

**COMMONWEALTH OF MASSACHUSETTS  
LAND COURT  
DEPARTMENT OF THE TRIAL COURT**

ESSEX, ss.

95 MISC 222901 (MDV)

ELIZABETH A. FISHER,

Plaintiff/Counterclaim-  
Defendant,

v.

COMMONWEALTH OF MASSACHUSETTS,

Defendant/Counterclaim-  
Plaintiff.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW  
(Rule 52, Mass. R. Civ. P.)**

By an amended complaint filed in 1995, plaintiffs Elizabeth A. Fisher and Howard E. Stempler sued defendant Commonwealth of Massachusetts pursuant to G.L. c. 240, § 11. They asked the Court to determine whether an 1887 deed (Trial Exhibit 6) required them to keep the “ledges and rocks” on their coastal property at 18 Long Branch Avenue in Rockport, MA, “open to the general public.”

In 1996, this Court (Scheier, J.) consolidated this action (which this decision will call *Fisher I*) with another case filed in 1995, *Allen v. Commonwealth of Massachusetts*, Land Court Miscellaneous Case No. 223684. (The Court’s convention for numbering “Miscellaneous” cases was different then.) *Allen* raised similar questions regarding a deed to Lot 121A on Long Branch Avenue (“Lot 121A”), which was subject to the same restriction as in *Fisher I*. Later in 1996, plaintiffs in both actions moved for summary judgment on their claims. The Commonwealth

cross-moved for summary judgment.

In June 1997, in a decision not published in the *Land Court Reporter* but attached as an Appendix to this Decision, this Court (Lombardi, J.) held that the 1887 Deed was in 18 Long Branch Avenue and Lot 121A's chains of title. The Court also found that in the Deed, its grantors (the trustees of the will of one Maria L. Phillips) stated they

release and forever quit claim unto [the Deed's grantee, John M.] Way, his heirs and assigns, all the right, title and interest which we have as Trustees aforesaid in and to the land, ledges or rocks, between the land above described hereby conveyed, and the Ocean, at the low water mark, be the same more or less, and we also do hereby release, and quit claim unto said Way, his heirs and assigns all the right, title and interest we have (if any) in and to the land, ledge or rocks, in front of and between said Dawn avenue and Point de Chene avenue and the Ocean, at low water mark and being in front of the cottage and land which said Way now owns. . . . *The above releases of the ledges and rocks, is [sic] upon the condition that they forever remain open to the general public.*

This Decision calls the italicized language the "Condition."<sup>1</sup>

The Commonwealth argued on summary judgment that the 1887 Deed created an easement for the benefit of the public across the "ledges and rocks." Appendix at 4. The Court rejected that contention. See *id.* at 8, quoting *Hodgkins v. Bianchini*, 323 Mass. 169, 172 (1948) ("An easement cannot be imposed by deed in favor of one who is a stranger to it."). Instead, the Court construed the Condition as "an offer of dedication to the public . . . ." *Id.* Relying on *Attorney General v. Abbott*, 154 Mass. 323 (1891) ("*Abbott II*"), the Court held that such an offer, by itself, did not effectuate the Condition; the Commonwealth also needed to prove "acceptance" of the Condition. Only then could there be an easement for the benefit of "the

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<sup>1</sup> This Decision will refer frequently to the "ledges and rocks" or vice versa. Those phrases are shorthand for the areas described in the paragraph indented above. Other than concluding they are somewhere seaward of those parts of 18 Long Branch Avenue conveyed to Mr. Way in 1875 and 1878, see Findings #10 and #13 below, the Court makes no determination in this case regarding the location of the "ledges and rocks" or whether they comprise a smaller portion of the "land, ledges or rocks" the 1887 Deed granted to Way.

public at large.” Appendix at 6-7, quoting *Abbott II*, 154 Mass. at 328-329.

The June 1997 decision held there were material disputes of fact surrounding the public’s alleged acceptance of the Condition. The Court thus denied the parties’ cross-motions for summary judgment. See Appendix at 8-9. The docket shows no activity in *Fisher I* between the June 1997 denial and June 2003, at which point the Commonwealth moved for dismissal of the case for want of prosecution. The Court (Trombly, J.) denied that motion in July 2003. The docket shows a flurry of discovery motions over the next two years, only to have the case go dormant again – so much so that in March 2020, the Court administratively declared *Fisher I* and *Allen* “inactivated.”

The story resumes a year later. On April 1, 2021, Ms. Fisher sued the Town of Rockport (the “Town”), a Town rights-of-way committee, and its members over public use of Long Branch Avenue and two paths crossing or flanking 18 Long Branch Avenue.<sup>2</sup> That case is *Fisher v. Town of Rockport*, Case No. 21 MISC 000183 (“*Fisher II*”). In her *Fisher II* complaint, Fisher alluded to *Fisher I*, calling it “currently pending but inactive . . . .” Eight months later, the *Fisher II* defendants argued the Court needed to resolve *Fisher I* and *Allen* before moving to the claims in *Fisher II*. In March 2022, this Court (Roberts, J.) agreed and essentially stayed *Fisher II*.

New counsel for both parties appeared in *Fisher I* in late April 2022.<sup>3</sup> In October 2023, the Commonwealth sought leave to file an amended answer and counterclaim against Fisher. In December 2023, this Court granted the Commonwealth leave to amend only to the extent the

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<sup>2</sup> Fisher alone filed *Fisher II* because twenty years earlier, Mr. Stempler had deeded to her his interest in 18 Long Branch Avenue, making Fisher the property’s sole owner. In February 2023, this Court (Roberts, J.) formally dropped Stempler as a plaintiff in *Fisher I*.

<sup>3</sup> In the meantime, *Allen* was dismissed: Mr. Allen no longer owned Lot 121A, and its new owner declined to continue the suit.

Commonwealth now sought, pursuant to G.L. c. 231, § 1, declarations that the Condition “constitutes a valid and enforceable dedication of the rocks and ledges on a perpetual affirmative easement to the general public for recreational purposes” and that the general public “accepted the dedication . . . .”

The parties appeared for trial on September 16, 2024, with the Court (Vhay, J.) taking a view of 18 Long Branch Avenue and surrounding Rockport properties. Trial resumed on July 16, 2025, and continued various days through August 28, 2025. In November 2025, the parties in both *Fisher* cases requested stays pending mediation. The Court lifted the stay of this case on March 20, 2026. Having considered what the Court saw on its view, having heard the parties’ witnesses, having reviewed the exhibits admitted into evidence, having considered the parties’ stipulations of fact, and having read and heard the arguments of their counsel, the Court FINDS the facts set forth above as well as those enumerated below. The Court HOLDS the public timely accepted the Condition, and hence the Court will declare the Condition’s valid.

Pursuant to Rule 52, Mass. R. Civ. P., the Court FINDS these additional facts:

#### *The Ocean View Development*

1. 18 Long Branch Avenue is within a large oceanfront area at the extreme northern end of Rockport. 18 Long Branch Avenue once was part of a much larger parcel bounded on the north and east by the Atlantic Ocean. (The Atlantic bounds 18 Long Branch Avenue to the north.) In the mid-1800s, that larger parcel attracted the attention of two developers, Eben B. Phillips and George Babson. They envisioned developing a resort community called “Ocean View.”

2. Mr. Phillips’s earliest rendering of Ocean View dates from 1860. His plan showed a path, which he dubbed “Atlantic Avenue,” running along the development’s shoreline. Trial Exhibit 23, prepared thirteen years later (the “1873 Plan”), shows an “Atlantic Avenue” traversing Ocean View’s entire eastern shoreline, then curving to the west along Ocean View’s northern shoreline before stopping at a proposed “Cedar Avenue.” For part of that stretch, Atlantic Avenue runs roughly parallel to what the 1873 Plan shows as “Long Branch Avenue,” which lies south of Atlantic Avenue and is separated from Atlantic Avenue by several numbered lots. The 1873 Plan shows Atlantic Avenue abutting those numbered lots.

3. The 1873 Plan shows Atlantic Avenue never reaching the ocean except at the extreme southern end of the Avenue. Instead, the Plan shows considerable shoreline separating the Avenue from the water.

4. The 1873 Plan shows, running perpendicular to Atlantic and Long Branch Avenues, three other avenues. From west to east, they are Vine Avenue, Dawn Avenue, and Point de Chene Avenue.

5. The 1873 Plan is an advertisement for Ocean View. Here's its opening pitch (capitalization in original):

THE VIEW HERE OF OCEAN SCENERY, for grandeur, beauty and extent, surpasses any other site on the New England shore. Looking across Ipswich Bay, in a north-westerly direction, you have in full view the Massachusetts shore, with Ipswich and Newburyport; also, the whole of the New Hampshire coast, with Rye Beach, Portsmouth, and the Isle of Shoals; while in the distance, northerly, can be seen the hills of Agamentiens and the coast of Maine to within fifteen miles of Portland harbor.

6. The 1873 Plan next comments on the views to the east and south. It then says this (emphasis added):

The walk along the shore is about two mile and one-half in length,<sup>[4]</sup> and full of romantic beauty at every turn. The Blue Streaks, the Giant's Stairs, Cathedral Rocks, Day Break, Par View, Dick's Dream, *and on the extreme end of the point*, more than one hundred feet above high water, huge rocks are piled one on another, some weighing as high as fifty tons, and one further down estimated at two hundred tons; having been done by the force of the waves during the great gales, and leaving nothing but the smooth granite shore below.

The largest of these rocks was moved over sixty feet in the great gale of 1851.

7. The 1873 Plan identifies 32 shoreline features, including all but two of those mentioned in Finding #6 above. Four of the 32 features are shown at "the extreme end" of the point, north of Long Branch Avenue.

8. No one explained at trial Mr. Phillips or Mr. Babson's practical conception of the 1873 Plan's Atlantic Avenue, particularly at the northern end of Ocean View. At the time of trial, one of the more striking features of that area – composed of the same granite that typifies the rest of Ocean View's shore – are its large boulders and ledges. It's also more sharply sloped

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<sup>4</sup> The 1873 Plan doesn't include a scale, but a plan of the Ocean View area published in an 1884 atlas (the "1884 Atlas," excerpts admitted as Trial Exhibit 51) does. For the "walk along the shore" to be 2.5 miles, it had to include a course somewhere on the north side of Ocean View.

than the rest of the shoreline. Moreover, several witnesses confirmed that the 1873 Plan's description of the effects of storms upon "the extreme end of the point" has persisted to modern times: such storms frequently rearrange many of the shore's boulders.

9. Creating a formal "Atlantic Avenue" on the northern end of Ocean View would be a considerable undertaking today, let alone in the 1870s. But at the time of trial, the area was suitable for walking (or more aptly, clambering) among its rocks, boulders, and other outcroppings. Weather permitting, one can do that without having to follow a developed path or using trail-related infrastructure such as stairs or railings. No such path or infrastructure was visible at the time of trial.

### *The 18 Long Branch Avenue Parcels and the Condition*

10. In June 1875, Mr. Phillips conveyed by deed to Mr. Way (the "1875 Deed," Trial Exhibit 2) land north of Long Branch Avenue. The Deed describes the conveyed premises by reference to various numbered lots but doesn't identify the plan on which those numbers appear. The Court FINDS, however, that the 1875 Deed relied on either the 1873 Plan or a plan having lot numbers and avenues identical to those on the 1873 Plan.

11. Via the 1875 Deed, Mr. Way took title to every lot shown on the 1873 Plan bounded by Dawn Avenue on the west, Long Branch Avenue on the south and Point de Chene Avenue on the east, except for two lots (numbered 468 and 469 on the 1873 Plan) then owned by Horace Dodd.

12. While the 1875 Deed describes the conveyed premises in relation to Dawn, Long Branch, and Point de Chene Avenues, the Deed doesn't mention Atlantic Avenue. Instead, the Deed describes the northern boundary of the premises as a mere 140-foot distance between its northeast corner (a point on Point de Chene Avenue) and its northwest corner (a point on Dawn Avenue). The Deed also doesn't describe any feature (shorelines, paths, rocks, or ledges) north of the conveyed premises.

13. In December 1878, Mr. Phillips conveyed by deed to Mr. Way (the "1878 Deed," Trial Exhibit 3) what the 1875 Deed called the "Dodd" lots, Lots 468-469. Unlike the 1875 Deed, the 1878 Deed refers to lots "as shown on a plan of lots at Ocean View, Pigeon Cove Mass. drawn by Edmund K. Turner Surveyor." The lot numbers in the 1878 Deed nevertheless correspond to those on the 1873 Plan. The lands described in the 1875 and 1878 Deeds comprise today's 18 Long Branch Avenue, save for what the 1887 Deed adds (see Finding #24 below).

14. In 1879, Mr. Way conveyed the "interior" 18 Long Branch Avenue lots to his wife Fannie D. Way via two deeds, Trial Exhibits 4-5, the latter of which is from Nellie A. Kelliher to Ms. Way (the "Kelliher Deed"<sup>5</sup>). The Kelliher Deed describes only the interior 18 Long Branch Avenue lots; it does not include the "rocks and ledges" to the north.

15. That same year Mr. Phillips died, survived by his wife Maria Phillips. She died in

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<sup>5</sup> Trial Exhibit 4 spells Kelliher as "Kelleher." Trial Exhibit 5 spells Kelliher as both "Keliher" and "Kelliher." Later deeds stick with "Kelliher."

1882. The 1884 Atlas lists as the owner of much of the Ocean View lands the “Trustees of Maria L. Phillips Estate.” The Atlas doesn’t depict the grand Atlantic Avenue shown on the 1873 Plan: according to the Atlas, the only completed portion of that Atlantic Avenue (the Atlas doesn’t call it that) lies between Long Branch Avenue and Walnut Avenue, north of a property owned by “Phillips” (hereafter, the “Phillips Section”). The Atlas shows various other 1873 Plan avenues (Water Street, Harbor Avenue (not named on the Atlas), Cathedral Avenue (ditto), Mt. Locust Avenue, Bay Avenue, Linwood Avenue, Long Branch Avenue (called “Point Avenue” on the Atlas), Point de Chene Avenue, Dawn Avenue, Vine Avenue, Cove Avenue, Walnut Avenue, and Cedar Avenue) ending in the vicinity of Atlantic Avenue’s location on the 1873 Plan.

16. The 1884 Atlas shows north of Long Branch Avenue, but within Vine, Dawn, and Point de Chene Avenues, areas having the same shape as the corresponding numbered lots shown on the 1873 Plan. But instead of showing Atlantic Avenue on the northern sides of those lots (as the 1873 Plan did), the Atlas shows a dashed line.

17. The 1884 Atlas shows two structures within 18 Long Branch Avenue: one midway along Point de Chene Avenue and another at the southwest corner of the lot, west of Dawn Avenue. The Atlas also shows several buildings in the immediate neighborhood (the Atlas calls that area “Andrews Point” and “Extreme Point of Cape Ann”). For example, across from 18 Long Branch Avenue on the east side of Point de Chene Avenue (the extreme northeast corner of Ocean View), there are three cottages. Two blocks south of those homes and 18 Long Branch Avenue there’s a shorefront hotel called The Linwood.<sup>6</sup> The Atlas shows two other hotels within a mile’s walk of Andrews Point, Ocean View House and Pigeon Cove House.

18. In 1885, John S. Webber, Jr. published *In And Around Cape Ann* (Cape Ann Advertiser 1885) (excerpts in Trial Exhibit 33). He wrote of a visit to Pigeon Cove and his stay at Pigeon Cove House. Webber wrote: “The walk and rambles near Pigeon Cove are many and particularly worthy of notice.” *Id.* at 55.

19. Mr. Webber quoted the observations of Rev. H.C. Leonard as the latter described his travels in 1873 on “the marginal path” along Pigeon Cove, starting at the “Breakwater” (what the 1873 Plan shows as the extreme southern end of proposed Atlantic Avenue) and heading north along the coast of Ocean View.<sup>7</sup> Webber quotes Leonard’s description of reaching “Ocean Bluff, the outermost footing of Andrews’ Pont, the farthest Cape Ann projection towards England; thence around Hoop Pole Cove [a cove west of 18 Long Branch Avenue] to the old cedar; and so by Cedar avenue, Phillips avenue and Ocean avenue . . . back to the place of setting out.” Trial Exhibit 33 at 56. Webber also quotes this from Leonard: “Those who are vigorous enough for the ramble go to Halibut Point [north of Ocean View along the Atlantic coast], *following the shore from Andrews’ Point around Hoop Pole Cove*, or by the way of the village road and Captain Gott’s Lane . . .” *Id.* at 57 (emphasis added).

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<sup>6</sup> See Marshall W.S. Swan, *Town on Sandy Bay*, 285 (Phoenix Pub. 1980) (excerpts contained in Trial Exhibit 36) (“The cove’s Linwood Hotel, which had been dispensing hospitality since 1877, went up in flames in April 1906.”).

<sup>7</sup> Excerpts from Henry C. Leonard, *Pigeon Cove and Vicinity* (F.A. Searle, 1873), are found in Trial Exhibit 52.

20. An 1886 “hot air balloon insurance map” of the Ocean View area (the “1886 Map,” Trial Exhibit 35, page 12, Trial Exhibit 38, pages 222-223, and Trial Exhibit 88) shows greater construction of Atlantic Avenue than does the 1884 Atlas, but nothing north of Pine Avenue (as shown on both the Atlas and the 1886 Map) until one reaches the Phillips Section.

21. Five years after Ms. Phillips’s death her testamentary trustees executed the 1887 Deed. That Deed quitclaimed to Mr. Way “a certain lot of land at Ocean View, so called, in that part of the town of Rockport Mass. known as Pigeon Cove and lying on the Northerly side of Long Branch avenue, so called . . . .” (Trial Exhibit 6.)

22. The 1887 Deed doesn’t refer to any survey. It quitclaims to Mr. Way, for the stated consideration of “One dollar,” the Phillips trustees’ interests in three areas. The first is a 32,329 square-foot parcel north of Long Branch Avenue and west of Dawn Avenue (hence, west of 18 Long Branch Avenue), what this Decision calls Lot 121A. The 1887 Deed describes the northern edge of that Lot by distances starting at “a bolt in the ground,” then going to “a bolt in the top of a ledge,” then to “a drill hole in a rock,” then to “a bolt in a rock,” and last to “a bolt in a ledge, at the Northerly end of Dawn avenue . . . .” The 1887 Deed says this parcel “includes the Vine avenue running through the above described lot.”

23. The 1887 Deed next releases and quitclaims to Mr. Way the Phillips trustees’ interests “in and to the land, ledges or rocks, between the land above described hereby conveyed [that is, Lot 121A], and the Ocean, at low water mark, be the same more or less . . . .”

24. The 1887 Deed last releases and quitclaims to Mr. Way the Phillips trustees’ interests “(if any) in and to the land, ledge or rocks, in front of and between said Dawn avenue and Point De Chene avenue and the Ocean, at low water mark and being in front of the cottage<sup>[8]</sup> and land which said Way now owns.” After granting Way rights of way in Long Branch, Dawn, and Point de Chene Avenues, the 1887 Deed sets forth the Condition: “The above releases of the ledges and rocks, is upon the condition that they forever remain open to the general public.”

### *Use of the Rocks and Ledges After 1887*

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<sup>8</sup> What the Deed means by a “cottage” is unclear. Page 20 of *Rockport As It Was...A Book of Pictures* (Rockport Picture History Comm. 1975) (excerpts included in Trial Exhibit 35) contains a photograph, circa 1872, of a “large summer cottage on Long Branch Avenue” built by Mr. Way, allegedly his “first structure . . . .” Trial Exhibit 38, p. 112, shows a later “Way Villa,” which the authors of *Rockport Through the Years* (Sandy Bay Historical Society and Museums, Inc. 2017) call “[p]erhaps the most elaborate granite villa in Pigeon Cove,” a four-story granite structure that “was a landmark for many years.” *Id.* Page 21 of *Rockport As It Was* asserts the Villa was “the second summer home erected during 1879-’80 at the corner of Long Branch and Point de Chene Avenues . . . .” Other documents call that claim into question. The 1884 Atlas shows two modest structures on the eastern and western edges of 18 Long Branch Avenue (see Finding #17 above). Trial Exhibit 27, a plan of the property of the Estate of Maria L. Phillips prepared sometime after the 1887 Deed, and Trial Exhibit 26, an atlas published in 1899, show a single, larger, and more centrally located structure on 18 Long Branch Avenue. John W. Erkkila and Betty Anne Erkkila, *Souvenirs of Pigeon Cove*, 1 (2014) (Trial Exhibit 37), assert that the Way Villa was built in 1888 and that Way’s first cottage was moved “across Long Branch Avenue.”

25. Trial Exhibit 27 is a “Plan of Ocean View, Pigeon Cove, Mass., Property of Estate of Maria L. Phillips” (the “Estate Plan”). It postdates the 1887 Deed, as it (a) shows on 18 Long Branch Avenue the location of the Way Villa (see note 8 above) and (b) lists Mr. Way as the owner of Lot 121A, which he acquired in 1887 (see Finding #22 above). Consistent with the terms of the 1887 Deed, the Estate Plan doesn’t show Vine Avenue extending through Lot 121A.

26. The Phillips trustees prepared the Estate Plan to offer “[l]ots of land . . . for sale on easy terms . . . .” The Plan pitches its lots thusly (emphasis added):

The view here of ocean scenery, for grandeur, beauty and extent, surpasses any other site on the New England shore.

Broad off from the shore easterly is old ocean, spread out before you in all its magnitude and grandeur, without any land intervening between you and the coast of Europe; while here and there are fleets of fisherman, coasters, or trading vessels, making a continual moving panorama. *The rambles in the woods and by the shore*, and the excellent facilities for fishing and sailing, *make the place one of unequalled attraction for those who are in quest of health or of pleasure.*

The Plan also reprints a quote from one Francis A. Durivage that appeared on the 1873 Plan: “Of all the wild and romantic places I have visited, nothing exceeds Pigeon Cove, Cape Ann, in the variety of its scenery, rocks, woods, hills, glens, beetling precipices, granite promontories, lofty hills, broad bays, and smiling hamlets . . . .” The Plan does not show, however, the 1873 Plan’s Atlantic Avenue or any shoreline paths.

27. The earliest “live” testimony regarding use of the rocks and ledges at 18 Long Branch Avenue describes such uses after 1910. (Even then, the testimony was that of elderly persons recounting the stories of their deceased parents and grandparents.) From 1910 to the filing of *Fisher I* in 1995, the public used the rocks and ledges for the same purposes identified in the earlier findings: walking, rambling, enjoying views and vistas (whether while strolling or while stationary), observing nature, and reaching the water to swim, bathe, fish, and beachcomb. As early as the 1920s, members of the public were using the rocks and ledges for picnics, cookouts, and other social gatherings. As early as the 1910s, the rocks and ledges were reputed to be open to the public.

28. While no live witness bridged the gap in the admitted evidence between the late 1880s and 1910, no one offered evidence suggesting the uses ceased for that period. Between 1887 and 1910, the area continued to have seasonal residences (which only increased in number, compare Trial Exhibit 26 with the 1884 Atlas) and hotels that attracted visitors to Ocean View’s shores.

#### *Ownership of 18 Long Branch Avenue*

29. In June 1897, John M. Way’s surviving spouse, Fannie D. Way, conveyed by deed to trustee Charles G. Way (see Trial Exhibit 7) several properties, including “all the parcels of land with buildings thereon at Pigeon Cove in Rockport . . . .” *Id.* at 2.

30. In 1904, Trustee Way conveyed to the administrators of Fannie D. Way's estate (the "Administrators") the Trustee's interests in "land with buildings thereon at Pigeon Cove in Rockport . . ." (Trial Exhibit 8, p. 2.)

31. In 1905, the Administrators conveyed by deed to Frank E. Simpson of Framingham, MA (the "1905 Deed," Trial Exhibit 9) numerous Ocean View parcels, including 18 Long Branch Avenue. The 1905 Deed describes that parcel as "bounded Southerly by Long Branch Avenue one hundred and forty feet more or less; Easterly by Point de Chene Avenue, and by the continuation northerly of the middle line thereof to low water mark; Northerly by the ocean at low water mark, and Westerly by Dawn Avenue, and by the continuation Northerly of the middle line thereof." The Deed says the premises is that conveyed by John M. Way to Fannie D. Way in 1879 (see Finding #14 above) as well as "part of the premises abutting on said low water mark" conveyed by the 1887 Deed. The 1905 Deed also conveys to Simpson Lot 121A. The 1905 Deed states: "The ledges and rocks comprised in the above parcels being conveyed subject [sic] to the rights of the public mentioned or referred to in [the 1887 Deed]."

32. In 1924, Helen Seely of Cincinnati, OH, conveyed 18 Long Branch Avenue and Lot 121A by deed to her daughters Elizabeth D. Espy and Grace E. Groesbeck, also of Cincinnati. See Trial Exhibit 10. Seely traced her title to the probate of Mr. Simpson's estate. Eight months later, Espy and Groesbeck conveyed the lots by deed to Gordon Curtis of Weston, MA. See Trial Exhibit 11. In 1931, Curtis conveyed the lots by deed to Hugh P. McNally of Boston, MA (the "1931 Deed," Trial Exhibit 12). Each of the 1924-1931 deeds describes 18 Long Branch Avenue and the Condition in the manner appearing in the 1905 Deed.

33. In 1929, a "Plan of Ocean View, Pigeon Cove, Rockport, Mass. Property of the Estate of Maria L. Phillips" was recorded in the Essex County Registry of Deeds (the "Registry") Plan Book (the "1929 Plan," Trial Exhibit 28). The 1929 Plan labels the area of the rocks and ledges on 18 Long Branch Avenue and Lot 121A as "Restricted." There's no evidence, however, that the 1929 Plan is in the chain of title for 18 Long Branch Avenue: instead, the Plan appears to pertain to eighteen other Pigeon Cove lots, which the Plan labels alphabetically.

34. In 1934, Mr. McNally conveyed 18 Long Branch Avenue by deed to John M. Keenoy of New York, NY (the "1934 Deed," Trial Exhibit 13). The 1934 Deed describes 18 Long Branch Avenue in the manner appearing in the 1905 Deed but does not mention the Condition. The 1934 Deed states, however, that McNally's title came from the 1931 Deed.

35. In 1937, the Town took 18 Long Branch Avenue for non-payment of taxes (the "Taking," Trial Exhibit 14). The Taking lists the property's owner as John M. Keeney. In 1938, the Town assigned the Taking to Carl E. Newton of New York, NY. See Trial Exhibit 15. In 1941, Newton assigned the Taking to Andrews Point Association, Inc., of "Pigeon Cove" (the "Association").<sup>9</sup>

36. In 1942, the Association obtained a decree from this Court foreclosing Mr. Keeney's right to redeem 18 Long Branch Avenue following the Taking. See Trial Exhibit

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<sup>9</sup> In the 1940s, the Association viewed its mission as including protection of "the quiet residential quality" of the Andrews Point neighborhood. Trial Exhibit 53 (1949 letter from the Association to Town's selectmen).

17. In 1946, the Association conveyed 18 Long Branch Avenue and Lot 121A by deed to Kathleen Sibley of Pittsburgh, PA (the “1946 Deed,” Trial Exhibit 18<sup>10</sup>). The 1946 Deed described 18 Long Branch Avenue substantially in the manner of the 1905 Deed. The 1946 Deed also says this: “The ledges and rocks comprised in the above parcels being conveyed subject [sic] to the rights of the public mentioned or referred to in [the Kelliher Deed<sup>11</sup>] and by [the 1887 Deed].”

37. In 1968, the executor under the will of Ms. Sibley (“late of Rockport”) conveyed by deed to Jean S. Lorish of Delaware, OH (the “1968 Deed,” Trial Exhibit 19) 18 Long Branch Avenue but not Lot 121A. The Deed describes 18 Long Branch Avenue in the manner appearing in the 1946 Deed.<sup>12</sup> The Deed also says this: “The ledges and rocks within the above described parcel of land is subject to the rights of the public mentioned or referred to in [the Kelliher Deed<sup>13</sup>] and in [the 1887 Deed].”

38. In 1991, Ms. Lorish conveyed 18 Long Branch Avenue by deed to Mr. Stempler and Ms. Fisher. See Trial Exhibit 20. In 2001, Stempler and Fisher conveyed the premises to Fisher alone. Both deeds describe 18 Long Branch Avenue and the Condition in the manner found in the 1968 Deed.

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The parties tried three issues: was the 1887 Deed’s Condition accepted; if so, did that acceptance occur within a reasonable time before or after execution of the Deed on November 21, 1887; and if not, does the doctrine of laches nevertheless bar Ms. Fisher from obtaining relief.

Two cases involving the private development of a resort area in today’s Oak Bluffs, MA, contemporaneous with Phillips and Babson’s Ocean View activities, are the starting point for this Court’s analysis of the acceptance issue. In *Abbott v. Cottage City*, 143 Mass. 521 (1887)

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<sup>10</sup> The 1946 Deed recites that the Association obtained its title to Lot 121A via a different Town tax taking than the 18 Long Branch Avenue’s Taking.

<sup>11</sup> No one explained at trial why the 1946 Deed refers to the Kelliher Deed: its grant didn’t include (or allude to) the ledges and rocks. See Finding #14.

<sup>12</sup> With one difference: the Taking, the two assignments of the Taking, and the 1946 Deed state that 18 Long Branch Avenue contains 26,600 square feet. The 1968 Deed states the parcel contains “46,600 square feet, more or less.” (Emphasis added.) That assertion appears in subsequent deeds to 18 Long Branch Avenue.

<sup>13</sup> This deed repeats the same puzzling reference discussed in note 11 above.

(“*Abbott F*”), a town had laid out a way over George C. Abbott’s land. Abbott sought damages. The town claimed the way lay in something called Ocean Park. The town contended that in the late 1860s, its prior owner dedicated it “to the public, as and for a public square or park,” and that “such dedication was then accepted by the public,” “not under any statute or by vote of the town” but solely by “public use thereof for all purposes of a public park . . . .” *Id.* at 522. The trial court “ruled that no such dedication was possible in Massachusetts” and dismissed the town’s acceptance-of-dedication defense. *Id.* at 523.

Writing for the court, Justice Holmes disagreed. While acknowledging there were statutory formalities for the acceptance of areas privately dedicated for use as certain types of rights of way, no such formalities (nor even an express vote of a town) was needed to accept a dedication of land for park use. See *id.* at 524. Holmes reasoned that rights of way required maintenance, and that a town “ought not to be subjected to that burden without its consent. There is no such burden in the case of a public park. And as the use is in the public at large, it is hard to see how an acceptance by the town can be declared necessary, except upon grounds which are hardly definite enough for judicial decision, however they might be regarded by the Legislature.” *Id.* at 525 (citations omitted). Holmes continued:

The necessity of acceptance, in any form, of a gift to public uses has been a little over-insisted upon, perhaps, from a desire to bring the doctrine of dedication within some more general principle of law. But apart from the considerations specially applicable to highways, . . . it has been admitted that the so-called acceptance which is deemed necessary may be indicated by common user.<sup>[14]</sup> Or, as we think it better put, . . . acceptance will be presumed if the gift is beneficial, and user is evidence that it is beneficial.

*Id.* (citations omitted).

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<sup>14</sup> In this context, “user” does not mean “someone who uses a thing.” Instead, it’s a “Law French” term meaning “the continued use, exercise, or enjoyment of a right.” See Black’s Law Dictionary 1856 (2019); Bryan A. Garner, Garner’s Dictionary of Legal Usage, 325 (3d ed. 2011) (describing the etymology of “user”).

Mr. Abbott returned to the Supreme Judicial Court four years later in *Abbott II*. This time the Attorney General accused Abbott of interfering with the public's use of Ocean Park and two other parks dedicated by the private developers of the Oak Bluffs resort area. After a commissioner and special master heard the evidence, on appeal the *Abbott II* court determined two questions: did the developers intend to dedicate the parks to public use, and if so, had that dedication been accepted prior to 1880, when Abbott purchased land encumbered by the alleged dedication.

The court answered the first question yes. See *Abbott II*, 154 Mass. at 324-328. As to the second question, the court said this:

The acceptance of such a dedication at common law need not appear of record, and need not be by the town. The acceptance is by the public at large, and the principal thing to show it is use by the public. . . . No assent of the town is necessary, because no burden is put on the town, as in the case of a way. . . . Whether the easement of a public park could be accepted merely by enjoying an unobstructed view over it of the ocean, need not be considered. Various other acts of use of all the parks are shown, sufficient to show an acceptance of them by the public. Such acceptance need not be very specific.

*Id.* at 328 (citations omitted).

Under the standards articulated in *Abbott I* and *Abbott II*, the Court holds the public accepted the Condition, owing to (1) the public's use of the rocks and ledges prior to the delivery of the 1887 Deed, (2) the public's continuation of that use after delivery, and (3) the lack of any expectation at the time of the 1887 Deed that the manner or frequency of such use would intensify or require public expenditure. Such a holding is consistent with *Abbott I*'s rationale for why courts care at all about "acceptance" in dedication disputes: to avoid saddling the public with the burdens associated with well-meaning but costly private dedications. The Condition imposed no such burdens: the public already was using the rocks and ledges. Continuing that use required no improvement or investment whatsoever.

Ms. Fisher argues acceptance requires more than a showing of public use. She cites first a statement in *Horn v. Crest Hill Homes, Inc.*, 340 Mass. 362, 366 (1960), that “an offer to dedicate may be accepted by frequent and long continued public use . . . .” She suggests that’s the test for acceptance. She also correctly points out that the trial record lacks evidence of the “frequency” of public use of the rocks and ledges before or immediately after the 1887 Deed. Fisher reads too much into *Horn*’s statement. *Horn* involved a developer who’d installed a drainpipe on plaintiffs’ property without their permission. The trial court held the pipe had become part of the town’s drainage system, albeit also holding that no one ever had granted the town an easement for the pipe. See *id.* at 364-365. The Supreme Judicial Court rejected that reasoning. The court held that if no one had granted the town an easement, and if the town had never taken an easement by eminent domain, the only way the town could have acquired rights in the pipe would have been by dedication. *Id.* at 365. The court dismissed that possibility on account of the lack of proof of “an offer to dedicate” and “acceptance, either express or implied, of such an offer.” *Id.* at 366. It’s at that point in *Horn* (again, a case about drainage lines) the court offers the dicta Fisher tries to parlay into a new, post-*Abbott* test for the acceptance of a dedication of parkland. This Court declines to accept Fisher’s reading of *Horn*.

Ms. Fisher next cites a pre-*Abbott I* case, *Hayden v. Stone*, 112 Mass. 346 (1873), and a post-*Abbott I* case, *Newburyport Redev. Auth. v. Commonwealth*, 9 Mass. App. Ct. 206 (1980), for the proposition that mere use by the public isn’t enough to prove acceptance of a dedication. Both cases involve acceptance of alleged dedications of a land for use as a public highway. *Abbott I* explains why the test for acceptance of a dedication of a highway differs from that for parks. (*Abbott I* cites twice to *Hayden*, each time in the context of discussing acceptance of highways. See *Abbott I*, 143 Mass. at 524, 525. *Newburyport* relies solely on *Hayden* and never

mentions *Abbott I*. See *Newburyport*, 9 Mass. App. Ct. at 227.) *Hayden* and *Newburyport* are thus inapposite.

Ms. Fisher last insists (citing *Nahant Preservation Trust, Inc. v. Northeastern University*, 2022 WL 16855621 (Mass. Sup. Ct. Sept. 20, 2022)) that to prove the “public’s” acceptance of parkland, there must be evidence of use by persons other than residents of the municipality where the land lies. *Nahant* cites *Smith v. Westfield*, 478 Mass. 49, 60 (2017), for that proposition (see *Nahant*, 2022 WL 1685561 at \*14), but *Smith* contains no such holding. *Nahant* also does not mention (let alone discuss) the *Abbott* cases. This Court thus declines to follow *Nahant* on that point. Even if *Nahant* were controlling, the Commonwealth’s evidence of acceptance passes its test: there’s no evidence that use of the rocks and ledges ever has been limited to Rockport residents or advertised as such. Instead, there’s abundant evidence that in the relevant periods before and after the 1887 Deed, Ocean View was a resort community that catered to seasonal visitors from outside of Rockport.

The Court thus holds that the public accepted the Condition, and that such acceptance (via continued use of the rocks and ledges) occurred almost immediately. (The Court recognizes the 1887 Deed was signed in November. If the rocks and ledges weren’t used then, they certainly were once spring and summer arrived.) That continued use satisfies the rule in most jurisdictions that acceptance of a dedication must be reasonably timely. See Herbert Thorndike Tiffany, 4 Tiffany Real Property § 1108 (3d ed. 1975); Eugene McQuillin, 11A The Law of Municipal Corporations § 33:62 (3d ed. 2000). The Court thus does not need to reach the third question tried, whether the doctrine of laches bars Ms. Fisher from obtaining a declaration that the Condition lapsed for lack of acceptance. It strikes the Court, however, that equity as well as public policy should disfavor a challenge to public acceptance of park lands in the

Commonwealth coming 108 years into the alleged use of such lands, and long after key witnesses (in this case, the Phillipses, the Ways, and the Gilded Age visitors to Andrews Point) have died.

Judgment to enter accordingly.

/s/ Michael D. Vhay

Michael D. Vhay  
Associate Justice

Dated: July 9, 2026

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**Appendix to Findings of Fact and  
Conclusions of Law**

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

ESSEX, SS.

\_\_\_\_\_  
HOWARD E. STEMLER and  
ELIZABETH A. FISHER,  
Plaintiff

MISCELLANEOUS CASE ✓  
NO. 222901

v.

\_\_\_\_\_  
COMMONWEALTH OF  
MASSACHUSETTS,

Defendant

\_\_\_\_\_  
CHARLES D. ALLEN,

MISCELLANEOUS CASE ✓  
NO. 223684

Plaintiffs

v.

\_\_\_\_\_  
COMMONWEALTH OF  
MASSACHUSETTS,

Defendant

**ORDER ON SUMMARY JUDGMENT MOTIONS**

The first of the above actions was filed by Howard E. Stempler and Elizabeth A. Fisher (first plaintiffs) on November 2, 1995, pursuant to G. L. c. 240, § 11, to determine the validity of a certain restrictions affecting land owned by first plaintiffs. The complaint named Any Member

of the General Public Claiming an Interest in Certain Land, Rocks and Ledges in Rockport, Massachusetts as the defendants. An amended complaint was filed on November 10, 1995, naming as defendant Scott Harshbarger, Attorney General of the Commonwealth of Massachusetts, as Representative of Any Member of the General Public Claiming an Interest in Certain Land, Rocks and Ledges in Rockport, Massachusetts (Attorney General). Neither the complaint nor the amended complaint filed by first plaintiffs was verified.

On November 30, 1995, Charles D. Allen (second plaintiff) filed a complaint against the Attorney General pursuant to G. L. c. 240, § 11, to determine the validity of the same restrictions affecting land owned by second plaintiff. The complaint was not verified. A Motion to Consolidate was filed by the Attorney General with the assent of first plaintiffs and second plaintiff (collectively, plaintiffs) on February 23, 1996, and was simultaneously allowed by this Court (Scheier, J.).

On October 31, 1996, plaintiffs jointly filed Plaintiffs' Motion for Summary Judgment and Plaintiffs' Memorandum of Law in Support of their Motion for Summary Judgment. The Attorney General filed on January 28, 1997, Defendant's Opposition to Plaintiffs' Motion for Summary Judgment and Defendant's Cross Motion for Summary Judgment and a memorandum of law. Oral arguments were heard on these motions on February 10, 1997.

Based upon the record before me,<sup>1</sup> I find the following material facts exist without

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<sup>1</sup>There is a limited amount of summary judgment material before me. Although plaintiffs' complaints were unverified, the Attorney General filed answers admitting certain allegations to be true. None of the parties have filed affidavits, relying instead upon copies of unrecorded plans, books from the nineteenth century, and recorded deeds. Those copies are attached to memoranda of the parties without being properly authenticated by affidavit. Although no one has objected to my considering those materials, I will consider them to be part of the summary judgment record only for the limited purposes stated herein.

substantial controversy.

1. First plaintiffs are the owners of a certain parcel of land now known and numbered as 18 Long Branch Avenue in Rockport as evidenced by a deed from Jean S. Lorish dated October 25, 1991, and recorded with the Essex County Registry of Deeds, Southern District, in book 10999, at page 220.<sup>2</sup>

2. Second plaintiff is the owner of a certain parcel of land now known and numbered as Lot 121A, Long Branch Avenue in Rockport as evidenced by a deed from James F. Farr and David W. Pitts dated November 24, 1992, and recorded in book 11643, at page 480.

3. The Attorney General is made a party to this action as the representative of any member of the general public claiming any interest in the land, rocks, and ledges which are a part of the properties owned by plaintiffs (locus).

4. A certain condition (condition) in the plaintiffs' title chain was imposed in the deed from David K. Phillips, Leonard H. Phillips, and Nathaniel J. Bradlee, as trustees under the will of Maria L. Phillips, to John M. Way dated November 21, 1887, recorded in book 1213, at page 183 (1887 deed). The language of the condition was as follows:

Also, we do hereby release and forever quit claim unto said Way, his heirs and assigns, all the right, title and interest which we have as Trustees aforesaid in and to the land, ledges or rocks, between the land above described hereby conveyed, and the Ocean, at the low water mark, be the same more or less, and we, also do hereby release and quit claim unto said Way, his heirs and assigns all the right, title and interest we have (if any) in and to the land, ledge or rocks, in front of and between said Dawn avenue and Point De Chene avenue and the Ocean, at low water mark and being in front of the cottage and land which said Way now owns. We hereby also convey to said

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<sup>2</sup>All subsequent recording references shall refer to this particular Registry of Deeds.

Way, his heirs and assigns a right of way to pass and repass over and upon Long Branch avenue, Dawn and Point de Chene avenues, with or without teams. The above releases of the ledges and rocks, is [sic] upon the condition that they forever remain open to the general public (emphasis in original).

5. No action has been taken by anyone to enforce the condition, whether by taking physical possession or filing a written statement, prior to the institution of the instant actions by plaintiffs.

The Attorney General contends that the language in the 1887 deed creating the condition requiring the land, ledges, or rocks to be kept open for the benefit of the general public is an easement that runs with the land, Kenney v. Marino, 350 Mass. 534, 535 (1966), or an express dedication of a public easement. See Attorney General v. Abbott, 154 Mass. 323, 328 (1891).

The Attorney General also claims “[d]edication resembles a public trust” or a “public charitable trust.” The facts of this case do not support such a characterization of the grant in the 1887 deed. The cases involving public or charitable trusts refer to grants to a charitable entity such as a hospital, Anna Jaques Hosp. v. Attorney General, 341 Mass. 179 (1960); non-profit corporation, Arnold v. Commissioner of Corps. and Taxation, 327 Mass. 694 (1951); or municipal entity, Dunphy v. Commonwealth, 368 Mass. 376 (1975); Jacobson v. Parks & Recreation Comm’n of Boston, 345 Mass. 641 (1963); Salem v. Attorney General, 344 Mass. 626 (1962); Cohen v. Lynn, 33 Mass. App. Ct. 271 (1992); Newburyport Redevelopment Auth. v. Commonwealth, 9 Mass. App. Ct. 206 (1980). Furthermore, “a mere statement in a grant of the use to which the grantee contemplates putting the granted premises or of the purpose for which the grant is made is insufficient to create an enforceable trust.” Newburyport Redevelopment Auth., 9 Mass. App. Ct. at 229. Although it

was found that the use of the word "forever" in Newburyport Redevelopment Auth. expressed an intent in plain words to create a trust in perpetuity, Id. at 230, all the cases relied upon in that decision referred to grants to municipalities or their political subdivisions. I have found no authority to impress a public trust in perpetuity upon land conveyed to an individual.

The answer to the question of which party will be successful in this action is largely dependent upon whether the condition is a dedication. Dedication is the "intentional appropriation or donation of land, or of an easement or interest therein, by its owner for some proper public use." 23 Am. Jur. 2d Dedication § 1 (1983). The execution of a deed is a common means of effecting a dedication. Id. at § 28; see also 3, American Law of Property § 12.133 (A.J. Casner, ed. 1952).

Plaintiffs argue that a "dedication depends upon the intent of the owner which must be made manifest by unequivocal declarations or acts to appropriate his land to a public use and to surrender its control to the public." Longley v. Worcester, 304 Mass. 580, 586-587 (1939). If the intent to so dedicate the land is not clearly established, plaintiffs insist there is no dedication. Hayden v. Stone, 112 Mass. 346, 349 (1873). They point to the conditional language of the 1887 deed as being inconsistent with the idea of a permanent abandonment of locus to public use.

A deed will not be construed as an estate in fee simple subject to a condition subsequent "unless language is used which, according to the rules of law, *ex proprio vigore*, imports a condition, or the intent of the grantor to make a conditional estate is otherwise clearly and unequivocally indicated. Conditions subsequent are not favored in law." Rawson v. Inhabitants of Sch. Dist. No. 5 in Uxbridge, 7 Allen 125, 127-128 (1863). Conditional language "must be conjoined in a deed with [other words] giving a right to reenter or declaring a forfeiture in a specified contingency, or the grant will not be deemed to be conditional." Id. at 128. Although the use of the

words “upon the condition” were used in the instant action, there was no other language giving a right to anyone to reenter locus or declare a forfeiture.

There is authority for the proposition that if a deed contains a clause to the effect that the conveyance is made on the condition that the land conveyed be forever kept open for a public use, there is an express dedication. 23 Am. Jur. 2d Dedication § 28 (1983). In Greene v. O'Connor, a grantor deeded land to the city of Providence “upon the condition that the said strip of land shall be forever kept open and used as a public highway . . . .” 18 R. I. 56, 57 (1892). The court held that “[s]uch a declaration does not create an estate on condition, but merely imposes a confidence or trust on the land, or raises an implied agreement on the part of the grantee to use the land for the purpose specified. Id. at 60 (citing Rawson and other Massachusetts decisions).

In Attorney General v. Abbott, 154 Mass. 323 (1891), certain persons created a resort village in Oak Bluffs and prepared various plans showing lots for sale and open space areas. Copies of the plans were widely circulated, mailed, and displayed in various public places. The Court found that there was a “scheme of the enterprise or speculation [by which] the public should understand that these spaces should be left open for public use . . . . [W]e think the evidence is sufficient to show an offer to the public of the spaces shown on the . . . plans . . . .” Id. at 327-28. Similarly, “[dedication] may spring from oral declarations . . . made to persons with whom [the dedicator] deals and who rely upon them; or it may consist of declarations addressed directly to the public.” Attorney General v. Onset Bay Grove Ass’n, 221 Mass. 342, 348 (1915); see also Carroll v. Hinchley, 316 Mass. 724, 728 (1944).

If there is an offer of dedication to the public, acceptance, in some form, must occur to complete the dedication.

The acceptance of such a dedication at common law need not appear of record, and need not be by the town. The acceptance is by the public at large, and the principal thing to show it is use by the public. [citation omitted] There is no need of a formal grantee . . . . Whether the easement . . . could be accepted merely by enjoying an unobstructed view over it of the ocean, need not be considered . . . . Such acceptance need not be very specific . . . . The dedication . . . carries only an easement. This easement is not in the town, but it is in the public at large.

Abbott, 154 Mass. at 328-29.

The missing element at this procedural point in the litigation is clear and sufficient evidence of use of locus by the public. I find the documents offered by the Attorney General do not provide the required proof. A few comments on certain exhibits attached to Defendant's Response to Plaintiffs' Reply Brief are in order.

Exhibits 1 and 3 appear to describe a certain walk along the shore as beginning in the area of Breakwater Wharf to "the extreme end of the point" beyond Dick's Dream. There is no evidence as to the location of the so-called "extreme end of the point." Exhibit 5 consists of photocopies of six pages from an 1873 book entitled Pigeon Cove and Vicinity by Henry C. Leonard. The Attorney General must satisfy the requirements for proof of an ancient document before it may be considered as an exception to the hearsay rule. P.J. Liacos, Massachusetts Evidence § 12.3.1, at 686-87 (6th ed. 1994). Furthermore, the location of the walk as described on page 57 of this book is a matter that needs to be established at trial. Exhibit 7 refers to cookouts on the rocks in the Pigeon Cove Shore Area at the edge of an extensive woods and brush area. There is no way to determine from the material submitted the proximity of such an area to locus.

It will be left to counsel to decide whether any of these documents may be admitted by agreement or whether they must be introduced by one or more competent witnesses who can

authenticate them and explain their relevance or probative value to this litigation. The admissibility of these or any other documents will be considered at time of trial or in advance by a motion in limine.

Plaintiffs raise various arguments in support of their position. First, they assert the condition is no longer valid under G. L. c. 260, § 31A, because a) it was created before January 2, 1955, b) it has not been broken, c) possession has not been taken, d) a reverter has not occurred, and e) no statement of claim was recorded; second, no notice of restriction was recorded prior to January 1, 1964, as required under G. L. c. 184, § 28; third, there has been no offer of dedication and no acceptance; and, fourth, there is no easement to the public because an easement cannot be imposed by deed in favor of one who is a stranger to it.

The merits of these arguments, however, are inextricably tied to whether the Attorney General can prove there has been a completed dedication. If no such dedication is established, I have already indicated a public trust theory is inapplicable to the facts of this action. Similarly, the Attorney General cannot prevail on the theory that the grantors have granted an easement to the general public. "An easement cannot be imposed by deed in favor of one who is a stranger to it." Hodgkins v. Bianchini, 323 Mass. 169, 172 (1948), quoting Hazen v. Matthews, 184 Mass. 388, 393 (1903).<sup>3</sup>

Until further evidence is submitted at trial, I cannot make findings as to whether the public has used locus in such a manner as to constitute acceptance of the dedication. Until such facts

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<sup>3</sup>Even though there is language in Abbott regarding the public having a right in the nature of an easement, 154 Mass. at 328, the core finding was that a dedication was completed. Id. The use of the word "easement" was to emphasize that fee title remained in the record title owner. See Onset Bay Grove Ass'n., 221 Mass. at 348.

are determined, neither party is entitled to summary judgment as a matter of law. Mass. R. Civ. P.

56 (c). Therefore, I hereby deny both parties' motions for summary judgment.

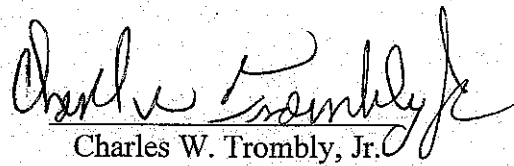
The facts specified in paragraphs one through five are deemed established for the purposes of trial pursuant to Mass. R. Civ. P. 56 (d).

So ordered.



By the Court. (Lombardi, J.)

Attest:



Charles W. Trombly, Jr.

Recorder

Dated: June 13, 1997