

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FAR-30985

APPEALS COURT NO. 2025-P-480

STEVEN J. GLADSTONE et al.,

Plaintiffs/Appellees,

v.

KATHLEEN M. DENIZARD,

Defendant/Appellant,

*ON APPEAL FROM A JUDGMENT OF THE LAND COURT*

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**APPLICATION FOR FURTHER APPELLATE REVIEW  
OF PLAINTIFF/APPELLEE JERI GILLING**

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Dated: July 31, 2026

## **I. Request For Further Appellate Review**

The Plaintiff/Appellee Jeri Gilling (“Gilling”) hereby requests leave to obtain further appellate review of the Memorandum and Order Pursuant to Rule 23.0 issued by the *Appeals Court in Steven J. Gladstone et al. v. Kathleen M. Denizard*, Case No. 25-P-480. In reversing the Land Court judgment, the Appeals Court wiped out an express easement for beach recreation benefiting a 1.5 acre parcel of land (the “319 Parcel”) without legal basis, thus delivering an unearned windfall to the Defendant/Appellant Kathleen Denizard (“Denizard”) whose beachfront was expressly burdened.

Traditionally “an express easement can be extinguished only by grant, release, abandonment, estoppel or prescription”, see Canton Highlands, Inc. v. Searle, 9 Mass. App. Ct. 48, 52-53 (1980), citing Emery v. Crowley, 371 Mass. 489, 495 (1976), as well as by merger where “a unity of title . . . come[s] into existence in the same person”. See York Realty v. Williams, 315 Mass. 287, 289 (1943). However, the Appeals Court invented a new category of easement extinguishment. Specifically, it invoked the doctrine of “overload” to extinguish the beach easement simply because Denizard complained that it would inconvenience her to resort to contempt proceedings to ensure that Gilling and other co-Plaintiffs/Appellees limited their beach use only for the benefit of parcels that had not lost such rights through merger. Such disregard of property rights

warrants further review. See generally Murphy v. Olsen, 63 Mass. App. Ct. 417, 423 (2005) (“recognizing the importance of beach rights”).

The Appeals Court’s error included the following doctrinal expansions in its decision: i) disregarding the Land Court judge’s careful analysis of this Court’s decision in Taylor v. Martha’s Vineyard Land Bank Comm’n, 475 Mass. 682 (2016) to rule that overload doctrine is to be applied only to true after-acquired property and not where, as here, it was intended at the time of the original 1899 grant of the beach easement that both sub-parcels that comprise the Gilling property have the easement (but one sub-parcel lost it through a 1909 merger rather than express release); ii) expanding overload doctrine beyond the right-of-way context and the remedy of limiting the end-destination of the dominant estate by applying it to a recreation easement and wholly extinguishing it, without any limiting principles; and iii) applying extinguishment-by-merger to the other sub-parcel in the first place, thus expanding merger doctrine by **not** requiring that 100% of the servient estate (i.e. the entire beach) be held in common ownership, contrary to the approach taken by the Restatement and persuasive jurisdictions such as California and New York, which this Court has yet to weigh in on.

## **II. Prior Proceedings**

Gilling and her co-Plaintiffs/Appellees filed a complaint in the Land Court on February 19, 2021. (R.A. I 21, 26). Denizard filed her answer and

counterclaim on March 21, 2021. (R.A. I 22, 195). On May 4, 2022, Gilling and her co-Plaintiffs/Appellees filed a motion for summary judgment. (R.A. I 23; R.A. II 42). On August 15, 2022, Denizard filed an opposition and cross-motion for summary judgment. (R.A. I 23; R.A. III 246). On May 30, 2024, all parties filed a joint statement of uncontested facts and supplemental appendix of exhibits in support of cross-motions for summary judgment. (R.A. I 24; R.A. IV 124, 134).

On January 27, 2025, the Land Court judge issued a decision and judgment. (R.A. I 24; Addendum P. 21, 37). Among other things, the Land Court judgment declared that Gilling held

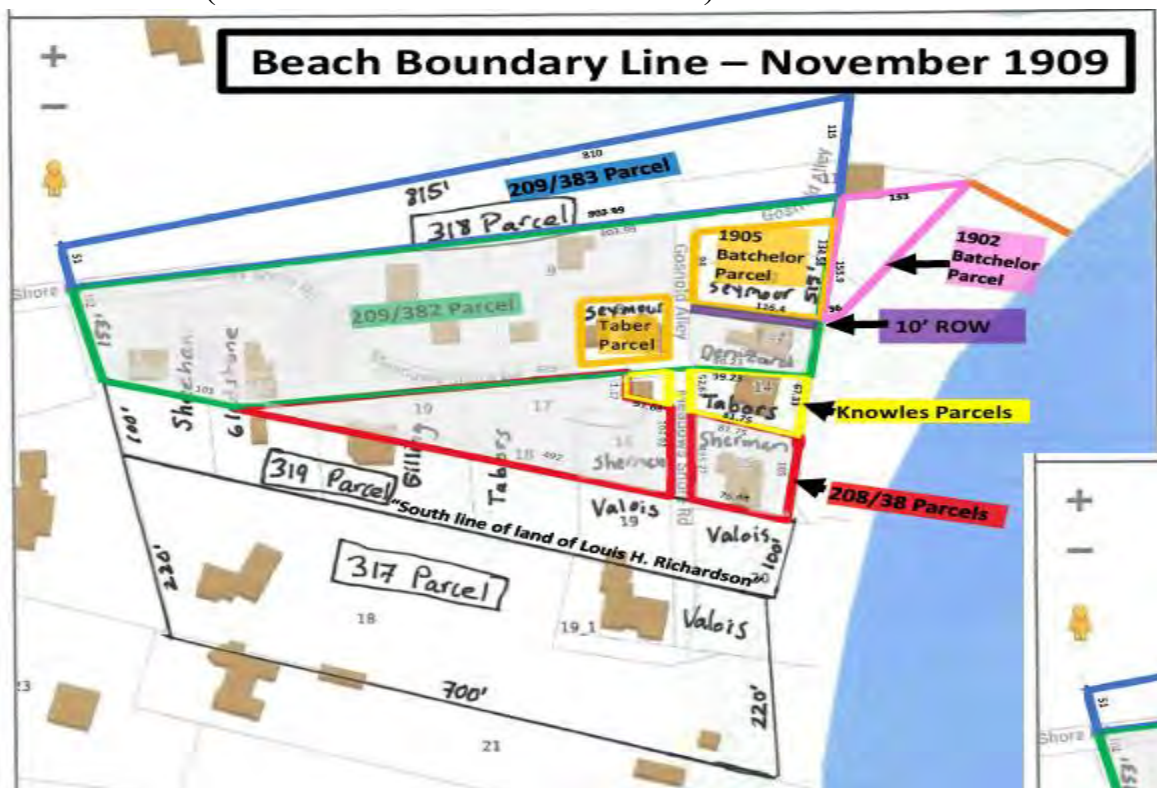
“an express easement to use ... the beachfront portion of the Denizard Property, for boating, bathing and fishing and for all customary beach uses incidental thereto, including without limitation sunbathing, sitting on blankets or chairs, picnicking, and playing beach games.”

(Addendum P. 58). On February 19, 2025 Denizard filed a notice of appeal. (R.A. I 25; R.A. IV 353). On June 15, 2026, the Appeals Court issued a Memorandum and Order Pursuant to Rule 23.0 affirming in part and reversing in part the judgment. (Addendum P. 61). Among other things, the Appeals Court reversed the Land Court judgment by eliminating Gilling and other co-Plaintiffs/Appellees’ beach recreation rights, restricting them instead to “pass and repass over the Denizard beach to reach other sections of the beach”, ruling that “[i]t would overload the easement, however, to allow . . . Gilling . . . to use the Denizard

Beach for all beach activities” because “the doctrine of overloading” caused the portion of the Gilling property derived from the 319 Parcel “to lose easement rights to the full use of the Denizard beach”, and “remanding the case to the Land Court to modify the scope of the easement”. (Addendum P. 79, n. 14).

### III. Facts Relevant to the Appeal

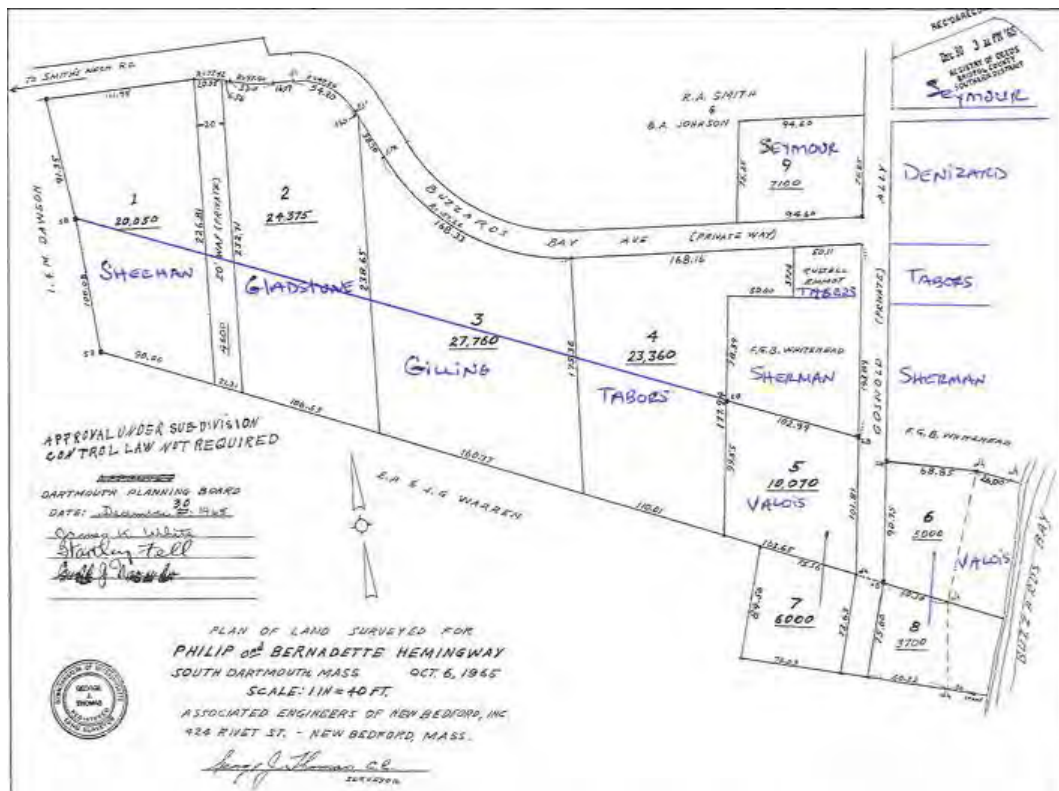
In 1899 a prior owner granted cognate beach recreation easements to the 319 Parcel and an abutting parcel to the north of it known as the “318 Parcel”. (R.A. IV 126, 184-95). A partial merger of title occurred in November of 1909 when the owner of portions of the 318 Parcel shown below in green and red acquired title to the portion of the beach below the orange line in the upper right corner of the below sketch (the “Southern Section of Beach”):



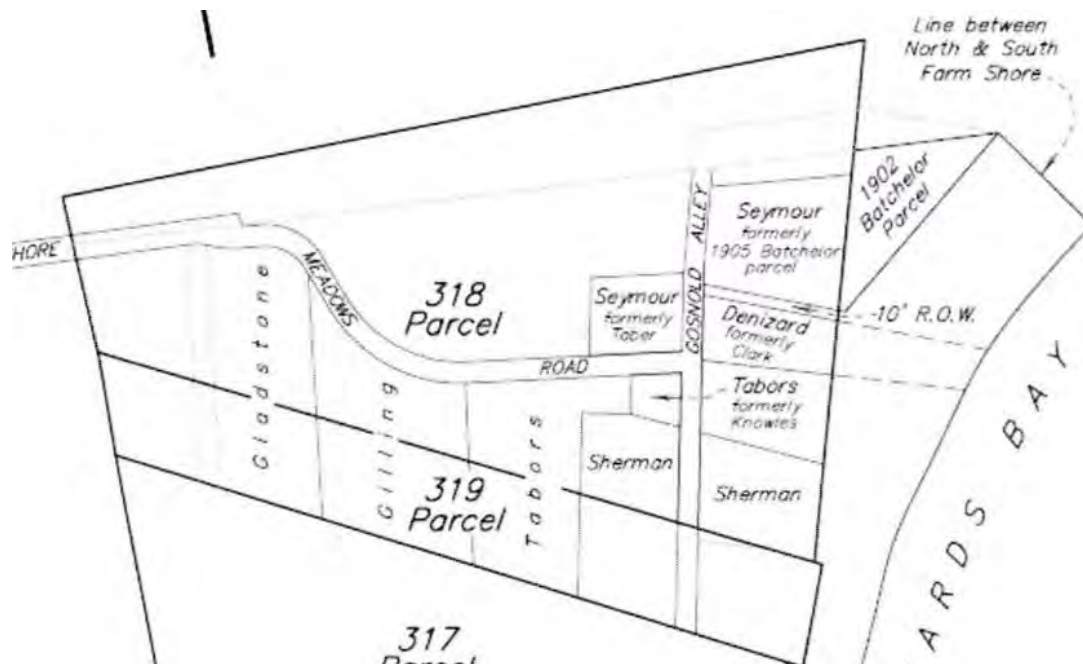
(R.A. IV 132, 274). The red and green portions of the 318 Parcel enjoyed beach recreation rights of record over the entirety of the beach (referred to in the 1899 conveyances as the “farm shore”), including both the Southern Section of Beach and the stretch of beach to the north that fell outside the above described common ownership (the “Northern Section of Beach”). (Appeals Court Decision P. 4-5 [Addendum P. 64-65]). Denizard’s land is one of the lots highlighted in green, and the 1914 deed creating her lot extended the lot lines to the sea (thus including the adjacent beachfront). (R.A. IV 132, 293-94). In short, as of November 1909, Denizard contends that a *partial* extinguishment of the beach easement occurred only as between: i) the portions of the 318 Parcel shown above in red and green, and ii) her beachfront in the Southern Section of Beach.

The Gilling property is an inland parcel created under a 1965 subdivision plan that combined portions of the 318 and 319 Parcels as shown below (with an overlay of the parties’ names):

***(Cont’d on Next Page)***



(R.A. IV 17). The approximate location of the division between the 318 and 319  
Parcels is also shown on the Land Court's decision sketch as follows:



(Addendum P. 60).

The 319 Parcel, which was deeded appurtenant beach recreation rights over 100% of the beach, including both the Southern and Northern Sections of Beach, never fell into common ownership with the Denizard parcel or its beachfront, and no extinguishment-by-merger was asserted as to the 319 Parcel. (R.A. IV 126).

The 1899 deed creating the 319 Parcel (and granting it appurtenant beach recreation rights over the full beach) describes it as a lot measuring 700' by 100', i.e. 70,000 square feet or approximately 1.5 acres. (R.A. IV 126, 191-95).

#### **IV. Points With Respect to which Further Appellate Review is Sought**

Whether the doctrine of easement extinguishment-by-merger even applies where less than 100% of the servient estate comes into common ownership with portions of the original dominant estate.

Whether, as the Land Court judge ruled, overload doctrine is only meant to apply to true after-acquired land and not situations where both parcels were originally intended at the time of easement granting to have the full benefits of the easement (but one parcel lost them through merger as opposed to express release).

Whether overload doctrine can wholly eliminate a recreation easement as the remedy simply because the record dominant estate owner expands its lot lines to include land subject to an extinguishment-by-merger claim.

## V. Reasons Why Further Appellate Review is Sought

### *Extinguishment by Merger*

The general rule for extinguishment by merger is that it “takes place only when all the benefits and burdens of the servitude come into a single ownership” and “[s]o long as there are any outstanding interests in the property or estate benefited or burdened by the servitude, merger does not take place.” See Restatement (Third) of Property (Servitudes) § 7.5, Comments c and d (2000; Rev. October 2024)(emphasis added). In some jurisdictions, unity of title requires consolidation of the entire dominant estate in a single owner based on reasoning that unless all dominant estate holders enter common ownership, the servient estate never *earned* the right to use the land free and clear of the servitude. See, e.g., Hall v. Pippin, 984 S.W.2d 617, 622 (Tenn. Ct. App. 1998)(“courts will normally not apply the doctrine of merger in situations where third parties have independent interests in an easement that would, apart from the merger of interests, qualify the owner’s unlimited use of the fee estate”), citing Heritage Communities of N.C., Inc. v. Powers, Inc., 49 N.C. App. 656, 272 S.E.2d 399, 401 (1980).

However, in Cheever v. Graves, 32 Mass. App. Ct. 601 (1992), the Appeals Court took a different approach and held that common ownership “need not extend to the whole of the original dominant estate”. See id. at 606, citing 2 American Law of Property § 8.92 (1952 & 1977 Supp.). Here, the Appeals Court expanded

Cheever to not require full ownership of the *servient* estate either (namely, the entire stretch of beach), which is fundamentally different than excusing full ownership of the dominant estate. In Cheever, 100% of the easement was located within a single lot held in common ownership with only a portion of the benefited lots that originally comprised the dominant estate. See id. at 606-7. In this case, the beach runs across a multi-owner stretch of interconnected land of which Denizard's beachfront is just a small pocket, and only the Southern Section of Beach was owned in common with portions of the 318 Parcel. Multiple jurisdictions agree that easement extinguishment by merger should not occur in such circumstances, and this case is an opportunity for this Court to weigh in.

In Tract Development Services, Inc. v. Kepler, 199 Cal. App. 3d 1374 (1988), the California Fourth District Court of Appeal held that notwithstanding that two subdivision blocks on opposite sides of a paper street were once held in common ownership, no extinguishment by merger occurred as to the section of right of way easement in the street adjacent to each block. See id. at 1379-84. The paper street, which continued through other parts of the subdivision that were not subject to the merger claim, was part of "the entire network of streets set out in the subdivision map". See id. at 1384. As such, the Court concluded that where "each owner enjoys an easement which is not simply an easement over an abutting owner's land, but which is an easement over the land of non-abutting owners; the

whole of the subdivision is in essence the servient tenement to each lot” and that “there can be no merger unless there is common ownership of the entire subdivision.” See id. Similarly, in Castle Associates v. Schwartz, 407 N.Y.S. 2d 717 (1978), the Supreme Court of New York Appellate Division ruled that where an access easement passed through two lots between the dominant estate and public roads, and only one of the two lots entered common ownership with the dominant estate, no extinguishment by merger occurred where “a portion of the easement was never in the hands of the owner of the dominant estate.” See id. at 720-21. In short, persuasive authority holds that no extinguishment by merger should occur absent common ownership of 100% of the beach that was subject to an interrelated recreation easement for the benefit of both the 318 and the 319 Parcels, which if applied to the instant case would not even require this Court to reach the issue of overload.

### ***Overload Doctrine***

The Appeals Court created a new rule for easement extinguishment that goes something like this:

*Blackacre has an express easement for recreation over a beach. Whiteacre does not have the easement. Blackacre and Whiteacre merge into one parcel. The entire combined parcel loses beach recreation rights.*

The Appeals Court announced this new rule with no limiting principles whatsoever, such as any consideration of the size of the lots or whether it matters

that the 318 Parcel also once held the same express easement that was extinguished under an application of merger doctrine that the parties in 1909 could not have anticipated given that Cheever would not be decided for another 83 years.

Denizard made much of the “bright line rule” adopted by this Court in Taylor. However, the Land Court judge carefully considered Taylor and reasoned that “[t]he bright line rule against overloading by expansion to land not originally benefitted by the easement applies only where there is an expansion” into “after acquired” land, but “was not intended to deprive a dominant estate of the benefits of a granted easement when part of the land had been merged with the servient estate.” (Addendum P. 48). As the Land Court judge correctly observed, this Court recognized such distinction in the Taylor decision when it distinguished cases from Alabama and Connecticut on the ground that those decisions concerned easements for which the parties at the time the easement was created intended for both lots to benefit, as was the case when both the 318 and 319 Parcel were granted identical beach recreation rights. See 475 Mass. at 689-90. The Appeals Court offered no reason why it overruled the Land Court judge and the underlying reasoning of this Court in Taylor when it reversed the Land Court judgment. Instead, it simply held in conclusory fashion at Footnote 14 of its decision that “the doctrine of overloading” caused “the property deriving from [the 319 Parcel] to lose easement rights.”

Even if the Appeals Court was correct that overload applies, it also did not consider whether a less extreme remedy, such as a limitation on volume of easement usage, would be more appropriate. See generally Restatement (Third) of Property (Servitudes) § 4.11, comments b and c (2000 & October 2024 Supp)(in applying relief from easement overload the court has “wide discretion in selecting remedies appropriate to the case” and “should take account of the purposes of the servitude arrangement and its continued utility as well as the relative equities of the parties”). After all, the extinguishment applies not just to the Gilling parcel but the full 1.5 acres of the 319 Parcel. The owners of the Gladstone and Tabor parcels shown in the above sketches were co-Plaintiffs/Appellees subjected to the same extinguishment, and the remaining portions of the 319 Parcel are likewise combined with either a portion of the 318 Parcel (the Sheehan parcel shown above) or the so-called “317 Parcel” (the Valois parcels shown above), whose easement rights were limited to the adjacent beach and did not extend north to the Denizard beach under the 1899 deed creating the 317 Parcel. (R.A. IV 125-26, 179-83). Relieving Denizard altogether of an express easement appurtenant to a 1.5 acre parcel without a free-standing basis to do so under any recognized theory of easement extinguishment confers an excessive unearned benefit on her.

To date, this Court only applied overload doctrine to right-of-way or access easements and limited the remedy to a restriction on the end-destination for

easement use rather than a wholesale extinguishment. See Taylor, 475 Mass. at 690 (two easements burdening the plaintiff's land, which the defendant sought to connect into a hiking loop trail, must be maintained as unconnected trails because not every lot along the proposed loop trail benefited from both easements; Murphy v. Mart Realty of Brockton, Inc., 348 Mass. 675, 679-81 (1965) (defendant enjoined from passing across an easement only to the extent of access to and from a store and parking lot constructed on after-acquired land). Denizard never offered a reason for the extreme expansion of remedy<sup>1</sup> that she received other than to say that she should not have to be burdened with attempting to ascertain what part of their land Gilling used in connection with beach visits. Since the beach easement is not an access easement, and there is no requirement that Gilling travel directly to and from her house every time she accesses the beach, it is misleading for Denizard to compare the remedy in Murphy and Taylor to her situation.

Some other limitation such as number of seasonal uses or number of persons visiting would be a more appropriate remedy if overload is to apply. Moreover, Gilling has no intent to disobey the terms of the final judgment that enters, and Denizard's hypothetical that Gilling may fly in the face of a court order and risk

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<sup>1</sup> At pages 30-31 of her appellate brief, Denizard held out additional Land Court cases as examples of an extinguishment occurring through overload. However, as explained at pages 33-36 of the appellee brief, in actuality those cases also limited the remedy to a restriction on end-destination.

the severe sanctions that come with doing so is not a valid basis to give Denizard an overly generous remedy in the first instance. In short, the Appeals Court engaged in an overly broad stripping away of record property rights that warrants further review.

### ***Implications of the Appeals Court's Ruling***

The Appeals Court not only expanded merger and overload doctrines, but it also applied them in lockstep to create a new basis for easement extinguishment that this Court never before recognized. This is a substantial issue that this Court should weigh in on.

If left unchecked, the Appeals Court's ruling opens the door for parties to mine the back title for moments of common ownership between lot owners sharing easement rights over a large interconnected servient estate (such as a subdivision road or a beach), carve out isolated pockets of the servient estate to extinguish, and then spread the extinguishment further through overload doctrine any time lot lines were reconfigured in the back title. While Denizard was quick to dismiss such hypotheticals by arguing that property owners engaging in innocuous lot line adjustments with their neighbors should obtain the consent of relevant servient estate owners, that presumes that prior owners in the back title could have possibly anticipated the new and unprecedented expansion of overload application that occurred here.

Indeed, by applying overload to the non-right-of-way context as was the case here, dominant estate owners could also be exposed to a loss of easement rights not just from lot line adjustments but also from purchasing secondary residences because (according to Denizard) it would be unfair to require her to monitor whether they exercised beach recreation rights in connection with their use of the record dominant estate (which is non-adjacent to her land) or the second residence located somewhere else. Given the common ownership of second homes in beach communities in the Commonwealth, this could have wide implications if the decision stands.

## **VI. Conclusion**

The Land Court judge issued a thorough and thoughtful analysis that included a careful examination of this Court's decision in Taylor, concluding that it did not apply where both parcels were originally intended to have the right and it was never expressly released. The Appeals Court set aside his analysis with a conclusory footnote that simply stated that Gilling and other Plaintiffs/Appellees lost their beach recreation easement rights as a result of overload.

As the Land Court judge observed, the availability of private beachfront land in the Commonwealth inevitably leads to beachfront owners engaging in litigated campaigns to limit such use by others. The Appeals Court's decision added new tools to the arsenal of such beachfront owners that were previously unrecognized

and that are proper for this Court to weigh in on both as a matter of upholding property rights and providing clearer guidance to the lower courts.

Respectfully submitted,

Plaintiff/Appellee

Jeri Gilling,

By her attorney,



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Dated: July 31, 2026

**CERTIFICATION PURSUANT TO MASS. R. APP. P. 27.1(b)**

I, Giles L. Krill, counsel for Gilling, hereby swear and certify that the foregoing complies with the rules of court that pertain to the filing of further appellate review applications, including but not limited to Mass. R. App. P. 20(a) and 27.1(b), such compliance having been confirmed by the formatting and word count tools of MS Word version 2606 as containing 1997 non-excluded words in 14 point Times New Roman proportionally spaced font within the statement why further appellate review is appropriate (including the conclusion).



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Giles L. Krill

### **CERTIFICATE OF SERVICE**

I, Giles L. Krill, counsel for Gilling, hereby swear and certify that on the above date I served the within document on the Defendant/Appellant's counsel of record and all other counsel of record via the Tyler e-filing system.



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Giles L. Krill

## **ADDENDUM**

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

BRISTOL, ss.

MISCELLANEOUS CASE  
No. 21 MISC 000082 (HPS)

STEVEN J. GLADSTONE, KIM DAIGLE  
GLADSTONE, JERI L. GILLING, JOHN  
SEYMOUR, MARY ELISABETH SWERZ  
and KINNAIRD HOWLAND, as TRUSTEES  
OF THE SHERMAN FAMILY REALTY  
TRUST, RICHARD D. TABORS and  
PATTON O. TABORS, as TRUSTEES OF  
THE TQUAD REALTY TRUST,

*Plaintiffs,*

v.

KATHLEEN DENIZARD,

*Defendant.*

**DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

In Massachusetts, beachfront land can be owned privately, subject only to the limited rights of public access afforded by the Colonial Ordinance of 1641-1647, which provides that owners of oceanfront property own land in fee to the low water mark, subject to the easement of the public over the portion of land between the high and low water mark “for the purposes of navigation and free fishing and fowling, and of passing freely over and through the water without any use of the land underneath, wherever the tide ebbs and flows.”<sup>1</sup> The desirability of beach access combined with the rights of beachfront owners to limit access either pursuant to the

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<sup>1</sup> See *Butler v. Attorney Gen.*, 195 Mass. 79, 83-84 (1907).

Colonial Ordinance or private easement agreements, inevitably has led in Massachusetts to frequent, bitter and lengthy court battles between beachfront owners and those who own land just inland of a beach.<sup>2</sup>

The present case is typical of the genre. Kathleen Denizard owns a beachfront house on Buzzards Bay in Dartmouth, including the fee to the low-water mark, subject to the rights of others pursuant to the Colonial Ordinance, and also subject to disputed easement rights of inland owners whose properties originate from a common predecessor in title. The inland owner plaintiffs claim easement rights to the use of the beach in front of Ms. Denizard's property; Ms. Denizard argues that those rights have been extinguished by the doctrine of merger as a result of a brief period beginning in 1909 when most of the beachfront and much of the inland property that had the benefit of beach rights came into common ownership.

A hearing was held before me on the parties' cross-motions for summary judgment on December 15, 2022, following which, after discussion with the court, the parties agreed to file an agreed statement of facts. The parties filed a "Joint Statement of Uncontested Facts" and a supplemental appendix of agreed exhibits on May 30, 2024. On September 5, 2024, the parties re-argued the cross-motions for summary judgment before me, based on the newly filed statement of agreed facts and the supplemental appendix. Following the re-hearing I took the matter under advisement. For the reasons that follow, the plaintiffs' motion for summary judgment will be ALLOWED and the defendant's motion for summary judgment will be DENIED.

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<sup>2</sup> Just a few examples: *Hickey v. Pathways Ass'n, Inc.*, 472 Mass. 735 (2015); *White v. Hartigan*, 464 Mass. 400 (2013) and its progeny, *Barnett v. Myerow*, 95 Mass. App. Ct. 730 (2019); *Coon, III, Trustee of Rexhame Terrace Land Trust v. McCabe*, 22 LCR 622 (Land Court 2014); and *Kelso v. Baker*, 27 LCR 593 (Land Court 2019).

## FACTS

The following material facts are found in the record or have been judicially noticed for purposes of Mass. R. Civ. P. 56, and are undisputed for the purposes of the pending motions for summary judgment:

1. Plaintiffs Steven Gladstone and Kim Daigle Gladstone (“the Gladstones”) reside at and own, as husband and wife, tenants by the entirety, the property at 11 Meadows Shore Road in the town of Dartmouth (“the Gladstone Property”) by virtue of a deed recorded on September 28, 2015.<sup>3</sup>
2. Plaintiff Jeri L. Gilling (“Gilling”) owns property at 9 Meadows Shore Road in Dartmouth (“the Gilling Property”) by virtue of a deed recorded October 6, 2017.<sup>4</sup>
3. Plaintiffs John Seymour and Lynn Seymour (“the Seymours”) reside at and own, as husband and wife, tenants by the entirety, the property at 14 Meadows Shore Road in Dartmouth (“14 Meadows Shore”) and the property identified on the Dartmouth Assessors Map as Lot 12 on Map 90 (“Seymour Lot 12”) (collectively, “the Seymour Property”) by virtue of deeds dated May 24, 2004, and November 23, 2013, respectively.<sup>5</sup>
4. Plaintiffs Mary Swerz and Kinnaird Howland own, as Trustees of the Sherman Family Realty Trust (“the Sherman Trust”) the property at 4 Meadows Shore Road in Dartmouth and the property shown on Map 90, Lot 16 of the Dartmouth Assessors Map (collectively, “the Sherman Property”) by virtue of a deed dated September 27, 2007.<sup>6</sup>

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<sup>3</sup> Parties’ Joint Statement of Uncontested Facts (“PJSF”) ¶ 1; Bristol South District Registry of Deeds (“Registry”), Book 11486, Page 322 (Supplemental Appendix (“SA”) 1).

<sup>4</sup> PJSF ¶ 2; Registry, Book 12230, Page 262 (SA 2).

<sup>5</sup> PJSF ¶ 3; Registry, Book 7010, Page 114; Book 10959, Page 299 (SA 3,4).

<sup>6</sup> PJSF ¶ 4; Registry, Book 8808, Page 19 (SA 5).

5. Plaintiffs Richard Tabors<sup>7</sup> and Patton Tabors (“the Tabors”) own, as Trustees of the TQUAD Realty Trust (“the Tabors Trust”), property located at 6 Meadows Shore Road in Dartmouth by virtue of a deed dated August 17, 1995. Richard Tabors also individually owns property located at Dartmouth Assessors Map 90, Lots 17 and 18, by virtue of a deed dated November 9, 2004 (collectively, the “Tabors Properties”).<sup>8</sup>
6. The defendant, Kathleen Denizard (“Denizard” or “the defendant”), owns property at 8 Meadows Shore Road in Dartmouth (“Denizard Property”) by virtue of a deed of distribution from the estate of her husband, Guy Denizard, dated August 4, 2015.<sup>9</sup>

*Relevant Chains of Title*

7. All of the parties’ properties were at one time part of a large tract of land conveyed by William Butler to Emily Sweet in July, 1885 (“1885 Tract”). The 1885 Tract was bounded by Smith Neck Road to the west and by the sea (Buzzards Bay) to the east.<sup>10</sup>
8. Four years later, Emily Sweet carved out and conveyed three separate parcels from the 1885 Tract. By deed dated April 29, 1889, Sweet conveyed a 3 ¾ acre parcel to Henry Dennis and Foster Dennis (“the 317 Parcel”). By deed dated December 14, 1889, Sweet conveyed a smaller parcel described as “part of the homestead farm of said grantor” to Henry Dennis, Ephraim Dennis, and Foster Dennis (“the 318 Parcel”). Also by deeds dated December 14, 1889, Sweet conveyed both a 1 ½ acre parcel and an abutting 15’ by 100’ parcel to Louis

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<sup>7</sup> Note that the plaintiffs Richard and Patton have the last name “Tabors” and the individuals Walter and Maude have the last name “Taber.” Richard and Patton Tabors are plaintiffs in the present case while Walter and Maude Taber, who are mentioned in a below section, are predecessors in interest to a property now held by the Seymours. These parties are unrelated for the purposes of this decision.

<sup>8</sup> PJSF ¶¶ 5–6; Registry, Book 4580, Page 19; Book 7291, Page 326 (SA 6,7).

<sup>9</sup> PJSF ¶ 7; Registry, Book 11446, 207 (SA 8).

<sup>10</sup> PJSF ¶ 9; Registry, Book 113, Page 346 (SA 11).

Richardson (collectively “the 319 parcel”). While the 317, 318, and 319 parcels were all conveyed in 1889, the deeds were not recorded until April, 1891.<sup>11</sup>

9. After conveyance of the 317, 318 and 319 parcels, Emily Sweet retained only the beachfront land east of the three parcels, referred to as the “Farm Shore.” The Farm Shore was described as being bounded on the west by the 317, 318, and 319 parcels and on the east by the sea (Buzzards Bay).

#### **The 317 Parcel**

10. When conveyed by Emily Sweet to Henry Dennis and Foster Dennis in 1889, the 317 Parcel was described in the deed as being bounded on the east by a stone wall. The 317 Parcel is depicted on the Decision Sketch, attached hereto. The 317 Parcel is not in the chain of title of any of the plaintiffs or the defendant. Accordingly, subsequent conveyances of this parcel are irrelevant to consideration of the present motions.<sup>12</sup>

#### **The 318 Parcel**

11. When conveyed by Emily Sweet to Henry Dennis, Ephraim Dennis, and Foster Dennis in 1889, the 318 Parcel was described as being bounded on the south “by the land of Lewis<sup>13</sup> Richardson” (the 319 Parcel) and “on the north by a stone wall” beginning 153 feet north of the northwest corner of the 319 Parcel and extending 815 feet easterly thereof. The 318 Parcel is bounded on the west by the land then held by the grantor (Emily Sweet) and on the east by a line running 515 feet north from the northeast corner of the land of Lewis

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<sup>11</sup> PJSF ¶ 10; Registry, Book 143, Page 317 (SA 13); PJSF ¶ 14; Registry, Book 143, Page 318 (SA 15); PJSF ¶ 18; Registry, Book 143, Page 319 (SA 16); PJSF ¶ 23.

<sup>12</sup> PJSF ¶¶ 11–12 (SA 46) (aside from the orange beach boundary line depicted in SA 46, SA 27 and SA 46 are identical and SA 46 will henceforth be cited for the sake of consistency).

<sup>13</sup> “Lewis” Richardson and “Louis” Richardson are the same person for the purposes of this decision, the alternative spellings appear in different conveyances but reference the same person.

Richardson. The 318 Parcel is depicted and labeled on the Decision Sketch. Each of the plaintiffs and the defendant own property either entirely or partially within the 318 Parcel.<sup>14</sup>

12. The conveyance by Emily Sweet of the 318 Parcel included “the right to said grantees, their heirs and assigns to use the farm shore for boating, bathing, and fishing purposes” and “[r]eserving to myself, my heirs and assigns the right of way through said land above-described as now used by me, and also to deposit seaweed and sand on said land near the east line.”<sup>15</sup>
13. By deed dated September 19, 1893, Foster Dennis conveyed his one-third interest in the 318 Parcel to Catherine Dennis, who subsequently conveyed that same one-third interest to Henry Dennis by deed dated January 15, 1894, resulting in Henry Dennis owning an undivided two-thirds interest in the 318 Parcel, with the remaining one-third being held by Ephraim Dennis.<sup>16</sup>
14. Between September, 1899 and July, 1909, smaller portions of the 318 Parcel and the land lying directly east of the 318 Parcel were conveyed to various parties, with the resulting property lines depicted on the Decision Sketch. The various conveyances of parts of the 318 Parcel are as follows.<sup>17</sup>
15. By deed dated September 7, 1899, Ephraim Dennis conveyed to Henry Dennis his one-third interest in two parcels of land located in the southeasterly portion of the 318 Parcel. The two parcels consisted of the current Sherman Properties, as well as the northern sections of the Gilling Property and the adjacent Tabors Property. The conveyance also included a small, triangular section of the current Gladstone Property. These properties are depicted on the

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<sup>14</sup> PJSF ¶¶ 14–17 (SA 14, 15, 46).

<sup>15</sup> PJSF ¶ 16 (SA 15).

<sup>16</sup> PJSF ¶¶ 25–26; Registry, Book 159, 165 (SA 22, 24).

<sup>17</sup> PJSF ¶ 28 (SA 46).

Decision Sketch. With this conveyance, the 318 sections of the Gladstone, Tabors, and Gilling Properties, as well as the entire Sherman Property, became exclusively held in fee by Henry Dennis.<sup>18</sup>

16. Also by deed dated September 7, 1899, Henry and Ephraim Dennis conveyed two parcels of land within the 318 Parcel, which had been jointly held, to Walter Knowles, later becoming one of the lots making up the Tabors Properties. The Knowles parcel is labeled as “Tabors formerly Knowles” on the Decision Sketch. The Knowles deed conveyed with the parcel “the privilege of using the beach in front of the lot, in common with others for boating, bathing, and fishing.”<sup>19</sup>
17. By deed dated October 10, 1899, Ephraim Dennis conveyed his one-third interest in the remaining two acres of the 318 Parcel to Henry Dennis.<sup>20</sup> This conveyance resulted in the entirety of the 318 Parcel being held in fee by Henry Dennis, excluding only the parcel previously conveyed to Walter Knowles.<sup>21</sup>
18. By deed dated December 28, 1905, Henry Dennis conveyed to George Batchelor a portion of the 318 Parcel lying north of the 10-foot right of way, depicted on the Decision Sketch (“the 1905 Batchelor Parcel”). The 1905 Batchelor transfer was conveyed “with the right to use the right of way Ten (10) feet wide. . . which I [Henry Dennis] agree to keep open.” The 1905 Batchelor Parcel, which borders the 10-foot right of way, is now part of the Seymour Property, as labeled on the Decision Sketch. Additionally, “a portion of the 1902 Batchelor

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<sup>18</sup> PJSF ¶ 29a (SA 25, 26, 46).

<sup>19</sup> PJSF ¶ 29b (SA 28–30, 46).

<sup>20</sup> PJSF ¶ 29c (SA 31–32, 46).

<sup>21</sup> The conveyance also excluded the narrow, northern strip of the 318 Parcel (approximately 51’ by 810’), which had been previously held jointly by Henry Dennis and Ephraim Dennis. Also on October 10, 1899, Henry Dennis conveyed to Ephraim Dennis his two-thirds interest in the same northern narrow strip, establishing the northern parcel as being exclusively held in fee by Ephraim Dennis. The section is outlined in blue in SA 46 but is irrelevant to the present analysis and is therefore excluded moving forward (PJSF ¶ 29d (SA 33–34, 46)).

Parcel [described in ¶ 27] now comprises part of the Seymour waterfront property,” but the majority of the Seymour Property is made up of the 1905 Batchelor Parcel.<sup>22</sup>

19. By deed dated July 26, 1909, Henry Dennis conveyed to Walter and Maude Taber<sup>23</sup> a parcel which is presently owned by the Seymours, depicted on the Decision Sketch as “Seymour, formerly Taber.” This parcel was conveyed “together with the use of the shore lying North of the South line of land of Louis H. Richardson [the 319 Parcel], for boating bathing and fishing” and “also the right to the shore, as now laid out. . . .”<sup>24</sup>
20. In November, 1910, Henry Dennis conveyed to Catherine Dennis and Lucy Dudley all his title and interest in the remaining 3 ½ acres of the 318 Parcel, including its (previously, separately acquired<sup>25</sup>) adjacent beachfront to the low water mark.<sup>26</sup>
21. In April, 1914, Lucy Dudley (who recites in her deed that she gained full title through inheritance from her sister, Catherine Dennis) conveyed the current Denizard Property, originally part of the 318 Parcel, to Fredrick Clark. The Parcel is depicted as “Denizard, formerly Clark” on the Decision Sketch. The parcel was said to be bounded by “the sea” and was conveyed to the mean low water mark. The deed stated the land was “free from all incumbrances.”<sup>27</sup>

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<sup>22</sup> PJSF ¶¶ 29f, 29e (SA 30, 39–41, 46) (¶ 29e states that a portion of the 1902 Batchelor Parcel now comprises part of the Seymour waterfront property. Although the specific portion is not disclosed or depicted on the map, this is significant because the 1902 Batchelor Parcel carries with it rights to boating, bathing, and fishing in the Farm Shore that were not explicitly granted in the 1905 Batchelor deed (likely because both parcels were under the ownership of the same person, George Batchelor, who would have already been granted rights to the Farm Shore in the 1902 conveyance.)

<sup>23</sup> Walter and Maude *Taber* are predecessors in title to one of the current Seymour Properties, not to be confused with plaintiffs Richard and Patton *Tabors*.

<sup>24</sup> PJSF ¶ 29g (SA 30, 42–43, 46).

<sup>25</sup> *Infra* § 31

<sup>26</sup> PJSF ¶ 37 (SA 51–52).

<sup>27</sup> PJSF ¶ 38 (SA 53–54); The Clark to Denizard deed does not appear in the record.

22. The parties agree that none of the deeds in the chain of title for the current Denizard Property contain reference to any deeded easement rights of others to use the beach or the Denizard Property.

### **319 Parcel**

23. By deed dated December 14, 1889, Sweet conveyed both a 1 ½ acre parcel and an abutting 15' by 100' parcel to Louis Richardson (collectively "the 319 Parcel") which is shown on the Decision Sketch.<sup>28</sup>
24. The 319 Parcel was conveyed together with "the right to said grantees, their heirs & assigns to use the farm shore for boating, bathing & fishing purposes and the right to erect a bathing house on the beach." The 319 Parcel never entered into common ownership with any part of the Denizard Property, but several of the plaintiffs' properties are partially within the 319 Parcel, including the Gladstone, the Tabors, and the Gilling Properties.<sup>29</sup>
25. With the exception of the Seymour and Sherman Properties, the non-beach portions of all remaining plaintiffs' properties currently lie partially within the 318 Parcel and partially within the 319 Parcel.<sup>30</sup>

### **Beachfront Property and the Remaining Parcels**

26. On March 28, 1891, Emily Sweet conveyed the entire beachfront area to the east of the 317, 318, and 319 Parcels (hereinafter "the Farm Shore") to Ephraim Dennis. This land was bounded on the north by land formerly owned by John and Gideon Howland and on the south by land owned by the heirs of Thomas Smith. The Farm Shore parcel was bounded on the west by the eastern boundaries of the 317, 318 and 319 Parcels and was bounded to the east

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<sup>28</sup> PJSF ¶ 18 (SA 16-17, 46).

<sup>29</sup> PJSF ¶ 20 (SA 16-17, 46).

<sup>30</sup> PJSF ¶ 22 (SA 18, 46).

by the sea.<sup>31</sup> The Farm Shore is depicted on the Decision Sketch as bordering Buzzards Bay to the east.

27. By deed dated June 19, 1902, Ephraim Dennis conveyed to George Batchelor a parcel of land near the northwest corner of the Farm Shore, labeled "the 1902 Batchelor Parcel" on the Decision Sketch. The property lay east of the 318 Parcel and was conveyed together with "the right of boating, bathing, and fishing on the farm shore." The 1902 Batchelor Parcel now comprises part of the Seymour waterfront property.<sup>32</sup>
28. By deed dated June 19, 1902, Henry Dennis likewise conveyed to George Batchelor his respective rights to the same 1902 Batchelor Parcel outlined on the Decision Sketch, further granting "a right of way to be hereafter located across my land adjoining on the west to reach the highway or the way leading thereto" and further releasing "all rights in the land and shore or beach to the east of the land above described, except the right of boating, bathing, and fishing."<sup>33</sup>
29. The parties agree that as of July, 1909, Henry Dennis owned all of the land that remained of the 318 Parcel (after the multiple conveyances of the smaller parcels within it) including the land now comprising the upland portion of the Denizard Property.<sup>34</sup>
30. The parties agree that with the exception of the 1902 Batchelor Parcel, Ephraim Dennis, in July, 1909, owned all of the land lying seaward of the 317, 318, and 319 Parcels to the low

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<sup>31</sup> Registry, Book 141, Page 347 (SA 20, 46).

<sup>32</sup> PJSF ¶ 29e; Registry, Book 225, Page 326 (SA 35-36, 46).

<sup>33</sup> PJSF ¶ 29e; Registry, Book 225, Page 327 (SA 35-39, 46); there is no deed in the record that purports to convey the entire Farm Shore, or even a partial interest in the Farm Shore shared with Ephraim Dennis, to Henry Dennis, prior to the November 8, 1909 conveyance of the North Farm Shore property to William Hill. So, although Henry Dennis and Ephraim Dennis together conveyed the North Farm Shore to William Hill on that day, there is no record of Henry Dennis having a valid interest in that land which he could have conveyed to William Hill. Henry Dennis was conveyed the southern, remaining portion of the Farm Shore (the remaining section which was not previously conveyed to William Hill) later that same day, November 8, 1909. Either way, this shows that the entirety of the North and South Farm Shore was not held by Henry Dennis in fee at any point.

<sup>34</sup> PJSF ¶ 30 (SA 46).

water mark (the Farm Shore) including the seaward portion of the present Denizard Property, extending eastward from the north and south boundary lines of the Denizard Property.<sup>35</sup>

31. On November 8, 1909, by a deed recorded at 12:42 PM, Henry Dennis and Ephraim Dennis conveyed two parcels to William Hill. The "second lot," which is also referred to as the "bathing beach," is a curved beachfront area which is unlabeled, but roughly lies to the north of the Farm Shore division line depicted on the Decision Sketch.<sup>36</sup>
32. The "bathing beach" was conveyed to William Hill "subject to the common law rights of the public and to rights in certain persons as follows:
  1. Henry Dennis, rights granted to him and others by deed of Emily J. Sweet. . . consisting of rights to use the farm shore for boating, bathing, and fishing purposes. The further right contained in that deed to erect a bathing house on the beach said Henry G. Dennis for himself and his heirs and assigns expressly releases to this grantee.
  2. Louis Richardson, rights granted to him by Emily J. Sweet. . . to use the farm shore for boating, bathing, and fishing and to erect a bathing house on the beach.
  3. George H. Batchelor, rights granted to him by Ephraim K. Dennis. . . to use the farm shore for boating, bathing, and fishing.
  4. Walter T. Almy. . . rights granted to him by Ephraim Dennis. . . to use the beach for boating, bathing, and fishing in common with others.
  5. Edward O. Knowles, rights granted in him by Edgar W. Russell to use the beach for boating, bathing, and fishing.
  6. Walter J. Taber and Maude W. Taber, rights to use the shore lying north of the south line of land of Louis Richardson.<sup>37</sup>
33. The grantors of the "bathing beach," Henry and Ephraim Dennis, also "reserve[d] the further right to convey to any purchasers of the whole or any part of the land now remaining in their ownership on the east side of Smith Neck Road, rights of boating, bathing, and fishing in common with others."<sup>38</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> PJSF ¶ 33; Registry, Book 305, Page 369 (SA 30, 47-50).

<sup>37</sup> PJSF ¶ 34; Registry, Book 305, Page 369 (SA 48).

<sup>38</sup> *Id.*

34. Also on November 8, 1909, but by a deed recorded at 3:02 PM, Ephraim Dennis conveyed to Henry Dennis the remaining South Farm Shore (the beachfront south of the division line on the Decision Sketch). This land was described as “any and all land lying between the high-water mark and the easterly lots heretofore conveyed by Emily J. Sweet, by Henry G. Dennis or by myself to various persons” The South Farm Shore is bounded on the north by the Farm Shore division line shown on the Decision Sketch and is roughly bounded on the south by the southeastern most point of the 317 Parcel, or by the northernmost point of the land of Thomas Smith and/or his heirs.<sup>39</sup>
35. The South Farm Shore was conveyed by Ephraim Dennis to Henry Dennis with reservation “to myself my heirs and assigns the right of boating bathing and fishing on the. . . premises.” With this last conveyance, Henry Dennis owned in fee both the South Farm Shore and all remaining portions of the 318 Parcel which were not previously conveyed to other parties.<sup>40</sup>
36. In November, 1910, Henry Dennis conveyed to Catherine Dennis and Lucy Dudley all of his remaining title and interest in two parcels. First, the 3½ acre parcel comprising of the remaining portions of the 318 Parcel not otherwise conveyed. Second, Henry Dennis conveyed to Catherine Dennis and Lucy Dudley his fee interest in the South Farm Shore.<sup>41</sup>
37. In April, 1914, Lucy Dudley (who recited in the deed that she gained full title through inheritance from her sister, Catherine Dennis) conveyed the present Denizard Property, originally part of the 318 Parcel, to Fredrick Clark. The parcel was said to be bounded on the east by “the sea” and was conveyed “free from all incumbrances.” The Dudley to Clark deed describes the perimeter of the property by way of reference to the 10-foot right of way (“at

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<sup>39</sup> PJSF ¶ 32; Registry, Book 293, Page 286 (SA 44-46).

<sup>40</sup> *Id.*

<sup>41</sup> PJSF ¶ 37; Registry, Book 360, Page 281 (SA 51-52); *supra* § 21.

the intersection of. . . the south line of a ten (10) foot way, thence easterly in the south line of said ten (10) foot way”).<sup>42</sup>

38. At no time did Henry Dennis own the entirety of the Farm Shore (both the North Farm Shore and the South Farm Shore) in fee. When Henry Dennis was conveyed the South Farm Shore, the North Farm Shore had already been conveyed to William Hill subject to numerous access rights in boating, bathing, and fishing to various parties.

#### DISCUSSION

“Summary judgment is granted where there are no issues of genuine material fact, and the moving party is entitled to judgment as a matter of law.” *Ng Bros. Constr. v. Cranney*, 436 Mass. 638, 643–644 (2002). “The moving party bears the burden of affirmatively demonstrating that there is no triable issue of fact.” *Id.* at 644. In determining whether genuine issues of fact exist, the court must draw all inferences from the underlying facts in the light most favorable to the party opposing the motion. See *Attorney Gen. v. Bailey*, 386 Mass. 367, 371, cert. denied, 459 U.S. 970 (1982). Whether a fact is material or not is determined by the substantive law, and “an adverse party may not manufacture disputes by conclusory factual assertions.” *Ng Bros. Constr. v. Cranney*, supra, 436 Mass. at 648. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When appropriate, summary judgment may be entered against the moving party and may be limited to certain issues. *Community Nat’l Bank v. Dawes*, 369 Mass. 550, 553 (1976).

Additionally, “a party moving for summary judgment in a case in which the opposing party will have the burden of proof at trial is entitled to summary judgment if she demonstrates, by reference to material described in Mass. R. Civ. P. 56(c), unmet by countervailing materials, that the party opposing the motion has no reasonable expectation of proving an essential element of that party’s case.” *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 714 (1991). To

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<sup>42</sup> PJSF ¶ 38; Registry, Book 411, Page 532 (SA 53–54); supra § 22.

succeed, the party moving for summary judgment does not need to submit affirmative evidence to negate one or more elements of the opposing party's claim, but the motion must be supported by some material contemplated by Rule 56(c). *Id.* Though the supporting material offered does not need to disprove an element of the claim of the party who has the burden of proof at trial, it "must demonstrate that proof of that element at trial is unlikely to be forthcoming." *Id.*

In the present action, the question before the court on these cross-motions for summary judgment is the extent to which, if at all, the plaintiffs' rights to use the beachfront portion of the Denizard property on the Farm Shore for boating, bathing, and fishing, as well as their right to use the 10-foot right of way easement adjacent to the Denizard property to access the Farm Shore, were extinguished by merger when Henry Dennis came to own portions of the 318 Parcel as well as the South Farm Shore beginning on November 8, 1909.

"Massachusetts courts have recognized the doctrine of merger at least since the mid-nineteenth century." *Busalacchi v. McCabe*, 71 Mass. App. Ct. 493, 497 (2008). The doctrine provides that a servitude, such as an easement, "terminates 'when all the benefits and burdens come into a single ownership.'" *Id.*, quoting Restatement (Third) of Property (Servitudes) § 7.5 (2000). More simply, an owner "cannot have an easement in its own estate in fee." *Cheever v. Graves*, 32 Mass. App. Ct. 601, 606 (1992), quoting *York Realty, Inc. v. Williams*, 315 Mass. 287, 289 (1943). The philosophy behind this principle is that "[w]hen the dominant and servient estates come into common ownership there is no practical need for the servitude's continued existence, as the owner already has 'the full and unlimited right and power to make any and every possible use of the land.'" *Busalacchi v. McCabe*, *supra*, 71 Mass. App. Ct. at 497.

Two requirements must be met for a merger to occur. "First, the unity of title between the affected parcels must be of 'a permanent and enduring estate, an estate in fee in both.'"

*Busalacchi v. McCabe*, supra. 71 Mass. App. Ct. at 498. Second, the two ownership interests must be “coextensive.” *Id.* Coextensive means that “the type of ownership interest being united must be the same; a fee simple absolute interest, for example, cannot be merged with a joint ownership interest to extinguish an easement. *Id.*; see *Atlanta Mills v. Mason*, 120 Mass. 244, 251 (1874) (“When [an owner] holds one estate in severalty and ... a fractional part of the other, there is no extinguishment of an easement”); see also *Parkinson v. Board of Assessors of Medfield*, 398 Mass. 112, 114 n.3 (1986) (stating, in dicta, that where party owned dominant estate in fee and had reserved a life estate in the servient estate, the life estate interest in the servient estate prevented extinguishment by merger). Relatedly, extinguishment of easements by merger is not barred by a land’s registration status. *Williams Bros. Inc. of Marshfield v. Peck*, 81 Mass. App. Ct. 682, 685–86 (2012) (“extinguishment by merger is not included in the statute among the enumerated theories barred from application by the registration system. We regard this absence as significant”).

While entire parcels are susceptible to merger, in some cases, a parcel held by the dominant estate is subdivided, and subsequently one or more of those subdivided lots may be conveyed to the owner of the servient estate. When this occurs, the doctrine of partial merger is implicated. *Cheever v. Graves* addresses extinguishment of easements through partial merger by holding that “common ownership of servient estate and several of the dominant estates extinguished easements *as to those lots*. . . but only as to th[ose] lots. . . . [t]he easement was not extinguished as to those lots in the [] subdivision which were not held in common ownership.” 32 Mass. App. Ct. at 606–607 (emphasis added).

“Where there are multiple dominant estates, merger may apply to extinguish the easement rights of some of the dominant estates and not of others, or the doctrine may apply to

extinguish the easement over part of the dominant estate if there is only one.” *Wojcik v. Lovett*, 31 LCR 288, 298 (Land Court 2023), citing *York Realty, Inc. v. Williams*, 315 Mass. 287, 289–290, *aff’d*, *Wojcik v. Lovett*, 104 Mass. App. Ct. 1121 (2024); *Cheever v. Graves*, *supra*, 32 Mass. App. Ct. at 606 (“common ownership need not extend to the whole of the original dominant estate” for merger to apply); *Mills v. Mason*, 120 Mass. 244, 251(1876) (“it is the ownership of the two estates that must be coextensive, and not the land area comprising the dominant and servient estates. . . . [t]he common ownership need not extend to the whole of the original dominant estate).

It has long been held that “[w]hen an easement or other property right is created, every right necessary for its enjoyment is included by implication” *Anderson v. De Vries*, 326 Mass. 127, 134 (1950); *Sullivan v. Donohoe*, 287 Mass. 265, 267 (1934); *Flanders v. Flanders*, 14 LCR 172 (Land Ct. 2006); *Sullivan v. Dart*, 17 LCR 543 (Land Ct. 2009). In fact, this “rule that conveyances include those rights necessary to make use of the property conveyed can be traced back in the common law at least as far as the 13th century.” *Murphy v. Olsen*, 63 Mass. App. Ct. 417, 424 (2005). The implied rights necessary to enjoy easements are often called secondary easements. *Murphy v. Olsen*, *supra*, 63 Mass. App. Ct. at 424, quoting Restatement (Third) of Property, Servitudes § 2.15 comment b (2000).

Secondary easement rights have often occurred alongside easements granting beach access over a right of way or rights in beaches themselves.<sup>43</sup> In *Anderson v. De Vries*, several dominant estate owners were granted an easement over one servient estate on an old roadway “for beach access.” 326 Mass. 127, 134 (1950). Respondents contended that the dominant estate

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<sup>43</sup> The cases discussed, *infra*, demonstrate the concept of secondary easements only in the context of beach use and beach access easements, but these concepts are in no way limited only to coastal contexts, although several cases finding secondary easements in coastal contexts do so while emphasizing a “recogni[tion of] the importance of beach rights” *Murphy v. Olsen*, Mass. App. Ct. 417, 413 (2005).

owners' rights ended where the pathway met with the beach's highwater mark, or at most, carried rights to the low watermark only to the extent of the width of the right of way. *Id.* The court rejected this contention, granting the dominant estate holders access and use of the entire beachfront, stating that the "use of the beach by these lot owners included whatever was reasonably necessary for the full enjoyment of the privilege granted." *Id.*

While courts have found secondary easements allowing the use of entire beachfronts where only beach access on a right of way was granted, so too have courts found the inverse: easements for the use and enjoyment of beachfronts may encompass secondary easements to a right of way or access point across another's land in order for the holder of the easement to access the land in which they hold rights, even if the means of access is not one of strict necessity or the result of landlocking. In *Rice v. Vineyard Grove Co.*, the Supreme Judicial Court, "recognizing the importance of beach rights, held that the trial judge properly construed a grant of use of all the beach in front of the . . . lot. . . for bathing purposes only, as including as incidental thereto 'the privilege of going to and from [the lot owner's] premises over the intervening strip of bluff and beach upland belonging to the respondent.'" *Murphy v. Olsen*, 63 Mass. App. Ct. 417, 423 (2005) quoting *Rice v. Vineyard Grove Co.*, 270 Mass. 81, 86–87.

In *Murphy v. Olsen*, the court found that a pedestrian easement that gave inland landowners access to the beach included beach rights and the right of passage over a way in order to access the easement "even though the easement did not expressly reserve rights to the beach or the way, where the manifest intention of the grantors of the easement was to provide beach use rights to inland landowners." *Murphy v. Olsen*, *supra*, 63 Mass. App. Ct. at 417.

With these principles in mind, the court turns to the specific claims and defenses pertaining to the various properties of the plaintiffs as they relate to the Denizard Property.

I. THE PORTIONS OF THE GLADSTONE, GILLING, AND TABORS PROPERTIES WITHIN THE 319 PARCEL BENEFIT FROM THE RIGHT TO USE THE ENTIRETY OF THE FARM SHORE (THE NORTH AND SOUTH FARM SHORE) FOR THE PURPOSES OF BOATING, BATHING, AND FISHING, DERIVING FROM RIGHTS GRANTED TO THEIR PREDECESSOR IN INTEREST, LOUIS RICHARDSON.

The Gladstones, Gilling, and the Tabors (specifically the Tabors lot overlying the original 319 Parcel as shown on the Decision Sketch)<sup>44</sup> benefit from the right to use the entirety of the Farm Shore for the purposes of boating, bathing, and fishing. All three properties are partially within the original 319 Parcel, held exclusively by Louis Richardson during the relevant period beginning in 1889, and partially within the original 318 Parcel, held at various relevant points by Henry and/or Ephraim Dennis.

The plaintiffs' rights in the Farm Shore south of the division line (hereinafter the "South Farm Shore") originated from Emily Sweet's conveyance of the 319 Parcel to Louis Richardson on December 14, 1889, which included "the right to said grantees, their heirs & assigns to use the farm shore [then belonging to Emily Sweet] for boating, bathing & fishing purposes."<sup>45</sup> These rights persisted throughout subsequent transfers of the Farm Shore, including Emily Sweet's conveyance of the Farm Shore to Ephraim Dennis on March 28, 1891; Ephraim's conveyance of a partial interest in the Farm Shore to Henry Dennis, wherein they became tenants in common; and ultimately Ephraim and Henry Dennis' conveyance of the South Farm Shore to Henry Dennis, as sole owner in fee on November 8, 1909, at 3:02 PM. The plaintiffs' rights to boating, bathing, and fishing in the South Farm Shore persisted because at all relevant times, the 319 Parcel, the dominant estate, was held in fee by Louis Richardson. Meanwhile, the servient estate, the South Farm Shore, was held exclusively by other individuals, therefore never falling

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<sup>44</sup> The Tabors own two properties, one which was previously owned by Knowles, and one which lays partially within the 319 Parcel and partially within the 318 Parcel. The present analysis only applies to the property lying partially within the 319 Parcel.

<sup>45</sup> Facts ¶¶ 24-26.

under common or co-extensive ownership with any portion of the 319 Parcel, thus preventing the easement's extinguishment by partial or total merger.

The conveyance of the current Denizard property to Fredrick Clark in 1914 recited that it carried title to the beach out to the mean low water mark and was "free from all incumbrances." However, notwithstanding this representation, the land in fact remained burdened by rights previously conveyed to Louis Richardson nearly twenty-five years prior in 1889. These boating, bathing, and fishing rights were undisturbed through the subsequent conveyances leading from Louis Richardson's original receipt of them up to the present possession of them by the Gladstones, Gilling, and the Tabors. These rights attach specifically to the portions of the Gladstone, Tabors, and Gilling Properties that lie within the 319 Parcel; the portions of these properties within the 318 Parcels obtain their rights through a differing analysis.<sup>46</sup>

The Gladstones, Tabors, and Gilling also hold rights in the section of the Farm Shore north of the division line (hereinafter the "North Farm Shore") for the purposes of boating, bathing, and fishing, as well as over the 10-foot right of way to access the North Farm Shore. The plaintiffs' rights in the North Farm Shore also derive from the Emily Sweet conveyance of the 319 Parcel to Louis Richardson, as Sweet granted Richardson boating, bathing, and fishing rights in the entirety of the Farm Shore. These rights were reiterated (as to the North Farm Shore) by Ephraim Dennis and Henry Dennis, who later jointly conveyed the North Farm Shore to William Hill on November 8, 1909. The North Farm Shore was conveyed to William Hill subject to "Louis Richardson, rights granted to him by Emily J. Sweet. . . to use the farm shore for boating, bathing, and fishing."<sup>47</sup> This unequivocally affirmed Louis Richardson's and his future assigns' (plaintiffs Gladstone, Gilling, and Tabors) rights in the North Farm Shore, along with

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<sup>46</sup> *Infra*, Section IV.

<sup>47</sup> Facts, ¶ 33.

rights in the aforementioned South Farm Shore under a separate grant, for the purposes of boating, bathing, and fishing. At no time could this right have been extinguished by merger since Louis Richardson never held any portion of the Farm Shore in fee.

This is significant because it establishes that these plaintiffs hold undisputable rights to boat, bathe, and fish in the North Farm Shore, and that in order to fully exercise those rights, the plaintiffs must be able to pass over the Denizard beachfront and the 10-foot right of way for a practical access point to the North Farm Shore. Thus, even if, *arguendo*, these plaintiffs did not hold a right to boat, bathe, and fish on the South Farm Shore through Emily Sweet's grant of the 319 Parcel to Louis Richardson, then at the very least, a secondary easement to pass and repass over the Denizard beachfront and corresponding right of way to reach the North Farm Shore was preserved by implication; without it, the plaintiffs' ability to access their rights on the North Farm Shore would be greatly inhibited, or possibly eliminated, and they would be unable to fully enjoy the fruits of their North Farm Shore easement. *Anderson v. De Vries*, supra, 326 Mass. at 134 (“[w]hen an easement or other property right is created, every right necessary for its enjoyment is included by implication.”); *Rice v. Vineyard Grove Co.*, supra, 270 Mass. at 86–87 (easements for the use and enjoyment of beachfronts may encompass secondary easements to a right of way or access across another's land in order for the holder of the easement to access the land in which they hold rights); see also *Murphy v. Olsen*, supra, 63 Mass. App. Ct. at 423, quoting *Rice v. Vineyard Grove Co.*, 270 Mass. 81 at 86–87 (while “recognizing the importance of beach rights” the court held that a grant to a beachfront “for bathing purposes only, [included] as incidental thereto ‘the privilege of going to and from [the lot owner's] premises over the intervening strip of bluff and beach upland belonging to the respondent’”).

Overall, I find and rule that the portions of the Gladstone, Tabors, and Gilling Properties that are partially within the 319 Parcel benefit from the right to boat, bathe, and fish on both the North Farm Shore and the South Farm Shore through rights granted to their predecessor in title, Louis Richardson. I also find and rule that even without rights through their chain of title to use of the South Farm Shore, the Gladstone, Tabors, and Gilling 319 Properties benefit from the right to pass and repass over the Denizard beachfront and corresponding 10-foot right of way. The right to pass over these properties is implied through a secondary easement, as it is necessary for the plaintiffs' enjoyment of the easement rights they were granted in the North Farm Shore.

II. THE SEYMOUR PROPERTY BENEFITS FROM THE RIGHT TO USE THE ENTIRETY OF THE FARM SHORE (BOTH NORTH AND SOUTH OF THE DIVISION LINE), DERIVING FROM RIGHTS GRANTED IN HENRY DENNIS AND SUBSEQUENTLY CONVEYED TO THE TABERS AND GEORGE BATCHELOR.

The current Seymour Property consists of two parcels originating from the 318 Parcel, the former Taber parcel and the former 1905 Batchelor parcel, which are both depicted on the Decision Sketch. Both parcels are benefited by rights to the entirety of the Farm Shore for the purposes of boating, bathing, and fishing, although through differing chains of title. Unlike the other plaintiffs, the defendant does not dispute the Seymours' right to use the 10-foot right of way, as it lies between the current Denizard and Seymour property line.

The former Taber parcel traces its rights in the Farm Shore back to a conveyance by Henry Dennis to Walter and Maude Taber on July 26, 1909. The land conveyed originated on the 318 Parcel and was deeded "together with the use of the shore lying north of the south line of land of Louis H. Richardson [the 319 Parcel], for boating bathing and fishing."<sup>48</sup> This conveyance of easement rights was for the entirety of the Farm Shore and occurred four months before Henry Dennis acquired the South Farm Shore in fee, and before Henry and Ephraim

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<sup>48</sup> Facts, ¶ 19.

Dennis conveyed the North Farm Shore in fee to William Hill. Therefore, when Henry Dennis acquired the South Farm Shore in fee a few months later in November, 1909, the Tabers' rights to the Farm Shore could not be extinguished by merger because the Tabers already held the entirety of their parcel in fee, meaning there was neither co-extensive nor common ownership from which merger could have occurred. These rights persisted throughout the chain of title from the Tabers to the Seymour Property today; although the Denizard Property was conveyed by deed reciting that it was "free from all incumbrances," the parcel was nonetheless encumbered by easement rights granted to the Tabers well before the Denizard Property was carved out.

Additionally, the Tabers' easement rights in the entirety of the Farm Shore were reiterated (as to the North Farm Shore) in the November 8, 1909 conveyance of the North Farm Shore from Ephraim and Henry Dennis to William Hill. The North Farm Shore was conveyed to William Hill "subject to. . . Walter J. Taber and Maude W. Taber rights to use the shore lying north of the south line of land of Louis Richardson." Although slightly different phrasing, the Seymours' current rights to boating, bathing, and fishing on the Farm Shore came about similarly to the Gladstones,' Gilling's, and the Tabors' rights in the Farm Shore. The reinforcement of rights granted to the Tabers in the North Farm Shore further supports the contention that prior to even the possibility of any extinguishment by merger, the Taber parcel (as part of the current Seymour Property) was conveyed along with the rights to boating, bathing, and fishing on the entirety of the Farm Shore, thereby preventing any extinguishment by merger in future conveyances.

Even if, *arguendo*, the Seymours did not obtain rights to the South Farm Shore from the Tabers, a secondary easement would still arise by implication, allowing the Seymours to, at the very least, pass and repass over the Denizard beachfront, in order to access and fully utilize their rights to the North Farm Shore, and, since the Seymour Property is north of the Denizard

beachfront, the right to pass and repass over the Denizard beachfront is also necessary to access the southern points of the South Farm Shore, and is necessary for the Seymours' full enjoyment of their easement rights.<sup>49</sup>

The Seymours' second parcel also benefits from rights in the entirety of the Farm Shore for the purposes of boating, bathing, and fishing, but these rights derive from the conveyances of the 1902 Batchelor Parcel from Ephraim Dennis and Henry Dennis to George Batchelor on June 19, 1902, and the conveyance of the 1905 Batchelor Parcel from Henry Dennis to George Batchelor on December 28, 1905.

The 1902 Batchelor Parcel, depicted in the Decision Sketch, was taken from a section of the Farm Shore held by Ephraim Dennis and conveyed together with "the right of boating, bathing, and fishing on the farm shore."<sup>50</sup> Henry Dennis was presumed to also hold rights in the 1902 parcel, which he conveyed to George Batchelor, and which additionally included access to the 10-foot right of way which Henry Dennis owned in fee at the time. Henry Dennis conveyed his rights in the 1902 Batchelor Parcel to George Batchelor, releasing "all rights in the land and shore or beach to the east of the land above described, except the right of boating, bathing, and fishing" of which Henry Dennis also further reserved rights for himself.<sup>51</sup> Simply put, Henry Dennis discharged his rights to the 1902 Batchelor parcel, but not his rights to boating, bathing, and fishing on the Farm Shore to the east of the parcel. Because the current Seymour Property is said to contain an (undefined) portion of the 1902 Batchelor Parcel,<sup>52</sup> it follows that all rights to

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<sup>49</sup> *Supra* Part I ("[w]hen an easement or other property right is created, every right necessary for its enjoyment is included by implication."); Kathleen Denizard does not dispute the Seymour's right to use the 10-foot right of way, she only disputes the other plaintiffs' rights to, and all plaintiffs' use of the beachfront to the east of the Denizard Property.

<sup>50</sup> Facts, ¶ 28.

<sup>51</sup> Facts, ¶ 29.

<sup>52</sup> Facts, ¶¶ 18, 28.

boating, bathing, and fishing that Ephraim Dennis conveyed to George Batchelor, continue to benefit the Seymour Property today.

Notably, the majority of the current Seymour waterfront property lies on the former 1905 Batchelor Parcel, which was conveyed from Henry Dennis to George Batchelor on December 28, 1905, and is depicted in the Decision Sketch.<sup>53</sup> Likely due to the fact that boating, bathing, and fishing rights in the Farm Shore had already been conveyed to the grantee, George Batchelor, in the 1902 conveyance, this language is notably absent from the 1905 exchange. However, the 1905 conveyance did include “the right to use the right of way Ten (10) feet wide. . . which I [Henry Dennis] agree to keep open.”<sup>54</sup> The defendant does not dispute plaintiff Seymour’s rights in and use of the 10-foot right of way, but does dispute all other plaintiffs’ use of the right of way.

As well as rights to boat, bathe, and fish on the entire Farm Shore, George Batchelor’s parcels had these rights reiterated as to the North Farm Shore in the William Hill conveyance on November 8, 1909. Ephraim Dennis and Henry Dennis conveyed the North Farm Shore to William Hill “subject to. . . George H. Batchelor rights granted to him by Ephraim K. Dennis. . . to use the farm shore for boating, bathing, and fishing.”<sup>55</sup> Like the many plaintiffs above, this further affirms the rights of boating, bathing, and fishing on the Farm Shore, and was not subject to merger at any point. As it did for the other plaintiffs above, this reiteration of rights secured, at the very least, a secondary easement for the Seymours to pass and repass over the Denizard beachfront in order to fully access their rights as to the North Farm Shore. Also, as it did for the plaintiffs above, the court finds that the Seymours, stemming from the rights of the Tabers and

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<sup>53</sup> Facts, ¶¶ 16, 18.

<sup>54</sup> Facts, ¶ 18.

<sup>55</sup> Facts, ¶ 33.

George Batchelor as their predecessors in interest, gained absolute rights to boat, bathe, and fish over the Denizard beachfront and to pass and repass over the 10-foot right of way.

III. THE TABORS' PROPERTY LYING EXCLUSIVELY WITHIN THE 318 PARCEL BENEFITS FROM THE RIGHT TO USE THE ENTIRETY OF THE FARM SHORE (NORTH AND SOUTH OF THE DIVISION LINE), DERIVING FROM RIGHTS GRANTED TO THEIR PREDECESSOR IN INTEREST, EDWARD KNOWLES.

Plaintiffs Richard and Patton Tabors<sup>56</sup> own two parcels on Meadows Shore Road. The first, which was discussed in Section I (alongside the Gladstone and Gilling Properties), is benefitted by easement rights to the Farm Shore as a part of the former 319 Parcel, for which rights were granted to Louis Richardson by Emily Sweet. The second parcel, which is depicted in the Decision Sketch and labeled "Tabors formerly Knowles," is located south of the current Denizard Property and includes land both east and west of Meadows Shore Road. This parcel belonging to the Tabors derives rights in the Farm Shore from Walter Knowles, to whom the parcel was originally conveyed in September, 1899 by Ephraim Dennis and Henry Dennis, who held the 318 Parcel jointly at the time. The Knowles deed granted "the privilege of using the beach in front of the lot, in common with others for boating, bathing, and fishing;" a right which was conveyable because of Ephraim Dennis's ownership of the entirety of the Farm Shore at the time of conveyance.<sup>57</sup> No merger occurred because Henry Dennis and Ephraim Dennis jointly held the portion of the 318 Parcel at the time it was conveyed to Edward Knowles, while Ephraim individually held the entire Farm Shore at the time, thus preventing co-extensive, common ownership. Because the parcels did not merge and the original conveyance of the Knowles Parcel included boating, bathing, and fishing rights to the entirety of the Farm Shore, it follows that the Tabors (as successors in interest to Walter Knowles) currently enjoy these same rights in the Farm Shore, including the beachfront in front of the Denizard Property.

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<sup>56</sup> Not to be confused with Walter and Maude *Taber*, predecessors in title to the current Seymour Property.

<sup>57</sup> Facts, ¶ 15.

The right to boat, bathe, and fish on the Farm Shore was also specifically reiterated (as to the North Farm Shore) when it was conveyed by Ephraim Dennis and Henry Dennis to William Hill on November 8, 1909. In the conveyance, William Hill took the North Farm Shore “subject to. . . Edward O. Knowles. . . to use the beach for boating, bathing, and fishing.”<sup>58</sup> These two occurrences of rights being granted to both the entirety of the Farm Shore, and reiterated again as to the North Farm Shore, unequivocally demonstrate that the Knowles Property, which now belongs to the Tabors, benefited from rights in the Farm Shore which were subsequently conveyed to the current owners. Because there was no co-extensive, co-ownership of the Knowles parcel with any part of the Farm Shore, there was no opportunity for extinguishment by merger at any point.

Overall, I find and rule that the Tabors’ beachfront property (their parcel that is solely within the 318 Parcel) benefits from rights to boat, bathe, and fish on both the North Farm Shore and the South Farm Shore through rights granted to the Tabors’ predecessor in title, Walter Knowles. I also find and rule that even without the rights granted through their chain of title, the Tabors’ 318 Property would nonetheless benefit from the right to pass and repass over the Denizard beachfront and corresponding 10-foot right of way. The right to pass over these properties is implied through a secondary easement as it is necessary for the plaintiffs’ full enjoyment of the easement rights they were granted in the North Farm Shore. *Anderson v. DeVries, supra*, 326 Mass. at 134 (“[w]hen an easement or other property right is created, every right necessary for its enjoyment is included by implication”).

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<sup>58</sup> Facts ¶ 33.

IV. THE PORTIONS OF THE GLADSTONE, GILLING AND TABORS PROPERTIES WITHIN THE FORMER 318 PARCEL DID NOT LOSE THEIR RIGHTS TO FULL USE OF THE FARM SHORE BY REASON OF MERGER.

I have already found and ruled, above, that the portions of the Gladstone, Gilling and Tabors properties that are within the former 319 parcel are all benefitted by rights in the Farm Shore that have not been lost by merger. However, portions of those parcels are within the 318 parcel and arguably did lose easement rights on the Farm Shore upon Henry Dennis's 1909 acquisition of sole ownership of the South Farm Shore. However, notwithstanding the merger of the portions of the 318 Parcel then owned by Henry Dennis with the South Farm Shore parcel on November 8, 1909, the portions of the Gladstone, Gilling and Tabors parcels within the 318 Parcel did not lose their explicit rights in the Farm Shore by merger because to give effect to the merger doctrine under these circumstances would deprive the portions of those properties within the 319 Parcel of their deeded rights to full use of the Farm Shore, even though their rights had not been lost through merger.

Ordinarily, the owner of land benefitting from an easement may not use the easement to benefit other land added to the land originally benefitted by the easement. But where the dominant estate has been partially merged with the servient estate, the doctrine of merger cannot be applied without impermissibly depriving the non-merged portion of the dominant estate of its right to use of the easement. Impermissible overloading of an easement occurs when the owner of a dominant estate attempts to enlarge it by adding other land not entitled to benefit from the easement. *Davenport v. Lamson*, 38 Mass. 72, 21 Pick. 72, 74 (1838) (it is "well settled by the authorities, that if a [person has] a right of way over another's land, to a particular close, he [or she] cannot *enlarge* it and extend it to other closes") (emphasis added).

The bright line rule against overloading an easement by attempting to add to the dominant estate by adding land that had not been granted the easement does not apply where an

entire parcel of land had the benefits of being the dominant estate, and part of that land was merged with the servient estate. Rather, the rule applies only where after-acquired land has been added to the existing dominant estate. "It . . . is the long-established rule in the Commonwealth, as elsewhere, that after-acquired property. . . may not be added to the dominant estate. . . without the express consent of the owner of the servient estate." *McLaughlin v. Bd. of Selectmen of Amherst*, 38 Mass. App. Ct. 162, 169 (1995). This is so because the rule against overloading does not apply except where the owner of a dominant estate attempts to extend dominant rights to land that had not been benefitted by the easement. The bright line rule against overloading by expansion to land not originally benefitted by the easement applies only where there is an expansion, not where there is a partial merger of land already benefitting from the easement. See *Murphy v. Mart Realty of Brockton, Inc.*, 348 Mass. 675, 677-679 (1965) (defendant could not use an existing easement to benefit store and parking lot not benefitted by the easement).

The purpose of maintaining the bright line rule against overloading adopted in *Murphy* was to prevent unauthorized expansion of a dominant estate. *Taylor v. Martha's Vineyard Land Bank Com'n*, 475 Mass. 682, 688-699 (2016). It was not intended to deprive a dominant estate of the benefits of a granted easement when part of the land had been merged with the servient estate. Applying the merger rule, and by extension the overloading rule, to deprive either the 318 or the 319 portions of the Gladstone, Gilling and Tabors properties of the full use of the easement over the Farm Shore would be to utilize both rules for purposes for which they were not intended. Where "'the parties at th[e] time [the easement was created] contemplated that the easement would benefit' both [properties]," the rule against overloading does not apply. *Id.* at 690, quoting *Perdido Place Condominium Owners Ass'n v. Bella Luna Condominium Owners Ass'n*, 43 So.3d 1201, 1210 (Ala.2009) (Murdock, J., dissenting).

Where the dominant estate has been partially merged, preventing the remaining dominant estate from exercising its unmerged rights under a strict application of the rule against overloading would unfairly deprive the owner of the unmerged portion of the dominant estate of the use of the granted easement. Where, as here, the easement for the use of the Farm Shore was granted for the entirety of the Gladstone, Gilling and Tabors parcels, the owners are entitled to continue to exercise those rights for the benefit of their entire parcels notwithstanding the partial merger of each of those lots with the South Farm Shore parcel. See *Pion v. Dwight*, 11 Mass. App. Ct. 406 (1981) (no overloading where easement was intended to benefit disputed lot, notwithstanding ambiguous wording of easement).

V. THE SHERMAN PARCEL, LAYING ENTIRELY WITHIN THE 318 PARCEL, BENEFITS FROM THE RIGHT TO PASS AND REPASS OVER THE DENIZARD BEACHFRONT AND CORRESPONDING 10-FOOT RIGHT OF WAY THROUGH AN EASEMENT BY IMPLICATION BUT DOES NOT BENEFIT FROM THE RIGHT TO BOAT, BATHE, AND FISH OVER THE DENIZARD BEACHFRONT.

The only property on the former 318 Parcel that does not include land also on the 319 Parcel, and which does not benefit from the exception to the doctrines of merger and overloading discussed above, or gain its rights to the Farm Shore directly through an unmerged chain of title, is the property owned by the Sherman Trust. The Sherman Property originates from a section of the 318 Parcel that was held at relevant times in fee by Henry Dennis, before its subsequent transfer to Lucy Dudley and Catherine Dennis in 1910, and its eventual purchase by the Sherman Trust in 2007.<sup>59</sup> As part of the 318 Parcel, the land on which the Sherman Property sits was first granted rights to boating, bathing, and fishing on the Farm Shore when Emily Sweet granted those rights to Henry Dennis in 1889 when she conveyed the 318 Parcel to him. Henry Dennis preserved those Farm Shore rights on subsequent transfers, reserving the same rights for himself when he conveyed the 1902 Batchelor Parcel to George Batchelor (“releasing all [his] rights. . .

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<sup>59</sup> Facts ¶ 4.

except the right of boating, bathing, and fishing”)<sup>60</sup> and most notably when Henry Dennis and Ephraim Dennis together conveyed the North Farm Shore to William Hill in November of 1909, conveying the land “subject to. . . Henry Dennis, rights granted to him and others by deed of Emily J. Sweet. . . consisting of rights to use the farm shore for boating, bathing, and fishing purposes.”<sup>61</sup>

Shortly after the conveyance of the North Farm Shore to William Hill, Ephraim Dennis conveyed the remainder of the Farm Shore (the South Farm Shore) to Henry Dennis in fee. The conveyance of the South Farm Shore united what was left of the 318 Parcel, including the present Sherman Property, then held in fee by Henry Dennis, with the South Farm Shore, thus uniting one section of the original servient estate (the South Farm Shore) with the portions of the original dominant estate (the 318 Parcel) still held by Henry Dennis. This meant both parcels were held under a common owner (Henry Dennis) under an identical form of ownership interest (fee simple), thus satisfying the two requirements for merger. *Busalacchi v. McCabe*, supra. 71 Mass. App. Ct. at 498 (“[t]wo requirements must be met for a merger to occur. First, the unity of title between the affected parcels must be of ‘a permanent and enduring estate, an estate in fee in both.’ Second, the two ownership interests must be ‘coextensive.’ Coextensive means that ‘the type of ownership interest being united must be the same’”). Overall, under a traditional analysis, the South Farm Shore and those parts of the 318 Parcel still owned by Henry Dennis, including the present Sherman Property, as of November 8, 1909 at 3:02 PM, were merged because they were both held in fee by Henry Dennis.

The uniting of part of the dominant estate and the South Farm Shore part of the servient parcel meant that any easement rights Henry Dennis previously held in the South Farm Shore for

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<sup>60</sup> Facts ¶ 29.

<sup>61</sup> Facts ¶ 33.

boating, bathing, and fishing were no longer necessary for his use of the South Farm Shore, as his rights in the South Farm Shore were absolute at the time due to his ownership in fee.

*Busalacchi v. McCabe*, supra, 71 Mass. App. Ct. at 497, quoting Restatement (Third) of Property (Servitudes) § 7.5 (2000) ('an easement, 'terminates when all the benefits and burdens come into a single ownership.'"); *Cheever v. Graves*, supra, 32 Mass. App. Ct. at 606, quoting *York Realty, Inc. v. Williams*, 315 Mass. 287, 289 (1943) ("an owner 'cannot have an easement in its own estate in fee.'"); *Busalacchi v. McCabe*, supra, 71 Mass. App. Ct. at 497 ("[w]hen the dominant and servient estates come into common ownership there is no practical need for the servitude's continued existence, as the owner already has 'the full and unlimited right and power to make any and every possible use of the land'").

However, this is not the end of the analysis. Despite the traditional merger of the part of the 318 Parcel now held by the Sherman Trust after Henry Dennis acquired the South Farm Shore in fee, the rights of the now-Sherman Property (as well as the Gladstone, Gilling and Tabors properties) as a dominant estate were not merged as to the North Farm Shore. The North Farm Shore, which made up part of the original servient parcel, did not merge because it was held by William Hill, not by Henry Dennis, at the relevant time. Because the servient North Farm Shore was not held under common ownership with any of the dominant estates on the 318 Parcel, the dominant estate holders of properties within the 318 Parcel, including the predecessors of the owners of the Sherman Property, retained their full easement rights to boat, bathe, and fish on the North Farm Shore, even if those rights had been extinguished as to the South Farm Shore.

In order for subsequent owners of the dominant estates otherwise merged upon Henry Dennis's acquisition of the fee to the South Farm Shore to exercise their continued rights to

boating, bathing, and fishing on the North Farm Shore, they had to retain the right to access the North Farm Shore.

Accordingly, upon Henry Dennis's conveyance of the now-Sherman Property (and the Parcel 318 portions of the Gladstone, Gilling and Tabors properties to the extent they did not otherwise avoid merger) these properties retained a right by implication across the South Farm Shore as well as the 10-foot right of way to pass and repass to access the North Farm Shore, where they retained their full easement rights. Both the owners of the Sherman Property, and the owners of the Gladstone, Gilling and Tabors Properties, in addition to their full easement rights in the South Farm Shore, have rights to cross over the 10-foot right of way as well as rights use the South Farm Shore, including the Denizard beachfront, for access to and from the North Farm Shore.

An easement by implication is "a term more commonly applied to an implied grant derived from an established pattern of prior use rather than from the necessity to access a newly landlocked parcel." *Town of Bedford v. Cerasuolo*, 62 Mass.App.Ct. 73, 78 (2004) quoting *Sorel v. Boisjolie*, 330 Mass. 513, 516 (1953); *Wojcik v. Lovett*, supra, 104 Mass. App. Ct. 1121 (finding of an implied easement over a formerly merged right of way affirmed where it was "reasonably necessary" because it "derived from an established pattern of prior use"). Here, where Henry Dennis explicitly reserved his rights to access the North Farm Shore for boating, bathing, and fishing even upon his acquisition of the South Farm Shore, there is no question that upon the conveyance out of his retained parcels within the 318 Parcel, the rights of his grantees to continued access to the North Farm Shore was preserved by implication.

"Where during the common ownership of a parcel of land an apparent and obvious use of one part of the parcel is made for the benefit of another part and such use is being actually made

up to the time of severance and is reasonably necessary for the enjoyment of the other part of the parcel, then upon severance of the ownership a grant to continue such use may arise by implication. *Town of Bedford v. Cerasuolo*, supra, 62 Mass. App. Ct. at 78. An implied easement “arises when no easement appears in the record of a conveyance, but ‘there is evidence tending to show an intent of the parties’ to create such an easement.” *Chapman v. Pensivy*, 29 LCR 353, 359 (Land Ct. 2021), quoting *Mt. Holyoke Realty Corp. v. Holyoke Realty Corp.*, 284 Mass. 100, 104 (1933).

In determining whether an easement by implication arose, “the court must assess the ‘intention of the parties, to be gathered from the language of the instruments when read in the light of the circumstances attending their execution, the physical condition of the premises, and the knowledge which the parties had or with which they are chargeable.’” *Cheever v. Graves*, supra, 32 Mass. App. Ct. at 607, quoting *Perodeau v. O'Connor*, 336 Mass. 472, 474 (1957). Furthermore, “[w]hen an easement or other property right is created, every right necessary for its enjoyment is included by implication” *Anderson v. De Vries*, supra, 326 Mass. at 134.

In the present case, all the above requirements are met, so as to establish an implied easement benefiting the Sherman Property<sup>62</sup> over both the 10-foot right of way and the beachfront east of the Denizard upland property that was part of the 318 Parcel (“the Denizard Beachfront”) for the purpose of access to the North Farm Shore for boating, bathing, and fishing.

First, the framework requires that “during common ownership of a parcel” there is “an apparent and obvious use of one part of the parcel for the benefit of another part.” *Id.* Here, there are two analyses which follow the same sequence, one for the 10-foot right of way laying north of the Denizard Property, and one for the Denizard Beachfront.

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<sup>62</sup> This analysis applies as well to the sections of the Gladstone, Tabors, and Gilling Properties that lay within the 318 Parcel in addition to the full retention of easement rights in the South Farm Shore that they enjoy as discussed in an earlier section of this decision.

The 10-foot right of way was “under common ownership” with the area making up the plaintiffs’ current lots starting in 1899, when Henry Dennis was conveyed the entire 318 Parcel in fee, which included the land now comprising the 10-foot right of way.<sup>63</sup> This common ownership extended to include the entire South Farm Shore, (including the Denizard Beachfront) beginning on November 8, 1909 at 3:02 PM.<sup>64</sup> Once common ownership commenced the record indicates that an “apparent and obvious use of one part of the parcel” (the right-of-way and the Denizard Beachfront) was made “for the benefit of another part of the parcel” (the residential properties within 318 Parcel) to access the beachfront. This is demonstrated by Henry Dennis’s explicit retention of his right to continued use of the North Farm Shore upon the conveyance to Hill.

Second, the framework requires that “such use is being actually made up to the time of severance” and that such use “is reasonably necessary for the enjoyment of the other part of the parcel.” *Id.* This too is demonstrated by Henry Dennis’s explicit retention of his rights in the North Farm Shore, which could not be exercised without access over either the 10-foot right of way and the South Farm Shore, or just over the South Farm Shore. The physical characteristics of the property are such that Dennis could not have accessed the North Farm Shore without crossing the South Farm Shore or the 10-foot right of way and the South Farm Shore, and by retaining his rights in the North Farm Shore he made clear his intention of continuing to do so.

Every plaintiff’s property, the Gladstone, the Gilling, the Tabors, the Seymour, and the Sherman Properties, benefits from the right to pass and repass over the 10-foot right of way laying north of the Denizard Property. As for the Denizard Beachfront, with the exception of the

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<sup>63</sup> Even though the right of way was not carved out until 1902 to assist George Batchelor in getting to the highway from his 1902 Parcel, the area making up the right of way was under common ownership with the plaintiffs’ 318 Parcel Properties under the ownership of Henry Dennis beginning in 1899.

<sup>64</sup> PJSF ¶ 32; Registry, Book 293, Page 286 (SA 44-46); Facts, ¶ 36.

Shermans, whose property benefits only from the right to pass and repass, all other plaintiffs' properties benefit from the right to boat, bathe, and fish over the Denizard Beachfront.

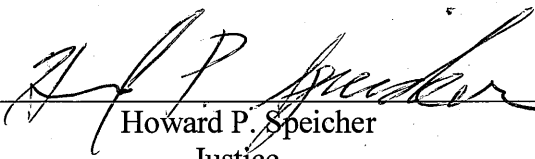
Reasonably consistent with boating, bathing, and fishing rights are any and all activities necessary for the beachfront's enjoyment, including but not limited to typical beach activities, such as the right to sit on a beach chair or blanket, suntan, play, or picnic on the entirety of the Farm Shore (both South and North) including the area encompassing the Denizard Beachfront.

*Anderson v. De Vries*, supra, 326 Mass. at 134 (“[w]hen an easement or other property right is created, every right necessary for its enjoyment is included by implication”); see generally *Hickey v. Pathways Association Inc.*, 28 LCR 15, 20 (Land Court 2020) (Vhay, J.) (rights implied with granted beach access easement are “those that the dominant owner needs in order to use the granted easement *for its intended purpose*”) (emphasis in original).

#### CONCLUSION

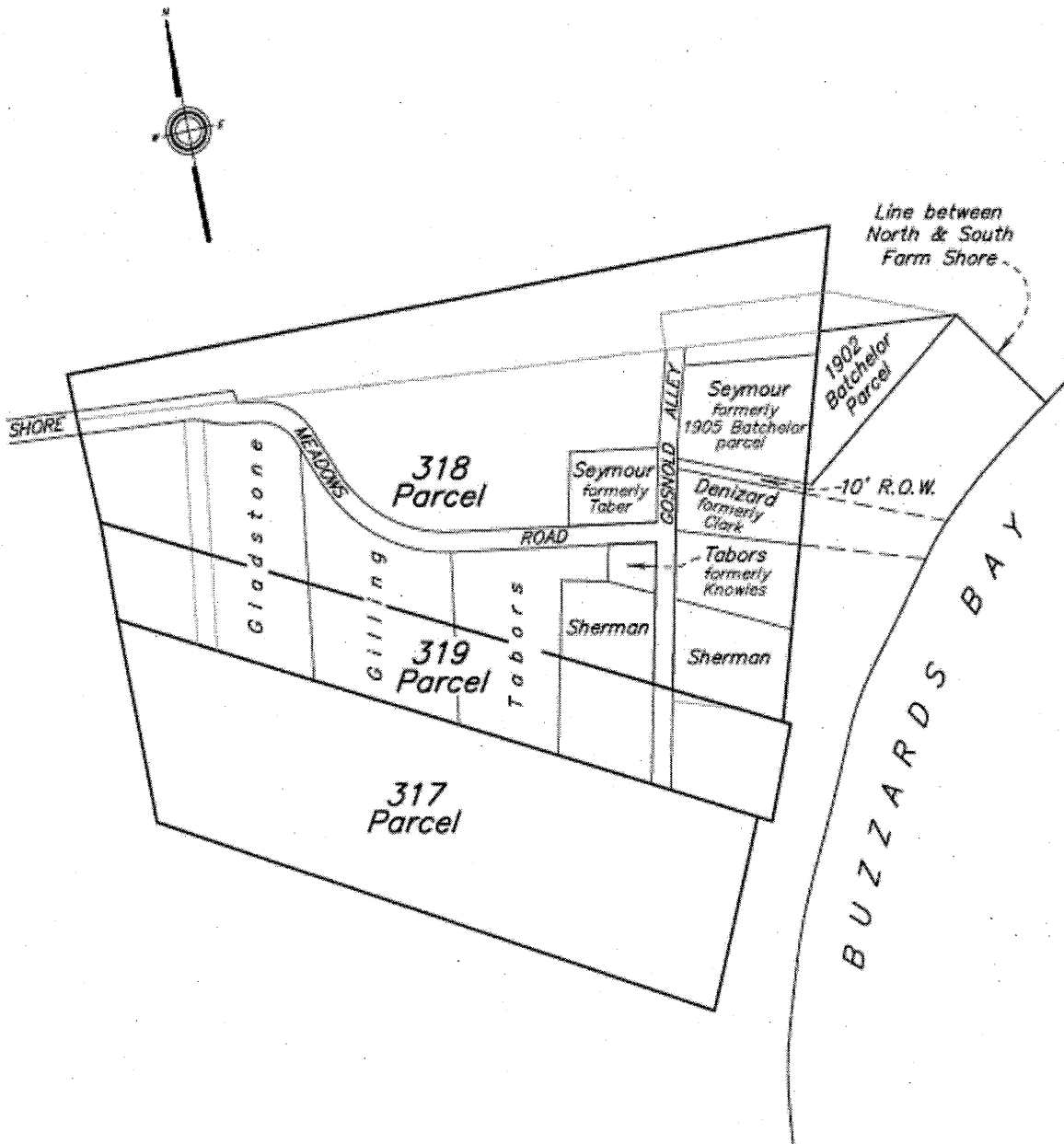
For the reasons stated above, the plaintiffs' motion for summary judgment is ALLOWED, and the defendant's cross-motion for summary judgment is DENIED.

Judgment will enter in accordance with this decision.

  
Howard P. Speicher  
Justice

Dated: January 27, 2025.

DECISION SKETCH  
21 MISC. 000082



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

BRISTOL, ss.

MISCELLANEOUS CASE  
No. 21 MISC 000082 (HPS)

STEVEN J. GLADSTONE, KIM DAIGLE  
GLADSTONE, JERI L. GILLING, JOHN  
SEYMOUR, MARY ELISABETH SWERZ  
and KINNAIRD HOWLAND, as TRUSTEES  
OF THE SHERMAN FAMILY REALTY  
TRUST, RICHARD D. TABORS and  
PATTON O. TABORS, as TRUSTEES OF  
THE TQUAD REALTY TRUST,

*Plaintiffs,*

v.

KATHLEEN DENIZARD,

*Defendant.*

**JUDGMENT**

This action commenced February 19, 2021 with the filing of a complaint by Steven J. Gladstone, Kim Daigle Gladstone, Jeri L. Gilling, John Seymour, Mary Elisabeth Swerz and Kinnaird Howland, as Trustees of the Sherman Family Realty Trust, and Richard D. Tabors and Patton O. Tabors, as Trustees of the Tquad Realty Trust, (collectively, “plaintiffs”) asserting claims for declaratory judgment pursuant to G. L. c. 231A, and for injunctive relief, all with respect to claims that the plaintiffs’ properties in Dartmouth are benefitted by express, implied or prescriptive easements over a portion of the property of defendant Kathleen M. Denizard at 8 Meadows Shore Road in Dartmouth (“Denizard Property”).

This case came on for hearing on the plaintiffs' motion for summary judgment and on the defendant's cross-motion for summary judgment. In a decision of even date, the court (Speicher, J.) has determined that judgment shall enter in favor of the plaintiffs on all counts.

In accordance with the court's decision, it is

**ORDERED, ADJUDGED, and DECLARED**, on Count I and Count II of the complaint, seeking a declaratory judgment and injunctive relief with respect to claimed easement rights over the beachfront portion of the Denizard Property, that is, the portion of the Denizard Property east of the boundary of the former 318 Parcel, as shown with dotted lines on the Decision Sketch attached hereto and made a part hereof, and on Count I of the defendant's counterclaim, seeking a declaratory judgment of trespass, and Count II of the defendant's counterclaim, seeking a declaratory judgment with respect to limitations on the claimed easement, as follows: the properties of the plaintiffs Steven J. Gladstone, Kim Daigle Gladstone, Jeri L. Gilling, John Seymour, and Richard D. Tabors and Patton O. Tabors, as Trustees of the Tquad Realty Trust, all as shown on the Decision Sketch, are benefited by an express easement to use of the North and South Farm Shore, as shown on the Decision Sketch, including the beachfront portion of the Denizard Property, for boating, bathing and fishing and for all customary beach uses incidental thereto, including without limitation sunbathing, sitting on blankets or chairs, picnicking, and playing beach games, and are also benefitted by an implied easement to pass and repass over the South Farm Shore and the 10-foot right of way, both as shown on the Decision Sketch, for access to and egress from the North Farm Shore as shown on the Decision Sketch; and the property of the plaintiffs Mary Elisabeth Swerz and Kinnaird Howland, as Trustees of the Sherman Family Realty Trust, shown as the Sherman property on the Decision Sketch, is benefitted by an implied easement to pass and repass over the South Farm Shore, including the beachfront portion of the

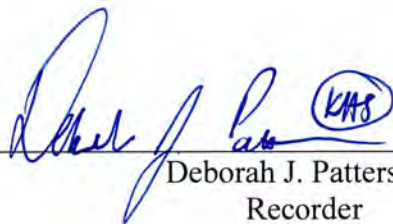
Denizard Property, and the 10-foot right of way, both as shown on the Decision Sketch, for access to and egress from the North Farm Shore as shown on the Decision Sketch; the exercise of the rights declared herein do not constitute a trespass on the beachfront portion of the Denizard Property; and it is further

**ORDERED** and **ADJUDGED**, that the defendant Kathleen M. Denizard and her agents and assigns are hereby permanently **ENJOINED** from interfering, by signage, fencing, blocking or otherwise, with the rights of the plaintiffs and their invitees to exercise their easement rights on the beachfront portion of the Denizard Property as declared in this Judgment; and it is further

**ORDERED** and **ADJUDGED** that this Judgment is a full adjudication of all the parties' claims in this case, and all prayers for relief by any party in this action that are not granted in the preceding paragraphs are DENIED.

HPX, By the Court. (Speicher, J.)

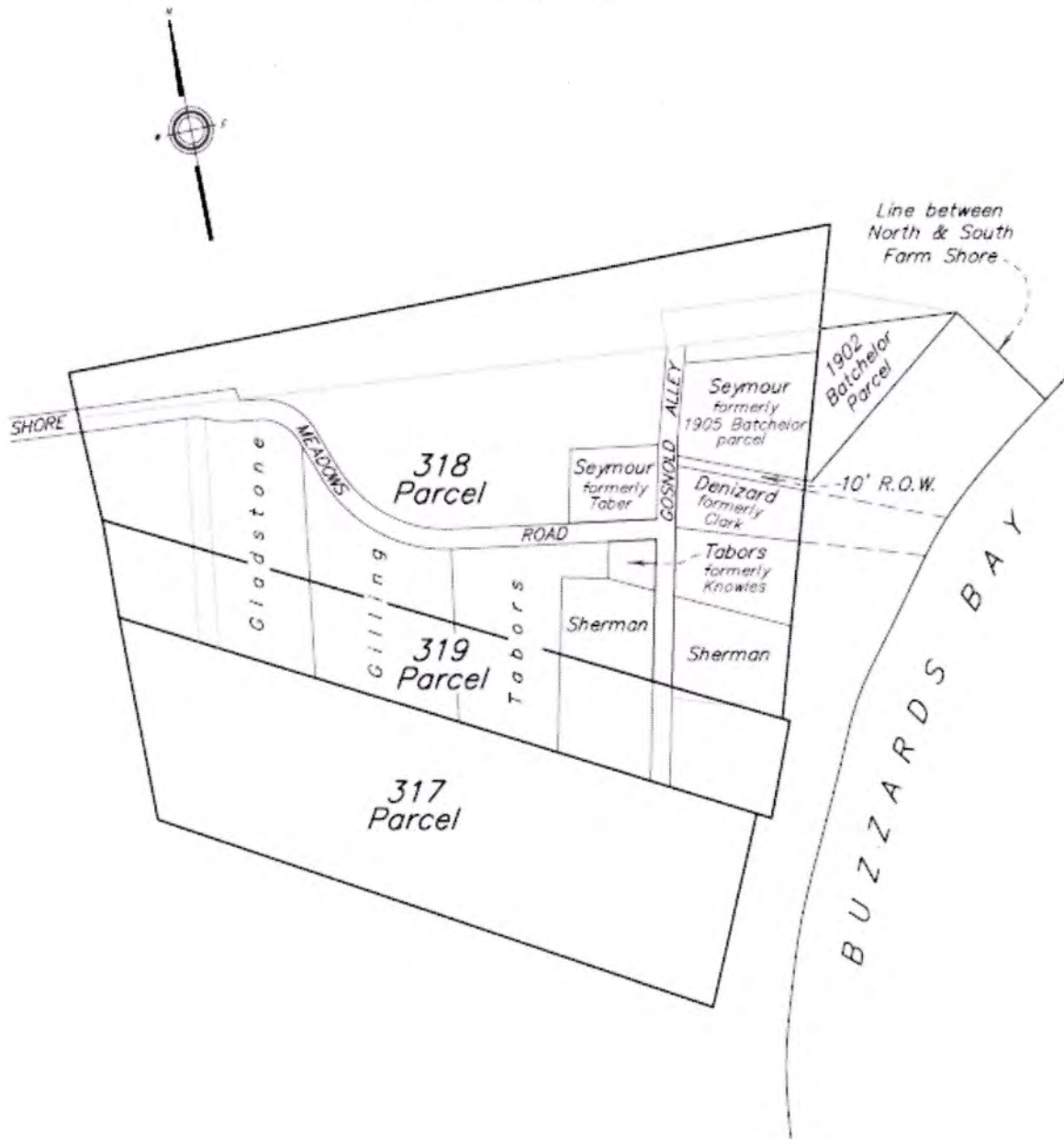
Attest:

  
Deborah J. Patterson  
Recorder

Dated: January 27, 2025.

# DECISION SKETCH

21 MISC. 000082



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

25-P-480

STEVEN J. GLADSTONE & others<sup>1</sup>

VS.

KATHLEEN M. DENIZARD.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant, Kathleen M. Denizard, owns oceanfront property in the town of Dartmouth and the plaintiffs, owners of nearby oceanfront, beachfront, or inland property, each claim to have the right to use the "beach" portion of Denizard's property for general beach purposes.<sup>2</sup> Denizard contends that several of the plaintiffs' properties lost their rights over her beach due

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<sup>1</sup> Kim Daigle Gladstone, Jeri L. Gilling, John Seymour, Lynn Seymour, Mary Elisabeth Swerz and Kinnaird Howland, trustees of the Sherman Family Realty Trust, Robert Tabors, and Richard D. Tabors and Patton O. Tabors, trustees of the TQuad Realty Trust.

<sup>2</sup> The plaintiffs also claim the right of access to the beach by a ten-foot wide right of way along the northern side of Denizard's property; Denizard no longer denies that the plaintiffs have that right -- with the exception that Denizard denies that the trustees of the TQuad Realty Trust have that right. We will address that argument below.

to the doctrine of merger and the longstanding "bright-line" rule prohibiting "the owner of the dominant estate [from using an easement] to pass to or from other land adjacent to or beyond that to which the easement is appurtenant" (citation omitted). Taylor v. Martha's Vineyard Land Bank Comm'n, 475 Mass. 682, 686 (2016). As to other plaintiffs, Denizard admits they have easements, but challenges their use of her beach as exceeding the scope of their easements. On cross motions for summary judgment on the plaintiffs' complaint seeking a declaratory judgment and injunctive relief, a judge of the Land Court declared the rights of the parties and Denizard now appeals from the judgment and from the denial of her motion for reconsideration.<sup>3</sup> Our reasoning differs in some respects from that of the Land Court judge and we affirm in part and vacate in part and remand for modification of the easement for the inland property owners -- Steven J. Gladstone, Kim Daigle Gladstone, Jeri L. Gilling, and Robert Tabors.

Background. The development of the plaintiffs' properties may be traced to 1885, when Emily Sweet acquired a large parcel including all the land at issue, which fronted on Buzzards Bay along the parcel's eastern boundary. In 1889, Sweet divided the

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<sup>3</sup> Denizard does not raise any separate arguments regarding the denial of her motion for reconsideration, and we therefore do not address it further.

large parcel into four smaller parcels -- three roughly rectangular adjacent parcels that proceed north to south and are labeled nonconsecutively on the attached decision sketch<sup>4</sup> as parcels 318, 319, and 317, and a fourth parcel, the "beach parcel," which Sweet referred to as the "farm shore." While retaining the fee in the farm shore,<sup>5</sup> Sweet transferred parcel 318 to Henry, Ephraim, and Foster Dennis,<sup>6</sup> and she transferred parcel 319 to Louis Richardson. Importantly for our purposes, in both deeds she expressly included the right to "use the farm shore for boating[,] bathing [and] fishing purposes."<sup>7</sup>

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<sup>4</sup> The decision sketch was attached to the Land Court decision and neither party suggests that it does not accurately depict the location of the various lots. Accordingly, we attach the sketch depicting the various parcels, Gosnold Alley, and other features as an appendix to assist the reader. We note, however, that some of the affidavits submitted suggest that there has been erosion of the beach area that may not be reflected on the sketch.

<sup>5</sup> The parties agree that Sweet "retained ownership of the land to the east of [parcels 317, 318 and 319] lying between the parcels and the sea ('the Farm Shore')," and they agree that the farm shore is accurately shown on the decision sketch.

<sup>6</sup> Because of the common surname, we refer to these people frequently by their first names.

<sup>7</sup> Sweet transferred parcel 317 to Henry and Foster "[t]ogether with the right to the grantees, their heirs & assigns of using the beach lying between the granted premises and the waters of Buzzards Bay for all purposes except the taking of seaweed . . . ." Because none of the parties' properties derive from parcel 317, we do not address it further.

Sweet retained the farm shore parcel until 1891 when she conveyed it to Ephraim Dennis, who conveyed it to Henry on November 8, 1909. On November 8, 1909, the same day that Henry acquired all of the farm shore, he and Ephraim conveyed a portion of the northern section of the farm shore to William Hill, "subject to the common law rights of the public and to rights in certain persons," including the owners of Henry Dennis' properties, Louis Richardson's property, George Batchelor's property, and Walter and Maude Taber's property, among others.<sup>8</sup> The division line for this "north farm shore" portion from the rest of the farm shore is shown on the decision sketch as just north of Batchelor's parcel (now owned by the Seymours). What the parties refer to as the "south farm shore" is south of that line and the "north farm shore" is north of that line. Denizard's beach is in the "south farm shore" portion. In November 1910, Henry transferred the remainder of parcel 318 and the south farm shore to Catherine Dennis and Lucy Dudley.

The parties agree that parcel 319 never entered common ownership with any part of the Denizard property and that the Sweet easement rights continue to benefit all property deriving

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<sup>8</sup> We note that the plaintiffs Robert, Richard, and Patton have the last name "Tabors," which is different from the last name "Taber." The Tabers and the Tabors are unrelated for purposes of this decision.

from parcel 319. As noted above, in November 1909, however, when Henry owned a large portion of parcel 318, including portions of several of the plaintiffs' interior lots, the Shermans' beachfront lot and interior lot, and Denizard's lot, he took title to the south farm shore. This is significant because Denizard argues that the Sweet easement over the farm shore benefitting parcel 318 merged by operation of law when Henry took title to both the remainder of parcel 318 and the south farm shore. And, because several of the parties' interior lots are comprised of property from the merged portion of parcel 318 and portions of parcel 319, and even though the parcel 319 portion of the lots do not suffer from a merger issue, she contends that the easements benefitting the parcel 319 portion of those lots are overloaded<sup>9</sup> by the combination of land from parcel 319 with land from parcel 318, and thus the owners may not exercise those easement rights.

1. The parties' properties. a. The beachfront properties. As shown on the decision sketch, four beachfront lots deriving from parcel 318 are separated from interior lots by "Gosnold Alley," which runs north to south over parcels 318

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<sup>9</sup> The term "overload" applies when an appurtenant easement is used to serve land other than the original dominant estate. Taylor v. Martha's Vineyard Land Bank Comm'n, 475 Mass. 682, 685 n.11 (2016).

and 319. These are labelled (1) "Seymour formerly 1905 Batchelor parcel" along with "1902 Batchelor Parcel"; (2) "Denizard formerly Clark<sup>10</sup>"; (3) "Tabors formerly Knowles"; and (4) "Sherman."

Proceeding from north to south, the plaintiffs John and Lynn Seymour's property is directly north of a ten-foot right of way that separates it from the Denizard property. The Seymour property is comprised of portions of parcels transferred in 1902, 1905, and 1909 to their predecessor, Batchelor, before any potential merger issue arose by virtue of Henry's ownership of the farm shore. The 1902 deed included a piece of the farm shore and the parties agree that "[a] portion of the 1902 Batchelor Parcel now comprises part of the Seymour Waterfront property." Each of the parcels transferred to Batchelor had rights to use the ten-foot right of way and the farm shore, including the Denizard beach, for boating, bathing, and fishing, either by virtue of the Sweet easement or an express easement in the relevant deed.<sup>11</sup>

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<sup>10</sup> The spelling of Denizard's predecessor, Frederick Clark, is inconsistent in the record between Clark and Clarke; we adopt the spelling in the original deed of Denizard's property to Frederick L. Clark.

<sup>11</sup> While the 1905 deed did not expressly include beach rights, the rights deriving from Sweet were still in effect. See G. L. c. 183, § 15. See also Anzalone v. Metropolitan Dist. Comm'n, 257 Mass. 32, 36 (1926) (easement not limited in scope by its terms attaches to every portion of tract and to owner of

The Denizard property is south of the Seymour property. It was conveyed to Denizard's predecessor, Frederick Clark, by Lucy Dudley, successor to Henry Dennis, in 1914, at a time when Dudley also owned the vast majority of the farm shore, aside from the section north of the Denizard property which had been previously conveyed to the Seymours' predecessor, Batchelor, and portions north of the Batchelor property -- the north farm shore -- that had been conveyed in 1909 to William Hill, subject to Henry's easement. The deed from Dudley to Clark included the beach to the shoreline. The deed purported to transfer the property "free from all of incumbrances" and does not contain an express reservation of an easement for Dudley's remaining land. Of note, however, is that Dudley retained the fee in or an easement right to use all other sections of the beach -- both the north farm shore and the south farm shore. In fact, a small portion of the "south farm shore" is north of Denizard's beach and a larger portion of it is south of Denizard's beach.

South of the Denizard property is the Tabor trustees' beachfront property (the "Tabors formerly Knowles" lot on the

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each lot divided from tract). Further, in 1909, Henry transferred a nearby interior lot to Walter and Maude Taber, "together with the use of the shore" north of the 319 parcel for boating, bathing, and fishing, reserving the right of boating, bathing, and fishing on the farm shore. The Seymours now own this lot also.

decision sketch). Ephraim and Henry Dennis originally transferred that lot to Walter I. Knowles on September 7, 1899, together with a lot across the alley that derives from parcel 318, with "the privilege of using the beach in front of the lot first above described [the beachfront lot] in common with others, for boating bathing and fishing." At that time, Ephraim owned the beach and Ephraim and Henry owned parcel 318. So far as the record reveals, there was nothing to prevent the easement that Sweet granted to parcel 318 from passing appurtenant to the two lots that Ephraim and Henry Dennis deeded to Knowles. See G. L. c. 183, § 15; Anzalone v. Metropolitan Dist. Comm'n, 257 Mass. 32, 36 (1926).

South of the Tabors' property is the Sherman property; it too is comprised of a beachfront lot and an adjacent inland lot -- all deriving from parcel 318. Henry took title to this property in 1899; in 1909, when Henry took title to the south farm shore, he owned both the south farm shore and all of the Sherman property, and Dudley succeeded to his interest.

b. The inland lots. The Gladstones, Gilling, and Robert Tabors own interior lots that are west of Gosnold Alley, run north to south, and are comprised of property from both parcels 318 and 319. The interior lots were created by a 1965 subdivision plan of land acquired by Philip and Bernadette Hemingway together with "any right to the use of the shore

appurtenant to it." The Tabors, as trustees, and the Shermans each own the beachfront lots noted above and adjacent interior lots derived from parcel 318.

Discussion. Our discussion is limited to the parties' rights over the Denizard property and Denizard's contention that the Sweet easements had been extinguished by the doctrine of merger for the portions of parcel 318 held by Henry at the same time he owned most of the south farm shore and had rights to use all of the south farm shore. We review the judge's decision de novo. See Marhefka v. Zoning Bd. of Appeals of Sutton, 79 Mass. App. Ct. 515, 517 (2011).

At the outset, we note that Denizard, in her brief, makes several concessions. She admits that in 1909, when Dudley conveyed the Denizard lot to Clark, the use of the ten-foot right of way abutting the northerly boundary of the Denizard property was an "apparent and obvious use" and "reasonably necessary" for gaining access to the north farm shore -- that it "had been established for at least 4 years and allowed for inland portions of [parcel 318] then owned by Henry Dennis . . . to access the [f]arm [s]hore." Thus, Denizard in essence concedes that Dudley reserved an implied easement for the ten-foot right of way for access to the north farm shore for all of the plaintiffs -- but not for the south farm shore still owned by Dudley. She also does not challenge the judge's "conclusion"

that the Sherman's property "has an implied easement over the Denizard Beach due to the fact that Sherman's property contains beachfront that was formerly part of the Farm Shore." The judge's decision, however, concludes only that the Sherman property "is benefitted by an implied easement to pass and repass over the South Farm Shore, including the beachfront portion of the Denizard property." Sherman did not file a notice of appeal on this issue. Finally, Denizard concedes that the Seymours have rights to use Denizard's beach for beach purposes. Thus, other than to address Denizard's "scope" argument, we need not address further the rights of the Seymours or any of the parties' right to use the ten-foot right of way for access to the north farm shore.

We turn to the plaintiffs' remaining claims.

1. Premerger transfers. Both the Seymours and the Tabors own properties that were transferred to their predecessors before Henry Dennis took title to both the south farm shore and the remainder of parcel 318. The Seymours' predecessors acquired express easements over Denizard's beach and over the ten-foot right of way. Although Denizard does not challenge the Seymour's right to boat, fish, and bathe on her beach, she contends that the scope of the easement granted by the judge is overly broad and the judge's conclusion that the Seymours' rights include "all customary beach uses incidental [to boating,

bathing, and fishing], including without limitation sunbathing, sitting on blankets or chairs, picnicking, and playing beach games" overburdens<sup>12</sup> the easement. Denizard makes only vague assertions that the various affidavits submitted in the case -- none of which shed light on the intentions of Sweet -- suggest that Bachelor has overburdened the easement, but does not point to any specific facts. Consequently, we discern no error in the judge's reasonable interpretation of the Seymours' express easement.

As for the Tabor trustees' beachfront property (which includes a parcel west of Gosnold Alley but comprised only of property from parcel 318), although their original predecessor, Knowles, did not receive an express easement over Denizard's beach, the Sweet easement was still appurtenant to the property in 1899. "An easement is to be interpreted as available for use by the whole of the dominant tenement existing at the time of its creation," Pion v. Dwight, 11 Mass. App. Ct. 406, 410 (1981), and "[u]nless otherwise stated in the deed, 'rights and appurtenant easements pass by grant without specific mention.'" Perry v. Nemira, 91 Mass. App. Ct. 12, 16 (2017), quoting Cheever v. Graves, 32 Mass. App. Ct. 601, 606 (1992).

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<sup>12</sup> The term "overburden" describes "use of an easement for a purpose different from that intended in the creation of the easement" (citation omitted). Taylor, 475 Mass. at 685 n.11.

Denizard argues that because the deed to the Tabors trustees' predecessor, Knowles, contained an express easement over the beach in front of the Knowles lot, the parties must have intended to "relocate" Knowles' easement rights deriving from the Sweet deed. While we agree with Denizard that in rejecting this argument the judge erred by suggesting that Walter Knowles and Edward Knowles were the same person, that error does not change the outcome as we do not find anything inconsistent about granting an express easement over the beach in front of Walter Knowles' property and also finding that the easement rights over all of the beach set forth in the Sweet deed were still operative. The easements, though duplicative in part, are not inconsistent, and Denizard points to no affirmative evidence of the parties' intent to extinguish the Sweet easement appurtenant to the property. Contrast Proulx v. D'Urso, 60 Mass. App. Ct. 701, 705 (2004) (easement relocated when parties acquiesced in use of alternative easement in lieu of original easement for over decade).

2. The Gladstone, Gilling, and Tabors inland parcels and the merger doctrine. Although it is clear that the original grantor, Emily Sweet, took steps to ensure that all of parcels 318 and 319 would have easement rights in and over the farm shore -- including what became the Gladstone, Gilling and Robert Tabors parcels -- the subsequent development of parcel 318 and

the farm shore caused some portions of parcel 318 and the farm shore to come into common ownership. "The [merger] doctrine requires that [an easement] terminate[] 'when all the benefits and burdens come into a single ownership'" because "[w]hen the dominant and servient estates come into common ownership there is no practical need for the [easement's] continued existence, as the owner already has 'the full and unlimited right and power to make any and every possible use of the land'" (citations omitted). Busalacchi v. McCabe, 71 Mass. App. Ct. 493, 497-498 (2008). "Although a subsequent conveyance of one of the commonly held parcels will not automatically revive the extinguished easement, the doctrine in no way precludes the common owner from recreating precisely the same easement by express reservation." Id. at 498. Extinguished easements, however, "must be created anew by express grant, by reservation, or by implication" (citation omitted). Williams Bros. Inc. of Marshfield v. Peck, 81 Mass. App. Ct. 682, 685 (2012).

Accepting that by late 1909, Henry owned the inland portions of parcel 318, the Denizard lot, the Sherman lots, and the south farm shore, the preexisting easement from Sweet had been extinguished as to those lots under the doctrine of merger. To be clear, Henry, as owner of both the south farm shore and the inland properties, had sufficient title to create the easements anew, but he never did, and the original easements

from Sweet were extinguished. Dudley took what title Henry had. Dudley's deed to Clark did not include an express reservation in the Denizard beach, thus easement rights must have arisen, if at all, by implication. See Williams Bros. Inc. of Marshfield, 81 Mass. App. Ct. at 685. Consequently, the question is whether when Dudley transferred the Denizard lot -- including the Denizard beach to Clark -- an easement by implication with respect to the Denizard Beach, which had been part of the south farm shore, arose for the benefit of Dudley's remaining land.

Whether by grant or by reservation, implied easements "do not arise out of necessity alone." Perodeau v. O'Connor, 336 Mass. 472, 474 (1957), quoting Dale v. Bedal, 305 Mass. 102, 103 (1940). Rather, they "must be found in a presumed intention of the parties, to be gathered from the language of the instruments when read in the light of the circumstances attending their execution, the physical condition of the premises, and the knowledge which the parties had or with which they are chargeable." Dale, supra at 103. Because "a deed is . . . construed most strongly against the grantor," it may be "more difficult to imply an easement by reservation for the grantor's benefit than an easement by grant for the grantee's benefit." Id.

Only "reasonable necessity" is required. Perodeau, 336 Mass. at 474. "The burden of proving such intent lies with the

party claiming the easement, here the plaintiffs." Kane v. Vanzura, 78 Mass. App. Ct. 749, 755 (2011). "The controlling question is whether the circumstances of the severance demonstrate that the parties intended that the owner of one of the resulting parcels be able to make some use of the other parcel even though no express easement was recorded." Lavoie v. McRae, 102 Mass. App. Ct. 14, 19 (2022). That intent "generally will be found only where the parties seeking to benefit from the easement can prove that it is 'reasonably necessary' for their use and enjoyment of their land" (citation omitted). Id. at 19-20.

Denizard asserts that because the Dudley deed stated that the property was transferred "free of incumbrances," there can be no implied easement for Dudley's remaining land. We place little weight on the deed's assertion, however, because at the time of the Dudley deed to Clark, Denizard's predecessor, several property owners from the original Sweet parcel had rights in and over the Denizard beach for boating, bathing, and fishing purposes. They included all of parcel 319, and the Seymours' predecessor, Batchelor. In addition, William Hill, who owned property north of the Seymours' lot and the north farm shore, had acquired rights to use the Denizard beach for boating, bathing, and fishing in 1909, including the right to grant the same rights to purchasers of his ten plus acres. All

of these appurtenant rights were a matter of record, and parties to a deed are charged with knowledge available from inspection of the records of the registry of deeds. See Barnes v. Boardman, 152 Mass. 391, 396 (1890). Thus, when the Dudley deed provided that the Denizard property was granted "free of incumbrances" that did not extinguish the rights of others to use the beach in front of the Denizard property and does not preclude us from finding an implied easement for the benefit of Dudley's remaining property.

Next, we must emphasize that Denizard has admitted that the use of the ten-foot right of way abutting the northerly boundary of the Denizard property was an "apparent and obvious use" and "reasonably necessary" and "that it had been established for at least 4 years" at the time of the Dudley to Clark deed in 1914, "and allowed for inland portions of [parcel 318] then owned by Henry Dennis . . . to access the [f]arm [s]hore." Although she contends the right of way was used for access to the north farm shore, we discern nothing in the record suggesting that at the time of the deed, Dudley and her predecessor, Henry, had limited their use of the farm shore to the north farm shore. Given that Denizard has conceded the open and obvious use of the ten-foot right of way, on this record, we cannot conclude that Dudley intended to give up her access to the rest of the beach she owned south of Denizard's property. Even if she could have

access to the beach generally by using the ten-foot wide right of way and turning north of the Denizard beach or access to the beach south of the Denizard beach via the Sherman lot, it is unreasonable to conclude that Dudley intended to cut off her ability to traverse the entire beach when she retained rights in or title to all of the south farm shore and the north farm shore other than the Denizard beach. We conclude, therefore, that an easement over the Denizard beach and the ten-foot right of way was reasonably necessary to enable Dudley to fully enjoy the rest of her property. When Dudley divided parcel 318, the rights over Denizard's property passed to the divided portion without having to be stated. Indeed, Denizard concedes that the internal properties retain the rights with respect to the north farm shore. "Unless otherwise stated in the deed, 'rights and appurtenant easements pass by grant without specific mention.'" Perry, 91 Mass. App. Ct. at 16, quoting Cheever, 32 Mass. App. Ct. at 606. So far as the record reveals no one with a fee interest in the portion of the south farm shore south of Denizard's beach appears to have challenged the inland lot owners rights, whether by virtue of permission or easement rights, to use the south farm shore south of the Denizard property and thus, we need not entertain the suggestion that any easement over the Denizard property is obsolete or unnecessary.

We note, however, that in Cheever, 32 Mass. App. Ct. at 608-609, we concluded that a plaintiff made no showing of reasonable necessity to demonstrate an intent to reserve an easement by implication for beach rights where there was no showing that the lot had no other waterfront access. Here, Dudley did have other waterfront access. However, as already stated, here Dudley retained rights in or title to all of the south farm shore other than the Denizard beach. It defies logic to conclude that Dudley intended to carve out a section of the beach that would disrupt her enjoyment of all of the remaining beach that she owned. In these circumstances, we conclude that she intended to reserve a right to pass and repass over the Denizard beach. That said, there is no indication that using it for "all beach purposes" was reasonably necessary where she transferred the fee and could enjoy other areas of the beach for beach purposes. Thus, we limit the reserved easement by implication to passing and repassing only -- in addition to the public's colonial rights. See Butler v. Attorney General, 195 Mass. 79, 84 (1907) (colonial ordinance of 1631-1647 grants public right of navigation, fishing, fowling, and passing freely over and through water between high and low water marks).<sup>13</sup>

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<sup>13</sup> Similarly, we note that Denizard admits in her brief that the inland lot owners continue to have rights in some portions of the beach south of Denizard's beach as well as the north farm shore.

Because we conclude that Dudley reserved an easement by implication over the Denizard beach, including property from parcel 318 in the Gladstones', Gilling's, and Robert Tabors' interior lots does not overload the parcel 319 easement to the extent that they may pass and repass over the Denizard beach to reach other sections of the beach over which they have beach rights. This is the same result the judge reached for the Sherman property -- that it retains the right to pass and repass over the Denizard beach and the ten-foot right of way. It would overload the easement, however, to allow the Shermans, the Gladstones, Gilling, and Robert Tabors to use the Denizard beach for all beach activities. Thus, we remand the case to the Land Court to modify the scope of the easement for the interior lots comprised of property from parcels 318 and 319 owned by the Gladstones, Gillings, and Tabors consistent with this decision.<sup>14</sup>

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<sup>14</sup> The judge found that the doctrine of merger did not apply because it was not the intent of the merger doctrine to "deprive the portions of those properties within the 319 [p]arcel of their deeded rights to full use of the [f]arm [s]hore, even though their rights had not been lost through merger." However, it is not the doctrine of merger that causes the property deriving from parcel 319 to lose easement rights to the full use of the Denizard beach. Rather, the doctrine of overloading came into play because of the much later decision to combine portions of parcel 319 with property from parcel 318 that had lost certain easement rights through merger, ultimately leaving that property with only the right to pass and repass, and developing them as single lots with property from both parcels 318 and 319. The prohibition against overloading an easement by extending it to after-acquired land has been firmly established for centuries. See e.g. Davenport v. Lamson, 21 Pick. 72, 74 (1838)

3. Remaining counterclaims. Denizard argues that her counterclaims were not completely addressed and that the Seymours and Tabors have "overburdened" their easement to use the Denizard beach. Specifically, Denizard asserts that the judge erred in broadly concluding that the easement authorized "all customary beach uses incidental [to boating, bathing, and fishing], including without limitation sunbathing, sitting on blankets or chairs, picnicking, and playing beach games." We discern no error in this aspect of the judge's decision; the Seymours and the Tabors trustees' beachfront lot, and the adjacent lot purchased with the beachfront lot, enjoy broad rights deriving from admitted express or implied easement rights. Nothing in the affidavits of record raise a genuine issue of material fact on the scope of those easements. Again, our decision does limit the Shermans' lot and the Gladstones', Gilling's, and Richard Tabors' interior lots to passing and repassing over the Denizard lot.

In addition, it appears that the plaintiffs also claimed easements by prescription. It is unclear to us whether these

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(right of way benefitting three-acre lot cannot be used for access to nine-acre lot which lay beyond three-acre lot). That premerger, both lots enjoyed the Sweet easement rights, does not assist the plaintiffs here. Thus, the portions of lots 319 and 318 that were combined to create the three interior lots each retained the right to pass and repass over the Denizard beach (as they retained the rights to use the north farm shore); those therefore are the rights the three interior lots retain.

claims were waived. To the extent that they were not waived, the Shermans, Gladstones, Gilling, and Robert Tabors may pursue those claims on remand, though they will bear the burden to show "that [their] use of the disputed beach area was sufficiently open and notorious as to entitle [them] to the benefit of the presumption that [Denizard or her predecessors] knew that . . . use of the area was being made under a claim of right."

Houghton v. Johnson, 71 Mass. App. Ct. 825, 840 (2008).

Conclusion. We affirm the judgment in part and vacate in part and remand for further orders and proceedings consistent with this opinion.<sup>15</sup> Specifically, the Shermans, Gladstones, Gilling, and Robert Tabors properties enjoy an implied easement to pass and repass over the Denizard beach and the ten-foot right of way to reach both the north farm shore and the south farm shore. The Seymours' beachfront property and the property of Richard D. Tabors and Patton O. Tabors, as trustees of the TQuad Realty Trust, enjoy easement rights over the ten-foot right of way to reach the north farm shore and the south farm shore, and the right to use the Denizard beach for boating, bathing, and fishing and all customary beach uses incidental thereto, including without limitation sunbathing, sitting on

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<sup>15</sup> Denizard's request for attorney's fees and costs is denied.

blankets or chairs, picnicking, and playing beach games. Denizard shall be enjoined from interfering with the plaintiffs' rights as declared. The Land Court shall determine whether any of the plaintiffs have acquired additional prescriptive easement rights if such claims have not been waived. The order denying the motion for reconsideration is affirmed.

So ordered.

By the Court (Rubin, Henry &  
Wood, JJ.<sup>16</sup>),

A handwritten signature in blue ink, appearing to read "Paul Little", with a stylized flourish at the end.

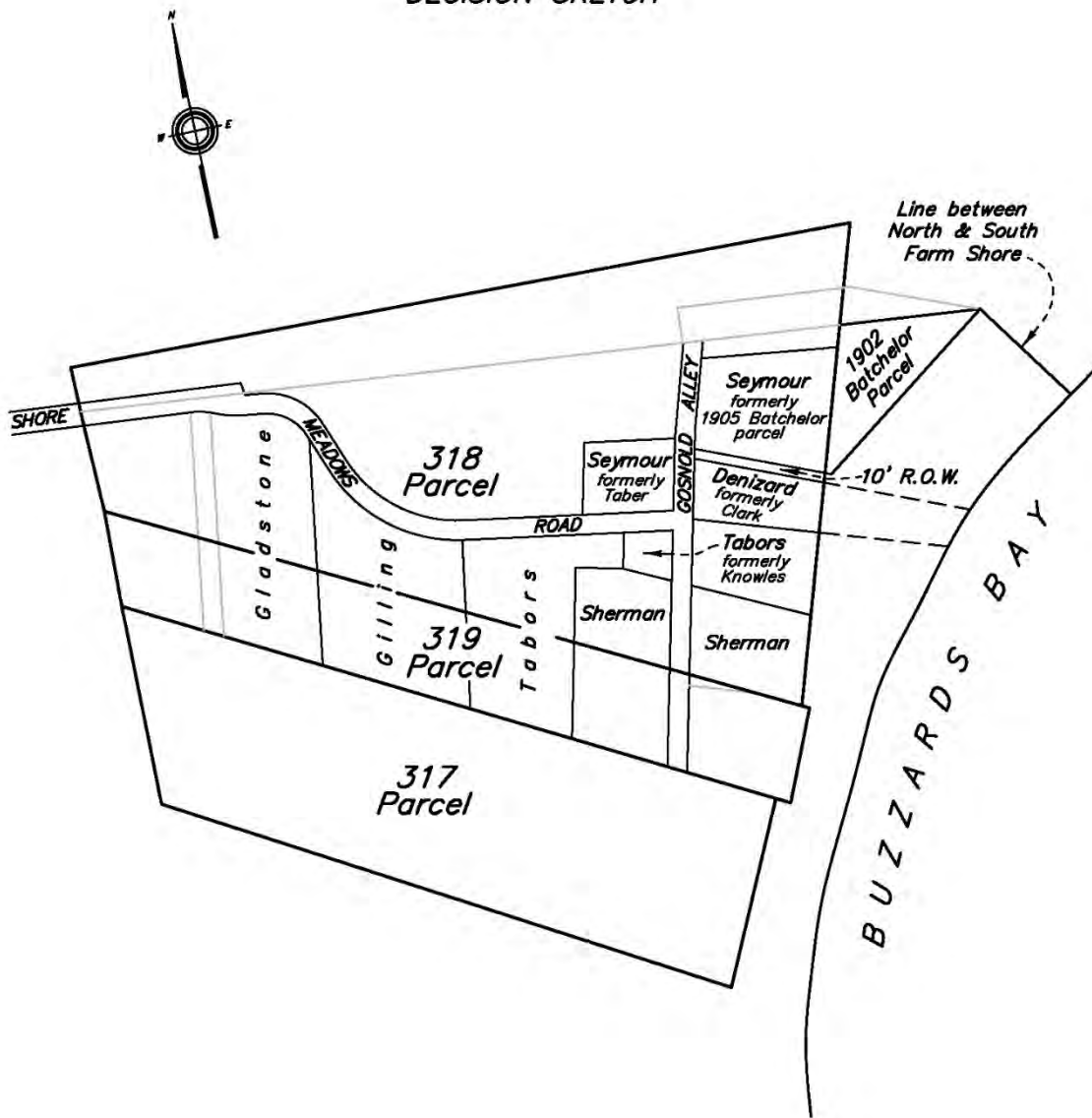
Clerk

Entered: June 15, 2026.

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<sup>16</sup> The panelists are listed in order of seniority.

# APPENDIX DECISION SKETCH



# Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 25-P-480

STEVEN J. GLADSTONE & others

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vs.

KATHLEEN M. DENIZARD.

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Pending in the Land Court

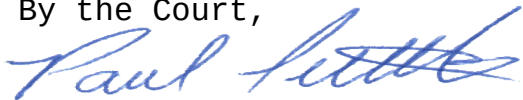
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Ordered, that the following entry be made on the docket:

The judgment is affirmed in part and vacated in part, and the matter is remanded for further orders and proceedings consistent with the memorandum and order of the Appeals Court.

The order denying the motion for reconsideration is affirmed.

By the Court,

 , Clerk  
Date June 15, 2026.

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