EXHIBIT
10

STATE OF MAINE
WALDO, ss.

SUPERIOR COURT
DKT. NO. RE-19-18

JEFFREY R. MABEE and JUDITH B. GRACE,

Plaintiffs,

v.

NORDIC AQUAFARMS, INC., et al.,

Defendants.

ORDER ON PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

In this matter regarding a dispute over a portion of the tidal flats[1] along Penobscot Bay in Belfast, Plaintiffs Jeffrey Mabee and Judith Grace filed two motions for summary judgment: one regarding an alleged restrictive covenant contained in a pertinent deed, and the second regarding the waterside boundary contained in that same deed.[2] Defendants Nordic Aquafarms, Inc. (NAF) and Janet and Richard Eckrote (the Eckrotes) opposed the motions.[3] The Court has considered the parties' arguments, the statements of material fact and supporting record, and the law governing the motions. It issues this decision.

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[1] The "'beach' and 'shore . . . are treated synonymously and refer to the 'land lying between the lines of the high water and low water over which the tide ebbs and flows.' The 'beach,' 'shore,' and 'intertidal zone' . . . all have their landward boundary at the high water line. However, unlike the 'intertidal zone,' the most seaward boundary of the beach is the mean low watermark; it does not include the alternative '100 rods' measurement element of the intertidal zone. . . . [This area] is also often referred to as the tidal flats or wet sand." *Almeder v. Town of Kennebunkport*, 2019 ME 151, ¶ 8 & n.7, 217 A.3d 1111 (citations omitted). The Court uses "tidal flats," "flats," and "shore" synonymously in this order.

[2] Plaintiffs filed amended versions of both motions. Therefore, Plaintiffs' motion regarding the alleged restrictive covenant is the amended first motion for summary judgment, and the motion regarding the waterside boundary is the amended second motion for summary judgment. Moreover, Plaintiffs filed a motion to amend the complaint while the motions were pending. The Court is addressing that motion in a separate order issued contemporaneously with this order. Because the second amended complaint does not change the substance of the claims that remain against NAF or the Eckrotes, the Court treats the motions for summary judgment as applicable to Plaintiffs' second amended complaint.

[3] The arguments in the Eckrotes' oppositions mirror NAF's arguments, except in a few specific instances. The Court will refer to the party making the argument generally as Defendants or as NAF, even though the Eckrotes also made the same argument, unless it was an argument advanced solely by the Eckrotes.

THE ISSUE OF A HEARING ON THE MOTIONS

This Court had previously scheduled a hearing in April on the summary judgment motions and other pending motions. The COVID-19 pandemic and the Supreme Judicial Court's resulting Pandemic Management Orders required the cancellation of the hearing. Then, in a letter dated May 18, NAF's attorney David Kallin requested that the Court proceed to schedule a telephonic or virtual hearing on the motions. The Court was already hesitant to hear these motions argued virtually due to both concerns with using a medium prone to technological issues and public interest in a case that has great implications for the greater Belfast area. Then, after the Court received Attorney Kallin's letter, the Supreme Judicial Court issued its May 27 COVID-19 Phased Management Plan (PMP). The PMP indicates that the earliest the Court could hold an in-person hearing in this case is during Phase 3, starting on July 6, assuming all required conditions are met to advance to that phase. That would drag out resolution of the summary judgment motions at least one more month. Moreover, Phase 3 permits only 10 persons, inclusive of court personnel, to be present in a courtroom at one time. This limitation would make achieving the open and public purpose of an in-person hearing nearly impossible. Because of these complicating factors, the Court elected to forego a hearing on the summary judgment motions and instead has ruled based on the submissions.

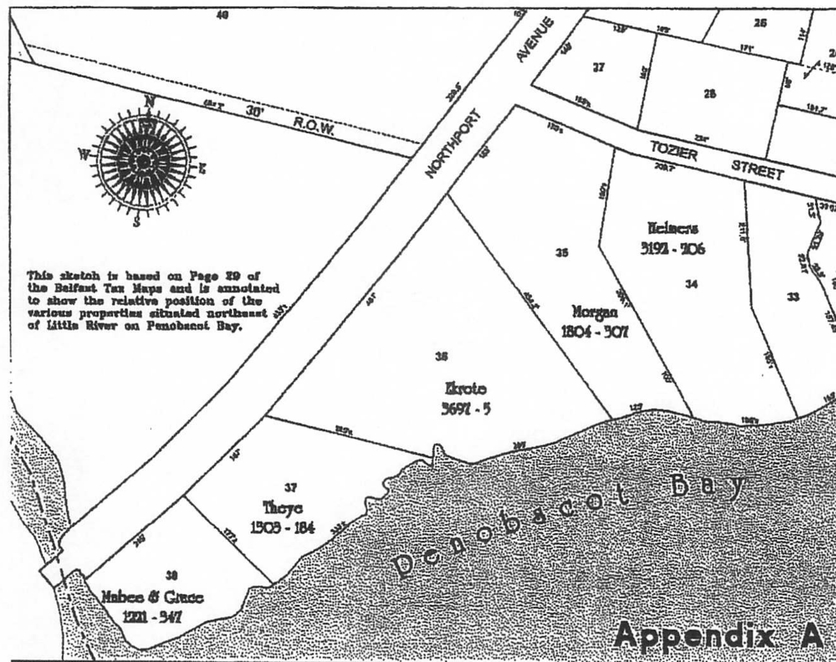
LEGAL STANDARD

Summary judgment is granted to a moving party where "there is no genuine issue as to any material fact" and the moving party "is entitled to judgment as a matter of law." M.R. Civ. P. 56(c). "A material fact is one that can affect the outcome of the case, and there is a genuine issue when there is sufficient evidence for a fact-finder to choose between competing versions of the fact." *Lougee Conservancy v. CitiMortgage, Inc.*, 2012 ME 103, ¶ 11, 48 A.3d 774. When reviewing the record on a motion for summary judgment, a court views the facts in the light most favorable to the non-moving party. *See Cormier v. Genesis Healthcare LLC*, 2015 ME 161, ¶ 7, 129 A.3d 944. "Any doubt on this

score will be resolved against the movant, and the opposing party will be given the benefit of any inferences which might reasonably be drawn from the evidence." 3 Harvey & Merritt, *Maine Civil Practice* § 56:6 at 242 (3d, 2018- 2019 ed. 2018).

SUMMARY JUDGMENT RECORD[4]

Though not in the summary judgment record, the Court provides the following sketch for the benefit of the reader in order to have a visual of the area at issue in this case:



1. <u>Record pertaining to Plaintiffs' amended first motion for summary judgment regarding the alleged restrictive covenant.</u>

The Eckrotes are the owners of Lot 36, Belfast Tax Map 29, having acquired that lot from The Estate of Phyllis J. Poor (a successor in interest to Fred R. Poor). (Pl.s' S.M.F. re: Amnd. First Mot. Summ. J. ¶ 1.) As Defendants point out, the general contours of the lot at issue have changed over the years through various conveyances. (Def.s' Opp. to Pl.s' S.M.F. re: Amnd. First Mot. Summ.

[4] The parties engaged in a substantial amount of bickering throughout the statements of material fact. The Court is going for the substance of the statements of material fact, not the skirmishes between the parties.

J. ¶¶ 1-5.) A predecessor in interest to the Eckrotes, Fred R. Poor, received a deed from his grantor, Harriet L. Hartley, for the property which contained the following sentence: "The lot or parcel of land herein described is conveyed to Fred R. Poor with the understanding it is to be used for residential purposes only, that no business for profit is to be conducted there unless agreed to by Harriet L. Hartley, her heirs or assigns." (Pl.s' S.M.F. re: Amnd. First Mot. Summ. J. ¶ 2.) The Eckrotes eventually took title to a portion of what was originally conveyed to Fred Poor. (*See* Pl.s' S.M.F. re: Amnd. First Mot. Summ. J. ¶¶ 2-5; Def.s' Opp. to Pl.s' S.M.F. re: Amnd. First Mot. Summ. J. ¶¶ 1-5.) Plaintiffs now have title to what was the last parcel owned by Harriet Hartley. (Pl.s' S.M.F. re: Amnd. First Mot. Summ. J. ¶ 7; Def.s' Opp. to Pl.s' S.M.F. re: Amnd. First Mot. Summ. J. ¶ 7.)

In addition to the conveyances, Hartley prepared and signed a will on September 25, 1945, four months before her deed to Fred Poor. (Def.s' S.A.M.F. re: Amnd. First Mot. Summ. J. ¶ 12.) In her will, Hartley specified that her "nephew, Samuel Nelson Woods Jr." would receive "the lot upon which Frederick Poor has a cottage (for which lot the said Frederick Poor pays twenty five dollars annually for ground rent." (Def.s' S.A.M.F. re: Amnd. First Mot. Summ. J. ¶ 13.) In her will, Hartley did not mention a restriction of residential use on the Frederick Poor lot. (Def.s' S.A.M.F. re: Amnd. First Mot. Summ. J. ¶ 14.) Hartley's will states that her "nephew, Samuel Nelson Woods Jr. may sell any part or all of his acreage if he so desires," with no restriction of any kind save her "earnest wish that he have the consent and approbation of Ruth Hartley Weaver to do this." (Def.s' S.A.M.F. re: Amnd. First Mot. Summ. J. ¶ 15.)

The phrase in the Hartley-to-Poor deed is at issue because NAF seeks to install three industrial pipelines under the Eckrotes' property in furtherance of its land-based salmon fish farm it is seeking to build in Belfast. (Pl.s' S.M.F. re: Amnd. First Mot. Summ. J. ¶ 6; Def.s' Opp. to Pl.s' S.M.F. re: Amnd. First Mot. Summ. J. ¶ 6; Def.s' S.A.M.F. re: Amnd. First Mot. Summ. J. ¶ 11.) It obtained the ability to do this by executing an option agreement with the Eckrotes. (Pl.s' S.M.F. re: Amnd. First

Mot. Summ. J. ¶ 8; Def.s' Opp. to Pl.s' S.M.F. re: Amnd. First Mot. Summ. J. ¶ 8.)

2. Record pertaining to Plaintiffs' amended second motion for summary judgment regarding the waterside boundary of the Eckrotes' lot.

The January 25, 1946 Warranty deed from Harriet L. Hartley to Fred R. Poor includes the call that the lot or parcel conveyed is "to an iron bolt in the mouth of a brook; thence Easterly and Northeasterly along high water of Penobscot Bay for 410 feet more or less to a stake at the outlet of a gully . . . ." (Pl.s' S.M.F. re: Amnd. Second Mot. Summ. J. ¶ 1.) The 1971 Frederick R. Poor-to-William O. and Phyllis J. Poor deed includes the call "to a point in the mouth of a brook; thence easterly and northeasterly along high-water mark of Penobscot Bay four hundred ten (410) feet, more or less, to a point at the outlet of a gully . . . ." (Pl.s' S.M.F. re: Amnd. Second Mot. Summ. J. ¶ 2.) The 1991 William O. Poor-to-Phyllis J. Poor deed includes the call "to a point in the mouth of a brook; thence easterly and northeasterly along high-water mark of Penobscot Bay four hundred ten (410) feet, more or less, to a point at the outlet of a gully . . . ." (Pl.s' S.M.F. re: Amnd. Second Mot. Summ. J. ¶ 3; Ex. C.) The description in Schedule A of the October 15, 2012 deed from the Estate of Phyllis J. Poor to Defendants Richard and Janet Eckrote calls "to the high water mark of Penobscot Bay," but then has the next call follow "along said Bay . . . ." (Pl.s' S.M.F. re: Amnd. Second Mot. Summ. J. ¶ 3.)

DISCUSSION

1. Plaintiffs' amended first motion for summary judgment regarding the alleged restrictive covenant.

On the restrictive covenant motion, Plaintiffs contend they are entitled to a declaration that the Eckrotes' parcel is burdened by a restrictive covenant that prevents the Eckrotes from letting NAF run the pipes under the parcel. The restrictive covenant motion comes down to whether the following phrase, which is found in the January 25, 1946 deed from Harriet Hartley to Fred Poor, meets the legal requirements of a restrictive covenant:

> The lot or parcel of land herein described is conveyed to Fred R. Poor with the understanding it is to be used for residential purposes only, that no business for profit is to be conducted there unless agreed to by Harriet L. Hartley, her heirs or assigns.[5]

The Poor parcel (which encompassed lot 36 and most of lot 35) is now owned by the Eckrotes (who own lot 36; the portion of lot 35 was later conveyed away), and it was carved off from the larger Hartley parcel. Plaintiffs trace their title directly to the Hartley parcel, though their lot (lot 38) is only a portion of what originally constituted the Hartley parcel.

Plaintiffs' argument for enforcement of the purported restrictive covenant on their motion for summary judgment presupposes that the paragraph *is* a restrictive covenant. (*See, e.g.*, Pl.s' S.M.F. re: Amnd. First Mot. Summ. J. ¶ 2 (emphasis added) ("[T]he predecessor in interest to the Eckrotes, Fred R. Poor, received a deed from his grantor, Harriet L. Hartley, for this property which contained the *restrictive covenant* . . . .").) Assuming in the statement of material facts that the paragraph in the deed is a restrictive covenant is an inappropriate starting point because "[t]he proper construction of a deed is a question of law . . . ." *Bennett v. Tracy*, 1999 ME 165, ¶ 7, 740 A.2d 571.

"The first step in any analysis of the language in a deed is to give words their general and

[5] Defendants argue that this paragraph is a "statement of purpose" instead of a restrictive covenant or equitable servitude. Their argument on this point is based on one case: *Phinney v. Gardner, et al.*, 121 Me. 44, 115 A. 523 (1921). That case involved a trespass action regarding a parcel of land in Machias that was used as a burying ground. The defendants (the selectmen for the town of Machias) claimed title via a May 1, 1841 deed that had the following statement: "The same being intended for a burying ground and to be used for no other purpose." The plaintiff claimed title to the lot by way of adverse possession and abandonment; the plaintiff owned the pasture land surrounding the lot at issue. The lot at issue and the surrounding land originally derived from the same grantor, but at different times; the plaintiff did not take title to the surrounding land until 1891. Notably, the plaintiff was not arguing that this statement was a restrictive covenant on the land that he could enforce as an assignee from the benefitted parcel. Instead, the Law Court opened the decision with a gratuitous discussion about the relevance of the language quoted above. It stated that "[t]hese words import merely the purpose of the parties when the conveyance was made and their intention as to the future use to which the lot should be devoted," *id.* at 46, 115 A. at 524, which is the language NAF and the Eckrotes emphasize in their "statement of purpose" argument. However, a close reading of this part of the decision reveals that the Law Court was analyzing the quality of title (i.e., whether it was a defeasible estate that could return to the grantor upon enforcement of his right to reentry) conveyed to the Town under the 1841 deed, not whether this was a covenant on the land. As the Law Court stated, the words did not "constitute a condition subsequent," and "[t]he title of the town, therefore, under its deed was an absolute fee." *Id.* NAF and the Eckrotes did not point to any other authority for their "statement of purpose" argument, and the Court finds it to be unpersuasive.

ordinary meaning to see if they create any ambiguity. If the words create no doubt, the deed is clear and unambiguous." *Id.* ¶ 8. "A court construing the language of a deed . . . must first attempt to construe the language . . . by looking only within the four corners of the instrument." *N. Sebago Shores, LLC v. Mazzaglia*, 2007 ME 81, ¶ 13, 926 A.2d 728 (alterations in original) (citation and quotation marks omitted). "If the language of the deed is ambiguous, and the intention of the parties is in doubt, the court may then resort to rules of construction and may examine the deed in light of extrinsic circumstances surrounding its execution." *McGeechan v. Sherwood*, 2000 ME 188, ¶ 24, 760 A.2d 1068. The court may consider extrinsic evidence to interpret a deed and enter summary judgment where the material facts are undisputed.[6] *See Friedlander v. Hiram Ricker & Sons, Inc.*, 485 A.2d 965, 968 (Me. 1984). Interpretive devices, including rules of construction, may be used to construe a deed so long as the results "are not absurd or manifestly inconsistent with the parties' intentions apparent from the face of the deed." *Id.* (quoting *Snyder v. Haagen*, 679 A.2d 510, 513 (Me. 1996)).

Here, an analysis of the entire deed reveals that the paragraph Plaintiffs insist is a restrictive covenant is ambiguous when considered in light of the entire deed. The paragraph at issue conveys the property to Fred Poor—and only Fred Poor—with the requirement that it be used for residential purposes with no business for profit conducted thereon unless agreed to by Harriet Hartley, her successors, or assigns. Yet, elsewhere in the deed, Hartley invoked Fred Poor and his heirs and assigns. In fact, Hartley specifically references them on five occasions in the deed before the paragraph at issue on this motion is included:

- "I do hereby acknowledge, do hereby give, grant, bargain, sell and convey, unto the said [1] *Fred R. Poor, his heirs and assigns* forever";

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[6] The *Friedlander* case is worth making a point about: the original grantor of the land burdened by the alleged restrictive covenant submitted an affidavit for the summary judgment record stating that it was his intent when he conveyed the land was that the restriction was intended to benefit his retained land. *See Friedlander v. Hiram Ricker & Sons, Inc.*, 485 A.2d 965, 967-68 (Me. 1984). Therefore, there was clear, undisputed evidence in the summary judgment record regarding the grantor's intent.

- "TO HAVE AND TO HOLD the aforementioned and bargained premises with all the privileges and appurtenances thereof, to the said [2] *Fred R. Poor, his heirs and assigns*, to [3] *his and their use* and [illegible] forever";
- "And I do Covenant with the said [4] *Grantee, his heirs and assigns*, that I am lawfully seized in fee of the premises"; and,
- "I and my heirs shall and will Warrant and Defend the same to the said [5] *Grantee, his heirs and assigns* forever."

If Hartley wanted to bind Fred Poor, his heirs, and his assigns with the purported restrictive covenant, why did she not say so expressly? The fact that Hartley knew how to invoke Fred Poor's heirs and assigns elsewhere in the deed calls into question why she did not do so in the purported restrictive covenant. She certainly had the capability to do so elsewhere in the deed, which makes one plausible reading of the purported restrictive covenant that the burden was only intended to apply to Fred Poor while he owned the property, and that, while he owned the property, Hartley, her heirs, and assigns could enforce this covenant against him. However, this is not clear from the face of the deed.

Moreover, as the above hints at, this language in the deed does not clearly evince Hartley's intent to have this purported restrictive covenant run with the land and apply to all heirs and assigns of Fred Poor.[7] As the Law Court has explained in circumstances such as these,

> [o]rdinarily the issue whether a restrictive covenant was intended to benefit the adjoining land retained by the grantor is determined by an interpretation of the written instrument. The subject covenant offers little assistance in this regard. No reference is made in the covenant to "running with the land", "benefiting the parcel retained by grantors" or binding "heirs, successors and assigns." In such circumstances, where it is necessary to resort to extrinsic evidence, a genuine issue of fact will normally be presented and the granting of summary judgment

[7] "For the benefit or the burden of a covenant to pass to a successor in interest of an original covenanting party, at law or in equity, there must be a finding that the original parties intended it . . . [T]he intention requirement focuses on the subjective state of mind of the original covenanting parties." 9 Powell on Real Property § 60.04[3][b] (2020).

will be precluded.

Id. at 967. It appears Hartley intended to benefit the parcel retained by her when she required the permission of her, her heirs, or assigns for Fred Poor to use the land for something other than residential purposes. It also appears that the purported covenant is binding on heirs, successors, and assigns, at least those of Harriet Hartley. Despite this, the purported covenant, and the deed as a whole, is missing evidence that it unambiguously was intended to run with the land and that it was intended to bind the heirs, successors, and assigns of Fred Poor. Therefore, the deed is ambiguous and extrinsic evidence is then necessary to determine Hartley's intent. *See id.*

The only extrinsic evidence either side pointed to is a will cited by Defendants that was drafted by Harriet Hartley several months (September 25, 1945) before she deeded the parcel in question to Fred Poor. This will stated that her "nephew, Samuel Nelson Woods Jr." was to receive "the lot upon which Frederick Poor has a cottage (for which lot the said Frederick Poor pays twenty five dollars annually for ground rent)." Defendants focus on the fact that the will did not impose any residential restriction on her nephew. This does not shed much light on Hartley's intent regarding her 1946 deed to Fred Poor. Most notably, there is the temporal difference; the will was drafted before any conveyance to Fred Poor occurred (or even apparently was contemplated considering the fact that the will had the lot going to someone other than Fred Poor). There is nothing in the will to indicate that Hartley was unable to change her mind and her intentions as it pertains to lot 36. The usefulness of the 1945 will is negligible as it relates to Hartley's intent in 1946 because she changed her mind regarding the ultimate disposition of that lot.

Because the deed as a whole is ambiguous regarding whether the residential use restriction was intended to burden all subsequent grantees of lot 36, or just Fred Poor, and because the scant extrinsic evidence present in the summary judgment record does not provide any insight into Hartley's intent in 1946, Plaintiffs' amended first motion for summary judgment must be denied. Moreover,

Defendants requested that the Court enter summary judgment in their favor pursuant to M.R. Civ. P. 56(c): "Summary judgment, when appropriate, may be rendered against the moving party." As the foregoing analysis impliedly details, however, nothing in the 1946 deed (nor the 1945 will) compels a judgment in Defendants' favor. The parties could assist the Court in this case at an eventual trial on this issue by locating and presenting any other evidence regarding the parties' intent at the time Hartley conveyed the parcel to Poor.

2. Plaintiffs' amended second motion for summary judgment regarding the waterside boundary of the Eckrotes' lot.

Plaintiffs moved for summary judgment on the issue of the waterside boundary in the Eckrotes' chain of title. They expressly avoided moving for summary judgment on the issue of the ownership of the flats. This only requires looking at the Eckrotes' chain of title, which reveals that all prior deeds in that chain of title deeded "along high water mark of Penobscot Bay." Only the Eckrotes' deed says something else; it says, "along said Bay."[8]

The legal standard for interpreting the deed on this point is the same as it is on the restrictive covenant issue: "The first step in any analysis of the language in a deed is to give words their general and ordinary meaning to see if they create any ambiguity. If the words create no doubt, the deed is clear and unambiguous." *Bennett*, 1999 ME 165, ¶ 8, 740 A.2d 571. "A court construing the language of a deed . . . must first attempt to construe the language . . . by looking only within the four corners of the instrument." *Mazzaglia*, 2007 ME 81, ¶ 13, 926 A.2d 728 (alterations in original) (citation and quotation marks omitted).

> If language in a deed is ambiguous, a court may consider extrinsic evidence to determine the intent of the parties, including the circumstances existing at the time of the making of the deed or the contemporaneous construction of the deed by the grantee or grantor.

[8] The distinction between a call along the high-water mark and along the bay is crucial. The Eckrotes cannot obtain more land due to a deed description that conveys in excess of what was originally conveyed in their chain of title. *See Eaton v. Town of Wells*, 2000 ME 176, ¶ 19, 760 A.2d 232 (noting that "a person can convey only what is conveyed into them").

> In the absence of extrinsic evidence, the intent of the parties should be ascertained by resort to the rules of construction of deeds, such as the familiar rule that boundaries are established in descending order of control by monuments, courses, distances and quantity.

Almeder v. Town of Kennebunkport, 2019 ME 151, ¶ 26, 217 A.3d 1111 (citations and quotation marks omitted).

NAF's primary argument in opposing the waterside boundary motion for summary judgment is that the Hartley-to-Poor deed did not sever the tidal flats from the upland. Its argument is premised on extrapolating from the wording of the Law Court's decision in *Almeder*. The language it relies on is the following:

> the owner of upland oceanfront property presumptively owns to the low water mark by operation of the Colonial Ordinance of 1641. *Roxbury*, 75 Mass. (9 Gray) at 498; *Storer*, 6 Mass at 438-39. Because the beach may be conveyed separately from the upland, an owner only benefits from this presumption where a grant of property specifically includes a call to the water. *Storer*, 6 Mass at 439 ("This rule applies only in cases where the grantor, seised of the upland and flats, in conveying his land, bounds the land sold on the sea or salt water, or describes other boundaries of equivalent meaning, without any reservation of the flats."). Terms such as "Atlantic Ocean," "ocean," "cove," "sea," or "river" are calls to the water that trigger the presumption, *Bell v. Wells*, 557 A.2d 168, 172 (Me. 1989); *Ogunquit Beach Dist. v. Perkins*, 138 Me. 54, 21 A.2d 660, 663 (Me. 1941). However, language limiting a grant "to" or "by" the shore, beach, bank, or sea shore may defeat the presumption. *See Hodgdon*, 411 A.2d at 672 ("As a monument, the shore limits the grant to the high-water mark."); *Whitmore v. Brown*, 100 Me. 410, 414, 61 A. 985, 987 (1905); *Lapish v. President of Bangor Bank*, 8 Me. 85, 89-90 (1831); *Storer*, 6 Mass. at 438-39.

Id. ¶ 37. NAF then reasons that because the Law Court considers "calls to the water" to trigger the colonial presumption, the call in the Eckrotes' chain of title of "along high water mark of Penobscot Bay" is a call to the water (i.e., not a call to land such as the shore, beach, bank, or sea shore). Specifically, NAF summarizes its proposition of what *Almeder* stands for by saying this: "In other words, the Colonial Ordinance presumption operates to include the flats when an upland property description lists a tidal body of water as one of the boundaries of the upland even when that

description is to the high water mark unless the grantor expressly reserves the flats by listing a land monument, such as the shore, beach, sea wall etc. [sic] as the abutter."[9] (NAF Opp. to Second Mot. Summ. J. 8.) NAF cites to the above-quoted paragraph 37 of *Almeder* for this proposition, but that is not what that paragraph says. The paragraph simply gives examples of what "may defeat the presumption," and it most notably then cites to *Lapish v. President of Bangor Bank*, 8 Me. 85, 89-90 (1831), and *Storer v. Freeman*, 6 Mass. 435, 438-39 (1810). This is most revealing because *Lapish* is one case that has spoken on this issue:

> Now, as high-water mark is one side of the sea-shore or flats, and low-water mark is the other, and as a deed bounding land on one side by the shore, does not convey the flats, *it is perfectly clear that a deed bounding a piece of land by high-water mark, which is one side of the shore, cannot be construed as conveying the flats.* The case of *Storer v. Freeman* is decisive of the question in the present case.

Lapish, 8 Me. at 90 (emphasis added). This recognizes a simple proposition: if a grant that is bounded by the shore—which starts at the high-water mark of some tidal body of water—excludes the flats, then it is equally true, given the recognized references to the high-water mark in defining what constitutes the "shore," *see* footnote 1, *supra*, a grant by the high-water mark of some tidal body of water excludes the flats (i.e., the shore). NAF does not grapple with the *Lapish* decision in its brief other than to parenthetically cite it once in a footnote for ostensible support of NAF's position that a reference to a monument of land is necessary. Despite this, the full decision in *Lapish* is worth looking at in more detail because it provides insight for this case.

Lapish involved a writ of entry brought by Lapish regarding an undivided portion of an acre of land on the Penobscot River in Bangor (though fresh water, it is tidal). *Lapish*, 8 Me. at 87. The only issue in the case was possession of the flats adjoining the upland lot; a prior case had determined that the defendant had title to the upland lot. *Id.* James Budge was an original settler of Bangor and

[9] If the high-water *mark* is not a reference to a monument of land, it is unclear what it is. The point at which the high water is marked is a point on the land.

the plaintiff was an assignee of his; the plaintiff claimed under this deed. *Id.* The defendant was a tenant of one McGlarthy, who had also taken title from Budge. *Id.* The deed from Budge to McGlarthy stated as follows:

> a certain lot of land, lying and being in Bangor, on Condeskeig point, so called, bounded and described as follows, to wit: beginning at a stake, on the west bank of Penobscot River, near a thorn bush, marked on four sides, running north eleven rods to a stake and stones; thence southerly to a stake and stones, a corner; thence south nine rods to a stake and stones on the same bank of the same river; ***thence running on the western bank of said river to high-water mark***, sixteen rods to the first-mentioned bounds, with all the privileges of water and landing to the same belonging.

Id. at 89 (emphasis added). NAF points to the reference of the bank of the river in conjunction with the high-water mark to support its argument that there must be a monument of land referenced in association with the high-water mark in order to sever the flats. (NAF Opp. to Second Mot. Summ. J. 11 n.1.) As quoted above, however, the mention of the bank of the river in the deed played no role in the Law Court's conclusion as to why the flats were not conveyed to McGlarthy under this deed: "it is perfectly clear that a deed bounding a piece of land by high-water mark, which is one side of the shore, cannot be construed as conveying the flats." *Id.* at 90. Though this conclusion is compelling in its own right, the case did not stop there. Instead, the defendant made the same argument that NAF makes later in its brief, namely that the plaintiff could not win on weaknesses in the defendant's title and instead had to win on the strength of his own title. *Id.* This required the Law Court to look at the instrument under which the plaintiff claimed title.

The deed under which the plaintiff claimed stated the following:

> Beginning at a stump with stones about it, standing on the bank of the river; being the southwest corner of lot number 12, and from thence north seven degrees west sixty rods to a pine stump marked; thence north two hundred and thirty-one rods to a stake marked; thence west fifty-seven rods to a fir tree marked; thence south about two hundred and twenty-seven rods, to a stake standing in the county road, one rod east of an oak stump in said road; thence west four rods to the [Kenduskeag Stream]; thence on said [Kenduskeag Stream] on the

> bank thereof, and on the bank of the Penobscot River to the first bounds, containing one hundred acres, agreeably to the certificate of said Holland.

Id. at 91-92. Much like the defendant's deed, there was a reference to the bank of the body of water in conjunction with the body of water itself. The Law Court interpreted the reference to the bank of each body of water to mean the body of water itself, in part because, unlike the defendant's deed, "no course is given in the deed from the place where the north end line of the lot strikes the stream, to the first mentioned bounds or stump begun at; and the only natural inference is that the circuitous line of the stream and river was intended as the boundary . . . ." *Id.* at 92. Under the Colonial Ordinance, the plaintiff therefore had title to the flats because the deed called to the body of water itself. *Id.* The Law Court "perceive[d] the difference between the rights of these grantees under the deed in question, and those of McGlathry under his deed of the acre; *for that acre was bounded expressly by high-water mark; by which the flats were necessarily excluded*, as [the Law Court] ha[d] already decided." *Id.* (emphasis added). This confirms the Law Court's first conclusion in the case, and it strengthens the argument that a reference to a land monument is not necessarily required when the boundary is the high-water mark.[10]

For additional support regarding its argument about *Almeder*, NAF string-cited to two Maine cases with parentheticals. NAF's string cites are not persuasive. The first case that NAF cites to is *Pike v. Munroe*, 36 Me. 309 (1853),[11] and it does so with this parenthetical: "although all monuments in the deed were located at the high water mark, by operation of the Colonial Ordinance the deed 'conveyed not only the upland, but also the flats, in front of and adjoining the same' likewise the same was true for a subsequent conveyance of half of that lot bounded with a call to the water '*on high water*

[10] There is one key distinction between the deed in *Lapish* and the deed in the case at hand: the deed in *Lapish* included an express call *to* the high-water mark, whereas the Hartley-to-Poor deed called *to* an iron bolt in the mouth of stream and then along high-water mark. The relevance of this will be discussed below.

[11] NAF contends that the case at hand "is an *identical fact pattern* to the case of *Pike* . . . ." ((NAF Opp. to Second Mot. Summ. J. 12 (emphasis in original).) As the description will show, that is not accurate.

mark, twenty-five rods" (emphasis added)[.]" (NAF Opp. to Second Mot. Summ. J. 7.) NAF's parenthetical disregards the role in the case played by poorly drafted and internally inconsistent deeds.

At issue in the case was a twenty-five-rod-wide strip of shore on the St. Croix River in Calais (a tidal body of water). *Id.* at 311. The deeds at issue in the case were the following:

- A 1792 deed from the proprietors of the land (including, apparently, Edward Robbins) to John Bohannan that included calls to two monuments near the river above the high-water mark, but then later referred to the line as "from thence running down river";
- A 1796 deed from Bohannan to Robbins that included the same description as the 1792 deed; and,
- A 1797 deed from Robbins to Bohannan that conveyed the northerly half of the lot that first conveyed all of Robbins's "right, title and estate" in the northern half of the lot, that then said it was "bounded on said river"—i.e., a call to the water that would trigger the Colonial Ordinance presumption—but later referred to the boundary running on "said river on high water mark."

Id. The plaintiff in the case was a subsequent grantee of Robbins who was seeking possession of the flats adjacent to the northern half of the lot that was conveyed to Bohannan in 1797. There were two issues in the case. First, the Law Court had to determine whether the 1792 and 1796 deeds conveyed the flats adjacent to the upland of the larger parcel. *Id.* at 311-12. If those deeds did, which would put the flats in possession of Robbins as of the time of the 1797 deed, the next question became whether the 1797 deed of the northern half of the lot conveyed the flats adjacent to that upland back to Bohannan. *Id.* at 313-14.

Regarding the first issue, confusion arose about the flats because the deed made calls to both monuments near the river but above the high-water mark, which would seemingly prevent the flats from being conveyed, yet then referred to the boundary "running down river"; the Law Court had to

determine "whether the line starting from the white rock and running *down river* to a stake and stones, is a line running on the river, or whether the words *down river* simply indicate the general direction of the line from one monument to the other." *Id.* at 311-12 (emphasis in original). The Law Court looked to a number of older cases where a similar issue arose, most of which supported the proposition that the call "running down river" meant the boundary was to follow the river, even though a straight line between the two monuments above the high-water mark would not make such a boundary. *Id.* at 312. Nonetheless, these precedents were not determinative because Law Court continued to try to discern the intent of the parties. *Id.*

It then looked to another part of the deed that set another boundary "'from said rock first mentioned, and from the stake and stones, running back *from the river*, fifty rods wide, in parallel lines, south-west so far as to include one hundred acres,' *thus strongly indicating the river as one of the boundary lines of the lot.*" *Id.* (first emphasis in original and second emphasis added). This made it clear to the Law Court "that the parties understood that one end of the lot was bounded *on* the river." *Id.* at 312-13 (emphasis in original). Because this was a tidal body of water, the Law Court then had to determine whether this meant that the grant extended to the low-water mark. *Id.* at 313. It cited to the colonial presumption of ownership to the low-water mark, and then concluded that, "[*b*]*y the application of these rules of construction and principles of law*, it follows that the deeds, from the proprietors to Bohannan, and from Bohannan to Robbins, conveyed not only the upland, but also the flats, in front of and adjoining the same . . . ." *Id.* at 313-14 (emphasis added).[12]

With the first issue having been decided, the Law Court had to next determine whether the 1797 conveyance from Robbins to Bohannan conveyed the flats adjacent to that parcel. Much like

[12] The Law Court did not simply apply the colonial presumption to the deeds as NAF asserts in its parenthetical about the case. The Law Court first had to go through an exercise of deed interpretation using rules of construction in order to glean the intent of the parties from an unclear deed in order to determine that the boundary went to the river, i.e., a call to the water, and *then* it applied the colonial presumption.

the first deeds at issue, there was some internal conflict in the 1797 deed regarding whether the flats were conveyed. The deed stated as follows:

> all my right, title and estate in the northerly moiety or half of the hundred acre lot on which the said Bohannan now lives, and bounded on said river; the half part hereby conveyed is bounded as follows; beginning on the bank of said river, at high water mark, on the line dividing the premises from the lot on which David Ferrol lived, and commonly called the Ferrol lot, and thence running on the bank of said river, on high water mark, twenty-five rods . . . .

Id. at 314. Importantly, the deed first conveyed everything Robbins had in the parcel "bounded on said river," but then purported to bound the parcel at the high-water mark. Because of this conflict, the Law Court resorted to the principle of "giv[ing] effect to the intention of the parties if practicable, when no principle of law is thereby violated. This intention is to be ascertained by taking into consideration all the provisions of the deed, as well as the situation of the parties to it." *Id.* at 315. The Law Court noted that Robbins had originally acquired land that was "bounded by monuments which in fact stood substantially at high water mark[, and] [h]is title to the flats accrued to him only by the force of this deed." *Id.* at 315-16. Robbins then "conveyed [to Bohannan in 1797] all [Robbins's] *right, title* and *estate* to the northerly half of the lot . . . , and though bounded on the river at high water mark, these bounds were at the same point on the face of the earth, as were the monuments in the deed from Bohannan." *Id.* at 316 (emphasis in original).[13] Because "all doubtful words and provisions are to be construed most strongly against the grantor," the Law Court concluded that Robbins conveyed the flats to Bohannan, which meant that the plaintiff, as a successor in interest to Robbins, had no right to possession of those flats. *Id.* at 316-17.

As the foregoing description shows, the *Pike* case is not a strong comparable because it involved sloppily drafted deeds that were internally inconsistent. Unlike *Pike*, the case at hand does

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[13] As noted in the discussion about the 1792 and 1796 deeds, there are uniquely specific reasons why those deeds conveyed the flats even though the monuments were above the high-water mark.

not involve a deed that calls to monuments above the high-water mark but then calls to the whole body of water, nor does it involve a deed that conveys to the whole body of water but then purports to limit the grant to the high-water mark.

The next case NAF cites to is *Partridge v. Luce*, 36 Me. 16 (1853), and it does so with this parenthetical:

> although the lot was described in a partition petition as a single acre of upland with side lots lines described "by a line from the highway *to an iron bolt in the ledge at highwa[ter] mark*," and with the parties admitting "*the highwater mark being a line curving into the upland*" the Court rejected the argument that the flats "are not embraced in the description of the premises" and held to the contrary that because the referenced "highwater mark" was that of "Owl's head Bay" in Rockland, and a "bay is an arm of the sea," the principles of the Colonial Ordinance" constructively included the intertidal zone between the highwater mark and the low water mark."

(NAF Opp. to Second Mot. Summ. J. 7 (emphases in original).) The actual description in the deed describes the parcel of land "as bounded westerly by a highway; southerly by a line, [described;] easterly by Owl's Head bay; northerly by a line from the highway to an iron bolt in the ledge at highway mark, and to the eastern boundary, being about one acre." *Id.* at 17. The deed itself did not mention the high-water mark, and the reference in the prior history to the case in relation to the parcel at issue was that the high-water mark was a line that curved into the upland, not that it was a boundary in the deed. This was important to the case in the sense that the case was a fight over whether the flats could be partitioned. *Id.* at 18.

The case did not involve distinguishing a call to Owl's Head bay versus a call along the high-water mark of Owl's Head bay (as would be the comparable to the Eckrotes' deed); instead, it reiterated a standard proposition:

> the premises are bounded "easterly by Owl's Head bay." . . . A bay is an arm of the sea, extending into the land. It is a part of the sea. And the boundary is to be regarded in the same manner as if it had been stated, that the premises were bounded on the east by the sea. The principle of the Colonial Ordinance of 1641 has been adopted in this

> State, so that the owner of lands bounded on the sea shall hold to low water mark . . . .

Id. at 19. The only reference in the case to the high-water mark was a general reference in relation to the Colonial Ordinance presumption: "The owner of the upland bounded on the sea can hold the flats for one hundred rods from highwater mark, provided they extend so far, but not beyond that distance." *Id.* The high-water mark of Owl's Head bay played no role in the outcome of the case because the description of the parcel was a clear call to the full extent of the water, which triggered the presumption. *See Almeder*, 2019 ME 151, ¶ 37, 217 A.3d 1111 (citations omitted) ("[T]he owner of upland oceanfront property presumptively owns to the low water mark by operation of the Colonial Ordinance of 1641. Because the beach may be conveyed separately from the upland, an owner only benefits from this presumption where a grant of property specifically includes a call to the water. Terms such as 'Atlantic Ocean,' 'ocean,' 'cove,' 'sea,' or 'river' are calls to the water that trigger the presumption."). *Partridge* was a straightforward application of the Colonial Ordinance presumption.

Despite the foregoing, there is still the question of whether the deed from Hartley to Poor severed the flats: "Under the Colonial Ordinance of 1641-7, the owner of upland adjoining tide-water prima facie owns to low-water mark (not exceeding 100 rods and subject to public rights of passage by boat). The flats are his unless the presumption is rebutted by proof to the contrary. Of course the owner of both may convey both, or he may convey either without the other. The question in a given case is what has he done." *Sinford v. Watts*, 123 Me. 230, 232, 122 A. 573, 574 (1923).

The Hartley-to-Poor deed was not drafted in the same manner as other deeds that more clearly indicated the flats were severed from the upland.[14] Instead of calling for the boundary to run "to the

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[14] *See, e.g.*, *Sinford v. Watts*, 123 Me. 230, 234, 122 A. 573, 575 (1923) (citations omitted) ("The boundary line continues northerly 'by easterly line of lot 6, 134 rods, thence easterly by Varney's line 105 rods, thence south 10 degrees east to the shore.' To which margin of the shore? Obviously to the high-water margin. The preposition 'to' when used in this connection is a word of exclusion. The line stops when it reaches the shore and does not continue across the shore any more than if it ran to land of another owner. The final call: 'thence by the shore to the first mentioned bound' further emphasizes the correctness of this construction and carries

shore" and then "along the shore," or "to the high-water mark" and then "along the high-water mark," as would more clearly indicate that the flats were excluded, the Hartley-to-Poor deed states:

> Beginning at the head of a gully in the center of a concrete culvert which is on or near the Southerly bound of the Atlantic Highway; thence Southeasterly following the bottom of the gully 275 ft. more or less *to an iron bolt in the mouth of a brook*; thence Easterly and Northeasterly *along high water mark* of Penobscot Bay 410 ft. more or less *to a stake at the outlet of a gully*; thence Northerly up to the bottom of the said gully 100 ft.; thence West 507 ft. to the center of a gully on or near the Southerly bound of the Atlantic Highway; thence Westerly along the Southerly bound of said highway 206 ft. to the point of beginning.

(Pl.s' S.M.F. re: Amnd. Second Mot. Summ. J. ¶ 1.) The conveyance to an iron bolt in the mouth of a brook, along high-water mark, and then to a stake in the outlet of a gully raises questions about where the iron bolt and stake are located, if they still exist. Moreover, the exact locations of the iron bolt and stake might raise a question regarding whether the rule pertaining to inconsistent termini of boundary lines might apply in this case. The Law Court has explained it thusly:

> [I]n the absence of some evidence that the grantor intended to separate the upland from the land between the high water mark and low water mark, inconsistent monuments which place the termini of one boundary at the low water mark and the termini of another boundary at the high water mark, will be reconciled in favor of including the land to the low water mark. *Dunton v. Parker*, 97 Me. 461, 469, 54 A. 1115 (1903). This is the result even when the call connecting the two termini, when read alone, appears to exclude that land. *Id. See also Whitmore v. Brown*, 100 Me. 410, 414, 61 A. 985 (1905) (holding that the call "to the shore and then by the shore," unqualified, excludes the shore, but when one or both termini of that call are at the low water mark, it includes the land to the low water mark). This rule reflects the presumption that a grantor of water's edge property usually intends to convey land down to the low water mark. *Dunton*, 97 Me. at 469; *Snow*, 84 Me. at 17.

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the line from the inland side of the shore where the easterly line stopped, along said inland side to the point of beginning."); *Storer v. Freeman*, 6 Mass. 435, 437, 439-40 (1810) (construing a deed that called to run *to* the shore and then *by* the shore as excluding the flats).

Snyder v. Haagen, 679 A.2d 510, 515 (Me. 1996).[15]

Whether the Court is dealing with inconsistent termini of boundary lines, and, if so, how they might factor into gleaning the parties' intent, is not readily apparent because it is not clear from the face of the deed whether the iron bolt and stake are above, at, or below the high-water mark. Nor do the statements of material facts indicate where on the face of the earth the bolt and stake are located, if they even still exist. The exact locations on the face of the earth are important because "[e]ven if one of the termini is at high water mark and the other at low water mark, the shore *may* be included in the conveyance . . . ." *Whitmore*, 100 Me. at 414, 61 A. at 987 (emphasis added). Moreover, whether the rule would apply in a hypothetical situation where at least one of the bolt or stake were located between high and low water mark is also not clear. On the other hand, if the iron bolt and stake are both at or above the high-water mark, combined with the call along the high-water mark of Penobscot Bay, it would seem likely that the Court would have to apply "the rule that where the two ends of a line by the shore are at high water mark, in the absence of other calls or circumstances showing a contrary intention, the boundary will be construed as excluding the shore." *Whitmore*, 100 Me. at 416, 61 A. at 988.

Nonetheless, it is not possible for the Court to set the waterside boundary in the Hartley-to-Poor deed (which would affect what was ultimately conveyed to the Eckrotes) on summary judgment

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[15] Though the Law Court termed this a "rule" in *Snyder*, a review of the cases cited reveals that it is a rule insofar as it assists with determining the ultimate intent of the parties regarding whether the flats were severed from the upland. *See, e.g.*, *Whitmore v. Brown*, 100 Me. 410, 415, 61 A. 985, 988 (1905) (emphasis added) ("So that the description in the Whitmore deed now in question begins at a point at or above high water mark, proceeds by several courses to the head of Gilpatrick's Cove, thence around the western side of the cove, to the point of beginning, which was at or above high water mark. Such a description, in the absence of other calls or circumstances showing a contrary *intention*, will be construed as excluding the shore."); *Dunton v. Parker*, 97 Me. 461, 469, 54 A. 1115, 1118 (1903) (emphasis added) ("[I]f one of the termini of the boundary by the shore is at low water mark, and the other, according to the technical construction of the call in the deed, is at high water mark, the shore will be regarded as included in the conveyance, because of the strong presumption, under these circumstances, that such was the *intention* of the grantor."); *Snow v. Mt. Desert Island Real-Estate Co.*, 84 Me. 14, 18, 24 A. 429, 430 (1891) (emphasis added) ("[I]t is not difficult to determine that they were *intended* to describe the sea side and not the land side of the shore, and thus include the shore to low water mark.").

when the exact locations of the two calls in the deed connecting to each side of the high-water mark are not set forth in the statements of material facts. *See id.* ¶ 7 ("Where boundaries are on the face of the earth is a question of fact . . . ."). Because of this, Plaintiffs' amended second motion for summary judgment must be denied.[16] The parties could assist the Court at a trial on this issue by presenting evidence regarding the locations of the monuments in order for the Court to fix the boundaries.

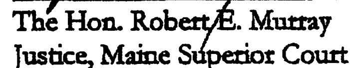
CONCLUSION

As the foregoing demonstrates, both of Plaintiffs' motions for summary judgment must be denied because of ambiguity as it pertains to the Hartley-to-Poor deed. The first ambiguity in the deed relates to Hartley's ability to refer to Fred Poor's heirs and assignees throughout the deed, but conspicuously not mentioning his heirs and assignees in the alleged restrictive covenant. The second ambiguity relates to the location (or existence) of the artificial monuments described in the boundary description and how those monuments relate to the high-water mark.

The entry is:

1. Plaintiffs' amended first motion for summary judgment regarding the alleged restrictive covenant is **DENIED**.
2. Plaintiffs' amended second motion for summary judgment regarding the waterside boundary of the Eckrotes' lot is **DENIED**.
3. The Clerk is directed to incorporate this Order into the docket by reference pursuant to M.R. Civ. P. 79(a).

Dated: 6/4/2020



The Hon. Robert E. Murray
Justice, Maine Superior Court

[16] The Eckrotes raised the possibility that they acquired title to the tidal flats by acquiescence or adverse possession. Though not filing their own summary judgment motion, presumably because they had not answered the complaint and no discovery had been conducted when the summary judgment motions were filed, the Eckrotes attached the affidavit of Janet Eckrote to demonstrate these factual issues. Plaintiffs responded by attaching their own affidavit to counter these factual assertions. Even if the issue is properly raised in a motion that is seeking partial summary judgment on the boundary only (and not the issue of ownership of the tidal flats), it is clear there is a dispute of fact about whether title by acquiescence or adverse possession could be proved.