19-P-371 Appeals Court

VINCE KUBIC & another[1] vs. DAVID AUDETTE & others.[2]

No. 19-P-371.

Suffolk. May 12, 2020. - August 28, 2020.

Present: Vuono, Milkey, & Desmond, JJ.

Easement. Real Property, Easement, Littoral property, Boundary, Ownership. Way, Private.

Civil action commenced in the Land Court Department on December 17, 2013.

The case was heard by Judith C. Cutler, J.

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[1] Paul Kubik.

[2] The following additional defendants were joined as defendants in the late stages of the litigation because of their potential interest in the easement rights at issue: Ann Marie Peters, trustee of the Douglas H. Babcock and Elaine L. Babcock Irrevocable Trust; Raymond E. Pion, Jr.; Ann M. Pion; Ronald P. Pierce; Pauline D. Pierce; Joel L. Kubilis; Rhonda Brunelle; David L. Nigro; Tammy M. Nigro; Earnest F. Gatto, Jr.; Carolyn G. Gatto; Scott G. Anderson; Elaine G. Anderson; Marvin O. Ferguson; Warren Lewis, Jr.; Lisa M. Lewis; Frederick R. Bock; Beth C. Bock; Lynn Ann Fellman; Robert Baxter; Raymond Gifford; Jane Gifford; and Adam S. Vrabel, trustee of the Vrabel Family Trust. These parties subsequently were defaulted pursuant to Mass. R. Civ. P. 55 (a), 365 Mass. 822 (1974), and they have not participated in the appeal.

Nicholas P. Shapiro for the plaintiffs.
Henry J. Lane for David Audette.

MILKEY, J. Plaintiffs Vince Kubic and Paul Kubik (collectively, the Kubics) are cousins who own adjacent lakefront homes on Fairfield Street in Webster. The two lots are separated by a fifty-foot wide right of way (ROW) that extends from Fairfield Street to Webster Lake, a great pond (hereafter, Webster Lake or the lake).[3] The ROW, which was created when the area was subdivided in 1948, provides deeded access to the lake for owners of certain inland lots. Among those easement holders is defendant David Audette, who purchased his property in 2006. Shortly thereafter, Audette also purchased a release deed for the ROW from a purported heir to the original developers of the subdivision, and thereafter claimed that he owned the ROW in fee. As we discuss in more detail below, Audette began using the ROW more intensively than other easement holders historically had done. Conflict ensued.

The Kubics brought this action in the Land Court to quiet title in the ROW and to establish the parties' respective rights to use it. Following trial, the judge ruled in the Kubics' favor on some of their claims and in Audette's favor on others.

[3] Webster Lake is also known by an Algonquian name, Lake Chaubunagungamaug, and variations of it, including Lake Chargoggagoggmanchauggagoggchaubunagungamaugg.

However, the judge declined to resolve some of the issues at the heart of the parties' dispute, including the question of who owned the formerly submerged land that lies at the end of the ROW. Both sides appealed. Our consideration of the cross appeals requires us to revisit two areas of property law: ownership of littoral property on a great pond, and the derelict fee statute, G. L. c. 183, § 58. For the reasons that follow, we conclude that the Kubics own the ROW in fee down to the water and that Audette has exceeded his easement rights in some respects beyond those found by the judge. We therefore affirm in part and reverse in part, and remand for further proceedings.

Background. The Kubics acknowledge both the existence of the ROW and Audette's right to use it. Most of the underlying facts also were uncontested, with many established by stipulation, or by agreed-upon exhibits such as deeds, plans, and photographs. Even the testimony of the six witnesses was largely consistent. We summarize the judge's findings, none of which was clearly erroneous, and supplement these findings where necessary with uncontested evidence from the record.

1. Title history. All of the lots at issue originally were part of a large parcel acquired by Arthur and Doriza Robinson in 1946. Over the next two decades, the Robinsons developed the parcel and divided it into thirty lots pursuant to a subdivision plan recorded in 1948 (1948 plan). The road that

became Fairfield Street is shown on the 1948 plan, as is the unnamed ROW. The 1948 plan depicts the ROW as running between lot 15 to its north and lot 14 to its south and extending one hundred feet from Fairfield Street to the waterline of the eastern shore of the lake.

Vince[4] owns the property that was depicted as lot 15 on the 1948 plan. The source deed for lot 15, which was from 1948, describes the property as being bounded by the ROW. Vince's father purchased lot 15 in 1953, and in the next two years, he acquired adjacent land to the east and west of lot 15. Together, the property is now known as 4 Fairfield Street. Vince was born in 1958, and he has lived at 4 Fairfield Street all his life.

Paul's father (Vince's uncle) purchased the northern portion of lot 14 in 1957. The source deed does not describe the land as bordering the ROW, but instead depicts it by metes and bounds. However, it is undisputed that the northern boundary of the land Paul's father purchased corresponds to the southern boundary of the ROW. The source deed includes rights to use the existing ways shown on the 1948 plan, except that it states that "no Right of Way is conveyed herein over any land

[4] Even though the plaintiffs use slightly different spellings of their last name, for clarity, we will refer to them by their first names when referring to them individually.

located Northerly of [the southerly boundary of the ROW]." The land acquired by Paul's father is now known as 6 Fairfield Street. Paul was born in 1960 and, like his cousin Vince, he has lived at his Fairfield Street home all his life. A sketch showing the lots owned by Vince and Paul and the ROW is attached to this opinion as an Appendix.

In 2006, Audette purchased the property at 17 Fairfield Street, an inland parcel that lies approximately 200 yards from the ROW. As the Kubics concede, Audette holds an express easement allowing him to use the ROW to gain access to the lake. In addition, in 2007, Audette purchased a release deed for the ROW from Francesca Pomerantz. Audette claims that Pomerantz is an heir to the original developers (the Robinsons).[5]

2. The topography of the ROW. The ROW has three distinct portions. Beginning at Fairfield Street, the initial forty or

[5] In 2007, Audette and the owners of 13 Fairfield Street together purchased the release deed from the purported Robinson heir for $250 stated consideration. In 2010, Audette bought out the share acquired by the owners of 13 Fairfield Street.

The release deed from Francesca Pomerantz references two wills, one of Arthur Robinson and one of Lillian Pomerantz. It does not otherwise explain the chain of title through which Francesca Pomerantz may have obtained any interest in the ROW that the Robinsons might have retained. The wills were not admitted as part of the trial record. We note that together with her husband Samuel Pomerantz, Lillian Pomerantz is the person who acquired lot 15 from the Robinsons and sold it to Vince's father.

so feet of the ROW are relatively flat. This is the area that lies between Vince's and Paul's homes. The middle section of the ROW drops relatively steeply until it flattens out again near the water.

The current waterline of the eastern shore of the lake is approximately thirty feet westward of the line shown on the 1948 plan. For simplicity, we refer to the area lying between the two waterlines as the shoreline area. As the judge found, "The present location of the shoreline has remained substantially unchanged during the lifetimes of the trial witnesses -- from the early 1960s through the present."[6] The record does not disclose what caused the water to recede sometime between 1948 and the early 1960s. The Kubics urged the judge to consider the changing waterline to be the product of "reliction," a natural process through which land gradually emerges as a result of receding waters.[7] Audette suggested an alternative explanation.

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[6] This was undisputed. In his own posttrial request for findings, Audette himself asked the judge to find that the current waterline "has been at approximately that location since the early 1960s, although the actual edge of the water may vary seasonally by approximately [ten] feet in either direction."

[7] "[R]elictions are lands once covered by water that become dry when the water recedes." Opinion of the Justices, 474 Mass. 1201, 1207 n.11 (2016), quoting Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Protection, 560 U.S. 702, 708 (2010). Relictions are distinct from "[a]ccretions" which "are additions of alluvion (sand, sediment, or other deposits) to waterfront land." Id., quoting Stop the Beach Renourishment, Inc., supra. Reliction is also considered distinct from

He testified that there was a dam on the lake that could be used to control water levels in the lake. However, he did not provide any specific historic evidence about how the dam in fact was used over time to control those levels.[8]

3. Historic use of the ROW. The Kubics long have used the flat upper portion of the ROW near their homes as part of their respective driveways and parking areas. For example, part of Vince's paved driveway runs through this portion of the ROW. The path through the ROW's steep middle section historically was used by people to walk down to the lake and back.[9] For example,

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"avulsion," which is "a sudden or perceptible change to the littoral land by natural forces, as opposed to the gradual and imperceptible change that constitutes accretion or reliction." Id., quoting Stop the Beach Renourishment, Inc., supra at 708-709.

[8] The extent to which the judge accepted Audette's limited testimony about the dam is not entirely clear. On one hand, she appears to have questioned the competency of this evidence, finding that, "[a]lthough Audette testified that the water levels of Webster Lake are controlled artificially by a dam, there was no documentary or expert evidence to support this claim and no evidence or testimony as to when a dam may have been installed or used to control water levels in the [l]ake." On the other hand, she seems to have considered the presence of such a dam as one possible explanation for the lowering of the water levels of the lake.

[9] The judge did not specifically find that use of the ROW was limited to pedestrians prior to Audette. However, the only trial evidence of motor vehicle use there other than by Audette and his guests was by Paul to access the lower portion of his property and occasional use by unidentified snowmobilers in the winter.

customers of a nearby sporting goods store once used the ROW to carry rental canoes down to the shore. Various individuals owned small docks at the end of the ROW, but those docks eventually fell into disuse.[10]

4. Audette's use of the area. After he purchased the release deed, Audette asserted that he held title to the ROW and the shoreline area. Representing to the Department of Environmental Protection that he "own[ed]" the land in question, Audette obtained a waterways license pursuant to G. L. c. 91, allowing the construction of a dock at the end of the ROW. In 2013, Audette installed that dock, a trident-shaped structure that is thirty-five feet wide and protrudes fifty feet into the lake. The prongs of the trident form two boat slips. For seven months each year (approximately April 1 to November 1), Audette uses one of the slips to moor his own boat, which he described as "a big boat" that "holds [fifteen] people comfortably." As the judge found, Audette uses the ROW "regularly," including "as much as every day throughout the summer season."

Audette acknowledged at trial that he has extended an "open invitation" to his family members to use the ROW, dock, and shoreline area. According to him, his family is "huge," with

[10] There was evidence that the use of these docks lasted into the 1980s. The record suggests that the abandonment of the docks may have coincided with this part of the lake becoming clogged by invasive aquatic species.

his "immediate family" including "at least" forty people. His girlfriend and other friends also use the area at his invitation. In addition, Audette allows an out-of-town friend to moor his boat at the dock's second slip throughout the summer season.

Audette and his various guests use the dock and adjacent shoreline area for group gatherings such as cookouts. He sometimes has placed a picnic table in that area to accommodate such parties. Audette also stores the float portions of the dock in the shoreline area during the winter. At trial, Audette referred to the dock and shoreline area as "my property."

With regard to the ROW itself, Audette has regraded the middle portion and installed concrete "pavers" there to facilitate motor vehicle use. He and his guests frequently use the ROW for motor vehicle access, for example, to ferry people, coolers, and water skis down to the dock. They also use the ROW for parking. Although they sometimes park down near the water, they typically park alongside Paul's cars in the flat, upper portion of the ROW area next to Paul's house.

There was evidence of multiple acrimonious exchanges between Audette and the Kubics related to Audette's use of the ROW. For example, Vince's wife described an incident that allegedly occurred when her mother, Vince, and she were leaving their house to go out to dinner. According to her, Audette,

while driving on the ROW, "showed us his middle finger and said, 'Suck it, buddy,' and kept driving." Although Audette did not deny that such exchanges had occurred, the judge made no specific findings about them, and we note the testimony solely as demonstrating the level of discord between the parties.[11]

5. The earlier action. In 2007, Vince brought an action in the Land Court seeking to challenge Audette's plans for using the ROW. At the time, Audette had just begun to expand such use. He cleared vegetation from and regraded the ROW path, and he used a "hydro rake" to remove aquatic vegetation from the lake in the vicinity of the ROW. These changes were done in preparation for the construction of a dock. However, as the judge found, the dock's size and specific location had not yet been determined (indeed, as noted, the dock would not be built until 2013).

The case proceeded to trial before the same judge who presided over the case before us. The judge ruled in Audette's favor, and she dismissed the case in 2010. The judge concluded that the actions that Audette already had taken -- such as clearing the ROW path -- were in furtherance of the easement

[11] On appeal, the Kubics' counsel has represented that an actual physical altercation between Audette and one of his clients occurred since trial, resulting in criminal complaints being filed in District Court against both parties. He raised this to underscore the need to resolve the legal issues in dispute.

rights he held, and that Vince had failed to prove that Audette's future actions would overburden the ROW.[12]

6. The current action. The Kubics filed the current action in 2013 after Audette had installed his dock and begun to use it. They argued that they, not Audette, owned the fee interest in the ROW down to the current waterline. Although they acknowledged that Audette held an express easement to use the ROW to gain access to the lake, they argued that Audette's actions exceeded the scope of that easement by using and parking motor vehicles there, and by storing his dock floats there in the winter. They also argued that Audette was overburdening the easement by his intensive use of it, including by the construction of a dock that spans thirty-five feet of the ROW's fifty-foot width. They asserted -- based on adverse possession and various other theories -- that they have acquired exclusive rights to use portions of the ROW for their own parking.[13] In

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[12] Vince also had brought a trespass count based on Audette's having deposited dredged material on his property. Because ownership of the land was at that point not being contested, the judge dismissed the trespass count as lying outside the Land Court's jurisdiction. The judge also expressed her view that Audette's leaving the material was "inadvertent" and that he addressed the issue after it was brought to his attention.

[13] In fact, Vince was not allowed to press such claims in the current litigation because the judge concluded these were barred by claim preclusion (in light of the fact that Vince had not raised them in the earlier litigation). Pointing out that the dispute over Audette's use of the ROW for parking had not

the alternative, the Kubics sought a unilateral modification to the easement that would allow them the exclusive right to park in the upper portion of the ROW. See Martin v. Simmons Props., LLC, 467 Mass. 1, 9-10 (2014).

In 2014, Audette moved to dismiss the case, and the Kubics cross-moved for partial summary judgment regarding the title issues. The judge never resolved these motions on the merits.[14] Following extensive motion practice regarding amendments to the complaint and other issues, a two-day trial was held on nonconsecutive days in 2017 and 2018.[15] The judge issued findings and rulings in 2019.

The judge ruled that pursuant to the derelict fee statute, the Kubics, not Audette, owned the fee to the ROW (with Vince and Paul each owning to the ROW's center line). With regard to the scope of Audette's rights to use the ROW, she concluded that he had the right to drive on it, to make improvements to

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arisen before the first action was dismissed, Vince argues on appeal that the judge erred in not allowing him to pursue these claims in the current action. Given our resolution of the parking issues on other grounds, we need not reach this issue.

[14] The cross motions were filed in January and February of 2014. A year and one-half later, the Kubics filed an amended complaint, and in October of 2015, the judge formally denied the still-pending cross motions "[i]n light of the Amended Complaint having been filed."

[15] On a third day, the judge took a view.

facilitate motor vehicle use, and to park there. However, the judge also ruled that Audette's rights to drive and park on the ROW were personal to him and his "household members," and that his guests generally could not drive or park there.[16] With regard to Paul's efforts to secure exclusive rights to park in the portion of the ROW next to his house, the judge ruled that he failed to establish either that he already had acquired such rights or that he unilaterally should be allowed to do so through a modification of the easement.

The judge declined to resolve whether the ROW extended all the way to the current waterline of the lake, and the related issue regarding which party owned the underlying fee in the shoreline area. She reasoned that the record was insufficient to resolve these issues due to the lack of information regarding what in fact had caused the lake's waters to recede. Accordingly, the judge "proceed[ed] to decide the [Kubics'] claims in this case only as they apply to the location and

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[16] In a footnote, the judge recognized that "there might be occasions where a guest might need to drive down the [ROW] to the [l]ake." In the judgment, the judge stated that Audette could "permit his guests to access the [l]ake over the [ROW] by foot," without defining who would qualify as a "guest." In their respective appeals, neither party raised the lack of definition of that term as a problem (e.g., whether the term should apply to anyone that Audette invited, or to a subset of those invitees, such as those who accompanied Audette). The parties may want to seek clarification of this in the remand that we order.

dimensions of the [ROW] depicted on the 1948 [p]lan." This resolution, she declared, was "without prejudice to any party seeking adjudication of ownership in a proper proceeding." Both parties appealed. For the reasons that follow, we conclude that the judge could have, and should have, resolved the issues she reserved.

Discussion. 1. Ownership of the shoreline area. As the judge correctly observed, the reason the waterline receded at some point between 1948 and the early 1960s was not established at trial. It may well be, as Audette contends, that the water level of the lake was lowered by human intervention at a dam. The judge concluded that she could not determine who owns the shoreline area without information about why the waterline receded.[17] In so concluding, she expressly declined to adopt a legal presumption that the emergence of the land was the result of accretion or reliction. Such a presumption has not been recognized in Massachusetts, but it has been recognized in many other States.[18]

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[17] The judge did not explain how Audette's claim to ownership of the shoreline area would be strengthened if the receding of the water levels was caused by changes made at the dam. Neither has Audette on appeal.

[18] The Kubics cited to cases in fourteen States that have adopted such a presumption, sometimes known by the shorthand "presumption of accretion." See State v. Bonelli Cattle Co., 107 Ariz. 465, 467-468 (1971); Pannell v. Earls, 252 Ark. 385, 388 (1972); Hall v. Brannan Sand & Gravel Co., 158 Colo. 201,

We are not unsympathetic to the judge's frustration about the limited state of the evidence regarding the lake's historic water levels, and about what role, if any, a dam on the lake has played in determining them. The question, however, is whether the absence of such information prevented the judge from resolving the highly contentious dispute presented to her. In our view, it did not. For the reasons that follow, we conclude that based on existing case law and the current record, the question whether the littoral owners hold title to the shoreline area could be answered. Adopting a general presumption of accretion or reliction is unnecessary to reach our conclusion, and, therefore, we do not decide whether such a presumption is warranted.

It is undisputed that Webster Lake qualifies as a great pond, a term that includes "a pond that exceeds ten acres in its

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204 (1965); Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1118 (Fla. 2008), aff'd 560 U.S. 702 (2010); Nesbitt v. Wolfkiel, 100 Idaho 396, 398 (1979); Kitteridge v. Ritter, 172 Iowa 55, 59 (1915); Murray v. State, 226 Kan. 26, 36-37 (1979); United States Gypsum Co. v. Reynolds, 196 Miss. 644, 659 (1944); Roe v. Newman, 162 Mont. 135, 139-140 (1973); Woodland v. Woodland, 147 N.W.2d 590, 600 (N.D. 1966); State ex rel. Comm'rs of Land Office v. Seelke, 568 P.2d 650, 654 (Okla. Civ. App. 1977); Gubser v. Town, 202 Or. 55, 73 (1954); Cunningham v. Prevow, 28 Tenn. App. 643, 657-658 (1945); Severance v. Patterson, 370 S.W.3d 705, 722-723 (Tex. 2012). That presumption appears to have been rejected with respect to one State. See Omaha Indian Tribe, Treaty of 1854 with U.S. v. Wilson, 614 F.2d 1153, 1158 n.6 (8th Cir. 1980) (applying Nebraska law).

natural state." Opinion of the Justices, 474 Mass. 1201, 1203 (2016). "The great ponds of the Commonwealth belong to the public, and, like the tidal waters and navigable streams, are under the control and care of the Commonwealth." Attorney Gen. v. Jamaica Pond Aqueduct Corp., 133 Mass. 361, 364 (1882). As a general rule, title to both the land under a great pond and the waters in the pond are held by the Commonwealth for the benefit of the public. See Watuppa Reservoir Co. v. Fall River, 147 Mass. 548, 554-557 (1888).[19] Moreover, just as with coastal land, private party ownership of land abutting a great pond generally extends to the low water mark, albeit subject to there being reserved public rights in any area between high and low water.[20] See id. at 556 ("The cases we have cited deal with questions as to the title and rights to the sea-shore; but the laws of Massachusetts, from the earliest times, have regarded

[19] There is at least one exception to this rule that applies to a great pond that the King deeded to a private party prior to the enactment of the Colonial Ordinance of 1641-1647. Watuppa Reservoir Co., 147 Mass. at 553-554 (Humfrey's Pond located in Lynnfield and Danvers). No party at trial maintained that such an exception applies to Webster Lake.

[20] For those great ponds that lie inland far from tidal forces, there may not be separate high and low water marks. In the case before us, the parties agreed to the approximate location of a single waterline, without reference to high or low water.

the rights of the public in the great ponds as similar to their rights in the sea-shore").

Here, the record establishes that, at least for a period of time that included 1948, the shoreline area was submerged. This raised some question whether the Commonwealth might make a claim of ownership of such land if and when it reemerged. See Potter v. Howe, 141 Mass. 357, 360 (1886) (recognizing circumstances under which lowering of pond might create strip of land held by Commonwealth). However, in the case before us, we need not be concerned with this possibility, because the Commonwealth expressly disavowed such a claim in an amicus brief it filed in the Land Court.[21] Rather, in the Commonwealth's view, the reemerged land that makes up the shoreline area is owned by the littoral owners, whoever they may be.

The Commonwealth's position is consistent with long-established case law, which recognizes that the waterside boundaries of littoral property generally follow the changing waterline. White v. Hartigan, 464 Mass. 400, 407–408 (2013)

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[21] The Commonwealth initially sought to intervene and suggested that the trial date be postponed so that it could do so. The judge expressed her reluctance to postpone the trial and invited the Commonwealth to consider filing an amicus brief in lieu of intervening. The Commonwealth ultimately determined that this option sufficiently protected its interests. We need not decide how the principles enunciated in this opinion would apply had the Commonwealth not foresworn title to the reemerged land.

("littoral [shoreline] boundaries are not fixed, because natural processes of accretion or erosion change them"; "[t]he line of ownership [of littoral property] follows the changing water line" [quotations and citations omitted]). As a general rule, a littoral owner is entitled to newly emergent land whether that land emerged as a result of accretion (the gradual buildup of material next to the existing land) or reliction (the gradual receding of the waters), while such an owner loses title to land lost to the water through erosion. The Supreme Judicial Court has recognized three considerations that underlie this doctrine:

> "(1) the interest in preserving the water-abutting nature of littoral property; (2) the promotion of stability in title and ownership of property as it concerns newly accreted property; and (3) the equitable principle that a property owner who enjoys the benefit of an increase in property when waterlines shift seaward ought also to bear the burden of a decrease in property when waterlines shift landward."

Id. 407.[22] There are some exceptions to the general rule. For example, the cases indicate that an owner cannot artificially add to his land and then claim the benefit of the addition. See

[22] Relying on such considerations, we even have held that where littoral land is registered, newly accreted land that becomes part of the registered property itself is deemed registered upon its creation. Brown v. Kalicki, 90 Mass. App. Ct. 534, 538-539 (2016).

Michaelson v. Silver Beach Improvement Ass'n, 342 Mass. 251, 254 (1961).[23]

The rule that the boundary of littoral property shifts with the changing shoreline has been applied to land adjacent to ponds. See Lorusso v. Acapesket Improvement Ass'n, 408 Mass. 772, 780-783 (1990) (owners of land abutting coastal pond acquired ownership of accretions thereto).[24] However, as Audette

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[23] See also Lorusso v. Acapesket Improvement Ass'n, 408 Mass. 772, 780 (1990) (accretions created by government as necessary aids to navigation are owned by government). The judge appears to have assumed that the rule that boundaries follow changing shorelines does not apply where such changes rapidly occurred through an avulsion, rather than gradually through reliction or erosion. Although some statements in the cases could be taken to suggest that it may matter whether the changes to the waterline are gradual or sudden, see, e.g., Michaelson, 342 Mass. at 253-254 (noting gradual nature of accretions), we are unaware of any reported Massachusetts case that actually turns on this distinction. We need not address whether the judge was correct to assume that a change caused by an avulsion would not alter property lines, because Audette's specific claim is that the shoreline area emerged as the result of the operation of the dam, not due to some avulsive event.

[24] The judge placed great reliance on her reading of an advisory opinion that the Justices of the Supreme Judicial Court issued to the Senate in 2016. See Opinion of the Justices, 474 Mass. 1201 (2016). There, the Justices declined to answer the inquiry the Senate had posed, because these "issues cannot properly be resolved in an advisory opinion, at least not with the limited information we have here." Id. at 1207. The judge viewed such statements as establishing that "the applicability of the long-established littoral ownership rules to great ponds is still an open question." In our view, the judge read too much into the statements the Justices made. We see nothing in the Justices' opinion that indicates an intention to abrogate existing case law, or to suggest that the law applicable to great ponds is completely unsettled. Rather, we view the Justices' statement as signifying only that it was inappropriate

emphasizes, ponds are different from ocean waters in some respects, thereby implicating some legal questions that do not arise as to coastal property. As is relevant here, if a pond has a dam, the waterline can be altered by the manipulation of the water level through operation of the dam. Indeed, some ponds owe their very existence to the damming of a stream. The question then is how the artificial raising or lowering of the water level of a pond affects the ownership of the land that emerges, or is submerged, as a result.

As the law developed, the ownership of littoral property on natural ponds -- which include great ponds -- was treated differently than that on man-made ponds created by damming a stream (impoundment). The owner of littoral property on a natural pond owned down only to the low water mark. Waterman v. Johnson, 13 Pick. 261, 265 (1832). By contrast, the owners of the land adjacent to a stream that was dammed to form a pond generally continued to own to the former "thread of the stream." Id. However, there is a key exception that applied where "the pond had been so long kept up as to become permanent, and to have acquired another well-defined boundary." Id. Accord Paine v. Woods, 108 Mass. 160, 170-171 (1871). Together, such cases

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to try to answer the Senate's specific inquiry in an advisory opinion, in light of the complicated and fact-dependent nature of the issues, especially with regard to the intersection of public and private rights.

stand for the proposition that although short-term, artificial changes to the water levels of a pond may not affect existing property lines, permanent changes do.[25] In this manner, the distinction between natural ponds and man-made ponds formed by impounding a stream diminishes with the passage of time and the onset of permanency.

Of course, Webster Lake is not wholly man-made. Although the record includes scant information about the lake, we know that -- as a great pond -- it began as a natural water body even if there now may be a dam there. Where property boundaries are redrawn by permanent changes to the water level of a wholly man-made pond, then this same outcome certainly would apply to great ponds that are now subject to a dam. Cf. Michaelson, 342 Mass. at 254 (where accretion caused by mixture of man-made and natural causes, littoral owner is entitled to newly emergent property "provided [the accumulations] are not caused by the littoral owner himself").

Applying these principles to the facts established at trial is straightforward and leads to the conclusion that whoever

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[25] Paine, 108 Mass. at 160, well illustrates this principle. That case involved a pond that was formed by an impoundment that was flooded in the winter for the harvesting of ice. Id. at 166, 172. After noting that permanent changes to the waterline of the pond would have the effect of redrawing property boundaries, the court declined to apply that principle because the changes at issue were merely temporary. Id. at 172.

holds title to the ROW above the 1948 waterline now holds title to the shoreline area below it. As noted, it is undisputed that, but for small seasonal variations, the current waterline has not changed since at least the early 1960s. Even to the extent that the specific cause of the lowered level of the water once might have mattered, now -- more than one-half century later -- it would be beside the point. Regardless of whether the shoreline area emerged as a result of natural reliction or as a result of the operation of a dam, we conclude that the ROW now extends through the shoreline area to the current waterline. This result fulfils the purpose for which the ROW was created by continuing to provide easement holders access to the lake. Cf. Maslow v. O'Connor, 93 Mass. App. Ct. 112, 115-117 (2018) (licensed filling of tidelands area at end of right of way did not extinguish rights of easement holders to gain access to sea).[26] We now turn to the question of identifying who holds the fee interest in the ROW.

2. Title to the ROW. Pursuant to G. L. c. 183, § 58, the derelict fee statute, the transfer of title to land abutting a

[26] Bergh v. Hines, 44 Mass. App. Ct. 590, 593 (1998), is not to the contrary. There, the easement holders held a lateral easement running along a beach. Seeking to push the easement further from their home, the owners of the servient estate argued that the location of the easement moved seaward to follow the contours of a shoreline that their predecessors-in-title had extended by filling. We affirmed the Land Court's rejection of that claim based on the particular facts presented.

way is presumed to transfer the grantor's fee interest in the way. See Tattan v. Kurlan, 32 Mass. App. Ct. 239, 242-247 (1992). The effect of the statute is "to quiet title to sundry narrow strips of land that formed the boundaries of other tracts, by establishing 'an authoritative rule of construction for all instruments passing title to real estate abutting a way.'" Rowley v. Massachusetts Elec. Co., 438 Mass. 798, 803 (2003), quoting Tattan, supra at 242. Quieting title in such "sundry narrow strips of land" in turn has the salutary effect of promoting repose; by creating a robust presumption that the adjacent land owner acquired title to the way, the statute serves to discourage others from trying to search ancient deed records for "lost" fee interests upon which a competing claim to title could be based.

Pursuant to G. L. c. 183, § 58, the ownership of the northern one-half of the ROW is no longer in dispute: Vince holds title to that land (subject, of course, to the easement rights of others). Audette now concedes the point, while still claiming ownership of the fee in the ROW's southern one-half.

Whether Paul holds the underlying fee in the southern one-half of the ROW presents a closer question. The statutory presumption that the purchaser of land bordering a way acquired the grantor's fee interest in that way can be overcome by language in the deed excepting the transfer of that interest.

Rowley, 438 Mass. at 804. Audette argues that the language in Paul's source deed stating that "no Right of Way is conveyed herein over any land located Northerly of [the southerly boundary of the ROW]" demonstrates the Robinsons' intent not to transfer any fee interest in the ROW. While this argument is not without some force, we ultimately find it unpersuasive.

As our cases indicate, "the derelict fee statute pertains only to the question of ownership of the fee" in a way; it is not concerned with the existence or nature of any easement rights there. Adams v. Planning Bd. of Westwood, 64 Mass. App. Ct. 383, 389 (2005) (despite enactment of G. L. c. 183, § 58, "existence, nature, scope, and extent of easement rights in a way" can be shown by extrinsic evidence). In light of the fact that the statute bears only on the issue of who holds title to the fee of a way, we have held that only an express reservation of the fee in the way can overcome the presumption created by the statute. Tattan, 32 Mass. App. Ct. at 244-247 (evidence in deed that disputed strip of land bordering grantee's property was reserved for use as way held insufficient to establish that fee in strip was reserved to grantor).

Against this background, we note that the relevant language in Paul's source deed excepts from transfer a "right of way" in the ROW. In this manner, the deed speaks in terms of rights to use the ROW, not to the question of whether the Robinsons

retained the underlying fee.[27] We agree with the judge that such language is insufficient to overcome the statutory presumption that the fee interest in the ROW passed to Paul's father when he acquired the northern portion of lot 14. We additionally note that this interpretation serves to avoid the very sort of mischief that the derelict fee statute was enacted to prevent: unnecessary title disputes created by a party's pursuing from a developer's putative heirs a fee interest in a way that the developer arguably intended to reserve despite the absence of clear deed language to that effect.

3. Scope of the easement. Having concluded that Vince and Paul own the fee interests in the ROW, and that the ROW extends to the current waterline, we turn to what rights are held by Audette and the other easement holders. As signified by the ROW's designation as a "right of way," the easement holders were given a right to use the ROW to gain access to the lake. Once there, they can use the lake for fishing, swimming, boating, and other uses that are reserved for the public in great ponds. See

[27] Audette argues that because the person who holds the fee interest in a way already would have the right to use that way, the language of the source deed necessarily presupposes that the grantees would not hold the underlying fee. In other words, Audette contends that if Paul were deemed to own the fee in the southern one-half of the ROW, then the language excepting a right of way to use that area would be rendered to be of no effect. However, as the judge observed, the deed can be interpreted as denying him a right to use the northern one-half of the ROW.

Watuppa Reservoir Co., 147 Mass. at 558. Cf. Maslow, 93 Mass. App. Ct. at 115 (right of way to tidelands allowed easement holders ability to exercise rights reserved there).

With regard to what modes of transport are allowed, we discern no error in the judge's conclusion that easement holders may use motor vehicles in the ROW. Put differently, it was within the judge's authority to determine that using motor vehicles to ferry people or goods to the water was "reasonably necessary to the full enjoyment" of the access rights that the easement provided (citation omitted). Cannata v. Berkshire Natural Resources Council, Inc., 73 Mass. App. Ct. 789, 795 (2009). In addition, Audette and other easement holders possess the right to "make reasonable repairs and improvements to the right of way." Chatham Conservation Found., Inc. v. Farber, 56 Mass. App. Ct. 584, 589 (2002).

However, it does not follow that Audette also has a right to park on the ROW. As we have observed, "a right to pass and repass does not normally imply a right to park." Harrington v. Lamarque, 42 Mass. App. Ct. 371, 375 (1997). That principle has particular application where, as here, there is alternative parking in the immediate vicinity. Specifically, there is public parking on Fairfield Street (a mere 130 feet from Audette's dock), and, in any event, Audette's home is only

another 200 yards or so down the road.[28] Audette is unable to show a "reasonable need" to park on the ROW in order for him and other easement holders to use their right to access the lake. We conclude that apart from temporary parking needed for easement holders to offload people or items at the shore of the lake, only the Kubics have the right to park on the ROW.[29]

We turn next to Audette's use of the shoreline area and whether such use extends beyond the scope of his easement rights, or, if not, whether it nevertheless overburdens the easement. Easement holders have the right to cross the shoreline area, but not the right to occupy that area without the Kubics' permission, be it by hosting social events, placing a picnic table, or storing the dock over the winter. Nor can any easement holder block or otherwise interfere with the rights of other easement holders or the Kubics to gain access to the lake.

The remaining issues have to do with Audette's placement and use of his dock. We recognize that only a small portion of the dock lies within the ROW; most of it is moored over

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[28] The other lots benefited by the easement lie even closer.

[29] Having resolved the conflicts over parking in this manner, we need not address the suite of issues raised by the Kubics' efforts to establish their exclusive rights to park there (as their counsel acknowledged at oral argument). Of course, the Kubics cannot park in a manner that prevents easement holders from gaining access to the lake.

submerged land owned by the Commonwealth. Despite the fact that Audette received a G. L. c. 91 license to occupy that area (albeit based on an application that misrepresented that he was the owner of the land from which the dock extended), the question remains whether the placement and use of the dock is overburdening the easement.[30] There was evidence presented at trial showing that the dock interferes with the ability of others to access the lake to at least some extent. The dock itself creates something of a physical barrier to the lake and there was testimony -- which the judge neither credited nor discredited -- that Audette engaged in various acts of intimidation to discourage others from using the area.[31] The judge made no findings about the extent of any such interference, nor did she address what specific remedy would be

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[30] The G. L. c. 91 license itself states that "[n]othing in this Waterways License shall be construed as authorizing encroachment in, on or over property not owned or controlled by the Licensee, except with the written consent of the owner(s) thereof."

[31] According to unrebutted testimony, Audette made it clear that other people were not welcome to use the area. For example, according to Vince's brother, when he tried to take his nine year old nephew fishing in 2013, and the wind started to blow their rowboat toward the dock, Audette began yelling, "Don't touch my dock, don't touch my dock, get away from my dock" (an interaction that Vince's brother claimed caused him to avoid using the waterfront area or even Vince's yard when he visits). Vince's wife corroborated her brother-in-law's account.

appropriate.[32] Such findings are necessary to determine the extent to which the construction and use of the dock overburdens the easement. Accordingly, a remand is necessary to consider such questions.[33]

Disposition. We vacate the judgment insofar as it states that Audette and his household members have a right to park on the ROW. We also order that the judgment be modified consistent with this opinion as follows: (1) to state that the ROW extends to the current waterline, (2) to establish the rights that Audette and other easement holders have to use the shoreline area, and (3) to prohibit Audette's activities in the shoreline area that constitute occupation of that area. The judgment is otherwise affirmed. We remand the case to address the extent to which Audette's use of the dock unreasonably interferes with the rights of Vince, Paul, and people other than Audette who hold easement rights in the ROW.[34]

So ordered.

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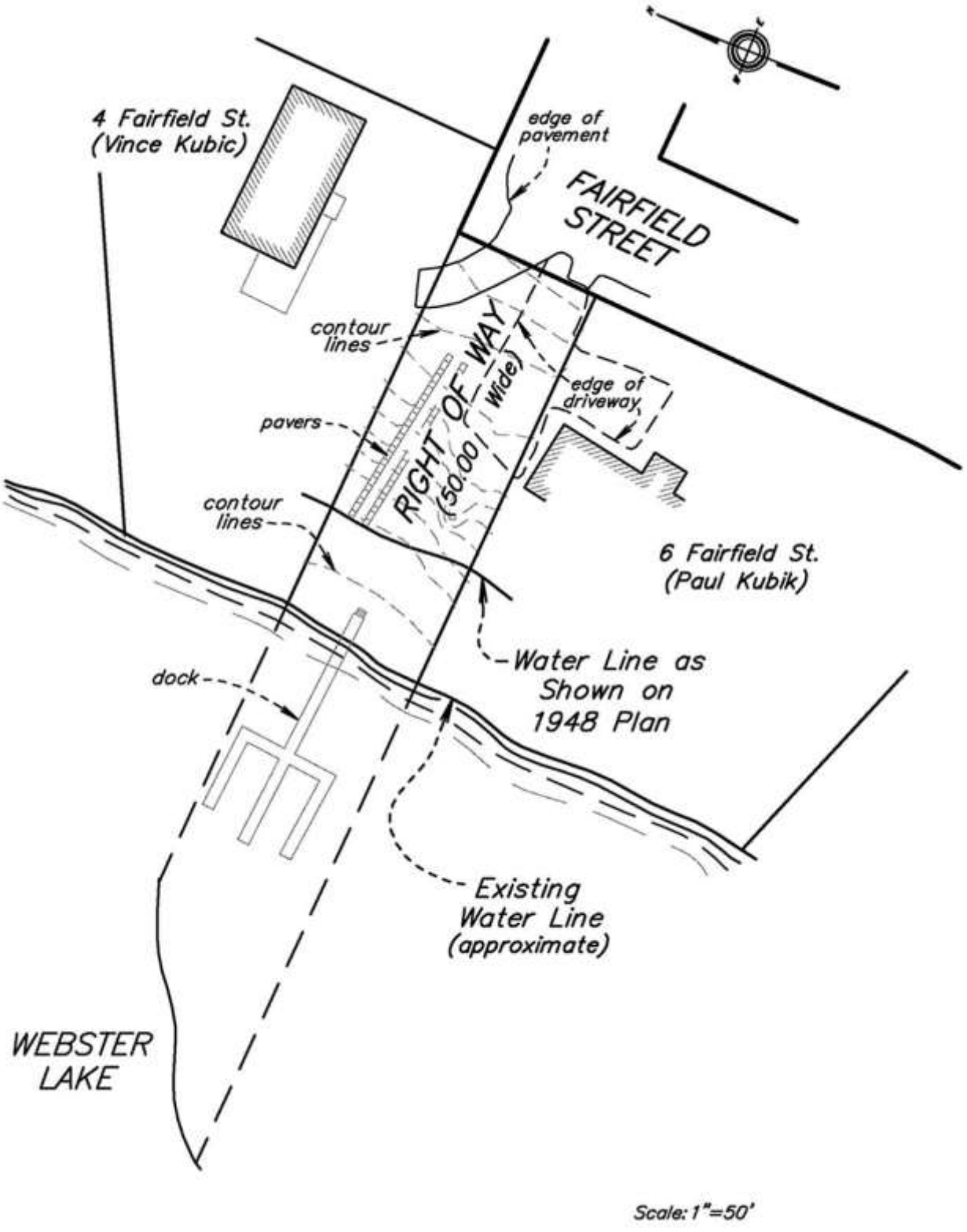
[32] At oral argument, counsel for the Kubics suggested a specific potential resolution: the removal of one of the two existing boat slips, which would have the effect of reducing the width of the dock by almost one-half. We leave it to the parties to consider the merits of this suggested compromise.

[33] We recognize that the judge has retired and that the case therefore will need to be assigned to a different judge.

[34] Vince and Paul's request for appellate attorney's fees is denied.

Appendix


4 Fairfield St.
(Vince Kubic)
edge of
pavement
FAIRFIELD
STREET
contour
lines
RIGHT OF WAY
(50.00' Wide)
edge of
driveway
pavers
contour
lines
6 Fairfield St.
(Paul Kubik)
Water Line as
Shown on
1948 Plan
dock
Existing
Water Line
(approximate)
WEBSTER
LAKE
Scale: 1"=50'