STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

[FILED: September 4, 2014]

PETER F. KILMARTIN, Attorney General of The State of Rhode Island,	:	
Plaintiff	:	
VS.	:	**C.A. No. WB-12-0579**
JOAN M. BARBUTO; LYNNE D. KAESMANN; WILLIAM H. ANDERSON; SUSAN BRANDT; JOANN HARRINGTON; CLARENCE G. BROWN; JUDITH W. BROWN; JOHN B. STELLITANO, Trustee of The John Bruno Stellitano Living Trust; JAMES M. TOBIN; JOSHUA M. VOCATURA; HATTIE G. VOCATURA TRUST; NICHOLAS P. JAREM; SANDRA L. JAREM; MICMAYS, LLC; JOAN A. CARR; JOHN C. MAFFE, JR.; PATRICIA JEAN SHANNON; STEPHANIE E. IMMEL; JEANNE E. SHANNON; and JOSEPH M. SHANNON,	:	
Defendants	:	
AND	:	
DUNES PARK, INC., DONNA PIRIE, MARGARET ANDREO, JANE L. TAYLOR, DAVID K. McGILL, MIRIAM B. McGILL, TIMOTHY F. SHAY, BRIAN P. SHAY, and JUSTIN T. SHAY, JEFFREY A. FEIBELMAN, TRUSTEE OF THE 627 REALTY TRUST,	:	
Defendant Intervenors	:	

DECISION

STERN, J. More than one hundred (100) years ago, five owners of beachfront property in the Misquamicut Beach area of Westerly, Rhode Island filed and recorded a plat map with the Town of Westerly. During the past century there has been an on-again, off-again dispute about the intent of the owners to dedicate a portion of the beach for use by the general public. The

issue of the legal status of a portion of the beach became active again when members of the community complained that things such as fences and no-trespassing signs were being put on the beach by the adjacent homeowners.

Attorney General Peter F. Kilmartin (Attorney General), acting on behalf of the State of Rhode Island (State), has brought suit against certain homeowners (Homeowners) on Misquamicut Beach. At issue in this case is an approximately two-mile long stretch of land running east to west and bordering the shore of the Atlantic Ocean and extending approximately 80-120 feet landward (northward) from the sea (Disputed Area or Beach Area). The Attorney General claims that in 1909, the original owners of the Disputed Area (Plattors) recorded in the Town of Westerly Land Evidence Records a subdivision plat (1909 Plat) by which the Plattors made an offer of an easement across the Disputed Area to the general public.[1] The Attorney General seeks from this Court a declaratory judgment pursuant to the Uniform Declaratory Judgment Act (UDJA) permanently enjoining the Homeowners from interfering with the public's right to use the Disputed Area as a public easement, including the erection of fences traversing the Disputed Area from Homeowners' individual lot lines south to the Atlantic Ocean shore.

The Homeowners contend that the public does not have any easement rights over the Disputed Area. The Homeowners deny that the Plattors ever dedicated to the public an easement over the Disputed Area because, in the first place, the Plattors did not have the power to offer the Disputed Area to the public as an easement through dedication; and second, because even if the

[1] In the initial complaint, the Attorney General argues these two theories in the alternative, but, over the course of the two-week trial, has abandoned the claim that the State owns an interest in the Disputed Area in fee simple.

Plattors did have the power to make an offer of dedication, the Attorney General cannot show that the Plattors ever intended to make an offer of dedication to the public.

The Court conducted part one of, potentially, a two-part bench trial over eleven hearing days between April 1 and April 25, 2014. Both sides have submitted briefs in support of their positions, and the Court has heard extensive oral arguments from the litigants. It is the Court's task to determine whether the creators of the 1909 Plat effectively offered the Disputed Area to the public through dedication as an easement.[2]

I

Procedural History

On September 18, 2012, the Attorney General filed suit against seven property owners along Atlantic Avenue in Westerly, Rhode Island. In his original complaint, the Attorney General alleged eight counts against these original Defendants, including public nuisance; purpresture; private nuisance; trespass; and unlawful use of easement against the State as owner of the parcel. The State sought to vindicate what it asserted was the dedication of an easement across the Disputed Area in favor of the State and/or the public, and requested a preliminary and permanent injunction enjoining the Defendants from interfering with the State and the public's right to use the easement. The Attorney General asserted his authority to bring an action against the original Defendants pursuant to statutory and common law authority to maintain actions to abate public nuisances and purprestures; and pursuant to State's position as owner, in fee, of certain lots depicted on the 1909 Plat. On November 30, 2012, over the State's objection, this Court granted the original Defendants' motion to require joinder of persons needed for a just

[2] If the Court answers this question in the affirmative, the question to be decided in phase two of the trial is whether or not the public accepted the Plattors' offer of dedication, thereby accomplishing the common law act of dedication by plat. See discussion on the law of dedication, infra.

adjudication, and ordered the State to provide notice of the suit to neighboring landowners. Eventually, the number of defendants represented in this litigation was extended, by court order, to the current group of twenty-one.

On May 14, 2013, the original Defendants and the Defendant Intervenors filed with this Court a motion for summary judgment. This Court heard oral arguments from both sides on their respective cross-motions for summary judgment. The Attorney General's position was that, as a matter of law, the Plat and the Indenture (Indenture) demonstrate the clear intent to dedicate the disputed parcel to the public. The Homeowners argued that the Plat, as a matter of law, did not demonstrate the clear intent to dedicate the disputed parcel to the public. The Court, finding that there were material issues of fact, denied both sides' motions for summary judgment via a bench decision. The Court further entered a scheduling order under Rule 16 that provided for factual and expert discovery, including depositions. The parties prepared for trial.

Prior to the trial date, the parties amended the scheduling order and agreed on the parameters of a two-part, non-jury trial. The parties agreed that two issues would be addressed during this trial. First, during Phase I, the parties would litigate the issue of whether or not the five owners who became parties to the 1909 Plat caused to be extended, to the general public, by virtue of the 1909 Plat, an easement across the Disputed Area. If the Court found that, indeed, those five owners did offer to the general public easement rights across their property, the question for the Court during Phase II of the trial would be whether or not the general public had accepted the offer of an incipient dedication. The Court would then make a determination as to whether to exercise its jurisdiction under the UDJA and grant the injunctive and declaratory relief demanded by the Attorney General.

Over the course of eleven hearing days, beginning on April 1, 2014, this Court conducted Phase I of the trial. The State's burden during this phase was to demonstrate that the 1909 Plat clearly and unambiguously manifested the Plattors' intent to dedicate an easement to the general public across the Disputed Area. In support of its case, the State presented seven witnesses and over 200 documented exhibits. Mr. Alfred Thibodeau, a Rhode Island title attorney, was called to testify about his analysis of the 1909 Plat and the Indenture, and expressed his opinion, as an expert, that the Plattors intended to convey public rights in the right of way corridors extending from Atlantic Avenue to the Beach, and in the Beach Area itself. Mr. Alfred DiOrio, a Rhode Island licensed surveyor, next testified about the markings that the creator of the 1909 Plat used on that document, and about surveys that were published for a number of state, local, and private entities between 1909 and the present day. The Director of the Rhode Island Coastal Resources Management Council (CRMC), Mr. Grover Fugate, was the next witness for the State and offered testimony about how his agency has interpreted the public rights over the right of way corridors depicted on the 1909 Plat. Next for the State was Professor Steven Corey, a social historian from Columbia College in Chicago, who specializes in environmental and urban history, including the process of urbanization. Professor Corey testified about research that he conducted on behalf of the State with respect to the development of the Misquamicut Beach area in the early part of the twentieth century, and expressed that, in his view, the developers of what was then known as the Pleasant View beach community (Pleasant View) conceived the Beach Area as a single continuous beach. Professor Corey's testimony suggested that the developers of Pleasant View—some of whom included signatories to the 1909 Plat and the Indenture—wanted the entire Beach Area to be public as part of their overall scheme to develop the community for profit. Mr. David Thompson, the Westerly Town Assessor, testified about the Town of

Westerly's assessment of taxes based on the publicly-recorded property limits of lot owners along Atlantic Avenue. The State then called Ms. Janet Freedman, a coastal geologist with CRMC, who testified about the topography of the Disputed Area and its evolving boundaries, both as they stand presently and as they were estimated to have been in the past. Finally, Mr. Paul LeBlanc, an engineer for the Town of Westerly, was called by the State for his expert opinion as to whether the 1909 Plat was nebulous with respect to depicting the southern boundary of the lots on the southern side of Atlantic Avenue.

The Homeowners countered with three witnesses and more than two hundred documented exhibits. First, the Homeowners called Mr. Joseph Priestly, who, like Mr. Thibodeau, is also a Rhode Island title attorney. Mr. Priestly's extensive testimony centered on his interpretation of the 1909 Plat and the Indenture, and his opinion that the Homeowners' boundary lines extended all the way to the Atlantic Ocean, and not to the "Line of Foot of Bank" depicted on the 1909 Plat. Next for the Homeowners was Mr. Nathan Lauder, also a land surveyor, to counter the testimony of Mr. DiOrio. Finally, the Homeowners called Mr. Richard Strause, an engineer and land surveyor from Connecticut, who testified about his interpretation of the 1909 Plat.

Following testimony, the parties procured transcripts of the eleven days of testimony, and drafted and submitted post-trial briefs summarizing their positions on the facts and law. The parties also submitted rebuttal briefs. The Court held oral argument from the parties. After carefully considering the merits of the two sides' positions, the Court renders the following decision.

II

Facts and Arguments

A

The State's Position

The Attorney General claims that the five parties to the 1909 Plat made an offer of dedication of an easement across the Disputed Area when they recorded, simultaneously, the 1909 Plat and the accompanying Indenture in the Town of Westerly Land Evidence Records on July 1, 1909. The Attorney General claims that this purported offer of public dedication was subsequently accepted through public use over the course of ensuing generations.[3] The Attorney General contends that the 1909 Plat and the Indenture together, clearly and unambiguously manifest the Plattors' intention to dedicate an easement to the public over the Disputed Area as part of an overall scheme to open up Pleasant View to tourism and commercial enterprise. The State points out that the signatories to the 1909 Plat and the Indenture were land developers and entrepreneurs—motivated, in their own words, by developing for sale and profit the land around the Beach Area for commercial gain and to advance their business interests for which dedication of a beach to the general public was of utmost importance.[4]

The State further argues that should the Court find that the Plattors' intentions with respect to the Beach Area are ambiguously described by the markings on the 1909 Plat and the words on the Indenture, the Court should rely on the extrinsic evidence presented at trial to find in the State's favor. The Attorney General argues that the property descriptions contained in the

[3] The question of whether there was public acceptance of an offer of dedication would be the subject of a second phase of trial before this Court.

[4] Evidence at trial revealed that some of the individual Plattors, in addition to their interests in developing the actual property depicted on the 1909 Plat, also had business interests in a proposed trolley line and a casino that would be constructed on the parcel.

deeds to the original lot owners; the descriptions contained in deeds allotted to subsequent property owners; certain tax assessor plats; and maps commissioned by the CRMC, other state agencies, and private surveyors over the course of the last hundred years, are sufficient to elucidate these ambiguities and reflect the Plattors' intention to create an incipient dedication of the Beach Area in favor of the general public at the time they recorded the 1909 Plat and the Indenture.

B

The Homeowners' Position

The Homeowners reject the Attorney General's contentions on three different levels. First, the Homeowners argue that the parties to the 1909 Plat did not have the power to dedicate an easement across the Disputed Area to the public through the 1909 Plat because, in fact, not all of the parties that owned an interest in the Disputed Area were parties to the 1909 Plat. The Homeowners argue the Plattors could not have dedicated, collectively, a portion of land that did not actually belong to them. Second, the Homeowners argue that the Plattors did not dedicate an easement to the general public across the Disputed Area because the evidence shows that it was never their intention to dedicate an easement over the Disputed Area to the public. The Homeowners claim that, instead, it was the Plattors' intention to provide, at most, limited private easement rights over the Beach Area only to the future owners of the subdivided lots depicted on the 1909 Plat. Finally, the Homeowners argue that even if the Plattors may have had a general intent to dedicate the beach to the public, evidence adduced at trial is insufficient to show that the Plattors intended to use the 1909 Plat as an instrument for affecting an offer of dedication to the public. The Homeowners contend that the 1909 Plat does not clearly and unambiguously

manifest an intention by the Plattors to dedicate an easement to the public over the Beach Area.[5] The Homeowners also argue that even if the Court construes the Plat and the Indenture as a single, unitary instrument, these documents together do not clearly and unambiguously manifest an intention by the Plattors to dedicate an easement over the Beach Area.[6] Moreover, the Homeowners argue, even if the Court finds ambiguity with respect to the Plattors' intentions regarding an easement over the Beach Area as manifested through the 1909 Plat on its own or the 1909 Plat and the Indenture together, the parol evidence submitted for the Court's consideration resolves the ambiguity in the Homeowners' favor: the Plattors did not intend to dedicate an easement over the Beach Area to the general public.

III

Declaratory Judgment Standard

The law requires there to be a "justifiable controversy between a plaintiff and a defendant" in order for the Court to exercise its power under UDJA. Berberian v. Travisono, 114 R.I. 269, 332 A.2d 121 (1975). This is because the UDJA does not authorize the Court to give an advisory opinion based on hypothetical facts which are not in existence or may never come into being. Id. See also Lamb v. Perry, 101 R.I. 538, 225 A.2d 521 (1967) (Supreme Court holds that the UDJA is not intended to serve as a forum for determining abstract questions or rendering advisory opinions); N & M Props., LLC v. Town of W. Warwick, 964 A.2d 1141 (R.I. 2009) (trial court lacked jurisdiction to entertain a claim under the UDJA where the plaintiff

[5] Contrary to the Attorney General's position, the Homeowners contend that only the four corners of the 1909 Plat itself—and not the contemporaneously filed Indenture—may be analyzed by the Court under the doctrine of dedication by plat to ascertain the Plattors' supposed dedicatory intent. The Homeowners argue that the 1909 Plat, when considered on its own, clearly and unambiguously manifests an intention on the part of the Plattors not to dedicate the Disputed Area to the public.

[6] The parties disagree about the burden of proof that the State must apply.

lacked standing, so there was no justiciable controversy between the parties); Pascale v. Capaldi, 95 R.I. 513, 188 A.2d 378 (1963) (petitioner was not qualified to bring a taxpayer suit under the UDJA, having no standing). Compare Pellegrino v. R.I. Ethics Comm'n, 788 A.2d 1119 (R.I. 2002) (public officers involved in a lawsuit against the state Ethics Commission were entitled to have their legal rights and duties determined judicially in an action for a declaratory judgment under the UDJA). Thus, a plaintiff seeking declaratory relief under the UDJA must show evidence of a personal stake in the outcome, as well as entitlement to actual and articulable relief. McKenna v. Williams, 874 A.2d 217, 226-27 (R.I. 2005). A justiciable controversy contains a plaintiff who has standing to pursue an action, "that is to say, a plaintiff who has suffered an 'injury in fact.'" Meyer v. City of Newport, 844 A.2d 148, 151 (R.I. 2004) (quoting Rhode Island Ophthalmological Soc. v. Cannon, 113 R.I. 16, 22, 317 A.2d 124, 128 (1974)). Such an "injury" is characterized as "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" Meyer, 844 A.2d at 151 (citing Pontbriand v. Sundlun, 699 A.2d 856, 862 (R.I. 1997)). The Rhode Island Supreme Court has explained that "[s]tanding is an access barrier that calls for the assessment of one's credentials to bring suit." Blackstone Valley Chamber of Commerce v. Pub. Utils. Comm'n, 452 A.2d 931, 932 (R.I. 1982). Therefore, "standing involves a threshold inquiry into the parties' status before reaching the merits of their claims." Id.

Our Supreme Court has established that "[the] Attorney General is vested with the authority to maintain suits seeking redress of a public wrong, except in such instances 'where one of the public who is injured has a distinct personal legal interest different from that of the public at large * * *.'" Newport Realty, Inc. v. Lynch, 878 A.2d 1021, 1032 (R.I. 2005) (quoting McCarthy v. McAloon, 79 R.I. 55, 62, 83 A.2d 75, 78 (1951)). Because the Attorney General

seeks to protect the right of the public to make use of an easement that was purportedly dedicated to the benefit of the general public, the Attorney General's involvement in this litigation is justified because the public's interest is clearly implicated. The Attorney General has standing to bring this suit. Moreover, because this case involves a justifiable controversy between the Homeowners and the State, should the Court find that the Plattors created an incipient dedication of an easement over the Beach Area as described on the 1909 Plat and the Indenture, the Court would have discretion under the UDJA to issue the prayed for relief.

IV

Legal Issues

The fundamental question that the Court must answer at this stage of the trial is whether the five signors to the 1909 Plat and the Indenture intended to offer by dedication an easement to the general public across the Disputed Area labeled as "Beach" on the 1909 Plat. Specifically, the Court must determine whether or not the markings on the 1909 Plat and, possibly, the words written on the Indenture—either together or separately—clearly and unambiguously manifest the Plattors' collective intent to use the 1909 Plat (and the Indenture) to effectuate an offer of dedication.

There are three core legal issues that derive from this fundamental question and with which the Court has grappled over the course of Phase I of the trial. First, the Court must determine whether or not the Plattors had the power to dedicate the "Beach" to the public as a matter of law, given the undisputed fact that these five landowners did not own all of the land depicted on the 1909 Plat, and, specifically, did not own, in fee, all of the land in the Disputed Area over which the purported easement runs. Second, if the Court determines that the Plattors did have the ability to dedicate an easement over all or part of the Disputed Area to the general

public, the Court must determine whether, as a matter of law, an easement of the nature alleged by the Attorney General could have been dedicated to the public through the 1909 Plat and the Indenture in the first place. Finally, assuming that it would have been possible for the Plattors to dedicate an easement of the nature alleged by the Attorney General to the general public, the Court must ascertain whether, in fact, the Plattors had the intention to offer such an easement to the general public using the 1909 Plat and/or Indenture, and whether, as a matter of fact, the 1909 Plat and/or Indenture clearly and unambiguously manifests such an intent.

Once these issues are addressed, the Court will determine whether to exercise its discretion under the UDJA and issue the relief prayed for by the Attorney General.

A

Background on the Law of Dedication

1

General Principles

"Dedication" is a deliberate conveyance of an interest in land from a grantor to the public. See Media Gen. Cable of Fairfax, Inc. v. Sequoyah Condo. Council of Co-Owners, 991 F.2d 1169 (4th Cir. 1993). It has also been defined as "[t]he donation of land or creation of an easement for public use." Black's Law Dictionary (9th ed. 2009). A dedication "resembles both a grant and a gift," County of Solano v. Handlery, 155 Cal. App. 4th 566, 575 (1st Dist. 2007). Although it accomplishes the task of transferring interests in land from a grantor to a grantee, the act of dedication does not need to satisfy the statute of frauds. Kemper v. Campbell, 27 Ill. 2d 376, 379, 189 N.E.2d 282, 284 (1963). A dedication has been described by our Supreme Court as an "exceptional and unusual method by which a landowner passes to another an interest in his property," Robidoux v. Pelletier, 120 R.I. 425, 433, 391 A.2d 1150, 1154 (1978) (citing Volpe v.

Marina Parks, Inc., 101 R.I. 80, 220 A.2d 525 (1966)), but, nevertheless, such method of transferring property from the hands of a private owner to the public rests on public convenience and has been sanctioned by the experience of the ages. New Orleans v. United States, 35 U.S. 662, 712, 9 L.Ed. 573 (1836).

Dedication of land to the public can be accomplished either according to the terms of a prevailing statute (statutory dedication) or it can be accomplished by operation of the common law (common law dedication). Minerva Partners, Ltd v. First Passage, LLC, 274 Mich. App. 207, 213, 731 N.W.2d 472, 477 (2007). Statutory dedications of property are necessarily express dedications; common law dedications can be either express or implied. City of Fort Payne v. Fort Payne Athletic Ass'n, Inc., 567 So. 2d 1260, 1263 (Ala. 1990); Glass v. Carnes, 260 Ga. 627, 632, 398 S.E.2d 7, 11 (1990); Cottage Hill Land Corp. v. City of Mobile, 443 So. 2d 1201, 1202 (Ala. 1983). By and large, both common law dedications and statutory dedications are carried out through a two-step process. Wright v. Town of Matthews, 177 N.C. App. 1, 627 S.E.2d 650, 658 (2006). First, the owner of the interests in the land to be dedicated must offer the land to the public for dedication. See, e.g., Bonner v. Sudbury, 18 Utah 2d 140, 417 P.2d 646 (1966); Coffin v. Old Orchard Development Corp., 408 Pa. 487, 491, 186 A.2d 906, 909 (1962). Second, the public—either ceremoniously through an authorized official or more informally, through public use—must accept the grantor's offer. Newport Realty, 878 A.2d at 1033; Mill Realty Assocs. v. Zoning Bd. of Review of Town of Coventry, 721 A.2d 887, 891 (R.I. 1998). Once these two steps are completed, a dedication is effected and the general public, as grantee, assumes control of the conveyed interests. [7]

[7] The Attorney General has not advanced an argument over the course of the present litigation to suggest that the Plattors offered an easement over their beachfront property to the general public via statutory dedication.

Generally, offers of dedication are irrevocable. See, e.g., Newport Realty, 878 A.2d at 1033 (finding that a developer or subsequent owner may not unilaterally revoke a dedication); Day v. Edmonson, 68 R.I. 382, 389, 27 A.2d 904, 907 (1942) (holding that offers of dedication may not be rescinded without the consent of the owners of all lots abutting the dedicated right of way); Cent. Land Co. v. City of Providence, 15 R.I. 246, 2 A. 553, 555 (1886) (finding no dedication based on the facts, states that the platting and conveyance of lots with intersecting streets may create an estoppel, which is the equivalent of an "irrevocable offer of dedication" of the streets depicted on the plat); Bitting v. Gray, 897 A.2d 25, 33 (R.I. 2006) (finding that "once an incipient dedication is established by the sale of lots with reference to a recorded plat, it can be revoked only by consent of all property owners in the plat * * * or by adverse possession." (Internal quotations and citations omitted.) It may be that an offer of dedication is not actually accepted by the public for a number of years—generations, even. See, e.g., Day, 68 R.I. at 382, 27 A.2d at 904; Simmons v. Cornell, 1 R.I. 519, 522 (1851). However, public policy warrants that such offers remain open in perpetuity in order to protect the interests of adjoining property owners who took their property under the expectation and understanding that an offer of dedication of appurtenant land had been made to the public at large. See McConnell v. Town of Lexington, 25 U.S. 582, 6 L.Ed. 735 (1827); City of Cincinnati v. White's Lessee, 31 U.S. 431, 432, 8 L.Ed. 452 (1832). See also Smylie v. Pearsall, 93 Idaho 188, 193, 457 P.2d 427, 432 (1969) (finding that a district court finding of a common law dedication to public use created a benefit "not only of the other [community lot] owners but also of the public generally").

The common law prescribes "[n]o particular mode of making a dedication." State v. Frank W. Coy Real Estate Co., 44 R.I. 357, 117 A. 432, 434 (1922). Instead, a landowner's intent to set aside a portion of his land for the public's use is "to be ascertained from his acts and

his declarations." Id. Because ownership of land entails burdens as well as it does benefits, an owner may reduce this burden by parrying interests in his parcels to the general public. See Carpenter v. Hanslin, 900 A.2d 1136, 1149 (R.I. 2006) (finding that "[t]he dominant tenant of an easement has a right, if not a duty, to maintain the easement so that it can be used for the purpose for which it was granted").

An owner who dedicates to the public an easement over his land is said to retain his interests in the soil. Barclay v. Howell's Lessee, 31 U.S. 498, 513, 8 L.Ed. 477 (1832) (holding that, by common law, fee in the soil remains in the original owner when the land is dedicated to the public, but the use of the road is in the public and the owner is entitled to timber and grass that may grow on the surface, as long as he does not interfere with use by the public). An easement is "[a]n interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose, such as to cross it for access to a public road." Rhode Island Economic Dev. Corp. v. Parking Co., L.P., 892 A.2d 87, 107 (R.I. 2006) (citing Black's Law Dictionary 548 (8th ed. 2004)). A public easement is "an easement for the benefit of an entire community, such as the right to travel down a street or sidewalk." Black's Law Dictionary (9th ed. 2009). The owner of the fee over which the public easement lies retains the right to use the land in order to exploit its resources or develop it, as long as he does not interfere with the public's use of the easement. Thompson v. Sullivan, 88 R.I. 305, 313, 148 A.2d 130, 136 (1959) (held dedication of highways for public use did not cost the owners the fee and the associated right to wharf out). Moreover, in case of abandonment by a public grantee, the grantor retains a reversionary interest in the land he offered for dedication. Barclay, 31 U.S. at 498.

Of course, a grantor may not transfer a greater interest in the land than he owns. See Daniels v. Almy, 18 R.I. 244, 27 A. 330 (1893) (all tenants in common to a parcel of land must join in the deed to make a valid dedication of land to the city); Brown v. Curran, 83 A. 515 (R.I. 1912) (owners of adjoining land, on platting it, may agree on a scheme providing for a street between the two plats); Comber v. Inhabitants of Plantation of Dennistown, 398 A.2d 376, 378-79 (Me. 1979) (purported dedicator did not have the power to dedicate land he did not own); Louisville & N.R. Co. v. Tolliver, 239 Ky. 412, 39 S.W.2d 660, 662 (1931) (no valid dedication when supposed dedication was made by a third-party without the owner's consent); Town of Minocqua v. Neuville, 174 Wis. 347, 182 N.W. 471, 473 (1921) (no valid dedication of highway to the public when supposed dedication was accomplished without notification and participation of property owners). However, grants of easements in the land allow a grantee to take up to the fullest extent of the interests that were offered. See Vallone v. City of Cranston, Dep't of Pub. Works, 97 R.I. 248, 259, 197 A.2d 310, 317 (1964) (citing Sharp v. Silva Realty Corp., 86 R.I. 276, 285, 134 A.2d 131, 136 (1957)) for the proposition that "the unrestricted grant of an easement gives the grantee all such rights as are incident or necessary to the reasonable and proper enjoyment of the easement"). Once dedicated, the public can make use of a public easement to the fullest extent contemplated by the grantor, without overburdening it. Frenning v. Dow, 544 A.2d 145, 146 (R.I. 1988) (citing Penn Bowling Recreation Centers, Inc. v. Hot Shoppes, Inc., 179 F.2d 64, 66 (D.C. Cir. 1949)), finds that "[t]he right to an easement is not lost by using it in an unauthorized manner or to an unauthorized extent, unless it is impossible to sever the increased burden so as to preserve to the owner of the dominant tenement that to which he is entitled, and impose upon the servient tenement only that burden which was originally imposed upon it"); Catalano v. Woodward, 617 A.2d 1363, 1368 (R.I. 1992) (reversing trial

court's finding of an overburdened easement where the trial court failed to find that making use of an easement during the hours of 8:00 AM to 5:00 PM, in and of itself, constituted an overburdening); Il Giardino, LLC v. Belle Haven Land Co., 254 Conn. 502, 516, 757 A.2d 1103, 1113 (2000) (finding that "the expanded use of an easement appurtenant by the dominant estate to benefit a nondominant estate, not owned by the dominant estate owner, constitutes, as a matter of law, an impermissible overburdening of the servient estate"); Flaherty v. Muther, 17 A.3d 640, 659-60 (Me. 2011) (finding that "a dominant estate owner may not use an easement to access property that the parties to the conveyance did not originally contemplate would be served by the easement"). Once an easement has been effectively dedicated to the public, the original grantor, in whom the fee to the soil below the easement lies, may not engage in any conduct that would interfere with the public's right to use the dedicated easement, but he may engage in activities to recover or extract from the land on which the easement sits valuable minerals, metals, or other commodities from the soil, as proper owner of the underlying fee. See Barclay, 31 U.S. at 498 (finding that, in the context of a dedication of an easement over a highway, the original owner retains the right "to the timber and grass which may grow upon the surface and to all mineral which may be found below it").

2

Dedication by Plat

One way that a landowner can accomplish a dedication of an interest in his land is by dedicating such an interest through a publicly recorded plat. A "plat" is "[a] map describing a piece of land and its features, such as boundaries, lots, roads, and easements." Black's Law Dictionary (9th ed. 2009). Beyond its illustrative qualities, a plat depicting a landowner's property can also serve as a legal instrument. A landowner motivated by subdividing his

property and selling off individual lots to new owners within the common development may create a subdivision plat depicting the overall plan for his property into the future. See, e.g., Mill Realty Assocs., 721 A.2d at 891. Such a plat has value as a marketing instrument for prospective owners or investors interested in buying property from the landowner because these prospective buyers would have an idea of the landowner's development scheme for the entire community at some later point in time, so that a prospective buyer analyzing the landowner's subdivision plan acquires an idea about what the community he is considering becoming part of or investing in will look like in the future. Id. The vision portrayed in the subdivision plat becomes a part of the benefit of the buyer's bargain, which the law protects by providing that when such a buyer purchases property with reference to a subdivision plan, that owner acquires a right to make use of areas that are designated on the plat as intending to benefit the community as a whole. See Thaxter v. Turner, 17 R.I. 799, 24 A. 829 (1892) (stating that all who buy with reference to the general plan disclosed by the plat or map acquire a right in all the public ways designated thereon); Gervasini v. Vuono, 54 R.I. 242, 172 A. 319 (1934) (finding that a section of an avenue was found to be a street, just like other streets depicted on a given plat, and that it had been dedicated to use by the lot owners, even though this avenue in question led to a river and did not intersect other highways); Kotuby v. Robbins, 721 A.2d 881 (R.I. 1998) (when a subdivider sells lots with reference to a plat, he grants easements to the purchasers in the roadways shown on the plat, with or without later dedication of the roadways to the public, and the purchaser of a lot holds an implied covenant that the street will be kept open for his enjoyment as a private way, if not as a public street). By virtue of platting his land and selling off lots on it with reference to the plat, an owner of a subdivision effectively conveys servitudes in favor of the new buyers. Id. These private servitudes run with the land. Robidoux, 120 R.I. at 438, 391 A.2d at 1157. The

scope of the rights of way conveyed to the new owners by virtue of the referenced subdivision plat varies from jurisdiction to jurisdiction, the nature of the area of land in question, and the owner's proximity and relationship to that area. See V. Woerner, "Conveyance of lot with reference to map or plat as giving purchaser rights in indicated streets, alleys, or areas not abutting his lot," 7 A.L.R.2d 607 (originally published in 1949).

This Court is guided by the Rhode Island Supreme Court's recent rulings on the doctrine of dedication by plat in Newport Realty, 878 A.2d at 1021[8] and Drescher v. Johannessen, 45 A.3d 1218 (R.I. 2012).[9] Those two cases stand for a number of guiding principles that directly affect the analysis of the case before this Court.

A landowner who depicts lots, streets, and roads on a plat of his parcel of land, and then conveys these lots to grantees with reference to the plat, "grants easements to the purchasers [of said lots] in the roadways shown on the plat, with or without later dedication of the roadways to the public." Newport Realty, 878 A.2d at 1032 (citing Kotuby, 721 A.2d at 884). The easement that the new lot owner possesses becomes appurtenant to the property and will run with the land, even though the plat itself—which vested the lot owner with the interest in the easement—was unrecorded. Id. (citing Robidoux, 120 R.I. at 436, 391 A.2d at 1156).

Whether or not the general public has an easement right in the streets and roads depicted on a plat "depends on the owner's intent at the time the plat is recorded and the lots are sold." Newport Realty, 878 A.2d at 1033 (citing Robidoux, 120 R.I. at 434, 391 A.2d at 1155). See

[8] In Newport Realty, reversing the Superior Court, the Supreme Court found an incipient dedication of wharves to the general public when the plat-makers depicted the wharves on a plat that was subsequently publicly recorded.

[9] In Drescher, the Supreme Court held that the subdivision plans in question in that case "[did] not unambiguously disclose the owner's manifest intent to dedicate the right-of-way" to the public because, although the plans were unclear as to the intended purpose of the right-of-way that was depicted, extrinsic evidence did not resolve the ambiguity in favor of a finding of an intent to dedicate.

also Donnelly v. Cowsill, 716 A.2d 742 (R.I. 1998) (finding that merely delineating a street or way on a plat for the purpose of depicting a boundary was insufficient to establish conclusively the owner's intent to dedicate that street to the public because proof of a "manifest intent" to dedicate, such as publicly recording the instrument, was required).

It has come to be recognized by the courts as a common law rule that "the recordation of a plat with streets delineated thereon and lots sold with reference to the plat reveals the owner's intent to offer the streets to the public for use as ways." Id. (quoting Robidoux, 120 R.I. at 434, 391 A.2d at 1155 (internal quotations omitted)). A landowner's filing (and a municipality's acceptance) of a plat depicting on it streets and roads is usually "sufficient evidence of a landowner's intent to dedicate land for road purposes, particularly in situations in which lots are subsequently sold with reference to the recorded plat." Id. (quoting Donnelly, 716 A.2d at 748 (internal quotations omitted)).[10] "[A] recorded plat," therefore, is generally "all that is needed to disclose a landowner's dedicatory intent" with respect to the streets and roads thereon depicted. Robidoux, 120 R.I. at 434, 391 A.2d at 1155. Land depicted as a street or road on a plat must be clearly marked as such for the presumption of an intention to dedicate to attach, or else an owner must, through some other way, express his intent to dedicate the street or road to the public. Donnelly, 716 A.2d at 748.

Whenever a landowner depicts a street or road on his publicly recorded plat and sells lots on that plat referencing the plat, a presumption arises that the landowner intended to dedicate the street or road to the public. This is so even if the street or road depicted on the plat does not, in

[10] The process of opening up streets and roads to the public via "incipient dedication" is a "time honored method" of conveying interests in property to the public, Newport Realty, 878 A.2d at 1033, and has been described by our Supreme Court as a "bedrock principle" of our jurisprudence, id. at 1035, stemming from an era before the advent of municipal subdivision regulations. Id.

fact, physically exist yet. See Bitting, 897 A.2d at 25 (a road that was not yet in existence but was nonetheless depicted on a publicly recorded plat could have been dedicated to the public as a "paper road"). The presumption of the landowner's intent to dedicate a street or road he depicts on a publicly recorded plat also applies, even if the street or road depicted on the plat is not in fact labeled and appears only as an empty space on the recorded plat. See Baker v. Barry, 22 R.I. 471, 48 A. 795, 796 (1901) (Court finds that in light of the plat's layout in question; references to a gangway in subsequent deeds; and subsequent use of the area in question as a gangway, a blank strip of land depicted on the publicly recorded plat had, without question, been dedicated as a gangway, just as clearly "as though the owner had written on it, '[t]his is for a gangway'").

Crucially, however, a landowner wishing to depict a street or road on a plat but not wishing to dedicate this street or road to the public can overcome the presumption of dedication by using "specific language, broken lines, or other marks" to make his intentions clear. Newport Realty, 878 A.2d at 1037. See Swanson v. Gillan, 54 R.I. 382, 173 A. 122 (1934) (holding strip of land labeled "reserved" on a publicly recorded plat evidenced platter's intention to avoid dedicating said strip to the general public); Robidoux, 120 R.I. at 439, 391 A.2d at 1158 (finding that the road in question had not been dedicated to the public, as evidenced by the plat-maker's use of broken, dotted lines to depict the road, contrasted with the plat-maker's use of solid lines to depict the other streets and roads on the same plat); c.f., Marwell Const. Co. v. Mayor and Bd. of Aldermen of City of Providence, 61 R.I. 314, 200 A. 976 (1938) (use of the word "undivided" on a plat describing a purported street did not reveal the plat-maker's intention to not dedicate that street); c.f., Patalano v. Duarte, 68 R.I. 138, 26 A.2d 629 (1942) (a supposed right of way depicted on a plat was found, plainly, to not have been laid out as a road or street, so the Supreme Court concluded that the platters had not intended to dedicate this land for a public road

or street, even though it had been labeled "a right of way" on the map, and so any easement that existed was private, not public in nature).

The case law is clear that "under no circumstances" will an offer of dedication to the public be lightly presumed. Newport Realty, 878 A.2d at 1043 (citing Volpe, 101 R.I. at 86, 220 A.2d at 529; Vallone, 97 R.I. at 254, 197 A.2d at 314) (emphasis added). Central to determining whether a landowner offered a strip of land to the public through the process of incipient dedication is an analysis of the owner's intent. Robidoux, 120 R.I. at 433, 391 A.2d at 1154; Drescher, 45 A.3d at 1230. See also City of Cincinnati, 31 U.S. at 435 (articulating the principle that it is the role of the law to "carry into execution the intention and object of the grantor, and secure to the public the benefit held out, and expected to be derived from, and enjoyed by the dedication"); Vallone, 97 R.I. at 248, 197 A.2d at 317 (1964) (Court finds no incipient dedication based on an unrecorded plat depicting a 60-foot strip that was not indicated to constitute a street); Frank W. Coy Real Estate Co., 44 R.I. at 357, 117 A. at 434 (dedication is sufficient if the owner's intention to set apart a portion of his land for public use is clear). "Evidence must be shown which reasonably tends to demonstrate" the landowner's intent to dedicate." Drescher, 45 A.3d at 1230 (citing Volpe, 101 R.I. at 86, 220 A.2d at 529; Vallone, 97 R.I. at 254, 197 A.2d at 314) (internal quotations omitted).[11] Clear and unambiguous evidence that reasonably tends to

[11] Although the parties have debated, at considerable length, whether a "preponderance of the evidence" or a "clear and convincing" standard applies to evaluating the persuasiveness of evidence of a landowner's intent to execute an incipient dedication via recorded plat, the Supreme Court's actual words are not in dispute. The standard is as stated: evidence must be presented of a quality that reasonably tends to show that a would-be grantor intended to dedicate an easement over a given portion of his land. The Court does note, however, that although the Homeowners argue that a clear and convincing standard should apply, the Supreme Court has only announced this high standard with respect to the evidence of acceptance of an offer of dedication—not with respect to evidence demonstrating that an offer of dedication was made. See Vallone, 97 R.I. at 254, 197 A.2d at 314 (Court finding that "evidence of . . . an acceptance must be clear and convincing."

demonstrate a landowners' intent to execute an incipient dedication must be given effect. See W.P. Assocs. v. Forcier, Inc., 637 A.2d 353, 356 (R.I. 1994). If—and only if—a trial justice is confronted with an ambiguity on the face of a recorded plat that purportedly executes an incipient dedication, parol or extrinsic evidence may be considered to clear up the ambiguity. Newport Realty, 878 A.2d at 1034 (citing Farrell v. Meadowbrook Corp., 111 R.I. 747, 749, 306 A.2d 806, 807 (1973)).[12]

B

Court's Findings

1

1909 Plat and the Indenture Must Be Construed As a Single Instrument

The 1909 Plat and the Indenture were recorded simultaneously in the Town of Westerly's Land Evidence Records on July 1, 1909. The parties that signed the 1909 Plat were the same parties that signed the Indenture. Clearly, neither the Indenture nor the 1909 Plat were intended by the signors of these documents to supersede the other. It is beyond doubt that the Plattors intended the words on the Indenture to inform the markings placed on the 1909 Plat—and for the markings on the 1909 Plat to inform the words written on the Indenture. The 1909 Plat and the Indenture were intended to be read together. They were part of the same instrument, each incorporated into each other. The common law does not prescribe one particular means of

[12] Parol or extrinsic evidence may not be used to vary the terms of a writing. Newport Realty, 878 A.2d at 1034. However, although "[r]ecorded plats are writings that come within the interdictions of the parol evidence rule," id., quoting Farrell, 111 R.I. at 747, 306 A.2d at 807 (internal quotations omitted), the rule itself "presupposes a clearly written unambiguous document." Id. Thus, if a plat is susceptible to more than one interpretation, extrinsic evidence is admissible to aid in its interpretation. W.P. Assocs., 637 A.2d at 356. Extrinsic evidence must not be allowed to introduce ambiguity into the equation. The determination of whether or not there is an ambiguity is made by looking at the recorded instrument. Only if there is an ambiguity may the court consider extrinsic evidence.

dedicating land from a private owner to a public grantee. See Frank W. Coy Real Estate Co., 44 R.I. at 357, 117 A. at 434. Accordingly, the Court will consider whether the Plat and the Indenture, considered as a single instrument, clearly and unambiguously manifest the Plattors' intention to dedicate the Disputed Area to the general public.

2

Determination of Intention to Dedicate

An owner's intent to dedicate will not be lightly presumed by a trial justice under any circumstances. Newport Realty, 878 A.2d at 1043 (citing Volpe, 101 R.I. at 86, 220 A.2d at 529; Vallone, 97 R.I. at 254, 197 A.2d at 314). It follows that the act of dedicating land to the public is conscious, affirmative conduct—it is not a happenstance that occurs passively by inertia or a byproduct of a non-related activity. A would-be dedicator must have more than a general intent to convey a portion of his land to the general public for its use and benefit: he or she must have the specific intent to transfer to the public at large a specific subset of the universe of his ownership interests, and he or she must have the specific intent to accomplish this transfer through a specific means. See Robidoux, 120 R.I at 434, 391 A.2d at 1154-55 (accepting that the plat-maker's representation of streets and roads on the plat "unquestionably indicate[d] a general intent to offer platted roadways to public use," but, nonetheless, specific evidence of the plat-maker's intent to dedicate a specific road was required to be able to find that said specific road was, in fact, dedicated to the public).

To prevail on a claim that a plat-maker offered to dedicate an easement over a non-street or road to the general public via recorded plat, the proponent of an incipient dedication must submit evidence that reasonably tends to demonstrate the landowner's intent to dedicate such an easement to the public. Drescher, 45 A.3d at 1230. This evidence, in turn, must derive from the

face of the plat, and if it is clear and unambiguous with respect to the plat-maker's intent, it is dispositive of the question of whether an incipient dedication arose. Only if the evidence, on the face of the plat, is ambiguous with respect to the plat-maker's intention to dedicate an easement to the public may the proponent of an incipient dedication rely on extrinsic evidence to buttress his position. Evidence of the landowner's intentions with respect to dedicating an easement over his land is ambiguous if it is susceptible to more than one reasonable interpretation, W.P. Associates, 637 A.2d at 356, i.e., that it reasonably tends to show both the landowner's intent to dedicate and the landowner's intent to not dedicate an easement over a given strip of land.

In this case, to prevail on his claim that the Plattors offered to dedicate an easement over the Beach Area to the general public, the Attorney General must show proof that reasonably tends to demonstrate the Plattors' intent to dedicate such an easement by creating an incipient dedication, evident from the face of the combined 1909 Plat and the Indenture, considered together. If this evidence is clear and unambiguous, this Court will find that an incipient dedication arose from the recordation of the 1909 Plat and the Indenture and the subsequent sale of lots depicted on the platted parcel made with reference to the recorded plat. Only if the Court finds that the purported evidence of the Plattors' intent to dedicate is ambiguous will the Court consider evidence extrinsic to the four corners of the combined 1909 Plat/Indenture instrument.

i

The Plattors Did Not Have the Power to Dedicate an Easement Across the Disputed Area to the General Public

It is a fundamental tenet of property law that an owner may not convey more interests in his land than he owns in the first place, and an owner of land may not convey an easement over property that does not belong to him. Comber, 398 A.2d at 378-79. In situations where a group of owners collectively own a parcel of land, all of the owners may, together, convey an interest

over that parcel to a third party, Daniels, 18 R.I. at 244, 27 A. at 330, but a subset of those owners may not grant to a third party an interest over property that does not belong to them.

In this case, the Disputed Area described as a "Beach" on the 1909 Plat is owned by more than one individual owner. The Disputed Area, as a contiguous sector of the parcel depicted on the 1909 Plat, is collectively owned, inasmuch as more than one individual owner has an ownership stake in it. This is not to say, however, that each owner of an interest in the Disputed Area has an ownership stake in every square inch of the contiguous sector. Rather, each individual owner of a lot along Atlantic Avenue has an exclusive ownership interest in fee in a strip of land that extends from the southern boundary of Atlantic Avenue all the way to the Atlantic Ocean. So, in the aggregate, the Disputed Area labeled as "Beach" on the 1909 Plat is owned by more than one individual, but each individual owns, exclusively, a piece of the aggregate whole.

At least four lot owners of property depicted on the parcel did not sign the 1909 Plat or the accompanying Indenture. Necessarily, since the signors to the 1909 Plat and the Indenture did not have the ability to dedicate easement rights over property that did not belong to them, it would have been impossible for the Plattors to dedicate an easement over the entire contiguous Disputed Area they labeled as "Beach." Intention to dedicate must be anchored to an actual ability to carry out the task. See Comber, 398 A.2d at 379. As a matter of law, if the Plattors did have a clear and unambiguous intention to dedicate an easement over the area they labeled as "Beach" on the 1909 Plat, it could not have been over the entire, unbroken, stretch of territory.[13]

[13] The Attorney General submits that some of the owners of property who were not signatories to the Plat and Indenture bought their land with the knowledge that the 1909 Plat and the Indenture would be filed, thereby dedicating a portion of the land. However, no evidence was presented at trial on this matter and no recording of this intention was made. The State argues in the alternative that the declaratory judgment they originally asked for is only against limited

An easement over the area labeled "Beach" on the 1909 Plat would have looked substantially different than the way the Plattors ultimately portrayed the Disputed Area on their 1909 Plat. For instance, if the Plattors had intended to dedicate easement rights over the "Beach" area to the public, that part of the "Beach" area held by the owners of the "Hoxie Lot" in between lots on the 1909 Plat would have had to have been carved out and exempted from the easement dedicated over the remainder of the "Beach." Similarly, that part of the "Beach" area held by the other owners would have had to have been delineated, by the Plattors, as exempted from the easement rights otherwise dedicated to the public's benefit. In the State's best case scenario, any clear and unambiguous intention the Plattors may have had to dedicate the "Beach" area to the public would have been an intention to dedicate an easement over the entire area contiguously defined as the "Beach." Making a dedication of this scope, even if it could be shown that the Plattors clearly and unambiguously intended to make it, would have been ineffective because it was beyond the power of the Plattors to do so. As a matter of law, the Plattors did not have the ability to dedicate an easement over the entire Beach Area as depicted on the 1909 Plat. This finding should end the inquiry.

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defendants and therefore, it should not make a difference that some of the property was owned by non-Plattors for the purpose of ascertaining whether or not there was an offer of dedication. Such a position is wholly inapposite. Before the Court is the question of whether, through the 1909 Plat and Indenture, an offer of dedication was extended to the general public. It is unquestioned that the 1909 Plat and the Indenture referenced property that was owned by parties other than the Plattors. Whether or not the Attorney General initially filed suit against some owners and not others is beside the point of whether or not the Plattors executed a dedication. If there was a dedication by plat, analysis of the 1909 Plat is in order.

ii

The Plattors Did Not Have the Power to Dedicate an Easement of the Nature Described By the Attorney General

Even if the Plattors may not have had the power to dedicate an easement over the length of the entire contiguous area labeled as "Beach" on the 1909 Plat, the Attorney General asks this Court to consider that the Plattors, nonetheless, did offer for dedication an easement over the substantial portion of the "Beach" area over which they did, in fact, have ownership rights. The Attorney General asks the Court to declare essentially that notwithstanding the demarcations on the 1909 Plat and the wording of the Indenture, an easement benefiting the public in fact exists over most, though not all, of the "Beach" area, and that any easement rights that passed over land that did not belong to the Plattors were ineffectively assigned—essentially null.

Although the Court finds this argument interesting and original, it is also unpersuasive. The State does not supply a legal foundation upon which such a finding by the Court can be sustained. Clearly, the makers of the 1909 Plat were working in concert to outline their vision for the Pleasant View beach development plan. The Indenture specifically states that the Plattors were working together for the mutual objective of developing the Pleasant View community for business and profit. By signing their names to the 1909 Plat and to the Indenture, the Plattors recognized that they were no longer acting individually, but were working collaboratively on the Pleasant View beach development. Any dedications of property rights to third parties were to be assigned by the collective group, not by individuals comprising that group assigning their exclusive incremental rights individually. Under the terms of the Indenture, and as reflected on the 1909 Plat, for purposes of developing the Pleasant View parcel, the interests in communal property over which the Plattors were exercising control as of July 1, 1909 were controlled by the collective group, not the individuals. For the purpose of an analysis of the conveyance of

property rights over common areas to third parties, the collective group of Plattors was acting effectively as tenants in common to the platted parcel. As such, the law in Rhode Island clearly provides that all tenants in common to a parcel of land must join in the deed to make a valid dedication of land to the public, Daniels, 18 R.I. at 244, 27 A. at 330, and so the Attorney General's proposition cannot be sustained.[14]

iii

The 1909 Plat and the Indenture Do Not Clearly and Unambiguously Manifest An Intent to Dedicate

The Attorney General's argument that the recorded 1909 Plat and the Indenture clearly and unambiguously evidence the Plattors' intent to dedicate the Beach Area to the public is spurious, at best. The nature of the contiguous Disputed Area on the 1909 Plat indisputably reflects the Plattors' understanding that the Beach Area was something other than a street or road.[15] Not only did the Plattors label the Beach Area "Beach" (and not "Street," or "Road" or "Avenue"), but they expressly prescribed, through the Indenture, the dedication to the public of narrow twelve-foot-wide rights of way to a known street to an area that was, inferentially,

[14] The question for the Court is whether or not the 1909 Plat and the Indenture was the mechanism that the Plattors used to dedicate an easement to the public over the "Beach" area. The Attorney General's suggestion that the Plattors effectively conveyed property interests to the general public over only those areas that they actually individually controlled undermines the basic premise of its own argument. If the individual Plattors had the intention to dedicate an easement to the general public only over the land they exclusively, as individuals, owned, then they would not have needed the 1909 Plat (or any other plat) to do so, because such conduct would have been individual—and not collective—action. The Plattors could have merely deeded out a right of way over their own strip of land overlapping the "Beach" area to achieve the effect the Attorney General is suggesting. Their association with each other and their collaboration on the 1909 Plat is indicative of a desire to act collectively. Any dedication that was achieved through the recordation of the 1909 Plat and the Indenture was a collective endeavor, attributable to the group of the five undersigning Plattors as a group.

[15] Indeed, the Attorney General does not even argue that the easement rights vested in the public were of the nature of a right of way over a street or road, as evidenced by his request for declaratory judgment of an easement that includes all "general" beach rights, including the right to lay down one's towel on the easement and sunbathe.

something other than a street. Most importantly, the lines that delineate the northern and southern boundaries of the contiguous Beach Area on the 1909 Plat are of a different character than the lines that delineate the boundaries of known streets or roads elsewhere on the Plat. See Robidoux, 120 R.I. at 439, 391 A.2d at 1158. The northern and southern boundaries of Atlantic Avenue, for example, are thick, straight, uninterrupted lines containing, at frequent intervals, survey markers pronouncing angle and distance measurements and have a clear beginning and end point. By contrast, the northern "boundary" of the Beach Area actually consists of six separate, undulating line segments, which themselves are referred to, alternately, as a "Line of Bank" or "Line of Foot of Bank," not as a "boundary" line for a right of way. Furthermore, the northern "boundary" of the Beach Area contains no survey markers, and is actually, at certain points, intersected by the dashed lines that comprise eastern and western boundaries of the platted lots, and by the dashed line running parallel to Atlantic Avenue that comprises the "set-back line" for the platted lots. Unlike the lines depicting the boundaries of the platted streets, the supposed northern boundary of the Disputed Area has no beginning or end point. Instead, on the western end of the 1909 Plat, the "Line of Bank" simply disappears, with no explanation, merging the Disputed Area with more upland territory. On the eastern end of the 1909 Plat, the undulating northern "boundary" line meanders northward along the shore of the Atlantic Ocean and appears to reach a final destination at about the point where the Atlantic Ocean connects with a "Breachway" that flows beneath a bridge at Atlantic Avenue. The southern boundary of the Beach Area is the Atlantic Ocean—a natural monument, not a line calculated and surveyed by a human being. This edge of the Beach Area is depicted on the 1909 Plat as a series of very narrow undulating lines—again, different than the single, solid, straight, and measured southern boundary of Atlantic Avenue. The southern boundary, like the northern boundary, and unlike

the Atlantic Avenue boundaries, contains no surveyor's benchmarks depicting angles, distances, or other measurements. The Plattors clearly did not conceive the Beach Area in the same way they conceived the streets.

Because the Plattors did not conceive of the Beach Area as a street or road, the common law rule attributing a presumption of an intention to dedicate when a street or road is depicted on a publicly recorded plat would have been inapplicable to the Plattors with respect to their depiction of the Beach Area on the 1909 Plat. No common law rule existed in 1909—and no common law rule exists now—on which the Plattors could have relied to manifest their supposed intention to create an incipient dedication of an easement over the Beach Area, merely by depicting it on the 1909 Plat. The Plattors had no reason to think that their depiction of an area labeled "Beach" on their platted parcel would be construed, either then or one hundred years later, as an incipient dedication.

If the Plattors truly intended to dedicate an easement over the area labeled "Beach" on the 1909 Plat, as the Attorney General contends, the Plattors needed to do more than merely label the Disputed Area "Beach." Even the inclusion of the word "Public" before the word "Beach" could have, arguably, reasonably tended to demonstrate the Plattors' intent to create an incipient dedication over this part of their property. The Plattors certainly knew and understood the power of descriptive language to express their intention to convey their interests in property to the general public: with respect to the twelve rights of way connecting the Beach Area to Atlantic Avenue, the Indenture expressly provides that these rights of way are "hereby dedicated to public use"; and the 1909 Plat expressly labels these dozen corridors as "rights of way." No such language is connected to the Disputed Area labeled simply as "Beach" on the 1909 Plat, and described simply as "the Beach" on the Indenture.

The Attorney General's argument that the 1909 Plat and the Indenture clearly and unambiguously reflect the Plattors' intention to dedicate an easement to the general public over the Beach Area is without merit. Unless the Court finds that there is, somehow, an ambiguity in the expression of the Plattors' intent as manifested through the 1909 Plat and the Indenture, this finding must end the inquiry. The court has "no authority . . . to go beyond the [1909] [P]lat [and Indenture] and entertain parol or extrinsic evidence to vary the terms of" those instruments unless it specifically finds that the 1909 Plat and the Indenture are ambiguous. Newport Realty, 878 A.2 at 1034.

iv

The 1909 Plat and the Indenture Are Not Ambiguous

Logic has it that a finding that the 1909 Plat and the Indenture do not clearly and unambiguously reflect the Plattors' intention to dedicate an easement over the Beach Area to the general public is not equivalent to a finding that the 1909 Plat and the Indenture are unclear or ambiguous. This Court will not base a finding that the 1909 Plat and the Indenture are susceptible to more than one reasonable interpretation on the conclusory statements of a proponent of an incipient dedication. The State may not introduce ambiguity to an otherwise clear and unambiguous instrument by asserting, in a vacuum, the plausibility of its own argument. A document is ambiguous when it is susceptible to more than one reasonable interpretation. One reasonable interpretation of the 1909 Plat and the Indenture is that the Plattors did not intend to create an incipient dedication of an easement over the Beach Area depicted on the 1909 Plat. The State posits the opposite point of view—that the markings and the words on the 1909 Plat and the accompanying Indenture reasonably tend to demonstrate the Plattors' intent to dedicate an easement over the Beach Area. The Court has already concluded

that such is not a reasonable interpretation of the markings and the words on the 1909 Plat and the Indenture. Accordingly, the 1909 Plat and the Indenture are susceptible to only one reasonable interpretation. Therefore, the 1909 Plat and the Indenture are not ambiguous. The Court does not have the authority to entertain parol or extrinsic evidence to vary the terms of these unambiguous instruments. Newport Realty, 878 A.2d at 1034.

v

Extrinsic Evidence Submitted to the Court Does Not Resolve Any Potential Ambiguity In the State's Favor

Even if it could be found that the 1909 Plat and the Indenture are susceptible to more than one reasonable interpretation of the Plattors' intentions and are therefore unambiguous instruments, the extrinsic evidence submitted for its consideration are insufficient to resolve the ambiguity in the State's favor.

The Court notes, first of all, that the admissibility of parol or extrinsic evidence is within the court's discretion. Levcowich v. Town of Westerly, 492 A.2d 141, 143 (R.I. 1985). Because the issue for the Court to resolve is the intention of Plattors with respect to the Beach Area at the time they recorded the 1909 Plat and the Indenture, this Court finds superfluous (if not exactly irrelevant) all evidence of surveys; tax assessor plans; communications between state agency officials and beachfront property owners; and "second-generation" deeds, so called. The most important body of extrinsic evidence to which the Court lends weight in this section of the analysis includes the original first deeds out from the Plattors to the new grantees made in the aftermath of the recordation of the 1909 Plat and the Indenture; all documents related to the platted area produced during the time period immediately leading up to the recordation of the 1909 Plat and the Indenture; and, expert testimony as to the meaning of lines and markings appearing on the 1909 Plat. These are the pieces of evidence that are most probative of the

question of whether or not the Plattors intended to create an incipient dedication over the Disputed Area or not on July 1, 1909.

After carefully considering this segment of the submitted evidence, the Court resolves any ambiguity in the interpretation of the words and markings that appear on the 1909 Plat and the Indenture in favor of the position that the Plattors intended to not dedicate an easement over the Beach Area for the benefit of the general public. The Court notes that language in the first deeds out from the Plattors to lot owners following the recordation of the 1909 Plat and the Indenture that reserve "beach rights" to third parties are reflective of preexisting covenants that landowners might have had with these third parties, and not reflective of easement rights in the Beach Area held by the public at large. The Court also finds persuasive evidence and testimony to the effect that the "Line of Foot of Bank" as portrayed on the 1909 Plat reflects the Plattors' intention to depict a geographic feature, not the boundary of an easement or a right of way.

vi

"To the Beach" Language in Indenture Does Not Evidence an Intent to Dedicate Through the 1909 Instrument

The Attorney General invites the Court to find an offer of dedication of the Disputed Area to the general public, essentially by inference. The Attorney General makes reference to certain language in the Indenture suggesting that the dedication of the twelve north-south corridors in between certain lots depicted on the 1909 Plat would not have made any sense without a simultaneous dedication of an easement over the beach covering the Disputed Area, to which the twelve corridors lead. The Indenture describes these rights of way as extending from the southern boundary of Atlantic Avenue "to the Beach," and provides that they are "hereby dedicated to public use." The Attorney General asserts that it would be an "absurd result" to

dedicate, through the 1909 Instrument, rights of way that stop at the line of the foot of bank and do not provide any easement rights over the beach to which they lead.

Interestingly, the Homeowners offer an explanation for the scope of these rights of way that likewise defies the letter of the words that defined them.[16] It is the Homeowners' position that, despite the words "to the Beach" offered in the text of the Indenture—and despite the fact that the markings on the 1909 Plat reflect, precisely, rights of way from Atlantic Avenue that terminate at the line of foot of bank as described on the Indenture—the rights of way offered to the public by virtue of the 1909 Instrument actually extend from the southern boundary of Atlantic Avenue all the way to the mean high water line of the Atlantic Ocean, thereby providing access to the general public to the shore area[17] which the Rhode Island Constitution has reserved exclusively for public use and benefit.[18]

Neither of these explanations is satisfactory to the Court. Contrary to the Homeowners' suggestion, although it is true that the general public has a right to the use and benefit from the shore that is protected by article I, section 17 of the Rhode Island Constitution, private owners have the right to own property all the way to the shore, and littoral rights protect these owners' property from trespassers. Although the general public has a right to the shore, the general public does not have the concomitant right to access it. A private party—generally speaking[19]—does not have the right to interfere with the public's use and benefit of the area between the mean

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[16] Their explanation goes beyond the letter of the Indenture, despite their position in closing arguments that "words must mean what they say."

[17] Defined as "the land between high and low water marks" by the case law. See Waldman v. Town of Barrington, 102 R.I. 14, 19, 227 A.2d 592, 595 (1967).

[18] "The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore." R.I. CONST. art. I, § 17.

[19] He may have the right to wharf out. See Newport Realty, 878 A.2d at 1025; Potter v. Crawford, 797 A.2d 489, 493 (R.I. 2002).

high water line and the mean low water line of Rhode Island's shore. But neither does he have the obligation to provide the public with a way of access to the shore across his private property. The general public does not have the right to trespass across private property to exercise his right to use and benefit from the shore. See State v. Ibbison, 448 A.2d 728, 732 (R.I. 1982) (affirming "[the] mean-high-tide line as the landward boundary of the shore for the purposes of the privileges guaranteed to the people of this state by our constitution.").

More importantly, for the purposes of this litigation, even accepting the State's position that the dedicated corridors connect public rights of way across Atlantic Avenue with public easement rights across the Disputed Area, this theory would only evidence a general intent by the Plattors to somehow, at some time, offer for public dedication an easement across the Disputed Area. The Attorney General's explanation does not clearly and unambiguously evince an intention by the Plattors to dedicate, specifically through the 1909 Instrument, easement rights to the general public across the Disputed Area that can now be enforced.[20]

The State's position is to the contrary; the law does not foreclose to the owner of a parcel of land the possibility of dedicating to the general public a right of way that is physically a "dead

[20] The Attorney General's position would be consistent with a theory that the Plattors had, by some prior instrument, dedicated easement rights across the Disputed Area to the general public, because the perpendicular rights of way dedicated to the public through the 1909 Instrument would have connected public rights of way along parallel routes—Atlantic Avenue and the Disputed Area. The Attorney General's position would also be consistent with a theory that the Plattors intended, eventually, to dedicate a public right of way across the Disputed Area to the public sometime in the future, perhaps once they had acquired control over the necessary parcels of land required to effectuate such a conveyance; perhaps once they achieved mutual agreement on the issue of whether a right of way across the beach should be even granted to the general public in the first place; or perhaps once they achieved further development of their plan to develop Pleasant View. Such theories, however, although entirely plausible and realistic, require extreme speculation by the Court and were not advanced by the Attorney General over the course of this trial. The Court is mindful that an act of dedication is not to be lightly presumed. Newport Realty, 878 A.2d at 1043. Moreover, the issue before the Court is exceedingly narrow: did the Plattors manifest a clear and unambiguous intention, through the 1909 Instrument, to offer to the public a right of way across the Disputed Area?

end." See Good v. Music, 398 S.W.2d 874 (Ky. 1966) (recognizing that a road or street that is a dead end way may be dedicated to the public in the same way as a thoroughfare). Moreover, the court can imagine that rights of way that do not appear to lead to any particular destination would be valuable to the general public in light of the legal, factual, and historical context in which the subject matter of the present litigation exists. For example, in an era before the advent of zoning laws, and in light of the fact that the owners of the underlying plot of land were actively seeking to commercially develop Pleasant View for profit, it would have been valuable for owners of lots adjacent to the dedicated rights of way to have the possibility of establishing storefronts that the public could access via the dedicated corridors. Moreover, public vistas overlooking the Atlantic Ocean from the line of the foot of bank where the dedicated corridors terminated would have held commercial appeal to the developers of the community. Additionally, members of the subdivided community could have been motivated by providing, to the general public, access to the beginning of the Beach Area marked by the line of foot of bank, and then granting a license to use the otherwise private Beach Area to a subset of the general public that used that public right of way and was willing to pay an access fee to enter the beach. Finally, as has been indirectly suggested by the Homeowners in this case, terminating public rights of way at the line of the foot of bank would have reflected a recognition by the Plattors that they could not have dedicated an easement across the Disputed Area to the general public at the time the 1909 Instrument was recorded because they did not exclusively control the underlying fee simple. The line of the foot of bank may have been understood as the limit of the property that the Plattors in fact collectively controlled. Perhaps they fully intended to acquire collective control over the Disputed Area sometime in the future, and perhaps they even devoted resources—or were in the process of devoting these resources—to securing these rights. The

question for the Court is whether, through the 1909 Instrument, the Plattors possessed a clear and unambiguous intent to dedicate an easement over the Disputed Area to the general public, which was manifested by the recorded 1909 Instrument. The answer, based on this analysis, is "no." The Court must decline the State's invitation to find an inferential manifestation of a clear and unambiguous intention to dedicate the Disputed Area to the general public.

V

Conclusion

The Court has concluded that the 1909 Plat and the Indenture did not create an incipient dedication of an easement across the Beach Area portrayed on the 1909 Plat. Accordingly, the Attorney General's request for declaratory judgment and injunctive relief is denied.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Peter F. Kilmartin, Attorney General of the State of Rhode Island v. Joan M. Barbuto, et al.
CASE NO:	WB 12-0579
COURT:	Washington County Superior Court
DATE DECISION FILED:	September 4, 2014
JUSTICE/MAGISTRATE:	Stern, J.
ATTORNEYS:	
For Plaintiff:	Michael L. Rubin, Esq.; Gregory S. Schultz, Esq.
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