Darlene F. Edwards et al., Plaintiffs

v.

Cynthia S. Blackman et al., Defendants

Civil Action No. RE-11-47

Superior Court of Maine, Knox

July 30, 2014

DECISION AND JUDGMENT

Jeffrey L. Hjelm, Justice Maine Superior Court.

Trial on the complaint and counterclaim was held on December 16, 17, 19 and 23, 2013, and January 27, 2014. On each hearing date, all parties appeared with or through counsel. Following the trial, the parties supplemented the record with additional transcribed testimony and submitted written argument. This order adjudicates all claims.

Plaintiffs and counterclaim defendants Darlene F. Edwards and Lewis M. Edwards jointly own contiguous parcels of waterfront land in Owls Head. A way passes over their land and ends in a cul-de-sac that is partly on their land and partly on the land of the abutting landowner, the Arthur Titcomb Living Trust. The way is either part of or an extension of the Cooper's Beach Road (an issue in dispute here). The individual defendants and counterclaim plaintiffs have ownership interests in various parcels of land located near the Edwardses' property. Cynthia S. Blackman and her brother, Eliot A. Scott, jointly own land located at 15 Water's Edge Lane in Owls Head; Blackman also owns land located at 24 Montgomery Lane; and Blackman, Eliot Scott and their parents, Nathalie M. Scott and Willis A. Scott, Jr., jointly own land located at 34 Cooper's Beach Road.[1] The claims in this action center on the question of whether persons other than the Edwardses have the light to use the Edwardses' land. The Edwardses contend that no such rights exist, [2] except for certain common law rights held by the public to use the intertidal zone, which the Edwardses have not contested in this action. The Town of Owls Head contests the Edwardses' claim that it did not acquire rights to the way located on their property by dedication and acceptance, and the Town contests the Edwardses' claim that the Town has not acquired a public easement over the way.[3] The individual defendants contend that they have rights to use the way over the Edwardses' property and the beach located 011 their property by virtue of public and private prescriptive easement rights appurtenant and in gross, and also by deed.

The court first addresses the land use rights implicated by the Edwardses' claims against the Town and then the claims between the Edwardses and the individual defendants.

A, Claims against the Town

The dispute between the Edwardses and the Town of Owls Head is whether the way that passes over the Edwardses' land became a public easement road by dedication and acceptance, and separately whether the public has acquired prescriptive rights over the way. The court concludes that the way is a public easement road pursuant to dedication and acceptance.

A public way may be created by dedication from the landowners and acceptance by the municipality when

the owner of such property or interest has filed with the municipal officers a petition, agreement, deed, affidavit or other writing specifically describing the property or interest and its location, and stating that the owner voluntarily offers to transfer such interests to the municipality without claim for damages, or has filed in the registry of deeds an approved subdivision plot plan which describes property to be appropriated for public use.

A municipality may accept a dedication of property or interests therein by an affirmative vote of its legislative body.

23 M.R.S. § 3025. To establish dedication and acceptance, the grantor's intention to dedicate the land for public use must be clear. *Town of Kittery v. MacKenzie* , 2001 ME 170, ¶ 10, 785 A.2d 1251, 1254. A municipality may accept a dedication by means of a vote of approval included in a warrant. *Vachon v. Inhabitants of the Town of Lisbon* , 295 A.2d 255, 260 (Me. 1972). The party seeking to assert the public interest by dedication has the burden of proof. *See Comber v. Inhabitants of the Plantation of Dennistown* , 398 A.2d 376, 378 (Me. 1979). Consequently, as the proponent of the claim that the way is public, the Town bears the burden of proof.

Here, the Town relies on municipal action that was taken at a town meeting held in August 1986, when the " Town voted by hand to accept the dedication of a public [e]asement over Cooper's Beach Road." This action was predicated on two written " agreement[s]" signed by people who lived on or near Cooper's Beach Road. One instrument identifies its group of signatories as " owners of property consisting of Coopers Beach Road. . . ." The second identifies another group of different signatories as " abutting property owners on Coopers Beach Road." The texts of the two documents are otherwise identical and recite their agreement that the Town would accept the road " as a public easement, without claim for damage." In 1986, one John McLoon owned the land now owned by the Edwardses. He signed the abutters' petition in

support of the easement dedication.

The Town makes several arguments that the court should not reach the merits of the dedication issue. It contends first that the Edwardses are time-barred from challenging the 1986 acceptance, because any such challenge amounts to an appeal from final governmental action and is therefore governed by M.R.Civ.P. 80B, which requires an appeal to be filed within 30 days of notice of the underling action, Because no such appeal was filed, the Town argues that the Edwardses cannot do so now.

In 1986, " Cooper's Beach Road" actually consisted of a cluster of roads that now have four different names. All of the people who signed the dedication agreement as " owners" had parcels of property located on what is now Water's Edge Lane. Those who signed as " abutters, " including McLoon, owned land 011 what is now Cooper's Beach Road, Osprey Lane, Montgomery Lane as well as the remaining parcels on Water's Edge Lane. One of the Edwardses' arguments is that the dedication did not adequately identify which way or ways were offered to the Town as public roads. They argue that because McLoon identified himself as an abutter to the way that was the subject of the dedication, he understood that Cooper's Beach Road ended at his southerly property line and did not cross onto his land. In this way, his property would abut the terminus of Cooper's Beach Road. If this contention is correct, then the dedicated way is not located on the Edwardses' property, and McLoon would have had no reason to appeal, because the Town's acceptance of Cooper's Beach Road as a public way would not have aggrieved him or his successors-in-interest. On the other hand, if Cooper's Beach Road as accepted by the Town extended across the Edwardses' property to and including the cul-de-sac, [4] then any appeal from the 1986 acceptance would have been subject to the filing deadline prescribed by rule 80B. Therefore, there is an analytical identity between the procedural argument advanced by the Town and the merits of the dedication issue; if the Town is correct on the merits, then it is also correct in its argument that the claim is time-barred, Thus, consideration of the latter requires consideration of the former.

The Town also argues that the Edwardses are barred from contesting the Town's claim of a public interest in the disputed way, because it has been prejudiced by the delay in their initiation of the challenge (laches), and because they and their predecessors have accepted the benefit of it in the meantime in the form of snowplowing services subsidized by the Town (estoppel). Laches and estoppel are defenses of avoidance on which the Town bears the burden of proof. *See Hansen v. Sunday River Skiway Corp* ., 1999 ME 45, ¶ 11, n.2, 726 A.2d 220, 223.

The Town has proven neither defense. As an element of laches, the proponent must show, among other things, that the delay in asserting a legal claim has prejudiced the respondent. *See Van Dam v. Spickler* , 2009 ME 36, ¶ 12, 968 A.2d 1040, 1044, Here, the Town complains primarily that because McLoon died in 1987, the Town cannot present direct evidence about his intention when he signed the abutters' petition. However, the Edwards' are similarly deprived of that evidence. Further, there does exist extrinsic evidence on that point, including testimony from the person who discussed the petition with McLoon when he signed it and the fact that McLoon signed the dedication agreement. Beyond this, because the Town has not shown that it has lost evidence that would have been favorable, its laches argument is not persuasive.

Similarly, the Town has not proven that the Town's use of the road to plow snow has created such a benefit to the Edwardses and their predecessors that they are now estopped from claiming that the way is not public. The Edwardses have owned the property since 2011 but use it only seasonally, so snowplowing has not benefitted them significantly. The magnitude of any such benefit accruing to prior owners is not clear in the record. Further, the length of the way on their land is not particularly long, and the plowing contractors needed to plow it anyway in order to be able to plow the portion of Cooper's Beach Road that is not at issue here, because the plows use the cul-de-sac to turn around. Therefore, the Town has not established that the Edwardses are equitably estopped from seeking an adjudication that the way located on their property is not public. *See Blue Star Corp. v. CKF Properties, LLC* , 2009 ME 101, ¶ 27, 980 A.2d 1270, 1277,

This leads to the merits of the dedication and acceptance issue, where the Town has the burden of proving that the interest dedicated by McLoon was the portion of the way that crossed over his land (now the Edwardses') and that the description of the way accepted by the Town clearly described this portion of it. The court finds that the Town has proven these points.

Both aspects of the dedication and acceptance issue must be considered in light of the historical background of the way at issue. Through contractors that it hired, since at least 1973 the Town continuously had plowed and sanded the way over the Edwardses' land and the cul-de-sac, as well as the other sections of the Cooper's Beach Road network. The Town announced its intention to stop that arrangement for all private ways located in the municipality at the end of the 1985-86 winter season, after it had learned that public funds could not be used for a benefit that was deemed private because the roads themselves were private. In response, at a special town meeting held in August 1986, members of the Town's voting public considered petitions to accept at least eleven private ways as public easement roads.[5] A way described as " Cooper's Beach Road" was one of them. In addition to listing these proposed dedications, the warrant for the special town meeting called for consideration of a

proposal to establish standards that the roads would need to meet. The voters approved the standards, accepted at least ten of the roads (one was not accepted because of an " improper dedication"), and approved an appropriation of money from the Town's budget to cover plowing and sanding of the roads that became public easement roads.

Prior to the meeting, McLoon and twenty-one other people signed written agreements as owners or abutters of property on " Coopers Beach Road" for the Town to accept the road as a public easement. As is noted above, McLoon signed the abutters' endorsement. However, only five people signed as owners. They were owners of land located in the middle and toward the end of what is now Water's Edge. The other signatories, including McLoon, owned property associated with the other branches of the road network, over which one was required to travel to get to the land owned by those who signed the owners' endorsement, The court does not place weight on this ostensible allocation between " owners" and " abutters" in those instruments. If the signatories attached meaning to those characterizations, then that means that they would have to have researched the extent of their ownership interests to make legal judgments about whether they truly held title to a portion of the private road or whether the land they held in fee ended at the edge of the way. There is no evidence that this occurred, and the court finds it unlikely that it did. Thus, the court does not attach material weight to McLoon's identification of himself as an abutter of Cooper's Beach Road rather than as an owner of the land underneath the way.

The best and most reasonable assessment of the dedication process is that it represented an effort of those who owned property in the Cooper's Beach Road neighborhood to maintain the status quo: they wanted the Town to continue to provide plowing and sanding services. Nothing in the record meaningfully suggests that any of those who signed the agreement wanted to change the long-standing arrangement. The dedication temporally followed the Town's determination that it could not provide those services unless the roads became public easement roads. There had been a long-standing history of those Town services, and when the Town expressed a conditional intention to terminate those services, those who would be affected by that municipal action responded to create a situation that would allow the services to continue. The near universal agreement of all affected property owners demonstrates a unified desire for that to happen.

The evidence also reveals McLoon's specific intent to dedicate the way passing over his property as a public easement road. Because McLoon died in 1987, he was not available at trial to provide direct evidence about his understanding and intention when he signed the agreement. There exists, however, indirect evidence on this point. The fact that he executed the agreement in the circumstances note above is corroborative evidence that he wanted the Town to continue to plow the road on his land. Additionally, Edward Dodge, a town official who held several positions there, was the person who approached McLoon about this issue. Although, understandably, Dodge does not recall their conversation verbatim, he explained to Dodge the purpose of the proposed agreement -- that the Town would plow and sand the road, that others could then use it, but that Dodge would need to sign the document if he wanted this arrangement, (The 1986 annual Town report corroborates the information that Dodge communicated to McLoon, that one effect of a dedication would be the loss of privacy on the dedicated road.) The court credits Dodge's testimony that McLoon appeared to understand what Dodge told him when he executed it.

This evidence demonstrates that McLoon clearly expressed his intent to dedicate the way over his land as a public easement road.

In the order on summary judgment issued May 7, 2013, the court ruled that as a matter of law, the description of the dedicated way as " Cooper's Beach Road" was sufficient to meet the statutory standard for an acceptance, subject only to the factual determination of locating the terminus of the northerly end of the way.[6] The better evidence demonstrates that Cooper's Beach Road in fact encompasses the way that passes over the land now owned by the Edwardses. That proof largely consists of the way the road has been used. Primarily, the Town has used in a way that is materially indistinguishable from the way it has used other portions of the network of roads formerly all called Cooper's Beach Road (now with separate names). This was true even in 1986, at the time the dedication was offered to the Town. Further, although the extent and quality of use is subject to some dispute, it is clear that people other than the owners of the land have used it. And as Darlene Edwards testified, the physical address of her house is 70 Cooper's Beach Road.

The Edwardses point to maps and diagrams of roads that existed in and prior to 1986, arguing that none of them showed that Cooper's Beach Road extended onto their property or included the cul-de-sac. In fact, some of those documents are not clear on the point. However, to the extent that they may depict a way that falls short of the Edwardses' land, the court has considered that evidence and does not give it such weight as to defeat the better evidence noted above. Further, any weight it deserves is mitigated by maps and diagrams created after 1986 showing the entire way as it has existed at all times relevant to this case. Also, there is no evidence that after the Town accepted " Cooper's Beach Road" in 1986 as a public easement road, McLoon or any of the subsequent owners, up to the Edwardses, complained that the dedicated road did not include the road on the land now owned by the Edwardses.[7]

For these reasons, the court finds that as at the time the Town accepted the dedication of Cooper's Beach

Road as a public easement road, it included the portion way located on the Edwardses' property. The dedication was supported by the specific description of the road as Coopers Beach Road. Because Cooper's Beach Road extended to the cul-de-sac on the Edwardses' land, this means that this portion of the road was included in the dedication and acceptance and that the way located on their land is a public easement road.

By law, when a way located on private property is encumbered by a public easement, the way may be used in any way that a public way itself may be used. *See MacKenna v. Inhabitants of the Town of Searsport* , 349 A.2d 760, 762-63 (Me. 1976). When a municipality acquires a prescriptive public easement over a private way, the nature of the public's use is not limited to the character of the prescriptive use. *See id* ., 349 A.2d at 763. Here, because the Town accepted the road statutorily and without the need to prove prescriptive use, the nature of the use is not an element of its proof and does not need to be considered. Thus, either under the *McKenna* analysis, or because the the Town created the public easement through a non-prescriptive means that did not limit the nature of the use, the way may be used in any manner that " is not inconsistent with a public way, " *Id.*

Because the Town has established that the road on the Edwardses' land is burdened by a public easement created through dedication and acceptance, in the context of the Town's separate argument the court need not and does not reach the alternative issue of whether the same rights were created prescriptively. However, the individual defendants have adopted and incorporated the Town's prescriptive public easement contention as their own, and the court addresses it below in conjunction with their own claims that go beyond the Town's.

B. Claims between the Edwardses and the individual defendants

The claims between the Edwardses and the individual defendants, excepting Constance Scott, *see* note 1 *supra* , are best categorized as ones based on prescription and others based on deeded rights. The court considers these categories of contentions separately.

1. Prescription-based claims

The individual defendants claim rights to use the way and the beach owned by the Edwardses based on public prescriptive rights, private prescriptive rights appurtenant to the parcels of the land they own, and private prescriptive rights in gross. For the reasons set out above, the way that passes over the Edwardses' land is subject to a public easement. The court therefore need not and does not address the question of whether there is a separate, prescriptive basis for the rights claimed by the individual defendants over that way, because any such rights would be no more extensive than the rights they would be entitled to exercise on the way as a result of the Town's acceptance of it. The court therefore addresses the contentions of the Edwardses and the individual defendants as they concern the beach that is part of the Edwardses' land. The court ultimately concludes that they do not hold prescriptive rights to use the beach.

The proponent of a private prescriptive interest must prove by a preponderance of the evidence that the land has been subject to use for at least 20 years; that the land was used under a claim of right adverse to the property owner; and that the land was used in that way with the owner's knowledge and acquiescence, or with a use so open, notorious, visible and uninterrupted that the owner's knowledge and acquiescence will be presumed. *See Androkites v. White* , 2010 ME 133, ¶ 14, 10 A.3d 677, 681. Although most Law Court opinions examining easements in gross address deeded or recorded easement rights, here the parties have not argued that there is a difference between the proof of a prescriptive easement appurtenant and a prescriptive easement in gross. Although the former benefits the dominant estate and the latter benefits a particular person and does not attach to the land, *see Stickney v. City of Saco* , 2001 ME 69, ¶ ¶ 31-32, 770 A.2d 592, 605, the court examines the bases for those two types of easement interests without a distinction that is material here. (In any event, Nathalie Scott and Willis Scott are the only parties who claim prescriptive easements in gross, and they also claim that they hold prescriptive easements appurtenant to their property.) Finally, a public prescriptive easement arises under the same circumstances as a private prescriptive easement, except that the creation of a public easement requires proof of public use. *See Jordan v. Shea* , 2002 ME 36, ¶ 22, 791 A.2d 116, 122. Therefore, the court addresses the dispositive aspects of all three types of prescription claims identically.

Despite the similarities between private and public easements noted above, there are certain presumptions and burdens of proof that differ between them. If the proponent of a private prescriptive easement establishes use for the requisite period of time and further proves that the use was accompanied by the owner's actual or constructive knowledge and acquiescence (in other words, proving the first and third elements of a private prescription claim), then there will arise a presumption that the use was under a claim of right adverse to the owner (the second element of such a claim). *See Riffle v. Smith* , 2014 ME 21, ¶ 6, 86 A.3d 1165, 1167. " This means that in most cases permission becomes the defense to a prescriptive easement claim." *Lyons v. Baptist School of Christian Training* , 2002 ME 137, 5 35, 804 A.2d 364, 374 (Calkins, J., dissenting). However, that presumption of adversity will not arise in the first place " if there is an explanation of the use that contradicts the rationale of the presumption. . . . " *Riffle* , 2014 ME 21, ¶ 6, 86 A.3d at 1167 (citation and internal punctuation omitted).

In contrast, in cases adjudicating the claim of a

public easement over open, unposted land that the public uses recreationally, regardless of the character of the land itself, there is a presumption that the use is permissive. *Lyons* , 2002 ME 137, ¶ ¶ 24-25, 804 A.2d at 372. This means that in cases where a public easement is claimed, a presumption of permissive use arising from the public's recreational use of open, unposted land operates to negate the presumption of adversity that arises in other contexts. *Riffle* , 2014 ME 21, ¶ 5, n.1, 86 A.3d at 1167; *Lyons* , 2002 ME 137, ¶ 25, 804 A.2d at 372. In this class of cases involving the public's recreational use of open land, the claimant is therefore left to affirmatively prove " adversity through a claim of right hostile to the owner's interest, without benefit of any presumption of adversity arising from long term public recreational uses of the land." *Lyons* , 2002 ME 137, ¶ 25, 804 A.2d at 372.

The adverse use of land under a claim of right occurs " when the claimant has received no permission from the owner of the soil, and uses the [land] as the owner would use it, disregarding the owner's claims entirely, using it as though she owned the property herself." *Androkites* , 2010 ME 133, ¶ 16, 10 A.3d at 682. The permissive use of land that negates a claim of adversity may be express or implied, Lyons, 2002 ME 137, ¶ 26, 804 A.2d at 372.

Here, those who used the beach did so with at least the implied permission of those who owned the Edwardses' land, until they took steps to foreclose that use beginning within the past 20 years. The Cooper's Beach neighborhood has been described as a colony, for good reason. Homeowners, both year-round and seasonal, have developed strong friendships with each other. As an aspect of the relationships among them, they sometimes walk on or otherwise use each other's property. Families visited with each other, and there were neighborhood parties and events. Children from different families played with each other and during the day and at sleepovers. No express permission to use another's property was requested, because none is needed. Rather, implied permission arises from the communal atmosphere.

The same was true with the beach now owned by the Edwardses, During the time that is within the prescriptive period urged by the individual defendants, local residents and others freely used the beach for various recreational purposes, At times, people from beyond the immediate neighborhood did the same.[8] The freely exercised use of the beach by at least the local residents is a long-standing circumstance. Because of this, the court finds that the people who owned the Edwardses' property prior to 2005, which is when the Mednicks acquired the land and, at some point during their ownership, put up a " no trespassing sign, " at least impliedly permitted that use. This permission was different than simply passively assenting or submitting to the use of the beach, which constitutes mere acquiescence and falls short of permission. *See Lyons* , 2002 ME 137, ¶ 35, n.7, 804 A.2d at 374 (Calkins, J., dissenting); *Dowley v. Morency* , 1999 ME 137, ¶ 23, 737 A.2d 1061, 1069, Here, the prior owners' inclusion in the neighborhood community reveals that the use of the beach was part of a larger practice of local residents to use the local area, including but not limited to the beach, as an asset they were all free to enjoy.

When the facts are framed by the claim that the beach is subject to a public easement, the claimants would not be entitled to a presumption of adversity because the land at issue was open and used recreationally. This means that the individual defendants would be required to prove non-permissive adverse use of the land under a claim of right. They have not done so, which defeats their claim for a public easement.

When one assesses their claim for a private prescriptive easement (either appurtenant or in gross), then whether or not the individual defendants are entitled to the benefit of the presumption discussed in *Androkites* , their claim fails. Even if the presumption applies, the evidence of permissive use overcomes it. Further, the presumption may not arise in the first place, because as the *Androkites* Court casts the issue, the rationale for the presumption of adversity may not be supported in the circumstances of this case because of the communal use of the land in the Cooper's Beach environs. In *Androkites* , the Court recognized an inference that when family members used land owned by other family members, the presumption of adversity did not arise because the landowners could be expected to accommodate or permit their relatives to use the land without a suggestion of adversity. 2010 ME 133, ¶ 18, 10 A.3d at 683. If the analogous " friendly neighbor" exception to the presumption of adversity represents good law in Maine (an issue the Law Court reserved in *Riffle* , 2014 ME 21, ¶ 9, 86 A.3d at 1167), then there is a strong argument that it would apply here. However, resolution of the private prescriptive easement claims is not dependent on that outstanding legal issue, because even with a presumption of adversity, the best evidence demonstrates that the beach was used permissively, thus defeating the claim that it is subject to private prescriptive interests, whether those interests were appurtenant or in gross.

2. Record-based claims

The individual defendants (again, except for Constance Scott) argue alternatively that pursuant to the construction of their deed to 34 Cooper's Beach Road and the history of that land's ownership, they have record rights to use the beach that is part of the Edwardses' holdings.[9] The court agrees.

The land now located at 34 Cooper's Beach Road was once part of a larger parcel owned by Cora E. Perry. In 1924, she conveyed a portion of her larger holding to Ensign Otis. Part of that outconveyance consists of a portion of the lot at 34 Cooper's Beach Road (in other

words, part of the land that Perry conveyed to Otis is not part of 34 Cooper's Beach Road, and part of 34 Cooper's Beach Road was not part of the land conveyed to Otis). The land was described in the deed by reference to the Blackinton Plan. In addition to conveying land, the deed to the 1924 conveyance also recited a transfer of " privileges of all streets laid out on said plan [the Blackinton Plan] and the free use of the beach for bathing and boating purposes." [10] Subsequent conveyances of land located at 34 Cooper's Beach Road did not expressly convey those beach rights. The only easement right expressed in the deed given to the individual defendants when they acquired the lot was " a right-of-way over the Cooper's Beach Road to the" parcel. This clearly would not include rights to use the beach.

The individual defendants contend that although the record easement creating rights to use the beach is not set out in their own deed, they nonetheless hold that right because a it was expressly made appurtenant to a portion of the same land when it was owned by a predecessor-in-title, namely, Ensign Otis.

An easement over a way in a development is created " by implication based upon estoppel, " when the deed of conveyance describes the lot by reference to the plan that also shows the way. *Callahan v. Ganneston Park Development Corp* ., 245 A.2d 274, 278 (Me. 1968). Those easement rights are protected from subsequent interference. *Id*. The rationale for this protection given to the grantee is " to secure to persons purchasing lots under such circumstances those benefits, the promise of which, it is reasonable to infer, has induced them to buy portions of a tract laid out on the plan indicated." *Id*. (citation and internal punctuation omitted).

The same principle applies here: Otis acquired land with a promise that it would give him rights to use " the beach" for bathing and boating. That record easement thereby becomes appurtenant to the parcel of land itself, and it runs with the land even though subsequent deeds make no reference to it. *Cole v. Bradbury* , 86 Me. 380 (Me. 1894). Further, the existence and enforceability of the easement is not limited by its nature. The easement in *Callahan* was a right-of-way. In *Cole* , water rights were at issue. More generally, the Law Court has held that the nature of the easement does not need to be tied to the grantee's enjoyment of the land. *See Dority v. Dunning* , 78 Me. 384 (Me. 1886). This suggests breadth in the nature of the easement rights that become appurtenant in a prior grant and would include beach rights to property that is close to the water but otherwise without ocean frontage.

In the order dated May 7, 2013, the court denied the Edwardses' motion for judgment on the pleadings to resolve this part of the case. The obstacle to adjudication was the fact that the individual defendants own only a portion of the land that benefited from the grant of beach rights and it would be unclear whether the easement should continue to benefit the parcel that was severed from the larger lot. The resulting question was whether an easement appurtenant is conveyed by operation of law when only a portion of the dominant estate is conveyed. That question has now been resolved in two ways. First, the Edwardses' expert on property issues has established that it does. Additionally, further secondary authority cited by the individual defendants confirms that this result obtains. *See* Restatement (Third) of Property (Servitudes) § 5.7 (2000).

The Edwardses argue that because *Callahan* was a case decided decades after Perry granted the record easement to Otis, its doctrine cannot be used to analyze the effect of that provision of the deed. However, *Callahan* did not purport to create new law. And in fact, the legal foundation for that opinion consists of caselaw that predated the 1924 conveyance. The *Callahan* Court cited caselaw from 1919 (*Harris v. South Portland* , 118 Me. 356 (Me. 1919)) and from even earlier (*Lennig v. Ocean City Association* , 7 A. 491 (N.J. 1886).

The court is also not persuaded by the Edwardses' argument that because the individual defendants acquired an express easement giving them access to their property, any implied easements are nullified. The easements are different and have different purposes. Further, affirmative Maine law as set out in *Callahan* and the authority on which it rests entitles the individual defendants to the beach rights they seek in this action.

Consequently, the facts of the case and governing law combine to establish that the land located at 34 Cooper's Beach Road benefits from an easement to use " the beach" freely for bathing and boating. The next question is, where is the beach that they have the record right to enjoy? In their written summation, the individual defendants acknowledge that they have the burden of proving the nature and extent of their record rights, and the court imposes that burden on them.

The deed from Perry to Otis did not describe the location of the beach, and the Blackinton Plan, which is used to describe the location of the lot that Otis acquired, does not expressly designate the location of any particular beach area. In legal terms, the word " beach" has a " fixed and definite meaning" and, when associated with areas near the sea, simply refers to the intertidal zone. *See Hodge v. Boothby* , 48 Me. 68 (1861). The Edwardses contend that the " beach" referenced in Perry's deed to Otis is located immediately in front of lot 24 as shown on the Blackinton Plan and did not extend onto the land they now own. When Perry conveyed land to Otis and gave Otis beach rights, Perry also owned the land that is now the Edwardses. Lot 24 on the Blackinton Plan is contiguous to the Edwardses' land. Both lot 24 and the land retained by Perry have intertidal areas. There is nothing in the deed or in the Blackinton Plan itself that purports to limit the " beach" as referenced in the former,

to the intertidal area in front of lot 24. Rather, the grant is to the " beach" without limitation. This constitutes persuasive evidence that the grantor of the easement did not intend to limit the area of the " beach" that Otis (and therefore his successors-in-title) would be entitled to enjoy.

The Edwardses' strongest argument to support their claim that the intended beach is the area in front of lot 24 is based on the location of the that lot's boundary closest to the water. The relevant boundary for that parcel is the high-water mark. In contrast, the Edwardses' boundary is the low-water mark, described in the deed as the waters of Rockland Harbor, From this, the Edwardses contend that Perry must have intended to allow other landowners to use the beach for lot 24 that was not part of that parcel but intended to exclude the easement grantees from the beach that she continued to own. This argument has two flaws. First, the question here is one of use and not ownership. Thus, when she conveyed land and beach rights to Otis in 1924, even though Perry retained ownership of the land now owned by the Edwardses (she remained the owner of the parcels now owned by the Edwardses until at least 1927), that retention of title is not a limitation of the use of that retained land by others. Second, if Perry did not convey the beach in front of lot 24, then as the grantor she would have retained title to it, just as she retained title to the beach area in front of the property that the Edwardses now own. There is no meaningful evidence that Perry would have intended to grant rights to some of the beach area that she owned but intended to deny the same rights to another area of the beach that she also owned and that was immediately adjacent to it.

The weight of the evidence is therefore sufficient to establish that the individual defendants have record rights to the free use of the beach, namely, the intertidal area, that the Edwardses own " for bathing and boating purposes." [11]

3. Common law claims

In count 6 of their counterclaim, all individual defendants seek a declaration that under Maine common law they are entitled to use the intertidal area on the Edwardses' land. The individual defendants are entitled to use that area to the extent allowed by the holdings in *McGarvey v. Whittredge* , 2011 ME 97, 28 A.3d 620; *Bell v. Town of Wells* , 557 A.2d 168 (Me. 1989), and other applicable cases.

C. Costs of court

The allocation of costs of court is based on a functional analysis of which party prevailed when the action is viewed as a whole. *See Flaherty v. Mather* , 2011 ME 32, ¶ 89, 17 A.3d 640, 663. When the resolution of the parties' claims is viewed in that light, the court concludes that the Town and the individual defendants are entitled to an award of costs.

The entry shall be:

Judgment issued by the court. For the reasons set out therein, the way located on the land owned by the plaintiffs, described in a deed recorded at book 4357 page 190 of the Knox County Registry of Deeds, is a public easement road pursuant to 23 M.R.S. § 3025.

Defendants and counterclaim plaintiffs Cynthia S. Blackman, Eliot A. Scott, Nathalie M. Scott and Willis A. Scott, Jr., as owners of land located at 34 Cooper's Beach Road and described in a deed recorded at book 1857 page 87 of the Knox County Registry of Deeds, hold easement rights to freely use the intertidal beach area located on the plaintiffs' land for bathing and boating purposes. They and defendant and counterclaim Constance Scott also are entitled to use said area to the extent allowed by Maine common law.

All other claims are either denied, or not reached and dismissed as moot.

All pending rule 50(d) pending for judgment as a matter of law are dismissed as moot.

The Town of Owls Head, Cynthia S. Blackman, Eliot A. Scott, Nathalie M. Scott, Willis A. Scott, Jr. and Constance Scott are awarded their costs of court.

Notes:

[1]The remaining individual defendant is Constance Scott, Eliot's wife. There is no evidence that she has a record interest in any of the parcels at issue in this action. Also, the parties have stipulated that she is not making a claim that she holds any interest in the way that passes over the Edwardses' house or in any land above the high-water mark of the shore. The court can only assume that the Edwardses have joined her as a party-defendant because of any marital interest she may have in the land through her husband. In the end, it appears that the only claim in which she has an active interest is the assertion of common law rights to the intertidal area on the Edwardses' land, The Edwardses have not opposed this limited claim. Nonetheless, for ease of reference in this order, the court's allusions to the " individual defendants" are intended to mean the other defendants/counterclaim plaintiffs.

[2]The Titcomb Trust holds easement rights over the Edwardses' land. The Titcomb Trust is not a party to this action, and its rights over the Edwardses' land as the servient estate are not at issue here.

[3]These issues have been framed entirely by the Edwardses' complaint: the Town did not file a counterclaim asserting a public interest directly. Thus, as

a matter of pleading, those issues are presented here in the negative rather than in the affirmative.

[4]It bears note that the then-owner of the Titcomb Trust property did not sign either of the 1986 agreements. Because the Trust is not a party to this action and because the issue has not been raised, the court does not address the Town's rights, if any, to the part of the cul-de-sac that is located on the Trust's land.

[5]The minutes from the Town meeting note ten ways that were accepted as public easement roads. *See* plaintiffs' exhibit 30. The 1986 annual report refers to twelve such ways. *See* Town's exhibit 73.

[6]Even if the court had denied this aspect of the summary judgment motion so that this issue would have been subject to litigation at trial (and in fact the Edwardses presented evidence during trial and argued the question of whether the proposed road was specifically described as section 3025 requires), that evidence would support the same conclusion that the location of the road was specifically described in the dedication, because the location of the road is where Cooper's Beach Road lies on the face of the earth, Except for the question of whether the way passing over the Edwardses' land is a portion of that road, the location of the road is not subject to legitimate dispute.

[7]There is evidence that Elliot H. Mednick and Josephine H. Mednick, who owned the land between 2005 and 2010, posted a no trespassing sign on the property. There is no evidence, however, that they opposed municipal snowplowing services or that they held the view that the road itself ended at their boundary line.

[8]The court need not and does not reach the question of whether the use by people who did not live in the Cooper's Beach Road area amounts to public use. *See Stickney* , 2001 ME 69, ¶ 18, 770 A.2d at 601.

[9]This claim is set out in count 1 of the counterclaim, In their counterclaim, Cynthia Blackman and Eliot Scott do not allege that they hold a record easement to the beach as part of their ownership of land located at 15 Water's Edge Lane and 24 Montgomery Lane. Further, they have not made such an argument in response to the Edwardses' more generalized claims for declaratory judgment. Consequently, the only question presented here is whether ownership of the land located at 34 Cooper's Beach Road carries record easement rights to use the beach that is part of the Edwardses' parcel.

[10]The court does not reach the question of whether this express grant to the use of the roads, and a similar grant found in the deed from Robert Hurtig and Marie Hurtig to the individual defendants, give the individual defendants record rights to use the way located on the Edwardses' land. Because that way is part of a public easement road, there is no further relief that can be granted through adjudication of the deeded easement issue as that issue pertains to the way.

[11]In this order, the court has addressed the question of whether the individual defendants hold prescriptive easement rights to use the beach. The court did so, even though it also concluded that those parties hold record easement rights by implication, because the record easement rights entitle them to use the beach for purposes of " bathing and boating." If the claimed prescriptive rights were no greater than the record rights, then in the present circumstances there would not be any need for the court to address the former. On the other hand, if the prescriptive rights claimed by the individual defendants are more extensive than their record rights to bathe and boat, then the determination that they have those record rights would not fully address the issues in this case. Because of that possibility, the court has gone ahead to analyze both sets of claims.
