



To: Kristen Grant, Maine Sea Grant College Program, and Paul Dest, Wells National Estuarine Research Reserve

From: Terra Bowling, Research Counsel II, National Sea Grant Law Center; Stephanie Otts, Director, National Sea Grant Law Center

Re: Incipient Dedication in Cape Elizabeth, Maine (NSGLC-20-04-08)

Date: September 1, 2020

Advisory Summary

The Maine Supreme Judicial Court ruled that the Town of Cape Elizabeth retained its right to accept “incipient dedication” of a public way outlined in a subdivision plan along the Atlantic Ocean. Several property owners filed suit claiming that the town’s right to accept the public way had lapsed under common law. The high court affirmed the trial court’s ruling that the property owners had insufficient evidence to show that the town had lost its right to develop or use the land. The town has the right to accept the dedication through 2036.

Background

In 1911, developers filed a subdivision plan that proposed a portion of Surf Side Avenue adjacent to the Atlantic Ocean as a right of way. In Maine, when a developer of a subdivision records a deed with a proposed, unaccepted way, this is an “incipient dedication” of the land for public use.¹ “Dedication is the conveyance to the public through a gift or for a nominal sum, resulting in an appropriation by a public entity for public use.”² For a dedication to be effective, there must be an offer and acceptance. So, until the public accepts the offer the dedication is deemed “incipient.” Cape Elizabeth has not accepted the dedication – meaning they have not expressed intent to develop the area or use the land, referred to as a “paper road” by the court, as a highway.

Pursuant to Section 3032 of Title 23 of Maine Statutes, such “proposed, unaccepted ways” were deemed vacated no later than 1997 unless the municipality recorded a

¹ *Ocean Point Colony Trust, Inc. v. Town of Boothbay*, 1999 ME 152, 739 A.2d 382 (1999).

² Knud E. Hermansen & Donald R. Richards, *Maine Roads and Easements*, 48 ME. L. REV. 197, 248 (1996).



notice in the registry of deeds accepting the way. Municipalities can extend the time period for 20 years, and then renew it for another 20 years. Cape Elizabeth filed such a notice on September 11, 1997 stating their intent to extend the period for “all proposed, unaccepted ways” except for seven identified on a map (of which Surf Side Avenue was not one). They published a second notice renewing it in 2016 thereby extending the time limit to 2036. Maine courts have found that “section 3032 applies only to those incipient dedications that have not lapsed pursuant to the common law.”³

Lower Court

In 2018, the property owners adjacent to the paper road filed suit claiming that the town’s right to accept the incipient dedication had lapsed at common law. The court outlined the common law standard for determining whether a dedication of a road or way for public use has lapsed.

*At common law an incipient dedication must be accepted within a reasonable time or the right to accept that dedication will be lost. Adverse possession of the incipiently dedicated way will cause the dedication to lapse, but mere non-use or use that is not inconsistent with the premise that the public may later open the path will not cause the incipient dedication to expire. The facts and circumstances of each case determine whether a reasonable time for acceptance has passed. We have consistently found that the public’s right to accept the incipient dedication lapses when another person possesses the property and exhibits ownership over the property in a manner that is inconsistent with the incipient dedication and would likely constitute adverse possession of the property.*⁴

The court noted that there is not a specific rule regarding “as to what uses are inconsistent with the public’s later acceptance of a way or how long the use must be extant for the public’s ability to accept the way to lapse.”⁵ Instead, it is a fact-specific determination by the court.

The owners claimed that they developed the property through landscaping, installing irrigation systems, walkways, decks, and landscaping. The court found that the property owners’ use of the land in these ways did not rise to the level of inconsistent use that would foreclose the town’s acceptance of the dedication. Further, incipient

³ *Khalidi v. Town of Cape Elizabeth*, No. BCD-RE-18-06, 2019 WL 1265027 (Me. B.C.D. Feb. 18, 2019), citing *Ocean Point Colony*, 739 A.2d 382.

⁴ *Id.*

⁵ *Id.*



dedication must be accepted within a reasonable time or the right to accept will be lost. The property owners had to show that the structures were there for a reasonable time prior to 1997 when the town filed its notice under Section 3032. The court found that many of the structures were there for an insufficient duration between 1911 and 1997 to establish adversity. The lower court granted summary judgment to the town, stating “the purported structures identified . . . as having been in Surf Side Avenue between 1911 and September 1997 . . . do not exhibit ownership over the property in a manner that is inconsistent with the incipient dedication, and would not likely constitute adverse possession of the property.”⁶

Supreme Judicial Court

On appeal, the Maine Supreme Judicial Court affirmed the lower court’s opinion. The court first ruled that the town’s notice filed under Section 3032 was legally sufficient to preserve incipient dedication of the paper road after the notice was filed in 1997. Next, the court looked at whether the town’s common law right to accept the incipient dedication lapsed prior to 1997. The court stated that the lower court correctly applied the common law standard. The court agreed that the plaintiffs’ evidence was insufficient to establish that Cape Elizabeth’s right to accept the dedication of the paper road had lapsed at common law. The court noted that even if the plaintiffs could show that they used the road for a legally sufficient length of time between 1911-1997, “[t]hese uses are not inherently inconsistent with the premise that the public may later open the street.”⁷ The court’s ruling preserves the town’s right to develop the paper road. The town has the right to accept the dedication through 2036.

⁶ *Khalidi v. Town of Cape Elizabeth*, No. BCD-RE-18-05, 2019 WL 7631215 (Me. B.C.D. July 22, 2019).

⁷ *Pilot Point, LLC v. Town of Cape Elizabeth*, 2020 ME 100 (July 21, 2020).