COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

FAR No.____________________ Appeals Court No. 2024-P-1396

MATTHEW and JEAN WALSTON,
Plaintiffs/Appellees,

v.

NORTH12, LLC, and others,
Defendants/Appellants/Appellees,

v.

On Appeal from a Judgment of the Land Court

APPELLEES JAMES AND NADIA BUNNS' REQUEST FOR FURTHER APPELLATE REVIEW

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Dated: February 10, 2026

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A. INTRODUCTION

Pursuant to Mass. R.A.P. 27.1, the defendants-appellees, James and Nadia Bunn (the “Bunns”), seek further appellate review on a single issue that the Appeals Court decided in a Memorandum and Order Pursuant to Rule 23.0 on January 20, 2026 (the “Order”):[1] that a judge of the Land Court (Vhay, J.)(the “trial judge”), after a trial, erred by concluding that the plaintiffs/appellants, Matthew and Jean Walston (the “Walstons”), through the conduct and intentions of their predecessors-in-interest, Thomas Teller (“Mr. Teller”) and his daughter, Stephanie Teller Bell (“Ms. Bell”), had abandoned their rights to travel over a section of North Street, in Edgartown, Massachusetts (Martha’s Vineyard”) identified as “Area B” on the sketch attached to the judgment.[2] The Appeals Court remanded the matter to the trial judge to make “additional findings” as to whether the co-defendant, North12, LLC (“North12”), can demonstrate abandonment based on the Appeals Court’s rendition of the correct standard governing abandonment of easement rights in this

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[1] A copy of the Order is appended as Exhibit A.

[2] A copy of the Judgment is appended as Exhibit B.

Commonwealth.

The Bunns did not participate in the trial involving North12 and the Walstons because the trial judge, on cross motions for summary judgment before the trial, had ruled that the Walstons' rights to travel over a section of North Street to the east of Area B – which the judgment references as the Eastern Section – had been extinguished by prescription. The Appeals Court reversed and remanded that issue as well on separate grounds, and also rejected the Bunns' argument, on appeal, that the trial judge's decision that the Tellers had abandoned their rights to travel over Area B, based on his findings at trial, did not warrant a remand to address abandonment over the Eastern Section. The Appeals Court rejected that contention because, the panel concluded, "the abandonment ruling itself was based on an erroneous legal standard." (Slip Op. at 9). Since the Bunns contend that the trial judge applied the correct standard – and had ample evidence before him to determine, as he did, that the Tellers (and therefore the Walstons) had abandoned their rights to travel over both Area B and the Eastern Section – the Appeals Court should have affirmed the judgment on behalf of the Bunns and not remanded this question for further proceedings.

The Bunns rely on and join in the petition filed by North12, and supplement that submission with the following points.

B. PRIOR PROCEEDINGS

1. The Walstons filed a verified complaint in the Land Court against Michael and Rebecca Hegarty (the "Hegartys") and Joseph and Lillian McNeila (the "McNeilas") on June 11, 2020. (I: 37-64)[3]. In addition to claims against the Hegartys concerning their property at 12 North Street in Edgartown (for whom North12 has been substituted), the Walstons sought a declaration that the Hegartys and the McNeilas, who then owned property at 1 North Street (and who later sold to the Bunns), had interfered with the Walstons' alleged deeded easement over North Street, which the motion judge called the "Disputed Way", to reach Peases Point Way ("PPW"). (I: 45.)

2. The Walstons filed a sixth amended complaint on April 26, 2022 (II:199) (the Complaint), which contained the same causes of action as the initial complaint. (I: 30.) In Count IV, the Walstons sought a declaration (against all defendants) that they have the right to use the Disputed Way to and from PPW "for all purposes, including utilities, in

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[3] These are citations to the Record Appendix in the Appeals Court.

which public streets and ways are or may be used in the Town of Edgartown . . . .” (II: 211.)

3. In May of 2022, the Walstons moved for summary judgment against all defendants on Count IV. (II: 255.) North12 and the Bunns opposed and cross moved for summary judgment on Count IV. (III: 383; 402.)

4. North12 and the Bunns opposed the Walstons’ motion on the so-called “substitution” theory and cross moved for summary judgment on the ground that any rights attached to Lot 1 to use the “Eastern Section” had been abandoned by the Tellers. (III: 383; 402.)

5. The motion judge issued an order on the summary judgment motions on December 12, 2022 (the “SJ Order”)(referred to as “*Walston I”* in the Trial Order, infra).[4] (IV: 384-386.) The motion judge held that the Walstons’ rights in the “Eastern Section” of the Disputed Way had been extinguished by prescription. The motion judge elected not to “declare that Mr. Teller, the Bells or their successors in interest were obligated under [the terms of their deeds] to abandon the Disputed Way.” (IV: 385.)

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[4] A copy of the motion judge’s summary judgment decision is attached as Exhibit C.

6. The trial judge conducted a non-jury trial on May 9, May 13, May 14, and May 16, 2024 on the issues outlined in Trial Orders (I: 32-33) and a Pretrial Memorandum. (IV: 388-389.) The Bunns did not participate in the trial.

7. On August 30, 2024, the trial judge issued Findings of Fact and Conclusions of Law under Rule 52 (the "Trial Decision")(IV: 436)[5] and the judgment entered the same day.

8. All parties properly preserved their appellate rights.

9. On January 20, 2026, after argument, the Appeals Court issued its Order.

C. SHORT STATEMENT OF THE FACTS

1. The Appeals Court correctly summarizes the key facts relevant to this Petition, with the following additions.

2. In the late 1970s, the developer of the area and Mr. Teller's grantor, Robert Carroll ("Mr. Carroll"), renovated a house on the south side of North Street abutting the Eastern Section and moved to that location. Whether Mr. Carroll blocked off access from North Street to PPW by planting, at the corner of Lot 2F, "shrubs . . . and stuff" (the "Shrubs"), or that material grew up on its own, those plants and shrubs

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[5] The Trial Order is appended as Exhibit D.

blocked off access to PPW. (III: 175; IV: 378, ¶ 16.)

3. Mr. Teller did not object to the Shrubs blocking the Disputed Way and barring access along that route to PPW. (III: 175; IV: 379; ¶ 17.) Once Mr. Carroll built his section of South Street identified on Plan No. 167, Mr. Teller ceased using the Eastern Section. Instead, he entered the Disputed Way heading west, then turned south on South Street, then reached Middle Street, a public way. (III: 175-176; IV: 379-380, ¶ 17.)

4. The parties' statement of materials facts in the summary judgment proceeding contains the following:

"45. [Factual Statement by the Bunns]: Upon the construction of South Street and roads leading out to the public way, Mr. Teller **understood** the substitution of South Street for North Street to have taken place and immediately commenced using South Street.

> Response [by the Walstons]: Admitted as to what Mr. Teller's understanding was and his use of South Street. Denied that a substitution had taken place as this states a legal conclusion.

(Emphasis added.)

> 5. [Factual Statement by the Bunns]: Mr. Teller agreed "100 percent" with North Street being blocked off.
>
> Response [by the Walstons]: Admitted as to what Mr. Teller may have agreed to, but denied that Mr. Teller "gave up" the right to travel from 19 North Street to Peases Point Way, as this states a legal conclusion, and the Walstons deny such legal conclusion."

(IV: 232-233.)

6. In January 1984, Mr. Teller conveyed by deed (the "Bell

Deed"), to his daughter Stephanie (then known as Stephanie Bell) and her then-husband, David T. Bell, Lot 1 (Stephanie Teller Bell will be referred to hereafter as "Ms. Bell", even though she later changed her name back to Teller). (III: 133-134; 237; IV: 380, ¶ 19.) Lot 1 was vacant at the time. (III: 134, ¶ 8; IV: 380, ¶ 19.)

7. In May 1984, the Tellers granted the Bells, for the benefit of Lot 1, a ten-foot-wide easement along the eastern edge of 28 Mullen Way (the "Teller Easement"). (III: 134, ¶ 6; 241; IV: 380, ¶ 21.) That easement connected Lot 1 to Mullen Way. (Id.) *This easement provided an alternative route for Ms. Bell to reach PPW from Lot 1 by travelling over Mullen Way, which runs parallel to North Street.* [In 2013, the parties to the Teller Easement revoked it (prior to the Bell sale to the Walstons). (III: 134, ¶ 7; 242; IV: 380, ¶ 21.)]

8. In 1984, the Bells began building a house on Lot 1. (IV: 247, ¶ 22; 380, ¶ 22.) The Bells gained access to Lot 1 by travelling over Middle Street or South Street – they did not use the Eastern Section as access to Lot 1 during construction. (IV: 380, ¶ 22.)

9. Ms. Teller testified (in deposition, part of the summary judgment record) that she never used the Eastern Section after construction ended. (IV: 247; ¶ 23; 380, ¶ 22.)

10. Ms. Teller conveyed Lot 1 to the Walstons in 2014.

11. In the penultimate paragraph of the Trial Decision, the trial judge finds as follows after hearing from Mr. Teller and Ms. Teller as witnesses:

> "While Mr. Carroll didn't formally exercise his rights under the Thomas Teller Deed to substitute acceptable ways for the Disputed Way, Mr. Teller concluded that Carroll had done so; after all, Carroll had built the substitute ways and allowed the Tellers to use them. The Tellers thought Carroll had kept his end of the bargain (he didn't contend otherwise); being Carroll's friends, the Tellers lived up to what they thought was their promise to use the Disputed Way east of Area C no longer. *That the Tellers knew they'd agree to stop using that part of the Way in exchange for Carroll's construction of an alternate route, and intended to keep that promise, distinguishes this case from those that hold that mere non-use of a granted easement is insufficient to prove abandonment*."

(IV: 446-447.)(Emphasis added.)

12. In a footnote to this paragraph, the trial judge concludes as follows:

> "While North 12 [and the Bunns] raised an argument like this one at summary judgment, the facts concerning the Teller family's intentions at the time Mr. Caroll built the connecting portions of South and Middle Streets and thereafter were disputed. *Having heard both Tellers at trial, this Court finds they each intended as of the time Carroll built the ways to abandon the Disputed Way as a means of reaching anything east of Area C, notwithstanding the Tellers' occasional excursions into Area B."*

(IV: 446. n. 4.)(Emphasis added.)

D. STATEMENT WHY FAR IS APPROPRIATE

i.) Further appellate review is warranted because the trial judge's findings and the record on review support a conclusion that the Tellers abandoned their rights to travel to PPW.

Further appellate review is warranted because the Appeals Court's decision extends precedents from this Court too far and imposes an unreasonable standard – not consistent with prior decisional law - on a party claiming that easement rights have been abandoned. A review of the Appeals Court's decision makes it evident that the panel concluded that a trial judge's factual finding – after hearing live testimony – that an easement holder *intended* to abandon their rights is insufficient, as a matter of law, to support a determination of abandonment, even when coupled with over forty (40) years of nonuse and other circumstances and acts supporting that inference. This Court should clarify the standard for future litigants and, in the interests of the parties, modify the Appeal Court's decision that further proceedings are necessary on this question or, if they are, that the trial judge applied the incorrect standard.[6] He did not. There was no error in the Land Court.

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[6] An Appeals Court decision referenced in the Order, The 107 Manor Avenue LLC v. Fontanella, 74 Mass. App. Ct. 155 (2009), signifies that the lower courts have difficulty applying the abandonment rules to static

"Abandonment of an easement requires a showing of intent to abandon the easement by acts inconsistent with the continued existence of the easement." Cater v. Bednarek, 462 Mass. 523, 528 n.15 (2012). Nonuse alone "will not work an abandonment[,]" (Desotell v. Szczygiel, 338 Mass. 153, 159 (1958)), but an extended period of nonuse is a factor to consider in determining whether an easement has been abandoned." Casey v. LaCourt Family LLC, 90 Mass. App. Ct. 1103, (2016) (Rule 1:28 Opinion).

Intent is to be "ascertained from the surrounding circumstances and the conduct of the parties." 107 Manor Ave. LLC v. Fontanella, 74 Mass. App. Ct. at 158. In Sindler v. William M. Bailey Company, 348 Mass. 589, 592 (1965), this Court ruled that intent to abandon an easement "can be shown by acts indicating an intention never again to make use of the easement in question." The Sindler court went on to say that, "for a

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facts. In 107 Manor, two members of a panel concluded that there had been sufficient evidence at summary judgment to conclude that the plaintiff had demonstrated his neighbors had abandoned their rights in a "paper street". The majority ruled that the law established that "failure to protest acts which are inconsistent with the existence of an easement, particularly where one has knowledge of the right to use the easement, permits inference of abandonment." Id. at 158. A dissent, by then Justice Kafker, concluded that the summary judgment record did not evince sufficient evidence of intent to abandonment to warrant a conclusion that acquiescence in a blockage was sufficient. See id. at 161-62.

period of over thirty-five years, the respondent has permitted the occurrence of events and relatively permanent changes in the disputed area, all of which combine to warrant an inference that it has abandoned its rights to the easement in question." Id. at 593. The easement holder there sat by while wooden planks that provided a crossing point over a brook disappeared; the brook widened; and rubbish collected in the bed. Id. at 592. A chain link fence appeared as a blockage "for a few years" but not the duration of the abandonment period. Id. at 593. While Sindler was a registration proceeding, it appears that the trial judge heard from witnesses.

Here, the motion/trial judge had ample evidence before him to determine that the Tellers and Walstons had abandoned their easement rights over Area B, and by extension the Eastern Section, consistent with Massachusetts law. The Tellers collectively testified in depositions that the Eastern Section had been "closed off" since 1978. (III: 175; 252-253; IV: 379-380, ¶¶ 16-17.) A series of aerial photographs in the summary judgment record (and Joseph McNeila's affidavit at summary judgment) confirm that thick vegetation ran across its width from 1978 to 2019, when the Hegartys installed fencing (over forty (40) years later). (III: 342, 344; 373, ¶ 15.) Even assuming that the Walstons' statements that they purportedly used the Eastern Section after 2014 are true, it is undisputed that the Tellers did not use the Eastern Section to reach PPW from 1977 to 2014 – thirty-seven years.

The parties' statement of material facts (referenced in the facts) establishes agreement that Mr. Teller stopped using the Eastern Section because *he believed* Mr. Carroll had substituted South Street for the Eastern Section as a means of access for Lot 1. Those same facts also show that Mr. Teller *agreed*, "100%", with Carroll's blockage of the Eastern Section. Id. These agreed facts show that Mr. Teller intended to abandon his right to travel over the Eastern Section when Mr. Carroll built out South Street. More importantly, as noted, the trial found – as the fact finder – the requisite intent after hearing and observing Mr. Teller and Ms. Bell *testify* at trial, who were subject to cross-examination. That a trial judge as a fact finder has broad discretion to make credibility determinations after viewing witnesses' demeanor and bearing is a fundamental principle of the Commonwealth's judicial system. A trial judge's considered finding on a historically factual question should not be overturned when, as here, he also analyzed the governing case law and carefully distinguished its nuances in the context of his finding on intent.

The trial and summary judgment record *does* contain sufficient, independent evidence qualifying as "acts" to support the trial judge's determination of the Teller and Bell's intent to abandon. Acknowledging that the Bunns and North 12 shouldered the burden to demonstrate abandonment, even the cases cited by the Appeals Court establish that *only* "'**some** affirmative conduct by [the easement holder] inconsistent with the exercise of the easement' must be shown," particularly where there is a finding on the "abandoner's" intent. Slip Op. at 10-11, quoting from Benvenuto v. 204 Hanover, LLC, 97 Mass. App. Ct. 140, 149 (2020).

A key fact that the Appeals Court failed to consider is Mr. Teller's (and his spouse's) decision to grant an easement to Stephanie Bell to reach PPW by travelling over Mr. Teller's property on Mullen Way abutting Lot 1. The Teller Easement is an act and constitutes affirmative evidence that both Mr. Teller and Ms. Teller: a.) thought that they had no rights to use the Eastern Section of North Street to reach PPW, and b.) intended "never again to make use of the easement in question." Sindler, supra. The Teller Easement provided an alternative access route for the owners of Lot 1 to reach PPW (in place of both using the Eastern Section or South Street-Middle Street).

Teller and Bell's use of South Street to reach a public way, rather than take affirmative steps to require Mr. Carroll and his successors to remove the shrubs to open up North Street easterly, is, moreover, not simply "nonuse" of that route of access, but rather also constitutes an affirmative act. The many times that Teller/Bell or their guests used South Street as their route of access – and concomitantly chose not to exercise or enforce their easement rights over North Street in an easterly direction – surely constitutes affirmative evidence of their intent to abandon any rights they had over North Street travelling easterly, across Area B, and to the Eastern Section.

In summary, given the uncertainty of how the rules are applied in this area, given the Appeals Courts' failure to evaluate the evidence of the Tellers' intently sufficiently, and given the public interest in avoiding a remand for unnecessary, costly, and time consuming proceedings, further appellate review on the question of abandonment constitutes substantial reason acting in the public interest and the interests of justice within the meaning of Mass. R.A.P. 27.1(a).

E. CONCLUSION

For the reasons stated in this petition, the petition for further appellate review should be granted.

JAMES and NADIA BUNN,

By their attorney,

/s/ Michael A. Goldsmith

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Dated: February 10, 2026

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RULE 16(k) Certification

I certify that this petition complies with the rules of court pertaining to the filing of requests for further review, including but not limited to Mass. R.A.P. 16(k), 20(a), and 27.1(b), and that the petition is prepared using Microsoft Word and Times New Roman font, in fourteen point, monospaced text, with no more than 10.5 characters per inch. The statement of reasons in the petition contains fewer than 2000 (1,328) words, using the word count function of Microsoft Word.

/s/ *Michael A. Goldsmith*
Michael A. Goldsmith

CERTIFICATE OF SERVICE

I, Michael A. Goldsmith, certify that I have served a copy of this Petition James and Nadia Bunn in Motion for Further Appellate Review on all parties of record by sending copies through the electronic filing system to all registered users of by emailing copies of the same to the party or counsel of record on this 10th day of February, 2026, if not registered.

/s/ *Michael A. Goldsmith*
Michael A. Goldsmith

EXHIBIT A

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 24-P-1396

MATTHEW WALSTON & another

vs.

JAMES BUNN & others.

Pending in the Land Court

Ordered, that the following entry be made on the docket:

So much of the judgment as implements the rulings that the reserved right of substitution was never properly exercised, and that the Walstons own Area C, but not Area B, by adverse possession is affirmed. The judgment is otherwise vacated, and the matter is remanded for further proceedings consistent with the memorandum and order of the Appeals Court.

By the Court,

Paul Tuttle, Clerk

Date January 20, 2026.

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

24-P-1396

MATTHEW WALSTON & another[1]

vs.

JAMES BUNN & others.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

These cross appeals from a Land Court judgment concern the ownership and use of various sections of a twenty-five-foot-wide way known as North Street in Edgartown. We affirm so much of the judgment as determines that the plaintiffs own a section of North Street referred to as Area C by adverse possession, but do not so own the section referred to as Area B. We vacate the remainder of the judgment and remand the case for further proceedings.

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[1] Jean Walston.

[2] Nadia Bunn; North12, LLC; ETown, LLC; Vineyard Oceans, LLC; Mortgage Electronic Registration Systems, Inc., as nominee for Webster Bank, N.A.; Jason Kicza; Desiree Kicza; and Mortgage Electronic Registration Systems, Inc., as nominee for HarborOne Mortgage LLC. Only the Bunns and North12, LLC, are parties to this appeal. The remaining defendants need not be discussed further.

Background. The parties own properties situated on North Street, portions of which are located across the street from one another. The plaintiffs Matthew and Jean Walston own the house and lot at 19 North Street (lot 1), on the north[3] side of the street. Lot 1, at least on paper, is a corner lot and its eastern boundary abuts a twenty-five-foot way, referred to in this case as "MS Way." The defendant North12, LLC (North12), owns the house and lot at 12 North Street on the south side of North Street. The defendants James and Nadia Bunn own the house and lot on North Street to the east of lot 1, but separated from it by MS Way, which runs north to south and intersects North Street from the north. The eastern end of North Street intersects a public way, Peases Point Way, and at least as of 1977, North Street provided access from lot 1 to Peases Point Way and from there to other public ways.

Lot 1 and two other large parcels abutting North Street were previously owned by Robert Carroll. A part of one of those other parcels later became the North12 property, meaning that the Walstons' and North12's chains of title have a common grantor, Carroll. When Carroll sold lot 1 to a predecessor of the Walstons in 1977, the deed included a right of way over North Street, but Carroll retained the fee in the section of North Street that abutted lot 1, and he still owned the North12 property. When Carroll later transferred the North12 property, he did not expressly retain the fee in that section of North Street, and it passed (we presume by operation of the derelict fee statute, G. L. c. 183, § 58) to others including North12's predecessors.

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[3] Although lot 1 actually lies on the northwestern side of North Street, we adopt the parties' use of simpler directions; like the Land Court judge, we treat North Street as if it runs from east to west.

In count one of their sixth amended complaint (the operative complaint), the Walstons claimed ownership by adverse possession of the fee in North Street along the entire southern boundary of lot 1 (what the judge later labeled Area C, and much of what he labeled Area B). In count two, the Walstons asserted a quiet title claim. In count three, the Walstons asserted that North12 was trespassing on lot 1 and on that part of North Street that the Walstons claimed to own by adverse possession (again, Area C and much of Area B). In count four, the Walstons sought declarations that (a) lot 1 enjoyed a deeded right of way over North Street east to Peases Point Way, by virtue of deeds extending back to Carroll; and (b) North12 was interfering with that right.

The parties' cross motions for partial summary judgment focused on two issues. The first was whether Carroll, pursuant to a right of substitution he reserved in his 1977 deed to one of the Walstons' predecessors in title, Thomas Teller, had relocated the right of way over North Street. Carroll assertedly did so by constructing a way known as South Street, which intersected North Street west of lot 1. South Street, once reached by proceeding west on North Street from lot 1, provided access to a public way known as Middle Street. Carroll assertedly allowed Teller and his successor in interest, Stephanie Bell,[4] to use South Street to gain such access.[5] A Land Court judge ruled in favor of the Walstons, concluding that, although Carroll had constructed South Street, and although Teller and Bell had used it to access a public way, Carroll never properly effected the substitution.

The second issue addressed at summary judgment was whether lot 1's deeded right to pass over an eastern part of North Street (east of its intersection with MS Way), which the judge designated the "eastern section," had been extinguished. We will use that same nomenclature. This assertedly resulted from Carroll's act of planting shrubs across North Street, east of lot 1, in the late 1970s. The judge ruled in favor of North12's and the Bunns' position that lot 1 had lost that right to pass over the eastern section.

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[4] The Walstons' chain of title to lot 1 included the 1977 deed from Carroll to Teller, a 1984 deed from Teller to Bell (his daughter), and a 2014 deed from Bell to the Walstons. Teller's and Bell's spouses' names also appeared on the relevant deeds but are omitted here for brevity. Upon Bell's divorce in 2009 or 2010, she resumed using her original surname (Teller), but for clarity we refer to her as Bell in this decision.

[5] South Street became a public way in 2001, as did the portion of North Street at and to the west of its intersection with South Street, and a portion of Middle Street.

After a trial of the remaining claims, the judge issued detailed findings and rulings, along with a plan of the North Street area to which he added markings to illustrate those rulings.[6] The judge focused on three principal issues. First, he ruled that the Walstons owned a small area of North Street he labeled Area A, by virtue of their 2020 purchase from Carroll's heirs of the fee in MS Way, combined with the effect of the derelict fee statute, G. L. c. 183, § 58. Second, the judge ruled that the Walstons and their predecessor Bell had acquired, by adverse possession, the fee in a western part of North Street that the judge labeled Area C, but not in an adjacent part of North Street that he labeled Area B. Third, the judge ruled that lot 1 had lost, through abandonment by Teller and Bell, the right of way over Area B.

Judgment then entered declaring the rights of the parties and ordering North12 to cease trespassing on Areas A and C and to restore them to their previous condition. Both the Walstons and North12 appealed.

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[6] We take judicial notice that the plan may be viewed on MassCourts as part of the judgment in Walston vs. North12, LLC, Land Court Department Dock. No. 20 MISC 000207 (Oct. 15, 2024).

Discussion. The cross appeals raise five main issues. The Walstons challenge (1) the ruling at summary judgment that lot 1's right of way over the eastern section was extinguished by prescription and (2) the ruling after trial that lot 1's right of way over Area B was extinguished by abandonment.[7]

North12, for its part, challenges (3) the ruling at summary judgment that Carroll had failed to effect a substitution for lot 1's right of way over North Street, (4) the ruling after trial that the Walstons and their predecessor Bell acquired all of Area C by adverse possession, and (5) the ruling after trial that the Walstons own the fee in Area A. We address the issues in that order.

1. Eastern section; prescription. The Walstons challenge the judge's summary judgment ruling that Carroll planted shrubs across North Street in the late 1970s (when he still held the fee in North Street as it abutted and ran east from lot 1). The judge ruled that these shrubs blocked lot 1's access to the eastern section and thus extinguished by prescription lot 1's

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[7] The Walstons also challenge the judge's ruling that they have not acquired Area B by adverse possession. We defer discussion of that issue until that part of our decision addressing the judge's adverse possession ruling on Area C.

easement over that section.[8] See Cater v. Bednarek, 462 Mass. 523, 528 n.16 (2012) (acts of servient estate holder inconsistent with easement may extinguish it by prescription).

The grant of summary judgment on this issue was error, because the Walstons' summary judgment opposition materials showed that there was a genuine dispute of material fact over whether Carroll had planted any shrubs or taken any other action to block lot 1's access to the eastern section. In particular, the Walstons argued that although Teller (the key witness on the point) testified at his deposition that "I think [Carroll] just put shrubs up there and stuff" to block North Street, Teller immediately thereafter testified, "I really don't know because I never went out there." North12, in response, argued that Teller's testimony established a blockage, although not necessarily by Carroll. "In reviewing an order granting summary judgment . . . we . . . consider the facts in their light most favorable to the nonmoving party, drawing all reasonable inferences in [that party's] favor." Sullivan v. Liberty Mut. Ins. Co., 444 Mass. 34, 38 (2005). On the issue of extinguishment by prescription, the Walstons were the nonmoving parties. Viewing the summary judgment record in the light most favorable to them -- in particular, Teller's admission that he lacked personal knowledge -- Teller's testimony was without foundation and could not establish an intentional blockage by anyone, let alone Carroll. The mere presence of shrubs, unless planted by a servient tenant, does not show extinguishment by prescription. See Desotell v. Szczygiel, 338 Mass. 153, 159 (1958).[9] Accordingly, it was error to award summary judgment to North12 on the eastern section.

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[8] North12's and the Bunns' summary judgment motions argued that lot 1's right of way had been extinguished primarily by abandonment, rather than prescription, but their arguments referred to, among other assertedly undisputed facts, Carroll's claimed blockage of the right of way. As to the eastern section, at summary judgment, the judge rejected the abandonment theory but accepted the prescription theory.

This and other factual disputes relating to prescription could have been resolved at trial, where Teller essentially repeated his equivocal deposition testimony, and where other evidence bearing on the issue of blockage by Carroll was offered. But the judge made quite clear to the parties that he would not allow them to use trial evidence to challenge his summary judgment ruling on this or other issues, and we cannot make credibility determinations on appeal. The factual disputes regarding prescription of lot 1's easement over the eastern section were thus never appropriately resolved and must now be resolved on remand.

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[9] Elsewhere in his summary judgment decision the judge stated that Carroll "installed (or allowed the growth of) the [s]hrubs." Allowing shrubs to grow would not be an act of the servient tenant, as is required for extinguishment by prescription. See Cater, 462 Mass. at 528 n.16.

We are unpersuaded by the Bunns' argument that we should affirm the judgment as to the eastern section on the alternative ground of abandonment. The Bunns rely on the judge's finding after trial that, once Carroll built South Street, Teller and Bell "intended . . . to abandon [North Street] as a means of reaching anything east of Area C," which would include the eastern section (as well as Area B). The problem with the Bunns' argument is that, as we explain next, the abandonment ruling itself was based on an erroneous legal standard. We are therefore constrained to vacate so much of the judgment as addresses lot 1's right of way over the eastern section and remand the claim for further proceedings.[10]

2. Area B; abandonment. The Walstons challenge the judge's ruling after trial that lot 1's right of way over Area B was extinguished by abandonment. The judge so ruled based on his finding that, once Carroll built South Street and Teller and Bell were able to use it for access to a public way, Teller and Bell had ceased using North Street except as a means of access west to South Street, which did not require travel over Area B.

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[10] We express no view on whether the judge could make the necessary findings on the existing record, without further evidentiary proceedings.

Although the judge had ruled at summary judgment that Carroll never properly exercised his right to substitute another right of way for the one leading east over North Street, the judge found at trial that Teller nevertheless believed Carroll had done so. Teller considered Carroll's right of substitution to be an agreement, which Carroll had performed and which Teller in turn felt bound to perform. The judge ruled that Teller's and Bell's intent to carry out Teller's promise not to use North Street once Carroll made alternative access available, coupled with their nonuse of Area B once Carroll did so, sufficed to show that they had abandoned their right to use Area B.

This was error, because abandonment "requires a showing of intent to abandon the easement by acts inconsistent with the continued existence of the easement" (emphasis added). Cater, 462 Mass. at 528 n.15. "[N]onuse of itself, no matter how long continued, will not work an abandonment" (citation omitted). Id. To show abandonment, a party is "required to prove not mere lack of use, but acts by the owner of the dominant estate conclusively and unequivocally manifesting either a present intent to relinquish the easement or a purpose inconsistent with its further existence" (emphasis added; quotation and citation omitted). Benvenuto v. 204 Hanover, LLC, 97 Mass. App. Ct. 140, 149 (2020). "[S]ome affirmative conduct by [the easement holder] inconsistent with the exercise of the easement" must be shown. Id. at 149-150. This is a "rigorous standard" and the party claiming abandonment has a "heavy" burden. Proulx v. D'Urso, 60 Mass. App. Ct. 701, 704 n.2 (2004). Although "abandonment is usually a question of fact," Willets v. Langhaar, 212 Mass. 573, 575 (1912), that fact must be determined using correct legal standards.

Here, although the judge acknowledged the rule that abandonment required conclusive and unequivocal acts by Teller or Bell (not merely nonuse), he did not identify any such acts. Nor can we agree that abandonment may be shown by nonuse coupled only with an intent to abandon, without that intent being "conclusively and unequivocally manifest[ed]" by any act of the easement holder. Benvenuto, 97 Mass. App. Ct. at 149. The parties have not cited, nor have we found, any authority in Massachusetts or elsewhere establishing that nonuse together with an unmanifested intent is enough.[11]

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[11] The judge made no finding that, once Carroll built South Street, Teller or Bell made any statements to Carroll or anyone else of their intent or agreement to abandon the easement east over North Street. Even if they had done so, it does not appear that such a statement would be a sufficient "act" to work an abandonment. "An oral or written statement by an easement holder that the holder intends to give up the servitude generally does not satisfy the affirmative conduct standard" (footnote omitted). J.W. Bruce, J.W. Ely, Jr., & E.T. Brading, The Law of Easements & Licenses in Land § 10:20 (2025-2 ed.) (Law of Easements & Licenses in Land).

North12 nevertheless maintains that an easement holder may be held to have engaged in affirmative conduct merely by acquiescing in conduct by the servient estate holder that is inconsistent with the easement. For that proposition, North12 relies on this court's statement in The 107 Manor Ave. LLC v. Fontanella, 74 Mass. App. Ct. 155, 158 (2009) (107 Manor Ave.). There we said, "Our cases indicate that failure to protest acts which are inconsistent with the existence of an easement, particularly where one has knowledge of the right to use the easement, permits an inference of abandonment." 107 Manor Ave., supra, citing Sindler v. William M. Bailey Co., 348 Mass. 589, 593 (1965), and Lund v. Cox, 281 Mass. 484, 492-493 (1933). But 107 Manor Ave. did not characterize acquiescence either as conduct or as otherwise sufficient to establish abandonment. See 107 Manor Ave., supra at 158-159. Moreover, in 107 Manor Ave., the easement holders had indeed engaged in affirmative conduct: they had extended their lawn into a portion of the right of way at issue, showing their intention not to use it as a way. Id. at 159. See Benvenuto, 97 Mass. App. Ct. at 149-150 (relying on this feature of 107 Manor Ave.). The Walstons' predecessors did nothing similar here -- and when North12's predecessors took action to block the way with fencing, the Walstons filed suit.

It is true that the 1965 Sindler decision and the 1933 Lund decision relied on in 107 Manor Ave. did not state or apply the requirement of affirmative conduct by the easement holder before abandonment may be found. See Sindler, 348 Mass. at 592-593; Lund, 281 Mass. at 492-493. But the Supreme Judicial Court stated and applied that requirement both (1) before Sindler and Lund, see Dubinsky v. Cama, 261 Mass. 47, 57 (1927), and cases cited; and (2) after Sindler and Lund, see Cater, 462 Mass. at 528 n.15. This court, too, has stated and applied the affirmative conduct requirement in two recent cases. See Trustees of the Beechwood Village Condominium Trust v. USAlliance Fed. Credit Union, 100 Mass. App. Ct. 192, 197 (2021); Benvenuto, 97 Mass. App. Ct. at 149. We are not free to depart from that requirement.

Moreover, in both Sindler and Lund, the court relied on the easement holder's acquiescence in conduct by or for the benefit of the servient estate holder that was inconsistent with the existence of the easement. See Sindler, 348 Mass. at 593 (placement of chain); Lund, 281 Mass. at 489-490, 492-493 (construction of walls and buildings). See also First Nat'l Bank of Boston v. Konner, 373 Mass. 463, 467 (1977) (noting this aspect of Sindler). That element is missing here, where it is not apparent that Carroll, as the servient estate holder, took any such action inconsistent with the easement in Area B. Even if Carroll planted the shrubs, they would not have blocked Teller's and Bell's access to Area B. And although Carroll's construction of South Street allowed additional access from lot 1 to a public way, such access was not inconsistent with lot 1's then-existing access over Area B and the eastern section of North Street out to a different public way. Even if that then-existing access was no longer necessary, "lack of necessity or obsolescence will not, alone, suffice to extinguish an express easement."[12] 107 Manor Ave., 74 Mass. App. Ct. at 160, citing Emery v. Crowley, 371 Mass. 489, 495 (1976).

Although we see no sufficient affirmative conduct by Teller and Bell, we acknowledge another potential basis for abandonment: the judge's findings that, in 2015-2016, the Walstons extended their lawn and an underground sprinkler system into Area B.[13] Cf. 107 Manor Ave., 74 Mass. App. Ct. at 159 (extending lawn into right of way showed intention not to use it as way). But the judge also found that the Walstons occasionally parked cars there. In addition, Matthew Walston testified that he had left gravel underneath the lawn in this area "because we knew we were going to drive on it," and he was "able to still drive and park [his] cars" there even after sprinklers were installed. Although North12 asserted in its closing argument at trial that extension of the lawn and sprinkler system constituted evidence of intent to abandon, the judge made no finding on that issue. Therefore, North12's claim that the Walstons' conduct conclusively and unequivocally showed their intent to abandon cannot be resolved without additional findings by the judge.[14] We remand for that purpose.

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[12] The mere use of alternative access, such as over South Street, is ordinarily insufficient to prove abandonment. See Law of Easements & Licenses in Land § 10:20 & n.8. Such use is not necessarily "inconsistent with the continued existence of the easement" (emphasis added). Cater, 462 Mass. at 528 n.15. That is particularly so where the alternative access exists not as of right but only because it is tolerated by other landowners. See Law of Easements & Licenses in Land, supra at n.12, citing Consolidated Rail Corp. v. MASP Equipment Corp., 67 N.Y.2d 35, 40 (1986). As we shall discuss, because Carroll failed to properly effect substitution, Teller and Bell had no legal right to use South Street, at least for the first twenty years that they used it.

3. Substitution. North12 challenges the judge's ruling at summary judgment that Carroll, despite reserving in his deed of lot 1 to Teller the right to substitute another right of way for lot 1's right of way over North Street to Peases Point Way, had

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[13] The judge's findings on this issue applied to Area C as well, but whether the easement over Area C was abandoned is moot in light of the judge's ruling that the Walstons acquired the fee in Area C by adverse possession -- a ruling we affirm infra.

[14] We again express no view on whether the judge could do so on the existing record, without further evidentiary proceedings.

failed to accomplish such a substitution. Carroll's deed of lot 1 to Teller stated in pertinent part:

> "The premises are conveyed subject to and with the benefit of the right to use [North Street] for all purposes including utilities which public streets and ways are used in the Town of Edgartown in common with those lawfully entitled thereto on the condition that at any time Grantor herein [Carroll] may substitute another right of way at which time the Grantee herein [Teller] by acceptance of this deed hereby agrees to relinquish all rights in and to [North Street], provided, however, that said substituted right of way leads to a public way" (emphasis added).

The judge ruled that although Carroll built South Street, and although lot 1's owners Teller and Bell were able to use South Street in the course of gaining access between lot 1 and a public way, Carroll never effected the substitution, for two reasons.

First, the judge reasoned that lot 1 still had to use a western portion of North Street to obtain access to South Street Therefore, the attempted substitution could not have extinguished the entirety of lot 1's right to use North Street.

Second, less than a year after Carroll built South Street (sometime in or after December 1977), he transferred the fee in South Street, along with the fee in the four lots abutting it, to four other owners. Carroll did so without reserving for the benefit of lot 1 any right to use South Street to access a public way, and South Street itself did not become a public way until 2001. Thus, the judge found that lot 1 had no "immediately enforceable rights" to use South Street. Put differently, Carroll did not "substitute another right of way" as the deed authorized him to do (emphasis added). Carroll merely created a new road and, apparently, acquiesced in the Walstons' predecessors' use of it during the brief period that Carroll continued to own it (until October 1978). He did nothing more. For the Walstons' predecessors to acquire a right to use South Street (before South Street itself became a public way in 2001), they would have had to use it for the twenty-year prescriptive period without permission from the four abutting owners (who from October 1978 onward did not include Carroll).

On appeal, North12 does not seriously challenge, and we see no error in, the judge's conclusion that Carroll's attempted substitution did not comply with the terms of his deed to Teller.[15] Instead, North12 argues that, because Teller believed that substitution had occurred and acquiesced in it, the Walstons are now estopped from arguing that it did not occur. We are not persuaded.

North12 relies on the following proposition:

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[15] North12's brief (with emphasis added) states in an argument heading that Carroll "did substitute an alternative right of way," but the argument following the heading refers only to "an alternative means of access," and recognizes that Carroll did not confer on Teller and successor owners of lot 1 any "right" to use South Street.

> "[T]he original easement may be deemed relocated when the conduct of the parties is such as to permit a conclusion that a different easement had been substituted for the way mentioned in the deeds because the evidence reflects a tacit understanding or an implied agreement, manifested by the dominant owner's acquiescence in the use of the different easement in lieu of the original for a number of years" (quotations and citation omitted).

Proulx, 60 Mass. App. Ct. at 705. But North12 fails to address the judge's correct ruling that Carroll, despite building South Street, never provided an "easement" over it to lot 1. Carroll apparently did not object to whatever use lot 1 made of South Street, but he gave lot 1 no "immediately enforceable rights" to use it.[16]

That lot 1 might have acquired such rights from other owners by prescription after twenty years of use, and that in any event lot 1 acquired a right to use South Street once it became a public way in 2001, is fortunate for lot 1. But those happenstances do not retroactively remedy Carroll's 1978 failure to substitute a different easement -- a "right" of way -- for the easement specified in the deed. North12 cites no case suggesting that a valid substitution or relocation may be accomplished in this fashion.

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[16] Relatedly, even if Carroll had given lot 1 a right to use South Street to access a public way, Carroll did not give lot 1 any right to reach South Street. As the judge recognized, this could be accomplished from lot 1 only by "heading westbound" over North Street. That portion of North Street included a segment abutting what the judge referred to as "Ms. Teller's lot." As the judge also recognized, it was undisputed that Carroll's 1977 acquisition of the fee in North Street did not include the segment abutting "Ms. Teller's lot." North12 has cited nothing in the record showing that Carroll ever owned the fee in or a right of way over that segment. If he did not, he could not have included such a right of way in his deed of lot 1 to Teller or as part of his attempted substitution for the right of way specified in that deed. Nor was that segment included in what the town made a public way in 2001. If lot 1 had no right to pass over that segment, then Carroll's attempted substitution failed. Lot 1 may have acquired such a right by prescription or otherwise, but North12 made no such showing.

Similarly unavailing is North12's reliance on the following principle:

> "It is well settled that the owner of land subject to a right of way may, with the assent of the owner of the dominant estate, substitute _on his own land_ a new way for the old way, and that when the change is actually made and a new way is thus _adopted by them_, it fixes and determines their respective rights by dedication or by estoppel" (emphases added).

Byrne v. _Savoie_, 225 Mass. 338, 340 (1916). See _Assad_ v. _Sea Lavender, LLC_, 95 Mass. App. Ct. 689, 694 (2019) (same). But here, although South Street was initially on Carroll's "own land," he sold that land less than a year later, without reserving any right for lot 1 to use it. If Carroll "adopted" South Street as the new right of way at all, it was for a period too brief to have "fixe[d] and determine[d]" any right of lot 1 to use South Street. _Byrne_, _supra_. Again, North12 cites no case applying the principle stated in _Byrne_ to rule that an easement has been substituted or relocated in circumstances like those present here. Therefore, and because lot 1 still had to use a western portion of North Street to obtain access to South

Street, North12 has shown no error in the judge's ruling that substitution did not occur.

4. Areas C and B; adverse possession. North12, as the record owner of Area C and Area B, challenges the judge's ruling after trial that lot 1, through the actions of Teller, Bell, and the Walstons, acquired all of Area C by adverse possession. North12 argues that the judge should have drawn the line between Area C and Area B (i.e., between what lot 1 did and did not acquire by adverse possession) no further east than the eastern edge of a former driveway used by Bell.[17] The Walstons, for their part, contend that lot 1 not only acquired all of Area C by adverse possession (as the judge ruled) but also acquired Area B by adverse possession (a claim the judge rejected). In short, both North12 and the Walstons argue that the judge erred in determining the extent of lot 1's adverse possession.

"A party claiming title to land through adverse possession must establish actual, open, exclusive, and nonpermissive use for a continuous period of twenty years." Totman v. Malloy, 431 Mass. 143, 145 (2000). "The nature and the extent of occupancy required to establish a right by adverse possession vary with the character of the land, the purposes for which it is adapted, and the uses to which it has been put" (citation omitted). Aspell v. Raad, 106 Mass. App. Ct. 291, 293 (2025).

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[17] The judge's finding of fact number 13 places the line "approximately [fifty-five] feet west of the eastern edge of the MS Way (if it had continued into [North Street])." The record does not show how much farther west of that line the former driveway began. At oral argument, North12 stated that it did not challenge the judge's adverse possession ruling as to the portion of Area C west of a fence across North Street erected by North12's predecessor in interest.

a. Area C. Conceding that the Walstons have acquired the western portion of Area C by adverse possession, North12 focuses instead on the part of Area C east of the former driveway, arguing that Bell's use of that area was not "continuous" but "at most[] intermittent." "'[C]ontinuous use' does not necessarily mean 'constant use.'" Bodfish v. Bodfish, 105 Mass. 317, 319 (1870). A finding of "use[] in each of the twenty consecutive years" justifies a finding of "continuous enjoyment," even without "evidence of actual use in each year of the twenty." Id. at 320. Where an adverse use has been regular, that it was periodic rather than constant does not "require a finding that the adverse use of the [area] was not continuous." Stagman v. Kyhos, 19 Mass. App. Ct. 590, 593 (1985), quoting Mahoney v. Heebner, 343 Mass. 770, 770 (1961).

The judge found as fact that Teller and then Bell (along with her husband) used the part of Area C east of the driveway from 1988 through 2014, primarily for parking vehicles. He further found that the vehicles "blocked all use of" Area C "except when Teller or Bell chose." In the period from 1988 (if not earlier) through 2014, other than crews occasionally maintaining overhead wires, "no one used [Area C] except for Teller, Bell, and their guests and invitees." Although the judge acknowledged that these uses "were varied in their nature and extent," he also recognized that "continuous" use does not require "constant" use. See Bodfish, 105 Mass. at 319. The judge further found that from 2015 through 2019, the Walstons cleared, regraded, and planted a lawn in Area C (including its eastern portion, as shown by photographs admitted in evidence). They used the lawn primarily for recreation.

We have carefully reviewed the evidence and North12's challenges to the judge's findings on this issue and conclude that, with one minor exception, those findings are not clearly erroneous.[18] We also conclude that the findings warranted the judge's determination that the Walstons, by their actions tacked together with those of Teller and Bell, own the entirety of Area C by adverse possession, including its eastern portion.

b. Area B. The Walstons claim that they also acquired Area B by adverse possession and that the judge erred in ruling otherwise. The judge ruled that "[w]hat distinguishes their claims to the two Areas is the extent of the proof of adverse use." He found that "Teller and Bell didn't park vehicles in Area B." Indeed, "[t]he Walstons failed to prove that Teller and Bell made any continuous use of Area B." After a careful review of the evidence, including in particular the many aerial photographs showing the presence or absence of parked vehicles, we conclude that the judge's findings were not clearly erroneous.[19] We therefore do not disturb his ruling that the Walstons did not acquire title to Area B by adverse possession.[20]

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[18] North12 challenges the judge's finding that, during a period when Bell operated a taxi service from lot 1, "[t]he taxis would often park in Area C, including portions of Area C east of the [d]riveway." Although the judge could reasonably infer that the taxis were parked somewhere in Area C, we agree with North12 that there was no evidence specifically supporting the finding of parking in Area C's eastern portion. That finding was not, however, essential to the judge's ruling regarding adverse possession of that eastern portion.

5. Area A; derelict fee statute. North12 challenges the judge's ruling that the Walstons, when they purchased MS Way in 2020 from Carroll's heirs, thereby also acquired the fee in the abutting Area A,[21] by operation of the derelict fee statute, G. L. c. 183, § 58. North12 argues that the ruling was

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[19] The judge's placement of the line between Areas C and B, see supra note 17, appears to correspond to the easternmost extent of Bell's regular parking of vehicles -- specifically, the eastern end of a large recreational vehicle, owned by Bell's then-husband, that is visible in numerous aerial photographs.

[20] We thus pass over the point that, as with Area A as discussed infra, the Walstons' complaint appears not to have asserted any adverse possession claim to that portion of Area B lying to the east of the part of North Street that abutted lot 1, i.e., that portion of Area B lying immediately south of Area A.

[21] The judge defined Area A as "that part of [North Street] that abuts the MS Way to the south, to the midpoint of [North Street]."

procedurally improper, because the Walstons never asserted any claim to own Area A under that statute; instead, North12 asserts the issue was first identified and decided by the judge after trial, without affording the parties a chance to be heard. We agree with North12 on this point and thus need not reach North12's additional argument that the judge misapplied the derelict fee statute.

As North12 argues, the operative version of the Walstons' four-count complaint did not assert any claim of ownership of Area A. That complaint asserted an adverse possession claim only as to North Street "along the southerly boundary of the Walston Property," which the complaint variously defined as 19 North Street or as lot 1. Area A does not lie in that part of North Street along the southerly boundary of the "Walston Property" as so defined; rather, area A lies farther east, along the southerly boundary of MS Way.[22] The quiet title claim, insofar as it concerned North Street, was similarly limited. And the trespass and declaratory judgment claims asserted the Walstons' right to use the right of way over North Street, which included what the judge later labeled Area A, but did not assert ownership of the fee in Area A itself.

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[22] The Walstons filed their initial complaint and first and second amended complaints before, and without alleging that, they owned the MS Way. Their third through sixth amended complaints alleged ownership of the MS Way but did not change their definition of the "Walston Property" or otherwise assert ownership of Area A as it abutted the MS Way.

The Walstons nevertheless argue that ownership of Area A was encompassed in one of the issues that North12 itself identified for trial in the parties' joint pretrial memorandum.[23] We are not persuaded. The issue North12 identified was whether the Walstons or their predecessors in interest had "abandoned and/or relinquished any interest in, or right to pass and repass over, portions of North Street" (emphases added). Although ownership of Area A would constitute an interest in a portion of North Street -- and although one cannot abandon or relinquish what one does not own -- the Walstons could not have acquired ownership of Area A (if at all) by operation of the derelict fee statute until they acquired ownership of MS Way from Carroll's heirs, which was in 2020. By that point, North12's predecessors in interest had already blocked the Walstons' access to Area A (among other areas) by erecting a fence along its northern edge and across North Street.

At no point in this case was there any claim that the Walstons, by the time of trial in 2024, had abandoned or relinquished a fee interest that they did not even arguably acquire until 2020, after access to the area was blocked and after this litigation was commenced. The statement in the pretrial memorandum thus cannot have been intended to and would not have been understood as putting in issue the ownership of Area A by virtue of the derelict fee statute. And we see nothing in the trial transcript, including the parties' closing arguments, that mentions the issue or the derelict fee statute.

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[23] The Walstons themselves, in their section of the joint pretrial memorandum, did not identify ownership of Area A as an issue for trial. Nor did their pretrial brief.

As this court stated in Messina v. Scheft, 20 Mass. App. Ct. 945, 945 (1985):

> "Serious problems may be created whenever a judge bases a decision on an issue that is not before the court. . . . We are not stating that a judge at a bench trial is held to deciding only those issues raised by the parties. We recognize that there will be instances where a judge may glimpse an issue not perceived by the parties. On those occasions, the course that the judge should follow is to notify counsel of his concerns and permit counsel to present evidence on the question which the judge perceives to be dispositive."

The same principle applies even if an issue first identified by a judge is one of law that requires no additional evidence to resolve. The parties are entitled to an opportunity to be heard, commensurate with the significance of the issue raised. Nothing in this decision prevents the Walstons from now asserting this claim to Area A.

Conclusion. We agree with the judge's rulings that the right of substitution reserved in the 1977 deed of lot 1 was never properly exercised, and that the Walstons own Area C, but not Area B, by adverse possession. We are unable to agree on this record with the judge's rulings that the Walstons and their predecessors' right to pass over the eastern section was extinguished by prescription or that they lost by abandonment the right to pass over Area B. Those rulings require further consideration on remand. Finally, the ruling that the Walstons acquired the fee in Area A by operation of the derelict fee statute was made without notice to North12 and the Bunns of such a claim and therefore cannot stand.

Accordingly, so much of the judgment as implements the rulings that the reserved right of substitution was never properly exercised, and that the Walstons own Area C, but not Area B, by adverse possession is affirmed. The judgment is otherwise vacated and the matter is remanded for further proceedings consistent with this memorandum and order.

So ordered.

By the Court (Henry, Sacks &
Tan, JJ.[24]),

Paul Tuttle

Clerk

Entered: January 20, 2026.

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[24] The panelists are listed in order of seniority.

EXHIBIT B

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

DUKES COUNTY, ss. 20 MISC 000207 (MDV)

MATTHEW WALSTON and
JEAN WALSTON,

Plaintiffs/Counterclaim-Defendants,

v.

JAMES BUNN and NADIA BUNN,

Defendants/Counterclaim-Plaintiffs,

and

NORTH12, LLC;
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as nominee for Webster Bank, N.A.;
ETOWN, LLC; VINEYARD OCEANS, LLC; JASON KICZA; DESIREE KICZA;
and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as nominee for HarborOne Mortgage LLC,

Defendants.

JUDGMENT

On June 5, 2020, plaintiffs/counterclaim-defendants Matthew and Jean Walston filed a complaint in this Court against defendants Michael and Rebecca Hegarty and Joseph and Lillian McNeila. The Walstons amended their complaint eleven days later. They claimed they'd acquired by adverse possession part of the Hegartys' property at 12 North Street in Edgartown, Massachusetts. The Walstons also asserted that the Hegartys had trespassed on the Walstons' land. Finally, the Walstons sought a declaration that the Hegartys and the McNeilas had interfered with the Walstons' alleged deeded easement (the "Disputed Way") to reach Pease's Point Way.

The Hegartys answered the Walstons' complaint on July 6, 2020, denying the Walstons' claims. The McNeilas answered the complaint on July 7, 2020, also denying the Walstons' claims. The McNeilas also counterclaimed for (1) a declaration that the Walstons have no rights to use North Street in Edgartown or the Disputed Way, and (2) an injunction preventing the Walstons from using either the Street or the Way.[1]

On November 2, 2020, the Walstons filed a second amended complaint. They added as defendants the Bank of New Hampshire ("BONH," the holder of two mortgages on the Hegarty property), Bethpage Federal Credit Union ("BFCU," the holder of a mortgage on the McNeila property), and two abutters to the Disputed Way, Pensco Trust Company, LLC ("Pensco") and Belgrave Square, LLC ("Belgrave"). In December 2020, BONH answered, denying the Walstons' claims. Belgrave likewise answered, denying the Walstons' claims and counterclaiming for the same relief the McNeilas sought by counterclaim. In February 2021, BFCU answered, denying the Walstons' claims. The Court defaulted Pensco on February 10, 2021.

In May 2021, (1) North12, LLC was substituted for the Hegartys; (2) ETown, LLC, was substituted for Pensco; and (3) Mortgage Electronic Registration Systems, Inc., as nominee for Webster Bank, N.A. ("MERS"), was substituted for BONH. Those substitutions led to the filing of the Walstons' third amended complaint in July 2021. In September 2021, the Court defaulted ETown. Later in September, (1) Jason Kicza and Desiree Kicza were substituted for Belgrave, and (2) their mortgagee, MERS as nominee for HarborOne Mortgage LLC, was added as a defendant. The latter substitutions led to the filing of the Walstons' fourth amended complaint in September 2021. In October 2021, the Court defaulted the Kiczas. MERS as nominee for HarborOne answered the Walstons' fourth amended complaint in late October 2021, denying the Walstons' claims.

In January 2022, the Court granted the Walstons leave to file a fifth amended complaint. That complaint substituted (a) the Bunns in place of the McNeilas as owners of the McNeila property and (b) substituted the McNeilas for BFCU as the holders of a mortgage on what was now the Bunn property. In April 2022, the Court granted the Walstons leave to file a sixth amended complaint, in which they (a) dropped their claims against the McNeilas, as they'd discharged their mortgage on the Bunn property; and (b) added Vineyard Oceans, LLC, a new part-owner of the ETown property. In June 2022, the Court defaulted Vineyard Oceans.

The Walstons' sixth amended complaint (the "Complaint") is the final iteration of their claims in this case. In Count I, the Walstons assert they've acquired by adverse possession the land within the Disputed Way as it runs along the southern edge of the Walstons' property at 19 North Street (the "Abutting Way"). (While the Walstons brought Count I against all defendants, at the time of filing, the sole record owner of the land beneath the Abutting Way was North12.) In Count II, the Walstons sought against all defendants a declaration that the Walstons have the right to "occupy or otherwise use" the Abutting Way. In Count III, the Walstons claimed that North12 had trespassed on the Walstons' property, hence entitling the Walstons to injunctive relief. In Count IV, the Walstons sought against all defendants a declaration that the Walstons have the right to use the Disputed Way to and from Pease's Point Way "for all purposes, including utilities, in which public streets and ways are or may be used in the Town of Edgartown in common with those lawfully entitled thereto."

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[1] In their later cross-motion for summary judgment, the McNeilas' successors in interest to their North Street property, James Bunn and Nadia Bunn, clarified their counterclaim to limit it to what the Court's order dated December 12, 2022 ("*Walston I*") calls the "Eastern Section" of the Disputed Way, beginning at a point adjacent to the southwestern corner of the McNeila/Bunn property.

In May 2022, the Walstons moved for summary judgment against all defendants on Count IV of the Complaint. North12 and the Bunns cross-moved for summary judgment on the same Count IV. In *Walston I*, the Court held that the Walstons' rights in the "Eastern Section" of the Disputed Way had been extinguished by prescription.[2]

The Walstons, North12, and MERS as nominee for Webster Bank appeared for trial on May 8-9, 13-14, and 16, 2024, on their remaining issues. The Court issued findings of fact and conclusions of law by order issued August 30, 2024 ("*Walston II*").

For the reasons set forth in *Walston I*, *Walston II*, and this Judgment, it is hereby:

A. **ORDERED, ADJUDGED,** and **DECLARED**, that judgment enters in FAVOR of plaintiffs/counterclaim-defendants Matthew Walston and Jean Walston, and AGAINST defendants North12, LLC and Mortgage Electronic Registration Systems, Inc., as nominee for Webster Bank, N.A. ("MERS"), on Counts I-II of the Walstons' sixth amended complaint (the "Complaint");

B. **ORDERED, ADJUDGED,** and **DECLARED**, that judgment enters in FAVOR of the Walstons, and AGAINST North12, on Count III of the Complaint;

C. **ADJUDGED** and **DECLARED**, that the Walstons own the fee beneath "Area A" and "Area C" shown on Exhibit A to this Judgment;

D. **ORDERED**, that:

1. Within 45 days of entry of this Judgment, North12 must serve on the Walstons a proposal (the "Proposal") for (a) installing, at the Walstons' and North12's shared expense, suitable monuments demarking the boundary as declared by this Judgment between the land of the Walstons and that of North12 (the "Monuments"); (b) removing, at North12's expense, all structures or vegetation North12 or its predecessors in interest to the land described in a deed to North12 recorded at the Dukes County Registry of Deeds (the "Registry") in Book 01574, Page 1070 ("12 North Street") have erected or planted on Areas A or C; and (c) restoring, at North12's expense, Areas A and C to either their condition prior to the installation of such structures and

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[2] By order issued October 4, 2024, the Court granted the Walstons' motion for entry of a default judgment against defaulted defendants the Kiczas, Vineyard Oceans, and ETown. The motion requested entry of a judgment consistent with *Walston I*, *Walston II*, and all other orders in this case, without prejudice to the Walstons' rights of appeal. The defaulted defendants' interests in this case relate exclusively to the Eastern Section. Since *Walston I* holds that the Walstons' rights to use the Eastern Section have been terminated, this Judgment dismisses the Walstons' claims against the defaulted defendants.

plantings or as satisfactory to the Walstons (all of the foregoing effort, the "Work"). The Proposal must include an estimate of the amount of time required for the Work and identify all governmental approvals or private permissions necessary to perform the Work;

2. Within fourteen days of receipt of the Proposal, the Walstons and North12 must confer in a good faith effort to agree on the scope and timing of the Work. Should the parties agree within 21 days on the scope and timing of the Work, North12 shall perform the Work as agreed (with the Walstons paying half of the cost of locating and installing the Monuments); and

3. Should the parties fail to agree within 21 days of the Walstons' receipt of the Proposal on the scope and timing of the Work, (a) the Walstons shall file with this Court the Proposal (or, if modified by North12, the last such modified Proposal) and the Walstons' written objections to it, seeking this Court's determination of the Work to be performed; and (b) North12 shall have no obligation to perform the Work unless and until ordered by the Court;

E. **ORDERED**, that except as reasonably necessary to perform the Work, North12 (including its successors in interest to 12 North Street); its or their agents, servants, employees, and attorneys; and all persons in active concert or participation with the foregoing who receive actual notice of this Judgment are PROHIBITED from entering (1) the land described in a deed to the Walstons recorded at the Registry in Book 01351, Page 1023, and (2) Areas A and C (all of the foregoing, "19 North Street"), without the permission of the Walstons or their successors in interest to 19 North Street; provided, however, that all structures or vegetation encroaching on Areas A and C as of the date of entry of this Judgment may remain until the Work has been performed;

F. **ORDERED, ADJUDGED,** and **DECLARED**, that judgment enters in FAVOR of North12, MERS, and defendants/counterclaim-plaintiffs James Bunn and Nadia Bunn, and AGAINST the Walstons, on Count IV of the Complaint;

G. **ORDERED, ADJUDGED,** and **DECLARED**, that judgment enters in FAVOR of the Bunns, and AGAINST the Walstons, on the Bunns' Counterclaims;

H. **ORDERED** and **DECLARED**, that the Walstons' claims against defendants (1) Mortgage Electronic Registration Systems, Inc., as nominee for HarborOne Mortgage, (2) ETown, LLC; (3) Vineyard Oceans, LLC; (4) Jason Kicza; and (5) Desiree Kicza are DISMISSED;

I. **ADJUDGED** and **DECLARED**, that the Walstons and their successors in interest to 19 North Street have no right to use "Area B" or the "Eastern Section" shown on Exhibit A to this Judgment;

J. **ORDERED**, that except as reasonably necessary to perform the Work, the Walstons (including their successors in interest to 19 North Street); their agents, servants, employees, and attorneys; and all persons in active concert or participation with the foregoing who receive actual notice of this Judgment are PROHIBITED from entering the Eastern Section without the permission of (1) the owners thereof or (2) those holding suitable easements in the Eastern Section; and

K. **ORDERED**, that upon payment of all fees required by law, a certified or attested copy of this Judgment may be recorded at the Registry and marginally referenced on all relevant documents.

SO ORDERED.

By the Court (Vhay, J.)

/s/ Michael D. Vhay

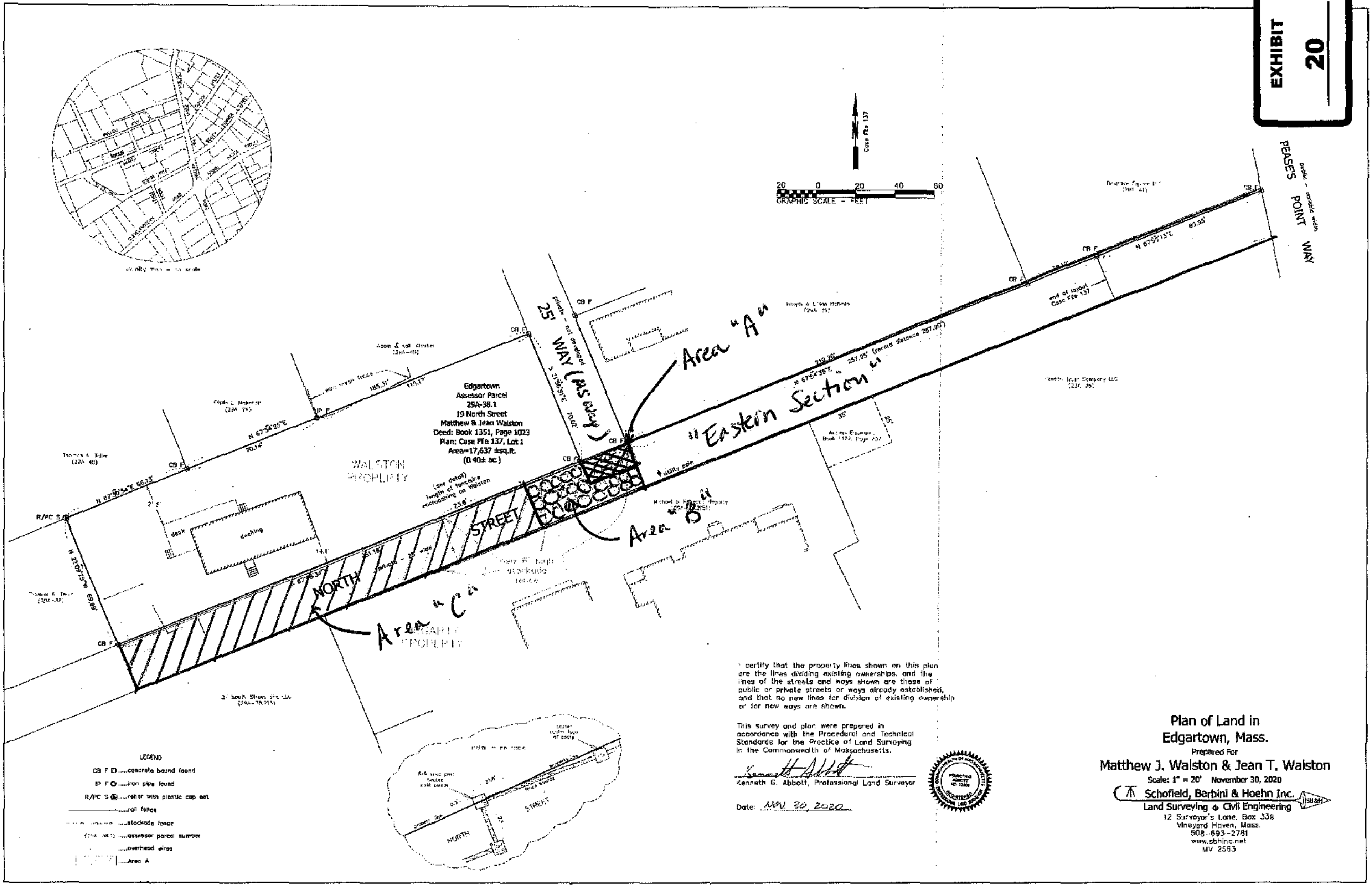
Attest: */s/ Deborah J. Patterson*
Deborah J. Patterson
Recorder

Dated: October 15, 2024

EXHIBIT A

EXHIBIT

20


Edgartown
Assessor Parcel
29A-38.1
19 North Street
Matthew & Jean Walston
Deed: Book 1351, Page 1023
Plan: Case File 137, Lot 1
Area=17,637 ±sq.ft.
(0.40± ac.)
WALSTON PROPERTY
dwelling
deck
NORTH
STREET
private – 25' wide
(see detail) length of fenceline encroaching on Walston
23.6'
25' WAY (AS easy)
private – not developed
S 21°56'51"E 70.02'
N 67°30'54"E 66.13'
N 67°54'25"E 70.14'
185.31'
115.17'
N 22°05'25"W 69.89'
N 67°53'34"E
R/PC S
CB F
IP F
Thomas A. Toller (29A-40)
Clyde L. Maker Jr. (29A-39)
Adam & Kali Kleuber (29A-41)
Joseph & L. Nelson (29A-35)
"Eastern Section"
N 67°54'39"E
219.76'
257.95' (record distance 257.90')
end of layout Case File 137
N 67°55'13"E
83.55'
PEASE'S POINT WAY
public – variable width
utility pole
Area "A"
Area "B"
Area "C"
Michael & Rebecca Property
Access Easement Book 1122, Page 237
35'
25'
GRAPHIC SCALE – FEET
20
0
20
40
60
Case File 137
vicinity map – no scale
LEGEND
CB F ⊡.....concrete bound found
IP F ○.....iron pipe found
R/PC S ⊗.....rebar with plastic cap set
.....rail fence
.....stockade fence
(29A-38.1).....assessor parcel number
.....overhead wires
.....Area A
NORTH
STREET

I certify that the property lines shown on this plan are the lines dividing existing ownerships, and the lines of the streets and ways shown are those of public or private streets or ways already established, and that no new lines for division of existing ownership or for new ways are shown.

This survey and plan were prepared in accordance with the Procedural and Technical Standards for the Practice of Land Surveying in the Commonwealth of Massachusetts.

Kenneth G. Abbott
Kenneth G. Abbott, Professional Land Surveyor

Date: NOV 30, 2020

KENNETH G. ABBOTT
No. 32309

Plan of Land in
Edgartown, Mass.
Prepared For
Matthew J. Walston & Jean T. Walston
Scale: 1" = 20'   November 30, 2020
Schofield, Barbini & Hoehn Inc.
Land Surveying ◆ Civil Engineering
12 Surveyor's Lane, Box 339
Vineyard Haven, Mass.
508-693-2781
www.sbhinc.net
MV 2563

EXHIBIT C

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

DUKES COUNTY, ss. 20 MISC 000207 (MDV)

MATTHEW WALSTON and JEAN WALSTON,

Plaintiffs/Counterclaim-Defendants,

v.

JAMES BUNN and NADIA BUNN,

Defendants/Counterclaim-Plaintiffs,

and

NORTH12, LLC;
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as nominee for Webster Bank, N.A.;
ETOWN, LLC; VINEYARD OCEANS, LLC;
JASON KICZA; DESIREE KICZA; and
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as nominee for HarborOne Mortgage LLC,

Defendants.

ORDER ON SUMMARY-JUDGMENT MOTIONS
(Rule 56(d), Mass. R. Civ. P.)

Before the Court are (1) plaintiffs/counterclaim-defendants Matthew and Jean Walston's motion for partial summary, as to all defendants in this case, on Count IV of the Walstons' Sixth

Amended Complaint[1]; (2) defendant North12, LLC's cross-motion for partial summary judgment against the Walstons on the same Count IV, and (3) defendants/counterclaim-plaintiffs James and Nadia Bunn's cross-motion for partial summary judgment "on the same issues raised by the Walstons," Bunns' Opposition to Plaintiffs' Motion for Partial Summary Judgment and Cross-Motion for Summary Judgment, 1 (June 29, 2022). The pending motions concern a way that appears on a plan recorded at the Dukes County Registry of Deeds (the "Registry") in Edgartown (Massachusetts) Case File No. 137 ("Plan No. 137"). Plan No. 137 shows, as abutting the Plan's Lots 1-3, a paper street labelled "25 ft Way to Pease's[[2]] Point Way" (the "Disputed Way").

Peases Point Way is a public way. The Walstons own Plan No. 137's Lot 1, which is some distance west of Peases Point Way.[3] The Walstons claim deeded rights to use the entire Disputed Way; they contend those rights include using it as access to and from Peases Point Way. North12, the owner of some of the land the Disputed Way crosses, and the Bunns, a couple that use what Fact #16 below calls the "Eastern Section" of the Disputed Way to reach Peases Point Way, contend the Walstons have lost all deeded rights to use the Disputed Way.[4]

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[1] While the Walstons' motion broadly seeks summary judgment on Count IV, on page 3 of their memorandum in support of their motion, they explain they want only three things at this time: (1) a declaration of their deeded rights to use the Disputed Way; (2) a determination whether those rights have been extinguished; and (3) a decision on whether the defendants have unlawfully impaired any of the Walstons' rights to use the Way.

[2] Some of the documents in this case spell this "Pease's," but most others spell it "Peases." The Court will use the latter spelling.

[3] Parts of the Disputed Way are now known as North Street. The current address of the Walstons' Lot 1 is 19 North Street. North12's current address is 12 North Street. The Bunns' current address is 1 North Street.

[4] The Walstons' Sixth Amended Complaint names six defendants besides North12 and the Bunns. The other defendants are Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for Webster Bank, N.A., the holder of a mortgage on North12's property; ETown, LLC and Vineyard Oceans, LLC, the owners of 112 Peases Point Way, another property that uses the Disputed Way to reach Peases Point Way; Jason and Desiree Kicza, the owners of 106 Peases Point Way, a property that abuts (but allegedly doesn't use) the Disputed Way; and MERS as nominee for HarborOne Mortgage LLC, the holder of a mortgage on the Kiczas' property. The Court defaulted ETown in September 2021. The Court defaulted Vineyard Oceans in June 2022. The Court defaulted the Kiczas in October 2021.

Having reviewed the record on summary judgment and considered the parties' arguments, the Court DENIES North12 and the Bunns' cross-motions (and GRANTS the Walstons' motion) on the issue of whether, by virtue of a condition contained in the Walstons' chain of title, Lot 1 has lost all rights to use the Disputed Way. The Court GRANTS North12 and the Bunns' cross-motions, however, on the issue of whether Lot 1 and a second lot acquired by the Walstons in 2020 (what Fact #3 below calls the "MS Way") have lost their easements over the Eastern Section of the Disputed Way: those rights have been extinguished through prescription. The Court thus DENIES the remainder of the Walstons' motion. The remaining issues in this case, which principally concern the Walstons' rights to use the Disputed Way west of the Eastern Section, will be the subject of future proceedings.

The undisputed facts (which the Court intends to treat as no longer in controversy, see Rule 56(d), Mass. R. Civ. P.) are these[5]:

1. In April 1977, Robert J. Carroll acquired by deed (the "Carroll Deed") from Green Lands, Inc., Trustee of Edgartown Meadows Realty Trust, Lots 1-3 as shown on Plan No. 137. Plan No. 137 shows within the Disputed Way an existing dirt road, with spurs leading in various directions. The Carroll Deed states that Carroll was receiving "the fee in the [Disputed Way] as shown on [Plan No. 137], subject to and with the benefit of the right to use said way in common with all those lawfully entitled thereto."[6]

2. The Disputed Way abuts the southern boundary of what's now the Walstons' Lot 1.[7] As shown on Plan No. 137, the Disputed Way continues to the east, first along

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[5] The facts set forth below don't include anything that's the target of North12's Motion to Strike Certain Paragraphs of the Affidavit of Matthew Walston, and thus the Court DENIES that motion as moot.

[6] In their response to ¶ 4 of the Bunns' Statement of Additional Facts, the Walstons concede that Green Lands's conveyance to Mr. Carroll of the fee in the Disputed Way didn't include the fee abutting a parcel previously conveyed to Estey L. Teller (see Fact #6 below), the fee abutting a parcel owned by New England Telephone and Telegraph Company ("NET&T") west of Plan No. 137's Lot 3, and the fee abutting what's now 1 North Street, the Bunns' property. It's also undisputed that as of April 1977, NET&T and seven other landowners had easements to use the Disputed Way for access and utilities.

[7] While the Disputed Way forms the southeastern boundary of Lot 1, the parties have called that direction "south," the northwest "north," the northeast "east," and the southwest "west." The Court will use the parties' simpler directions.

the northern edge of Plan No. 137's Lot 2 and then along the northern edge of another property that Mr. Carroll owned in 1977, the "Barn Lot." The Disputed Way meets Peases Point Way at the northeast corner of the Barn Lot.

3. Plan No. 137 also shows abutting the east side of Lot 1 a second 25-foot way. The Carroll Deed calls that way the "25 ft. way running to Mullen Way," but the parties also call it "Middle Street." (Because there was a nearby public way called Middle Street as of 1977, this Order will call the way abutting the east side of Lot 1 the "MS Way.") Under the Carroll Deed, Mr. Carroll took the fee in the MS Way "subject to and with the benefit of the right to use said way in common with all those lawfully entitled thereto." Mullen Way is a private way. From 1977 to the present, Mullen Way's been north of the Disputed Way and has run parallel to it. Like the Disputed Way, Mullen Way intersects Peases Point Way east of Lot 1.

4. Plan No. 137 shows at a southeast corner of its Lot 2 the dead end of a public street, Middle Street. On Plan No. 137, Middle Street is aligned with the MS Way, but an unlabeled paper street separates the Disputed Way from the MS Way. Plan No. 137 shows no actual or proposed connection between the Disputed Way and Middle Street.

5. As of April 1977, Thomas A. Teller and Estey L. Teller owned and resided at 28 Mullen Way, a property abutting the northwestern corner of Lot 1. Mullen Way bounds the north side of 28 Mullen Way. 28 Mullen Way's access from the nearest public way, Peases Point Way, was and is via Mullen Way.

6. As of April 1977, Ms. Teller owned individually a property ("Ms. Teller's Lot") that abutted 28 Mullen Way to the south and Plan No. 137's Lot 1 to the west. Ms. Teller's Lot bounds on the Disputed Way. Plan No. 137 shows a dirt road leaving an existing dirt road within the Disputed Way, crossing Ms. Teller's Lot, and entering 28 Mullen Way.

7. In May 1977, Mr. Carroll conveyed to Mr. Teller, via deed (the "Teller Deed"), Plan No. 137's Lot 1. At the time, Lot 1 was vacant.

8. The Teller Deed states that the conveyance of Lot 1 "except[s] and exclud[es] the fee in the 25 ft. ways bounded and described on the southeasterly and northeasterly sides" of Lot 1, meaning the Disputed Way and the MS Way. The Teller Deed also states:

> The premises are conveyed subject to and with the benefit of the right to use the [Disputed Way] for all purposes including public utilities which public streets and ways are used in the Town of Edgartown in common with those lawfully entitled thereto on the condition that at any time Grantor herein [Mr. Carroll] may substitute another right of way at which time the Grantee herein [Mr. Teller] by acceptance of this deed hereby agrees to relinquish

> all rights in and to the [Disputed Way], provided, however, that said substituted right of way leads to a public way.[8]

9. After selling Lot 1 to Mr. Teller, Mr. Carroll subdivided Plan No. 137's Lot 2, which originally was 11.2 acres. He first created Lot 2A, comprising the westernmost 6.71 acres of Lot 2, in July 1977. The plan for Lot 2A, Edgartown Case File No. 146, shows no access to Lot 2A other than by the Disputed Way.

10. Mr. Carroll next subdivided the remainder of Plan No. 137's Lot 2 into Lots 2B through 2F. The plan for that subdivision, Edgartown Case File No. 167 ("Plan No. 167"), shows Lots 2B-2F as south of the Disputed Way. Plan No. 167 also shows each new lot except Lot 2C abutting the south side of the Disputed Way. But Plan No. 167 also depicts a new, L-shaped, "30 ft. Way," the lower leg of which begins at the southeast corner of Lot 2. That beginning point also is the southeast corner of proposed Lot 2E, at the end of Middle Street, which was a public way in 1977. Plan No. 167 shows the 30 ft. Way continuing west along the southern edge of Lot 2E, then turning northwest, eventually intersecting with the south side of the Disputed Way diagonally to the southwest across from Ms. Teller's Lot. Plan No. 167 shows the 30 ft. Way separating proposed Lots 2B and 2C from Lot 2D.

11. Plan No. 167 depicts the Disputed Way as running along the northern edges of proposed Lots 2B, 2D, 2E and 2F. Plan No. 167 labels the Disputed Way "25 ft Way to Pease's Point Way," but doesn't show its full extent. Nothing on Plan No. 167 indicates discontinuance of the Disputed Way. In fact, Plan No. 167 shows a widening of the Disputed Way to 30 feet along the northern edges of proposed Lots 2B, 2D, 2E and 2F.

12. In December 1977, the Edgartown Planning Board approved Plan No. 167 with conditions. The conditions included one that approved Lot 2F only as one that was "to be added to the adjoining lot," and not as a "buildable lot." At the time, Lot 2F abutted Mr. Carroll's Barn Lot. The Planning Board didn't require Carroll, however, to make the 30 ft. Way a public way.

13. After receiving approval of Plan No. 167, Mr. Carroll built the 30 ft. Way. It's now called South Street. In October 1978, he conveyed Plan No. 167's Lots 2B, 2C, 2D, and 2E to four different parties, by deed (the "1978 Deeds"). Each of the 1978 Deeds states:

> The premises are conveyed together with the right to use the 30 foot way as shown on said plan for all purposes, including utilities, for which public streets and ways are used in the Town of

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[8] The Court disregards for purposes of this Order Mr. Teller's deposition testimony characterizing the Teller Deed. Teller admitted at page 25 of his deposition that he and Mr. Carroll discussed the Deed provision quoted here. Teller testified that the Deed sets forth his and Carroll's agreement concerning use of the Disputed Way.

> Edgartown in common with all those lawfully entitled thereto, including the Grantor, his heirs and assigns.

None of the 1978 Deeds expressly grants the owners of Lots 2B-2E the right to use the Disputed Way. The 1978 Deeds also don't reference Plan No. 137.

14. Plan No. 167's Lot 2E and a portion of Plan No. 167's Lot 2D are across the Disputed Way from the MS Way and Lot 1. None of the 1978 Deeds states that Mr. Carroll had retained title to the fee in the Disputed Way (or the 30 ft. Way, for that matter) as those ways abutted Plan No. 167's Lots 2B-2E. Hence, the 1978 Deeds for Lots 2D and 2E granted their owners the fee in the Disputed Way as it separates Lots 1, 2D, and 2E, subject to rights of others (including the owners of Lot 1) to use the Disputed Way.[9] As of 1978, however, Mr. Carroll still retained the fee in the MS Way; Carroll thus retained the fee in the northern half of the Disputed Way as it abuts the MS Way, and the southern half went to the new owner of Lot 2E.[10]

15. In the late 1970s, Mr. Carroll renovated the Barn Lot's barn and turned it into his residence. At the time, he owned both the Barn Lot and Plan No. 167's adjacent Lot 2F.

16. Once Mr. Carroll moved to the Barn Lot (which Mr. Teller believes was in the late 1970s), Carroll placed across the Disputed Way, starting at the northwest corner of Lot 2F, "shrubs . . . and stuff" (the "Shrubs") that blocked the Disputed Way.[11] This Order refers to the section of the Disputed Way that's east of the Shrubs as the "Eastern Section."

17. Mr. Teller didn't object to the Shrubs blocking the Disputed Way.[12] And once Mr. Carroll built his section of South Street (see Fact #13 above), Teller ceased

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[9] See G.L. c. 183, § 58 ("Every instrument passing title to real estate abutting a way . . . shall be construed to include any fee interest of the grantor in such way . . . unless (a) the grantor retains other real estate abutting such way . . . , in which case, (i) if the retained real estate is on the same side, the division line between the land granted and the land retained shall be continued into such way . . . as far as the grantor owns, or (ii) if the retained real estate is on the other side of such way . . . between the division lines extended, the title conveyed shall be to the center line of such way . . . as far as the grantor owns, or (b) the instrument evidences a different intent by an express exception or reservation and not alone by bounding by a sideline.").

[10] See note 9 above.

[11] Teller testified at a deposition that he suspected Carroll had built a split-rail fence in the same area, but Teller admitted he wasn't certain of that. His daughter Stephanie L. Teller testified at her deposition she too was unaware of a fence in that area. Stephanie agreed with her father that when she and her then-husband bought what's now the Walstons' Lot 1 in 1984, the area was "all a bunch of bushes. It's all, like, hedging and stuff." Stephanie Teller Deposition, 175. Ms. Teller testified that her son, however, was "able to cut through the bushes" to play with a friend who lived near the Eastern Section.

[12] The Court disregards for purposes of this Order Stephanie Teller's comment at her deposition that her father "gave up" the right of way or agreed that Mr. Carroll should block the Disputed Way. It's nevertheless undisputed that the elder Teller didn't object to Carroll allowing the Shrubs to block the Disputed Way.

using the Eastern Section. Instead, he entered the Disputed Way heading west, then turned south on South Street, then reached Middle Street, a public way.

18. In 1980, Mr. Carroll sold by deed (the "Eager Deed") to Jane E. Eager the northern half of the Barn Lot plus most of Plan No. 167's Lot 2F (together, the "Eager Lots"). The Eager Lots bound the entire south side of the Eastern Section. What Carroll retained of the Barn Lot and Lot 2F didn't abut the Disputed Way. The Eager Deed doesn't state that Carroll retained the fee in any part of the Disputed Way. The Deed does state, however, that the conveyed portion of the Barn Lot carries "the right to use the [Disputed Way] for all purposes which streets and ways are used in the Town of Edgartown, including all utilities, in common with others lawfully entitled thereto."

19. In January 1984, Mr. Teller conveyed by deed (the "Bell Deed"), to his daughter Stephanie (then known as Stephanie Bell) and her then-husband, David T. Bell, Lot 1. Lot 1 was vacant at the time.

20. The Bell Deed states in part (emphasis added):

> The premises are conveyed subject to and with the benefit of the right to use the [Disputed Way] for all purposes including public utilities which public streets and ways are used in the Town of Edgartown in common with those lawfully entitled thereto on the condition that at any time *the Grantor herein* may substitute another right of way at which time the Grantee herein by acceptance of this deed hereby agrees to relinquish all right in and to the [Disputed Way], provided, however, that said substituted right of way leads to a public way.

The Bell Deed also contains the Teller Deed's express exclusions from the conveyed premises (see Fact #8 above).

21. In May 1984, the Tellers granted the Bells, for the benefit of Lot 1, a ten-foot-wide easement along the eastern edge of 28 Mullen Way (the "Teller Easement"). That easement temporarily connected Lot 1 to Mullen Way. In 2013, the parties to the Teller Easement revoked it.

22. In 1984, the Bells began building a house on Lot 1. They didn't use the Eastern Section as access to Lot 1 during construction. Stephanie Bell also didn't use the Eastern Section after construction ended. During the time the Bells lived at Lot 1, it was physically impossible for them to travel by vehicle east on the Disputed Way beyond the Shrubs.[13] Ms. Bell's regular means of reaching a public way from Lot 1 was via the route described in Fact #17 above.

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[13] The Court nonetheless disregards for purposes of this Order Bunn Exhibits 20 and 23, as the Bunns provided no affidavit supporting the exhibits' admission as evidence.

23. In 1986, Ms. Eager conveyed to Andrew F. and Marie J. Zephir the Eager Lots (recall those lots abutted the entirety of the Eastern Section).

24. In 1989, the Zephirs, Gladys Wiswell (the owner of Plan No. 167's Lot 2E), and Robert Morgan and his wife (the owners of a property that abutted the Zephir and Wiswell properties) teamed up to obtain approval of a plan, Plan No. 522, that rearranged and depicted several lots. Plan No. 522's Lot 1 (the "Zephir Lot") is at the corner of Peases Point Way and the Disputed Way. Plan No. 522's Lots 2A and 2C abut the Disputed Way. (Plan No. 522's Lot 2A was part of the Eager Lots, which the Zephirs already owned. Plan No. 522's Lot 2C was part of Lot 2E, which Wiswell already owned.) Plan No. 522's Lots 2B was part of the Morgans' property.

25. After approval of Plan No. 522, Ms. Wiswell sold Lot 2C by deed (the "Zephir Lot 2C Deed") to Mr. Zephir. Lot 2C lies across the Disputed Way from the Walstons' Lot 1. The Zephir Lot 2C Deed doesn't mention the Disputed Way. The Morgans also sold Plan No. 522's Lot 2B to Mr. Zephir.

26. In 1990, the Zephirs conveyed by deed, to Mr. Zephir alone, Plan No. 522's Lot 2A. The Zephirs also conveyed by deed, to Ms. Zephir alone, the Zephir Lot. Neither deed mentions the Disputed Way.

27. In 1995, the Zephirs conveyed by deed to Patricia A. Kolbe (the "Kolbe Deed") the Zephir Lot and Plan No. 522's Lots 2A and 2C. As of 1995, Kolbe owned every lot on the southern edge of the Disputed Way from roughly the midpoint of what's now the Walstons' Lot 1 to Peases Point Way, including the Eastern Section. The Kolbe Deed states that the premises "are conveyed subject to and with the benefit of all easements, restrictions and conditions of record insofar as the same are now in force and applicable." In 2011, Ms. Zephir and a Zephir trust sold Plan No. 522's Lot 2B to Kolbe.

28. In 2001, the Town of Edgartown laid out and took as public ways (a) portions of Middle Street, (b) South Street as it runs from Middle Street to the Disputed Way, and (c) the portion of the Disputed Way running from its intersection with South Street to Ms. Teller's Lot.

29. In June 2014, Daniel T. Bell and Stephanie T. Bell (now Stephanie Teller) conveyed to the Walstons Lot 1, by deed (the "Walston Deed").

30. Like the Bell Deed, the Walston Deed states in part (emphasis added):

> The premises are conveyed subject to and with the benefit of the right to use the [Disputed Way] for all purposes including public utilities which public streets and ways are used in the Town of Edgartown in common with those lawfully entitled thereto on the condition that at any time the *Grantor herein* may substitute another right of way at which time the Grantee herein by acceptance of this deed hereby agrees to relinquish all right in and

> to the [Disputed Way], provided, however, that said substituted right of way leads to a public way.

The Walston Deed contains the Teller and Bell Deeds' express exclusions from the conveyed premises (see Facts ##8 and 20 above).

31. In 2017, Ms. Kolbe's successors in interest to Plan No. 522's Lots 2A-2C (now collectively called 12 North Street, North12's property) were granted an access easement over a 35' x 35' area at the northwest corner of the Zephir Lot, abutting the Disputed Way.

32. In 2017, Ms. Kolbe's successors in interest to 12 North Street conveyed that property by deed to Michael and Rebecca Hegarty.

33. In the spring of 2019, the Hegartys erected a temporary fence in the middle of the Disputed Way, parallel to the Walston's Lot 1.

34. In March 2020, the Hegartys installed a larger and longer stockade fence (the "Hegarty Fence"). The Fence began near the southeast corner of the MS Way, ran close to the southern terminus of the MS Way (and along the Disputed Way), then continued close to the boundary of the Walstons' Lot 1 (and along the Disputed Way) for about 74 feet. The Fence then turned south, crossed the width of the Disputed Way, then ran along the south side of the Disputed Way.

35. In 2020, by two separate deeds, the heirs of Mr. Carroll (who died in 2015) conveyed to the Walstons their interests in the MS Way.

36. In November 2020, the Bunns' immediate predecessors as owners of 1 North Street, which abuts the east side of the MS Way, erected a fence along the MS Way (the "Bunn Fence") and connected it to the Hegarty Fence. The Hegarty and Bunn Fences further blocked the Walstons from reaching Peases Point Way via the Eastern Section.

37. In 2021, the Hegartys sold 12 North Street to North12.

North 12 and the Bunns don't dispute that at one time, Lot 1 enjoyed via the Carroll and Teller Deeds deeded rights to use the Disputed Way. But such rights "can be extinguished . . . by grant, release, abandonment, estoppel or prescription." *Emery* v. *Crowley*, 371 Mass. 489, 495 (1976). North12 and the Bunns contend that Lot 1 has lost its rights to use the Disputed Way either through abandonment or by prescription. North12 and the Bunns have the burden of proving both claims. See *Proulx* v. *D'Urso*, 60 Mass. App. Ct. 701, 704 n. 2 (2004).

North12 and the Bunns' principal argument regarding abandonment rests on the "well settled" principle that

> the owner of land subject to a right of way may, with the assent of the owner of the dominant estate, substitute on his own land a new way for the old way, and that when the change is actually made and a new way is thus adopted by them, it fixes and determines their respective rights by dedication or by estoppel.

Byrne v. *Savoie*, 225 Mass. 338, 340 (1916). The owner of a dominant estate may provide the requisite assent to substitution in advance of the servient owner's actual substitution of ways. See John W. Bruce & James W. Ely, Jr., The Law of Easements and Licenses in Land, § 7:14 (2015).

It's undisputed that Mr. Carroll conveyed to Mr. Teller, with Lot 1, appurtenant rights to use the Disputed Way "on the condition that at any time [Carroll] may substitute another right of way at which time [Teller] by acceptance of this deed hereby agrees to relinquish all right in and to the [Disputed Way], provided, however, that said substituted right of way leads to a public way." This Order will call the foregoing provision the "Substitution Condition." North12 and the Bunns argue that Carroll satisfied the Condition in 1978, when he built "his" portion of South Street; that street indisputably led to a public way, Middle Street.

There are two problems with North12 and the Bunns' argument. First, according to Plan No. 167, South Street begins on the *southern edge* of the Disputed Way, southwest of the corner of Ms. Teller's Lot (and not across from the Walstons' Lot 1). To reach South Street from Lot 1, one must travel the Disputed Way, heading west. Thus, whatever substitution Mr. Carroll may have intended for Mr. Teller in 1978 by building South Street still depended on Teller having at the very least an interest in the Disputed Way heading westbound from Lot 1. So Carroll's 1978 substitution, if that's what it was, couldn't have extinguished "all" of Lot 1's rights in and to the Disputed Way.

The second and thornier problem with North12 and the Bunns' argument is that Mr. Carroll never delivered to Mr. Teller or his successors in interest to Lot 1 any *immediately enforceable* rights to use South Street. Instead, after building South Street, Carroll promptly conveyed to the abutting owners of Plan No. 167's Lots 2B-2E the fee in that street. Carroll took care in the 1978 Deeds to retain for himself, "his heirs and assigns" his own rights to use South Street, but the summary-judgment record contains no evidence that, prior to selling Lots 2B-2E, Carroll gave Teller the right to use South Street. See *Boudreau* v. *Coleman*, 29 Mass. App. Ct. 621, 630 (1990) ("Having expressly reserved some easements, [the grantor's] failure to reserve others must be regarded as significant."). Carroll also didn't reserve powers under the 1978 Deeds to grant additional easements in South Street. Thus, neither the 1978 Deeds, nor Plan No. 167, nor anything else of record would have put Teller on notice (or, for that matter, the new owners of Lots 2B, 2C, 2D, and 2E) that Teller as owner of Lot 1 was among those "lawfully entitled" to use newly constructed South Street.

It's true that after 1978, Mr. Teller and, later, the Bells stopped using the Eastern Section of the Disputed Way to reach a public way from Lot 1. Instead, they went west along the Disputed Way, turned south onto South Street, and thence to public Middle Way. But "[m]ere nonuse of an easement does not of itself constitute abandonment." *Parlante* v. *Brooks*, 363 Mass. 879, 880 (1973) (rescript). Instead, the owner of a dominant estate must intend to abandon an easement before a court may declare abandonment. See *id.* Because the terms of the Teller and Bell Deeds are intrinsic to North12 and the Bunns' proof of Teller and the Bells' intent to abandon the Disputed Way, the Court relies on the plain terms of those deeds, construed against grantor Carroll, see *Estes* v. *DeMello*, 61 Mass. App. Ct. 638, 641-642 (2004), to determine whether Teller and the Bells' actions after 1978 demonstrate the requisite intent to abandon the Disputed Way.[14] Since Mr. Carroll didn't comply strictly with the Substitution Condition – *he* never substituted an alternative way for the Disputed Way[15] – the Court won't declare that Teller, the Bells or their successors in interest were obligated under the Teller and subsequent Deeds to abandon the Disputed Way. Since the Walstons expressly seek summary judgment on the "substitution" issue, the Court will GRANT their motion on that issue.

North12 and the Bunns fare better in arguing extinguishment by prescription of the Walstons' rights to use the Eastern Section of the Disputed Way. A party's occupation of a servient estate in a manner that's "irreconcilable with its use as a way, openly, notoriously, adversely, and without interruption for more than twenty years," will extinguish a way by prescription. *Brennan* v. *DeCosta*, 24 Mass. App. Ct. 968 (1987) (rescript); see also *Benvenuto* v. *204 Hanover, LLC*, 97 Mass. App. Ct. 140, 143 (2020) (same). The undisputed facts show that starting in the late 1970s, Mr. Carroll installed (or allowed the growth of) the Shrubs. The Shrubs blocked vehicular use of the Eastern Section by anyone approaching it from the west. With the Eastern Section blocked, Mr. Teller and the Bells stopped using the Eastern Section as access to Lot 1. Lot 1's deeded easement over the Eastern Section thus lapsed sometime in the late 1990s, years before the Walstons bought Lot 1.

The Walstons didn't regain the right to cross the Eastern Section by acquiring the MS Way in 2020. When Mr. Carroll first allowed the Shrubs to grow, he owned both the

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[14] The Bell and Walston Deeds repeat the Teller Deed's Substitution Condition verbatim – too verbatim. Nothing in the summary-judgment record suggests that the parties to the Bell and Walston Deeds intended to give the specific "grantor" in each of those deeds (in the Bell Deed, Mr. Teller; in the Walston Deed, the Bells) the power reserved to Mr. Carroll under the Teller Deed to substitute one way for another. Instead, the record suggests the parties to the later deeds intended merely to perpetuate Carroll's right (and, perhaps, that of his successors in interest to the servient estates subject to the Disputed Way), pursuant to the original Substitution Condition, to substitute a new way for the Disputed Way.

[15] Whatever use Teller and the Bells made of South Street after 1978 wasn't by right. They conceivably could have argued by 1998, vis a vis the owners of Lots 2B-2E (the owners of the fee in South Street), that Lot 1 had acquired such rights by prescription. That issue became moot three years later, when South Street became a public way.

MS Way and the Disputed Way, including the Eastern Section. The MS Way thus didn't have (and couldn't have) an appurtenant easement over the Disputed Way. See *Patterson* v. *Paul*, 448 Mass. 658, 663 (2007), quoting Restatement (Third) of Property (Servitudes), § 1.2(1) (2000) ("An easement creates a nonpossessory right to enter and use land *in the possession of another* . . .") (emphasis added). That situation changed in 1980, when Carroll sold to Ms. Eager the Eager Lots and the adjacent fee beneath the Eastern Section, subject to the rights of "others lawfully entitled thereto" to use the Eastern Section. There's no evidence that Carroll thereafter exercised his remaining rights in the Disputed Way (for example, as the owner of the fee in the abutting MS Way) to go easterly through the Shrubs and use the Eastern Section. Thus, by sometime in 2000, some twenty years before the Walstons bought the MS Way, the MS Way lost whatever appurtenant rights it had to use the Eastern Section.

Because Lot 1 and the MS Way no longer have attached to them easements to use the Eastern Section, the Court DENIES the remainder of Walstons' motion, apart from the issue of the Substitution Condition: at the moment, the Walstons' deeded rights to use the Disputed Way are impaired as a matter of law. Whether those impairments are fatal to the Walstons' overall claims is unclear: they contend elsewhere in their Sixth Amended Complaint that what they don't enjoy by deed they, the Tellers and/or the Bells have obtained through prescription. The Court GRANTS, however, North12 and the Bunns' cross-motions to the extent they seek declarations concerning the Walstons' rights to use the Eastern Section.[16] The Court ORDERS the parties to appear on January 13, 2023, at 11:30 AM, for a status videoconference.

SO ORDERED.

By the Court (Vhay, J.),

/s/ Michael D. Vhay

Attest:

/s/ Deborah J. Patterson
Deborah J. Patterson, Recorder

Dated: December 12, 2022

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[16] It's unclear whether this Order resolves all issues concerning the Bunns in this case. The Court will explore that question at the upcoming status videoconference. The Bunns also ask the Court at page 20 of their memorandum in support of their cross-motion to issue an order enjoining the Walstons from use of the Disputed Way. Since the Bunns didn't include that request in their actual cross-motion, the Court will not issue any injunctions at this time.

EXHIBIT D

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

DUKES COUNTY, ss. 20 MISC 000207 (MDV)

MATTHEW WALSTON and
JEAN WALSTON,

Plaintiffs/Counterclaim-
Defendants,

v.

JAMES BUNN and NADIA BUNN,

Defendants/Counterclaim-
Plaintiffs,

and

NORTH12, LLC;
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., as
nominee for Webster Bank, N.A.;
ETOWN, LLC;
VINEYARD OCEANS, LLC;
JASON KICZA; DESIREE KICZA; and
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., as
nominee for HarborOne Mortgage LLC,

Defendants.

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

In April 1977, Robert J. Carroll acquired by deed three parcels of land. They're shown as Lots 1, 2 and 3 on a plan entitled "Plan of Land in Edgartown, Mass., Surveyed for: Robert J. Carroll" dated March 8, 1977, and recorded with the Dukes County Registry of Deeds (the

"Registry") in Edgartown Case File No. 137 ("Plan No. 137"). One month later, Carroll conveyed Lot 1 to his good friend Thomas Teller, by deed (the "Thomas Teller Deed"). Lot 1 was then a vacant rectangular parcel; today it has a house on it, and the property's called 19 North Street. (When referring to the unbuilt parcel, this decision will call Lot 1/19 North Street "Lot 1," and call the same parcel "19 North Street" in its condition following construction of the house.)

Mr. Teller's deed to Lot 1 refers to Plan No. 137. That Plan shows as abutting the Plan's Lots 1-3 a paper street labelled "25 ft Way to Pease's Point Way" (the "Disputed Way"). As of May 1977, with three exceptions not pertinent here, Mr. Carroll owned the fee in the Disputed Way, subject to easements held by a telephone company and seven others. See *Walston* v. *Bunn*, 30 LCR 740, 741 & n. 6 (2022) (Vhay, J.) ("*Walston I*"). Carroll also owned a 25-foot way that Plan No. 137 shows as abutting the entire northeast side of Lot 1, a way *Walston I* calls the "MS Way." Carroll's interest in the MS Way was "subject to and with the benefit of the right to use said way in common with all those lawfully entitled thereto." *Id.* at 741.

The Thomas Teller Deed states that the land Mr. Carroll sold to Mr. Teller as Lot 1 "except[s] and exclud[es] the fee in the 25 ft. ways bounded and described on the southeasterly and northeasterly sides" of Lot 1, meaning the Disputed Way and the MS Way. The Deed also states:

> The premises are conveyed subject to and with the benefit of the right to use the [Disputed Way] for all purposes . . . on the condition that at any time Grantor herein [Carroll] may substitute another right of way at which time the Grantee herein [Teller] by acceptance of this deed hereby agrees to relinquish all rights in and to the [Disputed Way], provided, however, that said substituted right of way leads to a public way.

At summary judgment in this case, a controversy between Mr. Carroll and Mr. Teller's various successors in title to Lot 1, the Disputed Way, and the MS Way, this Court held that while Carroll subsequently built ways that, under the Thomas Teller Deed, he could have substituted for the Disputed Way, Carroll failed to effect the substitution. See *Walston I*, 30 LCR at 744-745. But *Walston I* also finds that in the late 1970s, Carroll planted what *Walston I* calls the "Shrubs" in the Disputed Way east of its intersection with the MS Way. For the next twenty years, the Shrubs and other growth prevented Teller and his family from using what *Walston I* calls the "Eastern Section" of the Disputed Way, such that by the late 1990s, Carroll and others had extinguished by prescription Lot 1/19 North Street's rights to use the Eastern Section. See *id.* at 745.

Walston I didn't resolve the fate of the rest of the Disputed Way, particularly the stretch that abuts 19 North Street. That property's current owners are plaintiffs/counterclaim-defendants Matthew and Jean Walston. This decision, rendered after trial on May 8, 13-14 and 16, 2024, addresses most of the remaining issues. Having taken a view of 19 North Street, the Disputed Way, and surrounding properties, having heard the parties' witnesses, having reviewed the exhibits admitted into evidence, and having read and heard the arguments of the parties' counsel, the Court HOLDS that (1) the Walstons have obtained by adverse possession some, but not all, of the Disputed Way; (2) defendant/counterclaim-plaintiff North12, LLC is trespassing on what this decision declares to be the Walstons' property; but (3) the Walstons no longer have an easement over those parts of the Disputed Way that they sought (but failed) to claim in this case by adverse possession. The Court can't enter final judgment, however, until the Walstons clarify what they're seeking from a handful of defaulted defendants who didn't appear at trial.

Pursuant to Rule 52, Mass. R. Civ. P., the Court FINDS the facts stated above as well as these:

1. Attached as Exhibit A to this decision is a diagram showing portions of the Disputed Way, the MS Way, the Eastern Section, and abutting properties. Area "A" on the

exhibit is that part of the Disputed Way that abuts the MS Way to the south, to the midpoint of the Disputed Way.[1] Area "B" is a part of the Disputed Way that lies south and west of Area A. Area "C" is the part of the Disputed Way that lies west of Area B and ends adjacent to 19 North Street's western boundary.

2. After selling Lot 1 to Mr. Teller, Mr. Carroll developed Lots 2 and 3 on Plan No. 137. *Walston I*, 30 LCR at 742, holds that Carroll's interest in the fee beneath Areas B and C passed largely to the owners of parcels subdivided and sold from Lot 2 in 1978. Those parcels originally were Lots 2D and 2E on a plan recorded at the Registry in Edgartown Case File No. 167 ("Plan No. 167"). *Walston I*, 30 LCR at 742, also holds that since Carroll owned the MS Way in 1978, he kept the fee to the northern half of the Disputed Way as it abuts the MS Way (Area A), and the owner of Lot 2E became the owner of the fee of the southern half (included in Area B).

3. The Carroll Shrubs didn't just prevent Mr. Teller and his family from using the Eastern Section: they also stopped persons walking or driving west on the Eastern Section from reaching Areas A, B and C directly. (After the Shrubs took root, the only thing that continued unimpeded into Areas B and C was an overhead utility line attached to poles that march along the south side of the Disputed Way.) Lots 2D and 2E, abutting the south side of Areas B and C, were undeveloped former farmlands. Lot 1 likewise was undeveloped. Thus, once the Shrubs grew in, there was only one open vehicular route to reach Areas A, B and C: from the west along the Disputed Way. The latter Way connected to public ways via South and Middle Streets. One could reach Areas A, B, and C by foot, however, from Lots 1, 2D and 2E.

4. While *Walston I* holds that Mr. Carroll didn't take all of the steps needed to trigger his easement-substitution rights under the Thomas Teller Deed, see *Walston I*, 30 LCR at 744-745, Mr. Teller and his family *thought* Carroll had: he'd built the new sections of South and Middle Streets. Believing that Carroll had effected a substitution of the ways, Teller performed what he thought was his end of the bargain under the Deed: to his own mind, he abandoned his rights as owner of Lot 1 to travel the Disputed Way except as a means of access from Lot 1 to South and Middle Streets.

5. In January 1984, Mr. Teller conveyed Lot 1 by deed to his daughter Stephanie, then known as Stephanie T. Bell, and her then-husband David T. Bell ("Teller and Bell"). Lot 1 was vacant at the time, but by September 1984 Teller and Bell had built a modular home with a basement on the lot. Shortly thereafter they moved into the home along with their infant daughter. Teller and Bell and their guests and invitees reached 19 North Street via South Street, Middle Street, and the Disputed Way, all without interference from Mr. Carroll.

6. The home at 19 North Street was and is rectangular. Its long sides parallel the Disputed Way. At the eastern end of the home, at its basement level, there was a two-car garage. Teller and Bell reached the garage by driving east on Area C past their home, then entered a

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[1] To be precise, the MS Way runs northwest/southeast, and Area A is southeast of the MS Way, but since *Walston I* calls the area abutting the right side of Area A the "Eastern Section," this decision will pretend the MS Way runs north/south and the Disputed Way east/west. That puts 19 North Street north of the Disputed Way and 12 North Street south of the Disputed Way.

gravel driveway (the "Driveway") that started on the northern edge of Area C and curved back to the west towards the garage.

7. Teller and Bell's occupation of 19 North Street initially didn't change the conditions described in Finding #3 about access to Areas A, B, and C. The Court also accepts Ms. Teller's testimony that in 1984, the MS Way was overgrown and didn't furnish access to the Disputed Way from the north. Beginning in September 1984, Teller and Bell maintained Area C beginning on its west side up to the entrance to the Driveway. That maintenance included mowing that part of Area C (if and when needed; it had a "rap" surface) and trimming encroaching vegetation. Teller and Bell didn't remove vegetation south of Areas B or C, however. As a result, over time, heavy vegetation not planted or added by Teller and Bell largely blocked access to Areas B and C from the northern sides of abutting Lots 2D and 2E.

8. In 1989, the then-owner of Lot 2E (which lay across Areas B and C from 19 North Street and the MS Way) sold to Andrew F. Zephir the part of Lot 2E that's shown as Lot 2C on a plan recorded at the Registry as Edgartown Case File Plan No. 522 ("Plan No. 522"). Lot 2C contained the acreage in Lot 2E that abutted Areas B and C. Thus, as of 1989, the owners of Lot 2D on Plan No. 167 and Lot 2C on Plan No. 522 held record title to Areas B and C, except that only the owner of Lot 2C took title to the part of Area B that's immediately south of Area A. Mr. Carroll still owned Area A.

9. In 1988, Mr. Bell bought an eighteen-foot boat. He began parking that boat, in the offseason, on 19 North Street, but sometimes he parked the boat in Area C east of the Driveway.

10. At some point, Ms. Teller began operating a taxi service from 19 North Street. The taxis often would park in Area C, including portions of Area C east of the Driveway. Teller and Bell also would park their own vehicles, on occasion, in Area C east of the Driveway.

11. For several years Mr. Bell owned a large recreational vehicle. He'd park it in Area C, east of the Driveway, for several months at a time.

12. Objects that could be one or more of the vehicles described in Findings ##9-11 above are visible in Area C east of the Driveway in aerial photographs from 2000, 2003, 2005, 2009, 2010, and 2014. An aerial photograph from 2007 (Trial Exhibit 35) shows either a large vehicle parked in that same area or that that part of Area C has taken on the appearance of other nearby dirt roads or parking areas, indicating consistent use. An aerial photograph from 2014 shows continued use of that part of Area C.

13. But Teller and Bell didn't park vehicles in Area B. Their use of the Disputed Way for parking ended approximately 55 feet west of the eastern edge of the MS Way (if it had continued into the Disputed Way) and didn't extend into Area A either. (The point where Teller and Bell's parking ended is the boundary between Areas C and B.) The Court credits Mr. Walston's testimony, however, that Teller and Bell and their children used the more vegetated, more wooded Areas A and B: by June 2014, they'd left in those Areas old bikes, toys, boat buoys, and an aluminum antenna.

14. By 2011, Patricia A. Kolbe had purchased what's shown as Lots 2A-2C on Plan No. 522. Those lots form what's now 12 North Street, although the property was vacant in 2011.

15. Teller and Bell divorced in 2009 or 2010. In June 2014, Teller and Bell sold by deed to the Walstons 19 North Street. Prior to the June 2014 closing, Mr. Bell had his recreational vehicle parked in Area C east of the Driveway. It had been parked there since at least late April 2014. Bell removed the vehicle as a condition of his and Teller's sale of 19 North Street. (The Court doesn't accept the assertion that by May 2014, when Teller, Bell, and the Walstons executed a purchase and sale agreement for 19 North Street, the vehicle was parked within Area B, despite what Exhibit A to Trial Exhibit 53 suggests.)

16. All told, between January 1984 and June 2014, apart from occasional maintenance by wire crews, no one used Areas A, B, and C except for Teller, Bell, and their guests and invitees. The vehicles described in Findings ##9-12 and 15 blocked all use of Areas A, B, and C except when Teller or Bell chose. No one offered evidence at trial that Teller or Bell received permission from the owners of the fee beneath Area C to park vehicles or store boats there.

17. Upon their purchase of 19 North Street, the Walstons used Area C to reach 19 North Street's garage. They also parked their own cars and, occasionally, their own boat in Area C.

18. From 2015-2016, the Walstons cleared and regraded 19 North Street east of their house. They also cleared and regraded Area C, parts of Area B, and parts of the MS Way. (The Walstons did the latter work without asking for permission from the heirs of the MS Way's owner, Mr. Carroll, who died in 2015.[2]) They turned most of the cleared area (including the newly cleared portions of Areas C and B) into lawn, although the gravel base of Area C prevented the lawn from growing well there. They created a parking area to the west of their house and in the westerly end of Area C (the "Parking Area"). They also extended an underground sprinkler system into the grassed-in portions of Areas C and B. The Walstons left intact, however, a vegetated area near where Carroll had placed the Shrubs. It and the Shrubs continued to block vehicular access up the Disputed Way west of the Eastern Section.

19. Once the grass described in Finding #18 took hold, the Walstons used the new lawn primarily for recreation. They occasionally parked cars, however, on Area C east of the Parking Area and parts of Area B. Those cars, as well as cars parked within the Parking Area, blocked others from using Areas A, B, and C without the Walstons' permission. The Walstons also trimmed the vegetation along the south side of Area C, and part of Area B, in a manner that maintained the privacy of the adjacent lawns.

20. At some point after 2016, the Walstons erected a split-rail fence along the eastern side of the Parking Area. The fence prevented vehicles from travelling east on Area C past the

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[2] In 2020, by two separate deeds, Mr. Carroll's heirs conveyed to the Walstons their interests in the MS Way, along with its associated interest in Area A.

Parking Area unless one removed the rails (which the Walstons sometimes did, to allow parking on the lawn in Areas C and B or to reach their basement garage).

21. North12 introduced no evidence at trial that the Walstons obtained the permission of the owners of the fee beneath Areas B and C before conducting the activities described in Findings ##17-20 above.

22. In July 2017, Ms. Kolbe's successors in interest to 12 North Street conveyed that property by deed to Michael and Rebecca Hegarty. 12 North Street was still vacant. The area surrounding the Carroll Shrubs was still heavily vegetated, as was the area along the south side of Areas B and C. That vegetation thinned as one moved west. A row of multiple, large arborvitae occupied the Eastern Section parallel to the north side of 12 North Street.

23. By late February 2018, the Hegartys had cleared 12 North Street in anticipation of building a house there. That work included removing the arborvitae in the Eastern Section. But the Hegartys didn't enter Areas B or C at that time: in fact, they'd left a vegetative strip (the "Strip") along the south side of those Areas.

24. In March 2019, the Hegartys removed the Strip and cleared portions of Areas B and C, including areas in which the Walstons had planted lawn. The Hegartys then erected a temporary fence in the middle of the Way, parallel to the 19 North Street's record southern boundary line. Those activities were the first taken since January 1984 within Areas B and C by anyone other than Teller and Bell, the Walstons, or their guests or invitees.

25. In October 2019, the Hegartys removed the temporary fence described in Finding #24. But in March 2020, they installed a larger and longer stockade fence (the "Hegarty Fence"). The Fence began near the southeast corner of the MS Way, ran close to the southern terminus of the MS Way (within and along the north side of Area A), then continued close to the boundary of 19 North Street (along and somewhat within the north side of Areas B and C) for about 74 feet. The Fence then turned south, crossed the width of Area C, then ran along the south side of Area C. The Hegartys also landscaped and planted trees and other vegetation within the portions of Areas B and C they'd enclosed.

26. In November 2020, after the Walstons had filed this lawsuit, defendants/ counterclaim-plaintiffs James and Nadia Bunn, the owners of 1 North Street (a property that abuts the east side of the MS Way), erected a fence along the MS Way (the "Bunn Fence") and connected it to the Hegarty Fence.

27. In 2021, the Hegartys sold 12 North Street to North12. Defendant Mortgage Electronic Registration Systems, Inc., as nominee for Webster Bank, N.A. ("MERS"), holds a mortgage on 12 North Street.

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Trial of this case centered on the parties' rights and interests in, and potential encroachments upon, Areas A, B, and C. The Area A issues are the easiest to resolve: as a consequence of the Derelict Fee Statute, the Walstons acquired the fee to Area A when Mr. Carroll's heirs conveyed to the Walstons in 2020 the heirs' interests in the MS Way. The Walstons' acquisition of Area A moots the questions of (a) whether they or their predecessors in interest to 19 North Street, Teller and Bell, obtained the fee to Area A by adverse possession; (b) whether the Walstons have easement rights in Area A; and, if so, (c) whether those rights have been extinguished.

The only remaining Area A question is whether North12 has trespassed or is trespassing on it. To sustain an action for trespass, the Walstons must prove (1) they have actual possession of Area A and (2) North12 entered Area A voluntarily and without permission. See *New England Box Co.* v. *C&R Constr. Co.*, 313 Mass. 696, 707 (1943); *Edgarton* v. *H.P. Welch Co.*, 321 Mass. 603, 612-13 (1947). North12 owns the Hegarty Fence; while the Hegartys built it, North12 has maintained it, intentionally, where it was built. The section of the Fence that runs along the north side of Area A, severing it from the MS Way and the rest of 19 North Street, is on land the Walstons own. North12's continued maintenance of the Hegarty Fence in that location thus is a trespass against the Walstons.

The issues surrounding Areas B and C – the Disputed Way adjacent to 19 North Street plus the part of the Way that's immediately south of Area A – are more challenging than those concerning Area A. The Walstons lay claim to the fee in Areas B and C under the doctrine of adverse possession. To succeed, they must prove the usual four elements of such a claim, see *Totman* v. *Malloy*, 431 Mass. 143, 145 (2000): that (1) the Walstons or their predecessors in interest actually used Areas B and C for a continuous period of at least twenty years prior to June 5, 2020, the date they filed this action; (2) such use was open and notorious for that period; (3) such use also was exclusive for that period; and (4) the use was adverse to North12 and its predecessors in title. To establish the "continuity" element, use by the claimant must be continuous and uninterrupted for the full twenty-year period. See *Hewitt* v. *Peterson*, 253 Mass. 92, 94 (1925); see also *Mendonca* v. *Cities Serv. Oil Co.*, 354 Mass. 323, 326 (1968) (use by owner of record during statutory period breaks continuity of adverse claimant's possession). To be open and notorious, the use must "place the true owner on constructive notice of [the] use," *Lawrence* v. *Town of Concord*, 439 Mass. 416, 422 (2003), or "sufficiently pronounced so as to be made known, directly or indirectly, to the landowner if he or she maintained a reasonable degree of supervision over the property." *Boothroyd* v. *Bogartz*, 68 Mass. App. Ct. 40, 44 (2007).[3] To be exclusive, the claimant's possession of the disputed property must be to the exclusion of the true owner; exclusive use "must encompass a 'disseisin' of the record owner," which includes "exclusion not only of that owner but of all third persons to the extent that the owner would have excluded them." *Peck* v. *Bigelow*, 34 Mass. App. Ct. 551, 557 (1993) (holding that concurrent use of property prevented a finding of exclusive use and was fatal to the adverse possession claim). Finally, to establish "adversity," the Walstons must prove a "lack of consent from the true owner," in this instance, North12 or its predecessors in interest. *Totman*, 431 Mass. at 145.

The Walstons have obtained title by adverse possession to Area C but not to Area B. What distinguishes their claims to the two Areas is the extent of the proof of adverse use. Between 1984 and 2019, only Teller and Bell, the Walstons, and their guests and invitees used and occupied Area C. Those uses were open and unconcealed. While the uses were varied in their nature and extent, "[i]t is certain that 'continuous use' does not necessarily mean 'constant use.'" *Bodfish* v. *Bodfish*, 105 Mass. 317, 319 (1870). Moreover, "uninterrupted use" refers to the absence of interruption by the rightful owner of the fee, and not mere intermissions by the adverse user. See *id*.

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[3] Although *Boothroyd* involved a claim of prescriptive rights in a path, the requirement of open and notorious use is common to both claims for adverse possession and claims for prescriptive rights.

While Teller and Bell (and later the Walstons) had deeded rights of access in Area C, one of their chief activities in that Area between 1984 and 2019 was the parking and storage of vehicles. Easements granted for passage typically don't include the right to park. See *Delconte* v. *Salloum*, 336 Mass. 184, 190 (1957) (parking in a way isn't permitted where it would "interfere with the right of others to pass and repass over" the way); *Opinion of the Justices*, 297 Mass. 559, 564-565 (1937) (a right to pass over an easement or way doesn't include a right to park, but at most the right to make stops incidental to travel). Teller and Bell's parking, and later that of the Walstons, prevented the owners of Area C from using that Area and hence was adverse to them. See *Peck*, 34 Mass. App. Ct. at 556 (plaintiff's use of defendant's land "as a parking area for automobiles or boats" is adverse). Area C's owners nevertheless took no action to halt the parking, and North12 provided no proof that the owners ever granted permission for it either. The Walstons thus have taken the fee to Area C by adverse possession; the question of whether they continue to have easement rights in Area C is thus moot.

The same can't be said for Area B. The Walstons failed to prove that Teller and Bell made any continuous use of Area B, let alone uses (such as parking and storage of vehicles) that were inconsistent with Teller and Bell's easement rights. While the Court credits Mr. Walston's testimony that in 2014, he saw evidence that Teller, Bell, and their children used Area B to "store" (one might say "discard") various recreational and nautical items, the Walstons didn't prove when such activities began or how persistent they were. Such evidence can't support a finding of adverse possession.

The remaining questions are (1) has North12 trespassed on Area C and (2) do the Walstons continue to enjoy an easement over Area B. The answer to the first question is yes: the Hegarty Fence runs across Area C. It's just as much a trespass on that Area as it is on Area A. The answer to the second question, however, is no: Thomas Teller (and later Teller and Bell) abandoned that part of their easement over the Disputed Way. "In order to establish abandonment of easements . . . there must be acts by the owner of the dominant estate conclusively and unequivocally manifesting either a present intent to relinquish the easement or a purpose inconsistent with its further existence." *Dubinsky* v. *Cama*, 261 Mass. 47, 57 (1927). "Whether there has been an abandonment of an easement is a question of intention to be ascertained from the surrounding circumstances and the conduct of the parties." *107 Manor Ave., LLC* v. *Fontanella*, 74 Mass. App. Ct. 155, 158 (2009).

While Mr. Carroll didn't formally exercise his rights under the Thomas Teller Deed to substitute acceptable ways for the Disputed Way, Mr. Teller concluded that Carroll had done so: after all, Carroll had built the substitute ways and allowed the Tellers to use them. The Tellers thought Carroll had kept his end of the bargain (he didn't contend otherwise); being Carroll's friends, the Tellers lived up to what they thought was their promise to use the Disputed Way east of Area C no longer.[4] That the Tellers knew they'd agreed to stop using that part of the Way in exchange for Carroll's construction of an alternate route, and intended to keep that promise, distinguishes this case from those that hold that mere non-use of a granted easement is insufficient to prove abandonment.[5]

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[4] While North12 raised an argument like this one at summary judgment, the facts concerning the Teller family's intentions at the time Mr. Carroll built the connecting portions of South and Middle Streets and thereafter were disputed. Having heard both Tellers at trial, the Court finds they each intended as of the time Carroll built the ways to abandon the Disputed Way as a means of reaching anything east of Area C, notwithstanding the Tellers' occasional excursions into Area B.

The Court thus has resolved all of the Walstons' claims affecting defendants/ counterclaim-plaintiffs James Bunn and Nadia Bunn (victors in *Walston I*), North12, and MERS. That leaves the Walstons' claims against defaulted defendants Etown, LLC, Vineyard Oceans, LLC, Jason Kicza, and Desiree Kicza (collectively, the "Defaulted Defendants"). See *Walston I*, 30 LCR at 741 n.4. The Walstons' sixth amended complaint broadly states claims against the Defaulted Defendants concerning the entirety of the Disputed Way. It's unclear whether those claims survive *Walston I* and this decision. The Court thus ORDERS the Walstons to file by September 10, 2024, a memorandum suggesting what the Court should do next with their claims against the Defaulted Defendants as set forth in the sixth amended complaint.

SO ORDERED.

By the Court (Vhay, J.)

/s/ Michael D. Vhay

Attest: *Deborah J. Patterson*
Deborah J. Patterson, Recorder

Dated: August 30, 2024

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[5] See *Dubinsky*, 261 Mass. at 57; *Desotell* v. *Szczygiel*, 338 Mass. 153, 158-159 (1958) (defendant failed to show that plaintiffs intended to abandon their deeded easement, despite their not using or maintaining it "for many years"); *First Nat'l Bank of Boston* v. *Konner*, 373 Mass. 463, 466-467 (1977) (same); *Florian* v. *Cooper*, 89 Mass. App. Ct. 1112 (2016) (Rule 1:28 decision) (partial removal of driveway and conversion to other uses is not evidence of intent to abandon easement). See also *White* v. *Amiff Hous. Assocs., LP*, 16 LCR 550, 553 (2008) (dominant owner's mere acquiescence in servient owner's fences and non-use of easement insufficient to prove abandonment of easement, but could be evidence supporting a holding that the servient owner had terminated dominant owner's rights by prescription).

EXHIBIT A

EXHIBIT

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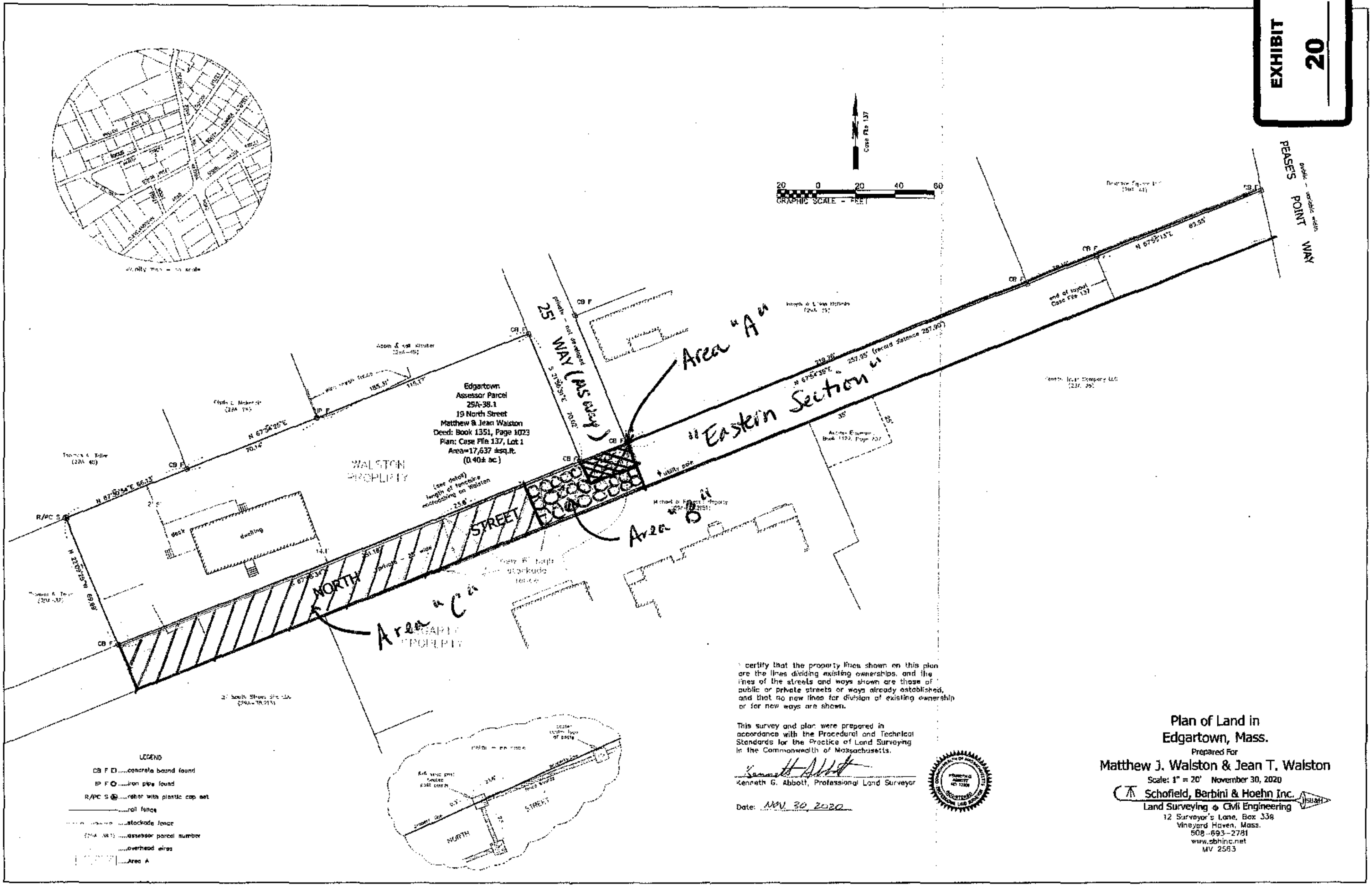
NORTH STREET
private – 35' wide
25' WAY (AS esmt)
private – not developed
S 21°56'51"E 70.02'
Area "A"
Area "B"
Area "C"
"Eastern Section"
PEASE'S POINT WAY
public – variable width
WALSTON PROPERTY
Edgartown
Assessor Parcel
29A-38.1
19 North Street
Matthew & Jean Walston
Deed: Book 1351, Page 1023
Plan: Case File 137, Lot 1
Area=17,637 ±sq.ft.
(0.40± ac)
(see detail)
length of fenceline
encroaching on Walston
23.6'
dwelling
deck
R/PC S
CB F
IP F
N 67°54'25"E
N 67°54'39"E
N 67°55'13"E
N 22°05'35"W 69.89'
218.26'
257.95' (record distance 257.90')
83.35'
185.31'
115.17'
70.14'
66.33'
utility pole
end of layout Case File 137
Case File 137
GRAPHIC SCALE – FEET
20
0
20
40
60
LEGEND
CB F ⊡.....concrete bound found
IP F ○.....iron pipe found
R/PC S ◉.....rebar with plastic cap set
.....rail fence
.....stockade fence
(29A 38.1).....assessor parcel number
.....overhead wires
.....Area A
NORTH
STREET

I certify that the property lines shown on this plan are the lines dividing existing ownerships, and the lines of the streets and ways shown are those of public or private streets or ways already established, and that no new lines for division of existing ownership or for new ways are shown.

This survey and plan were prepared in accordance with the Procedural and Technical Standards for the Practice of Land Surveying in the Commonwealth of Massachusetts.

Kenneth H Abbott

Kenneth G. Abbott, Professional Land Surveyor

Date: NOV 30, 2020

KENNETH G. ABBOTT
No. 32309

Plan of Land in
Edgartown, Mass.
Prepared For
Matthew J. Walston & Jean T. Walston
Scale: 1" = 20'   November 30, 2020
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