Trust their one-half undivided interest to property of the same description as was granted in the 1997 Sandifer/Bastos-to-Sandifer/Bastos/Bergen deed and the 1981 Gardner-to-Sandifer/Bastos deed, namely:

“Beginning at a hub by the sea at land formerly of Gertrude E. Day, now supposed of one Arnold; thence northerly by land of Arnold to a highway formerly called King’s Highway; thence easterly by said highway one hundred (100) feet more or less to a hub; thence southerly on a line parallel with the first mentioned course to a hub by the sea; thence westerly by the sea one hundred (100) feet more or less to the point of beginning, said lot is situated at Goose Rocks Beach, so called ...

Meaning and intending to convey our one-half undivided interest in the premises conveyed to the Grantors herein and Alexander Bastos and Kathleen Bergen, as joint tenants, by Warranty Deed of Michael Sandifer and Alexander Bastos dated May 15, 1997, which was recorded on May 20, 1997, in the York County Registry of Deeds in Book 8265, Page 267.”

Pl. Ex. 382 (emphasis added).

389. Exhibit 383 is a 1986 plan depicting the Sandifer lot:



Pl. Ex. 383.

390. No other evidence was presented as the specific location on the face of the earth of a “hub”, or the “set drill holes” or seawall depicted in the 1986 survey. Given all of the circumstances here, it is more likely than not the “hub” monuments marking the four corners of this parcel, two along the boundary on King’s Highway and two along the seawall, would have been located in the approximate places as the “set drill hole” monuments depicting the current boundaries of the parcel in the 1986 survey; and that the seawall depicted therein is located on or immediately proximate to the elevation of land or natural seawall between the dry sand of the beach and the upland lot.

Lencki—256 Kings Highway

391. The Lencki property was part of the 200-acre parcel of land conveyed to Benjamin Jeffery in 1734 in the will of John Jeffery. Def. Ex. 48, § E-2; Pl. Ex. 569, § E-2. The known deed chain of this property coming forward from Benjamin Jeffrey to Fuller and Dow is identical to that of the other eastern beach properties. See § IV(C), *supra*, ¶¶ 260-76. See also Pl. Ex. 397; Def. Ex. 48, at § G.

392. Fuller and Dow to William H. Dow. By deed dated September 30, 1881 and recorded in the York County Registry of Deeds at Book 440, Page 319, Benjamin F. Fuller and Orlando Dow granted to William H. Dow:

“a certain piece of land or Cottage Lot at Goose Rocks Beach in Kennebunkport, Maine, bounded as follows: *Beginning at the Ocean at the South corner of the lot this day conveyed to said Orlando Dow, thence N. 36° West by said Orlando’s lot over the Beach Wall and the town road to the N.E. side of the road to a hub, thence the same course by the Orlando lot three hundred feet from the road side to a hub at the westerly corner of the Orlando lot, **thence South 57° West by our land Seventy-One feet to a hub by the road side, and the (illegible) corner across the road and sea wall to the water, Thence S. 37° E. by the water to the lot of said Orlando at the place commenced at*** – Excepting therefrom the Town Road across (illegible). Also conveying to said William D. the right in common with us and our successors as owners of the premises adjoining said Avenue to pass and repass over the Avenue as laid out – 30 ft. wide and 300 feet long The South Westerly side of the Avenue to be within ten feet of the side of my [sic] the cottage of said Fuller.”

Pl. Ex. 241 (emphasis added).

393. William Dow to Francis A. Dow. By warranty deed dated November 17, 1893 and recorded in the York County Registry of Deeds at Book 458, Pages 491-92, William Dow granted to Francis A. Dow:

“all my right, title and interest in and to a certain piece of Land or Cottage Lot at Goose Rocks Beach in Kennebunkport, Maine: bounded as follows: **Beginning at the Ocean at the South corner of the lot conveyed to Orlando Dow; Sept. 30th 1881 thence N. 36° West by said Orlando’s lot over the Beach wall and the town road to the N.W. side of the road to a hub**, thence the same course by the Orlando lot three hundred feet from the roadside to a hub at the Westerly corner of the Orlando lot, thence South 57° West Seventy-one feet to the Easterly side of ‘Belvidere Avenue’; thence by said Avenue S. 36° East three hundred feet to a hub by the roadside, **and the same course across the road and sea wall to the water; thence N. 57° E. by the water to the lot of said Orlando at the place commenced at**, Excepting therefrom the Town Road across the same – Also conveying to said Francis A. Dow the right in common with Benjamin F. Fuller and Orlando Dow and their successors as owners of the premises adjoining said Avenue, to pass and repass over the Avenue as laid out – 35 feet wide and 300 feet long. The Southwesterly side of the Avenue to be within ten feet of the side of the B. F. Fuller cottage.”

Pl. Ex. 428 (emphasis added).

394. Dow to Foss. By warranty deed date August 11, 1899 and recorded in the York County Registry of Deeds at Book 495, Pages 514-16, Francis A. Dow granted to Mabel E. Foss:

“a certain tract of land situated at Goose Rocks Beach in Kennebunkport, Maine, bounded and described as follows, to wit; Beginning at the intersection of the town road and Belvidere Avenue at the Southwesterly corner of that part of land conveyed to me by William H. Dow by deed dated Nov. 8, 1873 which lies on the Northerly side of the town road; thence along the Easterly side of said Belvidere avenue one hundred feet to a point, thence in an Easterly direction, parallel with the said town road a distance of seventy-one feet to a point; thence on a line parallel with said Belvidere Avenue one hundred feet to the Northerly side of said town road; and thence along said town road in a Westerly direction seventy-one feet to the point of beginning.

Also that part of the land conveyed to me by William H. Dow as aforesaid which lies between the said town road and the ocean. Together with the right of passage over said Belvidere Avenue conveyed to me by said deed of William H. Dow.”

Pl. Ex. 427 (emphasis added).

395. Mabel E. Foss to Emma Foss. By warranty deed dated February 1, 1901 and recorded in the York County Registry of Deeds at book 507, Page 413, Mabel E.

Foss granted to Emma Foss **property of the same description** as was granted to Mabel E. Foss by the 1899 Dow-to-Foss deed. Pl. Ex. 426.

396. Foss to Bacon. By warranty deed dated April 27, 1910 and recorded in the York County Registry of Deeds at Book 591, Page 411, Emma Foss granted to Lewis H. Bacon **property of the same description** as was granted by Mabel E. Foss to Emma Foss. Pl. Ex. 425.

397. Bacon to Woodman. By warranty deed dated June 9, 1924 and recorded in the York County Registry of Deeds at Book 784, Pages 59-61, Lewis H. Bacon granted to Flossie I. Woodman “a certain lot or parcel of land with the buildings thereon, situated at ‘Goose Rocks’ so called, otherwise known as Beachwood, in Kennebunkport” and described as follows:

“Beginning at a point on the northerly side of the town road at the intersection of said town road and Belvidere Avenue; Thence northerly by the easterly side of said Belvidere Avenue, one hundred (100) feet to an iron pipe; Thence easterly and parallel with said town road by land now or late of Foss, seventy-one (71) feet to a stone bound; Thence southerly and parallel with said Belvidere Avenue, one hundred (100) feet to the northerly side of said town road; Thence westerly by said town road, seventy-one (71) feet to the point of beginning; And containing seventy-one hundred (7100) square feet, by any or all of said measurements more or less.

Also that parcel of land conveyed to me by Emma L. Foss, which lies between said town road and the ocean, together with the right of passage over said Belvidere Avenue as mentioned in the deed of Mabel E. Foss to Emma L. Foss...”

Pl. Ex. 424 (emphasis added). The first paragraph describes the portion of the lot north of the town road; the second paragraph refers to the property lying on the south, or water side of the road.

398. Flossie I. Woodman to Lloyd G. Woodman. By warranty deed dated March 13, 1926 and recorded in the York County Registry of Deeds at Book 746, Page 364, Flossie I. Woodman granted to Lloyd G. Woodman **property of the same description** as was granted by Lewis H. Bacon to Flossie I. Woodman. Pl. Ex. 423.

399. Woodman to Flossie I. and Philip F. Woodman as joint tenants. By warranty deed granted that same day and recorded in the York County Registry of Deeds at Book 758, Pages 314-15, Lloyd G. Woodman granted to Flossie I. Woodman and Philip F. Woodman as joint tenants, **property of the same description** as was granted by Flossie I. Woodman to Lloyd G. Woodman. Pl. Ex. 422.

400. Woodman to Crowley. By warranty deed dated May 20, 1927 and recorded in the York County Registry of Deeds in Book 766, Page 224, Philip F. Woodman (Flossie Woodman deceased) granted to Helene B. Crowley **property of the same description** as was granted by Lloyd G. Woodman to Flossie I. Woodman and Philip F. Woodman as joint tenants. Pl. Ex. 421.

401. Crowley to Woodman. By warranty deed dated May 20, 1927 and recorded in the York County Registry of Deeds at Book 773, Pages 247-48, Helene B. Crowley granted to Alfred K. Woodman, Lloyd G. Woodman, Philip F. Woodman and Paul M. Woodman as joint tenants **property of the same description** as was granted by Philip F. Woodman to Helene B. Crowley. Pl. Ex. 420.

402. Woodman to Crowley. By warranty deed dated January 25, 1928 and recorded in the York County Registry of Deeds at Book 766, Page 509, Alfred K. Woodman, Philip F. Woodman, and Lloyd G. Woodman granted Helene B. Crowley **property of the same description** as was granted by Helene B. Crowley to Alfred K. Woodman, Philip F. Woodman, Lloyd G. Woodman, and Paul M. Woodman. Pl. Ex. 419.

403. Paul M. Woodman to Crowley. By deed dated January 25, 1928 and recorded in the York County Registry of Deeds at Book 778, Pages 536-38, Lloyd G. Woodman, as guardian for Paul M. Woodman, granted to Helene B. Crowley any interest Paul M. Woodman may have had to the **property of the same description** granted by

Helene B. Crowley to Alfred K. Woodman, Philip F. Woodman, Lloyd G. Woodman, and Paul M. Woodman. Pl. Ex. 418.

404. Crowley to Philip F Woodman and Lloyd G. Woodman. By warranty deed dated January 25, 1928 and recorded in the York County Registry of Deeds at Book 778, Pages 538-39, Helene B. Crowley granted to Philip F. Woodman and Lloyd G. Woodman as joint tenants **property of the same description** as was granted by Alfred K. Woodman, Philip F. Woodman, Lloyd G. Woodman to Helene B. Crowley. Pl. Ex. 417.

405. Philip F. Woodman to Lloyd G. Woodman. By warranty deed dated April 23, 1930 and recorded in the York County Registry of Deeds at Book 800, Page 382, Philip F. Woodman granted to Lloyd G. Woodman all of his interest in **property of the same description** as was granted by Helene B. Crowley to Philip F Woodman and Lloyd G. Woodman as joint tenants. Pl. Ex. 415.

406. York Loan & Building Assoc. Notice of Foreclosure. On March 22, 1930 York Loan & Building Assoc. entered and took possession of **property of the same description** as that granted by Philip F. Woodman to Lloyd G. Woodman for the purpose of foreclosing upon a mortgage for breach. This notice was recorded in the York County Registry of Deeds at Book 814, Pages 375-76. Pl. Ex. 416.

407. York Loan & Building Assoc. to Lloyd G. Woodman. By foreclosure deed dated June 4, 1930 and recorded in the York County Registry of Deeds at Book 800, Page 424, York Loan and Building Association granted to Lloyd G. Woodman **property of the same description** as that foreclosed upon by York Loan & Building Assoc. Pl. Ex. 413.

408. Woodman to Stedman. By warranty deed dated May 31, 1930 and recorded in the York County Registry of Deeds at Book 809, Page 232, Lloyd G. Woodman granted to Howard S. Stedman:

“A certain lot or parcel of land, with buildings thereon, situated at Goose Rocks Beach, so-called, in Kennebunkport in the County of York and State of Maine, at the corner of Belvidere Avenue and King’s Highway, so-called, bounded and described as follows: Beginning at the intersection of the Northeasterly side line of said Belvidere Avenue with the Northwesterly side line of said King’s Highway and running North 33° 20’ West, ninety-six (96) feet to an iron stake set in the ground at the corner of land of Mabel E. Gordon; said iron stake being forty-four and 75/100 (44.75) feet Southeasterly from the Westerly corner of the house of said Gordon, and forty-nine and 2/10 (49.2) feet Westerly from the Westerly corner of the ell (not the garage or passageway connecting) of the house now or formerly of Lloyd G. Woodman; thence running Northeasterly by said Gordon land to the Easterly corner of said Gordon land and an iron stake set in the ground at a point ninety-eight and one-half (98 ½) feet Northwesterly from an iron stake set in the ground at the Easterly corner of the lot hereby conveyed and the approximate present line of King’s Highway; thence running Southeasterly by land of one Reoch ninety-eight and one half (98 ½) feet and to said iron stake set in the approximate present line of said King’s Highway; thence running Southwesterly by said King’s Highway to said Belvidere Avenue and point of beginning.

Also, all my right, title and interest in and to all the ***land lying Southeasterly of the above described lot and between the Southwesterly and Northeasterly side lines of the above described lot extended to the ocean***; together with right of passage over said Belvidere Avenue appurtenant to the above described premises. The above stakes and courses are more particularly shown on a plan of lands of Mabelle E. Gordon and Philip F. Woodman survey by Libby & Dow, May 14 1930, and recorded in the York County Registry of Deeds in Plan Book 11, Page 35.”

Pl. Ex. 411 (emphasis added). The first paragraph describes a larger, rectangular parcel with structures north of King’s Highway; the second paragraph describes a smaller, irregularly-shaped parcel on the seaward side of the road, as reflected in the referenced 1930 plan. Pl. Ex. 412:

409. Stedman to Schaltenbrand. By warranty deed dated September 23, 1952 and recorded in the York County Registry of Deeds a Book 1219, Pages 471-73, Howard S. Stedman granted to Alfred L. Schaltenbrand and Alice G. Schaltenbrand as joint tenants **property of the same description** as was granted by Lloyd G. Woodman to Howard S. Stedman. Pl. Ex. 409.

410. Schaltenbrand to Finnegan. By warranty deed dated November 18, 1965 and recorded in the York County Registry of Deeds at Book 1691, Pages 16-18, Alfred L. and Alice G. Schaltenbrand granted to James W. and Gloria M. Finnegan as joint

tenants **property of the same description** as was granted to Schaltenbrand in the 1952 Stedman-to-Schaltenbrand deed. Pl. Ex. 408.

411. Finnegan to Kershaw. By warranty deed dated May 31, 1971 and recorded in the York County Registry of Deeds at Book 1907, Pages 396-97, James W. and Gloria M. Finnegan granted to Violet G. and Clifford Kershaw as joint tenants **property of the same description** as was granted to Finnegan in the 1965 Schaltenbrand-to-Finnegan deed. Pl. Ex. 407. Clifford Kershaw died on February 10, 1982.

412. Kershaw to Gordon E. and Carolyn G. Kershaw (one-half interest). By warranty deed dated September 21, 1982 and recorded in the York County Registry of Deeds at Book 2998, Page 235, Violet G. Kershaw granted to Gordon E. Kershaw and Carolyn G. Kershaw a one-half interest in common and undivided in **property of the same description** as that granted by the 1971 Finnegan-to-Kershaw deed. Pl. Ex. 405.

413. Kershaw to Emery (one-half interest). By warranty deed dated September 21, 1982 and recorded in the York County Registry of Deeds at Book 2998, Page 236, Violet G. Kershaw granted to George W. Emery and Patricia L. Emery a one-half interest in common and undivided in **property of the same description** as was granted by the 1971 Finnegan-to-Kershaw deed. Pl. Ex. 404.

414. Gordon and Carolyn G. Kershaw to Violet G. Kershaw (one-half interest). By warranty deed dated May 22, 1984 and recorded in the York County Registry of Deeds at Book 3329, Page 71, Gordon E. Kershaw and Carolyn G. Kershaw granted to Violet G. Kershaw the same one-half, common and undivided interest as was granted by Violet G. Kershaw to them. Pl. Ex. 402.

415. Emery to Violet G. Kershaw (one-half interest). By warranty deed dated May 30, 1984 and recorded in the York County Registry of Deeds at Book 3329, Page 72, George W. Emery and Patricia L. Emery granted to Violet G. Kershaw the same one-half,

common and undivided interest as was granted by Violet G. Kershaw to them. Pl. Ex. 403.

416. Kershaw to Barry. By warranty deed dated June 29, 1984 and recorded in the York County Registry of deeds at Book 3329, Pages 68-70, Violet G. Kershaw granted to Jane N. Barry and Henry R. Barry, Jr. **property of the same description** as was granted by Gordon E. Kershaw and Carolyn G. Kershaw and by George W. Emery and Patricia L. Emery to Violet G. Kershaw by way of two separate deeds as set out above. Pl. Ex. 401. Henry Barry died on July 27, 1985.

417. Barry to Lencki. By warranty deed dated May 10, 1995 and recorded in the York County Registry of Deeds at Book 7408, Pages 31-32, Jane N. Barry granted to Donna K. Lencki **property of the same description** as was granted by Violet G. Kershaw to Jane N. Barry and Henry R. Barry, Jr. Pl. Ex. 399.

418. Lencki to Lencki Trust. By warranty deed dated October 5, 2006 and recorded in the York County Registry of Deeds at Book 14985, Page 760, Donna K. Lencki granted to Donna K. Lencki, trustee of The Donna K. Lencki Revocable Trust of 1993 property of the same description as was granted by Jane N. Barry to Donna K. Lencki, namely as follows:

“A tract or parcel of land, with any improvements thereon, situated at Goose Rocks Beach, so-called, in the Town of Kennebunkport, County of York, State of Maine, at the corner of Belvedere Avenue and the King’s Highway, so-called, more particularly bonded and described as follows:

Beginning at the intersection of the Northeasterly side line of said Belvedere Avenue with the Northwesterly side line of said King’s Highway and running North 33° 20’ West, a distance of ninety-six (96) feet to an iron stake set in the ground at the corner of land now or formerly of Mabel E. Gordon; said iron stake being forty-four and 75/100 (44.75) feet Southeasterly from the Westerly corner of the house of said Gordon, and forty-nine and 2/10 (49.2) feet Westerly from the Westerly corner of the ell (not the garage or passageway connecting) of the house now or formerly of one Lloyd G. Woodman;

Thence running Northeasterly by said Gordon land to the Easterly corner of said Gordon land and an iron stake set in the ground at a point ninety-eight and one-half (98.5) feet Northwesterly from an iron stake set in the ground at the Easterly

corner of the lot hereby conveyed and the approximate present line of King's Highway;

Thence running Southeasterly by land now or formerly of one Reoch ninety-eight and one half (98.5) feet and to said iron stake set in the approximate present line of said King's Highway;

Thence running Southwesterly by said King's Highway to said Belvedere Avenue and point of beginning.

*Also, all my right, title and interest in and to all **the land lying Southeasterly of the above described lot and between the Southwesterly and Northeasterly side lines of the above described lot extended to the ocean**; together with right of passage over said Belvidere Avenue appurtenant to the above described premises. The above stakes and courses are more particularly shown on a plan of lands of Mabelle E. Gordon and Philip F. Woodman survey by Libby & Dow, May 14 1930, and recorded in the York County Registry of Deeds in Plan Book 11, Page 35."*

Pl. Ex. 398 (emphasis added).

419. The smaller portion of the Lencki property between King's Highway and the beach as described in the second paragraph above is seaward of a man-made, rock seawall, which is on the seaward side of the road. On the seaward side of this smaller parcel, there is a natural seawall and a vegetation line described as "Seawall vegetation line," which lies inland of the higher high tide line. Yarumian Test. (Tr. VII 43:20 – 44:11); Def. Exs. 53, 55 (Plot 5).

Scribner—291 Kings Highway

420. The Scribner property was originally part of the Gregory Jeffrey lands, and then the 200-acre parcel devised to Joanna Jeffrey in 1734. See Def. Exs. 48, 79; Pl. Ex. 569, § G. The Joanna Jeffrey parcel is described as "beginning at a Pitch pine Tree on the northeast-side of sd Farm" and then "running southwest Eighty Rods to a pitched pine Tree standing on the Sea Wall marked four sides, then running norwest four hundred Rods to a Hemlock Tree marked four Sides. Then northeast Eighty Rods, Then South east to the first Bounds mentioned." Pl. Ex. 284.

421. The chain of title coming forward from Joanna Jeffrey is disputed, and the record establishes two alternate pathways coming forward in time to 1875, at which point the parties agree that title comes to rest in Robert Campbell and then proceeds forward from him. The chain of title asserted by Plaintiffs is reflected in the abstractor's title chain that is Plaintiffs' Exhibit 429, set out as follows.³⁹

422. John Jeffery to Benjamin Jeffery. By deed dated March 20, 1786 and recorded in the York County Registry of Deeds at Book 49, Pages 81-82, John Jeffery granted to Benjamin Jeffery:

*“five acres of Salt marsh lying in Arundel aforesaid and is bounded as follows Viz. by Richard Downing Westwardly, Northwardly on the River called the Eastern Branch, Eastwardly by Marsh (illegible) by Benjamin Jeffery, Southwardly on the Sea wall, Also Fourteen acres of Salt marsh lying in Arundel Bounded Westwardly on marsh belonging to Jacob Wildes, Northwardly on Marsh belonging to Thomas Wilds, Eastwardly on Eliakim Emmons Southwardly on the pines and also a piece or tract of upland in Arundel Containing **Two Hundred Acres more or less bounded as follows Southwardly on the Sea beginning at a pitch pine tree marked by Eliakim Emmons land from thence Running North West two hundred & Forty Rods from thence North east forty Six Rods to Land belonging to John Emmons thence South East to the Sea Wall thence South west to the first mentioned bound together with all the Buildings thereon**”*

Pl. Ex. 453 (emphasis added).

423. Estate of Benjamin Jeffery to William Jeffery and Samuel Jeffery. By executor's deed dated December 19, 1837 and recorded in the York County Registry of Deeds at Book 158, Page 186L, William and Samuel Jeffery acquired “a certain piece or parcel of land lying and being situated in Kennebunkport aforesaid near the dwelling

³⁹ The other pathway coming forward from Joanna Jeffrey is reflected in Plaintiffs' Exhibit 569, § G. This alternate path of title converges in part with the one shown in Plaintiffs' Exhibit 429 (which is detailed above) at the point of an 1847 deed from Jonathon S. Jeffery to Amos Proctor. See ¶ 427, *infra*. In the alternate title chain shown in Plaintiffs' Exhibit 569, there are six intervening deeds between Joanna Jeffrey and Jonathon Jeffery. The earliest three deeds convey “all right, title and interest” of “upland and marsh” or “land lying in Arundel” in which John Jeffery was “seized and possessed.” Pl. Ex. 569, § G. The later three deeds that follow use a more precise metes and bounds description of the seaward boundary of the lot, which starts at “a pitch pine tree marked on four sides thence southwest forty-three (43) rods (709.50') to another pitch pine tree marked on four sides.” *Id.* These deeds made a general reference to the James Jeffery land being “near the sea” or “at the sea.” *Id.*

house of the late Eliza Jeffery deceased being on the northerly side of a lot of two and one half acres which he purchased from James Jeffery to [illegible] the lot to seven and one half” Pl. Ex. 451.

424. William Jeffery to Samuel Jeffery. By deed dated December 19, 1836 and recorded in the York County Registry of Deeds at Book 158, Page 186R, William Jeffery, heir of Benjamin Jeffery, granted to Samuel Jeffery:

“the following lot of land situated in said Kennebunkport and bounded as follows, on the south west by land of Jonathan Jeffery, **on the southeast by the sea**, on the northwest by the public highway, and on the northwest by land of heirs of (illegible) Emmons, and land of (illegible) Emmons, the above being part of the real estate of the late Benjamin Jeffery, deceased.”

Pl. Ex. 452 (emphasis added).

425. Samuel Jeffery to Mary J. Jeffery. By warranty deed dated December 2, 1861 and recorded in the York County Registry of Deeds at Book 274, Page 259, Samuel Jeffery granted to Mary J. Jeffery “the dwelling house and outbuildings now occupied by me together with the land under and adjoining the same” The remainder of the instrument is illegible. Pl. Ex. 449.

426. Mary J. Jeffery to Robert Campbell. By warranty deed dated May 24, 1875 and recorded in the York County Registry of Deeds at Book 356, Page 112, Mary J. Jeffery granted to Robert Campbell:

“a certain parcel of land or cottage lot in front of my dwelling house in said Kennebunkport and bounded as follows: Beginning upon the sea side of the town road leading to the house of (Illegible) Emmons at the corner of the land of Eldridge G. Proctor, thence Northeasterly by said town road eight rods to the corner of the lot this day deeded to Alfred Pierce, **thence Southeasterly by the Pierce lot sixteen rods to the sea wall, thence Southwesterly by the sea wall three rods to the Proctor line**, thence Northwesterly by the Proctor land seventeen rods to the town road at the corner commenced at, containing about half as acre, being the same lot where said Campbell buildings now stand.”

Pl. Ex. 448 (emphasis added).

427. In addition, the abstractor’s title chain shows a second branch of title leading into Robert Campbell. This apparently represents the other half of the property

that was united in Robert Campbell by virtue of the second line of deeds, starting with the February 9, 1847 conveyance from Jonathon Jeffery to Amos Proctor of:

“the farm on which I now live, situated in Kennebunkport, and bounded thus, Beginning at a pitch pine tree standing at the southerly corner of the Samuel Jeffrey’s land *near the sea*, and running southwest forty three (43) rods (709.50’) to James Jeffrey’s land, thence northwest by James land . . . thence by said Samuel southwesterly and southeasterly to the bounds first named, containing 95 Acres more or less.”

Pl. Ex. 569, § G (emphasis added).

428. Amos Proctor to Eldridge Proctor. By warranty deed dated March 13, 1858 and recorded in the York County Registry of Deeds at Book 257, Page 59, Amos Proctor granted to Eldridge Proctor:

“one undivided half part of a certain lot of land, with the buildings thereon , situated in said Kennebunkport and bounded as follows:

Beginning at a Pitch Pine tree standing at the southerly corner of Samuel Jeffrey’s land near the sea and running southwest forty three rods to James Jeffrey’s land; thence northwest by said James Jeffrey’s land to the stone wall; thence southwesterly by said James’s land to William Bush’s ditched marsh; and then northeast by same to a ditch to said Bush’s northerly corner; thence northwesterly by said grantee’s land to the road & a red oak tree near the road; thence northwesterly by the road to James Jeffrey’s land & northwesterly by same to his southerly corner; thence northeast forty three rods to the Walker lot; thence northwesterly by said James to said road & by the road northeasterly to Isaac Jeffrey’s land; thence by said Isaac’s land to a creek of Ezekiel Emmons land & by said creed to Samuel Jeffrey’s land; thence by land last named and southeast to the bounds first named.

Also the reversion of said Grantor in the other undivided half of the same premises that is, the other undivided half of the above named premises, to take effect after the decease of said Grantor, who reserves to himself the right to a life estate in one undivided half of said property.”

Def. Ex. 75 (emphasis added).

429. Proctor to Campbell. By warranty deed dated March 14, 1877 and recorded in the York County Registry of Deeds at Book 364, Page 477, Eldridge G. Proctor conveys to Robert Campbell:

“A certain piece of land or building lot upon the Easterly side of the road leading between the summer residence of said Campbell and the dwelling house of Mrs. Samuel Jeffrey at the Goose Rocks beach in said town of Kennebunkport and bounded as follows: Beginning on said road at the West corner of a lot said Campbell lot of Mary J. Jeffrey; **thence by said Campbell lot to the sea wall as**

indicated by his new fence; thence South Westerly upon the sea wall one hundred sixty feet to my reserved road to the sea; thence northerly by said reserved road to the town way or road first mentioned about one hundred seventy feet; thence by said fist mentioned road fifty feet to the corner commenced at.”

Pl. Ex. 582 (emphasis added).

430. Robert Campbell’s rights in and to the property were passed to his heirs as set out below, although there is no will or other record in evidence documenting this devise.

431. Campbell Heirs to Howard and Campbell. By deed dated May 16, 1900 and recorded in the York County Registry of Deeds at Book 508, Pages 251-53, Robert A. Campbell, J. Byron Campbell, Francis D. Campbell, Mary B. Owen, Nellie J. Campbell, and Sarah A. Cowan, as heirs of Robert Campbell, granted to Florence C. Howard and Charles J. Campbell:

“a certain lot or parcel of land with all buildings thereon situate in Kennebunkport in said York County bounded as follows: **On the Southeast by the Sea Wall**. On the Southwest by a Reserved Street; On the Northwest by the road known as the “Town Road” leading to the house of Geo. H. Emmons; on the Northeast by the land of heirs of John T. Smith *and being the same premises conveyed to Robert Campbell by deed of Eldridge G. Proctor dated March 14, 1877* and recorded in York Registry of Deeds Book 364 Page 447 and by deed of Mary J. Jeffrey to Robert Campbell dated May 24, 1875 and recorded in York County Registry of Deeds Book 356, Page 112 to which deeds reference may be had for a more particular description.

Also one other parcel of land situate in said Kennebunkport bounded on the Northeast by land of Eliakim Emmons, On the Southeast by a ditch at the edge of the Marsh, On the Southwest by land of Isreal Emmons and on the Northwest by land of Oliver Emmons, containing about four and one half (4 ½) acres...”

Pl. Ex. 447 (emphasis added).

432. Howard to Campbell. By warranty deed dated December 12, 1900 and recorded in the York County Registry of Deeds at Book 507, Page 214, Florence C. Howard granted to Charles J. Campbell all of her interest in and to:

“a certain lot or parcel of land with buildings thereon situated in Kennebunkport in the County of York and State of Maine, bounded and described as follows: **beginning at a point on the sea wall at the southeasterly corner of a reserved street or road and running thence by said street or road to the “Town Road”** so-called: thence by said “Town Road” eighty two feet: **thence**

southerly to said sea wall: thence by said sea wall one hundred and eighteen feet to point of beginning; said lot or parcel of land being a part of a lot or parcel of land conveyed to me and to Charles J. Campbell by Robert A. Campbell et al. by their deed dated May 16th (illegible) 1900 and registered in the York County Registry of deeds Book 505 Page 251.”

Pl. Ex. 446 (emphasis added).

433. Campbell to Scribner. By warranty deed dated January 10, 1901 and recorded in the York County Registry of Deeds at Book 509, Pages 392-93, Charles J.

Campbell granted to George Scribner a parcel of land:

“situated in Kennebunkport in County of York and State of Maine and bounded and described as follows: beginning at a point on the easterly side of Town road running between this lot and farm of Samuel J. Jeffrey and leading to farm of Geo. H. Emmons; thence running in a Northeasterly direction along the line of said Town road eighty two (82) feet to land of Florence C. Howard, **thence in a southeasterly direction in a straight line along the land of Florence C. Howard about (200) ft to the Sea wall thence in a southwesterly direction along bulk head on sea wall one hundred and eighteen (118) feet to a reserved road leading from aforesaid Town road to the sea;** thence in a northwesterly direction along line of said reserved road about (200) feet to Town road the point of beginning; said lot is the whole of lot of land conveyed to me by Florence C. Howard by her deed December 8, 1900 and recorded in the York County register of deeds Book 507 Page 214 to which deed reference may be had for further description of said property.”

Pl. Ex. 445 (emphasis added). George Scribner died on January 10, 1935 and devised the property to Flora Scribner and Samuel Scribner. See Pl. Ex. 429.

434. Estate of Samuel Scribner to Dorothy H. Scribner. An abstract of an authenticated copy of the will of Samuel H. Scribner was recorded in the York County Registry of Deeds on October 4, 1955, at Book 1296, Page 212. Samuel H. Scribner passed away on September 13, 1955 and devised to his wife, Dorothy H. Scribner, “all of the rest, residue and remainder of my property of every name and nature and wherever found, including both real and personal property, unto the said Dorothy H. Scribner, to her and her heirs and assigns.” Pl. Ex. 240.

435. Beatrice Eldridge to Dorothy A. Scribner. By warranty deed dated October 8, 1980 and recorded in the York County Registry of Deeds at Book 2711, Pages 175-77, Beatrice Eldridge granted to Dorothy A. Scribner:

“All my right, title and interest in and to a certain lot or parcel of land situated in said Kennebunkport at Goose Rocks Beach, and more particularly bounded and described as follows:

Beginning at the Northwesterly corner of land of Grantee; *thence Southerly by said land of Grantee to low water mark of the Atlantic Ocean or so far as Grantor may own*; thence Westerly by said Ocean 20.67 feet, more or less, to a point in the extension Southerly of the centerline of the former passageway between lands of Grantor and Grantee; thence Northerly by said extension and by land simultaneously being conveyed by Grantee to Grantor, to land of George Scribner, et al., thence Easterly by said George Scribner land 20.67 feet to the point of beginning.

The above-described lot is part of what was once referred to as a two and one half rod passageway, but which has been claimed, owned and occupied exclusively by grantor and her predecessors in title, for approximately 80 years.”

Pl. Ex. 442 (emphasis added). This deed conveyed a 20-foot passageway abutting the Scribner property to the west. It was included as a “Reference” deed only; had not been part of the Scribner property heretofore; and is not in the chain of title to the property in issue.

436. Estate of Dorothy H. Scribner to Robert J. Scribner. By deed of distribution dated October 3, 1986 and recorded in the York County Registry of Deeds at Book 4064, Pages 211-14, George C. Scribner and Robert J. Scribner as co-personal representatives of the estate of Dorothy H. Scribner granted to Robert J. Scribner **a 69.63% interest** in:

“A certain lot or parcel of land with all the buildings and improvements thereon situated Southeasterly of, but not adjacent to the Kings Highway in that part of the Town of Kennebunkport, County of York and State of Maine known as Goose Rocks Beach and being more particularly bounded and described as follows:

Beginning at an iron pipe set in the ground and land now or formerly of Barbara Mitchell, which said pipe marks the Southeasterly corner of land conveyed by Dorothy H. Scribner to George C. Scribner and Robert J. Scribner by Warranty Deed dated February 26, 1973, and recorded in the York Registry of Deeds Book 1983, Page 38; ***thence running by said land now or formerly of Mitchell, S 10° 28' 14" E, 135 feet more or less, to a seawall; thence running about S***

88° 37' 42" W, 117.62 feet, more or less, along said seawall to a point; thence running N 03° 32' 24" W, 125 feet to a found iron pipe at the Southwesterly corner of the foresaid land conveyed by Dorothy H. Scribner to George C. and Robert J. Scribner in Book 1983, Page38; thence running N 83° 52' 46" E, 101.35 feet, more or less, to the point of beginning.

Also hereby conveying all of the right, title and interest of the Grantors, in and to all land lying adjacent to and Southerly of the Southerly boundary of the above described parcel to the Atlantic Ocean which lies between the prolongation Southerly of the Easterly and Westerly boundaries of the first above described parcel...

Said lot is conveyed subject to:

...

(2) The rights of the public in that portion between high and low water mark, as granted by the Colonial Ordinances of 1641 and as now enforced..."

Pl. Ex. 438 (emphasis added).

437. Estate of Dorothy H. Scribner to George C. Scribner. By deed of distribution dated October 3, 1986 and recorded in the York County Registry of Deeds at Book 4064, Pages 215-18, George C. Scribner and Robert J. Scribner as co-personal representatives of the estate of Dorothy H. Scribner granted to George C. Scribner **a 30.37% interest in property of the same description** as was granted by George C. Scribner and Robert J. Scribner as co-personal representatives of the estate of Dorothy H. Scribner to Robert J. Scribner. Pl. Ex. 437.

438. George C. Scribner to Robert J. Scribner. By quitclaim deed dated October 6, 1986 and recorded in the York County Registry of Deeds at Book 4064, Pages 219-21, **George C. Scribner granted to Robert J. Scribner his 30.37% interest** in the **same property** that was granted to him the estate of Dorothy H. Scribner in the October 3, 1986 deed above. Pl. Ex. 436.

439. Estate of Robert J. Scribner to Eleanor A. Scribner. By deed of distribution dated July 30, 2004 and recorded in the York County Registry of Deeds at Book 14225, Pages 135-36, Eleanor A. Scribner as personal representative for the estate of Robert J. Scribner granted to Eleanor A. Scribner **property of the same description** as was

granted by George C. Scribner and Robert J. Scribner as co-personal representatives of the estate of Dorothy H. Scribner to Robert J. Scribner and by George C. Scribner to Robert J. Scribner. Pl. Ex. 433.

440. Eleanor A. Scribner to Scribner Trust. By warranty deed dated July 30, 2004 and recorded in the York County Registry of Deeds at Book 14225, Pages 139-42, Eleanor A. Scribner granted to Eleanor A. Scribner and Robert H. Scribner, trustees of the Eleanor A. Scribner Qualified Personal Residence Trust **property of the same description** as was granted by Eleanor A. Scribner, personal representative of the estate of Robert J. Scribner to Eleanor A. Scribner. Pl. Ex. 432.

441. Scribner Trust to Jaccoma, Scribner, and Wallingford. By deed of distribution dated January 12, 2015 and recorded in the York County Registry of Deeds at Book 16960, Pages 401-10, Eleanor A. Scribner and Robert H. Scribner as trustees of the Eleanor A. Scribner Qualified Personal Residence Trust granted to Susan S. Jaccoma, Robert H. Scribner, and Joy S. Wallingford **property of the same description** as was granted by Eleanor A. Scribner to Eleanor A. Scribner and Robert H. Scribner, trustees of the Eleanor A. Scribner Qualified Personal Residence Trust. Pl. Ex. 431.

442. Jaccoma, Scribner, and Wallingford to 291 Rear King's Highway, LLC. By quitclaim deed dated January 12, 2015 and recorded in the York County Registry of Deeds at Book 16960, Page 406, Susan S. Jaccoma, Robert H. Scribner, and Joy S. Wallingford granted to 291 Rear King's Highway, LLC **property of the same description** as was granted by Eleanor A. Scribner and Robert H. Scribner as trustees of the Eleanor A. Scribner Qualified Personal Residence Trust to Susan S. Jaccoma, Robert H. Scribner, and Joy S. Wallingford. Pl. Ex. 430.

Asplundh—17 Sandpoint Road

443. The Asplundh property was originally part of the Jeffrey lands, specifically the 200-acre parcel of land conveyed to Joanna Jeffrey in 1734 in the will of John Jeffrey. Def. Ex. 48, §H; Pl. Ex. 569, §H. See Yarumian Test. (Tr. VII 102:21 – 113:3). As noted above, that conveyance described the relevant boundary as: “beginning at a Pitch pine Tree on the northeast-side of sd Farm” and then “running southwest Eighty Rods to a pitched pine Tree standing on the Sea Wall marked four sides, then running norwest four hundred Rods to a Hemlock Tree marked four Sides. Then northeast Eighty Rods, Then South east to the first Bounds mentioned.” Pl. Ex. 284.

444. Coming forward in time from 1734, the Joanna Jeffrey lands were passed down to or held by various members of the Jeffrey family, ultimately leading into Samuel Jeffery. The conveyances in 1753 (Benjamin to Joseph Jeffery), 1773 (Joseph to John Jeffery) and 1785 (Joseph to John Jeffery) are the same as those described above in Scribner; and do not alter the relevant boundaries of the property previously described. See Pl. Ex. 569, §§ G, H; § IV(C), *supra*, ¶ 421, n. 39.

445. John Jeffery to Benjamin Jeffery. By warranty deed dated March 18, 1786 and recorded in the York County Registry of Deeds at Book 49, Pages 81-82, John Jeffery conveyed to Benjamin Jeffery property described as bounded “Southwardly on the Sea”, but with a specific metes and bounds description consistent with the prior boundary descriptions of this property, namely:

*“beginning at a pitch pine Tree marked by Eliakim Emmons land from thence Running North West two hundred and forty Rods (3960’) from thence North East forth six Rods (759’) to Land belonging to John Emmons **thence South East to the Sea Walls thence South West to the first mentioned bounds together with the Buildings thereon.**”*

Pl. Exs. 453, 569, § H (emphasis added).

446. The chain going forward from here is less certain, but both Asplundh and the Town agree that title from Benjamin Jeffery and then William Jeffery lead into Samuel Jeffrey. See Pl. Exs. 454; 569, § H. The 1836 conveyance leading into Samuel Jeffrey from William Jeffery described the boundaries of the parcel in general terms, including the southeast boundary as “on the sea.”

447. Asplundh identifies six additional conveyances into Samuel Jeffrey, including one from Emmons/Wildes and another from the heirs of Samuel Ward, as set out below.⁴⁰ Compare Pl. Ex. 454 (Asplundh’s abstracted deed chain) with Pl. Ex. 569, at § H and Def. Ex. 48, at § H (Town’s summary of deeds up to 1861).

448. Eliakim Emmons to Isreal Emmons. By warranty deed dated January 21, 1837 and recorded in the York County Registry of Deeds at Book 424, Page 334, Eliakim Emmons conveyed to Isreal Emmons “several tracts or parcels of land lying or being situated in said Kennebunkport” by warranty deed dated January 21, 1837 and recorded in the York County Registry of Deeds at Book 424, Page 334. The first parcel is described as:

“beginning at the corner by the County Road adjoining land of Richard Emmons, thence running southwest by the road sixty one rods to John Wildes land, thence southeast one hundred twenty eight rods to land of Ezekiel Emmons, thence by said Emmons land Northeast sixty one rods, thence by Moses Emmons land to the place began at containing forty eight and three quarters acres with the buildings thereon.”

A second parcel is described as being “on the Northwest side of the road.” A third parcel (the “Beaver Pond parcel”) is described as:

“a piece of land beginning at the Beaver Pond, thence Southeast by land of Samuel Jeffrey to Ezekiel Emmons land, thence Northeast sixteen rods, thence Northwest by Ezekiel Emmons and Andrew Emmons land, thence southwest to the aforesaid pond, containing six acres, more or less.”

A fourth parcel (the “Little River parcel”) is described as:

⁴⁰ Deeds of the remaining four—Sylvanus Perkins, Mary Cutts, Ebenezer Emmons, and George Ward—do not appear to be in evidence. See Pl. Ex. 454.

“a tract or parcel of salt marsh lying and being *situated on Little River* containing six acres and adjoining marsh of Moses Emmons on the Southwest, thence by land and marsh of John Emmons and Ezekiel Emmons *Southeast to the river.*”

Pl. Ex. 474 (emphasis added). This parcel describes as a boundary the Little River, which borders the Goose Rocks Beach upland area on the north and east.

449. In November 1839, Isreal Emmons conveyed the Beaver Pond Parcel to Jacob Wildes, as is referenced in the following deed. The evidence does not establish that Isreal Emmons conveyed the Little River Parcel to Jacob Wildes or Samuel Jeffery.

450. Wildes to Jeffery. By warranty deed dated February 16, 1839 and recorded in the York County Registry of Deeds at Book 443, Page 356, Jacob Wildes conveyed to Samuel Jeffery “a certain lot of land situated in said Kennebunkport” described as follows:

“Beginning at the Beaver Pond (so-called) thence southeast by land improved by Isaac Jeffery to Ezekiel Emmons land—thence north sixteen rods—thence northwest by Ezekiel Emmons & Andrew Emmons land thence southwest to the aforementioned land containing six acres more or less. Being the same lot which I bought of Eliakim Emmons January 21st 1837.”

Pl. Ex. 473. This is a description of the Beaver Pond Parcel. The court infers that Beaver Pond was situated well inland from the beach and may have drained into a tributary of the Little River to the north of the subject property. *See* Pl. Ex. 459 (1961 subdivision plan showing Beaver Pond Branch (of the river) north of the lot that subsequently was acquired by Asplundh).

451. Ward et al. to Jeffery. By deed dated January 11, 1868 and recorded in the York County Registry of Deeds at Book 308, Page 108, Sarah Ward, Mary J. Huff, George T. Ward, Lucy A. Emmons and Sarah A. Proctor conveyed to Samuel Jeffery:

“[a] certain lot of land situated in said Kennebunkport and bounded by lot No. three, on a plan hereinafter referred to on the Southwest by the land of Ezekiel Emmons, ***on the Southeast by Little River*** so called on the Northeast by land of Moses Emmons and Oliver Emmons, *being lot no. four on a plan of the homestead farm of the late Samuel Ward of said Kennebunkport drawn by E. G. Staples, Jan. 2nd 1866*, to which reference is herein made, containing [illegible] and twenty seven square rods, be the same more or less, excepting and reserving the dwelling

house thereon, and one fourth of an acre of land for the use of the same also the burying ground, also a right of passage way from said dwelling house over said lot to the cross road.”

Pl. Ex. 472 (emphasis added). Samuel Jeffrey subsequently conveyed a portion of “lot 4” bordered by the Little River to George Emmons. See Pl. Ex. 471. The relationship, if any, between “lot no. 4” acquired from the Ward heirs and the Little River Parcel previously held by Isreal Emmons is unclear from the record. Nor does the record establish the approximate location of “lot no. 4” on the face of the earth. It is more likely than not that this land on Sand Point was east of the Jeffrey lands that trace back to Joanna Jeffrey. See *Def. Exs.* 53, 73; *Pl. Exs.* 459, 471, 472, 474, 569 § H.

452. Samuel Jeffery to Mary Jeffery. By warranty deed dated December 2, 1861 and recorded in the York County Registry of Deeds at Book 274, Page 259, Samuel Jeffery conveyed to Mary Jeffrey “the dwelling house and out buildings now occupied by me together with the land under and adjoining the same, and also all the real estate I now own and possess in the said town of Kennebunkport be the same more or less however bounded.” *Pl. Exs.* 468; 569, at § H.

453. Mary Jeffery to Samuel A. Jeffery. On February 14, 1888, an abstract of the will of Mary Jeffery was recorded in the York County Registry of Deeds at Book 418, Pages 460-61; it states: “[a]ll the rest of my real estate including the Buildings where I now live, I will give and devise to my son Samuel A. Jeffery.” *Pl. Ex.* 467

454. Samuel A. Jeffery to Albert Jeffery. On April 6, 1901, an abstract of the will of Samuel A. Jeffery was recorded in the York County Registry of Deeds at Book 490, Page 550; it states: “I give devise and bequeath to my son Albert Jeffery all the real and remainder of my estate real and personal to him and his heirs and assigns forever.” *Pl. Ex.* 466.

455. Clark to Jeffery. By warranty deed dated November 15, 1901 and recorded in the York County Registry of Deeds at Book 515, Page 494, Elisha Clark conveyed to Albert Jeffery “a certain lot of land situated in said Kennebunkport” described as follows:

“beginning on the westerly side line of land of the said Grantee at the northeasterly corner of land of heirs of George Emmons; thence running westerly by said Emmons land to the center line of the Beaver Pond brook so called; thence in a general northeasterly direction following the middle line of said brook to land of Isaiah Emmons; thence southerly by land of said Grantee to the point of beginning.”

Pl. Ex. 465. Consistent with above findings, it is more likely than not that the Beaver Pond brook was north of the land that became the Asplundh property.

456. Albert Jeffrey to Jennie Jeffrey. On June 21, 1932, an abstract of the will of Albert W. Jeffery was recorded in the York County Registry of Deeds at Book 831, Pages 133-34; it states: “I give, bequeath and devise to my beloved wife, Jennie M. Jeffrey, all of my estate, real, personal or mixed, wherever found and however situated, of which I may die seized and possessed. Meaning and intending to hereby give to my said wife all the property of every name and nature of which I may die seized or possessed, to her absolutely and to her heirs and assigns.” Pl. Ex. 464.

457. Jennie Jeffrey to O'Hara. By warranty deed dated September 19, 1939 and recorded in the York County Registry of Deeds at Book 937, Pages 538-40, Jennie M. Jeffrey granted to Eliot O'Hara and Shirley P. O'Hara:

“A certain lot or parcel of land, consisting of upland, marsh and beach land, situated at Goose Rocks Beach in said Town of Kennebunkport, bounded and described as follows:

Beginning at a point and iron in and near the southerly side of the paved surface of the road known as the “King’s Highway”, said point and iron marking the most northerly bound and corner of the present “studio lot” of the Grantees; thence South 54° 10' East, one hundred thirty-two (132) feet, by land of within Grantees, to an iron bound and corner marking the northern end of the boundary line between land of Grantees and land of one Mignault; thence South 24° 10' East two hundred and sixty-seven one-hundredths (200.67) feet, by said Mignault land, to a point and corner; thence South 61° 31' East, one-hundred sixty-five (165) feet, and still by land of said Mignault, to a point and corner; **thence South 0° 10' East, by said Mignault land, one hundred thirty-nine (139) feet, to**

the corner of said Mignault's land; thence on by the same course to the Atlantic Ocean; thence Southeasterly by the Atlantic Ocean to land formerly of Fred G. Emmons, now of these Grantees; thence North 36° 45' West by said land of Grantees, formerly of said Emmons to the thread and channel of the "Beaver Pond Branch of Little River", so-called; thence Westerly and Northerly by the thread or channel of said Beaver Pond Branch of Little River, to a point produced by the intersection of the southerly line of the premises convey by Albert W. Jeffrey to Wright Emmons by deed dated November 15, 1901, and recorded in York County Registry of Deeds, Book 520, Page 206 (said premises now owned by Mignault produced across the thread or channel of said River, with the said thread or channel, ~~with the said thread or channel of said River~~ thence Southwesterly along the Southerly line of said Mignault land, to the Easterly side of a reserved way, about two hundred and fifty-nine (259) feet, to the Southerly side of the road known as the "King's Highway", aforesaid; thence by said King's Highway to the point of beginning."

Pl. Ex. 462 (emphasis added) (strike-though in original). This was the first reference to the "Atlantic Ocean" in this deed chain.

458. O'Hara to Shaw. By warranty deed dated September 17, 1940 and recorded in the York County Registry of Deeds at Book 954, Pages 594-96, Eliot O'Hara and Shirley P. O'Hara granted to Florence Brumm Shaw:

"A certain lot or parcel of land, situated on "Sand Point", so-called at Goose Rocks Beach, so-called, in said Kennebunkport, bounded and described as follows, to wit:

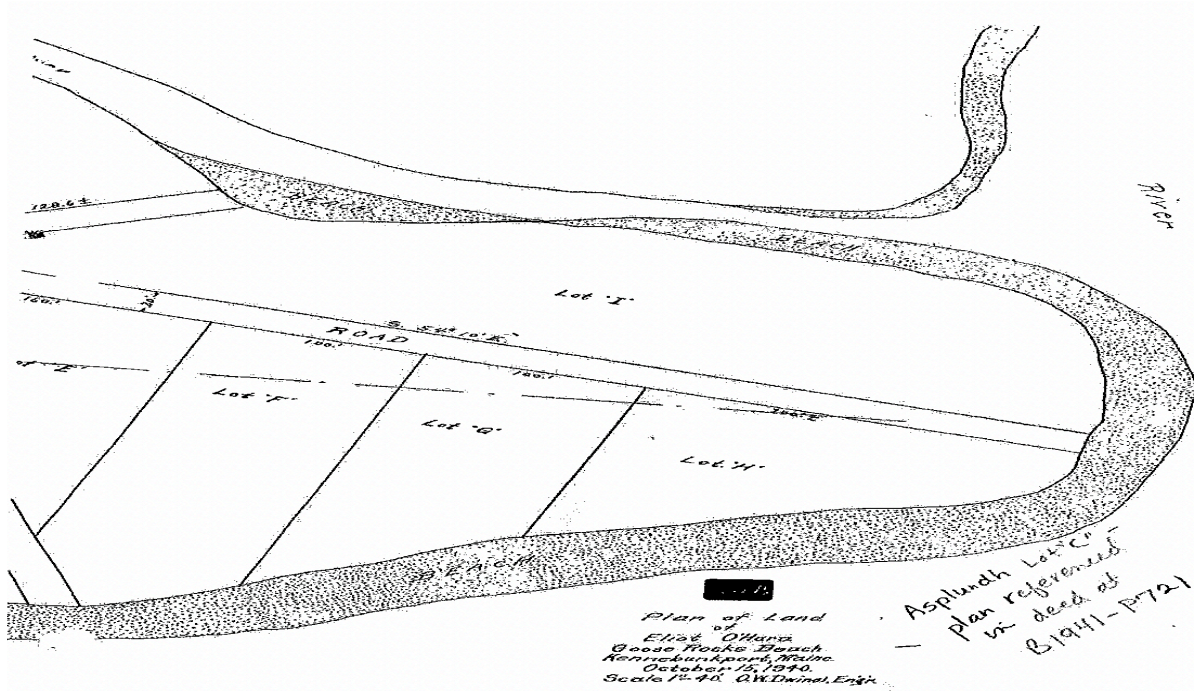
Beginning at a point at the northwesterly corner of the parcel of land herein conveyed, and in the southerly side line of a twenty-foot private way, and two hundred thirty-three (233) feet distant from the most easterly side line of the property of one Dorothy Mignault property, and passing through said point, which said point is to be marked with a suitable monument to be erected by said Grantors and Grantee; thence Easterly by the southerly side line of said twenty-foot private way, one hundred (100) feet, to a point to be later designated or marked by a suitable monument to be erected by within Grantors and Grantee; ***thence South 0° 10' East, and parallel with the most easterly side line of said Mignault property, to the Atlantic Ocean; thence Westerly by the Ocean to a Point in a line passing through the point of beginning and running South 0° 10' East, from said point of beginning to the Ocean;*** thence North 0° 10' West, parallel with the most easterly side line of said Mignault property, to the point of beginning, *said lot being designated as "Lot C" on plan⁴¹ of land of*

⁴¹ The plan referenced is the Plan of Land of Eliot O'Hara, dated October 15, 1940 and recorded in the York County Registry of Deeds at Book 1941, Page 721 ("O'Hara Plan #1"). A portion of O'Hara Plan #1 is in evidence. See Pl. Ex. 460. There are two other plans depicting the O'Hara and Jeffrey lands in evidence. Plaintiffs' Exhibit 459 is a 1959 plan by Libby & Dow, Eng'rs; Plaintiffs' Exhibit 463 appears to be an earlier plan. Neither plan references the Asplundh property, and neither appears to be referenced by a deed in evidence. The latter plan (Pl. Ex. 563) clearly depicts the parcel owned by Jennie Jeffrey as fronting on the beach and ocean, not the Little River.

Eliot and Shirley O'Hara, made by O. W. Dwinal, Eng'r., to be recorded in the York County Registry of Deeds.

Pl. Ex. 461 (emphasis added).

459. The portion of O'Hara Plan #1 (referenced in the above in deed) in evidence only shows Lots F, G, H, I, and a portion of Lot E; it does not show Lot C. The boundary lines of the lots fronting on the ocean side of the property (Lots F, G, and H) end at the "Beach", not the Atlantic Ocean:



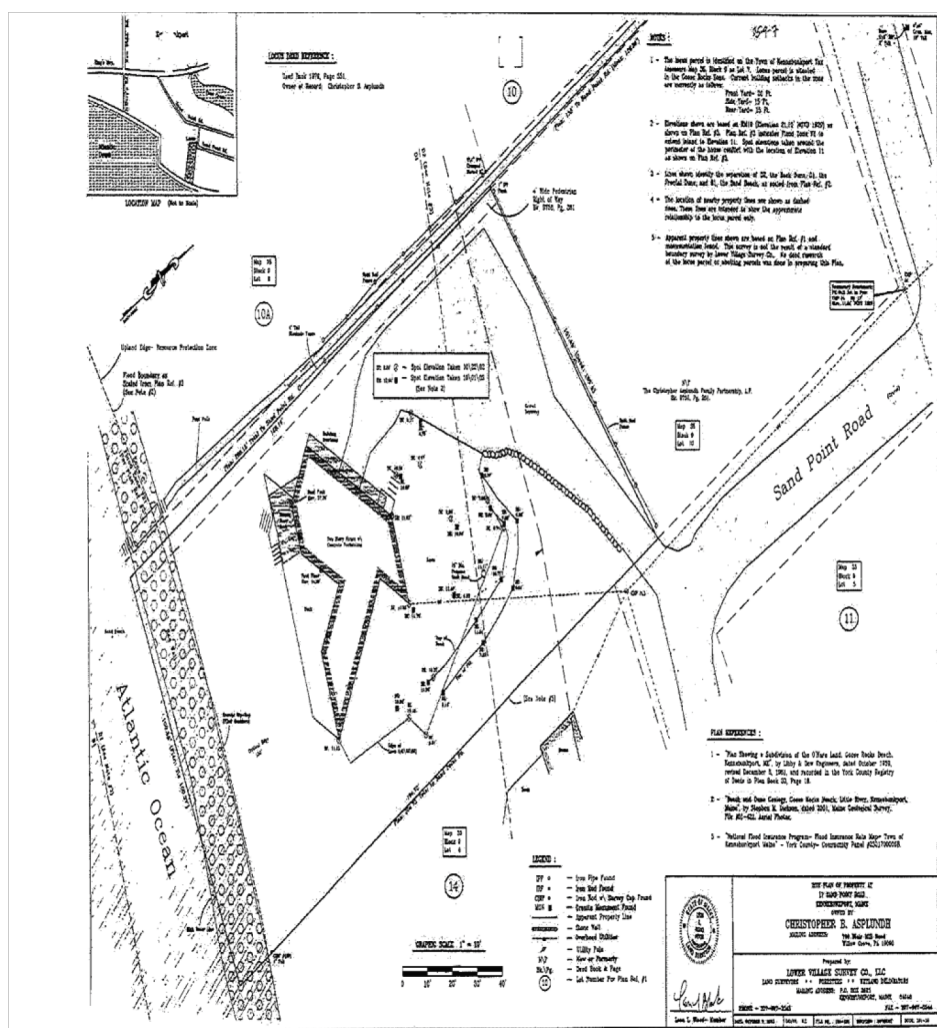
Pl. Ex. 460. Asplundh's property ("Lot C") is located on the face of the earth further west (left) of the lots depicted in this exhibit.

460. Shaw to Viger. By warranty deed dated April 3, 1972 and recorded in the York County Registry of deeds at Book 1941, Page 721, Florence Brumm Shaw granted to Leopold A. Viger **property of the same description** as was granted to Florence

Brumm Shaw in the 1940 O'Hara-to-Shaw deed. The 1972 Shaw-to-Viger deed also referenced the plan shown above. Pl. Ex. 458.

461. Viger to Asplundh. By warranty deed dated January 15, 1973 and recorded in the York County Registry of Deeds at Book 1979, Pages 551-52, Leopold A. Viger granted to Christopher B. Asplundh **property of the same description** as that granted to Leopold A. Viger in the 1972 Shaw-to-Viger deed. Pl. Ex. 457.

462. Plaintiff's Exhibit 455 is a site plan of the Asplundh property:



Pl. Ex. 455. Much of the writing on the reproduced copy above is illegible due to the reduced scale. Even the original copy that is in evidence as Plaintiff's Exhibit 455 is

difficult to read. Close examination discloses that the two words that appear above and below “Atlantic Ocean” at the left side of the plan are “sand beach” and “high water line”, respectively. There is an arrow from “high water line” to the shaded, polka-dotted area, which, according to the legend, represents a “stone wall.” The words, “sea wall” appear in the area depicted as the “stone wall.” The dotted line running roughly along the inland side of the “sea wall” is labelled, “Upland Edge—Resource Protection Zone.”

463. It is more likely than not that the stone wall, a man-made seawall, is located on or immediate proximate to the rise in land elevation that comprises a natural seawall.

Temerlin—29 Sandpoint Road

464. The Temerlin property is the eastern-most beachfront property on Goose Rocks Beach. Def. Ex. 53. It is located east of lands formerly owned by the Jeffrey family; there are no deeds in the Temerlin chain of title that derive from or trace back to Gregory Jeffrey or his successors in interest. Pl. Ex. 476. See Pl. Ex 502 (showing demarcation of Jeffery land and land on the eastern end of Sand Point.

465. The earliest known deed is a 1661 deed from William Phillips to William Scadlock. Def. Ex. 48, § I. This deed was not recorded, is not in evidence, and apparently has been lost. The Scadlock deed was confirmed in the Eastern Claims process. Def. Ex. 23, at 3-4.

466. Coming forward from Scadlock, there were a series of conveyances in the early 18th century that brought title to the land into Pendleton Fletcher and Samuel Fletcher. Pl. Exs. 476, 511-13. See also Def. Ex. 48, § I. Although the property descriptions in these early deeds were general in nature, the land referenced is proximate to the Little River at the eastern end of Goose Rocks Beach, and none of the deeds identify monuments that expressly include or exclude the beach. *Id.*

467. Samuel Fletcher to Ebenezer Emmons. By deed dated May 18th, 1767 and recorded in the York County Registry of Deeds at Book 40, Page 109, Samuel Fletcher granted to Ebenezer Emmons:

“Fifty acres of land situate in arundel aforesaid bounded as follows, **Beginning at stone by the Edge of the salt water** which stone is bound (illegible) of Land now of (illegible) of one John Gibson running from stone northwest one Hundred & fifty rods thence north East seventy rods **then southeast & by south or thereabouts to the salt water cove then by the Cove or flats to the bounds first mentioned** which is thirty rods, this Land is seventy rods wide at the head & thirty rods wide the foot & one hundred and sixty Rods in length.”

Pl. Ex. 509 (emphasis added). See also Pl. Ex. 508 (1773 Fletcher-to-Emmons deed conveying land in Arundel near Little River). Upon Ebenezer Emmons’s death, his real property passed to Ezekiel Emmons. See Pl. Exs. 476, 506.

468. Ezekiel Emmons to George T. Emmons. By two warranty deeds dated April 30th, 1861 and recorded in the York County Registry of Deeds at Book 335, Page 158 and Book 335, Page 160, Ezekiel Emmons conveyed to George T. Emmons:

“all the real estate I now hold & possess by virtue of the will of my Uncle Ebenezer Emmons, which will was duly proved at the Court of probate held in Wells March 17th 1817; the same being a portion of the property I now live upon & **bounded by Little River, by the Sea & by lands now or formerly of Andrew Emmons & Wm. Perkins Jr. and Sam Ward**, meaning to sell & convey to him all my estate not previously sold, however bounded, & be the same more or less which I own by virtue of said mentioned will of Ebenezer Emmons”, reserving unto himself a life estate.”

Pl. Ex. 506 (emphasis added), and:

“said lands now conveyed being purchased by me & of Abigail Fletcher of about 3 acres of upland by deed of Nov. 12th 1839 of Stephen Fletcher of about 2 acres of upland & marsh, by deed of May 2nd 1820; of Thomas Bolls of about 2 ¼ acres of marsh, by deed of March 7th 1820, of Charles Keiff of about seven acres of upland & marsh; of Ebenezer Jeffrey a lot called Pumpkin Island containing about three & ¾ acres & any other lands by one now owned not included in the above deeds, reference being had to my deeds for a description & bounds of the (illegible) premises, be the same more or less in quality,” reserving unto himself a life estate.

Pl. Ex. 507.

469. George T. Emmons to Fred J. Emmons. By warranty deed dated May 3, 1898 and recorded in the York County Registry of Deeds at Book 491, Pages 454-56, George T. Emmons granted to Fred J. Emmons:

“a certain lot or parcel of land with the buildings thereon, situated near the ‘Goose Rocks’ so called, in said Kennebunkport, bounded **Southeasterly by the Sea**, Northeasterly by wood land of Samuel Jeffery and land of Eliakim Emmons, Northwesterly by lands of Samuel Jeffery and Melville Wormwood, Southwesterly by the new road leading from the old highway along the sea to the Biddeford road; excepting there from about one acre called the “Hotel Lot” bounded by Little River, the Sea, and by a fence or wall.

...

Also another parcel of three acres of upland conveyed by deed of Abigail Fletcher, dated November 12th, A.D. 1839, to Ezekiel Emmons.

Also about two acres of upland and marsh conveyed by deed of Stephen Fletcher dated May 2nd 1820 to said Ezekiel also about 2 ¼ acres of marshland conveyed to said Ezekiel by Thomas Batts dated March 7th A.D. 1820.

Also about seven acres of upland and marsh, conveyed to said Ezekiel by deed of Charles Huff;

Also about 3 ¾ acres of land called ‘Pumpkin Island’ being same premises and parcels described in deed of Ezekiel Emmons to George T. Emmons dated April 3rd A.D. 1861, recorded in York County Registry of Deeds Book 335, Page 160, to which deed and the deeds therein referred to reference is made for further description.”

Pl. Ex. 503 (emphasis added). The deed reserved to grantor and his wife a life estate.

470. Emmons to O’Hara. By warranty deed dated December 11, 1936 and recorded in the York County Registry of Deeds at Book 891, Page 164, Fred J. Emmons granted to Eliot O’Hara and Shirley P. O’Hara:

“A certain lot or parcel of land, situated at Goose Rocks Beach, so-called, in Kennebunkport, in the County of York, and State of Maine, and bounded and described as follows: **Southerly by the Atlantic Ocean**; easterly by Little River; northerly by Little River, Creek and Cove; and westerly by land now or formerly of one Jeffrey.

The westerly side line between the premises herein conveyed and the Jeffrey land is coincident with a line extending from the Patch Rocks, so-called, in the River and the fence line dividing the properties of one Wiewel, formerly of one Jeffrey, and land of Fred J. Emmons.”

Pl. Ex. 501 (emphasis added).

471. O'Hara to Page. By warranty deed dated December 15, 1964 and recorded in the York County Registry of Deeds at Book 1639, Pages 378-79, Eliot O'Hara and Shirley P. O'Hara granted to C. Richmond Page and Helen Q. Page:

“Two certain parcels of land on Sand Point, so-called, at Goose Rocks Beach in the Town of Kennebunkport, County of York and State of Maine, and being lots numbered 19 and 21, as delineated on ‘Plan Showing a Subdivision of The O'Hara Land, Goose Rocks Beach, Kennebunkport, Maine’, dated October 6, 1959, revised December 8, 1961, drawn by Libby and Dow, Engineers, and recorded in York County Registry of Deeds, Plan Book 33, Page 18, to which Plan and record thereof reference is herein had for particular description of said premises and the metes and bounds thereof.”

Pl. Ex. 499 (emphasis added). The plan referenced in the foregoing O'Hara-to-Page deed is hereinafter called “O'Hara Plan #2.”

472. O'Hara Plan #2 depicts lots 19 and 21 at the far east end of a subdivision bordering on the Little River. The lots each have solid boundary lines with associated distances and course angles, and there is one dotted line extending seaward from the terminus of the solid side lot boundary line between lot 19 and the abutting lot to its west, lot 18. To the east of lots 19 and 21, separated by a solid lot line labelled “top of bank” is depicted the “Little River.” That same solid line curls around lot 19 and extends westward to form the water-side boundary of all waterfront lots. There are dotted lines extending from the side lot lines to an open area labelled, “Little River” in front of lots 19 – 16; and “Ocean” in front of the two western-most lots. Lot 9A and a large lot labelled, “Migneault.” Pl. Ex. 459.

473. Page to Page. By quitclaim deed dated December 29, 1994 and recorded in the York County Registry of Deeds at Book 7315, Pages 298-99, C. Richmond Page granted to Helen Q. Page his interest in property of the same description, namely lots 19 and 21 on the O'Hara Plan. Pl. Ex. 498.

474. Page to Trust. By quitclaim deed dated January 21, 1995 and recorded in the York County Registry of Deeds at Book 7327, Pages 125-26, Helen Page conveyed

the same property to the Page Residential Trust, and in 2001 conveyed by quit claim deed dated March 5, 2001 and recorded in the York County Registry of Deeds at Book 10538, Pages 74-75 interests in the same property to her four co-trustees (David R. Page, Pauline Q. Latham, Sandra L. Jenkins, Susan L. Parker) as tenants in common. Pl. Exs. 496, 497. These deeds use the **same property description** in the 1964 O'Hara-to-Page deed, *i.e.* referencing the same plan.

475. Trust to Temerlin. In October 2001, the trustees conveyed the property by four separate warranty deeds to J. Liener Temerlin and Karla S. Temerlin using the **same property description** referencing the O'Hara plan. Pl. Exs. 492-495.

476. Temerlin to Temerlin 1998 Family Trust. By quitclaim deed dated May 28, 2008 and recorded in the York County Registry of Deeds at Book 15455, Pages 875-76, J. Liener Temerlin and Karla S. Temerlin granted to J. Liener Temerlin and Karla S. Temerlin as trustees of the Temerlin 1998 Family Trust **property of the same description** as was granted by the prior deeds. Pl. Ex. 491.

477. In December 2010, in four separate quit claim deeds the trust granted fractional interests in the property (with the **same description as in the prior deeds**) to Grant Morris Gottesman (1.65%); Blake Lanier Gottesman (1.65%); Lisa Babette Temerlin Gottesman (1.65%); and Cary Michelle Gottesman Johl (1.65%). Pl. Exs. 487, 488, 489, 490.

478. In March 2012, in five separate quit claim deeds the trust granted out the property (with the **same description as in the prior deeds**) in fractional interests to J. Liener and Karla S. Temerlin (86.8%); Cary Michelle Gottesman Johl (1.65%); Lisa Babette Temerlin Gottesman (1.65%); Blake Lanier Gottesman (1.65%); Grant Morris Gottesman (1.65%). Pl. Exs. 482, 483, 484, 485, 486.

479. Temerlin to LTG Family Trust. By quitclaim deed dated December 21, 2012 and recorded in the York County Registry of Deeds at Book 16497, Pages 351-52, J. Liener Temerlin and Karla S. Temerlin granted to Lisa Babette Temerlin Gottesman, trustee of The LTG Family Trust an 86.8% interest, constituting all of their interest, in **property of the same description** as was granted to them in the prior deed. Pl. Ex. 481.

480. Also on December 21, 2012, four grantees who had earlier each received a 3.3% interest in the property (Blake Lanier Gottesman, Grant Morris Gottesman, Cary Michelle Gottesman Johl, and Lisa Babette Temerlin Gottesman) granted all of their respective interests in the **same property** to Lisa Babette Temerlin Gottesman, trustee of the LTG Maine Management Trust, by quitclaim deeds recorded in the York County Registry of Deeds at Book 16497, Pages 353, 355, 357 and 359, respectively. Pl. Exs. 477, 478, 479, 480.

V. Plaintiffs' Title Claims

Count I of Plaintiffs' complaint seeks a declaratory judgment affirming exclusive title in the sections of Goose Rocks Beach seaward of their respective upland lots pursuant to 14 M.R.S. §§ 5951-63. Count II asserts a claim to quiet title in and to the same property under 14 M.R.S. §§ 6651-63. Specifically, each individual Plaintiff claims title to the dry sand portion of the beach between the upland lot and the mean high water line and to the intertidal zone of the beach between the mean high and low water lines, subject to the limited public use rights of fishing, fowling and navigation under the 1647 Colonial Ordinance as recognized by Maine law.

Each party claiming title bears the burden of proof. *Levis v. Konitzky*, 2016 ME 167, ¶ 28, 151 A.3d 20; *Smith v. Libby*, 101 Me. 338, 64 A. 612 (1906). See *Marshall v. Walker*, 93 Me. 532, 535, 45 A. 497, 498 (1900) (with regard to quieting title to intertidal

lands used by others, “[h]e who begins the litigation must and ought to carry the burden of proving title”). The nature of their burden has been addressed previously by the court. *See 9/29/2016 Order on Pending Motions*, at 8-11. They also bear the burden of proving the side lot lines of the parcel in dispute as well.

Plaintiffs rely almost exclusively on their modern deeds to establish the seaward boundaries of their individual properties; and, with limited exception, did not present evidence to establish the location any parcel or boundary on the face of the earth.

Plaintiffs offered testimony of two expert witnesses. J. Gordon Scannell, Jr., Esq., a real estate attorney, testified as to the meaning and interpretation of relevant deeds and offered an opinion as to the grantor’s intent regarding the seaward boundary of each of the 23 properties in issue.⁴² He opined that the seaward boundary of these 23 parcels was the mean low water mark of the Atlantic Ocean, based upon either language of the deeds (and plans) in the chain of title and/or reference to extrinsic evidence consisting of other deeds (and plans) relating to other abutting or nearby lots. His opinions rested upon an assumption that under Maine Title Standards, title need only be traced to a “resting deed” going back 60 years.

The second expert, Johann Buisman, a licensed surveyor, offered general testimony about the features of Goose Rocks Beach and also about the principles and practices of surveyors. Mr. Buisman did not conduct boundary surveys of the properties in issue in this case. He did offer limited opinion testimony as to the interpretation of various deeds and plans relating to particular properties in issue; and on the location

⁴² The Town had objected to this expert’s testimony insofar as it constituted legal opinions as to the interpretation of deed boundaries. The court allowed the testimony with the understanding that ultimately these are questions of law for the court to determine. *See M.R. Evid. 704*. Except as noted, neither of Plaintiffs’ experts offered specific testimony on the factual question of where on the face of the earth a seaward boundary fell with respect to any particular lot.

of the seaward boundary of the Almeder property based on relevant deeds and plans as well as personal observation and photographs.⁴³

As far as the side lot boundaries are concerned, Plaintiffs rely upon deeds in evidence, the Beach Use Agreement, and the stipulation by the parties that the court may use the so-called “colonial method.”

Before reaching title claims to individual properties, the court addresses a number of general conclusions in connection with the interpretation of the deeds presented and legal theories advanced by Plaintiffs in support of their claims.

A. General Conclusions of Law

1. Principles of Deed Construction

Interpretation of a deed is a question of law. *Eaton v. Town of Wells*, 2000 ME 176 ¶ 19, 760 A.2d 232; *Bennett v. Tracy*, 1999 ME 165, ¶ 7, 740 A.2d 751. In construing a deed, courts “are to give effect, if possible, to the intention of the parties, so far as it can be ascertained in accordance with the legal canons of interpretation.” *McLellan v. McFadden*, 95 A. 1025, 1028 (Me. 1915). That requires courts “to give effect to the expressed, rather than the surmised, intent” and “to consider and construe the grant according to settled rules of construction.” *Id.*; see *Hodgdon v. Campbell*, 411 A.2d 667, 672 (1980) (“Although in construing deeds the law attempts to ascertain the intention of the parties, [the Law Court] has repeatedly stated that ‘to secure the certainty, precision and permanency of muniments of title, certain positive rules of law have evolved which are made to control and parties to real estate transactions must heed the same.’”); *Littlefield v. Littlefield*, 28 Me. 180, 187 (1848) (“if fixed and permanent monuments are given for its boundary, they must be allowed to have controlling effect”).

⁴³ See § V(B)(1), *infra*.

The rules of construction are reflected in principles and commonly accepted definitions, as set out below.

The court's task initially is to construe the deed's language by looking within the "four corners" of the document, giving the words in a deed their "general and ordinary" meaning to see if they create any ambiguity. *Pettee v. Young*, 2001 ME 156, ¶ 8, 783 A.2d 637. If the deed's language is unambiguous, the court "must construe the deed without considering extrinsic evidence of the intent of the parties." *Id.* The court may, however, consider the circumstances surrounding the execution of the deed as part of this initial analysis. *Emery v. Webster*, 42 Me. 204, 206 (1856).

If a deed's language is ambiguous, consideration may be given to extrinsic evidence; and with or without the aid of extrinsic evidence, the court should adhere to established principles of deed construction "to the extent that they are not absurd or manifestly inconsistent with the parties' intentions apparent from the face of the deed." *McGeechan v. Sherwood*, 2000 ME 188, ¶¶ 24, 36, 760 A.2d 1068; *see also Eaton*, 2000 ME 176, ¶ 25, 760 A.2d 232; *Snyder v. Haagen*, 679 A.2d 510, 513 (Me. 1996).

When a deed description references a plan, the entirety of the plan becomes a part of the deed. *Sleeper v. Loring*, 2013 ME 112, ¶ 13, 83 A. 3d 769.

A deed that only conveys a grantor's "right, title and interest," without more, is not a grant of land or of a particular estate and is not *prima facie* evidence of title. *Sargent v. Coolidge*, 399 A.2d 1333, 1343 (Me. 1979).

A grantor cannot convey that which he or she does not own. *Eaton*, 2000 ME 176, ¶ 19, 760 A.2d 232. *See Levis v. Konitzky*, 2016 ME 167, ¶ 23, 151 A.3d 20.

2. Determination of Seaward Boundaries

The determination of a boundary described in a deed is a question of law, whereas determining where that boundary falls on the face of the earth is a question of fact; and

this holds true with respect to determining a property’s seaward boundary. *Eaton*, 2000 ME 176 ¶ 19, 760 A.2d 232; *Hodgdon*, 411 A.2d at 672. *See also McGeechan*, 2000 ME 188, ¶ 24, 760 A.2d 1068.

Boundaries are determined “in descending order of control by monuments, courses, distances and quantity,” unless this priority produces an absurd result. *McGeechan*, 2000 ME 188, ¶ 24, 760 A.2d 1068. *See also McGrath v. Hills*, 662 A.2d 215, 218 (Me. 1995); *Theriault v. Murry*, 588 A.2d 720, 722 (Me. 1991). When interpreting whether a portion of land is included in or excluded from a grant, the words “to,” “from,” and “by” are words of exclusion, and do not convey the referenced land. *Stuart v. Fox*, 152 A. 413, 419 (Me. 1930) (citing *Bradley v. Rice*, 13 Me. 198, 201 (1836)); *Whitmore v. Brown*, 100 Me. 410, 61 A. 985, 987 (1905).

a. Monuments Generally

The terms “Atlantic Ocean,” “ocean,” “sea,” and/or “river” (tidal) are monuments commonly used by drafters to describe a property’s seaward boundary. When a deed describes a boundary as running “to,” “along,” and “from” such a monument, it is presumptively treated as a call to the low water mark and includes the intertidal zone or tidal flats. *See Ogunquit Beach Dist. v. Perkins*, 21 A.2d 660 (Me. 1941) (grant “to” and “by” the “sea” or “ocean” extends to ordinary low water mark where there is nothing to the contrary appearing in the deed).

A “bank, side, margin, or shore, become themselves monuments, and are to be treated as such.” *Bradford v. Cressey*, 45 Me. 9, 13 (1858).

“Shore” or “sea shore” is the “ground between the ordinary high and low water mark—the flats—and is a well defined monument.” *Hodgdon*, 411 A.2d at 672, *quoting Montgomery v. Reed*, 69 Me. 510, 514 (1879). *See Dunton v. Parker*, 97 Me. 461, 54 A. 1115 (Me. 1903) (holding that the ‘shore’ has a seaward side and an upland side, and

the context of calls determines which is meant); *Littlefield*, 28 Me. at 184-85. See also *Flaherty v. Muther*, 2011 ME 32, ¶ 5, 17 A.3d 640; *Sinford v. Watts*, 123 Me. 230 (1923); *Whitmore*, 100 Me. at 417; *Freeman v. Leighton*, 90 Me. 541 (1897); *Brown v. Heard*, 85 Me. 294 (1893); *Storer v. Freeman*, 6 Mass. 438 (1810).

Absent another call or intention expressed in a deed, “as a matter of law a deed reference to ‘by the shore’ calls for a measurement along the contour of the high water mark.” *Hodgdon*, 411 A.2d at 672. This excludes the flats or intertidal zone. *Id.* (“As a monument, the shore limits the grant to the high-water mark.”); see also *Matteson v. Batchelder*, 2011 ME 134, ¶18, 32 A.2d 1059 (high-water mark is boundary when deed refers to “bank”, “shore”, “shoreline”; without more, in this circumstance, low-water mark “cannot be the boundary” based on plain language of the deed).

“Beach,” when used as a deed reference, also is interpreted to mean the land between the high tide line and low tide line. *Hodge v. Boothby*, 48 Me. 68 (1875). Without more in a deed to indicate a different intent, a call “to,” “from,” or “by” the “beach” is a call to the high water line and excludes the tidal flats or intertidal zone. See *id.*; *Littlefield*, 28 Me. at 184-86.

“Bank,” when used in the context of tidal water, refers to a strip of land adjacent to the shore, running from the high tide line inland to the top or peak of a rise. See *Proctor v. Maine Cent. R. Co.*, 96 Me. 458, 473 (1902) (the “bank” is “not the shore. It was the land adjacent to the shore.” It “extended to the margin of the shore [the high tide line], as in case of a fresh-water river the bank extends to the margin of the water.” A deed call to the “bank” did not include the flats.); see also *Stone v. City of Augusta*, 46 Me. 127, 136-38 (Me. 1858); *Lapish v. President, etc., of Bangor Bank*, 8 Me. 85, 89-90 (1831) (a deed that calls to the bank at high tide line without calling to the water cannot pass the flats). A call “by the bank” excludes both the bank and the shore unless some

reference in the deed makes clear that it was seaward (high-tide) side of the bank that was intended. See *Stone*, 46 Me. at 136-38 (a boundary “by the bank” of the tidal water rebuts presumption that flats are conveyed).

When property granted is bounded by a road along the edge of tidal water, the presumption of ownership to the low water mark does not apply, and tidal flats adjacent to the road are not included in the grant. See *Codman*, 10 Mass. at 147.

Tidal flats do not pass as appurtenant to the upland when they are outside the express boundaries in the grant, even if the grant contains the words “together with all the privileges and appurtenances thereto belonging.” *Whitmore*, 100 Me. at 417, 61 A. 985.

b. “Seawall”

Numerous grants and deeds in this case use the “seawall” as a monument in a deed’s metes and bounds description a property or on a plan. While there is no universally accepted legal definition of this term, common sense suggests it is likely used in reference to a corresponding physical feature on the face of the earth that acts as a barrier or wall—either man-made or naturally-occurring—that acts to impede the flow of the sea. The record in this case establishes that there is, and more likely than not has been over time, a natural feature along the length of Goose Rocks Beach consisting of an elevated land between the higher high water line of the beach and the upland lots. Along much of the beach today there are man-made seawalls built on or immediately proximate to that natural feature of the land.

Law Court decisions interpreting deeds employing this term generally appear to treat “sea wall” as a monument or landmark referencing a natural or man-made feature that lies adjacent to the shore above the high water mark. *Cutts v. Hussey*, 15 Me. 237, 241 (1839) (court could “not see how the locus in quo can be considered as part of the

beach. It was above high water mark, and within the sea wall.”); *Donnell v. Clark*, 19 Me. 174, 181 (1841) (deed bounding farm “upon the sea-wall” did not convey the beach); *Hodge*, 48 Me. at 71 (seawall lies between upland and beach, and is not encompassed within the term “beach”); *Littlefield*, 28 Me. at 187 (“sea-wall” described as a “bank” or “embankment” of sand inland from the beach); *Robinson v. White*, 42 Me. 209, 213 (evidence of a “natural embankment” referenced as a “sea wall” at the margin of the bog and upland). See also *Robinson v. Fred B. Higgins Co.*, 135 A. 901 (Me. 1927); *Sweeney v. Town of Old Orchard Beach*, 644 A.2d 483 (Me. 1994).

Plaintiffs challenge the notion that the term “seawall” as a deed monument has a universal, generally-accepted meaning of a barrier-like feature, whether natural or man-made. They maintain that the term is a malleable one that can change depending upon context and ascertainment of a particular grantor’s intent. Certainly, a court’s paramount task in interpreting a deed is to “give effect, if possible, to the intention of the parties, so far as it can be ascertained.” *McLellan*, 95 A. at 1028. At the same time, in divining the parties’ intent or a grantor’s intent in a given instance, the common meaning of a word used, and the identifiable characteristics it implies, cannot be ignored without a clear basis for doing so.

Despite their rejection of a universal definition for this term, Plaintiffs appear to assert one in this case, namely the beach’s intertidal zone itself. As a general matter, that interpretation seems contrary to common language and intuition. The current topography of the beach certainly does not support a conclusion that its tidal flats resemble a wall. Further, Plaintiffs’ reliance upon *Eaton v. Town of Wells* and upon the opinion of its expert to support their position that “seawall” may be synonymous with intertidal zone is misplaced. The pertinent deeds in *Eaton* made numerous, and confusing, references to the term. The trial court in *Eaton* concluded that:

“The terms upland, seawall, and beach are used with some imprecision in all these documents, but it is reasonable to conclude that in 1674 the language must have been used in reference to the land in front of the marsh (on the seaward side) running to the ocean or intertidal zone.”

Eaton, 2000 ME 176, ¶ 26, 760 A.2d 232. The Law Court accepted this analysis as the basis for including the disputed intertidal zone within the grant because the conveyance “included the skirt of upland, seawall *and* beach.” *Id.* (emphasis added). And, the deed in question stated that the upland or seawall was “compassed about with water,” and this served as the call to the water that extended the grant to include the intertidal zone. See *Donnell*, 19 Me. 181 (“The deed purports to convey four to five acres of sea-wall, but one of the bounds, ‘so by the sea,’ might be sufficient to convey the beach. The deed, however, . . . bounds the farm upon the sea-wall.”) Thus, in *Eaton*, there was more than a reference to “sea wall” as a basis for including the intertidal zone as part of the grant.

Plaintiffs’ deed expert opined that the reference to “seawall” in a number of deeds was intended to identify the tidal flats or intertidal zone of the parcel in question as the monument demarking the property’s seaward boundary. His opinion in each instance was given in the context of construing a particular deed or deed chain. While a grantor’s intent is the ultimate touchstone for the meaning and import of deed language, there would need to be a clear, articulable basis for concluding that the word, “wall,” which connotes a barrier, should be read to mean flat land. The expert also acknowledged that that prior to this case he had not interpreted a deed’s reference to “seawall” to mean the intertidal zone or tidal flats nor given an opinion to that effect.

3. The Colonial Ordinance Presumption of Seaward Boundary

At common law, private ownership in coastal land extended only to the line of high water; and all land below that belonged to the Crown subject to certain public trust rights unless obtained by grant or prescription. *Bell v. Town of Wells*, 510 A.2d 509, 511 (Me. 1986) (“*Bell I*”); *Storer*, 6 Mass. at 438. See also *Arno v. Commonwealth*, 457

Mass. 434, 449 (2010); *Commonwealth v. Alger*, 61 Mass. 53, 66, 78-79 (1851). Enactment of a provision in the Massachusetts Colonial Ordinance of 1641-47 (“Colonial Ordinance”) altered the common law rule. Section 2 of the Colonial Ordinance provided that “in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to the low-water mark, where the sea doth not ebb above a hundred rods, and not more, wheresoever it ebbs further.” *Bell I*, 510 A.2d at 511; *Storer*, 6 Mass. at 438-39; *Emerson v. Taylor*, 9 Me. 42, 43 (1832). Even though subsequently repealed, this provision was adopted into, and has remained, part of Maine common law. *Id.* See, e.g., *McGarvey v. Whittredge*, 2011 ME 97, ¶ 31, 28 A.3d 620; *Bell v. Town of Wells*, 557 A.2d 168, 170 (Me. 1989) (“*Bell II*”); *Bell I*, 510 A.2d at 51; *Storer*, 6 Mass. at 439. See also *Commonwealth v. Alger*, 61 Mass. 79 (citing additional Maine authorities so holding).

Upon enactment of the ordinance, the owner of upland oceanfront property presumptively owned to the low water mark (and thus the tidal flats or intertidal zone). *Commonwealth v. Roxbury*, 75 Mass. 451, 498 (1857). Conveyance of the upland adjoining tidal water presumptively conveyed the tidal flats to the low water mark. *Snow v. Mt. Desert Island Real Estate Co.*, 24 A. 429, 430 (Me. 1891). Because the tidal flats may be separately conveyed, however, the presumption only stands where a grant of the property has a “call to the water.” *Storer*, 6 Mass. at 439 (Colonial Ordinance presumption applies “only in cases where the grantor, seised of the uplands and flats, in conveying his land bounds the land sold on the sea or salt water”); *Snyder v. Haagen*, 679 A.2d at 515 (presumption applies only to “water’s edge” property); *North Yarmouth v. Skillings*, 45 Me. 133, 139-40 (1858) (there must be a call to the water in order for the presumption to apply).

A deed's use of terms such as "Atlantic Ocean," "ocean," "cove," "sea," or "river" (if tidal) are considered calls to the tidal waters, and thus raised the presumption. See *Bell II*, 557 A.2d at 170; *Britton v. Dept. of Conservation*, 2009 ME 60, ¶ 6, 974 A.2d 303; *Ogunquit Beach Dist. v. Perkins*, 21 A.2d 660 (Me. 1941). Calls to the "shore," "beach," "bank," and "sea shore" defeat the presumption. See, e.g., *Storer*, 6 Mass. at 439 (call to "shore" or "high tide" not a call to the water triggering presumption of ownership to low water mark); *Lapish*, 8 Me. at 89-90 (presumption did not apply where deed call was "running on the western bank of said river to high-water mark").

For reasons discussed in connection with the deed chains in each individual claim below, the Colonial Ordinance presumption was not a determinative factor in establishing title. The source grants or deeds of many of the properties in issue initially established boundaries that did not call to the water, such as "seawall" or "sea banke", thereby defeating the presumption. In other instances, where the earlier deeds were general in nature, later deeds established clear seaward boundaries that did not invoke or maintain the presumption.

4. Language of "Ancient Deeds"

Plaintiffs contend that deeds drafted before the modern era prior are often imprecise, incomplete or otherwise deficient, and should not be held to current standards of property description and deed construction. They cite for support *Hill v. Lord*, 48 Me. 83, 91 (1861) ("much is to be presumed in favor of ancient deeds . . . [in that] it is not always possible to employ officers, or scriveners who understand all of the requirements of the law.") See also *Eaton*, 2000 ME 176, ¶ 26, 760 A.2d 232 (monuments in older deeds "used with some imprecision in all these documents").

It is not universally true that ancient deed calls, descriptions or language describing water boundaries were substandard or unable to express a grantor's intent,

or that courts were unable to interpret them. A number of the cases cited herein for general principles of deed construction are cases involving deeds or grants dating back over 200 years; courts have addressed and construed these “ancient” deeds and grants, some of which employed monuments or terms like “seawall”, “sea shore”, or “upland.” See, e.g., *Storer*, 6 Mass. at 439; *Cutts*, 15 Me. at 241; *Donnell*, 19 Me. at 181; *Hodge*, 48 Me. at 71; *Littlefield*, 28 Me. at 180. Each grant or deed must be assessed individually. “Ancient” grantors were capable of articulating a water boundary clearly where intended, such as, for example, a 1678 public grant of land that identified the “high water mark” as the boundary; a 1681 grant (laid out in 1720) of land “down to the [Kennebunk] River;” a 1720 grant of land “bounded by and upon ye aforesaid [Kennebunk] River;” or a 1720 grant described land as “beginning at the Sea at the middle of a stoney [sic] beach, taking in part of Kennebunk pond.” Def. Ex. 3, at 1, 24, 25, 29. See also *North Yarmouth v. Skillings*, 45 Me. 133, 141-42 (1858) (1743 grant of land “lying and below high water mark” from North Yarmouth proprietors to town selectmen of North Yarmouth).

Moreover, *Hill v. Lord* is not entirely on point. *Hill* was a trespass action in which defendant challenged plaintiff’s title. The Law Court began the title analysis with the original, 17th century royal grants from the Crown; then traced title forward through several other deeds up to 1680, after which the chain of title was “not distinct at every point.” These later deeds in the chain had “[v]arious defects . . . which would be serious if they were of recent date.” *Id.* at 94. It was in this context—referencing deeds in the middle part of the title chain—that the Court noted that “much was to be presumed in favor of ancient deeds . . . if accompanied by possession.” *Id.* (emphasis added). Continuous possession of the property in dispute was a key factor in reinforcing the title claim. Unlike *Hill*, this case presents a situation in which Plaintiffs have not had

continuous, exclusive possession of the disputed properties; and earlier source deeds and grants do not support their claims. It is also noteworthy that *Hill* was decided in the wake of recently-enacted legislation that made possession “conclusive evidence of title” if certain conditions were met, including long-term possession. *Id.*, at 94.

5. Modern Deeds and Maine Title Standards

In a related argument, Plaintiffs contend that the court should base its judgment on modern deeds alone. Their argument relies in part upon Maine Title Standards, Standard Number 201, which states that a party has good title if a title examiner can trace the chain of title back 40 years for a warranty deed and 60 years for a quitclaim deed.

The Maine Title Standards, published by the Maine State Bar Association, are intended to serve as a guide to examiners in searching title, and may also provide “safe harbor” from suit in the event of a subsequent challenge to the validity of title. Scannell Test. (Tr. II 135:10-20; 137:14-16). Title standards are not the result of adjudicative or legislative action, and do not serve as definitive standards for resolving contested boundaries or title in a litigated action. *See id.* at 136:17 – 137:17; *cf. U. S. Bank Nat’l Ass’n v. Ibanez*, 17 LCR 202, 206-07 (Mass. Land Court, March 26, 2009), *aff’d*, 458 Mass. 637 (2011) (REBA Title Standard No. 58, which incorrectly construed statute, “has never been reviewed or ruled upon by a court at any level.”).⁴⁴

The court considered a similar argument in the context of Plaintiffs’ motion for summary judgment, concluding that “the forty to sixty-year timeframe described by the title standards provides a reasonable guide for the court to *begin* examination.” *Almeder*

⁴⁴ Note, the Maine Title Standards warn that a boundary on the “shore” or “bank” of tidal waters “does not include a conveyance of the tidal flats abutting the premises unless the description expressly describes them or the description then runs ‘to low water and thence by low water.’” 1 Cowan & Scannell, *Maine Real Estate Law and Practice*, § 7:11 (2d ed. 2007)

v. Town of Kennebunkport, 2011 Me. Super. LEXIS 248 at *22 (*Brennan, J.*) (emphasis added). The motion court also noted that even as to those Plaintiffs whose modern deeds appear to include the beach, examination of prior deeds was required. Plaintiffs have put before the court scores of deeds and grants prior in time to the “resting deed” period. These earlier deeds clarify and, in many instances, contradict language in more recent deeds. With respect to the Almeder property, for example, deeds and grants predating the current deeds and the 1928 “resting deed” are clear that the seaward boundary of the property is not Atlantic Ocean, despite references thereto which have been included in the current deeds. The same is true for nearly all of other Plaintiffs’ properties. The court considers all relevant record evidence before it.

Plaintiffs also contend that under 14 M.R.S. § 815 and the case of *Dunton v. Parker*, 97 Me. 461, 54 A. 1115 (Me. 1903), evidence of “several decades” of record title to the intertidal zone is sufficient to overcome other evidence that prior deeds may have excluded this land. Section 815 precludes “real or mixed actions for recovery of lands” against a “person in possession thereof” for a period of 40 years, claiming to hold them by adverse, open, peaceable, notorious and exclusive possession.” Plaintiffs have not asserted an adverse possession claim, nor introduced evidence in this phase of the proceeding regarding the nature of their possession. In fact, as noted, the parties have stipulated that possession of the disputed beach property was shared, not exclusive in any party. Moreover, *Dunton* is not a quiet title action, and the issue in that case turned upon whether plaintiff had standing under a different statute on the basis of color of title, not actual title. *Dunton*, 97 Me. at 464, 54 A. 1115.

6. Presumption of Lost Grants

Finally, to the extent there are gaps in the title chains due to missing or unavailable deeds, Plaintiffs invoke the “presumption of lost grant doctrine” under

Crooker v. Pendleton, 23 Me. 339 (1843) to fill in any gaps and quiet their title to beach. *Crooker* involved a dispute over title to an island in Penobscot Bay. Plaintiff claimed title under an 1829 grant from Massachusetts and Maine. Defendant's title claim was based upon deeds from predecessors in title who had been in continuous possession of the island for over 60 years under a 1776 grant from the colonial government of Massachusetts that had been lost over time. *Crooker* held that lost grants may be presumed against individuals as well as the State (although a longer period of time may be required to invoke the doctrine against the State). *Id.* at 341-42. The presumption, however, "is bottomed upon the same principle as the statute of limitations, and is analogous to it." *Id.* at 342. The "object" of the presumption, therefore, "is to quiet ancient possessions, and to promote repose, after such a lapse of time, as that it may well be deemed difficult, if not impossible, to prove the existence of a regular grant." *Id.*; see also Note: *The Doctrine of the Presumption of a Lost Grant as Applied Against the State*, 29 Harv. L. Rev. 88, 89-90 (1915).

The *Crooker* doctrine, therefore, operates as a species of adverse possession. It is the element of exclusive possession over an extended period of time that solidifies the claim of title and substitutes for the missing deeds of record. *Cf. Dustin v. Crosby*, 75 Me. 75, 77 (1883) ("Possession is evidence of title.") Other states have more explicitly compared adverse possession to the presumption of lost grants. See *Bd. of Educ. v. Warner*, 853 So.2d 1159, 1170 (Miss. 2003); *People v. Helinski*, 222 A.D.2d 788, 791, 634 N.Y.S.2d 837, 840 (App. Div. 1995).

Here, no Plaintiff has asserted a claim based on possession; and it was stipulated that neither Plaintiffs nor the Town has exclusive possession. Earlier proceedings in this case determined that use of Goose Rocks Beach as a whole had been shared by Plaintiffs and others for years. See *Almeder v. Town of Kennebunkport*, 2012 Me. Super. LEXIS

195, *rev'd and remanded on other grounds*, 2014 ME 139, 106 A.3d 1115. *Crooker* does not apply.

7. Side Line Boundaries

The Law Court directed that the parties “present evidence as to the location of each Beachfront Owner’s specific parcel” and “the court must determine . . . the boundaries of each Beachfront Owner’s parcel.” *Almeder*, 2014 ME 139, ¶ 37, 106 A.3d 1115. In addition to determining the seaward boundary of a lot, therefore, the court is to determine, if feasible, the side lot lines across the beach for any lot whose seaward boundary is the mean low water mark. The parties stipulated that the court may use so-called “colonial method” to determine the side line boundaries of any lots for which plaintiffs proved they have title to the water.⁴⁵

As the name suggests, the colonial method is based upon principles derived from the Colonial Ordinance presumption; and was devised to determine the side lot lines of an upland parcel that also encompasses the land seaward down to the low water mark, including the intertidal zone. *Emerson v. Taylor*, 9 Me. 42 (1832). *See also Portsmouth Harbor, Land & Hotel Co.*, 109 Me. 17, 20, 82 A. 542 (1912); *Dillingham v. Roberts*, 77 Me. 284, 287 (1885). The method is as follows:

“Draw a base line from the two corners of each lot, where they strike the shore; and from those two corners, extend parallel lines to low-water mark, at right angles with the base line. If the line of the shore be straight, as in the case before us, there will be no interference in running the parallel lines. If the flats lie in a cove, of a regular or irregular curvature, there will be an interference in running such lines, and the loss occasioned by it must be equally borne or gain enjoyed equally by the contiguous owners”

Id. at 44-45. Despite the parties’ stipulation, on the current record the court cannot

⁴⁵ At trial the parties stipulated to use of the colonial method to determine side lot boundaries of the properties as well as to admission of certain abutters’ deeds for use in connection therewith. The stipulation did not represent agreement that reliance on those deeds and other record evidence would be sufficient to establish the side lot lines under the colonial method. *See* Tr. VI 42:8 –45:13.

determine side lot lines of any parcel.

First, the method is intended to apply at the time of the original subdivision. “The principle of *Emerson v. Taylor* applies when the lots are all run out at the same time. When original lots are subdivided, it may be regarded as a satisfactory rule for dividing the flats at the point of division, and as between the vendor and vendee; but it cannot be so construed as to affect the flats of adjacent proprietors.” *Call v. Carroll*, 40 Me. 31, 34 (1855). Here, upland property has been subdivided on subsequent occasions since the land was first granted, particularly in the eastern section of the beach. Attempted application of the colonial method would yield conflicting results as to side line boundaries in the flats with respect to certain upland lots. Partly for this reason, the method has fallen into disfavor. *Wonson v. Wonson*, 96 Mass. 71, 83 (1867) (“boundaries of [the colonial method] depend upon the acts of man and are therefore changeable and often artificial”); *Stockham v. Browning*, 18 N.J. Eq. 390, 396 (1867) (method “uncertain and impracticable”; may “vary at any point on high water line, if either of the adjoining proprietors, before running the division line, should sell some of his shore front, or increase it by purchase”).

Second, use of the colonial method is not a substitute for, and cannot be applied without, an adequate factual record. At the very least, this “requires considerable survey effort and research to locate adjacent boundaries of the same age or older than the boundary in question.” Richards and Hermansen, *Maine Principles of Ownership Along Water Bodies*, 47 Me. L. Rev. at 67. Plaintiffs have not provided the court with current surveys or other factual information in order to correctly fix the side lot boundaries on the face of the earth. Many of the deeds in question reference monuments whose locations cannot, on the current record, be determined on the face of the earth. Since the colonial method requires “[d]raw[ing] a base line from the two

corners of each lot, where they strike the shore”, there is insufficient evidence in the record to locate those points on the face of the earth.

Finally, even if the colonial method could be applied on the current record, it may be improper to do so. Many of the Plaintiffs’ properties are bounded on at least one side by a non-party. In order to establish a boundary between a Plaintiff’s lot and an ascertainable non-party’s lot, the court needs more than a stipulation between the current parties to this action to use the colonial method. See M.R. Civ. P. 19(a); *Efstathiou v. Payeur*, 456 A.2d 891, 893 (Me. 1983) (“The second part of Rule 19(a) focuses on the interests of the absent party. In this case, the Town of Ogunquit has a clear interest in participating in any suit purporting to effect the boundaries of its public ways.”). In addition, the Beach Use Agreement does not confer power on the Town to stipulate to the method for determining the boundaries of the beach front lots that are part of that Agreement. See Def. Ex. 58.

B. Plaintiffs’ Individual Title Claims

Western Section of Goose Rocks Beach⁴⁶

1. Almeder—113 Kings Highway

The current deed to the Almeder property is the 2009 quitclaim deed from Robert F. and Virginia S. Almeder to the Almeder Living Trust. Pl. Ex. 2. This deed, and related intra-family/trust transfers in prior deeds from 2007 to 2009, describe the property by reference to the 1921 Emmons Heirs Plan and by description of a portion of the property by metes and bounds, as extending from the “westerly corner of Lot 10 [the abutting lot on the east] on said Plan” and “along the sideline of Lot 10 on a straight line to the low water mark of the Ocean; thence southwesterly, along said low water mark, 99 feet more

⁴⁶ Findings of fact specific to properties in the western section of the beach are at § IV(C), *supra*, ¶¶s 76-176.

or less, to a point.” Pl. Exs. 2-7. This latter description encompasses the beach seaward of the residential lot, including the dry sand portion of the beach above the mean high tide line and the intertidal zone.

These are quitclaim deeds, and do not establish *prima facie* title. *Sargent v. Coolidge*, 399 A.2d 1333, 1343 (Me. 1979); see *Almeder v. Town of Kennebunkport*, 2016 Me. Super. LEXIS 305, at *11-13. Almeder traces title back to earlier warranty deeds. Examination of prior deeds, including the 1928 “resting deed” on which Almeder relies as the foundational deed in the chain of title, do not support the claim that title to this property includes the beach, despite the more specific property description in the most recent deeds. A grantor may only convey that which he or she owns. *Eaton*, 2000 ME 176 ¶ 19, 760 A.3d 232; see *Levis*, 2016 ME 167, ¶ 23, 151 A.3d 20.

The 1928 Cummings-to-Towne deed (the “resting deed”) describes the property conveyed as lot 11 on the 1921 Emmons Heirs Plan, recorded in 1922. Pl. Ex. 17. When a deed description references a plan, the entirety of the plan becomes a part of the deed. *Sleeper v. Loring*, 2013 ME 112, ¶ 13, 83 A.3d 769. The Emmons Heirs Plan depicts solid boundary lines and distances for each of the 14 lots in the subdivision, including lot 11. Pl. Ex. 19. There is a solid line shown on the seaward side of the lots, separating the lots from an area labelled, “BEACH.” The side boundary lines of all lots, including lot 11, extend to, and not beyond, this solid line. The plan clearly and unambiguously establishes the seaward boundary of lot 11, and thus the Almeder property, as the solid line depicted thereon separating lot 11 from the area labelled as “BEACH,” and thus excluding the beach.

When used as a monument in a deed, “beach” generally means the land between the mean high tide line and the mean low tide line. *Hodge*, 48 Me. 68. Absent other indicia of contrary intent of the grantor, a call “to” and “by” the beach is a call to the

high tide line and excludes the intertidal zone. *See id.*; *Littlefield*, 28 Me. 180. This deed provides no additional metes and bounds descriptions such as those later added in 2007 purporting to extend the lot's side boundaries to the low water mark of the ocean. While no monument is explicitly described by deed language, the deed incorporates the plan and that becomes the description of the property. *Sleeper*, 2013 ME 112, ¶ 13, 83 A.3d 709.

To the extent that leaves ambiguous identification of the lot's seaward boundary, examination of earlier deeds in the Almeder title chain confirms that the plan's solid line depicting the seaward boundary in the 1921 Emmons Heirs Plan is co-incident with the seawall. Cummings acquired the property from George Piper in 1923; and the deed into Piper was the 1905 Emmons-to-Piper deed that initially created the 14-lot subdivision and conveyed five lots (including lot 11). Pl. Exs. 18, 23. Each of the 14 lots was described in the deed as "containing *one hundred feet along the sea wall* excepting lot 3 which contains one hundred five feet." Pl. Ex. 23 (emphasis added). The 1905 deed also included a drawing depicting the boundaries of the 14 lots. This drawing, a precursor of the 1921 Emmons Heirs Plan, shows a solid line labeled "Sea Wall" running southwest from an "iron hub" at the seawall. That line is the same solid line depicting the seaward boundary in the 1921 plan. The 1905 deed's descriptive language, coupled with the incorporated drawing depicting a solid line labelled "Sea Wall" unambiguously establishes the seaward boundary of the lot in question as the seawall.

This is consistent with earlier deeds and grants in the chain of title. The Almeder title traces back to the properties owned by the Emmons family in this section of the beach, starting originally with the 1730 Dearing grant laid out in 1777 for John Emmons. The grant unambiguously identified the seaward boundary of the property as

the seawall. Pl. Ex. 34; Def. Ex. 3, at 72 (“South East to the sea wall then North East by the sea wall”). The two major properties devised under the 1830 will of Eliakim Emmons likewise did not include the beach. The “twenty five acres called the head of the marsh lot” was “upland.” Alternatively, if the 1774 Pepperell-to-Emmons deed is a source of title to this land as recited in the 1905 Piper-to-Emmons deed, the seaward boundary of the property conveyed by that deed was “the Sea Wall.” Pl. Exs. 23, 33. The “fifteen acres of land in common with the heirs of John Emmons, deceased, near the rush pond, so-called” did not have a definitive description of the property that included the beach, and alternatively may have been the same parcel laid out in 1777 for John Emmons that unambiguously described the seawall as the seaward boundary (but more likely was land that became the Ivory Emmons Subdivision). There are no deeds in the record that establish a separate, independent conveyance of land seaward of the seawall coming into the Emmons family, either before Eliakim Emmons or after, up to his descendant, Isreal Emmons. See § IV(C), *supra*, ¶¶ 78-92. None of the Emmons deeds, therefore, could expand the scope of property passed down to include the beach.⁴⁷ Moreover, “seawall” does not mean “intertidal zone.” See also § V(A)(2)(b), *supra*.

⁴⁷ The 1905 Tanner-to-Piper deed granting a parcel of land “bounded on the sea” inherited from Isreal Emmons did not expand the scope of title to this property to include the beach. As found above, in 1888 Tanner inherited “all my [Isreal Emmons’s] estate both real and personal however and wherever situated;” but there is no deed in the record from the estate reflecting any specific devise of the property in question. In 1905 Tanner conveyed to Piper a “certain parcel of property in Kennebunkport [in] that part known as Goose Rocks, and bounded by the sea; Batson’s River; the Marshes, and by land formerly of John Littlefield; being the same premises formerly belonging to the late Israel Emmons, deceased.” Pl. Ex. 24. The property granted is described only in general terms, and the grant is further qualified: “Meaning and intending to convey *only such interest as I may have, if any, in the above premises.*” Pl. Ex. 24 (emphasis added). This clause is one of limitation; close examination of prior deeds is warranted to determine what the grantor actually owned. See Scannell Test. (Tr. III, 24:20 – 25:17). Prior deeds in the title chain do not include the beach or the intertidal zone.

Even if the foregoing deeds and plans were considered to be ambiguous, the court has considered other, relevant, extrinsic evidence in the record including (i) evidence of the natural topography of the beach suggesting the existence of a natural seawall landward of the higher high tide line, and the alignment of the plans' boundary with this physical feature on the face of the earth; (ii) surveys which place iron pipes marking the seaward boundary of lots in the Emmons Heirs Subdivision at the seawall; (iii) a 1999 survey of another lot in the same subdivision which indicates the seawall as the seaward boundary and ownership of the beach as "unknown"; (iv) the evidence demonstrating, contrary to the Buisman testimony, that when the correct measurement of the subdivision side line boundary of 666.63 feet is used, the terminus of that side line boundary is in the vicinity of the natural seawall and not the intertidal zone; and (v) other evidence described in the court's findings of fact, above. See § IV(A), (C), *supra*, ¶¶ 7-10, 97-105.

The preponderance of evidence establishes that the seaward boundary of the Almeder property is the natural seawall shown on Defendant's Exhibit 51 as the solid black line separating upland lot from beach. Even though the 2007 deed and all subsequent deeds indicate an intent to include the dry sand portion and intertidal zone of the beach as part of the property being conveyed, the purported conveyance thereof has no legal significance, and does not establish title therein, because one cannot grant what one does not own. *Eaton*, 2000 ME 176, ¶ 19, 760 A.2d 232; see *Levis*, 2016 ME 167, ¶ 23, 151 A.3d 20.

Therefore, Almeder has not established by a preponderance of the evidence title to land seaward of the foregoing boundary, including without limitation the dry sand portion and intertidal zone of Goose Rocks Beach; and the claim to quiet title/declare exclusive rights therein is denied.

2. Coughlin—115 Kings Highway

The current deed to the Coughlin property is the May 6, 1983 warranty deed from Kennebunkport Industries, Inc. to John T. and Priscilla M. Coughlin, as trustees for the P.M.C. Realty Trust. Pl. Ex. 47. The deed describes two parcels of land. The first is the principal lot, described as a “*portion of lot 10, lying on the Southeasterly side of Batson River Road, so-called, sometimes referred to as the King’s Highway, as shown on the Plan of Emmons Heirs dated December 1921;*” and the second is a five-foot right-of-way “between the King’s Highway and the Atlantic Ocean along the Westerly side of a certain lot formerly owned by Edward M Martin . . . being a *part of lot numbered 9 on a Plan of Land of the Emmons Heirs, drawn by Libby & Johnson in Dec. 1921.*” The five-foot right of way is further described by general bounds, including “Southerly by said Atlantic Ocean about five (5) feet.” Pl. Ex. 47 (emphasis added).

The Coughlin property is a portion of lot 10 of the Emmons Heirs Subdivision. For the same reasons set out above in Almeder, the plan referenced by and incorporated into the deed establishes the seaward boundary of the lot as the solid line on the Emmons Heirs Plan, and this line represents the natural seawall.

The Coughlin chain of title is identical to Almeder up to 1905. The seaward boundary of the land from which lot 10 derives, beginning with the foundational 1730 Dearing grant, establishes the seaward boundary as the seawall.

In 1905, as part of the development of the Emmons Heirs Subdivision, Warren Emmons was granted rights in lot 10. *Compare* Pl. Ex. 1 *with* Pl. Ex. 46. The 1905 Piper-to-Emmons deed conveyed to Emmons four lots (4, 7, 10, & 13) outright and two lots in common with Piper, each lot “containing one hundred feet along the Sea Wall.” Pl. Ex. 55.

Winfield Towne acquired lot 10 from the heirs of Warren Emmons, Pl. Ex. 52, and then in 1938 conveyed to his wife, Helen, the same parcel described as “being Lot No. 10” of the Emmons Heirs Plan with a seaward boundary of “one hundred four and seven tenth (104.7) feet *on the sea wall.*” Pl. Ex. 51 (emphasis added). Coughlin cites this deed as their “resting deed”. For the same reasons set out above in *Almeder*, the deed and the incorporated plan (and, to the extent there is any ambiguity, the additional evidence discussed above) establish the Coughlin property’s seaward boundary as the natural seawall as well; and this excludes the beach, both high dry sand and intertidal zone.

The addition of the second parcel (the five-foot strip from lot 9), with an apparent call to the water, does not alter this conclusion. Despite the explicit reference to the “Atlantic Ocean” with respect to the five-foot strip of land, its seaward boundary is also the seawall. This five-foot strip of land added to the Coughlin property in the 1938 Towne-to-Towne deed was conveyed out of lot 9, which abuts lot 10 to the east. As another lot in the Emmons Heirs Subdivision, lot 9 would have the same seaward boundary—the seawall—absent evidence of an independent grant of the beach coming into the title chain. The 1923 Benson-to-Littlefield deed described the property conveyed as lot 9 on the Emmons Heirs Plan “having a frontage on the sea wall of 101.7 feet.” Pl. Ex. 53. Although the next deed, the 1924 Littlefield-to-Littlefield deed, describes the parcel conveyed as that portion of lot 9 on the Emmons Heirs Plan “which is between the Kings Highway and the beach,” there is no evidence of any other conveyance to Littlefield granting rights to land beyond the seawall. The general description likely reflects that only a portion of the original lot 9—the part between the road and the beach—was being conveyed while the inland portion was being retained (and was also likely a reference to the word, “beach,” on the plan). See Def. Ex. 62.

Even if the grantor intended to convey the dry sand portion and intertidal zone of the beach beyond the seawall, he did not have title thereto, as discussed above with respect to the historical chain of title leading into Piper and Emmons.

There is no evidence in the record of the conveyance to Edward Martin, who owned the portion of lot 9 on the southeast (seaward) side of the King's Highway subsequent to Littlefield and conveyed out of that lot the five-foot strip of land to Winfield Towne prior to his 1938 deed to Helen Towne. Based on the record evidence, therefore, it is more likely than not that Martin did not have any additional rights to lot 9 or the land seaward thereof.

The court therefore determines that the seaward boundary of the Coughlin property is the natural seawall shown on Defendant's Exhibit 51 as the solid black line separating upland lot from beach.

Coughlin has not established by a preponderance of the evidence title to land seaward of the foregoing boundary, including without limitation the dry sand portion and intertidal zone of Goose Rocks Beach; and the claim to quiet title/declare exclusive rights therein is therefore denied.

3. Celi—123 Kings Highway

The current deed to the Celi property is the June 18, 2002 warranty deed from Lorraine C. Celi to the Celi Kennebunkport Real Estate Trust No. 1. Pl. Ex 57. The deed describes the property as "a portion of Lot No. 7 on a plan of lots of Beachwood" (the Emmons Heirs Plan) and further describes the metes and bounds of the property with one boundary running from a point on the Kings Highway at its northeasterly corner, "thence Southeasterly along Lot No. 6 as shown on said Plan to the beach; thence Southwesterly along said beach One Hundred Nine and Eight Tenths (109.8) feet to Lot No. 8 as shown on said plan; then northwesterly." The deed further provides that the

premises are conveyed “together with whatever title grantor may now possess in and to the beach and tidal flats between the sidelines of said lot extended to low water mark of the Atlantic Ocean.” *Id.*

The metes and bounds description in the current deed—“to the beach” and “along said beach”—is clear and unambiguous, and excludes the beach. Even if the subsequent quitclaim clause creates an ambiguity, Celi has not established title in “the beach and tidal flats.”

Use of the “beach” as a deed monument, without more, is synonymous with intertidal zone and absent other evidence establishes the mean high water line as the boundary, *Littlefield*, 28 Me. at 184. The metes and bounds language first appeared in the 1946 Clark-to-Jacobson deed and was carried forward from that point. Prior deeds made express reference to the Emmons Heirs Plan, as does the current deed. When the deed references a plan, it becomes part of the deed. *Sleeper*, 2013 ME 122, ¶ 13, 83 A.3d 769.

The Celi property is lot 7 of the Emmons Heirs Plan. It was one of the lots retained by Warren Emmons as part of the 1905 transaction with George Piper that created the Emmons Heirs Subdivision. See Pl. Exs. 46, 55, 56. For the same reasons cited above with respect to Almeder (lot 11) and Coughlin (lot 10), the seaward boundary of this lot is also the solid lot line shown on the Emmons Heirs Subdivision Plan separating the beach from the designated lots. That line is coincident with the natural seawall in front of the upland lot (and, in Celi’s case, the man-made seawall built on or proximate to the natural seawall), and not the mean high water line.

Moreover, the predicate deeds in the title chain shared with Almeder and Coughlin, from the 1777 Emmons layout up to the 1905 Warren/Piper transaction, establish the seawall as the seaward boundary of the property. There is no record

evidence of any other deed coming into the title chain or before or after this point that added any land beyond the seawall.

The clause purporting to convey “whatever title grantor may now possess in and to the beach and tidal flats” does not operate as an independent grant of title. The genesis of this clause is a provision 1978 McGrory-to-Celi deed, which stated: “Said premises are also conveyed together with all grantors [sic] right, title and interest, however, acquired in and to any land lying between the side lines of said lot extended Southeasterly to low water mark of the Atlantic Ocean.” Pl. Ex. 63. The provision continued: “The Warranty covenants of this deed shall not apply to any such land, which is conveyed with quit claim covenants only.” *Id.* All deeds in the chain of title prior to the 1978 McGrory-to-Celi deed were unambiguous, excluded the beach, and contained no such purported grant of any land seaward thereof, including the Emmons-to-Clark deed (Pl. Ex. 77); the Clark-to-Clark deed (Pl. Ex. 75); the Clark-to-Jacobson deed (Pl. Ex. 74); and the Jacobson-to-McGrory deed (Pl. Ex. 64). The quitclaim grant was expressly qualified; it is not evidence of title. *See Sargent*, 399 A.2d at 1343.

Finally, even if extrinsic evidence were relevant to determine the grantor’s intent and to interpret the deed, the preponderance of such evidence, including the surveys referenced above as well as evidence considered in *Almeder* and *Coughlin*, establishes that the seaward boundary of the Celi property does not include the intertidal zone or dry sand portion of the beach, and is in line with the solid lot line on the Emmons Heirs Subdivision Plan.

The court therefore concludes that the seaward boundary of the Celi property is the natural seawall, and the man-made seawall built on or immediately proximate thereto, shown on Defendant’s Exhibit 51 as the solid black line separating upland lot from beach.

Celi has not established by a preponderance of the evidence title to land seaward of the foregoing boundary, including without limitation the dry sand portion and intertidal zone of Goose Rocks Beach; and the claim to quiet title/declare exclusive rights therein is denied.

4. GRB Holdings—149 Kings Highway

The current deed is a 2006 warranty deed conveying to GRB Holdings property described by reference to lot 13 on the Ivory Emmons Plan as well as by metes and bounds. As to the latter, the deed describes a side boundary running southeasterly by a reserved way 147.9 feet “to a point;” and then “by the beach” 50 feet to lot 14. The deed grants all right, title and interest held by prior grantors “in and to the land lying between the sideline of said lot extended southeasterly to low water mark of the Atlantic Ocean, or so far as Grantors may own.” Pl Ex. 92.

Title to the GRB Holdings property traces to the 1930 Emmons-to-Phelps deed, which describes the property conveyed with reference to the Ivory Emmons plan (Pl. Ex. 97) and further states, “said lots having such frontage on the Atlantic Ocean of fifty (50) feet.” Pl. Ex. 100. The description of the property in this deed carried forward in successive deeds, including the 1932 Phelps-to-Jeffrey deed, the 1946 Jeffrey-to-Phelps deed, and the 1963 Kroeger (Phelps)-to-Coppola deed, the latter cited as the “resting deed.” Pl. Exs. 96, 98, 99.

The current deed’s reference to “right, title and interest” to the land extending “to low water mark of the Atlantic Ocean, or so far as Grantors may own” and the prior deeds’ references to “frontage on Atlantic Ocean” raise at least a question as to grantor intent and perhaps a presumption of title to the ocean at low water line. The presumption is rebutted for the following reasons.

Predecessors in title did not own the beach. The deed preceding the 1930 Emmons-to-Phelps deed was an 1898 deed from George Emmons to Ivory Emmons, which described the property conveyed in general terms: a parcel of “marsh and wood . . . bounded Southeasterly by the Sea.” Pl. Ex. 101. This is a call to the water that would also raise or maintain the presumption of title to the low water line. The same call to the water does not appear, however, in the prior deed (Pl. Ex. 102), by which in 1894 Ivory Emmons had conveyed the same parcel of land to George Emmons using a completely different property description—the description that had been used in the 1891 executor’s deed to Ivory Emmons from the estate of Isreal Emmons, namely “fifteen acres of land situated near the Rush Pond so-called.” Pl. Ex. 25. This deed did not have a call to the water; and none of deeds in this chain prior to Isreal Emmons have a call to the water or appear to include the beach. See § IV(C), *supra*, ¶¶ 84-91, 139-40.

Deeds beginning with the 1930 Emmons-to-Phelps deed incorporate a plan, the Ivory Emmons Plan, which sets out precisely the dimensions and layout of the lots and clearly does not portray the lot extending to the low water line of the ocean. The plan’s description of the property is part of the deed. See *Sleeper*, 2013 ME 112, ¶ 13, 83 A.2d 769. At most, the plan refers to a “mean high water” line, not the mean low water line and thus would exclude the tidal flats in any event. For the following reasons, however, the court concludes that the plan establishes the seaward boundary of the property as the “top of the bank,” namely the natural seawall landward of the dry sand portion of the beach as well.

The plan shows a solid lot line along the “top of the bank” landward of the area labelled, “BEACH.” The “top of the bank” line lies inland of the beach as well as another line labelled, “Mean High Water.” The solid side lot boundary lines are marked with distances matching the distances specified in the deed and terminating at the solid line

delineating the “top of the bank.” Use of dotted lines crossing the beach area terminating at “mean high water” indicates less certainty as to intent or title. The line depicting the “top of the bank” on the Ivory Emmons Plan aligns with, and is an eastward extension of, the solid line depicting the seawall in the Emmons Heirs Plan. Both subdivision plans more likely than not used the same “old iron” as a monument on the face of the earth to locate this boundary line. A man-made seawall has been built above the high dry sand in front of all of the lots in the Ivory Emmons subdivision; and has been built on or immediately proximate to this natural embankment or seawall on the face of the earth. *See* § IV(C), *supra*, ¶¶ 143-47.

The specificity of the deed and plan override the general, qualified reference to “all right, title and interest” to land extending to the “low water mark of the Atlantic Ocean, *or so far as Grantors may own*” and to earlier deeds’ references to “frontage on the Atlantic Ocean.” Pl. Ex. 95 (Emphasis added); Pl. Exs. 96, 98, 99, 100.

The court determines, therefore, that the seaward boundary of the GRB Holdings property is the natural seawall, and the man-made seawall built on or immediately proximate thereto, shown on Defendant’s Exhibit 51 as the solid black line separating upland lot from beach.

GRB Holdings has not established by a preponderance of the evidence title to land seaward of the foregoing boundary, including without limitation the dry sand portion and intertidal zone of Goose Rocks Beach; and the claim to quiet title/declare exclusive rights therein is denied.

5. Flynn—161 Kings Highway

The current deed to the Flynn property is the January 26, 1972 warranty deed from Simon and Virginia Flynn. Pl. Ex. 104. The Flynn property consists of three parcels described as lots 4, 5, and 6 of the Ivory Emmons Plan. The seaward boundaries

of each parcel are described as: “to the top of the bank of the Atlantic Ocean; thence at nearly right angles . . . along the top of the bank.” Pl. Ex. 108. The deed also provides: “Also conveyed herein is so much of the land Southeasterly of the above described lot land southeasterly of the top of the bank and from thence Southeasterly to the Atlantic Ocean as lies between the sidelines of the above described parcel if produced Southeasterly to the Ocean.” *Id.* The prior deeds going back to 1948 reference the same plan and contain nearly identical property descriptions. *See* Pl. Exs. 104-07.

The deeds have a call to the water; create a presumption that the grantor intended to convey down to the low water mark of the ocean; and establish *prima facie* title to the beach. These are rebutted, however, because the predecessor in interest who created the subdivision, Ivory Emmons, did not have title to the land between the “top of the bank” (or seawall) and the water for the same reasons discussed in GRB Holdings, above. Moreover, these deeds refer with more specificity to the “top of the bank” or seawall as the seaward boundary of the lots and reinforce the interpretation of the plan’s intent both with regard to this property and the GRB Holdings property.

The Flynn property also consists of lots from the Ivory Emmons subdivision. Upon his death, Ivory Emmons devised the property to his widow, Olive Emmons, who in a 1948 deed conveyed lots 4, 5, and 6 to Emery and Nancy Sutch using essentially the same property description in the current deed. The considerations discussed above with respect to the GRB Holding property, also a lot from the Ivory Emmons subdivision, apply to the Flynn property, namely the source(s) and extent of Ivory Emmons’s title in the property reflected in the prior deeds in the chain of title into Ivory Emmons and the features of the Ivory Emmons Plan.

The court therefore determines that the seaward boundary of the Flynn property is the natural seawall, and the man-made seawall built on or immediately proximate

thereto, shown on Defendant's Exhibit 51 as the solid black line separating upland lot from beach.

Flynn has not established by a preponderance of the evidence title to land seaward of the foregoing boundary, including without limitation the dry sand portion and intertidal zone of Goose Rocks Beach; and the claim to quiet title/declare exclusive rights therein is denied.

6. Cooper—165 Kings Highway

The current deed to the Cooper property is the 2014 trustee deed from the Twombly Family Trust to the Emily Cooper Revocable Trust. The deed has a detailed, metes-and-bounds description of the property that employs monuments at each corner (rebar pins situated by reference to abutting properties and Kings Highway), distances and courses; as well as a clause stating: "Together with all rights of Grantor in and to the beach in front of said lot as was conveyed by deed recorded at Book 7182, Page 26 at the York County Registry of Deeds." Pl. Ex. 111. On its face, the deed does not contain a clear call to the water; and does not raise a presumption of title at the low water line of the ocean or establish *prima facie* title in the intertidal zone. Even if it did, for the following reasons they are defeated.

The deed to which reference is made by the current deed is a 1994 deed of distribution (Pl. Ex. 117). The 1994 deed and all preceding deeds in the chain of title adopt the property description language from the 1946 Wilson-to-Davis deed (Pl. Ex. 125), which modified slightly the property description in the preceding deed, the 1925 Piper-to-Wilson deed (Pl. Ex. 127). *See* Pl. Exs. 117, 120, 121, 122, 125, 127.

The 1925 Piper-to-Wilson deed contains a metes-and-bounds description, with one boundary running southeasterly "one hundred thirteen and forty-five hundredths feet to a stake on the beach"; and "thence Southwesterly by the beach one hundred one

and four tenths feet to land of said Emmons heirs;” and then “at a right angle . . . by land of said Emmons’ heirs one hundred and thirteen feet” to the town road. Pl. Ex. 127. The deed also provides: “Together with all rights of the grantors in and to the beach in front of said lot.” The monuments, distances and courses in the 1925 deed match those in the current deed. It is more likely than not that a “stake in beach”, just like the current rebar markers, would not have been placed in the intertidal zone, but rather on the upland or on the natural seawall separating the upland from the beach. Where a boundary runs “to a stake on the beach” and then “by the beach”, it extends only to that point, and as a matter of law excludes the intertidal zone, absent other evidence to support the grantor’s intent to include the same.

The Cooper property is lot 1 of a three-lot subdivision created by George F. Piper in 1924 (“Piper Plan”). See Pl. Ex. 127. The Piper Plan (Pl. Ex. 128) is referenced in, and therefore incorporated into and part of, the deed. *Sleeper*, 2013 ME 112, ¶ 13, 83 A.3d 769. The court has found that lot 1 of the Piper Plan abuts lot 1 of the Ivory Emmons subdivision; the two plans (which were created contemporaneously) share the same side lot boundary of equivalent length (113 feet); the side lot lines both end at solid lines parallel to the water; the solid line on the seaside of lot 1 on the Piper Plan appears, therefore, to be an extension of the same solid, seaside line on the Ivory Emmons Plan, and more likely than not represents the same physical feature on the face of the earth. This solid line in Ivory Emmons Plan is labelled, “top of the bank,” more likely than not corresponded to the natural seawall on the face of the earth, and was the seaward boundary of the lots in that subdivision. Further, as with the Ivory Emmons Plan, the Piper Plan does not indicate that the solid seaward lot line is a tie line; and the extension of the lot’s side boundary lines across an unlabeled area (the beach) leading to what

appears as water are dotted, indicating less certainty as to ownership of the beach. See § IV(C), *supra*, ¶¶ 161-76; § V(B)(4), *supra*.

The quitclaim grant referenced in the current deed as “[t]ogether with all rights of Grantor in and to the beach in front of said lot” and in prior deeds as “[t]ogether with all rights of the grantors in and to the beach in front of said lot” do not constitute independent grants of title to the beach. For the same reasons discussed above in *Almeder*, Piper’s predecessors in title (including Charles Tanner) did not own the beach. See § IV(C), *supra*, ¶¶ 78-92; § V(B)(1), *supra*, at n. 47. Therefore, Piper could not grant that which he did not own.

The court determines that the seaward boundary of the Cooper property is the natural seawall, and the man-made seawall built on or immediately proximate thereto, shown on Defendant’s Exhibit 51 as the solid black line separating upland lot from beach.

Cooper has not established by a preponderance of the evidence title to land seaward of the foregoing boundary, including without limitation the dry sand portion and intertidal zone of Goose Rocks Beach; and the claim to quiet title/declare exclusive rights therein is denied.

Middle Section of Goose Rocks Beach⁴⁸

7. Gerrish—173 Kings Highway

The current deed to the Gerrish property describes the seaward boundary of the property by reference “to the Atlantic Ocean; thence southwesterly by said ocean”. Pl. Ex. 135. This description was carried forward from predecessor deeds beginning in 1956. See Pl. Exs. 135-37, 140. These deeds establish *prima facie* title in the land down

⁴⁸ Findings of fact specific to the properties in the middle section of the beach are at § IV(C), *supra*, ¶¶ 177-254.

to the low water line of the ocean. The preponderance of evidence, however, rebuts this title because predecessors in title did not own the beach.

Title to this property traces back to the 1881 Porter-to-Knox deed, which described the seaward boundary as “[b]eginning at a hub in the sand on the beach wall, thence on the beach wall South westerly twelve and one half rods to a hub,” then from the hub to other inland monuments before returning “to the hub commenced at.” Pl. Ex. 154. The deed is unambiguous in its description of *what* the seaward boundary is—it is the “beach wall” between two “hubs” in the sand “on the beach wall.” *Id.* As a matter of law, land beyond the “beach wall” is excluded. Although “beach wall” is not further defined in the deed and does not have a prescribed legal definition, a common-sense construction of the term in this context suggests that the grantor intended to define the boundary of the grant by a prominent feature on the face of the earth similar to or synonymous with a natural seawall. In fact, the prior deed in the chain of title, the 1881 deed from Stephen Hutchins as guardian for Henry Littlefield to Mary Porter, conveyed the same parcel of land whose seaward boundary was described as “to and including the seawall, and thence by the sea wall.” Pl. Ex. 155.

Where a monument is actually located on the face of the earth is a question of fact. Plaintiffs did not offer evidence as to the likely location of a hub or beach wall in connection with this or any other property in issue. In all likelihood, the original marker, a “hub”, has long since disappeared. The evidence suggests, however, that generally a “hub” was a marker placed in the ground as a monument to locate a boundary on the face of the earth, and usually would not be placed in the dry sand or tidal flats of a beach for obvious reasons. *See Scannell Test.* (Tr. II 133:14 – 134:12). The record evidence also establishes that it is more likely than not that there is and has been an elevated feature of land along the entirety of Goose Rocks Beach between higher high

tide line and the upland residential lots; and in front the Gerrish and other middle section properties, a man-made seawall has been built on or immediately proximate to this feature. It is more likely than not that the hubs would have been set in a raised area of beach above the higher high water line. See § IV(A), *supra*, ¶¶ 7-10, 12-13.

Grants and deeds in the chain of title prior to the 1881 Porter-to-Knox deed did not have a call to the water or include the intertidal zone of the beach or other land seaward of the beach wall. The 1670 Bush-to-Barrett deed conveyed “ten acres of Sault Marsh.” Pl. Ex. 164. Marsh is not beach; and there is no other call to the water in this deed. The 1724 deed into Thomas Perkins from the Barrett heirs was not a grant of this specific property, but rather a general, quitclaim release of all right, title and interest they may have had in Barrett’s lands “east of the Piscataqua River.”⁴⁹ Pl. Ex. 164. Even if by virtue of the Colonial Ordinance or otherwise these early conveyances were valid and included the tidal flats, subsequent conveyances clearly did not.

The 1828 Adams-to-Littlefield deed established the seaward boundary “by the marsh road,” Pl. Ex. 160. This excluded the beach as a matter of law. *Codman*, 10 Mass at 147. The so-called “Beach Lot” that Mary Porter acquired from her brother, was described as extending from the road to the “sea wall.” Pl. Ex. 155. Given the likely topography of the land and the use of hubs as markers, employing the terms “sea wall” and then “beach wall” as monuments reflects an intent of the grantors to fix the

⁴⁹ The 1670 Bush-to-Barrett deed, though recorded, may have been an “ancient deed” subject to confirmation pursuant to the Proprietors’ call in 1720, particularly since it is unclear whether the consideration specified had been paid. See § IV(B), *supra*, ¶ 53; § IV(C), *supra*, ¶ 181. The Danforth Deed would not have operated independently to confirm the deed. See § IV(B), *supra*, ¶¶ 50-57; § VI(A)(4), *infra*. In addition, the Proprietors had laid out another, unrelated parcel of land that Perkins had acquired from the Barrett heirs, see § IV(B), *supra*, ¶ 68, presumably under the same 1724 deed. It is unclear, however, whether the particular parcel referenced above had been laid out and confirmed. Moreover, to the extent the Barrett heirs’ interest was based on the 1684 Danforth Deed, it was of questionable validity in any event. See § VI(B)(1), *infra*.

seaward boundary at the natural seawall, and not beyond. For reasons already discussed herein, the court rejects the general notion that “seawall” is synonymous with tidal flats.

Deeds in the title chain following the 1881 Porter-to-Knox deed up to the 1956 Gerrish-to-Clark/Libby deed did not have a call to the water or include land seaward of the beach wall. Therefore, the 1956 deed’s addition of the call to the ocean did not, without more, alter the boundaries of property conveyed to the grantor, Barbara Gerrish, from her predecessors in title. There is no evidence of another conveyance entering the title chain granting title to the beach. See Pl. Ex. 133.

Therefore, the court determines that the seaward boundary of the Gerrish property is the natural seawall, and the man-made seawall built on or immediately proximate thereto, shown on Defendant’s Exhibit 51 as the solid black line separating upland lot from beach.

Gerrish has not established by a preponderance of the evidence title to land seaward of the foregoing boundary, including without limitation the dry sand portion and intertidal zone of Goose Rocks Beach; and the claim to quiet title/declare exclusive rights therein is denied.

8. Vandervoorn—177 Kings Highway

The current deed is a quitclaim deed granting the property to a trust. The deed describes the lot by metes and bounds, with specific reference to distances, directions and courses; and, on its face, does not reference the water. The deed further includes a quitclaim clause granting “all the right, title and interest of the Grantor in and to so much of the land Southeasterly of the above described lot and right of way and from thence Southeasterly to the Atlantic Ocean as lies between the Northeasterly and

Southwesterly boundary lines of the combine [sic] area of the above described lot and right of way if produced Southeasterly to the Ocean.” Pl. Ex. 167.

A quitclaim deed conveying “all right, title and interest” is not a grant of land nor *prima facie* evidence of title. *See Sargent*, 399 A.2d at 1343. Even if the deed’s language purports to express the grantor’s intent to convey land down to the water, examination of prior deeds establishes that the seaward boundary of this lot is the seawall, and attempted conveyances beyond that point do not have legal effect.

Vandervoorn’s title traces to the 1952 Stone/Chester-to-Amon/Phinney deed which conveyed five adjacent lots “fronting on the Atlantic Ocean” as delineated on a 1949 plan. Pl. Ex. 175. The deed contains a metes and bounds description using the “top of the bank” as a monument (“to the top of the bank of the Atlantic Ocean; thence . . . along the top of said bank . . . to an iron pipe driven into the ground”). It also conveys “all right, title, and interest of the Grantors in and to so much of the land” between the top of the bank and the ocean. *Id.* As noted above, “bank” is not the shore; it is adjacent to, and inland of, the shore. *See Proctor*, 96 Me. at 473. A property with a seaward boundary described with call “to” the “top of the bank” and a boundary running “along the top of said bank” does not extend beyond the bank, and excludes any land seaward thereof, including tidal flats. *See id.*; *see also Stone*, 46 Me. at 136-38; *Lapish*, 8 Me. at 89-90.

Moreover, the deed references a plan, and that plan thus becomes part of the deed for purposes of describing the property. *Sleeper*, 2013 ME 112, ¶ 13, 83 A.3d 769. The plan depicts the “top of the bank in 1949”—the date the land was surveyed, which was three years earlier than the date of the deed. Coupled with the metes and bounds description, the plan fixes the seaward boundary at the “top of the bank”, well inland of the Atlantic Ocean and also inland of the position of the “seawall in 1881” as depicted

on the plan. Pl. Ex. 146. As found above, this reference in the plan to the former position of the seawall likely reflects that some minor erosion of the beach had occurred over the course of the 68-year period from 1881 to 1949. Where land fluctuates because of natural causes such as accretion or erosion, the owner's boundary fluctuates with it. *See Bell II*, 557 A.2d at 175, n. 18.

The 1952 Stone/Adams-to-Phinney/Amon deed also was the first deed in the Vandervoorn title chain to introduce the additional clause “further convey[ing]” all of the grantors “right, title and interest . . . in and to so much of the land” lying southeasterly of the top of the bank “to the Ocean.” Pl. Ex. 175. As noted above, this purported grant alone does not convey title; and examination of deeds prior in time to this one does not support this claim.

The Vandervoorn title, like Gerrish, traces back to Mary Porter and her predecessors in title. For the reasons discussed above, Mary Porter did not have title to land seaward of the beach wall, and therefore could not have granted, in this instance, title in the same to Smith and Benson in November of 1881. *See* Pl. Ex. 153. The relevant metes and bounds of the property described in the 1881 Porter-to-Smith/Benson deed begins “on the beach wall at a hub marking the corner of a lot recently sold by me to Ms. Abby S. Knox [the Gerrish property]”; and then runs “by the Knox lot” northwest (inland) “by a spotted oak timber” to a hub, northeast to another hub before turning back towards the water where it runs southeast “to a hub on the sea wall, thence by the sea wall South 69° W. or as the high water line is . . . to the Knox Corner commenced at” Pl. Ex. 153. Although the deed uses two different terms—“beach wall” and “seawall”—as monuments to describe the property's boundaries, it is clear from the context that both terms refer to the same monument. The metes and bounds description begins and ends at the same point, a “hub” on the “beach wall” at

the “Knox Corner.” Given the close similarity in the meaning of each term and the geometry of the bounds described, it is only logical to conclude that the two terms were intended to be used interchangeably.

The additional reference to “or as the high water line is” does not change the interpretation of the deed’s seaward boundary. The grant is still “to” a hub on seawall and then “by” the seawall. This does not convey land beyond the seawall. Even if the reference to “high water line” reflects an intent to grant additional land beyond the seawall, a grant to the “high water line” would exclude the intertidal zone. And, even if that phrase were viewed as introducing ambiguity into the deed, the court considers as corroborating extrinsic evidence the proximity of the higher high water line to the natural seawall to reinforce the interpretation of the deed as intending to convey to the seawall itself. *See* Def. Exs. 53, 55, 146; § IV(A), *supra*, ¶¶ 12-13.

Subsequent grants from Smith and Benson also did not operate as legally effective conveyances of the intertidal zone, even if so intended. They use the same metes and bounds description of the property as the prior deed, including the starting point (“on the beach wall at a hub”); the same course, directional and distance measurements (“South 23 ½° East eighteen rods and seven links or as far on the sea wall and beach as we own” and “on the wall as far down as our rights extend as it measures on the high sand”); and the same terminus (“to the Knox corner commenced at”). Pl. Ex. 179. *See also* Pl. Exs. 176-78. The reference “as far on the sea wall and beach as we own” reflects back to the prior deed and is not a grant of additional land; likewise, with respect to the reference, “as far down as our rights extend as it measures on the high sand.” Moreover, use of “high sand” reinforces that there was no understanding or intent that the grant included the intertidal zone.

Therefore, the court determines that the seaward boundary of the Vandervoorn property is the natural seawall, and the man-made seawall built on or immediately proximate thereto, shown on Defendant's Exhibit 51 as the solid black line separating upland lot from beach.

Vandervoorn has not established by a preponderance of the evidence title to land seaward of the foregoing boundary, including without limitation the dry sand portion and intertidal zone of the Goose Rocks Beach; and the claim to quiet title/declare exclusive rights therein is therefore denied.

9. Gray—183 Kings Highway

The current deed to the Gray property is a 2012 corrective deed issued in conjunction with a trust reformation. It describes the seaward boundary with reference to a call "to the ocean . . . by the ocean." Pl. Ex. 182. This boundary description can be traced back through several prior grants, beginning with the 1936 Seidel-to-Marsh deed, which described a side boundary of the parcel as "running south . . . to an iron stake at the top of the bank by the ocean, thence by the same course to the ocean, thence westerly by the ocean . . . to [abutting land] thence northerly by said [abutting] land to an iron stake at the top of the bank by the ocean" Pl. Ex. 191. The 1936 deed also incorporated by reference an April 1932 plan depicting the boundaries of the lot. See Pl. Ex. 192.

These deeds have unambiguous calls to the ocean and therefore establish a presumptive seaward boundary at the low water line and *prima facie* title to the intertidal zone and dry sand portion of the beach seaward of the upland lot. It is clear from a full examination of the record, however, that presumptive title to the beach is rebutted.

As with Gerrish and Vandervoorn, title to the Gray property extends back to the 1881 Hutchins/Littlefield-to-Porter deed and predecessors in title thereto. For the

reasons discussed above, the seaward boundary of the property conveyed by that deed was the seawall, and thus Mary Porter did not acquire title land seaward of that point.

Mary Porter's 1883 grant to Piper and Hutchins did not purport to convey any portion of the beach seaward of the "beach wall" or "sea wall." Her deed described the property conveyed as a "certain piece of land or Beach and Cottage lots on the westerly end of Goose Rocks Beach," the bounds of which began "on the Beach Wall at a hub in the sand," then run north and east before turning back toward the water and running "across the beach road 21 ½ rods *to a hub on the beach wall, thence on the beach wall* as far down as I own southwesterly twenty six & 39/100 rods, or to the hub or land of Emmons heirs" Pl. Ex. 150 (emphasis added). A call "to a hub on the beach wall" and then running the boundary "on the beach wall," does not include land beyond the "beach wall." For the same reasons discussed above with respect to Gerrish, the seaward boundary in this deed runs along the beach wall and does not include any portion of the beach seaward of that line.

The deed's description of the property's quantity—"supposed to contain about twelve acres to the sea wall at high water mark"—does not alter the conclusion as to its defined seaward boundary. *Id.* For the reasons discussed above in Vandervoorn, the deed's use of "beach wall" and "sea wall" was likely intended to be synonymous; and the reference to "high water mark" more likely than not reflects the close proximity of the higher high tide line to the natural seawall in this section of the beach. This reinforces the court's conclusion that the grant, as a matter of law, did not include the intertidal zone of the beach.⁵⁰ Even if "high water mark" was intended to extend the property

⁵⁰ Plaintiffs use this reference to "the sea wall at high water mark" in the Porter deed to support their conclusion that "sea wall" must mean "intertidal zone," and therefore this deed granted title down to the low water mark. For the reasons discussed, the court rejects the argument that "sea wall" was used and intended to mean the tidal flats, either generally or specifically in this instance. Clearly, a grant "to" a hub on the beach wall and "to" the "sea wall at *high water mark*"

boundary seaward, it would only extend title to the high water line, and that would not have conveyed the intertidal zone.

It was the next deed in the chain, the 1892 Piper-to-Hutchins deed, that altered the metes and bounds description to: “by said Smith and Benson’s land to the Sea; thence easterly by the Sea” Pl. Ex 194. Because Piper did not acquire rights in and to the beach seaward of the beach wall, he did not own and therefore could not convey the same. The references to the sea or ocean continued in successive deeds down to the current deed. The purported conveyances of the beach seaward of the beach wall in these and successor deeds in the Gray deed chain are of no legal significance. There is no evidence of a grant of title to the beach from any independent source. *See* Pl. Ex. 150.

Therefore, the court determines that the seaward boundary of the Gray property is the natural seawall, and the man-made seawall built on or immediately proximate thereto, shown on Defendant’s Exhibit 51 as the solid black line separating upland lot from beach.

Gray has not established by a preponderance of the evidence title to land seaward of the foregoing boundary, including without limitation the dry sand portion and intertidal zone of Goose Rocks Beach; and the claim to quiet title/declare exclusive rights therein is denied.

10. Rice—193 Kings Highway

The current deed is a 1989 deed of distribution granting property with a seaward boundary described by reference to a side lot line running from a granite monument at

would exclude the tidal flats themselves. Moreover, the deed’s coupling of “sea wall” and “high water mark” does not necessarily indicate that the mean high water line itself was being referenced. The uncontroverted record evidence established that on the beach today, the mean high water line of Goose Rocks Beach is seaward of an established mean higher high water line, which itself is seaward of the natural seawall running the length of the beach.

Kings Highway “[s]outheasterly . . . to the easterly corner of an old wooden bulkhead situated under a stone bulkhead; thence southwesterly by said stone bulkhead, 35.6 feet, more or less, thence northwesterly . . .” Pl. Ex. 222. The deed also contains a quitclaim clause, stating: “Together with all right, title and interest in and to any land lying between the sidelines of said lot extended Southeasterly to the low water mark of the Atlantic Ocean.”

The deed’s metes and bounds description of the stone bulkhead as a boundary is unambiguous. As discussed below, the bulkhead is landward of the beach; thus the property as described does not include the beach. The quitclaim clause does not constitute a grant of land; but even if it raises a question as to the grantor’s intent or title in land beyond that boundary, it is clear from prior deeds that the seaward boundary of the property was the seawall and did not include the beach seaward of that monument.

The Rice property was originally one of the lots conveyed out of the land Mary Porter acquired in 1881 from Henry Littlefield. For the reasons discussed above in *Gerrish*, the seaward boundary of the property conveyed in 1881 in the *Hutchins/Littlefield-to-Porter* deed was the natural seawall, thus Mary Porter did not acquire title to land seaward of that point.

The deed effectuating the 1882 out-conveyance from Mary Porter to Fred Dow described the property as a “piece of land or Cottage Lot” on Goose Rocks Beach whose bounds ran “south westerly on the sea wall four rods to a hub,” then inland and back “to the sea wall or as far as I own.” Pl. Ex. 152. The call “to” the seawall is exclusive, would not extend the bounds beyond that monument. The reference to “on the seawall” is an inclusive one, evidencing an intent to include the seawall itself, or at least a portion thereof. The reference to “a hub” on the seawall reinforces the conclusion that the deed

described a monument consisting of a raised bank above and landward of the high water mark. As found previously, it is more likely than not that boundary markers such as hubs, stakes, or iron rods would not have been placed in the intertidal zone of a beach; rather it is far more likely they would have been embedded in more stable ground, such as on the upland itself or on a natural bank or seawall. There is no evidence here or with respect to any other properties in issue to suggest otherwise. Finally, the phrase, “or as far as I own,” did not extend the grant beyond the seawall because Mary Porter did not own seaward of that point.

The next three deeds following in the Rice title chain described the property granted as “one fourth of an acre being four rods upon the seawall and running back ten rods following a lot now or formerly of Abby A. Knox.” Pl. Exs. 528 (1889 Town-to-Welch tax deed); 527 (1890 Welch-to-Dow deed); 562 (1895 Dow-to-Emery/Staples deed). In the partition of the property following Emery’s death, Staples and Emery’s widow exchanged deeds of partition each conveying “all my right, title and interest in and to a certain lot or parcel of land” whose bounds were only generally described, including the “front” or seaward boundary of “thirty-three and one third (33 1/3) feet by the sea.” Pl. Exs. 235, 236. Neither Staples nor Emery’s widow could convey to one another more than each held prior to the partition. Therefore, the general reference to the “front” boundary as “by the sea” does not constitute a grant of land seaward of the seawall and did not include the intertidal zone.

Upon the death of Staples’s devisee, the property passed to Clough in or around 1967, with the seaward boundary of the property again described as “beginning on the seawall” and running “on the seawall.” Pl. Ex. 230. The 1989 Clough deed of distribution discussed above clearly established the seaward boundary with reference to the current day seawall or bulkhead.

Rice offered no evidence as to the location of a stone or wooden bulkhead on the face of the earth other than a plan prepared in connection with the 1989 Clough Estate-to-McCormick deed (although the plan is not referenced in the deed). Pl. Ex. 226. Based on the uncontroverted record evidence, it is more likely than not that the bulkhead reference in the current deed is the man-made seawall in front of the property today built on or immediately proximate to the natural seawall.

Therefore, the court determines that the seaward boundary of the Rice property is the natural seawall, and the man-made seawall built on or immediately proximate thereto, shown on Defendant's Exhibit 51 as the solid black line separating upland lot from beach.

Rice has not established by a preponderance of the evidence title to land seaward of the foregoing boundary, including without limitation the dry sand portion and intertidal zone of Goose Rocks Beach; and the action to quiet title/declare exclusive rights therein is denied.

11. O'Connor/Leahey—195 Kings Highway

Both the current 2003 LaBrecque-to-O'Connor/Leahey deed and the immediately prior 1983 Wormwood-to-LaBrecque deed describe the property, in part, as a lot on the southeasterly side of the road with a side boundary running 268 feet, more or less, "to the Atlantic Ocean; thence Southwesterly by said Ocean 105 feet, more or less, to land now or formerly of one Staples." Pl. Exs. 203, 204. These deeds have a call to the water, with a presumptive seaward boundary of the low water line of the ocean; and thus establish *prima facie* title to the beach down to said boundary. For the following reasons, however, these are rebutted by examination of prior deeds in the chain of title because a grantor cannot convey that which he or she does not own.

The O'Connor/Leahey property is also one of the lots that traces title back to land Mary Porter acquired in the 1881 Hutchins/Littlefield-to-Porter deed. For the same reasons discussed above in Gerrish, Mary Porter did not own beyond the seawall.

The 1882 Porter-to-Knox deed itself did not grant title to the beach beyond the seawall. That deed conveyed “a certain piece of wood, grass and Beach wall land . . . upon the Westerly end of Goose Rocks Beach” that ran “across the road South 16° East 18 rods and 8 links or *as far towards the Ocean as I own, thence about South 75 ¼ West on the Sea wall six rods and five links to a hub on the Beach wall,*” and then back towards the road. Pl. Ex. 151 (emphasis added). The deed description clearly and unambiguously identifies the sea wall/beach wall as the monument defining the seaward boundary. The reference to “on the Sea wall” is an inclusive one and may include the seawall, but not beyond. Read in context, the language “as far towards the Ocean as I own” does not override the clear, unequivocal specification of this monument, the “Sea wall;” rather it appears intended to underscore the grantor’s intent that the boundary runs to the monument, even if the measured distance is not precisely accurate.

This same property description is found in the next deed in the chain of title, the 1921 deed from Abby Knox to Stephen and Edwin Smith. Pl. Ex. 212. The description was changed (and expanded for the first time in the deed chain) in 1946 when Edwin Smith (who had acquired Stephen’s one-half interest) devised the property to his daughter, Ruby. Smith’s will describes the devised property in general terms as “being the *same premises which I purchased from one Knox, and bounded: northerly by the road leading to Batson’s River; westerly by land of Lou A. Staples; southerly by the ocean; and easterly by land of Larrabee.*” Pl. Ex. 207 (emphasis added). This general description did not extend the property’s boundary; a grantor cannot convey that which

he does not own. Porter did not own beyond the seawall; Knox did not own beyond the seawall; and the Smiths did not own beyond the seawall.

The current property description first appeared in the 1983 deed from Eleanor Wormwood (Ruby Smith's devisee) to LaBrecque. There is no evidence of any other conveyance into the chain of title granting rights in the land seaward of the seawall.

Therefore, the court determines the seaward boundary of the O'Connor/Leahey property is the natural seawall, and the man-made seawall built on or immediately proximate thereto, shown on Defendant's Exhibit 51 as the solid black line separating upland lot from beach.

O'Connor/Leahey has not established by a preponderance of the evidence title to land seaward of the foregoing boundary, including without limitation the dry sand portion and intertidal zone of Goose Rocks Beach; and the claim to quiet title/declare exclusive rights therein is denied.

Eastern Section of Goose Rocks Beach⁵¹

12. Zagoren—215 Kings Highway

The current Zagoren deeds describe the property as bounded on the seaward side by "an iron pin on the sea wall . . . [t]hence by said sea wall . . . to an iron pin set in the ground;" and further conveys "all right, title and interest in and to the beach in front of said premises and contained between said sea wall and the ocean and the side lines of said lot as extended to the water." Pl. Exs. 244, 245, 246. The metes and bounds description of the boundary running "to an iron pin on the sea wall" and "by said sea wall" identifies the natural seawall as a boundary, is unambiguous, and standing alone

⁵¹ Findings of fact specific to the properties in the eastern section of the beach are at § IV(C), *supra*, ¶¶ 255 - 480.

would exclude any land seaward of that point, including the dry sand and intertidal zone of the beach.

Although the additional quitclaim clause does not constitute an independent grant of title to the “beach in front of said premises”, it introduces a degree of ambiguity in the deed and raises a question of the grantor’s intent that requires further consideration. Even if it were the grantor’s intent to convey title to the beach seaward of the seawall, review of prior deeds establishes that any such purported grant lacked legal effect because Gilpatric’s predecessors in title did not own the beach.

The foundational deed in the Zagoren chain of title, the 1651 Cleave/Rigby-to-Jeffrey deed, contains a rudimentary metes and bounds description of the 200-acre parcel conveyed, which began “at the southwest side” of the land previously conveyed by the same grantor and then ran “four score poole . . . Southwestwardly towards Cape Porpus,” and then “from the sea banke” ran inland “Norewestwardly four hundred pooles” Pl. Ex. 541. The deed’s reference to “southwest side” of the abutting parcel is facially ambiguous. Examination of earlier deeds to the abutting land, the 1648 deeds from the same grantor to Bush and Moore, clarifies the intended seaward boundary. This earlier deeds described the property’s seaside boundary as beginning at a “grove of pine trees near unto the sea and adjoining the [Little] River, & from thence to runne upon a straight line *to the sea banke* southwest, & *from thence southwest towards Cape Porpus*” and from there, inland on a northwest course. Pl. Exs. 541, 542 (emphasis added). Read together, these deeds describe a common boundary of “to the sea banke”; “from thence southwest towards Cape Porpus eight score poole”; and from that point continuing to run “four score poole breadth Southwestwardly towards Cape Porpus”; and then “from the sea banke” inland on a northwesterly course. The deeds describe a common boundary “to”, “along”, and “from” the “sea banke.”

The 1651 deed’s reference to “the sea” does not alter this conclusion. First, the reference was made with respect to a particular subset of the land being conveyed—“all the marsh ground.” The record establishes that the upland on the eastern side of the beach was woods and meadow, but also included marshland. Marsh ground does not include sand beach. Second, the reference was a general one that specified which marsh ground was being conveyed—that is, all the marsh ground between the “wood side” and the “sea” side. This general reference does not override the use of a fixed monument, the “sea banke.”

The 1727 town layout of the combined, 600-acre parcel to Gregory Jeffrey’s son, John Jeffrey, reinforced and confirmed the seaward boundary as the sea bank or sea shore. Def. Ex. 3, at 44. The description of the seaward boundary matches the earlier deed descriptions—beginning at in the northeast corner at a grove of trees near the river, then running to “a tree marked on four sides,” and then and runs to another “pitch pine,” and then, “from the sea shore” on northwest course. Pine trees do not grow on the sand beach or in the intertidal zone. The phrase, “from the sea shore,” excludes at least the intertidal zone of the beach. *See Matteson*, 2011 ME 134, ¶ 18, 32 A.3d 1059 (high-water mark is boundary when deed refers to “shore”); *Hodgdon*, 411 A.2d at 672 (deed reference to “shore” excludes intertidal zone); *Storer*, 6 Mass. at 439-400 (call to “shore” or “sea-shore” excludes tidal flats).

The deed that Zagoren contends is next in the title chain, the 1729 Curtis-to-Smith deed, also does not convey the beach. It references a “Parcel of Marsh . . . Running South East toward ye Sea Wall.” Pl. Ex. 260. In light of the court’s general findings and conclusions above, there is no reason to conclude that the grantor intended the “Sea Wall” to refer to the beach itself. Even if prior deeds did include the beach, this deed would have fixed boundary at the seawall and severed title to the beach.

Likewise, the 1854 Smith-to-Bailey deed established the seaward boundary as “the sea wall”—“to the sea wall” and “thence by the sea wall.” The deed’s “meaning and intending clause”—“meaning to convey all the land between the above named marsh road and the water”—does not operate as an independent basis of a grant but does serve as evidence of the grantor’s intent at the time. *See* Pl. Ex. 258. Even assuming that had been Smith’s intent, a grantor cannot convey that which he does not own.

All subsequent deeds carry this clause forward, up to the current Zagoren deed. In light of prior deeds, this clause does not, without more, constitute a grant of title in land beyond the seawall. The quitclaim clause is not evidence of title in that portion of real property for purposes of claiming exclusive use of the intertidal zone in this action. There are no other deeds coming into the title chain that include the beach.

The court therefore determines that the seaward boundary of the Zagoren property is the natural seawall, and the man-made seawall built on or immediately proximate thereto, shown on Defendant’s Exhibit 51 as the solid black line separating upland lot from beach.

Zagoren has not established by a preponderance of the evidence title to land seaward of the foregoing boundary, including without limitation the dry sand portion and intertidal zone of Goose Rocks Beach; and the claim to quiet title/declare exclusive rights therein is denied.

13. Gallant—219 Kings Highway

The current warranty deed to the Gallant property describes a monument—“a hub set in the ground”—with reference to the lot’s westerly side boundary, and then runs the side boundary “to the Atlantic Ocean *or so far as I may own*; thence Easterly by said ocean to a point formed by the intersection of this line with the southerly extension or prolongation of the first above described boundary line.” Pl. Ex. 262

(emphasis added). The call “to the Atlantic Ocean” is qualified and therefore not unambiguous. Even if this were considered to establish presumptively the seaward boundary at the low water line of the ocean, the presumption is defeated because prior deeds in the chain do not extend the property to the water, but rather set the upland boundary at the natural seawall, thus excluding the dry sand and the intertidal portions of the beach.

The source of the deed language including the beach is the 1898 Fuller/Dow-to-Whittemore deed, which used a “hub driven in the ground at the front of the seawall” as a monument but extended the side lot boundary from the hub as continuing “to the sea; thence easterly by the sea.” Pl. Ex. 275. Deeds coming forward include the same or substantially similar language. See Pl. Exs. 267, 269, 273, 274. The court cannot conclude, however, that Fuller and Dow had title to the beach.

Title to the Gallant property traces back to the 1651 Cleave/Rigby-to-Jeffrey deed, as subsequently laid out for John Jeffrey in 1727. For the reasons discussed above in Zagoren, the seaward boundary of the Jeffrey lands at the time was the seawall and thus excluded the beach.

This property was also part of the 200-acre parcel that Joseph Jeffrey inherited from his father John Jeffrey in 1734. The seaward boundary of the Joseph Jeffrey parcel (the western-most of the three parcels devised) as well as the other two parcels devised, when read together, is clearly and unambiguously established as the seawall. Pl. Ex. 284.⁵² See also Pl. Ex. 569, § E-2.

⁵² Running east to west: First parcel (the widow, Joanna Jeffrey), “beginning at a Pitch pine Tree on the northeast-side of sd Farm, *running southwest Eighty Rods to a pitch pine Tree standing on the Sea Wall* marked four sides;” to second parcel (Benjamin Jeffrey), “*from the Widow’s Part, by the sea Wall to a pitch pine Tree* marked four sides then running northwest four hundred Rods to a maple Tree marked four sides;” to the third parcel (Joseph Jeffrey), *from the Pine tree* which is marked on four Sides *to a Pitch Pine Tree which is marked on four sides and is the southwest Bounds of said Farm.*” Pl. Ex. 284 (emphasis added). Trees do not grow in the intertidal zone or

A 1734 deed from Joseph Jeffrey to Jacob Wildes and Moses Foster conveyed his 200 acres of “upland and marsh” using the same “pitch-pine-tree”-to-“pitch-pine-tree” description for the seaward boundary. Pl. Ex. 282. Consistent with the earlier Jeffrey deeds, this established the seaward boundary of the property at the “sea banke” or seawall, and thus excluded the dry sand portion and intertidal zone of the beach. The deed’s further reference to “with all and singular the ways Easements waters Watercourses Flatts rights members profits Privileges to the premises belonging” did not expand the scope of the property conveyed absent evidence of another independent grant into Joseph Jeffrey; and the record does not reflect such a grant. *See Whitmore*, 100 Me. at 417 (tidal flats do not pass as appurtenant to upland when outside the express boundaries of a grant, even if grant references “together with all privileges and appurtenances thereto belonging.”).

The chain of title coming forward in time from Wildes and Foster into Solomon Wildes about 100 years later is unclear. There is no deed in the Jeffrey-Wildes chain that grants title to land beyond the seawall. The land held by Solomon Wildes, and then conveyed to his brother William Wildes in 1826, more likely than not was subsumed within the Jeffrey land on the face of the earth, fell within the Jeffrey title chain, and therefore was bounded by the seawall. *See* Pl. Ex. 280; Def. Ex. 70; § IV(C), *supra*, ¶¶ 268-73. The 1832 Wildes-to-Littlefield deed purporting to convey “to the sea, thence southerly by the sea” was also predicated on the title received from Solomon Wildes. Pl. Ex. 279, 280. This land was also within the Jeffrey (and Wildes) land and title chain. *See* Def. Ex. 70. The record does not establish a separate, independent chain of title to the beach leading into Wildes or Littlefield. *See* § IV(C), *supra*, ¶¶ 263-64.

the dry sand part of a beach. The references “to a pitch pine standing on the Sea Wall” and “by the Sea Wall” specify a boundary that excludes the beach.

Thus, neither Wildes nor Littlefield had title to the beach; and the purported grant of the same to Fuller and Dow, as well as the subsequent grants to Whittemore, Mitchell and Gallant, were without legal effect. And, the record does not establish a separate, independent chain of title conveying the beach or flats between the upland and the sea into Gallant or predecessors in title.

The court therefore determines that the seaward boundary of the Gallant property is the natural seawall, and the man-made seawall built on or immediately proximate thereto, shown on Defendant's Exhibit 51 as the solid black line separating upland lot from beach.

Gallant has not established by a preponderance of the evidence title to land seaward of the foregoing boundary, including without limitation the dry sand portion and intertidal zone of Goose Rocks Beach; and the claim to quiet title/declare exclusive rights therein is denied.

14. Hastings—221 Kings Highway

The current deed to the Hastings property references the 1921 Whittemore-to-James deed to describe the property conveyed, and that deed described the seaward boundary as “[c]ommencing at a hub driven in the ground on the front of the sea wall . . . and continuing the same course to the sea; thence easterly by the sea” Pl. Exs. 286, 295. This call sets the presumptive seaward boundary as the mean low water line and establishes *prima facie* title to the beach. Because predecessors in title did not own beyond the natural seawall, this title is rebutted.

The Hastings chain of title is identical to Gallant's leading into Horace and Carrie Whittemore. *Compare* Pl. Ex. 261 *with* Pl. Ex. 285. The deed to Minnie James in 1921 conveying the eastern portion of the lot employs language identical to the 1898 Fuller/Dow-to-Whittemore deed in establishing the seaward boundary and purported

title to the beach. For the same reasons discussed above in Gallant, Fuller and Dow (and therefore Whittemore) did not have title to land seaward of the seawall. All deeds in the chain of title from James to Hastings incorporate the same description as was used in the 1921 James-to-Whittemore deed, and there is no evidence of another grant of title to the beach coming into this chain of title. Pl. Ex. 285.

The court therefore determines that the seaward boundary of the Hastings property is the natural seawall, and the man-made seawall built on or immediately proximate thereto, shown on Defendant's Exhibit 51 as the solid black line separating upland lot from beach.

Hastings has not established by a preponderance of the evidence title to land seaward of the foregoing boundary; and the claim to quiet title/declare exclusive rights therein is denied.

15. Sherman/Kinney—223 Kings Highway

The current deed to the Sherman/Kinney lot describes the property conveyed as a lot with "ocean frontage," with a side lot boundary running "in a southeasterly direction . . . to the ocean; thence in a southwesterly direction by the ocean" Pl. Ex. 301. This metes-and-bounds description calls to the water, presumptively establishing the low water line of the ocean as the seaward boundary and *prima facie* title in the beach. For the same reasons set out above with respect to Gallant and Hastings, the presumption is rebutted because predecessors in title did not own beyond the seawall.

This property, too, was part of the Gregory Jeffrey lands. The source of its title is the 1651 Cleave/Rigby-to-Jeffrey deed, and proceeds forward on the identical track as Gallant and Hastings up to Fuller and Dow. For the same reasons as discussed above, Fuller and Dow did not have title to the beach. Therefore, the purported

conveyance of the beach in 1897 from Fuller/Dow to Jellison/Boston did not have legal effect. See Pl. Ex. 314.

There is no evidence of another grant of title to the beach coming into this title chain from a separate, independent source after the 1897 Fuller/Dow-to-Jellison/Boston conveyance. Pl Ex. 300. Even though the property descriptions continue to reflect with increasing specificity an intention to convey the beach, the respective grantors did not have title to convey. See Pl. Exs. 301-304, 308, 309, 311-313.

The court determines that the seaward boundary of the property is the natural seawall, and the man-made seawall built on or immediately proximate thereto, shown on Defendant's Exhibit 51 as the solid black line separating upland lot from beach.

Sherman/Kinney has not established by a preponderance of the evidence title to land seaward of the foregoing boundary, including without limitation the dry sand portion and intertidal zone of Goose Rocks Beach; and the claim to quiet title/declare exclusive rights therein is denied.

16. Forrest/Julian—239 Kings Highway

The current deed to the property at 239 Kings Highway is the 2004 Stedman-to-Forrest/Julian deed, which describes a boundary of the property with reference "to an iron pipe driven into the ground near the top of the bank of the ocean; thence N 74° 50' W by said top of the bank fifty-five (55) feet to an iron pipe driven into the ground and said land of Dykstra . . ." Pl. Ex. 318. The deed further provides that the grantor is also conveying "all my right, title and interest in and to the land situated at said Goose Rocks Beach in said Kennebunkport lying southerly of and adjoining the above described land and lying between the southerly prolongations of the easterly and westerly sidelines described above to said ocean or as far southerly as this Grantor owns." *Id.*

The deed's metes and bounds description of the parcel referencing monuments, courses and distances describes a boundary on the seaward side of the property as fixed at the "top of the bank." This description is unambiguous, conveys only to the seawall, and would exclude the beach. The additional, qualified clause purporting to convey all "right, title and interest" to the land "lying southerly" (seaward) of the boundary just described, "to the ocean or as far as southerly as the Grantor owns," is not an independent grant of title but does reflect an intent on the grantor's part to convey title to the beach, including the dry sand and intertidal zone portions thereof, if owned. Examination of prior deeds confirms that Stedman and his predecessors in title did not own the land seaward of the seawall.

This property was part of the Joseph Jeffrey land. The source of its title is the 1651 Cleave/Rigby-to-Jeffrey deed, and the title chain coming forward is identical to that of Gallant, Hastings and Sherman/Kinney, up to Fuller and Dow. For the same reasons as discussed above, Fuller and Dow did not acquire title to the beach. Thus, even though the 1890 Fuller/Dow-to-Bartlett purported to convey property extending "to the sea" and "by the sea" (Pl. Ex. 329), the grant did not have legal effect because a grantor cannot convey that which he does not own. The 1937 Bartlett-to-Downing deed and 1944 Downing-to-Brackett deed employed the same property description as the 1890 deed. It was only in the 1961 Bartlett-to-Hill that the more modern metes and bounds description, along with the accompanying "meaning and intending clause" referencing the "land lying between said sea wall and the Atlantic Ocean" was first adopted; and then used in subsequent deeds down to the present. Pl. Exs. 327, 328; 319, 321-24.

There is no evidence of another grant of title to the beach coming into this title chain from a separate, independent source after the 1890 Fuller/Dow-to-Bartlett conveyance. Pl. Ex. 315.

The court determines, therefore, that the seaward boundary of the Forrest/Julian property is the natural seawall, and the man-made seawall built on or immediately proximate thereto, shown on Defendant's Exhibit 51 as the solid black line separating upland lot from beach.

Forrest/Julian has not established by a preponderance of the evidence title to the land seaward of the foregoing boundary, including the dry sand and intertidal zone of Goose Rocks Beach; and the claim to quiet title/declare exclusive rights therein is denied.

17. Julian—241 Kings Highway

The current deed to 241 Kings Highway is the 2006 deed from Suzanne M. Wilson, trustee of the S.M. Wilson Trust to Nancie M. Julian; and for purposes of this action, it is substantively identical to the 2004 Stedman-to-Forrest/Julian deed. The title chains of the two properties are identical up to Suzanne M. (Hill) Wilson's division in 1968 and 1976. No additional grants of land or title came into the chain of title to the Julian property after this division.

Therefore, the court determines that the seaward boundary of the Julian property is the natural seawall, and the man-made seawall built on or immediately proximate thereto, shown on Defendant's Exhibit 51 as the solid black line separating upland lot from beach.

For the same reasons in Forrest/Julian, Julian has not established by a preponderance of the evidence title to the land seaward of the foregoing boundary,

including without limitation the dry sand and intertidal zone of Goose Rocks Beach; and the claim to quiet title/declare exclusive rights therein is denied.

18. Raines—249 Kings Highway

The current deed to the Raines property is a 2004 trustee's deed describing the property's seaward boundary by reference to the side lot line that runs "to an iron pipe driven into the ground at the top of the bank of the Atlantic Ocean;" and "thence continuing on the same course to the Atlantic Ocean;" then "by the Atlantic Ocean" to an "extended boundary line" of the neighboring lot; and then by that extended boundary line north to "to an iron pipe driven into the ground at the top of said bank." Pl. Ex. 336. The deed also references and incorporates a plan (Pl. Ex. 348), which depicts the layout of the lot, including a stone or wooden bulkhead at the "top of the bank" where the iron pins have presumably been placed. This same description first appeared in the 1976 warranty deed from Monroe/Bryles to Raines. Pl. Ex. 339. The presumptive seaward boundary of the low water line of the Atlantic Ocean and *prima facie* title to the beach established by these deeds is rebutted because predecessors in title to Raines did not own the beach.

The Raines property was part of the Jeffrey lands. The source of title to this property is the 1651 Cleave/Rigby-to-Jeffrey deed; and the chain of title coming forward in time to Fuller and Dow is identical to Gallant, Hastings, Sherman/Kinney and Forrest/Julian. There is no evidence of an independent source of title to the beach, either prior or subsequent to the 1886 Fuller/Dow-to-Estey deed. For the same reasons discussed above, the court concludes that the predecessors in title to Fuller and Dow, and all subsequent grantors in the Raines chain of title, did not own the beach and therefore could not convey it forward into Raines.

The court determines that the seaward boundary of the Raines property is the natural seawall, and the man-made seawall built on or immediately proximate thereto, shown on Defendant's Exhibit 51 as the solid black line separating upland lot from beach.

Raines has not established by a preponderance of the evidence title to the land seaward of the foregoing boundary, including without limitation the dry sand and intertidal zone of Goose Rocks Beach; and the claim to quiet title/declare exclusive rights therein is denied.

19. Josselyn-Rose—251 Kings Highway

The current deed to the property at 251 Kings Highway describes the western side boundary of the property as running "southerly by said Potter land about one hundred feet to a hub", then "continuing same course to the sea or so far as my title extends", and then "by the sea easterly one hundred feet to land of said Goodwin." Pl. Ex. 358. The deed appears to call to the sea to establish the water-ward boundary; however, the qualification, "or so far as my title extends," introduces a degree of ambiguity. Review of prior deeds in the chain of title establishes that the seaward boundary is not the water, but rather the seawall.

This property, too, was part of the Gregory Jeffrey and Joseph Jeffrey land, the seaward boundary of which was the natural seawall. The chain of title coming forward from Joseph Jeffrey is unclear, but it appears this parcel remained in the Jeffrey family up to 1879, when Alexander Jeffrey conveyed to Benjamin Fuller "a certain piece of *wood land and Beach wall* at Goose Rocks Beach" described in relevant part as "[b]eginning on *the Beach wall at a hub* in the sand" then running northwesterly across the town road and proceed to and along land owned by William Littlefield and James Littlefield, and then "by the said Littlefield land Southeasterly *to the beach wall* so far

as I own, then Northeasterly *by the beach wall* to point commenced at . . .” Pl. Ex. 376 (emphasis added).

The seaward boundary established by this deed is the “beach wall”, that is, more likely than not a natural seawall or rise in elevation of the land between the higher high tide line and the upland. Use of the words, “beach wall,” suggests a plain meaning that identifies a physical feature on the face of the earth that has elevation and would serve as a natural monument. The placement of a “hub” at that location also reinforces this conclusion; hubs were not placed in the intertidal zones of beaches. Use of the beach wall or seawall is consistent with earlier deeds in the chain of title. Thus, the title to the land derived from Jeffrey did not extend to the beach seaward of the beach wall or seawall.

For the reasons discussed above in Gallant, the interests acquired by Fuller and Dow from the Solomon Wildes and John Littlefield conveyances likewise did not legally convey title to the beach, despite the general references to the sea as the seaward boundary in those deeds. The 1888 Fuller/Dow-to-Day deed purported to convey “a certain piece of Land and Sea Wall” with a rudimentary metes and bounds description resembling the property description in the current deed. Pl. Ex. 369 (“to the Sea or as far as we own thence by the sea . . . and over the Sea Wall”). Because Fuller and Dow did not have title to the beach beyond the seawall, they could not convey it to Gertrude Day. There is no evidence of a separate, independent grant of title coming into the chain of deeds from that point forward.

The court determines that the seaward boundary of the Josselyn-Rose property is the natural seawall, and the man-made seawall built on or immediately proximate thereto, shown on Defendant’s Exhibit 51 as the solid black line separating upland lot from beach.

Josselyn-Rose has not established by a preponderance of the evidence title to the land seaward of the foregoing boundary, including the dry sand and intertidal zone of Goose Rocks Beach; and the claim to quiet title/declare exclusive rights therein is denied.

20. Sandifer—253 Kings Highway

Deeds to the Sandifer property consistently have used the same metes and bounds description since the 1889 Fuller/Dow-to-Flagg deed, namely: “a certain lot or parcel of land” that is described as “[b]eginning at a hub by the Sea at land of Gertrude Day”, and then running northerly to and easterly one hundred feet by the King’s Highway “to a hub”, then “Southerly on a line parallel with the first mentioned course to a hub by the sea; thence Westerly by the sea one hundred to the point of beginning.” Pl. Exs. 382, 384, 386, 389-93, 395, 396. Even if the deed’s reference to “the sea” raises a presumption that the seaward boundary is the low water line of the ocean and/or an intention to convey part of the beach, the presumption is rebutted for the following reasons.

The deed descriptions use “hubs” as monuments to mark the two seaward corners and one inland corner of the property. As noted above, when used as seaward monuments, hubs were generally not placed in the intertidal zone or in the dry sand portion of the beach. At the very least, therefore, the deed language is ambiguous.

As has been concluded with respect to the other properties coming out of the Joseph Jeffrey land, the chain of title leading into William Wildes, then John Littlefield, and then into Fuller and Dow did not grant title to the beach. The seaward boundary of the Jeffrey land was the “sea banke” or seawall. No other conveyances into the chain of title coming forward in time up to Fuller and Dow would have expanded their title beyond the seawall. Therefore, for the same reasons discussed above in Gallant and

other eastern beach properties that derive from the Joseph Jeffrey land, it is immaterial whether Fuller and Dow (or any subsequent grantors) intended to convey title to the beach; they did not have title to convey.

The 1986 survey of the property reinforces this conclusion. Consistent with the language of the deeds and what the survey depicts, it is more likely than not that the “hubs” marking the two seaward corners of the property were located on or near the top of the natural seawall, or where the drill holes and man-made seawall are located today. *See* Pl. Ex. 383.

The court determines that the seaward boundary of the Sandifer property is the natural seawall, and the man-made seawall built on or immediately proximate thereto, shown on Defendant’s Exhibit 51 as the solid black line separating upland lot from beach.

Sandifer has not established by a preponderance of the evidence title to the land seaward of the foregoing boundary, including the dry sand and intertidal zone of Goose Rocks Beach; and the claim to quiet title/declare exclusive rights therein is denied.

21. Lencki—256 Kings Highway

The current deed to the Lencki property describes the lot in two parts. One part is inland of King’s Highway, which is described by metes and bounds and establishes the road as its southeastern boundary. The second part is described in more general terms and conveys “all my right, title and interest in and to all the land lying Southeasterly of the above described lot and between the Southwesterly and Northeasterly side lines of the above described lot extended to the ocean.” The deed also references a 1930 plan with respect to the “above stakes and courses.” Pl. Ex. 398. The description of land lying seaward of the road between two sidelines “extended to the ocean” suggests a presumptive seaward boundary of the low water line of the ocean.

The deed is not unambiguous, and the presumption is rebutted by examining earlier deeds in the chain of title and other evidence.

The Lencki property was originally part of the Gregory Jeffrey lands that were subsequently devised to, and laid out for, his son John Jeffrey; and then passed on by John Jeffrey's will to his son, Benjamin. The seaward boundary of the 400-acre parcel conveyed to Gregory Jeffrey's predecessor in interest, Richard Moore, and then subsequently to Jeffrey was described as "the sea banke." Pl. Exs. 43, 541, 542. The seaward boundary of Benjamin Jeffrey's 200-acre parcel was described as running "southwest Eighty Rods from the Widow's Part [i.e. the "pitch pine Tree standing on the seawall" at the southwest corner of her lot] *by the sea Wall to a pitch pine Tree marked four sides.*" Pl. Exs. 284, 569, § E-2 (emphasis added). Trees do not grow in the intertidal zone or high dry sand of the beach. The court concludes that the seaward boundary of Benjamin Jeffrey's land was the natural seawall inland of the higher high tide line and dry sand portion of the beach.

Conveyances coming forward from Benjamin Jeffrey did not include the beach beyond the natural seawall. In 1735 Benjamin Jeffrey conveyed to Jacob Wildes and Moses Foster his 200-acre parcel of "Upland & Salt Marsh" with the same seaward boundary of the natural seawall as was set as early as 1648 and carried up to the devise of the property to him under John Jeffrey's will. Pl. Ex. 569, § E-2 (boundary description matches earlier deed, from "pitch pine tree" to "pitch pine tree"). For the same reasons discussed above, the deeds coming forward through Wildes and Littlefield up to Fuller and Dow did not convey title to the beach. There is no evidence of another source of title in the beach entering into the title chain of this property prior to Fuller and Dow. See §§ IV(C), *supra*, ¶¶ 264-75, V(B)(13), *supra*.

The 1881 Fuller/Dow-to-Dow deed described the property in unitary terms, as a “piece of land or Cottage lot at Goose Rocks Beach . . . [b]eginning at the Ocean at the South corner of the lot” and then running “over the Beach Wall and the town road” to a hub on the other side of the road, and then continuing 300 feet; and then after squaring off, running back towards and “across the road and sea wall to the water” and then “by the water” to the “place commenced at.” Pl. Ex. 241. This same description was used in the 1893 Dow-to-Dow deed. Pl. Ex. 428.

Despite the references to “beginning at the Ocean”, “over” or “across” the “seawall”, “to the water”, and “by the water”, these deeds did not convey the beach. First, as noted, the grantors did not have title to the beach. Even if it were their intent to do so, conveyance of land seaward of the natural seawall did not have legal effect. Second, the unique, physical layout of this particular property makes it more likely than not that the intent was not to convey to the water but rather over the road and across the strip of land seaward of the road to the natural seawall/vegetation line. The road is closest to the beach and water along this stretch, leaving only a thin margin of land between the road and the high dry sand. *See* Def. Ex. 53, 55 (Plot 5). There is a man-made, rock wall along the road. *Id.* The land between the road and the beach is higher in elevation than the dry sand portion of the beach. There is an elevated dune or natural seawall (with a “seawall vegetation line”) very close to the higher high tide line (elevation +7) on the beach; and at times during the year when the tide is highest, the water approaches closely to the dune. Yarumian Test. (Tr. VII 43-44); Def. Ex. 53, 55 (Plot 5). This would reconcile the 1881 Fuller/Dow-to-Dow and 1893 Dow-to-Dow deeds’ references with the physical layout of the land and support the conclusion that the conveyance did not include beach down to the presumptive low water line.

The court determines that the seaward boundary of the Lencki property is the natural seawall vegetation line shown on Defendant's Exhibit 51 as the solid black line separating upland lot from beach.

Lencki has not established by a preponderance of the evidence title to the land seaward of the foregoing boundary, including without limitation the dry sand and intertidal zone of Goose Rocks Beach; and the claim to quiet title/declare exclusive rights therein and is denied.

22. Scribner—291 Kings Highway

The current deeds transferred the Scribner property from a trust to 291 Rear King's Highway, LLC. Pl. Exs. 430, 431. The deeds employ the same property description used in numerous intra-family transfers dating back to the 1986 deeds of distribution from the estate of Dorothy H. Scribner. Pl. Exs. 437, 438. *See also* Pl. Exs. 432, 433, 436. These deeds describe the property in relevant part as a lot at Goose Rocks Beach "[b]eginning at an iron pipe set in the ground and land now or formerly of Barbara Mitchell" and then "running by said land now or formerly of Mitchell [southeast] . . . to a seawall", then "along said seawall to a point" and then northwesterly to an iron pipe, and then northeasterly "to the point of beginning." The deeds purport to also convey "all of the right, title and interest of the Grantors, in and to all land lying adjacent to and Southerly of the Southerly boundary of the above described parcel to the Atlantic Ocean which lies between the prolongation Southerly of the Easterly and Westerly boundaries of the first above described parcel . . ." Pl. Exs. 430, 438.

The foregoing metes and bounds description unambiguously identify the seawall as its seaward boundary. The additional clause purporting to convey the beach down to the Atlantic Ocean, first added in 1986, does not establish title in the land seaward of the seawall. Even if this language creates ambiguity in the deed, it is clear from prior

deeds that predecessors in title did not own the beach between the seawall and the ocean.

Title to this property traces back to the 1648 Cleave/Rigby-to-Bush/Moore deeds, the 1727 layout of the land to John Jeffrey, and the 1734 devise to Joanna Jeffrey, which established the seaward boundary of this parcel as the natural seawall. *See* § IV(C), *supra*, ¶¶ 256-63.

Subsequent conveyances of the property within the Jeffrey family confirmed this boundary. Although the 1786 deed from John Jeffrey to Benjamin Jeffrey made reference to the property as being bounded “Southwestwardly by the Sea”, the land conveyed was a 200-acre “piece or tract of *upland*,” and the metes and bounds description began at the “pitch pine tree” monument, from which the bounds ran inland and then back to another monument, “the Sea Wall,” and “thence South west to the first mentioned bound.” Pl. Ex. 453 (emphasis added). When the property was eventually conveyed out of the Jeffrey family by the 1875 Jeffrey-to-Campbell deed, the same boundary of the property was described as “thence Southeasterly by the Pierce lot sixteen rods to the seawall, thence Southwesterly by the seawall three rods to the Proctor line.” Pl. Ex. 448.

Conveyances into or between Campbell and his family from 1877 to 1901 unambiguously established the seawall as the seaward boundary. *See* 1877 Proctor-to-Campbell deed, Pl. Ex. 582 (“to the sea wall” and “upon the sea wall”); 1900 Campbell Heirs-to-Howard/Campbell deed, Pl. Ex. 447 (“bounded . . . On the Southeast by the Sea Wall”); 1900 Howard-to-Campbell deed, Pl. Ex. 446 (“beginning at a point on the sea wall”; and “thence southerly to said sea wall; thence by said sea wall”).

The 1901 Campbell-to-Scribner deed, which conveyed the property into the Scribner family, unambiguously described the seaward boundary of the property as the

seawall, which also at least by that time included a man-made bulkhead. Pl. Ex. 445 (“in a southeasterly direction in a straight line . . . about (200) ft to the Sea wall thence in a southwesterly direction along bulk head on sea wall one hundred and eighteen (118) feet to a reserved road leading from aforesaid Town road to the sea.”).

The acquisition of an abutting 20-foot strip purporting to extend “to low water mark of the Atlantic Ocean or so far as Grantor may own” does not alter the boundaries of the Scribner property. Pl. Ex. 442. The court does not address the boundaries of the 20-foot parcel, the deed to which was a “reference” deed and not a “title” deed. *Id.* Moreover, the inclusion of the quitclaim clause for the first time in the 1986 deeds of distribution from the estate of Dorothy Scribner to Robert Scribner did not have legal effect in conveying title to land beyond the seawall.

The court determines that the seaward boundary of the Scribner property is the natural seawall, and the man-made seawall built on or immediately proximate thereto, shown on Defendant’s Exhibit 51 as the solid black line separating upland lot from beach.

Scribner has not established by a preponderance of the evidence title to the land seaward of the foregoing boundary, including the dry sand and intertidal zone of Goose Rocks Beach; and the claim to quiet title/declare exclusive rights therein is denied.

23. Asplundh—17 Sand Point Road

The 1973 deed to the Asplundh property employs the same property description carried forward from several, earlier deeds going back to the 1939 Jeffrey-to-O’Hara deed, which describes a side boundary of the lot running “to the Atlantic Ocean” and then “by the Ocean.” See Pl. Exs. 457, 458, 461, 462. The deeds reference a “Lot C” shown on a plan of land; however, the copy of the plan in evidence does not show this lot.

The deed calls “to the Atlantic Ocean” and “by the Ocean” establish *prima facie* title to the low water line; however, that is rebutted and Asplundh has not established title by a preponderance of evidence. Even if the intent of these respective grantors had been to convey the beach and intertidal zone seaward of the upland lot, a grantor may only convey that which he or she owns. Examination of the source of title to this property and earlier deeds in the chain of title leads to the conclusion Asplundh has not established by a preponderance of evidence that the seaward boundary of this property is not the low water line of the Atlantic Ocean.

The 1939 Jeffrey-to-O’Hara deed was the first in the modern chain of title that made specific reference to the ocean in defining the metes and bounds of the property. The three preceding conveyances leading to Jenny Jeffrey were made via devise, and the wills only generally made reference to “all of my estate, real, personal or mixed;” “the remainder of my estate real and personal;” and “all the rest of my real estate.” Pl. Exs. 464, 466, 467.

This property was originally part of the widow Joanna Jeffrey’s 200-acre parcel. The seaward boundary of the Joanna Jeffrey parcel began at a “Pitch pine Tree on the northeast-side of [a] Farm,” and ran “southwest Eighty Rods to *a pitch pine Tree standing on the Sea Wall* marked four sides.” Pl. Ex. 284 (Emphasis added). For reasons already discussed, “seawall” was more likely than not intended to reference the natural embankment separating the upland from the high dry sand and higher high water line. The sources of Joanna Jeffrey’s title, likewise, did not include a conveyance of the beach, including the original 1648 Cleave/Rigby-to-Bush/Moore deeds and the 1727 layout of Jeffrey property by the Town of Arundel.

The deed chain leading into Samuel Jeffrey from Benjamin and William Jeffery, whose title traces back to Joanna Jeffrey, established the seawall as the seaward

boundary of the land in question. Pl. Ex. 569, § H, at 28-29. Deeds reference “upland and marsh” or the “seawall”, reinforcing the conclusion that at least the tidal flats were not included. The exception is the 1836 William Jeffrey to Samuel Jeffrey, which employs a general description of the boundaries, including the southeast boundary as “by the sea.” Viewed in context, this lone reference does not, without evidence of a new source of title entering into the chain, extend the seaward boundary beyond that which was conveyed to William Jeffrey.

The six additional title streams flowing into Samuel Jeffrey reflected in Plaintiffs’ Exhibit 454 likewise do not establish title to the beach by a preponderance of evidence. The Beaver Pond Parcel from Jacob Wildes was not bounded by the sea. Lot 4 from the Ward heirs was bounded on the Little River; however, this appears to be more likely than not land on Sand Point further east of the Jeffrey lands. Moreover, Samuel Jeffrey subsequently conveyed some or all of this lot to George Emmons and it is thus unclear how much, if any, of this lot was in his estate at the time of his death (or where it was located on the face of the earth). Some of these additional title sources have been considered earlier in the context of other properties (such as the Tanner and Emmons deeds); and the remaining deeds referenced do not appear to be in evidence. See § IV(C), *supra*, ¶¶ 447-51; Pl. Ex. 454. Thus, the land that ultimately passed to Jennie Jeffrey that she then conveyed to O’Hara included land previously owned by the Jeffrey family as well as other land further east on Sand Point acquired by Samuel Jeffrey from these other conveyances. Based on the evidence as a whole, it is more likely than not that Asplundh’s property fell within the bounds of the original Jeffrey lands. See § IV(C), *supra*, ¶¶ 444-57.

A number of plans relating to this property have been admitted into evidence. Earlier plans depict the ocean as closely proximate to the upland in this area of the

beach. See Pl. Exs. 456, 459. Others depict a “beach” area between the ocean and the upland. See Pl Exs. 460, 463. The most recent, Plaintiffs’ Exhibit 455, depicts a man-made, stone seawall separating the upland from the “Atlantic Ocean.” Upon closer inspection it can be seen that the same area marked as ocean is also labelled “sand beach” and the “high water line” is indicated at the base of the stone seawall. Asplundh offered no evidence as to the location of the wall on the face of the earth. It is more likely than not located on or immediately proximate to the natural seawall.

The court determines that the seaward boundary of the Asplundh property is the natural seawall, and the man-made seawall built on or immediately proximate thereto, shown on Defendant’s Exhibit 51 as the solid black line separating upland lot from beach.

Asplundh has not established by a preponderance of the evidence title to the land seaward of the foregoing boundary, including the dry sand and intertidal zone of Goose Rocks Beach; and the claim to quiet title/declare exclusive rights therein is denied.

24. Temerlin—29 Sandpoint Road

The Temerlin property has been the subject of numerous intra-family transfers dating back to 1994. All deeds coming forward from the 1965 O’Hara-to-Page warranty deed have used the same reference to lots 19 and 21 on a 1959 plan for a “description of said premises and the metes and bounds thereof.” Pl. Ex. 499. See also Pl. Exs. 477-496, 498. Lots 19 and 21 are bordered by the Little River. Pl. Ex. 459. The preceding deed in the title chain (1939 Emmons-to-O’Hara deed) describes the property as “bounded . . . Southerly by the Atlantic Ocean” and “easterly by the Little River.” Pl. Ex. 501. This establishes *prima facie* title to the water.

Unlike all other lots in the eastern section of the beach, the Temerlin property was not part of the Jeffrey lands. It was located east of the Jeffrey lands and is believed

to trace back to the 1661 Phillips-to-Scadlock deed, which is not in evidence. The 1661 deed was confirmed in the Eastern Claims process. *See* Def. Ex. 23, at 3-4.

From the earliest known deeds to the 1936 Emmons-to-O'Hara deed, none excluded the beach. The earliest known deeds in the chain of title leading into Samuel Fletcher contained only general descriptions of the land conveyed. Pl. Ex. 511-13. The 1767 Fletcher-to-Emmons deed, however, described the property with more specificity, with a call to the water. Pl. Ex. 509 ("Beginning at a stone by the Edge of ye salt water . . . then southeast & by south or thereabouts to ye salt water cove then by the Cove or flats to the bounds first mentioned"). Later deeds, right up to the current deeds, had calls to the water. *See, e.g.*, Pl. Ex. 506 ("bounded by the Little River, by the Sea"); Pl. Ex. 503 ("bounded Southeasterly by the Sea").

Therefore, the court concludes that Temerlin has established by a preponderance of the evidence that the seaward boundary of the Temerlin property is the mean low water line of the Atlantic Ocean to the south and the Little River to the east.

VI. Town of Kennebunkport's Title Claim

Count I of the Town's counterclaim seeks a declaration pursuant to 14 M.R.S. §§ 5951-63 and 14 M.R.S. §§ 6651-63 that fee simple title to Goose Rocks Beach rests in the Town of Kennebunkport and/or the public. The Town bases its claim of title on the 1684 Danforth Deed from Massachusetts and/or on historical evidence that its predecessor, Cape Porpus (later Arundel), controlled and granted out common lands within the township and therefore effectively functioned as the local proprietary.

Plaintiffs previously had disputed the Danforth Deed's status as a deed; and also had contended that even if a deed, it was confirmatory only—an argument the motion court in this case accepted in denying the Town's motion for summary judgment. Plaintiffs have continued to oppose the Town's reliance upon, and the court's

consideration of, the Danforth Deed as a potential source of title to the beach, on procedural as well as substantive grounds. In addition, Plaintiffs rely upon *Eaton v. Town of Wells* and the record evidence as legally and factually sufficient, respectively, to defeat the Town's claim of fee title to the beach.

A. Danforth Deed

1. Consideration of the Deed

At the summary judgment phase, the motion court had concluded, and the court hereby reaffirms, that the 1684 indenture from Thomas Danforth on behalf of Massachusetts to Cape Porpus was a deed. See *Almeder*, 2011 Me. Super. LEXIS 248, at *9 (*Brennan, J.*) (Indenture has all the attributes of a deed conveying an interest in land). In all likelihood, the instrument was styled as an "indenture" because it imposed ongoing obligations of payment (in the form of "quit rents") on town residents. It was recorded in the York Book of Deeds at Book XVI, Fol. 209-10. The motion court's characterization of the deed at the summary judgment phase of this case does not preclude consideration of the deed at trial in the context of a fully developed factual record; and the court previously denied Plaintiffs' pretrial motion *in limine* to exclude the Danforth Deed. See *Almeder*, 2016 Me. Super. LEXIS 305. Upon further review and based upon a complete record after trial, the court reaches a different conclusion as to the interpretation and effect of the Danforth Deed.

2. Language of the Deed

Interpretation of a deed is a question of law. *Bennett v Tracy*, 1999 ME 165, ¶ 7, 740 A.2d 571. In construing a deed, the court attempts to ascertain the intention of the parties from the language of the deed itself "in accordance with the legal canons of interpretation," and must "consider all the words of the grant in the light of the circumstances and conditions attending the transaction." *McLellan v. McFadden*, 95 A.

1025, 1028 (Me. 1915); *Emery v. Webster*, 42 Me. 204, 206 (1856). A deed that is reasonably susceptible to different interpretations is ambiguous. *Labonte v. Thurlow*, 2008 ME 60, ¶ 9, 945 A.2d 1237. For the following reasons, the court concludes the deed language is ambiguous.

The deed authorized Danforth to “make Legal confirmation” unto the inhabitants of the entire Province of Maine, and to do so with respect to “all their Lands or proprieties” “to them justly appertaining *or belonging within the Limitts or Bounds of sd Province.*” Def. Ex. 20. The latter (italicized) phrase suggests a scope of authority broader than merely confirming title in lands that previously had been granted by private deed (“Lands or proprieties to them justly appertaining”), and rather one that extended to all land within the Province of Maine (“belonging within the Limitts or Bounds of sd Province”), whether previously the subject of a grant or not.

The deed’s granting language reads in relevant part as follows:

“Thomas Danforth pursuant to the Trust in him reposed & Power to him given as abovesaid by & on Behalf of the Governour & Company of the Massachusetts Colony aforesd Hath *given granted & confirmed & by these Presents Doth fully clearly & absolutely give grant & confirm* unto the above named John Barrett Senr John Burrington & John Badson Trustees as is above Expres’t All that Tract or parcel of Land within the Township of Cape Porpus in said Province according to the Bounds & Limitts of the sd Township”

Id. (emphasis added). On behalf of the Massachusetts government, Danforth, “[h]ath *given granted & confirmed & by these Presents Doth fully clearly & absolutely give grant & confirm*” to the named grantees the property described. The conjunctive phrases, “give, grant and confirm,” and “absolutely give, grant and confirm,” may be read to constitute either an outright grant or merely a confirmatory grant. *Compare Sargent v. Simpson*, 8 Me. 148, 153-154 (1831) and *Mayo v. Libby*, 12 Mass. 339, 343 (1815) (“a deed of grant and confirmation, thus pass[es] to the grantees all the right of the Commonwealth in a lot of land described”) with *Banton v. Crosby*, 95 Me. 429, 50 A. 86

(Me. 1901) (when deed suggests prior grant of title, then “give, grant and confirm” language acts only as confirmation of title). *See also Litchfield v. Inhabitants of Scituate*, 136 Mass. 39, 41-43 (1883) (even a confirmatory deed to a township or to proprietors gives them the ability to “dispose of the land” not previously granted to others); *Commonwealth v. City of Roxbury*, 75 Mass. 451, 479-80 (1857) (a charter that uses language “grant and confirm” gives rights to establish a government and also serves as “a grant of property within the realm of England.”).⁵³

The description of property conveyed is ambiguous. The deed described the subject property as follows:

All that Tract or parcel of Land within the Township of Cape Porpus in said Province according to the Bounds & Limitts of the sd Township to them formerly granted by Sir Ferdinando Gorges Knight or by any of his Agents or by the General assembly of the Massachusetts with all Privileges and Appurces to the same appertaining or in any Wise Belonging (All Royalties reserved to his Majesty by ye Charter granted to sir Ferdinando Gorges Knight as also those by sd Charter given to sd Ferdinando Gorges Kt his Heirs & Assigns together with the Rivers Streams & Coves contained within the Limitts or Bounds of sd Township always to be excepted & reserved).

Def. Ex. 20 (emphasis added). “All that Tract or parcel of Land” is phrased in the singular—as one “Tract” or “parcel” of land. The clause, “within the Township of Cape Porpus in said Province according to the Bounds & Limitts of the sd Township,” is broad, and includes all land within the boundaries of the town.

⁵³ The 1639 Royal Charter which granted plenary rights to Sir Ferdinando Gorges and was the source of subsequent title to lands in Maine used the identical phrase—“give, grant & confirm”:

“We have given, granted, & confirmed; And by these Presents for Us, Our Heirs & Successors do give, grant & confirm unto the said Sir Ferdinando Gorges his Heirs and Assignes, all that Part, Purpart, & Portion of the Main Land of New England aforesaid beginning at the Entrance of the Piscataqua Harbour, . . . , and from Piscataqua Harbour Mouth North-Eastward along the Sea Coast to Sagadahoc, & Up the River thereof to Kynygequy River etc.”

Def. Ex. 5. The lands and privileges under this charter were extensive and all-inclusive, and considered at the time to be “as ample as the Bishop of Durham, a comparison which was a common formula in issuing proprietary grants.” *Id.*

The next clause, “to them formerly granted by Sir Ferdinando Gorges, or his agents, or by the General assembly of the Massachusetts” is unclear. Does the plural, “them,” refer back to the three named grantees (Barrett, Burrington and Badson), in which case the extent of the property described is limited? Does it refer to anyone who may have received a grant from Gorges, or his agents, or Massachusetts General assembly, in which case it is broader? Or, does it refer to the “Bounds and Limitts of the sd Township,” in which case it is broader still, and inclusive of all land within the town? In addition, this clause references three alternative sources of “former grants”—Gorges, his agents, or “the General assembly of Massachusetts”—thus, not only land previously granted by private deed.

The deed’s habendum clause reinforces a broader reading. It provides that the three named trustees are:

To Have and to Hold all the abovesd same more or less with all the Privileges & Appurces to the same appertaining or in any Wise belonging (excepting as is above Excepted & reserved) *to them the sd John Barrett Senr, John Burrington, and John Badson Trustees as above sd forever* to the only proper Use & Behoof of the Inhabitants of the sd Town that now are & to them that shall there survive & succeed from Time to Time & forever more hereafter.”

Id. (emphasis added). Reference was to a singular “Tract of Land.” The land was “by these Presents granted and confirmed” to the three trustee/grantees to have and hold “forever”—but for “only proper Use and Behoof” of not only “the Inhabitants of the sd Town” but also those “that now are & to them that shall there survive and succeed from Time to Time hereafter.”

The deed also covenants “enjoyment” of the “given & granted Premises” “peaceably & and quietly” and “without the Let Denyall or contradiction of the Governour & Company of the Massachusetts Colony:”

And the above named Thomas Danforth for and on the Behalf of the Government & Company of the Massachusetts Colony and for their Successors & Assigns doth further *covenant, promise & grant to & with the above-named John Barrett Senr, John Burrington, & John Badson their Heirs & Assigns Trustees* above expressed

that *they* the sd John Barrett Senr, John Burrington & John Badson shall & may at all Times and from Time to Time *forever hereafter peaceably & quietly have hold occupie possess & enjoy all the above given & granted Premises without the Let Denyall or contradiction of the Governour & Company of the Massachusetts Colony* or of any other Person or Persons whatsoever claiming & Having any lawful Right, Title or Interest therein or in any Part or Parcell thereof by from or under the sd Governour & company or by any of their Assigns.

Id. (emphasis added). The covenant is made to the three grantee/trustees named and “*their Heirs Assigns Trustees*” that “*they*” shall at all times “*forever hereafter peaceably & quietly have hold occupie possess & enjoy all the above given & granted Premises.*” Further, Massachusetts would not interfere or make a competing claim of title to the land.

The court concludes that the deed’s language is not wholly unambiguous but rather may be susceptible to different interpretations. Therefore, it is proper to consider not only the context and the circumstances surrounding its execution but also other relevant, extrinsic evidence to ascertain its meaning and intent.

3. Nature of the Grant

When construed in light of the relevant historical context, attendant circumstances, and other extrinsic evidence, it becomes clear that the Danforth Deed was intended not only to confirm the validity of prior grants of title but also to enable further grants and confirmations of common and undivided land within the town of Cape Porpus.

By the early 1680s, Massachusetts had re-asserted its sovereignty over the western part of the Province of Maine; had authorized incorporation of towns in the Province, including Cape Porpus in 1653; and had enacted laws in the Massachusetts Colony to promote and support the settlement of towns. *See* § IV(B), *supra*, ¶¶ 23-24. These laws, which as of 1653 extended to Cape Porpus, authorized grants of “common land” within town limits to inhabitants of the town. *See id.* ¶ 25; *Lynn v. Nahant*, 113

Mass. 433, 448 (1873) (Common lands held “for public uses, with power by vote of the freemen of the town to divide them among the inhabitants, yet subject to the paramount authority of the General Court.”); *Springfield*, 12 Mass at 418 (“Authority was given to the freemen of every town to dispose of their lands, to grant lots, &c.”). By the early 1680s, hundreds of acres of common land in Cape Porpus had been publically granted out by vote of inhabitants at town meetings. *See* § IV(B), *supra*, ¶¶ 28-30.

In addition, by the early 1680s the status of land titles and holdings in the Cape Porpus area was in a state of confusion due to repeated depopulation and resettlement of the area. There was uncertainty, too, about the validity of title to lands previously granted by original proprietors or the town in light the acquisition of the Gorges Patent by Massachusetts. There was not only a need to clarify land holdings but also to promote resettlement of depopulated areas in the Province, including the town of Cape Porpus. Massachusetts had just acquired the “rights of soyle” to the Province of Maine formerly granted to Sir Ferdinando Gorges by virtue of its acquisition of the Gorges Patent from his heirs; and considered itself, therefore, to be “sole Proprietor” of this territory. *See* § IV(B), *supra*, ¶¶ 31-35.

It was in this context that Thomas Danforth was appointed president of the Province of Maine and authorized to issue a series of identical deeds to five townships including Cape Porpus. It is reasonable, and consistent with the historical context and surrounding circumstances at the time, to conclude that the Danforth Deed was not just intended to be a confirmatory deed with respect to previously granted lands. Rather, it was a grant from the Massachusetts General Court, which had not only “paramount authority” over town common lands but also the “right to soyle” in those lands, that was intended both to confirm title to land previously granted by private deeds or public grant and also to “give, grant and confirm” title to “All that Tract or Parcell of

Land within the Township of Cape Porpus” consistent with the customs and practices of the day. Additional record evidence further supports this conclusion.

There is no evidence that after 1684 Massachusetts made any further grants of lands in Cape Porpus (or in any of the other four towns that received the same deed). This was not the case in other areas of the Province of Maine. Up to the time Maine separated from the Commonwealth of Massachusetts in 1820, Massachusetts had continued making direct grants of land in other Maine localities. See § IV(B), *supra*, ¶ 43. See, e.g., *Dolloff v. Hardy*, 26 Me. 545 (1847) (1774 grant from legislature of the Province of Massachusetts to proprietors of New Pennycock [Rumford]); *Shapleigh v. Pilsbury*, 1 Me. 271 (1821) (1780 Grant and 1782 confirmation of lands in Shapleigh); *Chamberlain v. Bussey*, 5 Me. 164 (1827) (1785 Massachusetts General Court resolve to confirm grant of land in vicinity of Frankfort and Hampden); *State v. Cutler*, 16 Me. 349 (1839) (Lottery for sale of fifty townships in Maine); *Mayo v. Libby*, 12 Mass. 339 (1815) (Grants of land in Bangor and Hampden); *Sargent v. Simpson*, 8 Me. 148 (1831)⁵⁴ (1804 confirmation and grant of land in Sullivan by legislative resolve).

There was a contemporary understanding that the 1684 deeds from Danforth on behalf of Massachusetts had granted rights in common and undivided land within a town to enable confirmation of prior grants (public and private) and promote further settlement through further grants of that land. The Tyng petition drawn up by one of the “ancient proprietors” named in Danforth-to-Falmouth deed and submitted to the

⁵⁴ “It is part of our history [that] . . . multitudes of persons settled upon the public lands in Maine, which then belonged to Massachusetts, and in various parts made improvements; that they became the subject of legislative consideration and care, and were by successive legislatures treated as having a species of equitable title to the lands they had subdued and cultivated whereby the value of the adjoining or surrounding property had been enhanced; and that at different times provision was made for quieting them in their respective settlements, and on easy terms, conveying to them or their assigns the legal title which was in the Commonwealth.” *Sargent*, 8 Me. at 151.

government of Massachusetts requesting abatement of quit rents imposed by that indenture observed that Massachusetts had empowered Danforth “to lay out and appoint places for Townships in the said Province; and *also to grant power unto such Townships or Inhabitants or the Select men of all such Townships to give and grant lands to any persons whatsoever that would settle themselves and famalayes, in the said Province.*” Def. Ex. 21 (emphasis added). A 1731 judgment upheld the rights of the “ancient proprietors” in Falmouth under the deed from Danforth, which had granted “all the unsold and ungranted territory” within the town to the proprietors. Def. Ex. 22, at 9-11; *see also Proctor v. Goodwin*, 96 Me. 458, 470, 52 A. 933 (1902) (“Ancient proprietors” had rights to the common lands). *See* § IV(B), *supra*, ¶¶ 39-42.

4. Named Grantees

Incorporated towns are public corporations, and may acquire and hold property, real or personal. *North Yarmouth v. Skillings*, 45 Me. at 133 (a 1743 grant from proprietors to selectmen held to be valid conveyance to the town). *See also Inhabitants of Windham v. Inhabitants of Portland*, 4 Mass. 384 (1808); *Inhabitants of Gorham v. Inhabitants of Springfield*, 21 Me. 58 (1842).

The Danforth Deed does not name as grantee the incorporated entity, the town of Cape Porpus, nor officers or agents thereof. Rather, the grant is made to three individuals—John Barrett, Sr., John Badson, and John Burrington. Barrett (Barrat) was a landowner in the area, as was Badson (Batson). Burrington (Purinton) was likely as well landowner in addition to being active in town affairs. *See* § IV(B), *supra*, ¶ 38. The grant was expressly made to them as “Trustees on Behalf and for the sole use and benefit of the Inhabitants of the Town of Cape Porpus.” *See Bates v. Cohasset*, 280 Mass. 142, 147, 182 N.E.2d 284, 286 (1932) (1640 grant “not to the town in its corporate capacity, but to the inhabitant as individuals to hold as tenants in common.”) (emphasis

added). By its express terms, therefore, the deed did not make a direct grant to the town of Cape Porpus but rather to individual “trustees” for the “sole use and Benefit of the Inhabitants of the Town of Cape Porpus.” *See id.* at 286 (“limited corporate characteristics possessed by early towns tend to make it improbable that grants in 1640 were intended to be to the municipality”).

Consistent with the customs, practices and laws of the time, the Danforth Deed was intended to convey “All that tract of Land” within the town of Cape Porpus to the three grantees, individually and collectively, as proprietors thereof for confirmation of prior grants as well as for division of unclaimed, common land to inhabitants of the town. *See Green v. Putnam*, 62 Mass. 21, 25 (1851) (“In the early period of our colonial history, large tracts of land . . . were from time to time granted by the provincial government to individuals, constituting a proprietary”); *Rehoboth v. Hunt*, 1 Pick. 224, 228 (1822) (“The title to the township was, by the ancient conveyances, in sundry persons, not as a corporation, but as individuals, being tenants in common; for although they are mentioned in some of the ancient conveyances as townsmen, or as inhabitants of Rehoboth, this is only by way of description, and not as designating the capacity in which they are to take.”)

B. Title in Common Lands: Town vs. Proprietary

The record amply demonstrates that there were regular, public grants of unclaimed land made by vote at town meetings. There was a considerable amount unclaimed land within town boundaries that came to be considered common lands, perhaps due in part to the relatively small number of known, private grants by deed in this area. Land grants made at public town meetings began as early as 1678 and extended into the early 1720s. *See* § IV(B), *supra*, ¶¶ 20-22, 28, 30. 56. Town officials elected as lot layers surveyed the granted land and recorded their surveys in the official

town record, thereby confirming the grants. *Id.* ¶¶ 29, 57; *see Williams*, 38 Mass. at 289 (Title did not vest until land granted was “examined, located and confirmed by a locating committee”).

The Town’s expert historian, Professor Edwin Churchill, testified that these and other facts of record established Cape Porpus as an exception to the proprietorial model typical in other New England towns of that time, in that town inhabitants, acting under Massachusetts General Court authority and through municipal town meetings, comprised both the municipal government and the local proprietary, and thus owned and granted out common land in the town. Though these facts are substantial and un rebutted, they do not establish as a matter of law that the town itself held fee title to the common lands within its boundaries.

1. Town’s Interest in Common Lands

Grants of land by vote at public town meetings during this time were authorized by law and constituted valid conveyances. *See Springfield v. Miller*, 12 Mass. 415, 417 (1815). Common lands within town limits, however, “were not held by the town as its absolute property, as a private person might hold them,” but rather for “public purposes, with the power by vote of the freemen of the town to divide them among its inhabitants, *yet subject to the paramount authority of the General Court, which reserved and habitually exercised the power to grant at its discretion lands so held by the town.*” *Lynn*, 113 Mass. at 448 (emphasis added). *See Attorney Gen. v. Herrick*, 190 Mass. 311-12 (1906) (“rights and powers of the towns in lands within their limits were considered subordinate to the paramount power of the general court at its discretion to grant lands in any town, not already granted to individuals”); 3 Tiffany, *Real Property* § 934 (3d ed. 1939) (“In the New England colonies, the term ‘common’ was applied to a particular

class of lands, which belonged, not to the municipality or to individuals, but rather to associations of individuals.”).

Although there existed independent legal authority for these grants under the enactments of the Massachusetts General Court, *see* § IV(B), *supra*, ¶¶ 23-25, in this case there was an added dimension evidencing an exercise of that body’s “paramount authority” over unclaimed, common lands—the 1684 Danforth Deed. The contemporary view of the intent and effect of identical deeds granted to other towns and the absence of any subsequent grants of land in Cape Porpus by Massachusetts thereafter support the conclusion that this deed was intended as a grant to individual “trustees” or proprietors for the benefit of the inhabitants of the town. *See* § IV(B), *supra*, ¶¶ 36-43; *Green*, 62 Mass. at 25 (“In the early period of our colonial history, large tracts of land . . . were from time to time granted by the provincial government to individuals, constituting a proprietary.”).

Grants of land to individual proprietors were considered to be in the nature of a tenancy in common. *Burpee v. Burpee*, 118 Me. 1, 3 (1919); *Chamberlain v. Bussey*, 5 Me. 164, 170 (1827). *See Rehoboth*, 18 Mass. at 228 (title was “by ancient conveyances, in sundry persons, not as a corporation, but as individuals, being tenants in common”). *See also Gloucester v. Gaffney*, 90 Mass. 11, 13 (1864) (“By ancient usage in this commonwealth, as well as under authority of provincial statutes, proprietors of common lands . . . had sufficient seisin of the premises to enable them to convey, and to vest the legal seisin in the grantee.”)

Over time, as discussed below, the concept of ownership in the common and undivided lands evolved as provincial statutes began prescribing requirements with respect to “management, division and disposal of their common lands;” at which point “the seisin which the individuals had of their respective shares in common, became

transferred to the proprietary, and thereupon the proprietors could exercise any powers conferred upon them by law, and at a legal meeting could manage, divide and dispose of their property by majority vote.” *Burpee*, 118 Me. at 3-4. See *Chamberlain*, 5 Me. at 170 (when proprietary formally organized, “the seisin which the individuals had of their respective shares in common became transferred to the proprietary”); *Evans v. Osgood*, 18 Me. 213, 216 (1841) (once formally organized and meeting properly called, seisin is in the proprietary); *Proprietors of Jeffries Neck Pasture v. Ipswich*, 153 Mass. 42, 45, 26 N.E. 239, 240 (1891), quoting *North Bridgewater Society v. Waring*, 24 Pick. 304, 309 (1833) (“legal title was vested in the corporation which the grantees formed”). Each individual proprietor, however, may “by process of partition have his share assigned to him to hold in severalty, though such a partition would not be granted until all liens legally created and existing on the property by him owned had been removed. *Chamberlain*, 5 Me. at 170. See also *Burpee*, 118 Me. 1; *Evans*, 18 Me. 213; *Mitchell v. Starbuck*, 10 Mass. 5 (1813).

Thus, the court concludes as a matter of law that the town, as a distinct legal entity, did not hold a fee interest in the common and undivided lands either by virtue of the Danforth Deed or by virtue of the collective action of its inhabitants to assert control over and grant out common and undivided land. To the extent there was any question or ambiguity about the status of the town’s legal control over or interest in the common and undivided land within its boundaries in the early days of its history, a clear separation between town and proprietary would emerge.

2. Proprietary’s Interest in Common Lands

By the early 18th century, the authority and operating requirements of proprietors came into sharper focus. From 1692 to 1694, the Massachusetts General Court enacted laws clarifying and reinforcing proprietor authority to “manage, improve, divide up or

dispose” of common lands; and in 1712-13, it enacted An Act Directing how Meetings of Proprietors of Lands lying in Common may be called. *Copelas v. Miskell*, 5 LCR 203, 205 1997 Mass. LCR LEXIS 69 (Mass. Land Ct. Nov. 5, 1997). See § IV(B), *supra*, ¶¶ 46-47. These acts reaffirmed the authority of proprietors; prescribed formal requirements by which they were to operate; and effectively established the proprietary as an independent authority distinct from but affiliated with municipal town government. *Copelas*, 5 LCR at 205 (1713 General Court enactment “the dividing line between the merely traditional proprietors’ divisions and the fully and formally legal divisions.”); *Rehoboth*, 18 Mass. at 224 (Initially, “no separate meetings of the town and the proprietors, and no separate records;” after 1712 proprietors began independently transacting business).

As was the case in other towns, the transition to a formal proprietary in Cape Porpus (by then, Arundel) did not happen immediately and took several years. *E.g.*, *Rehoboth*, 18 Mass. at 224 (full transition to independent proprietary by 1731). The transition began in 1719. The November 18, 1719 meeting was the first meeting recorded in the Clerks Record as a “Legal Town meeting of *proprietors*, freeholders & other Inhabitants.” Def. Ex. 3, at 11 (emphasis added). The meeting had been noticed “to Rectify and Reform some things that have been acted in said Town;” and at the meeting consideration was given to “several grants lately pretended to be granted by said Town to several Inhabitants and other” that “were not so legal as we would have them to be” Def. Ex. 3, at 11. See § IV(B), *supra*, ¶¶ 49-51.

From 1719 to 1726, grants and layouts of common lands continued to be made at “town meetings,” indicating that the division of town and proprietary functions had not been completed and also that many of the same individuals may have continued to act in dual capacities. See § IV(B), *supra*, ¶¶ 52-57. See also *First Parish in Shrewsbury*

v. Smith, 31 Mass. 297, 301 (1833) (“towns, parishes and proprietors, often consisted so nearly of the same individuals”).

By 1726, the transition to an independent proprietary was complete. In February 1726, the “Proprietors of Arundel” held an inaugural meeting, chose officers, and established a separate record (the Proprietors Record). In March 1726 they elected other “Proprietors of the Common and undivided land in Arundel” and adopted rules and voting criteria; and from that point forward they exclusively oversaw, managed and granted out the common land in Arundel. See § IV(B), *supra*, ¶¶ 58-61, 64. These actions formally established the independent proprietary. *Dollof v. Hardy*, 26 Me. 545, 549 (1847). Any interest in common and undivided land not previously granted out and held by the “proprietors, freemen and other Inhabitants” of the town, whether under the authority of the earlier provincial statutes or the Danforth Deed, became fully vested in the “Proprietors of Arundel.” From that time forward, it was the proprietary, with certain limited exceptions, that exclusively managed and controlled the common and undivided land in the town, including dividing and allotting out portions of land, prosecuting trespassers who cut and hauled timber or took more than was laid out, etc. See § IV(B), *supra*, ¶¶ 60-61, 64-65, 67, 71. Proprietor meetings, and actions taken, were recorded in the Proprietors Record. See Def. Ex. 4, 4-A. After 1726, all grants of common lands were made by the Proprietors and reflected in the Proprietors Record; with only one recorded in the Clerks Record. *Id.* ¶¶ 60-61, 64.

3. Common Lands Included Beach

One of the earliest actions taken as the proprietary in Arundel began to organize formally was the 1720 call for confirmation of previous grants, which was thought necessary because “a diligent search and inquiry has been made for the ancient records of this town and nothing of them are to be found.” Def. Ex. 3, at 18-19. To avoid a loss

of rights, those who could “make it appear by deed, grant, or by sufficient witness or any other lawful conveyance from the ancient possessors of this town, are to be laid out according to their deeds, grants, or according to the common course or custom of other lots.” *Id.* See § IV(B), *supra*, ¶ 53.

In the years that followed, numerous layouts and confirmations were made. See § IV(B), *supra*, ¶¶ 66-68. Several grants or deeds involving land in the Goose Rocks Beach area were subsequently brought forward and confirmed; none included the beach. In the western section of the beach, the land was predominantly Town Commons; and the 1777 Emmons layout of the 1730 grant of land to Humphrey Dearing fixed the seaward boundary at the seawall. See §§ IV(B) & (C), *supra*, ¶¶ 55, 63, 77-79. By its terms, the Emmons layout did not include the beach. There is no evidence of confirmation by the Proprietors of any other grant or deed to land in the western section of Goose Rocks Beach inclusive of the tidal flats and dry sand portion of the beach.

The middle section of the beach also contained town commons land, a portion of which was the subject of the 1681 grant of upland and marsh to John Miller was laid out in May 1720 “to Captain John Downing in right of John Miller” (Downing’s late father-in-law). Upland and marsh do not include tidal flats. The 1670 Bush-to-Barrett deed was not brought forward for confirmation and layout, but was recorded in the York Book of Deeds. The land conveyed thereby, however, was “Tenn acres of sault Marsh.” Other relevant deeds did not convey out the tidal flats or beach. See §§ IV(B) & (C), *supra*, ¶¶ 55, 63, 181-85; §V(B)(7), *supra*, at n. 49. There is no evidence of confirmation by the Proprietors of any other grant or deed to land in the middle section of Goose Rocks Beach inclusive of the tidal flats and dry sand portion of the beach.

In the eastern section of the beach, the 600-acre Jeffrey lands were laid out for John Jeffrey in 1727. Neither the underlying deeds nor the layout included the beach.

The 1648 and 1651 deeds from Cleave/Rigby under which Gregory Jeffrey took title had conveyed land with a common boundary at the “sea banke.” This excluded the tidal flats and dry sand portion of the beach. The description of the same land in the 1727 layout to John Jeffrey as well as the 1734 devise of the same land to John Jeffrey’s heirs essentially used the same seaward boundary that excluded the beach. See §§ IV(B) & (C), *supra*, ¶¶ 55, 63, 256-57; § V(B)(13). There is no evidence of confirmation by the Proprietors of any other grant or deed in the eastern section of Goose Rocks Beach inclusive of the tidal flats and dry sand portion of the beach.

The court concludes, therefore, that the tidal flats and dry sand portion of Goose Rocks Beach remained part of the common lands held by the Arundel Proprietors. This would not have been an illogical outcome at the time, for several reasons. First, this area of Cape Porpus was remote and sparsely settled. Second, beaches were regularly used well into the 18th century as public roads for travel, passage and driving cattle, due to the difficulties of establishing and maintaining inland pathways and roads (the “high ways”). See § IV(B), *supra*, ¶¶ 69-70. Other than these uses, beaches such as this one did not offer significant economic or other advantage to abutters. See Pl. Ex. 570, at 17.

Finally, there is no evidence the Proprietors granted out any portion of the beach. A valid grant from the Proprietors requires both an adequate description of the parcel being granted and evidence of a vote taken at a duly called meeting. See *Evans*, 18 Me. at 215-16; *Gloucester v. Gaffney*, 90 Mass. 11, 14-15 (1864); *Codman*, 10 Mass. at 151; *Copelas*, 5 LCR at 205. A grant made by public vote did not pass title until located and confirmed by a locating committee. *Williams*, 38 Mass. at 289. After review of the entire portions of the Proprietors Record in evidence (Def. Exs. 4, 4-A), insofar as legible, as well as Clerks Record (Def, Exs. 3, 3-A), the court was unable to discern any grant or

layout of land including the tidal flats. *See Bates*, 280 Mass. at 148 (after reviewing “great mass of ancient records, grants and plans,” court found “land in controversy was not included in the proprietors’ divisions.”)

C. Common Lands Post-Proprietary

Just as the Massachusetts General Court enacted formal requirements regarding the formation of proprietaries and the requirements for conducting official meetings, it also established standards pertaining to their anticipated dissolution. One court observed about the proprietary: “This is a species of corporation different from corporations in general;” *this* [a proprietary] is intended to die; *those* [standard corporations] to *live* forever.” *Proprietors of Monumoi Great Beach*, 1 Mass. at 163 (emphasis in original). By a 1790 enactment, the Massachusetts General Court clarified standards applicable to the dissolution of a proprietary, including the following. After “final division” of the “land . . . lying in common”, the “last proprietors” shall continue in their corporate capacity until all debts and taxes are collected and contracts performed; and then “order and deliver the record of their proprietary into the custody of the town clerk.” Prov. St. 1790, c. 40 §§ 1, 2. Section 2 also provided that once the foregoing steps were taken, the proprietors could “recall the said record” from the town clerk, conduct further proceedings at a duly called meeting, and require the town clerk “to record all votes and proceedings” at the meeting. *Id.* The act further provided, however, that “the proprietors aforesaid shall not continue to act in their corporate capacity for more than ten years after the final division of their lands” *Id.* § 3. After the expiration of the ten-year period, there is “no resuscitation” of the proprietary; and the claim of title by an individual proprietor’s descendants may be extinguished. *See Adams v. Hannah*, 261 Mass. 125, 129, 158 N.E. 330, 331 (1927).

The record before the court does not establish whether the Proprietors of Arundel followed these requirements. Neither the Clerks Record (Def. Exs. 3, 3-A) nor the Proprietors Record (Def. Exs. 4, 4-A) in evidence reflect a final division or allotment of “lands lying in common.” At a January 1783 meeting, the Proprietors voted to “lot out the Common Land in said township into fifty acre lots” and that “the former Committee be empowered to do the same.” Def. Ex. 4-A, at 10. Almost two years later, though, there remained ungranted common land in the town. *Id.* at 11. See § IV(B), *supra*, ¶¶ 71-74. There is no discernable entry of a final accounting of the allotments of the “land lying in common”, or of a formal wind-down of the proprietary.

The last entry recorded in the Proprietors Record in evidence was made on April 3, 1790 by Thomas Perkins. It appears to be a recording of the final part of a January 1790 layout of a grant of land.⁵⁵ Def. Ex 4, at 23; Yarumian Test. (Tr. VII 78:25 – 79:2); § IV(B), *supra*, ¶ 73. Although this suggests that the Proprietors concluded their affairs by 1790, four years later questions were raised as to title to land, including land potentially in the vicinity of Goose Rocks Beach. There is no evidence that the Arundel Proprietors sought to “recall the record” from the town clerk and conduct further proceedings, other than perhaps the 1796 entry of a prior, 1730 layout referenced in the preceding footnote. Grants of land from the Town have been recorded as late as one hundred years later. See § IV(B), *supra*, ¶¶ 72-75.

Courts have had limited occasion to determine successorship in a proprietary’s interest in these circumstances, likely because proprietors followed the formal dissolution process after final division of common land as prescribed by governing statutes. See *Bates v. Cohasset*, 280 Mass. 142, 151, 182 N.E. 284, 287 (1932). In

⁵⁵ Below this entry on the same page is another, handwritten entry by William Smith, town clerk, on April 4, 1796. This appears to be an after-the-fact entry pertaining to a layout of a division of land by the Proprietors in 1730. *Id.*

dicta, however, *Bates* noted: “If title did remain in the proprietors, then, the land not having been set off or granted to any individual, but being held for public purposes, the title would vest in the town ‘by virtue of its establishment and existence as a municipal corporation.’” *Id.* at 152. See also *Soeder v. Cty. Comm’rs*, 60 Mass. App. Ct. 780, 805 N.E.2d 1026 (2004) (“Proprietors Ways belong for practical purposes to public authority, and there may be some undivided interests in land held in common by the thousands, which get respectful but nonpractical recognition.”); *Talbot v. Little Compton*, 52 R.I. 280, 287, 160 A. 466, 469 (1932) (“If the original proprietors did not allot the land in question, we think it was their intention and the intention of the Colony that the town should succeed to all their rights therein.”). See also 3 Tiffany, *Real Property* § 934 (3d ed. 1939) (common lands not granted out may be “regarded as the property of the town, rather than that of the proprietors or their descendants;” and retain their character “for the benefit of all the inhabitants.”)

The court concludes, therefore, that in the unusual circumstances presented by this case, the Town is the successor in interest to the Proprietors; and title to the property in dispute has passed by operation of law because the Proprietors ceased operations pursuant to St. 1790, c. 40 and more than ten years has passed, despite there being no express grant or deed from the Proprietors.

This case is distinguishable from *Eaton v. Wells*, which held that the Town of Wells could not establish title to land formerly held by the town proprietors in the absence of an express grant or deed. 2000 ME 176, ¶ 14, 760 A.2d 232. In *Eaton*, the town based its title claim on a general notion that in light of the transition from “feudal concept of property” to a system of “fee ownership” title in land held by the town proprietors was tantamount to title in the town. *Id.* ¶ 11. *Eaton* rejected that general theory as a basis for title, concluded the proprietors held title separate from the town as

a matter of law; and upheld that the trial court’s conclusion that “on those facts” the town could not prove title to the beach absent a deed. Here, by contrast, the facts support and the court has concluded as a matter of law that the town proprietors operated as a distinct body and held title to the common and undivided lands as opposed to the town itself.

There is another, critical difference between the instant case and *Eaton*. In *Eaton*, the plaintiffs were able to trace their title back to a deed from the proprietors. *Id.* ¶ 21. Thus, even though the “townspeople years after the town was established voted to take control of the [remaining] common land”, the disputed property in that case would not have been part of the “remaining common land” because the proprietors had previously granted out that property to plaintiffs. *Id.* ¶ 17. Here, that is not the case.

VII. Conclusion and Order

After review of the extensive record in this case and after consideration of the unique circumstances presented, the court concludes that title to the disputed parts of the beach rests with the Town of Kennebunkport as set forth herein. Those circumstances include: (i) the nature of the disputed property at issue—discrete, non-contiguous parcels of beach, which Plaintiff upland owners have not exclusively possessed and the use of which has been shared by Plaintiffs and others, including the public; (ii) failure of Plaintiff upland owners, with one exception, to prove title to the disputed property after full examination of their deeds and sources of title; (iii) abundant, unrebutted record evidence establishing a history of public grants of common and undivided lands within the town and also establishing that the former town proprietary, an entity closely affiliated with but distinct from the municipal corporation itself, held title to the common lands for the benefit of inhabitants of the town; (iv) the common and undivided lands included the dry sand portion and intertidal zone of the

beach; and (v) the lack of evidence that the proprietary, long since dissolved as a separate entity, had granted out these portions of the beach. Because “title within the limits of a town to lands never granted out [by the proprietors] to the town or any individual is held by the town,” *Bates*, 280 Mass. 142, 150-51, 182 N.E. 284, the court concludes that the Town of Kennebunkport holds title to the beach as set out below.

This judgment finally adjudicates both counts of Plaintiffs’ complaint. On count I (declaratory judgment), the Town is granted judgment against all Plaintiffs except Temerlin; and Temerlin is granted judgment as against the Town. On count II (quiet title), Plaintiffs’ failure to meet their burden of proof with respect to the side lot lines alone precludes a judgment to quiet title, even as to Temerlin. Thus, the Town is granted judgment as to count II of the complaint.

The judgment finally adjudicates count I (fee title) of the Town's counterclaim in mirror-image fashion, namely judgment for the Town with respect to all Plaintiffs except Temerlin; and judgment for Temerlin as against the Town.

Even though the parties agreed to defer consideration of the remaining, use-based claims in counts II, III, IV, V, VII and VIII of the Town’s counterclaim, those claims now appear to be mooted as against all Plaintiffs except Temerlin and as against all Parties-in-Interest. Even if the Town’s use-based claims against Temerlin (or others) are not mooted, the failure or inability to establish side lot lines on the instant record may effectively preclude adjudication of the claim(s) in this action. *See Almeder*, 2014 ME 139, ¶ 27. The State of Maine’s assertion of public trust rights also may either be mooted or otherwise not capable of adjudication in this action in light of the failure or inability to establish the side lot lines of the property in issue. *See id.*

In accordance with the foregoing, it is hereby ordered and the entry will be:

1. Judgment for Plaintiff Lisa Babette Temerlin Gottesman, Trustee of The LTG Maine Management Trusts on count I (declaratory judgment) of Plaintiffs' complaint and on count I (fee title) of Defendant's counterclaim, as follows:

(a) The court hereby declares pursuant to 14 M.R.S. §§ 5951-63 that the seaward boundary of the Temerlin property is the mean low water line of the Atlantic Ocean and, to the east, the Little River.

(b) Any further relief requested is denied because the court is unable to determine side lot lines extending from the upland residential lot to the water for the reasons set out in section V(A)(7), above, and therefore cannot quiet title in and to a specific plot of land.

(c) Any interest herein granted is subject to any and all public use rights in the intertidal zone of said beach recognized under Maine law, including the so-called Colonial Ordinance rights of fishing, fowling and navigation.

2. Judgment for Defendant Town of Kennebunkport on count II (quiet title) of Plaintiffs' complaint as to Plaintiff Lisa Babette Temerlin Gottesman, Trustee of The LTG Maine Management Trusts.

3. Judgment for Defendant Town of Kennebunkport on count I (declaratory judgment) and count II (quiet title) of Plaintiffs' complaint as to the following: Plaintiffs Robert F. Almeder and Virginia S. Almeder, Trustees of the Almeder Living Trust; John T. Coughlin and Priscilla M. Coughlin, Trustees of the P.M.C. Realty Trust; Mark E. Celi and William E. Brennan, Jr., Trustees of the Celi Kennebunkport Real Estate Trust No. 1; Goose Rocks Beach Holdings, LLC; Susan Flynn; Aaron Cooper and Emily Cooper, Trustees of the Emily Cooper Revocable Trust Agreement; Jule C. Gerrish; Richard M.

Vandervoorn, Lawrence W. Vandervoorn, and Robert O. Clemens, Trustees of The Cornelius J. Vandervoorn Qualified Personal Residence Trust; Robert M. Davis, Successor Trustee of the Eugene R. Gray Qualified Personal Residence Trust; Linda M. Rice; Terrence G. O'Connor and Joan M. Leahey; Beth G. Zagoren; John O. Gallant and Sharon A. Gallant; Edwina D. Hastings, Trustee of the Edwina D. Hastings Revocable Trust UTA; Sherman/Kinney Properties II, LLC; William D. Forrest, Nancie M. Julian, and The SIP SIP NORTH Condominium Association; Kristen B. Raines; Leslie A. Josselyn-Rose, Trustee of LAJR Trust; Michael J. Sandifer and Alice B. Sandifer, Co-Trustees of the Alice B. Sandifer Trust; Donna K. Lencki, Trustee of The Donna K. Lencki Trust of 1993; 291 Rear King's Highway, LLC; and Christopher B. Asplundh.

4. Judgment for Defendant Town of Kennebunkport on count I (fee title) of its counterclaim as to the following: Plaintiffs Robert F. Almeder and Virginia S. Almeder, Trustees of the Almeder Living Trust; John T. Coughlin and Priscilla M. Coughlin, Trustees of the P.M.C. Realty Trust; Mark E. Celi and William E. Brennan, Jr., Trustees of the Celi Kennebunkport Real Estate Trust No. 1; Goose Rocks Beach Holdings, LLC; Susan Flynn; Aaron Cooper and Emily Cooper, Trustees of the Emily Cooper Revocable Trust Agreement; Jule C. Gerrish; Richard M. Vandervoorn, Lawrence W. Vandervoorn, and Robert O. Clemens, Trustees of The Cornelius J. Vandervoorn Qualified Personal Residence Trust; Robert M. Davis, Successor Trustee of the Eugene R. Gray Qualified Personal Residence Trust; Linda M. Rice; Terrence G. O'Connor and Joan M. Leahey; Beth G. Zagoren; John O. Gallant and Sharon A. Gallant; Edwina D. Hastings, Trustee of the Edwina D. Hastings Revocable Trust UTA; Sherman/Kinney Properties II, LLC; William D. Forrest, Nancie M. Julian, and The SIP SIP NORTH Condominium Association; Kristen B. Raines; Leslie A. Josselyn-Rose, Trustee of LAJR Trust; Michael J. Sandifer and Alice B. Sandifer, Co-Trustees of the Alice B. Sandifer Trust ; Donna K.

Lencki, Trustee of The Donna K. Lencki Trust of 1993; 291 Rear King's Highway, LLC; Christopher B. Asplundh; and also Parties-in-Interest David L. Eaton and Jennifer L. Scully-Eaton; Heather Vicenzi, Trustee of the George A. Vicenzi Trust; Sea Rose Family Limited Partnership Trust; Mary L. Emmons, Trustee, Emmons Family Realty Trust; John A. Parker; and Linda Rice as follows:

(a) The court hereby declares pursuant to 14 M.R.S. §§ 5951-63 that the Town of Kennebunkport has title to the portions of Goose Rocks Beach adjacent to and seaward of each Plaintiff's upland property situated at the address set forth above in section III(A) with the exception of Temerlin and each Party-in-Interest's upland property situated at the address set forth above in sections III(D) and III(A)(10) at n. 3 extending seaward from the seawall or seawall vegetation line to the mean low water mark of the Atlantic Ocean consistent with the terms of this judgment.

(b) Any further relief requested is denied because the court is unable to determine side lot lines extending from the upland residential lots to the water for the reasons set out in section V(A)(7), above, and therefore cannot quiet title in and to specific plots of land.

(c) Any interest herein granted is subject to any and all public use rights in the intertidal zone of said beach recognized under Maine law, including the so-called Colonial Ordinance rights of fishing, fowling and navigation.

5. Counts II, III, IV, V, VII, and VIII of Defendant's counterclaim are dismissed as moot as against all Plaintiffs except Temerlin and as against all Parties-in-Interest.

6. Within 30 days after entry of this judgment, Temerlin and the Town shall prepare and submit to the court a proposed supplemental judgment in conformity with

the requirements of 14 M.R.S. § 2401(3) for purposes of recording this judgment in the York County Registry of Deeds.

The clerk may incorporate this Memorandum of Decision and Final Judgment on Fee Title Claims on the docket by reference pursuant to M.R. Civ. P. 79(a).

Dated: April 6, 2018

/s/ Wayne R. Douglas

Wayne R. Douglas
Justice, Maine Superior Court

ENTERED ON THE DOCKET ON: April 6, 2018