SHORT FORM ORDER

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

Post-Trial Decision

PRESENT:

Hon. RALPH T. GAZZILLO
A.J.S.C.

The Seaview at Amagansett, Ltd., *et.al.*,

Index No.: 34713/2009

Plaintiff(s),

- against -

Trustees of the Freeholders, et.al.

Defendant(s).

The Seaview at Amagansett, Ltd., et.al.

Defendants,

-against-

Index No.: 34714/2009

Trustees of the Freeholders, et.al.,

Defendants,

-and-

Jay H. Baker, Patty C. Baker, et.al.,

Additional Defendants,

The non-jury trial of these consolidated matters was conducted before the undersigned on June 6th, 7th, 8th, 9th and 23th, 2016. As explained more fully below, the central focus of both actions are the plaintiffs' claims of ownership of certain beachfront property commonly known as Napeague beach. Stemming from those claims are a number of "nuisance"[1] causes of actions.

Prior to the testimony, a number of items were pre-marked as either exhibits or directly admitted into evidence. In addition to those items, the parties relied upon the testimony of twenty-two (22) witnesses. The plaintiffs called Howard W. Young, Perry Finkelstein, Cynthia Crain, Kenneth Silverman, Robert Walter Powitz, Thomas John Grffiths, Edward S. Michels, Frederick L. Overton, Judy Desiderio, Robert Cristofaro, Matthew Skolnick, Bernard Kiembock, Lance Pomerantz, and Christine Szabo. The defendants called Diana Darrell, David H. Brown, William

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[1] So-called by the plaintiffs' attorney during his opening statement.

Taylor, Margery Courtney, Bradley P. Beyer, and Timothy Taylor. Catherine C. Regan was called on behalf of the additional defendant Marcus and Charles "Chick" Voorhis on behalf of the additional defendant Baker. The plaintiff also relied upon selected portions of the deposition of Kevin John Asher, Conrad Fisher and Diane McNally.

It should also be preliminarily noted that prior to any testimony, the following stipulation and agreement of the attorneys was placed upon the record:

> By order of this Court (Tanenbaum, J.) dated December 7, 2011, these two matters were joined for trial.
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> The plaintiffs and the additional defendants of the *Seaview* matter own approximately 4000 feet of oceanfront property in the Town of East Hampton.
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> That action was commenced on September 2, 2009 to quiet title pursuant to RPAPL Article 15, for permanent injunctions, and for a declaratory judgement concerning disputed beachfront land. The property consisting of approximately 4000 feet of the Atlantic Ocean beachfront in Amagansett, runs easterly from Napeague Lane to the westerly border of Napeague State Park and runs southerly to the mean high-water-line of the Atlantic Ocean in the Town of East Hampton.
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> Plaintiffs and additional defendants, except additional defendant Marcus, claim ownership interest in the subject property based on a deed dated March 15, 1882 ("the Benson deed") from the Trustees of the Freeholders and Commonalty of the Town of East Hampton (Trustees) to Arthur W. Benson conveying fee title to approximately 1,000 acres which included the subject property. Said deed contained the following language:
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> > And also except and reserved to the inhabitants of the Town of East Hampton the right to land fish boats and netts [sic] to spread the netts [sic] on the adjacent sands and care for the fish and material as has been customary heretofore on the South Shore of the Town lying Westerly of these conveyed premises.
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> Parenthetically, and by way of historical background, the Benson grant to him indicated that:
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> > Arthur W. Benson bought all of the common land on Napeaque below the highlands between a strip

> of land left for a road eight rods wide starting at the foot of the highland on the Montauk Road and running to the ocean front at right angle with Montauk Road and Montauk for $1,375.00

Defendant Town of East Hampton (Town) enacted Local Law No. 21 on September 24, 1991 which was codified as Chapter 91 of the Town Code to regulate beach areas within the boundaries of the Town. Based on the definitions contained therein, the subject property is a Trustee beach, owned and managed by the Trustees (*see* Town Code §91-3). Chapter 91 authorizes the Town to issue beach vehicle permits to Town residents free of charge and to non-residents for a fee of $275 (non-resident permits expire yearly on December 31), allowing the operation of vehicles on ocean beaches, including the subject property (*see* Town Code §§ 91-2, 91-5). It also contains regulations for vehicular traffic (*see* Town Code § 91-5). Notably, beach vehicles are required to maintain a distance of no less than 50 feet seaward of the beach grass line, if possible, and are prohibited from operating over or upon any dune, bluff or vegetation (*see* Town Code § 91-5 [C], [12]).

By their first cause of action, plaintiffs in the *Seaview* action seek a determination that plaintiffs and the additional defendants, except additional defendant Marcus, are the lawful owners of a portion of the subject beach area and are vested with absolute and unencumbered title in said property subject to an easement for the benefit of plaintiff Robert Higgins and non-party Judith Higgins. The second cause of action alleges that the reservation in the "Benson" deed does not inure to the benefit of current Town inhabitants and has been terminated or is terminable by the fee owner, and the Trustees and Town have no right or authority pursuant to said reservation to issue beach vehicle permits or to grant anyone permission to use the subject property to drive and park their vehicles. The third cause of action sounds in trespass and plaintiffs seek a permanent injunction against the Trustees and Town enjoining them and any persons acting under them or pursuant to their authority, from entering into or interfering with plaintiff's property.

By their fourth, fifth and sixth causes of action, plaintiffs seek a determination of the parties' rights and obligations with respect to the access point to the beach area and a permanent injunction against the Trustees and Town from using the access point in a manner inconsistent with documents between defendant Marcus and the Trustees regarding use of an access point to the beach. The eighth and ninth causes of action allege that the Trustees and Town have created a private and public

nuisance and plaintiffs seek a permanent injunction against the Trustees and Town to abate the nuisance and to restrain them from issuing beach vehicle permits. By their tenth and eleventh causes of action, plaintiffs seek a declaration that Chapter 91 of the Town Code violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article 1, Section 11 of the New York State Constitution by discriminating against plaintiffs in favor of beach front owners in other areas of the Town and vehicle beach users and bears no rational relationship to any legitimate interest of the Trustees and the Town. The twelfth cause of action alleges that the Trustees have breached their fiduciary duty to plaintiffs.

In the *White Sands* matter, plaintiff has operated an oceanfront motel extending approximately 220 feet along the beach. It has submitted nine (9) causes of action which somewhat mirror those in the *Seaview* matter, specifically,

1) Pursuant to RPAPL Art 15, a declaratory judgment that it owns the property.
2) A declaration that the original grant from Benson did not reserve rights to fish, drive vehicles on the beach or other similar trespasses.
3) A claim in equity that there is no adequate remedy at law.
4) Nuisance by allowing individuals and vehicles to trespass.
5) An additional nuisance claim.
6) Interference with its quiet enjoyment of its property.
7) Discriminatory denial of its right to equal protection under the law.
8) A "1983" violation.
9) A breach of the defendants' fiduciary duty.

At the conclusion of the proceedings and in lieu of summations, each side was invited to submit written factual and legal arguments, requests for findings of fact pursuant to CPLR §4213, as well as any responses and replies by August 31, 2016. Upon the application of the parties and with their consent, that period was extended an additional two (2) weeks. The parties were given addition time to prepare submissions when the Appellate Division, Second Department, issued decisions regarding these matters[2]. Those memoranda having finally been

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[2]*The Seaview at Amagansett, Ltd. v Trustees*, ___ AD3d ___, (9-21-16); *White Sands Motel Holding Corp. v Trustees*, ___ AD3d ___, (9-21-16). As a review of those decisions reveals, the appellate panel unanimously affirmed the prior orders of this court (Garguilo, J.) which denied summary judgment motions and, simultaneously, rejected the defendants' defenses

received and since reviewed, the Court's decision is as follows:

TESTIMONY

What immediately follows is an unquantified or evaluated but somewhat condensed version of the testimony of the various witnesses regarding the relevant and germane facts of this matter as was portrayed, purported and alleged by each. Any appraisal of the credibility of each, where warranted, will be noted before the addressing the determination and judgment of the merits of the plaintiffs' causes of action.

Young began the plaintiffs' case and he started his testimony with a brief description of his background; it was curtailed when all parties stipulated to him being deemed an expert as a surveyor. As to the facts of this matter, he testified that he had measured the Town of East Hampton's entire beachfront and found its length to be 119,745 feet or 22.7 miles. As to the Napeague Beach portion, the distance from Napeague Lane to Napeague State Park is 4124 feet or 3.4% of the Town's total Atlantic Ocean beachfront. He reviewed G.P.S. photographs of the area which display the high water mark; using "tweaked" County tax maps, he plotted the five subdivisions.

On cross-examination[3] he stated he hadn't measured the linear footage of the state park. Also, he had no knowledge of past uses of the beach, or if the beachfront houses were there in 1991. He also reiterated that he hadn't measured other beaches within the photograph, or any village beaches, nor particular private homeowners association beaches; therefore, he was unable to state how much of the Town's 22.7 miles of beachfront is actually "devoted to beaches in one way or the other."

Finkelstein indicated that he is the owner/operator of Pro Video Productions and is a videographer. On July 6, 2014 - during the July 4th weekend - while at the home of Mark Helie he recorded beach activity from10:40 a.m. to 6:00 p. m., taking two-hour videos one at a time. Selected excerpts of those videos were displayed, showing an unleashed dog, a nearby child, vehicular traffic, swimmers, surfers, a man, a woman and a dog relieving themselves.

On cross-examination, he indicated that from his taping location he could see for perhaps a thousand feet. He was able to see vehicles as they exited the beach but disputed

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of timeliness and laches. Contrary to the contentions contained in some of the post-trial memoranda, those decisions did not establish any of the plaintiffs' claims; those issues were referred to trial by the prior order of the Court and that referral was affirmed. The two stipulations made during the trial (see the information addressed by fns. 7 and 8, *infra*) however, remain effective.

[3] Most witnesses were subject to cross-examination by multiple parties' attorneys; the condensed versions have been combined without attribution.

whether there were any images of any such activity as the camera didn't record much beyond a 100 yards in any direction. He stated that didn't notice whether there was a large number of swimmers to the west who were not near any trucks parked on the beach. He stated that Cynthia Crain, an officer of one of the homeowners associations, had instructed him as to what portions of the tapes were to be edited and included into the court exhibit. Those selected were to fit into six categories, for example, vehicles, dog activity, *et cetera*. He had no knowledge of the area's historic use, nor if Helie had purchased his property when the beach had been used as shown in the videos. On a previous occasion, he had noticed a red slat-type fence to the west and did not see anyone parking near the fence. He added that he was unaware of any plover nesting areas nearby. Although he recorded for seven (7) hours and twenty (20) minutes, the edited portion in evidence and displayed during the trial is twenty-five (25) minutes long. He stated again that while he could see over a mile from his vantage point, he had videoed what occurred within a hundred yards. He didn't recall seeing any law enforcement vehicles while he was taping.

On his re-direct, he stated that throughout the time of the video there were always vehicles on the beach.

Crain testified as to her residence - a house on the beach. She is Secretary-Treasurer of the Ocean Estates Property Owners Association. She purchased her home in February, 2007, but had occupied it since October 20, 2006. She now lives there with her eight-year-old son and is familiar with Napeague Lane and the border of the state park (its adjacent to her house). In October of 2006 she observed "a little bit" of vehicular traffic on the beach which would drive between the park and beach; a few vehicles would park. They didn't park in October, the winter, nor the following Spring, but in the summer it would change dramatically with the beach congested with vehicles. In 2007, it was much busier on weekends; that was the first summer she was there and the first she knew about the beach activity. She indicated that since that time it has gotten worse and she "feel[s] like each year there are more cars." Now her use of the beach depends upon the season: She is there nights during the summer because she feels it's safer then for her son. She described an incident when her son was 3 or 4: It was the afternoon and a vehicle approached; she indicated to the driver to slow down but he accelerated and gave her "the finger." Since then, she has been afraid. She stated that on a warm summer weekends, the activity is as was reflected by the video. Also, there are dogs running around, children playing amid the traffic, people parking, swimming, surfing. She has never seen anyone use the bathroom facilities.

On cross-examination she stated that she instructed Finklestein which portions of the video to select for the court exhibit. The criterion she used for selection were: Cars near children, cars reversing near children, children having to run to avoid cars, loose dogs, people bathing, swimming, using it as a bathing area, a dog, a man, and a woman urinating. From her home she cannot see the beach. She has no individual claim to the beach. When she was asked about her knowledge of the beach's use prior to her occupancy or the Town Code's enactment, she denied knowledge. When she occupied in the house in 2006, she was unaware of the litigation and was not told of it until 2007 during a "discussion." She stated that when she first

saw her house in mid-September of 2006, "there were no cars on the beach." She had probably viewed the house three times before she entered into the lease but never saw any vehicles. Prior to entering into the lease she hadn't made any inquiries as to potential problems.

On her re-direct examination she stated that in the summer of 2014 there were no clover closures.

Silverman's testimony indicated that since 1989, he has been the President of The Dunes at Napeague Property Owner Association. It has twenty members, all of whom own homes at the location known as Dunes at Napeague. He lives in his home with his wife. In 1983 he purchased the property and the construction was completed in June of 1985. He first summered in the area in 1969; in 1970, he had a house nearby. He now occupies his home from May to October; except for the one year he rented it, he has always occupied it. He initially occupied it on weekends and summers, but since 2012 he was only there during the spring, summer, and fall seasons. Marine Boulevard runs nearby and it travels down to a *cul-de- sac* where there's a dirt path to the beach. He added that over the years he has observed the beach and in the "early years from1970 on, it was pretty desolate." As of 2015, it's become very congested with vehicles during the summer. Last summer he observed pedestrian bathers, vehicles, recreational activities, drinking, cars speeding, people in kites, unleashed dogs, and cooking. There was some form of this during the week but much more on weekends or 90 degree days. The vehicles would usually congregate from Gilbert's Path or the boardwalk to the end of the Ocean Estate subdivision. Last summer he observed hundreds of vehicles going in and out at the path at the end of Marine Boulevard; this happens after Memorial Day and lasts until sometime in September. He opined that the video appeared to show less traffic due to it being windy that day. He added that the usage varies more day-to-day than year-to-year but it has gotten worse over the years. During the 1983 construction of his home he spent more time there, specifically every weekend. He observed bathing on the beach and there were very few vehicles or a "haul seine boat" (the process of bring nets in and out by boat, bringing with them fish). Occasionally, there would be a truck. He added that starting around 1987, there were pickup trucks and Jeeps accessing the beach - a lot less than demonstrated by the video. In the 1990's it became more intense and by 2000 the level increased and stickers were required for the town and state park areas. As a result, those without state stickers were relegated to the town beaches and the former state park users now "got crunched" onto the smaller town beach. By 2000, the activity at the Marine Boulevard access point increased as the prior seven access points were reduced to one. A series of photographs were introduced which portrayed vehicles at the *cul-de-sac* or on the beach (some parked over and on the grass line) and people on the beach recreating. Another photo showed water entering the cut in the dune and some snow fence damage after a "relatively minor storm." Another - taken on the day of Hurricane Bob in 1991 - showed substantial flooding. An additional picture portrayed the remnants of a 1996 "no-name" storm and demonstrated water coming from the beach and onto the pathway. He indicated that the video had displayed the typical of activity on beach. He added that people would relieve themselves near dunes. He complained of fires and vehicles on the beach getting too close to him.

During his cross-examination, he addressed a photo of damage where the Marcus home would eventually be built around 1996. Between the time of the construction of his home (1984 or 1985) and the Marcus home (1995) there were two other homes built between their properties. Another was built on Marine Boulevard in 1984. He added that he has no fee title to the property except through homeowners association's quitclaim deed. He was aware of the Town Code legislation enacted in 1991; he got involved because the cut was becoming a flooding ground. He concluded by stating that while the video was accurate the area wasn't as active in prior years.

Additional cross-examination revealed that while he has observed dogs without leashes, people relieving themselves, and trucks traveling at fast speeds, beach activity is subject to Town Code regulations. He denied, however, that the conduct of dogs is embraced by the Code. As to any speeding, he acknowledged the Code's applicability but "a third or half" do not follow the Code. He indicated that after the Code was enacted he met with the Chief of Police; this was after the lawsuit was commenced in 2008 and after he had retained counsel. He indicated he had "probably" called prior to then but was unclear if he did so. In 2005 he observed the Police Department's Marine Patrol on the beach; he "probably" stopped them and complained. His association had never challenged the adoption of the Town Code section which addressed the beach. He disputed why trucks were parked near the entrance, *viz,* whether to take air from their tires prior to entering the unpaved, sandy beach versus his contention that they were parked there because they were stuck and couldn't move.

Powitz testified that he is a "public health sanitarium," commonly known as a health inspector, who deals primarily with contamination control and disease/injury prevention. He is licensed in most, including New York. On consent of all, he was deemed and expert in public health and sanitary matters. He indicated that he is familiar with the standards regarding recreational beaches. After being furnished with a copy of this matter's complaint, the video and New York State regulations, he surveyed the area on August 25, 2013. He reported that he was there at 11:30 a.m. when cars started to gather; when he left 2 ½ hours later there were 80 cars. He also observed quite a few dogs, traffic, people, trash and rubbish on the beach, including wood with nails, fireworks, bottles. He also noted the absence of sanitary facilities and lifeguards and that immediate access for emergency ingress and egress was often blocked. He opined that such conditions were below the standards necessary to maintain water quality and a safe environment. He indicated the health risk caused by people and animals defecating and urinating on the beach and in the water. He also addressed E-Coli bacteria and the results. He concluded by indicating that the New York State regulations require water testing, bathroom facilities, and garbage facilities.

On cross-examination, he indicated that he had never testified in a beach case before. As to his prior testimony, he had testified 23 times regarding prison sanitation issues. He often addresses "food and water-born illnesses for attorneys." He has never published any articles and his web-page addresses matters such as keeping "a slicing machine clean in a deli" and controlling bedbugs but contains nothing about beach sanitation. He was unable to explain the

applicability of the state codes and seemed confused and couldn't explain why state codes apply, opining that they would be applicable to beachfront homeowners - including the requirement of lifeguards. He also opined that the entire almost 23 miles of beach within the Town would also have to comply if there were a concentration of people at any such location. He added that he saw neither "swimming allowed" or "warning" signs. As to dogs, he was unaware that the Town Code prohibits unleashed dogs on the beach. He was equally unaware that many of the conditions he observed are prohibited by the Code. He was shown the applicable Code section and acknowledged that it "provides a regulatory scheme for the beach." He also admitted that he was unaware if the trash he observed on the beach was removed by people when they left. He also acknowledged that he never investigated whether the Town had performed any water testing, had never researched if there had been any illness reported by beach-goers due to the water, unaware if the beach was openly advertised, nor was he aware of any illness reported at beach in the last 100 years.

Upon further examination, he indicated that posting signs would not insure compliance nor obviate the need for enforcement or facilities nor would they remove the need for public health concerns. He added that it was unreasonable not to have bathrooms or trash bins and unregulated vehicular access to the beach. He concluded by unsanitary conditions would pose a potential health risk whether those conditions existed below or above the high water mark.

Griffiths testified that he is an aquatic safety consultant or aquatic risk manager; on consent, he was qualified as an expert as such. He has worldwide experience in both hemispheres and most continents, including work for the United States Navy. After a review of the regulations and the video, some articles and websites, he visited the beach on August 18, 2013. At that time it was a somewhat overcast day and it was starting to rain. There were 15 to 25 vehicles there, driving in both directions and parking or pulling out of spaces. There was also considerable human activity. He said he had never been to a beach where he has seen that activity. As to the safety of the conditions, he deemed the beach area "an accident waiting to happen."

On cross-examination, he admitted that he is mostly occupied with swimming pool negligence cases but has testified regarding lakes, rivers, and beaches. Before inspecting this beach he was given a copy of the complaint. He stated that some of the vehicular traffic he observed may have gone on toward the state park and some were traveling at a high rate of speed while others were not (but he couldn't gauge their speed). He noted that the beach was narrow - that is, the distance between the dunes and the water - and to his right (presumably to the west) there was a large congregation of people. There were no trucks there, and at this "no truck" beach he didn't observe any lifeguards or bathroom facilities. He admitted that he had never researched to determine if there were any prior accidents at the subject beach, nor any prior police reports at this specific location. He did read some articles about such incidents but didn't know if they had occurred at this beach or others. He also admitted that he didn't contact police to ascertain any reports and that he wasn't familiar with Chapter 91 of the Town Code.

Continuing his cross-examination, he stated that due to the sand, vehicular speed on beaches is a concern, and a driver has to know how to drive in the sand. He indicated that the absence of accidents does not change his opinion as to the potential for them, nor does he agree that the mere prohibition or legislation of conduct determines compliance. He added that beaches which require permits tend to be more popular. He added that since the access cut to the beach is narrow, it could not accommodate two lanes of vehicles and also needed decks to channel pedestrian traffic.

Michels, Chief Harbor Master for the Town and charged with all marine patrol for the Town including beach enforcement, testified that he has three (3) full time, and seventeen (17) seasonal officers. His staff performs the primary patrolling. He has been to the subject beach during the summer season, and has been there every year since 2000. There is no primary or particular location for vehicles. The people there swim and consume alcoholic beverages; those activities are not prohibited there but are at a beach further to the east. His officers patrol multiple times during the day and evening during summer seasons. There are no lifeguards or restrooms at the subject beach and doesn't know what people do when they require a restroom. He is personally there weekly or bi-weekly during the summer. Around 2001 or 2002, he was there more frequently due to complaints such as vehicles going too fast and no permits or stickers as well as substantial time spent due to the plover issues. From June to August there are plover restrictions; last year a third of the distance between the access path and the state park was restricted for plover issues.

He added that Sundays are the busiest beach days and 50 to 100 vehicles may be there on a sunny Sunday, perhaps even a 150 at times. They congregate from Napeague Lane to the state park. They would access from the Marine Boulevard cut from 10:00 a.m. to 6:00 p.m. Most of the time, there would be no vehicles to the west to the town line. He acknowledged Town Code Sec 91, specifically 91-5, B 2, which states, "No person shall operate or park a vehicle on the following restricted beaches from the Thursday before Memorial Day to September 15th of each year between the hours of 10:00a.m. and 4:00 p.m." There are other public beaches which have lifeguards and bathroom facilities, but not across the entire width of the Town's beachfront. As to beach maintenance, it is performed by the Parks Department on request while trash is removed on a periodic basis. As regards the area of the White Sands Motel, vehicles can access the beach and there are vehicles there but it's not an area of turmoil or one of his "attention-getting places." Most vehicles access from Atlantic Drive but there are other non-road access avenues. He also polices a nearby town-owned beach where vehicles congregate but they are not there in large numbers. He opined that most people are unaware of that beach area and that area has a number of single family, beachfront homes similar to the Town-owned beach.

On cross-examination he stated that he has been familiar with the subject area since 1993. At that time there were vehicles on the beach and "normal beach activity" such as there is today. As to the number of houses, it hasn't appreciably changed. The beach may be patrolled five or six times a day. His staff issued 790 summonses in 2013, 1,103 in 2014, and approximately 2,253 in 2015; there were one or two at the most at the subject area. There is

more activity on Sundays than Saturdays as most of the people who go there work on Saturdays. During his career, he has not been familiar any beach related injury nor illness ever being reported as emanating from this area, nor were there any arrests at that location. He opined that the level of activity among the beaches - i.e., White Sands - doesn't compare to the other area. He added that there had been more activity and problems during 2000 and 2001 than in the last seven or eight years and "things have diminished." He also stated that the harbor patrol enforces the code, i.e., speeding, lighting fires, disposal of garbage as well as responds to complaints. Today there is the same activity as in 1993 but peaked in 2000 and 2001. Today there are more trucks due to the popularity of four-wheel vehicles. Each vehicle brings three to four people to the beach. He repeated that he couldn't recall any summonses being issued in the subject area in the last few years but if his staff observed any violations they would issue a summons. He added that his "people don't let anything go that they can write a summons for." While he couldn't guarantee there are no violations he stated that if any had occurred in front of him or his staff, a summons would have been issued. He concluded by stating that the access to cut though the dune is one-vehicle wide.

Overton testified that he has been an East Hampton Town Councilman for two-and -a-half (2 ½) years. Prior to that, from January 2000 to December 2013, he had been the Town Clerk. He explained that "CFAR" stands for "Citizens For Access Rights" and its goal is to maintain access to public beaches, including vehicular access; he is not a member but he has contributed since 2013. He is familiar with the beach area and has been there during the summer season. On a Sunday last year, he was there in a vehicle and estimated there were 50 or 60 vehicles; he goes there once or twice a year. In 1989 or 1990, he was there and could observe vehicles as far east as he could see, perhaps 50 to 100. He started frequenting the beach in 1974; in 2005 there were many vehicles on the beach. When he visited the beach last year there was an increase in vehicles but it was not significant. The people who frequented the beach did the typical beach activities and they would have driven to a location, parked, and not moved their vehicles until they left. Access was from Napeaque Lane down to the end of Marine Boulevard to the cut. The average vehicle carried and average of four (4) people. There were leashed and unleashed dogs but no bathroom facilities. Over his years as Town Clerk he had supervised the issuance of vehicle permits; upon satisfactory proof of residency they were free of charge while non-residents paid $275. Approximately 1500 to 2000 permits were issued each year. Based upon a pre-trial interrogatory dated September 22, 2010, it was stipulated that if asked related questions he would provide the following answers: 1999 - 321 resident permits, non-residents 63; 2000 - 151/63; 2001 - 1,793/77; 2002 - 2,105/74; 2003 - 1,982/101; 2004 - 2,052/121; 2005 - 2,121/137; 2006 - 1,763/124; 2007 - 1,890/150; 2008 - 1,674/79; 2009 - 1,401/101; 2010 "to-date" - 1,519/108. Once issued, resident permits don't expire but non-residents expire each year. In the years 2011 to 2013, he estimated approximately 2,000 were issued each year. He added that due to better enforcement, the number of permits increased in the years of 1999, 2000 and 2001. He added that the Town doesn't provide periodic maintenance to either Napeaque Beach or the White Sands area. The South Flora parcel - a nature preserve - is occasionally used by vehicles during the summer. He has never been there.

On cross-examination, he reiterated that the first time he visited the Napeaque Beach was 1974. He indicated that at that time "we" would drive along the beach and fish; during summer months they would do "normal" family activities there, *viz,* barbecue, swim, play ball, catch, and throw a football around. He was been there with family and friends; what he described was the common use of the beach area in 1974 and it has continued since then. He added that what he observed in 1989 and 1990 was the same as in 1974, i.e.,"trucks as far as the eye could see." Since most people work Saturdays, there were more beach users on Sundays. It was his understanding that it was a public beach and his family and friends referred to it as "our beach." He placed the Town's population at approximately 20,000. He also stated that the damage, destruction or replacement of a vehicle as well as wear and tear on a permit or sticker could require an owner to replace it two or three times over a 10 to 15 year period. He estimated that during the summer months some 75 to 100 residents and their trucks use the beach but he disagreed with another's estimate of 50 to 150 or higher. He acknowledged that he is a contributing member of CFAR. As a Councilman, he voted to commence eminent domain proceedings on the Town's behalf toward condemnation of the property.

Thereafter, portions of the deposition of Kevin J. Ashern were read into the record. They indicated that had been the Town's Deputy Supervisor of Highways since January 1, 2008. They do not maintain the beaches, i.e., picking up debris or grade the sand. They clean the parking areas but never leave the asphalt. He described the access point to the beach and added that they perform no maintenance on it other than moving the sand back if it sand comes on to the street.

Portions of the deposition of Conrad Fisher were also read into the record. They stated that for a little over seven years he had been a laborer for the Town's Department of Parks and Recreation. His department provides no services to the Napeaque Beach area. His agency doesn't go on the beach and only picks up the garbage in the cans in the parking lot. They provide no services to the access point or the nearby beach area.

Next, Desiderio testified that she is employed as licensed real estate broker, has worked over 30 years in Hamptons area, and is familiar with the beaches. She doesn't live in the Napeague Beach area but her sales duties have taken her there. Some 29 years ago she sold a home there. As regards the beach, she only saw fishermen there but not any congregation of vehicles. Over the years, the beach has changed; it had been used in the morning by one or two fishermen in vehicles. She stated that she would drive on the beach with her children and there would be approximately ten (10) vehicles. This was only on weekends whereas today there are many, many more vehicles. This change occurred 15 or 20 years ago when SUVs became more popular. She added that years ago, people didn't do what they do today: "park and stay" all day. She indicated this did not occur in the past.

On cross-examination she indicated that she doesn't go to the beach any more but when she did 15 years ago it was with her family. She would "hang out" for a while, go into the ocean, play in the sand, have lunch, then leave. This was approximately during the year 2000

and during those times other families were there and perhaps 10 cars.

Cristoforo testified that he is a member and treasurer of the Dunes at Napeaque. He identified the location of his property and indicated he has been there for 19 years. For the 14 years prior to that (i.e., circa 1980), he lived approximately a quarter of a mile away. He occupied both homes during the applicable summers. He indicated that at the end of Marine Boulevard there is a sandy path which leads to the beach. When he was first in that community there would be occasional truck-traffic there - mostly fisherman and usually toward the end of the day. He noted this when living in the prior property but since he moved to his present location, the traffic has progressively increased and become greater every year. There also has been what he deems "unsafe" behavior there: On 10 to 15 occasions he has had to stop people driving recklessly near his children and grandchildren as well as other who would drive across the pedestrian beaches. He added that this has been true every summer since he's been there. He concluded by stating that this makes him worried and anxious; he has complained to the authorities but "really to no avail."

On cross-examination he indicated that the fisherman he had observed at the end of the day were not viewed from his home - they were three-quarters of a mile away and he noticed them during his frequent walks on Marine Boulevard.

Skolnick indicated that has been the President and a member of the Seaview at Amagansett Homeowners Association. He resides north of the beach in a home he first occupied in 1990; he primarily occupies it during the summer, late spring and early fall. He knows the beach area well, including the Marine Boulevard access point. He opined that vehicular use has dramatically increased since 1990. At that time, vehicles on the beach would be a sporadic event and very few vehicles would spend the day there. Since then, he has observed that it has dramatically increased and the enhanced amount of traffic has caused the turnover or sales of houses as well as making a trip to the beach risky for unattended children. Previously, he met with the authorities but to no avail; they claimed they do not have the personnel to attend to the traffic issues. He claims debris is left in driveways. He and his wife are constantly on the beach and have observed speeding vehicles constantly speeding and driving on the dunes. He added, however, that the activity hasn't affect him "that much."

On cross-examination he indicated that Florida is his "full-time place of residence." He met with the Police Chief on two occasions and they spoke on the telephone several times; he admitted that this was all after the lawsuit began. Previously, he had spoken with a town councilperson, the Parks Department, and "natural resources." He added that the significant increase in activity began about 15 to 16 years ago. He could neither confirm or deny the accounts of prior witnesses.

Before the next witness, the parties stipulated to foundational issues of exhibits 10-A to 10-I.

Thereafter, Kiembock testified that he is the owner of the plaintiff White Sands Motel Holding Corporation, the entity which owns the motel's buildings, contents and property. He purchased it in late 1989 or 1990; he had a partner but is now the sole owner. The property is located on the dunes in Amagansett and has a sandy beach. The motel has 20 units, but since he began living there only 16 are for rent. The property occupies 1.8 acres and is opened April 15th to October 15th every year. Over the years, vehicles with Town permits have driven on or near his property. Many times the vehicles weave through beach blankets, causing his guests to move. This happened the prior Sunday when the driver of a Jeep asked people to move so he could get by. This witness added that this happens all summer and that vehicles drive by or near his property at all times of the night and day. During the day, most of the traffic goes up and down the beach unaware of the people on the beach and they are "rude." They have many dog problems such as biting, urinating; most of the dogs are with "walk on" people, not cars. He has seen vehicles with out-of-state plates. The vehicular conditions have been occurring for the last 15 years and have become progressively worse. He added that they drive by day and night, they speed, often make beach fires and the smoke sets off hotel alarms causing the guests to evacuate. Some of these fires have burnt walkers when hot ambers were left behind. The impact on him has been complaints from his guests so he has installed lighting. When his guests have to move during the daytime to allow vehicular traffic they are disturbed and this happens seven days a week. When he complains to the beach-going drivers he has been cursed and told to get off the beach. When he complained to the Town Trustees he was told "get out of here, we give you nothing."

On cross-examination, he indicated that many of the activities he complained of are repetitious of the activity which occurred in 1990, 1991, and 1992 and many of the vehicles are speeding. He concluded by stating that there are never any vacancies at his motel.

Pomerantz, an attorney, began his testimony with the stipulation that he be deemed a land title expert. He reviewed a summary of title documents beginning with the Benson deed and ending with a 1925 deed from Anna A. Swartz to the to Navahoe Realty Company. This "common chain of title" refers to all the properties at issue west of the state park. Time wise, the next deed was from Navahoe Realty to Great Neck Montauk Corporation and there was a summary which travels from that event forward. Based upon the documents, he concluded that Seaview at Amagansett Limited owns the oceanfront area down to the high water mark of the Atlantic Ocean. He further concluded that from the 1882 Benson deed to the present, there was no conveyance to the Town or its Trustees and that the neither has any interest in the property. As to the Dunes at Napeague chain of title, he has concluded that it owns the fee title down to the high water mark. He added that the southerly boundary is the high water mark of the Atlantic Ocean. As to the Tides Homeowners Association - the owners of the Mitchell Dunes parcel - the same conclusion applies. As to the Whalers Lane Homeowners Association parcel he similarly concluded that they own the property to the high water mark. He reported similar findings as to the Ocean Estates Property Owners Association, Inc.'s parcel but not to the full westerly 600 feet (i.e., but for 400 feet) as there are some documents which do not appear to convey complete title to the high water mark. He added that there are no indications that the

remaining 200 feet were transferred to the Town or the Trustees. Focusing next on the White Sands' chain of title, he found that it, too, owned title down to the high water mark. As to all of these opinions, he also concluded that neither the Town nor the Trustees have been granted any conveyance since the Benson deed and they therefore have no legal interest in the property.

During his cross-examination, he initially indicated that his first review of the documents did not support the plaintiffs' claimed ownership and that he couldn't recall if any of the "Seaview" plaintiffs held title in 1991. He also didn't know if any who claim ownership to any portion of the Atlantic Ocean beach pay the taxes, or maintain title insurance on it. He then reviewed the dates of the applicable quitclaim deeds but one was dated after his initial report to plaintiffs' counsel. As to the Seaview plat, he indicated its seaward boundary is the foot of the "beach bank." He added those terms have no "distinct definition, and are open to interpretation"; typically, it is construed to be the "upland area that contains the flow or stream" and in this case it would be where dry land "is intersected by the plane of the water." A clarification deed for the Seaview chain expanded upon the legal description. He stated that the longest distance from Montauk Highway seaward is longer on the westerly side than the easterly portion. He was unable, however, to explain the deeds' phrase "1890" feet. He also acknowledged that a corrective deed may convey land in addition to that originally transferred. As to the Dunes at Napeague, its property line extends to the edge of the beach grass but he claimed this is different than the map limits (which is the landward edge of the beach grass). He indicated that in a prior deed, the seaward boundary was the mean high water line of the Atlantic Ocean; it also states "1890 feet more or less to the edge of the beach grass and land of the Town of East Hampton." He refused to acknowledged that every deed in his summary has a north to south dimension of 1890 feet. He did state that all deeds travel down to the high water mark but not to the mean high water mark. As to the Tides Homeowners Association, specifically Mitchell Dunes, its boundary is the beach grass line. As regards the Whalers Lane property, the surveyor's notation indicates "The developer does not purport to hold or convey title to lands south of beach line grass." He also stated that the beach grass line is landward of the mean high water line. He added that the notation and grass line explanation also apply to the Ocean Estates documents. He refused, however, to concede that an area seaward of a line of beach grass is likely to be a beach area - he considered it a "a term of art." He also dismissed the significance of a "dune crest" notation. He acknowledged that tax maps indicate the words "Trustees of the Town of East Hampton." He did however acknowledge that CPLR Rule 4522, titled "Ancient filed maps, surveys and records affecting real property," states that "[a]ll maps, surveys and official records affecting real property which have been on file in the state of the office of the register of any county, county clerk, any court of record or any department of the City of New York for more than ten years are *prima facie* evidence of their contents." He then acknowledged that each of the five plats he testified to were file in the Suffolk County Clerk's Office for over ten years.

During his re-direct examination, he dismissed the importance of notations on a map and stated that other than perhaps such matters being of interest to a title insurer they have no effect on title.

His re-cross-examination he reiterated his dismissal of the importance of the notations on a filed subdivision plat. Thereafter, the questioning focused on his familiarity with the Court of Appeals decision, *O'Mara v Town of Wappinger*[4]. Although he contended he was familiar with the case, even after he was offered a copy he disagreed that it held that notations on filed plat effected title.

Szabo indicated that she is familiar with the area, having been a resident there from 2001 to 2009. Specifically, she lived at 51 Hampton Lane and then at a beachfront property on Whalers Lane. She resided at the first for four and a half years and then for four more at the second. She left the area at the beginning of 2009. The first location was used as a year-round residence and she divided her time between there and a New York City home. The Whalers Lane home was her residence for eight (8) months a year with the balance of the year spent in the Caribbean. Currently, she has no interest in any relevant property. She reviewed a series of photographs she took during July of 2008. The photos depict people and vehicles on the beach, the dunes, and the grassy area as well as vehicle tire tracks in the dunes erosion area, trash, and bonfire debris, children relieving themselves, and a vehicle in proximity to a child sitting on the beach. During the time she resided at the latter residence she observed that wood from her walkway had been taken and used as firewood for a beach bonfire.

On cross-examination she stated that some of the pictures had been taken on the Fourth of July weekend. She added that the congestion during that weekend is comparable to August. When the walkway wood was removed she did not do anything and did not call the police.

Thereafter the plaintiff introduced portions of the deposition of Diane McNally, Clerk of the Town's Board of Trustees. She has been on the board for 23 years, beginning in 1990. She stated that Napeague was conveyed by the Trustees to Benson by way of the Benson deed. The Trustees do not provide any maintenance to the ocean beaches in that area, or any trash receptacles nor do they fence or demark the area. As to the White Sands area, the Trustees do not provide lifeguards, trash receptacles, maintenance, or do anything to limit access. She concluded by indicating that vehicle usage on the ocean beaches is limited during the summer months and daytime hours in the Village of East Hampton but there are exceptions to minimize conflict between bathing beaches and vehicle-user groups.

At that juncture, the plaintiffs rested and the defendants began their case-in-chief, starting with Darrell's testimony.

She indicated that she is 70 years old and familiar with the area. Her family started to go there in 1981; they drove there as a family and used the beach for recreation, *viz,* they spent the day fishing, swimming, and playing cards and volleyball. They drove down in a four-wheel drive pick-up and there would be 40 to 50 other families also there with their vehicles. Her

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[4] 9 NY3d 303 (2007).

family went there during the summers and up until a few weekends after school started. They tended to go on Sundays because they worked Saturdays. She never saw any injuries or illnesses from beach use. She stopped going there in 1990 as her children were older and "started to do their own thing"; as of late, her youngest son goes there with her grandchildren. She understood her neighbor's parents did so since the 1960's; she added that the activities she described are well known in the area for many years prior to her arrival.[5] She understood that the beach was open to the public.

On cross-examination she stated that while she went to the area beginning in 1981 and for the next 10 or 15 years. She hadn't been there since 1996, including the last two summers. When she did use the beach, she and her family would arrive around noon and leave by 6:00 or 6:30 p.m. During the seasons when she was at the beach there were no bathroom facilities but she never relieved herself on the beach, nor did she observe anyone else doing so. There were no lifeguards, and those people who would fish and swim there were not in the same area. Vehicles that were on the beach were all parked during the activities. There was no surfers, but once in a while there were unleashed dogs. On occasion, she observed people drinking beer. She believed the Town owned the property.

She added that neither she nor her family ever drove on the dunes or the beach grass or did they leave garbage behind and that any of that would be a bad thing. She indicated that she thought the beach was cleaner when she left than when she arrived. She concluded by stating that she never observed anyone relieving themselves nor would her vehicle speed in the area.

Brown testified that he is 69 years old and has been acquainted with the area all his life. He been going there since 1960 when he was 14 years old. He rode in a "beach buggy" with other children his age and they would ride along the entire beach area. This was a common occurrence during the spring, summer and fall, as well as a typical activity among high school students at that time. Beginning in the mid-1980's, he and his two daughters would spend the afternoons there, having lunch on Sundays and his girls and others swimming. This was mostly on Sundays as he was at work other days. He observed other people similarly engaged and on a typical July or August Sunday there were people from 20 or more four-wheel-drive vehicles on the beach doing the same things. He was unaware of any beach-related injuries or illnesses. He was "always able to" drive vehicles on the beach; his father did the same when he was "so small" and it's been like this as long as he can remember. This is a well known activity in the East Hampton community. He concluded by saying that he understood that the beach was open to the public and he never asked anyone's permission or had been challenged as a user.

On cross-examination, he stated that when he rode the beach buggy he didn't limit himself to the subject area but drove all over the beaches. He added that in the 1980's, no permits were required to drive on the beach. During the summers, people didn't park in the

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[5]Obviously this is rank hearsay and not considered for its truth, but it is indicative of her motivation.

state park area or elsewhere. He stated that would arrive at approximately 11:30 a.m. and stay until 4:30 or 5:00 p.m. He didn't consume any alcoholic beverages or observe others do so. He would park near his acquaintances. The area didn't have any bathroom facilities but he didn't relieve himself on the beach, nor did his daughters, nor did he see anyone else do so. Besides parking vehicles and people swimming, he didn't see any animals on the beach. He wasn't there last summer or since 1986 as he works on weekends. The only access was the Marine Boulevard cut. He never had never driven on the dunes, the beach grass, left garbage, started fires or relieved himself on the beach and anyone who would do so was doing "a bad thing."

William Taylor testified that he is 70 years old. He began working for the Town on April 10, 1989, when he was employed as a senior harbor master. Among his duties were patrol and regulation of activity along the Town beaches. (During his cross-examination he would acknowledge that he is a Town Trustee and a defendant in this matter.) Starting in 1989, he drove on the beach often and continuously adding that the patrol activity got much more intense in mid-1991 and 1992. The beach was fairly well used and a place where people went there with their vehicles for picnicking, fishing, and swimming. To his knowledge, this had been true for the 20 years prior to 1991, i.e., since 1971. When on the beach he observed people sitting, cooking, and grilling and "it was all families." The number of beach goers was heavier on weekends than weekdays. Sundays were the busiest as most of the people who went there were only off from work on Sundays and it was a "Sunday family day at the beach." During one "event" there were thousands of four-wheel-drive vehicles but the numbers usually "ran from around 75." Fourth of July fireworks were moved to Labor Day due to the piping clovers. The use of the beach is seasonal, i.e., July and August. After 1991, the Town started intensive patrols and kept track of the number of vehicles on the beach.

During a *voir dire* on the vehicle population reporting process, he stated that these reports were prepared monthly and there may have been an annual report, beginning "probably" in 1993 until he left his position. They were transmitted to the Town and the Trustees through the Clerk. In view of such records' non-disclosure pre-trial, they were admitted subject to a continuance and diligent search by the defendants for other such or similar documents; depending on the results, the witness was subject to re-call[6].

Continuing his testimony, William Taylor indicated that a 1994 report stated that the largest vehicle count "so far was 43 at 1:00 p.m. on July 4th." A report dated January 30, 1995, stated that other than a during a fireworks display, the largest number of vehicles observed during was 73 on July 17, 1994 and similar sized crowds on "nice beach days." He added that the most popular place for vehicles was Napeague. He also stated that he is presently the Waterways Management Supervisor and that the beach activity is similar. He is not aware of

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[6] After completion of that day's testimony, the trial was adjourned over the weekend until the following Monday and the parties given that opportunity to search for any records and, as a result and as appropriate, make any applications upon the trial's resumption. As the record reflects, there were no such applications.

any injuries or illnesses which emanated from the beach area. In 1989 - when he was appointed as the Harbor Master - one of his duties was to oversee the permit issuance process and he participated in meetings regarding the proposed beach laws. He added that the beach activities are common knowledge in the community.

On cross-examination he reviewed the Town Codes' "seasonal" parking limits. He recalled that this section was added to try "to stay with historical places where beach driving had been occurring." It was also his understanding that previously there had been no prohibitions on beach driving. A prior attempt at legislation had been attempted in 1988 but withdrawn after litigation and its being overturned. He was unaware of any other prior attempts as he was not involved with the Town before 1989 but he believed there was a piece of land given to the Town with driving beach restrictions. He hired an "Ed Swenson" whose duties included keeping track of the number of vehicles on the beach as it "was a main point of contention at the time." Since leaving his prior position, Taylor has gone down to the beach on numerous occasions, but other than recently, the last time he went there and parked was two or three years ago. At that time he noticed numerous boat-type, port-a-potties used by many of the beach goers and never saw anyone relieving themselves in public. On such occasions he typically saw people picnicking and preparing food, swimming, and an occasional fisherman. There were no lifeguards and he never saw animals running around or bothering people, although there were unleashed dogs. He is a member of CFAR and may have given it $20 as dues for two or three years. He reviewed the Town's "Local Waterfront Revitalization Program" (hereinafter the "LWRP"). He had participated in its formulation 10 or 15 years previously and he had provided information on local beaches and waterways. He considered the LWRP to be a "consensus" and it was so extensive so as incorporate improvements to a number of things, including erosion. That report noted that off-the-road vehicles had caused significant damage to the Marine Boulevard access route and that flooding would continue if beach traffic was not reduced or redirected and that they should be prohibited within 20 feet of the grass line. He stated, however, that the Town's regulations require a 50 foot line restriction which is enforced. He added that there is very little beach grass in this area and the dunes that are there are artificial and created as well as the result of fencing. Also, he stated that the beach is generally wide enough so that nobody goes within 50 feet of the beach grass and if they did they would be ticketed. He contested the LWRP's contention that beach-driving destabilized the dune at the access point and causes flooding into Marine Boulevard; he further stated that the breach in the dune was created as an access point. He added that "the cut on the beach is a destabilization of the dune." As to the improvements suggested by the report, he explained their application or lack thereof and distinctions between and among the various beach locations. He also indicated that the report was a plan to install a public beach which, for many reasons, did not occur. He also stated that he felt that portions of the report are overstated and he had adamantly dissented to much of the report. He admitted that driving on the beach will destroy it but added that could be mitigated by proper regulations, and that it is not possible to have access to the beach without having a degrading effect on the beach. As to any beach grass damage by vehicular traffic, he stated the Town regulation providing a 50 feet prohibited zone will prevent such damage. Regarding the report's claim of damage caused by off-road-vehicles, he believes some of the

report is overstated and it fails to cite specific incidents where the report's concerns had occurred. He also indicated that some of the report's recommendations are in effect, i.e., 24-hour closures of the birds' nesting area, fencing, and supervision of the nesting area, and closing half of the beaches.

On his re-direct examination, he reiterated that the Town Code permitted vehicles on the beach because of the historic use. The Town and Trustees were aware of that in 1991 when the Code provision was adopted; he knew of it since 1989 and had found references to it back to the 60's. He read the portion of the LWPR which stated "The Town Trustees claim title to the ocean beaches adjacent to Napeaque State Park between the beach grass line and ocean in accordance with the longstanding practice of surveyors to locate shoreline boundaries by reference to the line of vegetation." He also referenced a later section which indicated that the "beaches and the recreation they provide are a cornerstone of the Town's economy and their maintenance is an important planning consideration." He also noted the report's indications that the Town trustees did not support additional restrictions on beach vehicular traffic; rather, they believed that any problems could be reduced by increased and constant enforcement of the Code's provisions.

During the continuance of his cross-examination he was referred to the indication of the Trustees' claim of ownership (*viz*, the property between grass line and the ocean) was based upon the longstanding practice of surveyors. He stated that they "always had ownership to the natural grass line," but was unable to explain the surveyors' practice. He concluded by indicating that the lack of citations for Code violations in the area indicates the increased and consistent enforcement.

Courtney began her testimony by indicating her familiarity with the beach. Brought up in Springs, East Hampton, she began going there in 1966 when she was in high school. Many of her friends had beach buggies for use on the beach. In 1981 she drove there with her family, friends and other community members and they would swim and picnic during all-day events. Other vehicles would be there and this was the normal use of the beach. She and others would observe and respect the parking restrictions for plovers. Due to the softness of the sand, no one speeded or parked on the grass or the dunes. As to trash, "you take out what you bring in" and some of those who used the beach even cleaned up what others may have left behind. She added that the beach is "extremely maintained and cared for and clean." She didn't observe anyone relieving themselves on the beach as it was considered to be their local beach and that theirs was a beach community and this their weekend activity. She still goes to the beach, along with all her cousins, friends, relatives. In all the time she was at the beach, she was never asked to leave, or told that it was the property of others, observed an accident or someone intoxicated there, told of any illnesses which emanated from there, but she did observe routine police patrols.

On cross-examination she acknowledged that she has been a member of CFAR since it was established. Her high school beach buggy activity was not limited to Napeague; at that time

the state park hadn't been established. The last time she had been on the beach was September of 2015 but had been there that Fourth of July from 1:00 p.m. to 4:30 or 5:00 p.m. She saw vehicles parked alongside each other but none were in "double rows." She added that people who need to use the bathrooms can drive to public beach where there are restrooms; she never saw anyone relieve themselves on the beach, in the dunes, or the grass.

She also stated that in 1966 there where no houses on the beach. She added that if any of the complaints had occurred, i.e., driving on the grass, the dunes, urinating, that it would not be "a good thing." She denied that on that July Fourth there were between 70 and 150 vehicles on the beach and opined that the number was approximately 70. She added that when in high school she would go down to the beach on weekends "all year" - weather permitting. Now, as an adult, she generally uses the beach from June to October, although one could go on other occasions.

Beyer stated that he lives in Springs, East Hampton, but was raised in Sag Harbor. He considers himself very familiar with the subject beach, having first used it in the late 1950's and early 1960's. He added that his father grew up there and they would go there in his father's brother's Jeep. After that he always did and still does enjoy the beach with his family and friends. He acknowledged that he is a member of CFAR. When at the beach he had observed other vehicles and people enjoying their families and the beach. Since "everybody works," it is primarily occupied on Sundays. When he first went there and used the beach it was before the houses had been built. Prior to the 1991 enactment of the Town Code beach provisions there wasn't "anything beyond commonsense stuff." After the enactment, the Code was enforced, observed, and upheld; he never saw any vehicles speeding and if it did occur the other beach occupants would cause the driver to stop. He never observed vehicles parked on the dunes or the grass and he never left garbage and would pick up that of others as "it's very strict on garbage." He never observed anyone relieving themselves on the beach; he and others had a "port-a-potty." He added that the beach is open to and respected by the people of East Hampton. No one from the nearby homes ever told them to leave; in fact, one of them came with his dog and socialized. He never saw any accidents and the police were there "all the time" on their ATV's and trucks. He concluded by stating that no one in his family had ever become ill from swimming in the ocean, nor has he ever heard of it happening to anyone. There was no cross-examination.

Timothy Taylor indicated that he is a land surveyor and president CFAR. The association has a pledge to be responsible and respectful in the use of the beach and to adhere to the Town Code's beach provisions. He added that he began using the beach as a ten-year-old in 1982 and continues his use to the present time. He stated that CFAR absolutely respects the Code's laws and he has never observed a vehicle speeding. Additionally, the beach is not left with garbage as people carry garbage bags and take their own with them and that members of his group they pride themselves in leaving the beach in better condition than when they arrived. Additionally, he stated that his group generally has two annual beach cleaning events. As to people urinating on the beach, he denied it was a normal course of events and that many beach

goers use portable camping facilities. He has one which is called a "Luggable Loo." On occasion, some beach-goers may drive the two miles to the public beach facilities. Unofficially, he has counted 78 to 80 vehicles there on a sunny Sunday. CFAR's concern is not only for this beach but others. He has never become ill or heard of anyone becoming ill from swimming in water; he claims it's "the opposite . . . it's usually very refreshing and relaxing" there.

On cross-examination he stated that when he goes to the beach he "air downs" his truck's tires and that this takes three to five minutes and is a common practice. He acknowledged that tire tracks on the beach grass and dunes would be an irresponsible use of the beach. He stated that he had never seen anyone driving on the beach grass. As to the term "beach wrack" he stated it's an indication of a waterline. While he never drives on it, he and others park on it. He never drives below the mean high water mark as it would cause the vehicle to get stuck and wind up in the water. He acknowledged that there are sections of the beach which are not 50 feet between the mean high water mark and the beach grass line.

Thereafter, the testimony was suspended while the parties stipulated[7] as follows: "it is stipulated by the Trustees of the Freeholders and Commonalty of the Town of East Hampton and Jay H. Baker, as Trustee, and Pat Good Baker, as Trustee of the Jay H. Baker and Pat Good Baker Joint Trust dated February 17, 2015, that the trust owns fee title to that parcel of land known as 31 Maine Boulevard, Amagansett, Town of East Hampton. That fee title derives from an unbroken chain of title beginning with a deed from the Trustees of the Freeholders and Commonalty of the Town of East Hampton to Arthur W. Benson dated March 15, 1882, and the southerly boundary of the property owned in fee by the Trust is the mean high-water-mark or shoreline of the Atlantic Ocean."

In rebuttal and on behalf of the additional defendant Marcus, Catherine C. Egan was called and indicated that her residence, 24 Marine Boulevard, is one hundred feet from the *cul-de-sac* located by the beach access cut. She has owned the property since 1983 and resided there since 1984. Prior to 2012 she resided in New York City and was at the property on weekends and vacations; since then, she is there during the summer. During the weekend of July 4, 2014 she was in her residence. On July 6th, at approximately 2:00 p.m., she walked to the beach by way of the boardwalk. She walked east, to the western border of the state park; when she returned she had counted approximately 250 vehicles on the beach. She deduced, therefore, that there were 500 entrances to and exits from the beach that day. Her cross-examination consisted entirely of her admitting she is the wife of the prior witness, Silverman.

Thereafter, the above stipulation was amended to include that June Merton owns fee title to that parcel of land known as 41 Whalers Lane, Amagansett and that title similarly results from the Benson grant[8].

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[7] Subject to the decision of the Appellate Division, Second Department.

[8] This was also subject to the decision of Appellate Division, Second Department.

Next, and due to his non-appearance, an application to dismiss the plaintiff Marc Helie's matter was granted.

Voorhis was called on behalf of the additional defendant Baker. On consent, he was deemed an expert, specifically as an environmental geologist. He indicated his familiarity with the subject beach and the area adjacent to White Sands Motel, having visited both locations before the trial. He had also previously reviewed the 25 minute video and photographs of the beach. He opined that there were various violations on the beach such as vehicles traveling parallel to the ocean, vehicles parked in depth, passing each other, an unleashed dog, and a large amount of recreational activity. He did not observe any sanitary facilities. Based upon his 38 years of experience and college training he opined that the compressed soil from the vehicular traffic destabilizes the beach and results in a net migration of the sand and changes the profile of the beach. This may also cause damage to the dunes and the grass, and can impact on the ability of dunes to form. Additionally, it may damage wildlife as some species depend upon the stability of a dune environment. When he was on the beach he observed ruts in range of 10 to12 inches and saw deeper ruts in photographs. At great length, he indicated the impact of vehicular traffic upon the beach, dunes, beach grass. He also explained the dunes provide protection from storm surges and thereby protects the nearby homes. He subsequently indicated that high tide is "a six hour tidal cycle, so four times a day you will get a high tide." As regards driving on a beach and whether it is beneficial to the dune, he stated that it was only if "you are dumping sand or something to reinforce the dune, but there is really no scenario for recreational activity that is beneficial to the beach." He also indicated that beach access points also causes damage to the dunes and commented on the resulting extensive seawater in the dune area. Additionally, he addressed the negative impact of vehicular traffic on beach grass and birds, specifically the Piping Plover. He described "beach wrack" as floating and non-floating debris which is washed up from the ocean and accumulates on the beach. He claimed that this is environmentally important in that it provides moisture and is an area for insects as well as a foraging area for shorebirds, and that driving on it would change its character and benefits. He reviewed the LWRP and thereafter opined that the area by the access cut will continue to flood during storm seasons unless measures are taken. He acknowledged that some steps have been taken to lessen the damage but disagreed with the dunes' orientation. He concluded by stating that while he didn't know the age of the access cut, it is irrelevant to its affect on the beach and doesn't matter for current conditions - when a cut exists the impact is felt anytime there is a storm.

On cross-examination, he was questioned regarding his testimony that there are four (4) high tides. He said he was "trying to go though the math . . . and believed he was correct" and claimed he was a sailor. When he visited the beach he did not personally observe any damage to protected species' nests or eggs, nor did he see any "riding on a dune" evidence. As to the access gap or to cut on Marine Boulevard, he wasn't aware that it was an existing natural gap. As to the wrack line interference, he stated that it could potentially exist to varying degrees at all of the Town's public beaches. He added that he had viewed the beach on the first day of the trial (June 6, 2016), early in the afternoon and had taken photographs but they were in his

camera. On that date he didn't see any vehicles driving on beach grass, parked on beach grass, parked on dunes, or driving more than 15 miles per hour, or recklessly. He did acknowledge that the Town's legislative provision for a 50 feet protective zone around dunes and vegetation was more generous than his recommendation of 20 feet. On the afternoon of his visit he saw evidence of tire tracks within 50 feet of a dune and/or beach grass.

On his re-direct examination he indicated the prior photos demonstrated that the tide might preclude people from driving more than 50 feet from a dune and that driving on a wrack causes more damage than walking.

LAW

Initially, having the unique benefit of being somewhat "side-by-side" with the witnesses and the opportunity to thereby cooly and objectively observe them - including "the very whites of their eyes" on direct as well as cross-examination, the so-called "greatest engine for ascertaining the truth" *Wigmore on Evidence*, §1367 - the Court is satisfied that the exercise has been fruitful and more than sufficient to determine the credible information as well as to simultaneously filter that which is less than reliable. Secondarily, it should go without saying that in evaluating any witness' contributions to the resolution of the controversies in this matter—as well as all such determinations—it is hornbook law that the quality of the witnesses, not the quantity, is determinative. *See e.g. Fisch on New York Evidence,* 2d ed., §1090. As to the quality of any given witness, the flavor of the testimony, its quirks, a witness' bearing, mannerisms, tone and overall deportment cannot be fully captured by the cold record. The fact-finder, of course, enjoys a unique perspective for all of this as well as the ability to absorb any such subtleties and nuances. Indeed, appellate courts' respect and recognition of that perspective as well as its advantages is historic and well-settled in the law. *See e.g. N. Westchester Prof. Park Assn. v Town of Bedford,* 60 NY2d 492 (1983); *Latora v Ferreira,* 102 AD 3d 838 (2d Dept 2013); *Zero Real Estate Servs., Inc. v Parr Gen. Contr. Co., Inc.,* 102 AD3d 770 (2d Dept 2013); *Hom v Hom,* 101 AD3d 816 (2d Dept 2012); *Marinoff v Natty Realty Corp.*, 34 AD3d 765 (2d Dept 2006). Everyday and common sense, experiences, expectations as well as logic are, of course, all parts of the process; as Hemingway observed, "The truth has a certain ring to it."

Equally worthy of examination is any witness' interest in the litigation. *See e.g.* 1 NY PJI3d, vol.1A, §1.22, p. 186. The length of time taken by either side's case or that of any witness' testimony is, however, clearly non-conclusive. What can, however, be devastating to a witness' presentation is the fact-finder's determination that a witness testified falsely about a material fact; under such circumstances and pursuant to the maxim *falsus in uno, falsus in omnibus,* the law has long permitted—but not required—the finder of fact to disregard those portions or even *all* of the testimony. *Id.* §1.22, p.46.

Additionally, it should be underscored and acknowledged that while gauging any witness' credibility as well as reviewing the proof submitted, the undersigned's continuous trial

as well as post-trial tasks also included, of course, segregating the competent evidence from that which was not, an undertaking for which the law presupposes a court's unassisted ability. *See, e.g., People v Bass,* 110 AD3d 1356 (4th Dept 2014); *Matter of Onuoha v Onuoha*, 28 AD3d 563 (2d Dept 2006); *People v Brown*, 24 NY2d 168 (1969).

Those tasks and duties aside, there is also the purpose and goal of the proceeding, *viz.*, to try or test the case. It is hornbook law that the template or yardstick for measuring civil causes of actions such as the matter at bar is the same whether the trial is by bench or jury: The burden of proof rests with the plaintiff who must establish the truth and validity of each claim by a fair preponderance of the credible evidence. Stated otherwise, in order for a typical civil matter's plaintiff to prevail on any individual claim, the evidence that supports that claim must appeal to the fact-finder as more nearly representing what took place than the evidence opposed to it. If the evidence does not so satisfy the fact-finder, or if that evidence weighs so evenly that the fact-finder is unable to indicate that there is a preponderance on either side, then the question is decided in favor of the defendant. Only when the evidence favoring a plaintiff's claim outweighs the evidence opposed to it may that plaintiff prevail. *See e.g.* 1 NY PJI3d, vol.1A , §1:23. Parenthetically, the same standards and rules would apply, obviously, to a defendant *vis-a-vis* any counter-claims. *Pagnotta v Diamond*, 51 AD3d 1099 (3d Dept 2008); 1 NY PJI3d, vol.1A , §1:23; *see also,* pgs. 71-72.

As to the testimonial evidence, in most instances and since the common law it has been held that a party who voluntarily selected a witness typically a) vouches for that witness and b) may not heard to attack that witness' credibility. *Carlisle v Norris*, 215 NY 400 (1915). "For this would enable him to destroy the witness if he spoke against him, and make him a good witness if he spoke for him, with the means in his hand to destroying his credit if he spoke against him." *Id.* at 400-01. *See, also*, *People v Sexton*, 185 NY 495 (1907). An extension of that principle is the expression that after having called a witness, that party is typically "bound" by the witness' testimony. *See, generally*, Jerome Prince, *Richardson on Evidence,* § 508.

Also, the typically witness' testimony is confined to matters which he or she has personal knowledge - i.e., matters which were "witnessed." With respect to someone who is deemed an "expert witness," however, such a person is permitted to offer an "opinion" as to certain events when the event involves knowledge which is both a) possessed by the expert and 2) beyond the ken of a typical juror. *See, e.g., De Long v Erie 60 NY2d 296* (1983). While the admission of such opinion evidence is initially left to the sound discretion of the court, that determination is purely one of law. *Dufel v Green*, 84 NY2d 795 1995). With respect to the determination of the facts of the matter, however, the expert's opinion and credibility are subject to the same scrutiny and tests as any lay witnesses. *See, e.g., Preston v Young,* 239 AD2d 729 (3d Dept 1997). Indeed, "[d]eterminations regarding the credibility of expert witnesses are entitled to great weight on appeal, as the jury had the opportunity to observe and hear the experts." *Curry v Hudson Val. Hosp. Ctr.*, 104 AD3d 898 at 901 (2d Dept 2013)(citations omitted); *see, also, People v. Young*, 7 NY3d 40 (2006).

There are other matters which may be proven without a witness. In practice, this involves little evidence or "proof" but merely the recognition of certain events which are irrefutable and notorious within the jurisdiction. In such instances, the Court may take "judicial notice" of the existence of the event and deem it established as fact. Jerome Prince, *Richardson on Evidence,* § 8. Indeed, this practice was long ago firmly ingrained in the law and has been applied to such everyday events as the time of rising of the sun and the moon. *Montenes v Met. St. Ry. Co.*, 77 AD 493 (2d Dept 1902).

As to the law more specific to the plaintiffs' complaints and beginning with RPAPL Article 15, its purpose is to "place the court in a position where through its equity jurisdiction it can determine adverse claims to property and enter an order so as to provide a conclusive title to one of the parties involved." *Hibiscus Harbor, Inc. v Ebersold,* 53 Misc 2d 868, 871 (Cty Ct Seneca 1967) (citations omitted). It has been held that Article 15 determinations are in the nature of declaratory judgments. *Ibid.* (Parenthetically, whether it should be called an action "for a declaratory judgment" or "to quite title" has often been a matter of semantics. *See generally, Great Lakes Dredge & Dock Co. v Huffman*, 319 US 293 [1943]). In any case, the burden of proof rests with the plaintiff. *Best Renting Co v NYC,* 248 NY 491 (1928); *Shore Holders Assn. of Chase's Lake, Inc. v People*, 64 AD3d 1175 (4th Dept 2009). In essence, the plaintiff has the affirmative duty of going forward to demonstrate that title is vested in it. *The Seaview at Amagansett, Ltd. v Trustees, et al, supra; White Sands Motel Holding Corp. v Trustees, et al, supra; L.I. Land Research v Town of Hempstead*, 283 AD 663 (2d Dept 1954). Merely pointing to any weaknesses in the defendant's counter claim will not suffice. *Ibid.; Town of N. Hempstead v Bonner*, 77 AD 2d 567 (2d Dept 1980). Stated otherwise, "[p]laintiff has an affirmative duty to show that title lies in it, *which is not satisfied merely by pointing to weaknesses in defendants' title.*" *Ibid.*, 77 AD2d 567 at 558 (emphasis supplied). A plaintiff's presentation may be undermined where there are inconsistencies in the underlying documents such as maps and lot line surveys. *Shore Holders Assn. of Chase's Lake, Inc., v New York, supra.* Moreover, although under rare circumstances, even entries on a deed may not be conclusive. *Benham v. Hein,* 50 AD2d 808 (2d Dept 1975). Conversely, notations on other documents - while not be completely persuasive - may have some bearing on the outcome. *Winoker v Haring* 17 AD 3d 454 (2d Dept 2005).

Regarding the plaintiffs' claim of "nuisance," such actions fall into two categories: private and public. The essence of the former is "'interference with [an individual's] use or enjoyment of land'" while the latter is typically a crime as it is against the rights of the public. *Blessinton v McCrory Stores Corp.*, 198 Misc 291 at 299 (Sup Ct Queens Cty 1950)(citation omitted). A so-called "private" nuisance occurs when one invades the interest in the use and private enjoyment of land and the invasion is unreasonable and intentional, or negligent or reckless. *See, generally, Spano v. Perini Corp* 25 NY2d 11 (1987). Stated otherwise and *prima facie*, private nuisance requires a satisfactory demonstration of a tangible and appreciable injury to the plaintiff's property so as to render its enjoyment uncomfortable and inconvenient. *Gellman v Seawana Golf & County Club*, 24 AD3d 415 (2d Dept 2005). An important caveat to that cause of action is that the interference must be substantial. *Copart Indus. v Consol.*

Edison Co. of N.Y., 41 NY2d 564 (1977).

An action in trespass for wrongfully physically, or by an object, invading the property may often accompany the claim. *Gellman v Seawana Golf & County Club, supra.* In such cases remedial efforts - or the lack thereof - may be considered by the court. *Ibid.*

Equal protection claims are essentially premised on selected, disparate treatment which is wholly without a legitimate and justifiable motivation. *See generally, Westover Car Rental, L.L.C.. v Niagra Frontier Transp. Auth.,* 133 AD3d 1321 (4th Dept 2015).

A so-called "1983 action" (12 U.S.C. § 1983) requires that the defendant, while acting "under the color of state law," denied the constitutional rights of the plaintiff. *O'Mara v Town of Wappinger*, 485 F.3d 693 (2d Circuit 2007)[9].

In an action which seeks to establish a breach of fiduciary duty, the plaintiff must "prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct." *Guarino v N. Country Mtge. Banking Corp,* 79 AD3d 805 at 807 (citation omitted); *Palmetto Partners, L.P. v AJW Qualified Partners, LLC, supra; see also Donovan v Ficus Inv., Inc.,* 20 Misc3d 1139(A) (Sup Ct NY Cty 2008). In essence, a fiduciary relationship requires high level of trust or confidence in one which results in superiority and influence, but not where the parties are on equal footing. *See e.g,. Royal Warwick, S.A. v Hotel Representative, Inc.*, 25 Misc3d 878 (Sup Ct Queens 2009). The *sine qua non,* basic, and fundamental element of a fiduciary relationship is "that a fiduciary owes undivided loyalty to those whose interest the fiduciary is to protect." *Birnbaum v Birnbaum,* 73 NY2d 461 at 466 (1989). Any transaction which has been conducted in violation of the fiduciary duty may be set aside and the parties returned to their prior status (*Rose Ocko Foundation v Lebovits*, 259 AD2d 685 [2d Dept 1999]) and that remedy has been long recognized. *Norwegian-Amer. Securities Corp. v Schenstrom,* 124 Misc 235 (Sup Ct NY Cty 1924).

Finally, it is hornbook law that a request for injunctive relief - a drastic and essentially equitable remedy - involves a series of considerations. Chief among them, and perhaps the most frequent, is that the application will be denied where there remains available an alternative, legal remedy which is plain, adequate, appropriate, and complete, and, from a practical point of view, would be just as effective as an injunction. Siegal, *New York Practice*, § 398.

ANALYSIS, FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Focusing first on the witnesses' and their credibility, after scrutinizing each of the

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[9] As explained below, the history of the *O'Mara v Town of Wappinger* case and its dispute involved both state and federal courts.

witnesses' performance, comparing each account to logic, common sense and experience, juxtaposing each participant's testimony to the others as well as the other evidence, analyzing each for internal consistencies, the Court is prepared to note certain observations as to the credibility of each as well as some of their significant remarks[10].

Young was credible. His presentation established certain topographical facts but nothing else which might which appreciably contribute to the resolution of the matter's central or main issues.

Finkelstein was similarly credible and the video account he introduced basically speaks for itself. Although it was clearly edited, it does portray events which are obviously the genesis of the plaintiffs' complaints. It should be noted, however, that the presentation of 25 minutes of such events from seven (7) hours and 20 minutes (or 440 minutes) of recording does raise the question of how prevalent and prolific such events are. Also not to be overlooked is the obvious fact that the day chosen would be expected to be an exceptionally and extraordinarily busy beach day. Therefore, another question remains as to what is typical. (This should not be interpreted, however, as unappreciative of the offensiveness and repulsive of such acts which are at best uncivil, discourteous or rude, and in other cases, what appear to be violations of law.)

Crain was not totally unbelievable but she did not present herself as being totally candid either. For example, she indicated that she had she visited her house several times before the purchase in 2006 but never saw any vehicles. That was somewhat contradicted by other remarks she made and also not harmonious with the flavor and essence of other witnesses' testimony regarding the same period. In a word, she also appeared evasive.

Silverman was also credible. He indicated that he has observed vehicular traffic at the beach since the 1980's, it became intense by 1990, but by 2014 it was not as active as in prior years. At times, however, he appeared dogmatic.

Powitz was deemed a public health sanitarium expert. On cross-examination, however, it was demonstrated that his experience *vis-a-vis* beaches is considerably limited. Also, while he expressed concern with the potential pollution of the beach's water he never ascertained if any water tests had been performed nor did he test the water. Additionally, he was not armed with any information about any related illnesses or injuries. Stated otherwise, the only thing supportive of his concerns is his conjecture as there is an absence of any type of corroboration. Moreover, were his opinion taken to the extreme, it would appear that *all* beaches are similarly jeopardized and perhaps should be closed. Lastly, he was unaware that many of the potential conditions he complained of or observed are specifically prohibited by the Town Code.

Griffith, the aquatic safety consultant/aquatic risk manager expert indicated he has worldwide and expansive experience in both hemispheres and all continents. That contention,

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[10]The depositions, of course, are taken on "face" value.

however, is not easily reconcilable with his remark that he had never before seen such activity as that of the subject beach.

Michels presented himself as totally candid, honest, and - notwithstanding his affiliation with Town government - objective. Perhaps his most telling remark was his statement that his officers provide multiple patrols and if they observed a violation a summons issued.

Overton was also credible. He established the same type of beach activities have occurred since 1974 and due to enforcement, the number of permits has increased.

Both Desiderio and Cristofaro were equally credible and established that the typical beach activity has increased in the last 30 to 40 years and that there is no removal of trash. Paralleling their testimony in substance and presentation was Skolnick; typical of his candor however, and perhaps most telling, was his remark that the activity hasn't affected him "that much."

Kiembock's passion for redress of the wrongs purportedly suffered by his motel were undercut by his admission that there are never any vacancies.

Pomerantz, the "land title expert" was unimpressive. Any deference to his expertise was diminished by his unfamiliarity (and disagreement) with the state Court of Appeals decision in the *O'Mara v Wappinger* appeal. Clearly that decision was weighty; indeed, the federal treatment of that litigation stressed the importance of that case's issues as well as its "significant practical consequences" for New York municipalities.[11] His refusal to note any significance or applicability of certain markings on documents (i.e., the "1890 feet" notations, plus the intermingling of "high water marks," " mean high water marks," "dune crest" and "grass line") lacked consistency. Throughout, he appeared dogmatically devoted to his clients' case.

Szabo was a credible witness. Her contribution consisted of indicating that she had witnessed some activity which was similar to that complained of by the plaintiffs.

The testimony of Darrell, Brown, William Taylor, Courtney, Beyer, and Timothy Taylor was consistent, harmonious and equally credible and established that in their long lifetimes the beach has continually been a family and community recreational respite. They all denied there had been any misbehavior on the beach or beach-related injuries and/or illnesses. William Taylor also credibly undercut the weight of the LWPR, offering that the report did not fully embrace all of the opinions and concerns of all of the participants, that the end result was their "consensus," and it had not been completely accepted by all the participants. Indeed, he directly contested some of the report, *viz,* its apparently unsubstantiated claim that there was damage to the beach due to off-the-road vehicles. He was also adamant in his position that the Town's claim of ownership from the grass to the ocean comported with surveyors' long established practices and that the lack of Code citations mirrored the increase in enforcement.

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[11] *O'Mara v Town of Wappinger*, 485 F3d 693 at 699 (2d Cir. 2007)..

Egan - called in rebuttal - was also credible.

Lastly remains the testimony of Voorhis, the environmental geologist expert. His contributions are of questionable value and weight. For example, his hypothesis that vehicular traffic destabilizes the beach is by no means revolutionary and somewhat common sense. What was, however, somewhat extreme was his observation that there is no beach activity which is simultaneously recreational and beneficial to the beach (taken to its extreme, apparently all beaches should be closed). Lastly, what was most devastating to both the weight and credibility of his presentation was his adamant contention that there are four (4) high tides daily - while claiming to be college trained, the beneficiary of 38 years of experience in his field, and a "sailor."

As a result and that being noted, the Court is prepared to indicate those matters which have been sufficiently established. This begins, of course, with the uncontested 1882 *Benson* grant which clearly reserved some rights "to the inhabitants of East Hampton," and, arguably, the allowances for some public use. It is also clear and undeniable that in living memory - and even perhaps well before - the community has consistently used the beach as a recreational location which is open to the public. Predominantly, such activity occurs during the late spring to early fall seasons and the typical use had been and continues to be what might be expected: swimming, fishing, cooking, picnicking, and playing ball. Additionally, motor vehicles - especially if not exclusively four-wheelers - have for some time traversed the beach and/or parked there. With the increasing popularity of four-wheel-drive vehicles such use has also grown. In response to this as well as the concerns of some of the community, the Town amended its code to contain certain regulations and prohibitions regarding the beach's use. Its enforcement of those regulations has been vigorous and as a result there apparently have been few violations. The Town's attention to the area has not, however, included regularly scheduled trash removal.

Perhaps more importantly, however, is what has not been proven. As more fully explored below, the undersigned is not at all persuaded that the plaintiffs have established their ownership of the beach. Taken one step further, the absence of ownership severely undermines the support for the balance of their "nuisance" claims. Even if, *arguendo*, that were not the case and ownership had been demonstrated to the law and the Court's satisfaction, however, the Court is also unpersuaded that those claims have been sufficiently proven and would otherwise survive objective scrutiny[12]. For example and to begin with, there has been no proof or any reports of any beach-related injuries or illnesses. There is also no proof that there has been any noteworthy amount of reports of violations of law on the beach. Additionally, there has been no demonstration that the ocean waters have been in any way polluted or compromised (or even tested). Somewhat relatedly and as to any damages or inconvenience caused by the beach activities, there has not been sufficient, consistent proof that any such damage is in any way appreciable. In fact, two of the plaintiffs' own witnesses undermine such a conclusion, *viz,*

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[12]This also applies to the "other" defendants.

Skolnick, the President of the Seaview at Amagansett Homeowners Association, who testified that the activity at the beach hasn't affected him "that much," and Kiembock, the owner of the plaintiff White Sands Motel, who indicated that there are never any vacancies at the motel. Additionally, there is no denying that the "injured" parties were somewhat slow in pursuing any remedies. As to any damage to the beach itself, while even the defense acknowledges that there may have been "a dixie cup" left in the sand, such acts or omission neither shock the Court nor, it might be surmised, a reasonable person's expectations. Besides, as Voorhis testified, purportedly there is essentially no beach activity which is harmless. As to the allegation of violations of the plaintiffs' constitutional rights or the protection of 12 U.S.C. § 1983, the undersigned is disinclined to hold that their rights were violated and/or that any of the acts or omissions of the Town were motivated by anything other than a legitimate and justifiable rationale. Moreover, and perhaps another missing link in the plaintiffs' claims is the unfulfilled promise contained in the plaintiffs' opening statement, *viz*, that the proof would show the defendants had been "encouraging people to use" the beach; there is no such proof. Somewhat similarly defective is the claimed breach of fiduciary claim.

Returning to the claims of ownership, the undersigned is by no means suitably convinced that the plaintiffs' evidence rises to the required level. Indeed, the contrary conclusion has been reached: The undersigned is firmly convinced that the entire and sum total of any and all of the credible evidence which might lend some support to the plaintiffs' contentions not only falls substantially short of a preponderance of all of the evidence but is far less than even equal to that which opposes it. Stated otherwise, there are more reasons to deny the claims than those which might support them. As noted above, the key to the plaintiffs claims was proof of ownership. Also if the plaintiffs' multiple causes of action were divided into two classes, i.e., ownership or nuisance claims, the former would appear more important; indeed, the plaintiffs' opening specifically so indicated. An objective view of the record, however, reveals that much of the focus of the entire presentation was devoted to the conditions of the beach rather than the ownership issues. Moreover, even some of the witnesses offered by the plaintiffs' during their case seemed to be less than supportive of the plaintiffs' contentions of ownership as well as contrary to some other contentions while being more supportive of some of the positions of the defense[13]. Additionally, the undersigned is underwhelmed by the "expert" witnesses as both the weight and believability of their respective presentations have been diminished. For example and first of all, three of the four experts' testimony was predominantly focused on the beach conditions. Of those three, one despite his "worldwide" experience, however, allegedly hasn't

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[13]For example, they demonstrated the historic recreational use of the beach and the Town's increased and aggressive enforcement of the Code. The former demonstration could, of course, be deemed as consistent with the defendants' contentions of the viability and applicability of the *Benson* deed while the latter underscores the Town's commitment to preventing both misbehavior and violations of the Town Code by those who use the beach.

seen anything like Napeague[14], one was somewhat consumed by danger to the water but never tested it, and one - a sailor - swore that were being four (4) high tides a day[15]. The focus of all of them (as well as the parties' entire demonstration taken as a whole) could not be called consistent with the plaintiffs' burden of sufficiently proving the merits of their claim of ownership. The other or fourth "expert" witness - the purported "land title expert" who was not familiar with a case which even the federal bench found significant - chose to cavalierly overlook or deny any documents which were contrary to his clients' position; moreover, it appears that at one time his expert opinion was contrary to that which he urged during the trial. That testimony was confusing, confounding, contradictory and dogmatic and was too slender a reed to strengthen the persuasiveness of the plaintiffs' arguments much less to sustain their burden of proof. In simplest terms, the nuisance claims were over emphasized while the predicate to them - the ownership issue - suffered.

Moreover, even if the ownership aspect of the case was segregated from any of the other claims, the Court is not convinced that the preponderance of the credible evidence supports the claim's survival. For example, there is nothing which suitably persuades the Court to deem that the *Benson* deed's grant has been extinguished. Indeed, there are a number of subsequent transactions which are either consistent with its viability or at worst somewhat neutral. Those events were memorialized by duly filed documents as well as the numerous written notations contained therein. As a matter of law, those documents are preliminarily clothe with a finding of *prima facie* validity; the opposing proof, however, has failed to sufficiently overcome that protection. Taken as a whole, the case *viz-a-viz* the ownership issue is confusing, inconsistent and/or unreliable. Indeed, the only apparent consistency in the presentation was the attempt to support claims of superior title by alleging weaknesses in the defendants' title; the law rejects such a strategy.[16] In all candor, the plaintiffs' complaints as well as the resulting presentation was remineistent of a tactic that has been called "throwing spaghetti against the wall to see what sticks" by other courts[17].

It is, therefore, the considered determination of the undersigned that the plaintiffs have not proven the merits of any of their claims by a prepondarance of the credible evidence. In simplest terms, that proof is less than adequate. Having failed by a preponderance of the evidence to demonstrate the merits of their complaints and any of their causes of action, the

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[14]Such a contention by so experienced a person is difficult to embrace; although not contained within the record, there is ample evidence that such activities routinely dot the coastline.

[15]It only occurs *twice* a day; a commonly known fact which might invite judicial notice.

[16]That same tactic appears to color their post-trial memorandum.

[17] *Watermark Solid Surface, Inc., v Sta-care, Inc.* ___ F.Supp. ___, 2009 WL 723199 (WD Wisc. 2009); *People v Boldi*, ___Cal. Rptr. ___, (Cal. App., 1st District 1-31-13).

complaints are dismissed in their entirety and the Court finds for the defendants as to the plaintiffs. As to the "other" defendants, the Court finds for them so far as contained within the stipulation; all other claims are dismissed.

Lastly, and as noted in the record, this was the undersigned's last trial. As I end my judicial career and nearly five decades of public service, I am compelled to make two remarks regarding this litigation. First and foremost, the above opinion is the result of many weeks and countless hours of research and reflection, followed by more weeks of research and further reflection. To do any less would be a disservice to and a violation of my oath of office as well as a neglect of the duties I owe to the litigants, the attorneys, and my colleagues. That is the predicate for the second of my remarks: As also noted within the record, it is anticipated that this litigation will continue in this and other courts. Thus far, however, these cases have already assumed a life of their own and have the potential to outlive some of the participants. Sadly, even after this opinion is issued, after the years of litigation, all of the efforts of a collection of very fine, respected, and capable trial attorneys, as well as all of my efforts and those of all of the judges assigned to this case before me, nothing has resolved these controversies. It was and remains my earnest hope, however, that the parties will resolve their differences, avoid further litigation, and move forward. Life is too short.

The foregoing constitutes the decision and order of the Court. Submit judgment on notice.

Dated: 11/4/14

Hon. Ralph T. Gazzillo
A.J.S.C.

Non-Final Disposition

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