JOHN AND LORI WESTERHOLD, Plaintiffs/Respondents/Cross-Appellants, v. NORMANDY BEACH ASSOCIATES, INC., NORMANDY BEACH IMPROVEMENT ASSOCIATION, Defendant/Appellant/Cross-Respondent and TOWNSHIP OF BRICK, NEW JERSEY, Defendant/Respondent,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-2551-22T4 **Civil Action** On Appeal From Order of The Superior Court of New Jersey, Chancery Division, Ocean County Docket No. OCN-C-37-20 Sat Below: Hon. Francis Hodgson, Jr., P.J.Ch.

BRIEF ON BEHALF OF DEFENDANTS/APPELLANTS/CROSS-RESPONDENTS NORMANDY BEACH ASSOCIATES, INC. AND NORMANDY BEACH IMPROVEMENT ASSOCIATION IN SUPPORT OF THEIR APPEAL

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PRELIMINARY STATEMENT

Defendants/appellants Normandy Beach Associates, Inc. ("NBA") and Normandy Beach Improvement Association ("NBIA") appeal the trial court's erroneous order that granted partial summary judgment to plaintiffs/respondents John and Lori Westerhold on their claim for an implied easement appurtenant across NBA's private property and the protective sand dunes constructed thereon. In addition to the burdens and harms that the trial court's decision caused to private property rights, this case also involves an issue of significant public and private importance with far-reaching implications concerning preservation of beach dunes constructed at huge public expense to protect our beaches and coastal communities.

NBA and its predecessors-in-title previously permitted plaintiffs and their predecessors-in-title to access the mean high-water line ("MHWL") of the Atlantic Ocean by walking directly from their property across the NBA property as an alternative to the nearby common access paths used by the rest of the community. That changed after Hurricane Sandy struck in October 2012 and demonstrated the devastating damage that ocean storms can cause to coastal communities. The United States Army Corps of Engineers ("USACE"), the State of New Jersey, and many municipalities spent hundreds of millions of dollars to construct sand dunes along the Jersey Shore as a storm-damage reduction measure. The dunes constructed on and over NBA property are essential to protecting Normandy Beach and other

coastal communities, and required NBA to take appropriate and critical steps to preserve them. Consistent with the USACE design plans and the New Jersey Department of Environmental Protection's ("NJDEP") Coastal Zone Management Rules ("CZM Rules"), NBA determined that to avoid damage to and degradation of the protective dunes it could no longer allow its beachfront property owners, such as plaintiffs, to breach the dunes to access the MHWL. Instead, NBA would limit intrusions across the dunes to the eight street ends, which are no further than 150 feet from any beachfront property owner. In fact, most beachfront owners, including plaintiffs, are only about 50 feet from the nearest beach access point.

NBA was and is fully within its private property rights to limit beach access to these common access points, as this is exactly what the original developers of Normandy Beach intended. The foundational 1925 Map shows that the original owners and sellers of the plaintiffs' property planned to construct a boardwalk, which would have been a physical barrier to east-west crossing, along the beach with common access points; no private access points are shown. Further, neither the chain of title to plaintiffs' property nor the chain of title to NBA's property contains a reference to any such easement. Rather, the express language in the chain of title to plaintiffs' property defines the eastern boundary as ending "two feet west" of a reservation for the planned boardwalk on NBA's property, which NBA's predecessor-in-title specifically withheld for itself.

Nevertheless, unconcerned with preserving the dunes or protecting the broader community from the next super storm or hurricane, and instead indignant over a 50-foot walk, plaintiffs filed suit to force NBA to allow them to walk across the federally funded and environmentally protected dunes. Plaintiffs' claim for an implied easement is essentially built on a single premise: that because their property is in close proximity to the beach, conveyance instruments, boundaries, borders, regulations, and case law does not apply to them. Plaintiffs' claim further rests on the argument that their own self-serving assumptions about a grantor's intent in 1929 should take precedence over the express language used at that time or the host of more reasonable interpretations of what the original parties intended.

The motion record, viewed in the light most favorable to defendants, failed to establish an implied easement appurtenant by the requisite clear and convincing evidence. Indeed, the record had substantial evidence from which a factfinder could reasonably conclude that no such easement was intended. Nevertheless, swayed by the proximity of plaintiffs' property to the ocean, the trial court incorrectly ruled that plaintiffs have an easement across NBA's property and the protective dunes based on its own interpretation of what it thought would have been reasonable for the original seller and buyer to have assumed about beach access in 1929. The trial court's erroneous decision to grant plaintiffs an implied easement that burdens their property rights and threatens the protective integrity of the dunes should be reversed.

PROCEDURAL HISTORY

Plaintiffs filed a complaint on February 28, 2020, against NBA, NBIA, and Brick Township, asserting, in addition to their claim for an implied easement, claims for breach of an express easement, violation of riparian rights, nuisance, trespass, equitable and promissory estoppel, and inverse condemnation. (Da9) Plaintiffs filed an amended complaint on June 29, 2020, adding claims for fraud and a prescriptive easement. (Da149)

Plaintiffs thereafter filed a motion for partial summary judgment as to their implied easement claim on October 1, 2021. (Da4) The trial court held oral argument on November 12, 2021, after which Judge Hodgson ruled from the bench and granted plaintiffs an implied easement to cross NBA's property. (T61:8—T73:20) After entering an order with a mistake as to the relief awarded (referencing the wrong count of plaintiffs' complaint), the trial court entered a corrected order on November 22, 2021 memorializing its oral ruling. (Da2601-Da2607)

In December 2021 NBA sought interlocutory appellate review of the trial court's order to vindicate its property rights and safeguard the protective sand dunes, but NBA's motion for leave to appeal was denied. (Da2613) After additional proceedings and rulings at the trial court, all then-remaining claims were dismissed, and the trial court entered a final judgment order for this case on March 14, 2023. (Da2608-Da2612) This appeal followed.

STATEMENT OF FACTS

The Facts Before the Trial Court

The detailed facts of this dispute are set forth in the parties' extensive submissions before the trial court as reflected in the accompanying multi-volume appendix. In brief, the key facts are as follows:

In 1921, NBA's predecessor-in-title, Coast and Inland Development Company ("C&I"), acquired oceanfront land that became known as Normandy Beach. A subdivision plan for Normandy Beach was created in 1923 and filed with the Ocean County Clerk in 1925 ("1925 Plan"). (Da415) The 1925 Plan included a map ("1925 Map") setting forth multiple blocks and lots, including the two properties that are at issue in this case. (Da416-Da419)

NBA owns one of the properties, known as Normandy Beach ("Normandy Beach" or "NBA Property"). (Da486) NBA's chain of title runs successively and directly from C&I. (Da455-Da558, Da467-Da490) None of the title transfers in the chain from C&I through NBA for the NBA Property contains any language identifying any easement enabling other property owners to access the Atlantic Ocean below the MHWL via Normandy Beach, or implies any similar burden on the NBA Property. (Da455-Da558, Da467-Da490)

Plaintiffs own the other property, known as 526 Ocean Terrace, Normandy Beach, Brick Township, New Jersey (the "Westerhold Property"). (Da400) Their

chain of title runs successively and directly from a 1929 conveyance from C&I to Samuel Berger (the "Berger Indenture"). (Da442, Da551) None of the title transfers in the chain from C&I through plaintiffs for the Westerhold Property contains any express language identifying or granting any easement over any adjacent lots to any owners of the Westerhold Property, nor does any contain language implying such an easement. (Da400-Da405, Da491-Da508)

Indeed, the 1925 Plan, which is the source of any appurtenant rights for plaintiffs, demonstrates that no such rights should be implied. (Da415) The 1925 Plan shows 74 lots (of which 37 are beachfront) and eight defined entrances to Normandy Beach from each of eight identified avenues. (Da415) Nothing in the 1925 Plan implies direct access from any beachfront lot across the NBA Property to the beach, as such access is shown at the eight street entrances. (Da415)

The 1925 Plan also shows a two-foot wide "Ocean Boardwalk Reservation" ("Reservation") to the west of Normandy Beach and to the east of the beachfront properties, including the Westerhold Property. (Da415) The 1925 Plan does not show access points to or across the Reservation from properties located west of the Reservation, does not expressly identify any easements from properties located west of the Reservation to Normandy Beach, and does not expressly identify any easements from properties located west of the Reservation to the MHWL of the Atlantic Ocean. (Da415) The Reservation was included because, as also shown on the 1925 Plan, C&I

intended to erect a boardwalk on property it retained for itself, and the Reservation provided C&I with access to maintain the boardwalk. (Da947) In recognition of this Reservation, neither the Berger Indenture, nor any of the succeeding conveyances of the Westerhold Property through the deed conveyed to plaintiffs, has an eastern boundary that ends less than two feet west of Normandy Beach. (Da400, Da442, Da491-Da508)

In 1949, Charles Kupper acquired the Westerhold Property through a Final Judgment issued by the Superior Court of New Jersey, Ocean County, Chancery Division. (Da501) Normandy Beach Owners, Inc., the then-owner of Normandy Beach, was not a named party, nor was Normandy Beach one of the properties at issue in the 1949 Final Judgment. (Da501, Da642) Nothing in the 1949 Final Judgment, including the description of the property awarded to Kupper, contains anything indicating that the Westerhold Property had any express or implied easements of access across the NBA Property to the MHWL or the Atlantic Ocean. (Da501-Da508) To the contrary, everything relating to the filing of the 1949 Final Judgment, and particularly the specificity with which the property rights were described, indicates that Kupper (only 24 years after the 1925 Plan was filed) had no easement rights over the NBA Property. (Da642-Da649) In addition, the 1949 Judgment contains nothing to suggest an easement across the NBA Property with

respect to the other properties covered by 1949 Judgment, either. (Da501-Da508, Da642-Da649)

After Hurricane Sandy, the NJDEP in partnership with the USACE undertook flood hazard risk reduction measures that included the construction of engineered sand dunes and beach berm projects.[1] As part of those efforts, the USACE required New Jersey to obtain Deeds of Dedication and Perpetual Storm Damage Reduction Easements ("PSDREs") from some property owners, including plaintiffs and NBA, for the construction, operation, and maintenance of the sand dune project. (Da509, Da515) However, the PSDREs do not require the private property owners to grant any public access, nor did the PSDREs take property away from anyone. (Da1148, Da1308-Da1309) Thus, the Westerholds were not given any rights to, or over, the NBA Property as a result of the Westerhold PSDRE. (Da509, Da964) Likewise, the Westerholds were not granted any rights to, or over, the NBA Property by the NBA PSDRE. (Da509, Da515, Da964-Da966, Da1176, Da1585-Da1586) Moreover, there are no provisions in the NBA PSDRE that require NBA to provide private dune overwalk structures to parties (such as plaintiffs) demanding private access to the

[1] State and local authorities have also acted to protect the integrity and effectiveness of these dunes; for example, NJDEP put up signs telling all people to stay off the dunes and Brick has ordinances enforced by fines warning people to stay off the dunes.

MWHL, and the NBA PSDRE expressly provides that "[s]tructures not part of the project are not authorized." (Da515)

In 2018, plaintiffs constructed a private dune walkover directly from their property to the beach, traversing the protective dunes built by the USACE on the NBA Property. (Da2403) Brick Township issued violation notices to plaintiffs and to NBA because the plaintiffs had constructed their walkover without first securing the required permit and demanded that the walkover be removed from their respective properties. (Da818-Da819) Plaintiffs' subsequent permit application was denied because plaintiffs did not have NBA's consent[2] to build the walkover across NBA Property, and NBA removed that portion of plaintiffs' walkover from its property as directed. (Da812-Da816, Da538-Da540) Following the trial court's ruling in their favor on their motion for summary judgment that granted them an implied easement across the NBA Property, plaintiffs again built a private dune walkover from their property over NBA's Property to the beach.

The Trial Court's Erroneous Decision

At the conclusion of oral argument on plaintiffs' motion for partial summary judgment, the trial court issued a verbal ruling that plaintiffs have an implied easement appurtenant over the NBA Property. (T61:8—T73:20) In so doing, the trial

[2] Whether or not NBA, or its predecessors-in-title, previously permitted plaintiffs, or their predecessors-in-title, to cross the NBA Property to the MHWL is of no legal consequence to plaintiffs' claim to an implied easement appurtenant.

court relied on the proximity of the Westerhold Property to the Atlantic Ocean, as well as its own interpretation of what it thought would have been reasonable for the parties to have assumed about access to the Atlantic Ocean in 1929. (T66:19—T72:8)

The trial court's decision was contrary to the record before it, which was to be viewed in the light most favorable to defendants. Even with a view most favorable to plaintiffs, there was a dearth of information on which to imply an easement across the NBA Property. Although there was no evidence to support this, the trial court speculated that the original requirement in the Berger Indenture that a house built on a lot that bordered the NBA Property must cost more and be larger than houses built on lots not bordering the NBA Property somehow meant that the original parties intended there to be an unwritten easement that owners of such bordering lots could cross the NBA Property to the beach. (T68:19-69:18) The trial court similarly speculated, again without evidential support, that the inclusion of terms such as "Surf Fishing" and "Surf Bathing" in a 1920s advertisement for Normandy Beach – activities that were available to all purchasers of property in Normandy Beach and not just purchasers of lots that bordered the NBA Property – implied an intent to include an unwritten easement for owners of only the bordering lots to cross the NBA Property to the beach. (T66:23—T67:7) The trial court further relied on its unsupported supposition that the original purchaser of the Westerhold Property

would not have felt "obligated" to access the beach at one of the many street ends. (T67:8-15) Finally, the trial court concluded that C&I's subsequent decision not to build the planned boardwalk supported its ruling that at the time of the initial conveyance of the Berger Indenture the parties intended an unwritten easement to cross the NBA Property to the beach. (T69:19—T71:1)

LEGAL ARGUMENT

THE TRIAL COURT'S ERRONEOUS ORDER MUST BE REVERSED BECAUSE PLAINTIFFS DID NOT AND CANNOT ESTABLISH AN IMPLIED EASEMENT APPURTENANT BY CLEAR AND CONVINCING EVIDENCE (Da2601-2607, T61:8—T73:20)

A. Standard of Review

When determining a motion for summary judgment, the trial judge must determine whether "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Naturally, "conclusory and self-serving statements by one of the parties are insufficient," to create a genuine issue of material fact. Pruder v. Beuchel, 183 N.J. 428, 440-41 (2005). This court is to use "the same standard governing the motion judge's decision," but owes "no special deference to the motion judge's legal analysis." Russi v. City of Newark, 470 N.J. Super. 615, 619-20 (App. Div. 2022) (citations omitted).

B. An Implied Easement Appurtenant Must Be Established by Clear and Convincing Evidence

"An easement appurtenant is created when the owner of one parcel of property (the servient estate) grants rights regarding that property to the owner of an adjacent property (the dominant estate)." Rosen v. Keeler, 411 N.J. Super. 439, 450 (App. Div. 2010) (citing Village of Ridgewood v. Bolger Found., 104 N.J. 337, 340 (1986) (quoting Weber v. Dockray, 2 N.J. Super. 492, 495 (Ch. Div. 1949))).

Appurtenant easements can be express, prescriptive, or implied.[3] See Leach v. Anderl, 218 N.J. Super. 18, 24 (App. Div. 1987). Because implied easements appurtenant arise, if at all, at the time a property owner subdivides and conveys a portion of its property, any analysis of whether such an implied easement exists must focus on the time of that original conveyance. Id at 24-25 (explaining that "implied easements operate on the principle that the parties to the conveyance are presumed to act with reference to the actual, visible and known conditions of the properties at the time of the conveyance and intend that the benefits and burdens manifestly belonging respectively to each part of the entire tract shall remain unchanged").

Determination of an implied easement appurtenant is a fact-specific inquiry that requires clear and convincing evidence. Id. at 26; see also Eileen T. Quigley,

[3] As noted above, this appeal involves only plaintiffs' claim for an implied easement. Plaintiffs' claims for an express easement and for a prescriptive easement were separately dismissed and are not part of NBA and NBIA's appeal.

Inc. v. Miller Family Farms, 266 N.J. Super. 283, 294 (App. Div. 1993) (stating that "implied easements must be established by proofs which are clear and convincing as to all elements"); A. J. & J. O. Pilar, Inc. v. Lister Corp., 38 N.J. Super. 488, 498-500 (App. Div.), aff'd, 22 N.J. 75 (1956) (stating that "the proof of all of the requisite and essential elements of an alleged implied grant should be clear and convincing").

In addition to needing to establish their claimed implied easement by clear and convincing evidence, plaintiffs also were required to meet the summary judgment standard because this issue was before the trial court on their motion for partial summary judgment. Under R. 4:46-2, summary judgment is only appropriate when the "pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged, and that the moving party is entitled to a judgment or order as a matter of law." Plaintiffs were thus required to demonstrate that no reasonable factfinder could conclude that there was not an implied easement. Brill, 142 N.J. at 540.

C. The Record Before the Trial Court Did Not and Cannot Establish an Implied Easement Appurtenant by Clear and Convincing Undisputed Evidence

1. The reasons relied on by the trial court do not establish an implied easement

As noted above, the trial court's analysis of whether plaintiffs had an implied easement appurtenant required a fact-specific inquiry and a determination as to

whether the record established the existence of such an easement by clear and convincing evidence. Moreover, because it was plaintiffs' motion for summary judgment, the trial court needed to determine that no reasonable factfinder could do anything other than decide in plaintiffs' favor. The speculative and unsupported reasons proffered by the trial court in support of its decision failed this standard, and accordingly, the trial court's decision should be reversed.

a. Proximity to the beach

Before examining the specifics of the trial court's opinion, it is important to recognize, as the trial court itself acknowledged, that its ruling was primarily influenced by the proximity of the Westerhold Property to the beach. (T67:8-16, T69:19-23) New Jersey Courts have addressed questions of beachfront access rights before, and proximity to the beach has not, by itself, been the deciding factor. Instead, these courts have recognized the importance of an express easement for access, which necessarily belies the notion that mere proximity is sufficient to imply such an easement.

For example, in Rosen v. Keeler, 411 N.J. Super. at 450, the owners of a single beach lot between a boulevard and the Atlantic Ocean subdivided their lot into a "boulevard lot" fronting the road and an "ocean lot" fronting the ocean. They expressly granted an easement to the boulevard lot so those property owners could access the ocean. The Rosen court noted that this express easement made the

boulevard lot "marketable," implicitly recognizing that without the express easement, the boulevard lot owners would not have ocean access through proximity alone. Id. at 443. That is, the mere fact that the boulevard lot was adjacent to a 'beach' lot (like plaintiffs claim here) did not compel an easement into existence; an express easement was necessary to "make the boulevard lot marketable." Id.

Similar to plaintiffs here, in Levinson v. Costello, 74 N.J. Super. 539 (App. Div. 1962), an oceanfront lot was conveyed to the plaintiffs by reference to a subdivision map. Their lot was among a section of lots that was the recipient of an express easement for access to and from the Atlantic Ocean. Id. at 543. Although Levinson (like Rosen) did not involve an implied easement, the fact that the grantor of the map-described lots found it necessary to expressly convey an easement to non-beachfront lots to allow access to and use of the beach means that proximity alone was not sufficient to guarantee such access through an implied easement.

The notion that mere proximity is a sufficient basis on which to imply an easement is further belied by Bubis v. Kassin, 323 N.J. Super. 601 (App. Div. 1999). In Bubis there were streets running directly from the oceanfront lots to the beach, yet the grantors conveyed an express easement for the oceanfront properties to access the beach in order to "resolve" any "possible doubt" of rights to the beach. As the Bubis court explained:

> . . . plaintiffs' predecessors in title purchased lots in a planned development immediately adjoining the Atlantic Ocean. The map with

> reference to which those lots were sold showed streets running directly from the lots to the beach and an unnamed street next to the Beach and Bluff. Consequently, any person acquiring one of those lots would reasonably have assumed that one of the benefits of property ownership was convenient access to the beach and ocean by means of this street network. Moreover, if there were any possible doubt that access to the ocean and beach was an essential part of the package of benefits which the developers conveyed to plaintiffs' predecessors in title, that doubt would be resolved by the fact that each purchaser acquired not only a lot but also an express easement over the Beach and adjoining Bluff.

Id. at 611.

Thus, as the foregoing cases make clear, nothing about the proximity of the Westerhold Property to the beach provides a basis on which to imply an easement for access across the NBA Property, and the trial court was wrong to give this notion any credence.

b. The required cost and size of a house on the Westerhold Property

In addition to proximity, one of the trial court's specific reasons for its decision was its belief that the requirement that a house built on a lot that bordered the NBA Property must cost more and be larger than houses built on other lots somehow meant that C&I intended there to be an unwritten easement that the owners of the bordering lots could cross the NBA Property to the beach. (T68:19—T69:18) There is simply no logical reason why having a bigger house would have any impact on beach access. Not only was there no affirmative, non-speculative evidence in the record to establish this conclusion, the trial court disregarded other more plausible rationales for these housing requirements. For example, it is reasonable to believe

that C&I intended that houses built on such properties should be bigger and look grander because they would be visible from the planned boardwalk and/or the beach itself and would therefore serve as a positive advertisement for the community. Further, the inclusion of such requirements in the Berger Indenture shows that C&I was sophisticated enough to spell out any easement rights it intended to convey; the fact that C&I did not include any such express easement is thus itself evidence that C&I did not intend to create or convey such an easement, which the trial court failed to properly acknowledge.

c. References to "Surf Fishing" and "Surf Bathing"

Next, the trial court speculated that the inclusion of terms such as "Surf Fishing" and "Surf Bathing" in a 1920s-era advertisement for the sale of lots by C&I implied an intent to include an unwritten easement for owners of bordering lots to cross the NBA Property to the beach. (T66:3—T67:7) The fatal flaw in the trial court's rationale, however, is that the general promotional descriptions of activities available at Normandy Beach were applicable to all owners; availability was not limited to owners of lots bordering the NBA Property, but rather applied generally to all housing lots offered for sale by C&I throughout the Normandy Beach development. (Da420) There is absolutely nothing in this advertisement to suggest, for example, that the purchaser of a lot immediately to the west of the plaintiffs' property would have an implied easement across plaintiffs' property to the beach,

yet that is what would logically be implied by the trial court's decision that the mention of "Surf Fishing" or "Surf Bathing" meant all lots in the development would have direct beach access. In fact, no property owner in the development needed an easement to engage in "surf fishing," "surf bathing," or any of the myriad other activities noted in the advertisement, as all property owners already had ocean access via the eight marked street ends. There is nothing specific about "surf fishing" and "surf bathing" on which to imply an easement across the NBA Property to the beach as opposed to access from the marked street ends instead.

d. Whether Berger felt "obligated" to access the beach via the street ends

The trial court also relied on its unsupported supposition that the original purchaser of the Westerhold Property (Berger) would not have felt "obligated" to access the beach at one of the many street ends. (T67:8-15) Not only is there absolutely no evidence of this in the record, and thus no way for anyone to know Berger's private feelings, but Berger's subjective belief would not be determinative of whether the parties to that initial conveyance – and especially C&I as the original grantor – intended there to be an unwritten easement across the NBA Property to the beach.

e. The boardwalk not being built

The trial court further concluded that C&I's subsequent decision not to build the boardwalk that appeared on the 1925 Map supported its ruling that at the time of

the initial conveyance of the Berger Indenture the parties intended an unwritten easement to cross the NBA Property to the beach. (T69:19—T71:1) However, the subsequent decision not to build the boardwalk is irrelevant to inferring reasonable conclusions about C&I's intent at the time the map was filed. "[W]hen the intent of the parties is evident from an examination of the instrument, and the language is unambiguous, the terms of the instrument govern." Rosen, 411 N.J. Super. 439 (quoting Hyland v. Fonda, 44 N.J. Super. 180, 187 (App Div. 1957)). As defendants' expert Bill Slover explained, "If the boardwalk never was built, it proves, at most, that Coast & Inland, and its successors-in-interest, decided that a boardwalk was either unnecessary or un-welcome. An equally likely explanation for the absence of the boardwalk is that Coast & Inland decided to control access through other means. In any case, a subsequent decision by the owner of Normandy Beach not to build the boardwalk is not evidence of the intent of the parties in 1929." (Da635)

f. The trial court's erroneous reliance on Lennig v. Ocean City Ass'n

Last but not least, the trial court's reliance on Lennig v. Ocean City Ass'n, 41 N.J. Eq. 606 (1886), was erroneous because Lennig is a use case, not an access case, in which the issue was whether the defendant developer had the right to change the fundamental nature of the "tenting ground" properties at issue. Again, as Slover explains:

> Unlike Lennig, [the Westerholds] have never suffered a change of use of the beach or been denied reasonable access to it; unlike Lennig, in

> which "Tenting Grounds" was written clearly on the land to be used in common, there is no indication on the Filed Map that Berger, or any other beachfront owner, would have a private property right to access the ocean directly from their property; and unlike Lennig, there is an improvement in the common area shown on the Filed Map that indicates that the developer is retaining control of Normandy Beach. For Lennig to apply to the case at hand, the Plaintiffs would have to show that they had been deprived of any reasonable access to Normandy Beach; of course, the Plaintiffs cannot show that to be the case. They simply can walk one and one-half blocks to the designated entrance to the beach at the end of Eighth Avenue.

(Da639)

Lennig stands for the proposition that a conveyance describing land conveyed by reference to a map may imply the creation of a servitude restricting use of the land shown on the map to the indicated uses**.** Id. at 608; see also *Restatement (Third) of Property: Servitudes* § 2.13 ("In a conveyance . . . description of the land conveyed by reference to a map or boundary may imply the creation of a servitude, if . . . (1) A description of the land conveyed that refers to a plat or map showing streets, ways, parks, open space, beaches, or other areas for common use or benefit, implies creation of a servitude restricting use of the land shown on the map to the indicated uses"). The comments to the *Restatement* explain that when a

> deed does not expressly spell out the intent to create the servitude or the terms of the servitude, the same cautionary concerns that enter into other decisions to recognize and enforce servitudes that are not fully expressed in writing should be observed in determining whether to imply servitudes under this section. Servitudes should not be implied on the basis of equivocal map labels or references.

See *Restatement (Third) of Property: Servitudes* § 2.13 cmt. a (emphasis added).

Comments b and c of this section of the *Restatement* further confirm that Lennig is inapplicable to plaintiffs' claim for an implied easement. See id. at cmt. b ("If a map or plat clearly designates an area as devoted to a particular use, the inference that servitudes will be created to implement the planned use is strong. Only a clear statement that the developer retains the right to deviate from the uses shown on the map will ordinarily be sufficient to prevent implication of a servitude under the rule stated in this section.") (emphasis added); cmt. c ("When plat shows more than one street or facility for common use. The purchaser of a lot in a subdivision acquires rights to use all the roads, parks, beaches, open spaces, and other areas designated on the plat for common use and enjoyment. With respect to roads, the implied servitudes ordinarily extend to all roads shown on the plat, but in an appropriate case may be limited to those that are reasonably necessary for the enjoyment of the benefited lot.") (emphasis added).

Here, NBA has never changed the use of the beach as a beach nor prevented plaintiffs from using the beach or accessing the beach from the designated street ends. Accordingly, Lennig does not support plaintiffs' claim for an implied easement appurtenant across the NBA Property.

2. Substantial other aspects of the record disprove an easement

The trial court's myopic focus on these speculative and unsupported reasons obscured the substantial import of other significant portions of the motion record

applicable to the Westerhold Property that demonstrate that plaintiffs' motion for summary judgment on their claim for an implied easement should have been denied.

a. The Berger Indenture

The Berger Indenture (in which plaintiffs' property rights have their genesis) demonstrates the strong indication that C&I desired to retain control over what is now NBA's property to the exclusion of any easement such as the trial court awarded to plaintiffs. For example, in addition to describing the eastern boundary of the Westerhold Property as "two feet west" of an "Ocean Boardwalk Reservation" depicted to the east of the beachfront properties on the 1925 Plan, the Berger Indenture also has a number of other restrictive covenants, such as prohibiting the erection of any building within 40 feet of the boardwalk. (Da420, Da442) As Defendants' title expert Slover concluded with respect to these restrictive covenants and the limited eastern boundary:

> in my opinion, [they] demonstrate a desire on the part of the grantor [C&I] to retain: (i) dominion and control over Normandy Beach; (ii) the right to restrict access to the beach itself; and (iii) some level of control over the quality of housing within the development.[cite]. None of this is consistent with an intent to convey an easement benefiting Plaintiffs' property. (emphasis added)

(Da634) Indeed, even plaintiffs' expert agrees that the Berger Indenture does not establish an implied appurtenant easement for plaintiffs. (Da553)

b. The 1925 Plan

Plaintiffs also concede that the 1925 Plan, which they acknowledge is critical to any analysis of their property rights, does not contain anything to support the easement they seek. (Da999) Rather, plaintiff's expert admits that their claim to an easement is, essentially, "we're on or near the beach":

> Q. Okay. Like, for example, is it fair to derive from this that the [implied easement appurtenant] that the Westerholds are talking about is not specifically addressed in a conveyance?
>
> A. It's not, but the genesis document is, is the map, and the map doesn't specifically textually say that you have rights to the beach. It does not say that there.
>
> * * *
>
> Q. Okay. Is there anything else on the map other than proximity that otherwise suggests an easement other than the proximity?
>
> A. No.

(Da935, Da944) Because, as explained above, mere proximity to the beach is not enough under New Jersey law to establish an implied easement, the 1925 Plan does not support plaintiffs' claim for an implied easement.

c. The 1949 Judgment

In addition, even if documents subsequent to the time of the initial conveyance of the Westerhold Property via the Berger Indenture are considered (which they should not be), the 1949 Judgment does not support plaintiffs' claim for an implied easement. Instead, there are three reasonable inferences to be drawn from the 1949

Judgment: (i) had the parties believed in 1949 that the beachfront lots had the implied easement for direct access that the Westerholds now claim, they would have included specific language in the 1949 Judgment to make that clear; (ii) their failure to do so, or to do anything that would indicate they believed they had such an easement, means that they did not hold such a belief; and (iii) if those beachfront lot owners did not believe that they had such an implied easement nearly 75 years ago, that is further evidence that the current owners of the Westerhold property do not have one. In other words, as Slover cogently explains:

> . . . if Woerner and Kupper thought that their beach-front lots had the direct access now claimed by the Westerholds, it is reasonable to infer that they would have included specific language in the proposed Final Decree to that effect. They cared enough about the right of Normandy Beach property owners to access the beach via the streets that they included that language, even though, presumably, no one had ever questioned the existence of that implied easement based upon the map. Yet given the opportunity to establish the easement now claimed by the Westerholds by naming [Defendants' predecessors in interest] as a defendant in the tax sale foreclosure, or at least inserting language describing the direct access easement in the Final Decree, Kupper and Woerner consciously did not do so. In my opinion such inaction under those circumstances (opportunity and a good faith argument) indicates that Woerner and Kupper did not believe that they had the easement the Plaintiffs now are seeking. And if litigants owning beachfront lots held that view 24 years after the creation of the Normandy Beach development, then that is evidence that C&I did not intend to grant a direct access easement to beachfront owners in 1925.

(emphasis added) (Da648-Da649)

CONCLUSION

The record before the trial court was insufficient to find, by the required clear and convincing evidence, that plaintiffs have an implied easement appurtenant to access the Atlantic Ocean directly from their property over the NBA Property. None of the relevant conveyance documents provides a basis to imply an easement to allow plaintiffs to walk across NBA's property (and over the new protective sand dunes) to reach the Atlantic Ocean. While the trial court was swayed by plaintiffs' "proximity to the beach" argument, which is contrary to New Jersey law, and while the trial court was also able to proffer a subjective interpretation of some of the record evidence as supportive of plaintiffs' claim, the trial court did not and could not find that no reasonable factfinder could decide against plaintiffs' position. In fact, there was substantial evidence in the record from which a reasonable factfinder could easily conclude that at the time of the original conveyance of plaintiffs' property, no such easement was created or intended and thus that plaintiffs do not have an implied easement directly from their property across NBA's property. Plaintiffs' motion for partial summary judgement should therefore have been denied. Accordingly, for the foregoing reasons, NBA and NBIA urge this Court to reverse the trial court's order granting plaintiffs an implied easement appurtenant across NBA's property.

Respectfully submitted,

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