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Appellate Division, Second Department Docket No. 2013-01619
Suffolk County Index No. 2010-30131

Court of Appeals

of the

State of New York

JON S. SEMLEAR, FREDERICK C. HAVEMEYER, ERIC SCHULTZ, EDWARD J. WARNER, JR., and WILLIAM PELL, as Trustees of the Freeholders and Commonalty of the Town of Southampton,

Plaintiffs-Movants,

-against-

INCORPORATED VILLAGE OF QUOGUE,

Defendant-Respondent.

PLAINTIFFS' MOTION FOR LEAVE TO APPEAL

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Dated: November 6, 2015

COURT OF APPEALS
STATE OF NEW YORK

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NOTICE OF MOTION FOR LEAVE TO APPEAL

MOTION BY:	Plaintiffs-Movants Jon S. Semlear, Frederick C. Havemeyer, Eric Schultz, Edward J. Warner, Jr., and William Pell, as Trustees of the Freeholders and Commonalty of the Town of Southampton
PLACE AND DATE OF HEARING:	Court of Appeals of the State of New York 20 Eagle Street Albany, New York Monday, November 16, 2015 NOTE: Personal appearance in opposition to the motion is neither required nor permitted.
RELIEF SOUGHT:	An order, pursuant to CPLR 5602(a)(1)(i), granting Plaintiffs-Movants leave to appeal to the Court of Appeals from the April 22, 2015 Decision and Order of the Supreme Court, Appellate Division, Second Department, which reversed the

order and judgment of Supreme Court, Suffolk County dated December 11, 2012, and remitted the matter to that Court "for the entry of an appropriate amended judgment declaring that (a) the Trustees of the Freeholders and Commonalty of the Town of Southampton have no lawful governmental or regulatory power to grant or deny permits in connection with (i) the placement and grading of sand and earth, and (ii) the development, construction, maintenance, and use of structures and lands anywhere upon or in the ocean beaches located within the boundaries of the Incorporated Village of Quogue, except for the management of the specific activities and uses reserved to the inhabitants of the Town of Southampton by L 1818, ch 155, and L 1831, ch 283, for 'taking seaweed from the shores of any of the common lands of said town, or carting or transporting to or from, or landing property on said shores, in the manner heretofore practiced' (L 1818, ch 155, § IV), and (b) any attempt by the Trustees of the Freeholders and Commonalty of the Town of Southampton to exercise or extend such power or authority over ocean beaches within the boundaries of the Incorporated Village of Quogue, including enforcement of any provisions of the Rules and Regulations for the Management and Products of the Waters of the Town of Southampton, except in the management of the specific activities and uses reserved to the inhabitants of the Town of Southampton under L 1818, ch 155, and L 1831, ch 283, is unlawful, unenforceable, and null and void"; and granting such further relief as the Court deems just and proper.

DATE OF NOTICE OF MOTION: November 6, 2015

NOTICE OF MOTION SERVED BY:	WHITEMAN OSTERMAN & HANNA LLP John J. Henry, Esq. Neil L. Levine, Esq. Robert S. Rosborough IV, Esq. One Commerce Plaza Albany, New York 12260 (518) 487-7600 CAHN & CAHN, LLP Richard C. Cahn, Esq. 22 High Street, Suite No. 3 Huntington, New York 11743 (631) 752-1600 *Attorneys for Plaintiffs-Movants*
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STATEMENT OF PROCEDURAL HISTORY AND TIMELINESS OF MOTION FOR LEAVE TO APPEAL

Plaintiffs-Movants Jon S. Semlear, Frederick C. Havemeyer, Eric Schultz, Edward J. Warner, Jr., and William Pell, as Trustees of the Freeholders and Commonalty of the Town of Southampton ("Trustees") commenced this action to, among other things, to permanently enjoin Defendant-Respondent Incorporated Village of Quogue (the "Village") from moving, placing, depositing or scraping sand or placing hard or semi-hard structures, or conducting related activities, in the ocean beach area from the top of the primary dune to the high water mark of the ocean within the boundaries of the Village, without a permit or consent from the Trustees, and for a judgment declaring that the Trustees' Rules and Regulations for the Management and Products of the Waters of the Town of Southampton (the "Rules and Regulations") is valid and binding upon the Village.

By Order and Judgment dated December 11, 2012 and entered December 13, 2012, Supreme Court, Suffolk County (Mayer, J.) granted the Trustees' motion for reargument of the prior order and judgment of the same Court, dated May 9, 2012 and entered May 11, 2012, and upon reargument, adhered to its decision granting the Village summary judgment dismissing the complaint and declared that "the [Trustees] have the right to regulate activities to protect their easement as to that area south of the crest of the primary dune and north of the high water mark" along the ocean beaches located within the boundaries of the Village (R 4-7). The

Trustees served the Supreme Court judgment with notice of its entry on January 3, 2013 via regular first class mail. On January 16, 2013, the Village appealed from the December 13, 2012 Supreme Court judgment.

By Decision and Order dated and entered April 22, 2015, the Appellate Division, Second Department (Rivera, J.P., Leventhal, Hinds-Radix, and Barros, JJ.) reversed the Supreme Court judgment and remitted the matter to Supreme Court "for the entry of an appropriate amended judgment declaring that (a) the Trustees of the Freeholders and Commonalty of the Town of Southampton have no lawful governmental or regulatory power to grant or deny permits in connection with (i) the placement and grading of sand and earth, and (ii) the development, construction, maintenance, and use of structures and lands anywhere upon or in the ocean beaches located within the boundaries of the Incorporated Village of Quogue, except for the management of the specific activities and uses reserved to the inhabitants of the Town of Southampton by L 1818, ch 155, and L 1831, ch 283, for 'taking seaweed from the shores of any of the common lands of said town, or carting or transporting to or from, or landing property on said shores, in the manner heretofore practised' (L 1818, ch 155, § IV), and (b) any attempt by the Trustees of the Freeholders and Commonalty of the Town of Southampton to exercise or extend such power or authority over ocean beaches within the boundaries of the Incorporated Village of Quogue, including enforcement of any

provisions of the Rules and Regulations for the Management and Products of the Waters of the Town of Southampton, except in the management of the specific activities and uses reserved to the inhabitants of the Town of Southampton under L 1818, ch 155, and L 1831, ch 283, is unlawful, unenforceable, and null and void" (*Semlear v Incorporated Vil. of Quogue*, 127 AD3d 1062, 1063 [2d Dept 2015]). The Village served the Appellate Division Decision and Order with notice of its entry on the Trustees' counsel, via regular first class mail, on May 18, 2015. The Trustees served a motion for reargument of the April 22, 2015 Appellate Division order or, alternatively, for leave to appeal to this Court on May 26, 2015.

By Decision and Order on Motion dated and entered September 15, 2015, the same panel of the Appellate Division, Second Department denied the Trustees' motion. The Village served the September 15, 2015 Order of the Appellate Division with notice of its entry, via priority mail, on October 20, 2015. Therefore, this motion for leave to appeal to the Court of Appeals is timely made (*see* CPLR 5513).

BASIS FOR JURISDICTION

This Court has jurisdiction of this motion for leave to appeal pursuant to CPLR 5602(a)(1)(i), as the Appellate Division order finally disposes of all issues in this proceeding within the meaning of the New York Constitution. The Appellate Division order's remittal to Supreme Court for entry of the declaratory

judgment specified by the order does not affect the finality of the Appellate Division order for purposes of this Court's review because it contemplates purely ministerial action by Supreme Court (*see* Arthur Karger, Powers of the New York Court of Appeals § 4:10 at 73-74 [3d ed rev 2005]; *see also Harvey v Members Empls. Trust for Retail Outlets*, 96 NY2d 99, 103 n 1 [2001] [Appellate Division order reversing Supreme Court judgment, granting summary judgment to plaintiff, and remitting to Supreme Court for entry of judgment declaring the rights of the parties "contemplates purely ministerial action" and is final]).

QUESTIONS PRESENTED

1. Do the Laws of 1818, chapter 155 and the Laws of 1831, chapter 283 divest the Trustees of all authority to regulate activities occurring within their public easement over ocean beach lands between the crest of the primary dune and the high water mark of the Atlantic Ocean in the Town of Southampton?

The Appellate Division, Second Department held that chapter 155 of the Laws of 1818 divested the Trustees of regulatory authority to grant or deny permits for construction and other activities occurring within the Trustees' public easement over the ocean beaches in the Town, except for the management of the activities and uses reserved for the benefit of the inhabitants of the Town of Southampton under chapter 155 of the Laws of 1818, and chapter 283 of the Laws of 1831, that is, the "taking seaweed from the shores of any of the common lands of the town, or

carting or transporting to or from, or landing property on said shores, in the manner heretofore practiced" (*Semlear*, 127 AD3d at 1063 [internal quotation marks omitted]).

2. May the holder of a public easement be divested the regulatory authority granted attendant to the easement to protect the typical public uses of the lands and waters that are subject to the public's right of way?

The Appellate Division order holds that the holder of a public easement over certain lands or waters may not regulate private uses occurring within the public easement in order to preserve the typical public uses protected thereby.

PRELIMINARY STATEMENT

Plaintiffs-Movants Jon S. Semlear, Frederick C. Havemeyer, Eric Schultz, Edward J. Warner, Jr., and William Pell, as Trustees of the Freeholders and Commonalty of the Town of Southampton ("Trustees") respectfully submit this memorandum in support of their motion, pursuant to CPLR 5602(a)(1)(i), for leave to appeal to this Court from the April 22, 2015 Decision and Order of the Supreme Court, Appellate Division, Second Department, which reversed the judgment of Supreme Court, Suffolk County and remitted the matter for entry of a judgment declaring that the Trustees "have no lawful governmental or regulatory power"

over "the ocean beaches located within the boundaries of the Incorporated Village of Quogue, except for the management of the . . . 'taking seaweed from the shores of any of the common lands of said town, or carting or transporting to or from, or landing property on said shores, in the manner heretofore practiced' (L 1818, ch 155, § IV)" and that the Trustees' Rules and Regulations are not binding upon the Village except with respect to the specified activities (*Semlear*, 127 AD3d at 1063).

At issue here is the very existence of the Trustees' authority, granted by the British Royal Governor of New York nearly 100 years before the American Revolution, to regulate erosion control, construction and other activities that affect their long-recognized public easement over the ocean beach lands from the crest of the "primary dune" to the high water mark of the Atlantic Ocean in the Town of Southampton (the "Town").[1] The Second Department decision overturns 330 years of judicial and legislative recognition of the Trustees' broad regulatory powers to protect all manner of public recreational and other uses of the Town's ocean beaches, and circumscribes the Trustees' powers merely to protecting the public's use of the Town's beaches for the taking of seaweed and other products of the sea.

[1] The "primary dune" is generally defined as "the most seaward major dune where there are two or more parallel dune lines within a coastal area. Where there is only one dune present, it is the primary dune" (6 NYCRR § 505.2[dd]).

It is undisputed that by the Andross Patent of 1676 and the Dongan Patent of 1686, the Trustees were granted legal title to the undivided common lands of the Town, which included the ocean beaches. The Dongan Patent also conferred upon the Trustees the explicit right to manage and regulate their lands—that is, the regulatory authority to "make such acts and orders in writing for the more orderly Doeing of the premises as they . . . shall and may think CONVENIENT" (R 167-169)—to protect the free access of all of the inhabitants of the Town to the ocean beaches and the Atlantic Ocean.

Following the 1686 grant from the Royal Governor of New York, the Trustees exercised their regulatory authority over the Town's ocean beaches without challenge for 132 years. Indeed, the first New York Constitution in 1777 continued the Trustees' regulatory powers even after the American Revolution.

In 1818, however, a dispute arose between the Trustees of the freeholders (the commoners) and the proprietors of the Town (the landed gentry) over the financial assets of the Town. Ultimately, the parties reached a resolution satisfactory to both sides: the proprietors would be granted legal title to the remaining undivided common lands of the Town, which included the ocean beaches, and the right to sell off or lease those lands for profit, in exchange for foregoing any claim to the proceeds of the Trustees' sales of the products of the Town's waters. This compromise was the genesis for the enactment of chapter 155

of the Laws of 1818 (the "1818 Act") at issue in this case. Respondents contend, and the Second Department agreed, that the 1818 Act left with the Trustees only the power to protect the public's right to collect seaweed from and transport it over the Town's ocean beaches.

Contrary to the Appellate Division's holding, the 1818 Act, by its very language, grants legal title to the undivided common lands to the proprietors and authorizes them to elect their own trustees for the management of their lands, but expressly reserves to the Trustees of the freeholders a public easement over the ocean beaches for the benefit of all of "the inhabitants of [the] Town" (R 78). The 1818 Act does not, however, explicitly divest the Trustees of the regulatory authority granted under the Dongan Patent to protect the public's free access to and use of the Town's ocean beaches and the Atlantic Ocean.

Limiting the Trustees' regulatory authority over the ocean beaches was not the 1818 Act's intent. The 1818 Act, instead, had a very specific and limited purpose: to resolve a dispute between two different classes of citizens in the Town over the financial assets of the Town – (1) the sale and lease of its lands and (2) the sale of the products of its waters. The 1818 Act resolved that dispute by giving the undivided lands to the proprietors and keeping the products of the Town's waters in the hands of the Trustees. This was simply a compromise, sanctioned by the Legislature, of a dispute about money and how the Town's financial assets would

be shared. No evidence whatsoever exists that the Legislature contemplated diminishing the Trustees' power to protect the public's right to use the beaches for recreational and other uses.

Viewed in that context, the Appellate Division erroneously construed the 1818 Act as a near extinguishment of the Trustees' regulatory authority over private construction and activities within their undisputed public easement to protect the ocean beaches for public use. Indeed, the Appellate Division's holding ignores that the 1818 Act itself broadly reserved to the Trustees the power to protect for the public all shore activities "in the manner heretofore practised" (R 78). There would surely have been an uproar had the public understood that, nearly 200 years later, the Appellate Division would construe the 1818 financial compromise as divesting the Trustees of regulatory authority to protect the public's recreational use of the Town's ocean beaches in favor of the far more limited right to collect seaweed.

For nearly 200 years after the enactment of the 1818 Act, the Trustees have regulated the ocean beaches in the Town to ensure their continued vitality and the public's free access, without challenge. In fact, the Trustees have, among other things, granted permits for the creation and widening of inlets for Shinnecock and Mecox Bays across the ocean beaches, granted the use of the Highways at the beaches for the purpose of gunning, and approved permits for dredging on the

beaches at Pond Point. The parties have, therefore, by their very actions and inaction over the past 200 years, defined the scope of the Trustees' regulatory authority over the Town's ocean beaches far more expansively than did the Appellate Division below. The Appellate Division's interpretation of the 1818 Act was error.

In place of the Trustees' powers to protect the typical uses of their public easement, the Second Department's decision results in a patchwork, and at times inconsistent, regulatory framework over a prime asset of this State—the Hamptons beaches—to be overseen by five different villages and the Town. While the Town has specifically recognized and codified in the Town Code the Trustees' regulatory powers over the use of the ocean beaches, the five villages have not, leading to an unworkable regulatory framework that has often seen the interests of individual property owners placed above protection of this State's beaches for public use.

The Second Department's decision wrongly interprets dicta from a 1900 decision of this Court to support this untenable result, and ignores the Trustees' long-recognized powers to regulate the public easement over the Town's beaches. The Second Department's decision also creates a conflict with that Court's own prior decisions, which have consistently upheld the Trustees' regulatory powers over the ocean beach areas in the Town, and threatens the rights of any holder of a public easement to regulate private uses and activities occurring within the

easement to ensure that the public rights guaranteed by the easement are preserved. Because this case involves novel questions of statewide import concerning the scope of the regulatory authority possessed by holders of public easements, and the Appellate Division erroneously construed chapter 155 of the Laws of 1818 to divest the Trustees of virtually all regulatory authority to protect the public's free access to and use of the Town's ocean beaches, waters, and the Atlantic Ocean, this Court should grant leave to appeal.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The genesis of this case derives from the royal charters creating the Town of Southampton granted to the Trustees by the British governors of New York in 1676 and 1686 (*see generally Dolphin Lane Assoc. v Town of Southampton*, 72 Misc 2d 868, 871-872 [Sup Ct, Suffolk County 1971], *affd* 43 AD3d 727 [2d Dept 1973], *affd as mod.* 37 NY2d 292 [1975]). The lands encompassing the Town were first purchased by eight men, known as the "undertakers," in 1639 (*id.* at 870). The undertakers, who obtained a deed from a representative of the British Earl of Sterling, James Farrell, established a permanent settlement on Long Island, in the vicinity of the Town of Hempstead, but were forced to leave after sustained opposition from the Dutch settlers of New Amsterdam, who claimed ownership of all of Long Island (*see id.*). Having been displaced of their deeded lands, the undertakers sought redress from Farrell, who granted them "a new deed, purporting

to convey all those lands lying between: 'Peaconeck and the eastern most point of Long Island with the whole breadth of the said island from sea to sea . . . excepting those lands already granted unto any person by me'" (*id.* at 870-871; *see* R 200-204, 506).

In 1640, the undertakers returned to Long Island and established a permanent settlement in the vicinity of the Village of Southampton (*see Dolphin Lane Assoc.*, 72 Misc 2d at 871). Upon settling in Southampton, the undertakers divided the land among the settlers; some was apportioned for private homes, some divided for agricultural use, and the remainder was "held as an 'undivided commons' for use by all settlers" (*id.*). At the same time,

> [t]he townspeople were divided into two classes. One class was the "freeholder and inhabitant" and the other class was known as the "proprietors". The freeholder and inhabitant had all the rights of any townsmen and could purchase land after the same was divided by order of the town. However, this class did not share in the proceeds from the sale of undivided lands. Only the proprietors shared in the proceeds from the sale of the undivided lands

(*id.*). In essence, the proprietors were the landed gentry of the Town, while the freeholders were the common people who were given the right to inhabit the Town's remaining undivided lands.

In 1664, the British forcibly extinguished the competing Dutch claims to the lands of Long Island by seizing New Amsterdam (*see id.*; *see also Johnson v M'Intosh*, 21 US 543, 576 [1823] ["The claim of the Dutch was always contested

by the English; not because they questioned the title given by discovery, but because they insisted on being themselves the rightful claimants under that title. Their pretensions were finally decided by the sword."]).[2] Thereafter, King Charles II granted all of the lands of New Amsterdam, including Long Island, to the Duke of York (*see Dolphin Lane Assoc.*, 72 Misc 2d at 871; R 174-179). The Duke of York was granted a new royal patent in 1674, who appointed Edmund Andross the governor of New York (*see Dolphin Lane Assoc.*, 72 Misc 2d at 871). In 1676, Governor Andross, having invalidated all patents previously issued for lands within his control, granted to certain named individuals "'for and on the behalf of themselves and their Associates, the freeholders and Inhabitants of the said Towne, their Heiress, Successors and Assignees'" title to all of the lands and waters within the Town of Southampton (*id.* at 872; *see also People ex rel. Howell v Jessup*, 160 NY 249, 258 [1899]; R 159-161, 506).

In 1686, a new royal governor, Thomas Dongan, was appointed for New York and required the Town to take a new patent known as the "Dongan Patent" (*see id.*; R 172-173, 179-189). Reciting the Andross Patent at length, the Dongan Patent again granted the same lands and waters to certain named individuals, who were created as a corporation "by the name of the Trustees of the freeholders and

[2] The Dutch briefly regained control of New York in the early 1670s, but all Dutch claims to New York were extinguished finally when England won the war against Holland (*see Dolphin Lane Assoc.*, 72 Misc 2d at 871).

commonalty of the town of Southampton" and their successors (R 167, 507; *see also Dolphin Lane Assoc.*, 72 Misc 2d at 872).

The Dongan Patent thereby created the Trustees as a "body politic" and expressly conferred governmental regulatory power upon them to "make such acts and orders in writing for the more orderly Doeing of the premises as they . . . shall and may think CONVENIENT" (R 167-169; *see also People ex rel. Howell*, 160 NY at 258-259 ["These letters patent also contained provisions conferring the *power of management* of the premises upon the trustees of the town, who were authorized to perform such acts and to make such orders as they might see fit, so that the same should in nowise be repugnant to the laws of England" (emphasis added)]).

The legal title to the lands and waters of the Town and the regulatory powers granted to the Trustees in the Dongan Patent were repeatedly confirmed throughout New York's history (*see People ex rel. Howell*, 160 NY at 261 ["the validity of the [Andross and Dongan Patents] is not only unchallenged, but is established by previous decisions of this court, and is affirmed . . . by legislation of the colony and the state"]). The New York Constitution, from its inception in 1777 to date, confirms the grants to the Trustees in the Dongan Patent "until otherwise directed by the legislature" (*Knapp v Fasbender*, 1 NY2d 212, 221 [1956] [internal quotation marks omitted]; *see* NY Const, art I, § 14; *Gessin v Throne-Holst*, __

AD3d __, 2015 NY Slip Op 06885, *4 [2d Dept Sept. 23, 2015] ["By the thirty-fifth section of that Constitution such acts of the legislature of the colony of New York as were in force on the nineteenth of April, 1777 . . . were continued in force and made the law of this state unless and until such laws were repealed or altered by the Legislature . . . Since the colonial legislature had confirmed the Dongan Patent through legislation in 1691, it was thus reaffirmed by the Constitution, subject to any changes by the State Legislature" (internal quotation marks and citations omitted)], *appeal as of right and lv PU*).

In *Knapp*, this Court confirmed: "The Constitution thus entrusted the Legislatures with the authority of preserving boards of trustees or abolishing them, of creating towns and town boards, with specified powers, or abolishing them, of enlarging or curtailing powers granted to towns and town boards or to boards of trustees" (*Knapp*, 1 NY2d at 221). The historical record is clear, however, that the Legislature never abolished the public easement and regulatory authority of the Trustees over the ocean beaches in the Town. For 130 years, from 1686 to 1818, the Trustees' title to the lands and waters of the Town and governmental power over them was unchallenged (*see People ex rel. Howell*, 160 NY at 262 ["'the absolute control and management [of the lands under water in the Town] has been exercised by the trustees from the Dongan charter to the present time,'" quoting *Town of Southampton v Mecox Bay Oyster Co.*, 116 NY 1, 12 (1889)]).

By 1818, a majority of the undivided common lands of the Town had been sold, with the proprietors receiving all of the proceeds (*see Dolphin Lane Assoc.*, 72 Misc 2d at 872). The proprietors, unsatisfied with this income, sought to increase the amounts of money they received by asserting that their right to receive the proceeds of the sales of the undivided lands included the sales of the products of the Town's waters (*see id.*). That right, however, had been granted to the Trustees in the Dongan Patent, and so a Town committee was appointed to resolve the dispute between the proprietors and the freeholders (*see id.* at 872-873). Ultimately, the Town committee proposed that if the proprietors would give up their claim to any products of the Town's waters, and would not interfere with the freeholders' entitlement to "*free access to the waters* in any part of said Town when they please," the Trustees would relinquish their title and right to manage and control the Town's undivided common lands (*id.* at 873 [internal quotation marks omitted and emphasis added]).

The proprietors accepted the Town committees' proposal, and the resolution was confirmed by the Legislature's enactment of chapter 155 of the Laws of 1818 (the "1818 Act") (*see id.*; R 76-78, 512). The 1818 Act authorized the proprietors to elect their own "trustees to manage all the undivided lands, meadows and millstreams, in said town of Southampton" and granted the proprietor trustees that

same power to "superintend and manage" the undivided common lands as the Dongan Patent had granted to the Trustees of the freeholders (R 76).

As this Court recognized in *Town of Southampton v Betts* (163 NY 454 [1900]), although the 1818 Act divested the Trustees of legal title to the undivided common lands of the Town, including title to the ocean beaches, it reserved to the Trustees a public easement over the ocean beaches to ensure the freeholders retained "free access" to the waters and lands under the waters to which the Trustees still held legal title (*see id.* at 457-460 ["The [1818] act itself made a reservation with respect to public easements and privileges"]). Indeed, the Village itself acknowledges the existence of the public easement for the benefit of all of the residents of the Town (R 612 [quoting Code of Village of Quoque § 146-10 B: "The ocean beach (land area between the dunes and the Atlantic Ocean) is subject to a public easement for the benefit of the inhabitants of the Town of Southampton (including inhabitants of the Village); this historic easement provides the public with rights to use and enjoy the public beach, including public access to the beach fronting the Atlantic Ocean. This historic public easement has its origin in colonial grants and was reserved by state legislation."]).

In 1831, the proprietors again sought to encroach upon the Trustees' powers over the waters and lands under the waters of the Town. As a result, the Legislature again confirmed, in chapter 283 of the Laws of 1831 (the "1831 Act"),

that the Trustees possessed exclusive power over "'all the fisheries, fowling, sea weed, waters and productions of the waters within the . . . town, not the property of individuals, and all the property, commodities, privileges and franchises granted to them by the charter of Governor Dongan, in [1686],'" except as otherwise abrogated by the 1818 Act (*Dolphin Lane Assoc.*, 72 Misc 2d at 873, quoting L 1831, ch 283, § 5; *see* R 79-80). The 1831 Act also confirmed the Trustees' "power to make rules, orders, and by-laws for the management [of the lands in which they held a property right] and the regulation of their affairs," and to impose such penalties as they deemed warranted for violations of their regulations (R 80).

By 1882 all of the undivided common lands of the Town—the lands held by the proprietors under the 1818 act—had been sold, leaving the proprietor trustees without any land remaining to manage (R 520). The proprietor trustees all thereafter, in 1890, resigned (R 520).

For almost 200 years, from 1818 to date, the Trustees have exercised, without challenge, regulatory authority to protect their public easement over the Town's ocean beaches and to ensure that the freeholders—now including all of the Town's inhabitants—will have access to and use of the waters in the Town (R 523-525 [enacting laws (L 1892, ch 257 and L 1896, ch 872) authorizing the Trustees to locate inlets for Shinnecock Bay and Mecox Bay "through the beaches and meadows which separate said bays from the ocean" and granting the Trustees

power to exercise eminent domain for that purpose]). For example, exercising their authority under the 1831 Act to adopt regulations governing the use and management of the waters of the Town, the Trustees adopted their Rules and Regulations, including a provision prohibiting the placement of any structure or obstruction within an ocean beach area unless authorized by a permit issued by the Trustees (Rules and Regulations, art VII, § 1, *available at* http://www.southamptontownny.gov/DocumentCenter/View/1327 [pg. 30]).

On August 30, 2010, the Trustees filed this action against the Village seeking declaratory and injunctive relief to prevent the installation of 70 geocubes upon the ocean beach area without first obtaining a permit from the Trustees, in violation of Article VII the Trustees' Rules and Regulations, and to restrain the Village from obstructing and interfering with the Trustees' public easement (R 61-71). The Trustees also sought declaratory relief that their Rules and Regulations could be enforced within the ocean beach areas from the crest of the primary dune to the high water mark of the Atlantic Ocean (R 68).[3]

Geocubes are "semi-hard" structures consisting in this case of polypropylene bladders filled with sand. Each geocube installed by the Village holds one cubic yard of sand, weighing about 2,700 pounds. The geocubes were placed next to

[3] Although the Trustees sought a temporary restraining order in the companion case of *Semlear v Albert Marine Constr., Inc.* (Suffolk County Index No. 11287-2010) to prevent the installation of geotubes by the defendants in that case, Supreme Court, Suffolk County denied the Trustees' application. The Village and the defendants in *Albert Marine* thereafter installed the geocubes and geotubes in the ocean beach areas regulated by the Trustees.

each other in a line along the beach approximately 210 feet long. Geocubes, as well as the much larger and heavier "geotubes" implicated in *Semlear v Albert Marine Constr., Inc.* (Sup Ct, Suffolk County, Peter H. Mayer, J., Index No. 11287-2010), are used in hope of providing a barrier to prevent ocean waves and littoral currents from undermining or washing away homes or other structures built by private property owners. Scientific evidence, however, indicates that "hard" and "semi-hard" structures, such as those at issue here, deflect ocean waves and currents with great force away from the beach on which they are installed and onto the downdrift beaches, thereby causing increased "scouring" and washouts of both the beach in front of the unnatural barrier and the downdrift beaches of neighboring property owners or municipalities (*see e.g. Matter of Poster v Strough*, 299 AD2d 127, 131-132 [2d Dept 2002] ["[A] Report to the Legislature of the State of New York . . . noted that . . . the erection of 'erosion arresting structures' by individuals or communities out of their anxiety to protect their own properties might only aggravate the damage done to neighboring properties. In regard to various properties in Southampton, this report indicated that the bulkheads which were then being erected were often ineffective and, in many cases, did 'more harm than good'. . . [A]n expert report prepared for the Town of Southampton in 1997, entitled 'The Effects of Shoreline Hardening on the South Shore of New York' . . . focused on 47.4 miles of coast running east to Moriches Inlet. This report

describes in great scientific detail how the effectiveness of 'hard structures' . . . in shielding private homes or other properties from the natural consequences of erosion necessarily comes at the expense of the broader interest that the public has in preserving recreational beaches. The author of the report concluded that beaches in front of exposed seawalls or downdrift of groins or jetties were significantly narrower than 'unarmored' beaches, beaches under seawalls buried under dunes, and beaches updrift of groins and jetties.").

The Village moved for summary judgment dismissing the Trustees' permanent injunction and declaratory judgment claims, arguing that the 1818 Act stripped the Trustees of jurisdiction to regulate the ocean beaches throughout the Town (R 12-13, 45-50). The Village alternatively argued that even if the Trustees possessed power to regulate use of the beaches within the Town, they could not do so within the incorporated villages (R 51-54). On the Trustees' injunction claims, the Village contended that the Trustees failed to present evidence demonstrating that the geocubes interfered with the public easement (R 58-59).

In a Decision, Order, and Judgment dated May 9, 2012 and entered May 11, 2012, Supreme Court, Suffolk County (Mayer, J.), granted the Village's motion for summary judgment and declared that the Trustees "do not possess the right to regulate the subject beaches to protect their easement over them, to the extent that the beaches lie north of the high-water mark in the vicinity of the Atlantic Ocean"

(R 8-11). Specifically, the Court, after recounting the history of the Trustees' title to and authority over the ocean beaches in the Town, held that

> [t]he trustees, who retain the title to the lands under water and have the power to grant rights to erect structures on those submerged lands and to take shellfish from them, do not have control of the shores and beaches. As is defined by Southampton Town law (at Rules Article I), the ocean beach area is that area "along the Atlantic Ocean bounded on the north by the crest of the primary dune, . . . on the south by the high-water mark of the Atlantic Ocean." Thus, the trustees control the land in the vicinity of the Atlantic Ocean within their township that is south of the high-water mark of the Atlantic Ocean, and not the beach area north of the high-water mark

(R 10 [citation omitted]). The Court did, however, reject the Village's assertion that the Trustees' regulatory authority was limited by the Navigation Law, and held instead that the "lands lying on or bordering the tidewaters are not under [the Village's] jurisdiction as they remain under the jurisdiction of the town or its trustees" (R 10). The Trustees appealed and moved for reargument of the May 11, 2012 Supreme Court judgment (R 606-607).

In a Decision, Order, and Judgment dated December 11, 2012 and entered December 13, 2012, Supreme Court, Suffolk County (Mayer, J.) granted the Trustees' motion for reargument and, upon reargument, declared that the Trustees "have the right to regulate activities to protect their easement as to that area south of the crest of the primary dune and north of the high water mark" of the Atlantic

Ocean (R 4-7).[4] In effect, upon reargument, the Court reversed its holding concerning the Trustees' regulatory authority over the ocean beaches in the Town, and determined that the Second Department's decision in *Matter of Allen v Strough* (301 AD2d 11 [2d Dept 2002]), which remitted that matter for a determination of the geographical scope of the Trustees' regulatory authority, was persuasive that the Trustees in fact had authority to enforce their Rules and Regulations to protect the public easement (R 6-7). Thus, the Court held, the Trustees "possess[ed] only the right to regulate for the protection of their easement that portion of the beach which may be south of the crest of the primary dune and north of the high-water mark of the Atlantic Ocean" (R 7).[5] The Village appealed from the December 13, 2012 Supreme Court judgment (R 2-3).

In a Decision and Order dated and entered April 22, 2015, the Appellate Division, Second Department (Rivera, J.P., Leventhal, Hinds-Radix, and Barros, JJ.), reversed the December 13, 2012 Supreme Court judgment and remitted the matter to Supreme Court for entry of an amended declaratory judgment (*Semlear v Incorporated Vil. of Quogue*, 127 AD3d 1062, 1063 [2d Dept 2015]). Specifically,

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[4] Upon Supreme Court's granting of reargument and declaration of rights in the Trustees' favor, the Trustees withdrew their appeal from the May 13, 2012 Supreme Court judgment.

[5] The New York State Department of Environmental Conservation regulations define "beach" as "the zone of unconsolidated earth that extends landward, from the mean low-water line, to the seaward toe of a dune or bluff, whichever is most seaward. Where no dune or bluff exists landward of a beach, the landward limit of a beach is 100 feet landward from the place where there is a marked change in material or physiographic form or from the line of permanent vegetation, whichever is most seaward. Shorelands subject to seasonal or more frequent overwash or inundation are considered to be beaches" (6 NYCRR § 505.2[c]).

the Appellate Division directed entry of a judgment declaring that the Trustees "have no lawful governmental or regulatory power to grant or deny permits in connection with (i) the placement and grading of sand and earth, and (ii) the development, construction, maintenance, and use of structures and lands anywhere upon or in the ocean beaches" in the Village, except for the regulation of the specific uses enumerated in the 1818 Act, i.e., 'taking seaweed from the shores of any of the common lands of said town, or carting or transporting to or from, or landing property on said shores, in the manner heretofore practiced'" (*id.*, quoting L 1818, ch 155, § IV). In essence, the Court held, the 1818 Act extinguished the Trustees' regulatory authority over the Town's ocean beaches, except for the regulation of the removal of seaweed and other products of the sea.

Although the Appellate Division acknowledged that the Trustees' power "is derived from antique, royal land grants and patents which have been repeatedly confirmed and upheld throughout the history of this State for over 300 years by both the framers of the State Constitution and the Legislature despite various specific attacks upon such authority" (*id.* [internal quotation marks omitted]), the Court held that the 1818 Act "'only relates to the use of the beach or shore, by taking seaweed from it and carting or transporting to and from or landing property on such shore' and 'makes no reference to the management or regulation of the lands constituting the beach or shore . . . , but merely provides for the [Trustees']

management and regulation of the waters, fisheries, and taking of seaweed and the productions of the waters'" (*id.* at 1065, quoting *Trustees of Southampton v Betts*, 21 App Div 435, 439 [1st Dept 1897], *affd and quoted in* 163 NY 454, 459 [1900]). The Appellate Division also rejected the Trustees' argument that the Court had, in *Matter of Allen v Strough* (301 AD2d 11 [2d Dept 2002]) and *Matter of Poster v Strough* (299 AD2d 127 [2d Dept 2002]), already determined that the Trustees in fact have regulatory authority over the ocean beach lands in the Town south of the crest of the primary dune because, according to the Court, "neither of those two cases involved the issue of the subject matter of the Trustees' regulatory jurisdiction but, instead, involved the issue of the Trustees' territorial or geographical jurisdiction" (*Semlear*, 127 AD3d at 1065).

The Trustees moved for reargument of, or alternatively leave to appeal to this Court from, the April 22, 2015 Appellate Division order. In a Decision and Order on Motion dated and entered September 15, 2015, the same panel of the Appellate Division, Second Department denied the Trustees' motion. The Trustees now seek leave to appeal to this Court from the April 22, 2015 Appellate Division order.

ARGUMENT

POINT I

THE SECOND DEPARTMENT ORDER OVERRULES 400 YEARS OF LEGISLATIVE AND JUDICIAL RECOGNITION OF THE POWERS OF THE TRUSTEES TO REGULATE THE OCEAN BEACHES TO PROTECT THEIR PUBLIC EASEMENT

It is undisputed that the Trustees, through colonial grants and legislative enactments, hold a public easement for the benefit of the residents and inhabitants of the Town to ensure free access to the Town's waters and the Atlantic Ocean. By drastically limiting the scope of the Trustees' regulatory authority to protect their unchallenged public easement to the mere taking and carting of seaweed and transporting property over the ocean beaches in the Town—tasks largely irrelevant today—the Appellate Division has divested the Trustees of any authority to protect the public's free access to the beaches and Atlantic Ocean, contrary to the plain language of and legislative intent underlying the 1818 and 1831 Acts.

Indeed, this Court has confirmed that the Legislature granted the Trustees a public easement over the ocean beaches from the crest of the primary dune to the high water mark of the Atlantic Ocean in order to protect not only the typical public uses of the beach at the time of the 1818 Act, but also those public uses that may evolve into the future. This legislative foresight is seen in the plain language of the 1818 Act, protecting the uses "in the manner heretofore practiced" (R 78), but was improperly ignored by the Appellate Division. Instead, to justify its

misinterpretation of the 1818 Act, the Appellate Division order relies on a misinterpretation of this Court's dicta in *Trustees of Southampton v Betts*, and improperly construes it as a limitation on the scope of the Trustees' regulatory authority. No such limitation was announced in *Betts*, however, and thus the Appellate Division's reliance on this Court's dicta was misplaced. Because this case presents novel issues of significant import concerning the scope of the Trustees' regulatory authority to protect their undisputed public easement over a significant portion of the beaches of the south shore of Long Island, and the Appellate Division erred in construing the 1818 Act and 1831 Act to extinguish the Trustees' regulatory authority over the Town's ocean beaches, this Court should grant leave to appeal.

A. The Plain Language of the 1818 and 1831 Act Do Not Divest the Trustees of Regulatory Authority Over the Ocean Beaches.

The parties do not dispute, and the Appellate Division held, that the Trustees' power over the ocean beach areas in the Town—the land lying between the "crest of the primary dune" on the north and the "high-water mark of the Atlantic Ocean" on the south (Trustees' Rules and Regulations, art I, § A, *available at* http://www.southamptontownny.gov/DocumentCenter/View/1327 [pg. 5])—began with the royal charters granted in 1676 and 1686. Specifically, the Dongan Patent created the Trustees as a corporate "body politic," granted them legal title to all of the lands, waters, and lands under the waters now encompassing

the Town, not previously granted to others, and authorized them to make such rules and regulations for the maintenance and control of the property granted to them as they deemed pertinent (R 162-170). The ocean beaches at that time had not been otherwise lawfully granted to others, and thus it is not disputed that title to the ocean beaches vested in the Trustees with the grant of the Dongan Patent (*see People ex rel. Howell*, 160 NY at 256 ["on December 6th, 1686, in the second year of the reign of King James II, Thomas Dongan, then governor of the province of New York, by letters patent of that date, granted to the trustees of the freeholders and commonalty of the town of Southampton a confirmatory charter or patent of the premises before mentioned, creating the town a body corporate and politic, and confirming said premises to the said town, 'with all . . . swamps, rivers, riverlets, waters, lakes, ponds, brooks, streams, *beaches* . . . creeks, harbors, highways and easements, fishing, and all other franchises, profits, etc., to said premises belonging, or in anywise appertaining or therewith used, occupied, accepted, reputed or taken to belong or in anywise to appertain to all intents, purposes and constructions whatsoever'" (emphasis added)]; *see also* R 165).

For 132 years, the Trustees held legal title to the ocean beaches in the Town, and exercised unchallenged regulatory authority to protect the public's free access to and use of the Atlantic Ocean (*see Town of Southampton v Mecox Bay Oyster Co.*, 116 NY 1, 10-11 [1889] ["As an acknowledgment of the rights of the original

purchasers and those who had succeeded them, the habendum clause of the Dongan patent is explainable. The legal title was to be in the town; the rights of the proprietors were recognized, but were regarded as purely equitable. Whether this construction of the legal effect of the patent is correct or not, it was the one adopted by all parties in interest, and acted upon by the town and the proprietors or purchasers of the Indian rights. In the construction of a public charter granted for the purpose of creating a civil community, the practical interpretation it has received from those interested therein, and acquiescence in such interpretation for a long series of years is the most important evidence in the determination of rights existing thereunder, and the strict letter of the instrument becomes of comparatively little importance."]).

The first New York Constitution confirmed the colonial grant to the Trustees, subject to subsequent legislative alteration, and each constitution adopted thereafter has retained the same provision (*see Knapp*, 1 NY2d at 221; *Beers v Hotchkiss*, 256 NY 41, 53 [1931] [noting that "section XXXV of the Constitution of 1777 [provided] to the effect 'that such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony on the 19th day of April, in the year of our Lord 1775, shall be and continue the law of this State'"]; *Gessin*, 2015 NY Slip Op 06885, *4 ["Subsequent

constitutions of this State have included the provision of the 1777 New York Constitution that recognized the pre-revolutionary acts of the Colonial Legislature (see 1821 NY Const, art VII, § 13; 1846 NY Const, art I, § 17; 1894 NY Const, art I, § 16; 1938 NY Const, art I, § 16)"]; *see also* NY Const, art I, § 14 ["Such parts of the common law, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony, on [April 19, 1775], and the resolutions of the congress of the said colony, and of the convention of the State of New York, in force on [April 20, 1777], which have not since expired, or been repealed or altered; and such acts of the legislature of this state as are now in force, shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same."]).

At the center of this case is the effect of the 1818 Act on the Trustees' regulatory powers. In 1818, following the dispute between the proprietors and the freeholders concerning the proceeds of the sale of the products of the Town's waters, the Legislature enacted chapter 155, entitled "AN ACT relative to the common and undivided lands and marshes in Southampton, in the County of Suffolk" (R 76). The 1818 Act transferred legal title to the "undivided lands and meadows" in the Town from the Trustees to the proprietors, authorized the proprietors to elect "trustees to manage all the undivided lands, meadow and millstreams" in the Town, and conferred on the proprietor trustees "the same

power to superintend and manage the undivided lands, meadows and mill streams aforesaid, as the trustees of the freeholders and commonalty of the town of Southampton now have" (R 76). The 1818 Act also gave the proprietor trustees the full power to sell, lease, or partition the undivided lands, and the power to make such rules and regulations as necessary to regulate the undivided common lands granted to the proprietor trustees (R 76).

The 1818 Act, thus, did not expressly deprive the Trustees of their regulatory authority over the ocean beaches granted in the Dongan Patent and confirmed in the New York Constitution of 1777. Because the dispute that the 1818 Act was intended to resolve involved the proprietor trustees' attempt to usurp the proceeds of the sale of the products of the Town's waters, which had been granted exclusively to the Trustees under the Dongan Patent (R 163 [granting the lands of the Town to the Trustees "together with all Rivers Lakes waters quarries Wood-land plaines meadows pastures marshes fishing hawking hunting and fowling and all other profits Commodityes and hereditaments to the said Towne tract of Land"]), the 1818 Act confirmed that its grant of legal title to the undivided common lands of the Town to the proprietor trustees did not impair any of the other rights of the Trustees of the freeholders (R 77-78). Specifically, the 1818 Act provided

> that nothing in the afore recited act shall be construed to give the proprietors or their trustees any power to make any laws, rules or

> regulations, concerning the waters (other than mill streams) the fisheries, the sea-weed, or any other productions of the waters of said town, or in any manner or way to debar the inhabitants of said town from the privilege of taking sea weed from the shores of any of the common lands of said town, or carting or transporting to or from, or landing property on said sho(r?)es, in the manner heretofore practised; which waters, fisheries, sea-weed and productions of the waters, shall be managed by the trustees of the freeholders and commonalty of the Town of Southampton, for the benefit of said town, as they had the power to do before the passing of this act

(R 77-78).

Indeed, this provision expressly confirming the Trustees' continued regulatory authority only makes sense in the context of the then-existing dispute between the proprietors and freeholders, where the proprietors attempted to assert rights over the products of the sea that had been granted exclusively to the Trustees in the Dongan Patent (*see Beers*, 256 NY at 58 ["To learn what the law was we must try to ascertain what the colonists of those days believed it to be, and to learn what they believed it to be we must try to discover what they did."]). The language and context of the 1818 Act, then, demonstrates that it was intended merely to resolve the parties' monetary dispute over the proceeds of the sale of the products of the sea. It was not intended, in any way, to impair the public's rights of free access, or the Trustees' rights to regulate to protect the traditional public uses of the Town's ocean beaches. In fact, the 1818 Act expressly preserved those rights (R 77-78).

Contrary to the Appellate Division's holding, therefore, the 1818 Act is not a limitation upon the scope of the Trustees' regulatory authority over the ocean beaches to the mere taking and carting of seaweed. The 1818 Act merely confirmed that the grant to the proprietor trustees of legal title to the undivided common lands, as a compromise to settle the parties' dispute, did not confer upon them any regulatory authority over the products of the sea, which was reserved to the Trustees (*see e.g. Knapp*, 1 NY2d at 222 ["A careful examination of the decisions, statutes and public records compel us to conclude that chapter 816 of the Laws of 1952 merely ratifies, confirms and defines pre-existing powers of this board of trustees, powers which the Legislature has given to boards of trustees in general. The Legislature in confirming the powers in this board of trustees was reciting powers which have been granted to and exercised by the board of trustees of Southampton and other towns under similar grants and legislative enactments. Although the wisdom of continuing the coexistence of a dual political system is open to question, this court has not substituted and cannot substitute its judgment in the place of the judgment of the Legislature."]).

Although the Trustees were deprived of title to the ocean beaches by the 1818 Act, the Legislature expressly reserved to them a public easement to protect the typical public uses of the Town's ocean beaches—that is, "taking sea weed from the shores of any of the common lands of said town, or carting or transporting

to or from, or landing property on said sho(r?)es, in the manner heretofore practiced" (R 78; *see also Betts*, 163 NY at 460 ["The plaintiff's evidence is consistent with privileges and an easement enjoyed by the public . . . The [1818] act itself made a reservation with respect to public easements and privileges"]; *Burch v Trustees of Freeholders & Commonalty of Town of Southampton*, 47 AD3d 654, 655 [2d Dept 2008] [The Trustees "hold an easement, which extends along the beach, for the benefit of the inhabitants of the Town of Southampton."]; *Dolphin Lane Assoc.*, 72 Misc 2d at 879 ["This Court holds that the Act of 1818 reserved to the inhabitants of the Town of Southampton for all time a public easement over the subject beaches."]). This Court expressly confirmed the 1818 Act's reservation to the Trustees of a public easement for the benefit of all of the inhabitants of the Town in both *Betts* (163 NY 454, 460 [1900]) and *Dolphin Lane Assoc.* (37 NY 2d 292, 297 [1975]).

Indeed, the Trustees' regulatory authority over the ocean beaches to ensure the public's free access to and use of the Town's waters and the Atlantic Ocean via the public easement is consistent with the *jus publicum* over the foreshore between the high water mark and the low water mark of the sea—that is, "the right of the public . . . to use it for fishing, bathing, boating and other lawful purposes and, when the tide is out, the right of the public of access to the water for fishing, bathing, boating and other lawful purposes, to which the right of access over the

beach may be a necessary incident" (*Tucci v Salzhauer*, 40 AD2d 712, 713 [2d Dept 1972], *affd* 33 NY2d 854 [1973]).

Contrary to the Appellate Division's interpretation, however, the 1818 Act should be construed as only having provided a non-exhaustive list of typical public uses, not a strict limitation on the uses protected by the public easement (*see e.g. Trustees of Town of Southampton v Jessup*, 162 NY 122, 127 [1900] ["In construing this [public right of way] we are not to lose sight of the principle that a grant from the public, so far as it is ambiguous, is to be construed in the interest of the public, and hence in favor of the grantor, and not, as in ordinary cases, in favor of the grantee."]; *Holloway v Southmayd*, 139 NY 390, 405 [1893] [a public easement extends to "those uses for which highways have ordinarily been understood to be intended"]; *Richards v Citizens' Water Supply Co. of Newton*, 140 App Div 206, 209 [2d Dept 1910] ["It is well-settled law that in all highways, rural or urban, the public easement is primarily for passage over its surface. In what are called urban highways this primary easement is enlarged to cover a number of public uses not connected necessarily with the exercise of the right of passage, but growing out of the public necessities which attend a growth in population."]). The plain language of the 1818 Act protecting the public uses "in the manner heretofore practised" confirms the interpretation that the Legislature intended to protect the typical public uses of the ocean beaches, both at the time

and as they evolved into the future (R 78). Had the 1818 Act intended the list of protected public uses to be construed exhaustively, as the Appellate Division order holds, the language "in the manner heretofore practised," referring to the historical construction of the public's rights, would be read out of the statute entirely, contrary to well-established principles of statutory construction (*see Albano v Kirby*, 36 NY2d 526, 530 [1975] ["a construction, resulting in the nullification of one part of the rule by another, is not permissible"]).

Indeed, "[i]f usage was potent to bring an act of Parliament into effect, usage must also have been potent to define the scope of its reception" (*Beers*, 256 NY at 56). As this Court has previously held on numerous occasions, "[t]he littoral and the strand of the Southampton and Brookhaven proprietary lands have been used for centuries for recreation, including bathing, boating and fishing. The waters and docks have been utilized to anchor and berth boats. That such use was proprietary is beyond cavil" (*Knapp*, 1 NY2d at 225; *see also Betts*, 163 NY at 458-459 ["The evidence shows that this beach, or seashore, as were other beach lands in the vicinity, was used for sea fishing and purposes incidental thereto, for watching for whales and purposes connected with their catch, for bathing and for carting away of wreckage deposited. Boats were hauled up and kept upon the shore; seines were spread out upon it and persons passed, and repassed, and occupied themselves upon it, in ways which would be usual to the inhabitants of a fishing village or

settlement."]). Plainly, the typical uses that define the Trustees' public easement over the ocean beaches, which were the same "privileges" granted to the freeholders in the Dongan Patent, far exceed the taking and carting of seaweed (*see Tiffany v Town of Oyster Bay*, 234 NY 15, 20 [1922] ["The foreshore or land under the waters of the sea and its arms, between high and low-water mark, is subject, *first*, to the *jus publicum*--the right of navigation, and when the tide is out, the right of access to the water for fishing, bathing and other lawful purposes to which the right of passage over the beach may be a necessary incident"]). The Appellate Division order, therefore, erroneously limits the scope of the Trustees' public easement over the Town's ocean beaches beyond the language and intent of the 1818 Act.

Furthermore, this Court's holding in *Town of Southampton v Betts* does not limit the scope of the Trustees' regulatory authority, as the Appellate Division holding suggests. Notably, *Betts* was an action in ejectment, where the Trustees claimed legal title to the ocean beach lands and sought to displace Betts who held a deed from the proprietor trustees (*see Betts*, 163 NY at 456-457). As this Court held, because after the enactment of the 1818 Act, the Trustees no longer held legal title to or a right of possession of the ocean beaches—title was vested instead in the proprietor trustees, with the power to partition and sell the lands—the Trustees could not maintain an action in ejectment (*see id.* at 457-459 ["In the grant of

Governor Dongan to the plaintiff, 'the beaches' were included with 'the tracts and necks of land' and all were held under the same trust for the original purchasers or proprietors. The shore lands, or beaches, were just as much common and undivided lands, within the terms of the trust, as were any other lands within the town boundaries. The act of 1818, in transferring the title to other trustees, made no reservation of the beach, or shore of the ocean, and that no such reservation, or any exception, was intended in the general grant is rather made clear, than doubtful, by the particular reservations contained in the provisos of the act."]). Having decided all that was necessary to dispose of the case, this Court's further commentary in *Betts* purporting to limit the Trustees' rights to the taking and carting of seaweed was non-binding dicta and was not controlling below (*see Adirondack Trust Co. v Farone*, 245 AD2d 840, 842 [3d Dept 1997], *lv dismissed* 91 NY2d 1002 [1998]).

Nevertheless, as this Court held in *Betts*, the 1818 Act granted the Trustees a public easement over the ocean beaches to protect the public access to and use of the waters of the Town and the Atlantic Ocean (*see Betts*, 163 NY at 459-460).[6] Because the power to regulate for the protection of the "privileges" of free access

[6] Even the deeds to the ocean beaches in the Town that were conveyed by the proprietor trustees acknowledged that the Trustees' public easement encompassed far more than the taking and carting of seaweed (*see Dolphin Lane Assoc.*, 72 Misc 2d at 879 ["In fact, the reservation in the deed to Betts supports the [Trustees'] position in that it indicates that the proprietors recognized the existence of the public easement in the Act of 1818 and exactly what area that easement encompassed."]).

to and use of the ocean beaches, the Town's waters, and the Atlantic Ocean was explicitly granted to the Trustees of the freeholders in the Dongan Patent (R 164), the 1818 Act's failure to divest the Trustees of the right to regulate the ocean beaches explicitly is significant.

Indeed, the Trustees could not have been divested of its regulatory authority to protect the public's "privileges" of free access and use, which was confirmed in the first New York Constitution, unless the 1818 Act did so expressly (*see Matter of Consolidated Edison Co. of N.Y. v Department of Envtl. Conservation*, 71 NY2d 186, 195 [1988] ["Repeal or modification of legislation by implication is not favored in the law. Absent an express manifestation of intent by the Legislature—either in the statute or the legislative history—the courts should not presume that the Legislature has modified an earlier statutory grant of power to an agency."]; *Easley v New York State Thruway Auth.*, 1 NY2d 374, 379 [1956] ["Legislatures are presumed to know what statutes are on the books and what is intended by constitutional amendments approved by the Legislature itself."]). Because the 1818 Act does not expressly abrogate the Trustees' regulatory authority over the ocean beaches, the Trustees retained that power. The Appellate Division holding to the contrary was error.

The 1831 Act, which arose following another dispute between the proprietor trustees and the Trustees of the freeholders concerning the right to use and regulate

the lands under the Town's waters (R 494-495), also confirms the Trustees' exclusive rights and privileges under the Dongan Patent (R 79-80). Specifically, section 5 of the 1831 Act expressly reserves to the Trustees

> sole control over all the fisheries, fowling, sea-weed, waters, and the productions of the waters within the said Town not the property of individuals, and all the property, commodities, privileges and franchises granted to them by the Charter of Governor Dongo(a?)n in [1686], except so far as are abrogated, changed and altered by the laws of this state, passed in conformity to the Constitution and not now belonging to individuals, nor to the proprietors by virtue of [the 1818 Act]; and *they shall have power to make rules, orders, and bylaws for the management thereof* and the regulation of their affairs

(R 80 [emphasis added]). Thus, again in the 1831 Act, the Legislature confirmed that the Trustees have retained the regulatory authority reserved to them as a "body politic" under the Dongan Patent to protect the property rights they continue to hold after the 1818 and 1831 Acts. Because it cannot be disputed that the 1818 Act granted the Trustees a public easement over the Town's ocean beaches to ensure free access and use of the Town's waters and the Atlantic Ocean, and neither the 1818 Act nor the 1831 Act divested them of the regulatory authority granted in the Dongan Patent, the Trustees continue to possess regulatory authority to protect all of the typical uses of their public easement, not merely the taking and carting of seaweed.

For 330 years, the Trustees have exercised regulatory authority to protect the typical public uses of the Town's ocean beaches. For example, after the proprietor

trustees disbanded in 1882 upon selling off all of the previously undivided common lands of the Town, the Trustees took many important actions that involved a substantial physical alteration of the ocean beaches. On April 5, 1887, the annual town meeting resolved that "the Town Trustees be and are hereby authorized and requested to take such legal proceedings as they may deem advisable to protect the people's rights to all waters, lands and lands under water which may belong to the town of Southampton" (R 450). On November 15, 1890, the Trustees adopted a resolution

> that the inhabitants of this Town shall have the *free use of the shores and beaches of the lands* that were held in common previous to and since the year 1818, excepting such as may have been disposed of by the Trustees of the Town for the purpose of fishing, fowling &c. as it has been customary heretofore, and the *Trustees of the Town will protect them in the use thereof*

(R 452 [emphasis added]). The Trustees also consistently regulated activities upon the ocean beaches, including by granting and denying permission to certain individuals to open inlets from the Town's inland bays to the Atlantic Ocean across the ocean beaches, to dredge and fill in certain areas of the ocean beaches, and to use the roads at the beaches for the purpose of gunning, among other things (*see* App Div Record on Appeal in *Semlear v Albert Mar. Constr., Inc.* [127 AD3d 1061 (2d Dept 2015), *lv PU*], at 466-496). During the activities that the Trustees approved, the often inspected location of the work proposed and inspected the

work as it was being done to ensure consistency with its approvals (*see id.* at 473-475, 487-488, 493-494).

Similarly, in *Town of Southampton v Mecox Bay Oyster Co.*, this Court found:

> As to the lands under water none were ever allotted or sold or made the subject of individual ownership. The absolute control and management thereof has been exercised by the trustees from the Dongan charter to the present time.
>
> They leased the fisheries to particular persons, generally on condition that the fish be sold only to the inhabitants of the town. They prohibited the taking of fish, clams and oysters during certain periods of the year and enforced such prohibition by penalties.
>
> They leased the land under water for oyster planting, and agreed to indemnify and defend the lessees against assertion of hostile rights in the leased property.
>
> They sold the seaweed from the beaches, gave consent to the erection of wharves and docks, and regulated the use thereof. Provided for the building of mills on the streams, and in numerous instances passed and enforced ordinances regulating the fishing and oystering in the bay, which is the subject of this suit.
>
> Such was the usage under the patents down to the year 1818.

(*Mecox Bay Oyster Co.*, 116 NY at 12). Having operated under the same understanding of the scope of the Trustees' regulatory authority to protect these public uses for over 200 years, this Court held, the Trustees could not be divested of their title to the lands under the Town's waters, including the lands under Mecox Bay, and regulatory authority to protect the public easement by a "technical or

literal meaning of the language of the charter" to the contrary (*id.* ["In this case there is no dispute as to the uninterrupted user by the town under these patents for two hundred years, and, in the face of such user, it would be idle to discuss the technical or literal meaning of the language of the charter. The parties interested have settled that beyond recall. Even though it be susceptible of the meaning claimed for it by the appellant, the strict letter of the instrument must now give way to the practical construction adopted and acted upon by the inhabitants of the town."]).

The same practical construction of the Dongan Patent, the 1818 Act, and the 1831 Act applies here. For nearly 200 years, the Trustees have exercised regulatory authority to protect their public easement over the Town's ocean beaches, with repeated judicial and legislative sanction, to ensure the public's free access to and use of the Town's waters and Atlantic Ocean (*see Knapp*, 1 NY2d at 225). In fact, the Village's argument that the 1818 Act somehow implicitly divested the Trustees of any regulatory authority over the ocean beaches in the Town drastically conflicts with how the parties have acted for the past 330 years (*see e.g. Beers*, 256 NY at 62 ["A practical interpretation, too strong to be ignored, is evidence of the intention of the lawmakers that the exceptions should survive. Significant at all times in shaping the construction of a statute is contemporary usage, unless, indeed, the meaning is so plain that construction is excluded"];

Trustees of Freeholders & Commonalty of Town of E. Hampton v Vail, 151 NY 463, 471 [1897] ["The fact that there was no proof that the plaintiff ever claimed any title or exercised any acts of ownership over the waters under Ft. Pond Bay until about the time of this action must be regarded as a practical interpretation of the patents by the parties interested in them, and is important in determining their rights. The evidence, as well as the absence of any evidence that the plaintiff ever made any claim of title to the land under the bay, is significant, and indicates that the idea of its ownership of the property in dispute is of recent origin." (citation omitted)]). Contrary to the longstanding practical construction of the scope of the Trustees' regulatory authority under the Dongan Patent and the 1818 and 1831 Acts, the Appellate Division's misinterpretation of the 1818 Act effectively divests the Trustees of any authority to regulate to protect the typical public uses of the Town's ocean beaches that have been indisputably included within the public easement.

Because the Appellate Division erroneously interpreted the language and intent of the 1818 Act to drastically limit the scope of the Trustees' regulatory authority over the Town's ocean beaches to the taking and carting of seaweed, this Court should grant leave to appeal.

B. The Appellate Division Order Conflicts With the Second Department's Prior Holdings in *Allen* and *Poster*.

The Appellate Division order determining that the Trustees lack any regulatory authority "to grant or deny permits in connection with (i) the placement and grading of sand and earth, and (ii) the development, construction, maintenance, and use of structures and lands anywhere upon or in the ocean beaches" in the Town (*Semlear*, 127 AD3d at 1063) conflicts with the Second Department's prior holdings in *Matter of Allen v Strough* and *Matter of Poster v Strough*, where the Court determined, albeit implicitly, that the Trustees in fact have regulatory jurisdiction over construction within their public easement from the crest of the primary dune to the high water mark of the Atlantic Ocean. This Court's review is necessary to resolve the conflict between the Appellate Division decisions.

In the companion cases of *Allen* and *Poster*, two owners of private beachfront properties applied to the Trustees for a permit to construct revetments—"'hard structures' designed to dissipate wave energy or to trap sand and widen beaches"—on their adjoining properties "in conjunction with a dune restoration project consisting of the placement of approximately 3,000 cubic yards of sand over the revetment and the planting of beach grass" (*Poster*, 299 AD2d at 128-129). The Trustees denied both applications, primarily on the grounds that the revetments, although protecting the private properties, would likely "exacerbate the effects of beach erosion on other properties, to the detriment of the overall

community" and would likely "unreasonably interfere with the rights of the [public] to use their lands or to pass and repass along their rights of way" (*id.* at 128-129 [internal quotation marks omitted]).

The property owners challenged the Trustees' denials of their permit applications in Article 78 proceedings, arguing, among other things, that the Trustees lacked jurisdiction to require them to obtain permits for the construction of the revetments because the revetments would be placed north of the crest of the primary dune, outside of the geographical scope of the Trustees' public easement (*see Allen*, 301 AD2d at 16; *Poster*, 299 AD2d at 130, 133). In response, the Trustees argued that the 1818 Act confirmed the Trustees' power to preserve the public's rights to access the ocean beaches by protecting the shore areas from environmental degradation, including by declining to issue permits for construction that would exacerbate erosion of the beaches (R 537-539; *see Poster*, 299 AD2d at 131-133). Specifically, the Trustees argued that it denied the permits because

> shore hardening structures worsen erosion further down the beach through a scouring effect, and that the budding of the revetment would simply result in deflecting the erosion problems allegedly being experienced by the petitioner to the next homeowner. The Board was also concerned that approval of the petitioner's application would open the door for other oceanfront homeowners to request bulkheads or revetments which could close the whole oceanfront as erosion destroys the beach up to the structures

(R 539 [citation omitted]).

The trial court in *Poster* dismissed the property owner's challenge to the Trustees' determination, holding that the Trustees "had jurisdiction under the common law to grant or deny the permit application" (*Poster*, 299 AD2d at 134). The trial court in *Allen*, however, annulled the Trustees' denial of the permit, holding that "Allen had alleged that her proposed revetment was landward of the primary dune, and that the Board had produced no evidence to contradict" the allegation that the construction was outside of the geographical scope of the Trustees' regulatory authority (*Allen*, 301 AD2d at 17).

The Second Department, addressing the companion cases simultaneously, acknowledged that the dispositive issue in the cases was the location of the crest of the primary dune that defined the northern extent of the Trustees' regulatory jurisdiction (*see Allen*, 301 AD2d at 17 ["the governing local laws define the northern limit of the Board's permit-issuing jurisdiction with reference to the crest of the 'primary dune' as of the date of the permit application"]; *Poster*, 299 AD2d at 139 ["the extent of the Board's jurisdiction [to require permits for construction on the ocean beaches] is defined, in part, by reference to a line (the crest of the primary dune) which, as the Board itself freely concedes, is mobile even in the best of conditions. New York case law has not previously defined how the jurisdiction of a town or other agency should be limited, where the governing laws or ordinances define the territorial scope of such jurisdiction with reference to the

crest of a dune substantial segments of which have been destroyed"]). Implicit in both of the Second Department decisions, however, was a holding that the Trustees, in fact, have regulatory authority over construction occurring on the Town's ocean beaches between the crest of the primary dune and the high water mark of the Atlantic Ocean. Indeed, the Court would have had no reason to remand the matters for a hearing concerning the geographic scope of the Trustees' regulatory authority (that is, the location of the crest of the primary dune) if the Trustees had no power at all to regulate construction on the ocean beaches, as the Village suggests (*see Allen*, 301 AD2d at 17-18 ["the record in this case affords no basis upon which to determine the northern limit of the 'ocean beach area,' and . . . a hearing is therefore necessary in order to permit the parties to adduce evidence as to the location of that northern limit"]; *Poster*, 299 AD2d at 139).

The Appellate Division order below, holding that the Trustees lack any regulatory authority over construction occurring on the ocean beaches, flatly conflicts with the Second Department's implicit determinations to the contrary in *Allen* and *Poster* (*see Semlear*, 127 AD3d at 1063). This Court's review is therefore warranted to resolve this conflict over the scope of the Trustees' regulatory authority over the ocean beaches between the crest of the primary dune and the high water mark of the Atlantic Ocean.

POINT II

THE APPELLATE DIVISION ORDER IMPAIRS THE RIGHTS OF PUBLIC EASEMENT HOLDERS TO REGULATE FOR THE PROTECTION AND PRESERVATION OF THE EASEMENT

Although the Appellate Division order concerns the Trustees' continued regulatory authority over the Town's ocean beaches under the Dongan Patent and the 1818 and 1831 Acts, the legal principles underlying the Appellate Division's limitation of the scope of the Trustees' rights to protect the public easement to the taking and carting of seaweed will have drastic impacts on the rights of all holders of public easements to regulate and control private uses that impact on the public uses protected by the easement. The issues presented in this case, therefore, are of great statewide importance, and should be reviewed by this Court.

It is well established in New York that a public easement held over lands or waters is deemed to protect all customary public uses of the servient estate (*see Holloway*, 139 NY at 405 [a public easement over a roadway includes "those uses for which highways have ordinarily been understood to be intended"]). In order to ensure that those public uses may be protected, the public easement holder—a municipality or other public body, such as the Trustees—is implicitly granted such regulatory authority as is necessary to protect and preserve the public use (*see e.g. Wager v Troy Union R.R. Co.*, 25 NY 526, 531 [1862] ["This right was and is a mere easement, a right of passage for travel as highways are customarily used; and

the legislature, as the organ or legislative authority of the public, has undoubted control over this easement the same as it has on all other public rights" (emphasis added)]; *People ex rel. New York, Ontario & W. Ry. Co. v State Tax Commn.*, 116 Misc 774, 776 [Sup Ct, Albany County 1921] ["The Legislature . . . can interfere with [fresh-water] streams only for the purpose of regulating, preserving, and protecting the public easement . . . It may make laws regulating booms, dams, ferries, and bridges, only so far as is necessary to protect and preserve the public easement"]; *Appleton v City of New York*, 82 Misc 258, 265 [Sup Ct, NY County 1913] ["It is undoubtedly a general rule that a municipality, notwithstanding the ownership of the fee of the street by the abutting owner, may, by virtue of its ownership of a public easement for street purposes, regulate the use of the street by ordinances and require the securing of a license by the abutting owner for the use of such street."], *revd on other grounds* 163 App Div 680 [1st Dept 1914], *affd* 219 NY 150 [1916]; *see also e.g. Levy Corp. v Dick*, 116 Misc 145, 151 [Sup Ct, Kings County 1921] ["Whether, therefore, the city owns the fee or only has an easement, its power of control is restricted to public use, and any encroachment, whether it be upon the fee, or easement, which is not for a public use is an obstruction, and therefore a public nuisance, or may become such when the public authorities demand its removal."]).

Here, the Trustees' Rules and Regulations are designed to protect public access to and use of the Town's ocean beaches and the Atlantic Ocean itself, and regulate only to the extent necessary to protect the typical public uses of those lands and waters (*see* Trustees' Rules and Regulations, art XII, § 2[B] ["Ocean Beaches within the Town are open to the public at all times within the easement held by the Trustees consisting of the area between the high water mark and the crest of the dune" (emphasis omitted)], *available at* http://www.southamptontownny.gov/DocumentCenter/View/1327 [pg. 43]; *see also State of New York v Trustees of Freeholders & Commonalty of Town of Southampton*, 99 AD2d 804, 805 [2d Dept 1984] ["The [Trustees] are the successors to the original trustees of the freeholders and commonalty of the Town of Southampton whose proprietary rights to certain lands and waters of the Town of Southampton and their right to legislate and control the same as a body politic is derived from antique, royal land grants and patents which have been repeatedly confirmed and upheld throughout the history of this State for over 300 years by both the framers of the State Constitution and the Legislature despite various specific attacks upon such authority."]). In this case, the Trustees' Rules and Regulations require the Trustees to evaluate "whether the activity applied for will unreasonably interfere with the rights of the Freeholders and Commonalty to use their lands or to pass and repass along their rights-of-way," in addition to

considering "the protection of the environment and conservation of natural resources" when making permit determinations for construction within the Trustees' public easement over the ocean beaches (Trustees' Rules and Regulations, art VII, § 1[J][5], *available at* http://www.southamptontownny.gov/DocumentCenter/View/1327 [pg. 32]).

As history in the Town has shown, hard structures constructed on the ocean beaches for purposes of protecting a single property owner's property against the effects of natural erosion often exacerbate scouring of the ocean beaches and multiply the effects of erosion to downdrift properties and beaches. Indeed, as the New York State Department of Environmental Conservation has cautioned,

> Projects designed to extend waterward of the shore will affect the movement of littoral material, reducing the overall beach forming process which in turn may cause accelerated erosion on adjacent or down-drift properties with less protective beaches.
>
> Seawalls, (and to a lesser extent, stone revetments) change the direction (wave reflection) and intensity of wave energy along the shore. Wave reflection can cause an increase in the total energy at the seawall or revetment interface with the water, allowing sand and gravel to remain suspended in the water, which will usually prevent formation of a beach directly fronting the structure. This effect may impact the adjacent downdrift properties by either reducing beach formation (immediately adjacent) or potentially increasing beach formation (further downdrift). In extreme conditions, wave reflection may allow littoral material to be transported off shore rather than along the shore, which would potentially remove that material from the littoral system and starve downdrift beaches

(NY St Dept of Envtl Conservation, Protection against Wavebased Erosion at 1, *available at* http://www.dec.ny.gov/docs/water_pdf/waverosionrevetment.pdf). In light of this and other overwhelming scientific evidence, the Trustees generally prohibit the construction of hard structures on the ocean beaches to ensure that the public's undisputed right of free access to and use of the ocean beaches, the Town's waters, and the Atlantic Ocean remains unimpaired (*see Poster*, 299 AD2d at 143 [holding that "[t]he evidence submitted by the [Trustees] convincingly showed that the policy against hard structures had a sound basis in science, and that such structures ultimately do more harm than good in respect to a region's overall efforts to minimize the natural forces of erosion" and, therefore, the Trustees' denial of Poster's application for a permit to build a revetment in the ocean beach area was not arbitrary or capricious]).

The Village, however, has taken a different tack, favoring the interests of private owners of beachfront property over preservation of the public uses of the ocean beaches protected under the Trustees' public easement. The Appellate Division order extinguishing the Trustees' long-recognized regulatory authority over the ocean beaches only exacerbates that dilemma. Indeed, under the Appellate Division's holding below, the regulation of construction to protect the Trustees' public easement over the Town's ocean beaches is left to six different municipalities, the five incorporated villages and the Town. Each municipality has

taken a different stance on whether hard or semi-hard structures should be permitted as erosion control devices, leading to a patchwork of often inconsistent regulation without regard to the public's continuing rights to free access to and use of the ocean beaches, the Town's waters, and the Atlantic Ocean. On this highly valuable shoreline, the Appellate Division's order leads to the decentralization of regulatory authority to prevent erosion of this State's important ocean beaches among a group of municipalities whose constituents have undoubtedly conflicting interests. The Dongan Patent and the Legislature's enactments repeatedly confirming that royal grant vested regulatory authority to protect the public uses of these important natural resources in the Trustees to avoid exactly what the Appellate Division order now promotes, the balkanization of control over the public easement vested in the Trustees.

Even accepting, arguendo, the Appellate Division's erroneous limitation of the Trustees' regulatory authority to the protection of the taking and carting of seaweed, fishing, and the landing of property on the beaches, however, the Trustees still have the right to regulate the construction of hard or semi-hard structures within the public easement to preserve the beaches for the public uses for which they are intended. Indeed, if the geocubes at issue in this case result in the scouring of the ocean beaches and exacerbate the effects of erosion to downdrift properties and beaches, as the scientific evidence suggests, the effect

would be the destruction of the very beaches, and with them the public's right to free access and use of the Town's waters and the Atlantic Ocean that are protected by the Trustees' undisputed public easement. Therefore, even if the Appellate Division's interpretation of the 1818 Act was correct, its declaration that the Trustees lack authority to regulate private construction occurring within the public easement was error.

Without regulatory authority to control the private uses of the lands over which the public easement lies, the Appellate Division's holding deprives the Trustees, and all other holders of a public easement, of the very rights granted to enforce the easement and preserve the public uses it is intended to protect. This Court's review, therefore, is warranted to address these issues of significant statewide import.

POINT III

THIS COURT SHOULD GRANT LEAVE TO APPEAL

This case is one of three companion cases concerning the Trustees' regulatory authority over the Town's ocean beaches from which the Trustees are seeking leave to appeal to this Court. *Semlear v Albert Mar. Constr., Inc.* (127 AD3d 1061 [2d Dept 2015]) involves the attempt by private property owners to install geotubes, a semi-hard erosion control device, within the ocean beach area without first obtaining a permit from the Trustees in accordance with their Rules

and Regulations. The Appellate Division, on the opinion in this case, again held that the Trustees lack any regulatory authority to grant or deny permits for construction occurring on the ocean beaches between the crest of the primary dune and the high water mark of the Atlantic Ocean (*see id.* at 1061-1062).

Seizing on the Village's opposition to the Trustees' continued exercise of regulatory authority, the Village of West Hampton Dunes, which is one of the five incorporated villages within the Town, also commenced an action seeking a declaration that the Trustees "have no lawful regulatory authority over the placement and grading of sand and earth or the development, construction, maintenance, and use of structures and lands upon the ocean beaches of the Incorporated Village of West Hampton Dunes" (*Incorporated Vil. of W. Hampton Dunes v Semlear*, 127 AD3d 1024, 1025 [2d Dept 2015]). The Appellate Division again granted the same declaration. Because all three cases squarely present novel issues of substantial import to holders of public easements throughout this State, and the Appellate Division's holding was error, this Court should grant leave to appeal. Indeed, the Appellate Division's holding quotes the 1818 Act verbatim, but fails to provide any meaningful guidance to the Trustees or the public concerning the scope of the Trustees' public easement and their regulatory authority over the Town's ocean beaches.

Private beachfront property owners and the incorporated villages in the Town have begun using the Appellate Division orders below to challenge any exercise of regulatory authority by the Trustees. For example, a group of private property owners recently filed a notice of claim with the Village of Quogue alleging, based upon the Appellate Division's order, that the Trustees lack any authority to regulate the use of recreational vehicles on the ocean beaches (*see* Notice of Claim filed by Kathleen Askarog Thomas et al. in *Thomas v Trustees of Freeholders & Commonalty of Town of Southampton*, Oct. 21, 2015, at 7-8 [included in Addendum] ["The establishment of this daytime beach parking and driving area on claimants' property by the Town Trustees is illegal and *ultra vires* because the Town Trustees have no proper regulatory power on ocean beaches except in connection with fishing and the gathering of seaweed."]). Simply put, the Appellate Division order not only overrules 330 years of legislative and judicial recognition of the Trustees' unique position of regulatory authority in the Town, it threatens the Trustees' continued existence as the body designated to protect the public's free access to and use of the ocean beaches, the Town's waters, and the Atlantic Ocean.

The scope of the powers of the Trustees are also presently before this Court on an appeal as of right in *Gessin v Throne-Holst* (__ AD3d __, 2015 NY Slip Op 06885 [2d Dept Sept. 23, 2015]). In *Gessin*, the plaintiffs, a group of Town

taxpayers, "commenced [an] action against the Trustees, the Town Board, and the Town comptroller, alleging that the Trustees had violated Town Law § 64(1) by depositing their revenues into nine bank accounts over which the Town Board had no control. The plaintiffs further alleged that since the expenditures from these accounts were not specifically authorized by the Town Board and did not comply with the provisions of Town Law governing town expenditures, they were illegal and constituted waste" (*id.* at *1). In essence, the Town taxpayers sought to require the Trustees to pay over to the Town all funds that they derived from the exercise of the regulatory authority granted in the Dongan Patent.

Recognizing that the Trustees are a separate and independent body politic, however, the Appellate Division rejected the plaintiffs' challenge, holding:

> There is nothing in the plain language of the statute or the legislative history [of Town Law § 64(1)] to indicate that it was intended to transfer authority over Trust revenue away from the Trustees, or to otherwise abrogate or repeal the explicit legislation setting forth the duties and powers of the Trustees with respect to Trust revenue (see L 1831, ch 283). Although the Legislature surely could transfer control over Trust revenue to the Town Board, it has not done so. There is nothing in the constitutional or statutory history of this State that suggests that Trust revenues are subject to Town control. To the contrary, the past 400 years of legal history reveal consistent recognition and ratification of the independent existence of the Trust

(*id.* at *7). The plaintiffs have appealed the Second Department's decision in *Gessin* to this Court as of right, and their appeal is pending. Given the numerous

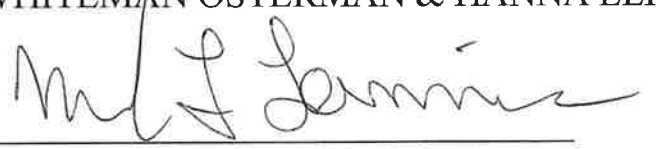
challenges to the Trustees' continuing authority under the Dongan Patent and the 1818 and 1831 Acts, this Court should grant leave to appeal.

CONCLUSION

For the foregoing reasons, the Trustees respectfully request that this Court grant their motion for leave to appeal in its entirety, and award them such other relief as this Court shall deem just, proper or equitable.

Dated: November 6, 2015
Albany, New York

WHITEMAN OSTERMAN & HANNA LLP

By: 

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APPENDIX

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION — SECOND DEPARTMENT

----------X

JON S. SEMLEAR, FREDERICK C. HAVEMYER, ERIC SCHULTZ, EDWARD J. WARNER, JR., and WILLIAM PELL, as Trustees of the Freeholders and Commonalty of the Town of Southampton,

Plaintiffs-Respondents,

- against -

INCORPORATED VILLAGE OF QUOGUE,

Defendant-Appellant.

----------X

Docket No. 2013-01619

NOTICE OF ENTRY OF DECISION & ORDER ON MOTION

PLEASE TAKE NOTICE that the attached is a true copy of a Decision and Order on Motion in this matter that was entered in the Office of the Clerk of the Supreme Court, Appellate Division, Second Judicial Department, on September 15, 2015.

NICA B. STRUNK
ATTORNEY AT LAW

Attorney for Defendant-Appellant
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Semlear v Incorporated Village of Quogue
Motion No: 2013-01619
Slip Opinion No: 2015 NY Slip Op 84548(U)
Decided on September 15, 2015
Appellate Division, Second Department, Motion Decision
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This motion is uncorrected and is not subject to publication in the Official Reports.

Supreme Court of the State of New York

Appellate Division: Second Judicial Department

M198423

E/ct

REINALDO E. RIVERA, J.P.

JOHN M. LEVENTHAL

SYLVIA O. HINDS-RADIX

BETSY BARROS, JJ.

2013-01619

Jon S. Semlear, etc., et al., respondents,

v Incorporated Village of Quogue, appellant.

DECISION & ORDER ON MOTION

(Index No. 30131/10)

Motion by the respondents, inter alia, for leave to reargue an appeal from an order and judgment (one paper) of the Supreme Court, Suffolk County, dated December 11, 2012, which was determined by decision and order of this Court dated April 22, 2015, or, in the alternative, for leave to appeal to the Court of Appeals from the decision and order of this Court.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, with $100 costs.

RIVERA, J.P., LEVENTHAL, HINDS-RADIX and BARROS, JJ., concur.

ENTER:

Aprilanne Agostino

Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION — SECOND DEPARTMENT

----------X

JON S. SEMLEAR, FREDERICK C. HAVEMYER, ERIC SCHULTZ, EDWARD J. WARNER, JR., and WILLIAM PELL, as Trustees of the Freeholders and Commonalty of the Town of Southampton,

Docket No. 2013-01619

AFFIRMATION OF SERVICE

Plaintiffs-Respondents,

- against -

INCORPORATED VILLAGE OF QUOGUE,

Defendant-Appellant.

----------X

NICA B. STRUNK, an attorney admitted to the practice of law before the Courts of the State of New York, and not a party to the above-entitled cause, affirms the following to be true under the penalties of perjury pursuant to CPLR 2106:

On the 20th day of October, 2015, I served the annexed NOTICE OF ENTRY OF DECISION AND ORDER ON MOTION upon

Richard C. Cahn
CAHN & CAHN, LLP
Attorneys for Plaintiffs-Respondents
22 High Street, Suite No. 3
Huntington, NY 11743

the addresses designated for service, by depositing a true copy of same enclosed in a postpaid properly-addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

NICA B. STRUNK

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION — SECOND DEPARTMENT

----------X

JON S. SEMLEAR, FREDERICK C. HAVEMYER, ERIC SCHULTZ, EDWARD J. WARNER, JR., and WILLIAM PELL, as Trustees of the Freeholders and Commonalty of the Town of Southampton,

Plaintiffs-Respondents,

- against -

INCORPORATED VILLAGE OF QUOGUE,

Defendant-Appellant.

----------X

Docket No. 2013-01619

NOTICE OF ENTRY OF DECISION & ORDER ON APPEAL

PLEASE TAKE NOTICE that the attached is a true copy of a Decision and Order in this matter that was entered in the Office of the Clerk of the Supreme Court, Appellate Division, Second Judicial Department, on April 22, 2015.

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Semlear v Incorporated Vil. of Quogue
2015 NY Slip Op 03345
Decided on April 22, 2015
Appellate Division, Second Department
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided on April 22, 2015 SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Second Judicial Department
REINALDO E. RIVERA, J.P.
JOHN M. LEVENTHAL
SYLVIA O. HINDS-RADIX
BETSY BARROS, JJ.

2013-01619
(Index No. 30131/10)

[*1]Jon S. Semlear, etc., et al., respondents,

v

Incorporated Village of Quogue, appellant.

Nica B. Strunk, Southampton, N.Y., for appellant.

Cahn & Cahn, LLP, Huntington, N.Y. (Richard C. Cahn of counsel), for respondents.

DECISION & ORDER

In an action, inter alia, to permanently enjoin the defendant from placing structures on, or moving, placing, or scraping sand in the ocean beach area within the boundaries of the Incorporated Village of Quogue, without a permit or consent from the plaintiffs, and for a judgment declaring that a certain set of rules and regulations is valid and binding upon the defendant, the defendant appeals from so much of an order and judgment (one paper) of the Supreme Court, Suffolk County (Mayer, J.), dated December 11, 2012, as, upon the granting of the plaintiffs' motion for leave to reargue and thereupon, in effect, adhering to the determination in an order and judgment of the same court dated May 9, 2012, granting its motion for summary judgment, declared that "the plaintiffs have the right to regulate activities to protect their easement as to that area south of the crest of the primary dune and north of the high water mark" along ocean beaches located within the boundaries of the Incorporated Village of Quogue.

ORDERED that the order and judgment dated December 11, 2012, is reversed insofar as appealed from, on the law, with costs, and the matter is remitted to the Supreme Court, Suffolk County, for the entry of an appropriate amended judgment declaring that (a) the Trustees of the Freeholders and Commonalty of the Town of Southampton have no lawful governmental or regulatory power to grant or deny permits in connection with (i) the placement and grading of sand and earth, and (ii) the development, construction, maintenance, and use of structures and lands anywhere upon or in the ocean beaches located within the boundaries of the Incorporated Village of Quogue, except for the management of the specific activities and uses reserved to the inhabitants of the Town of Southampton by L 1818, ch 155, and L 1831, ch 283, for "taking seaweed from the shores of any of the common lands of said town, or carting or transporting to or from, or landing property on said shores, in the manner heretofore practiced" (L 1818, ch 155, § IV), and (b) any attempt by the Trustees of the Freeholders and Commonalty of the Town of Southampton to exercise or extend such power or authority over ocean beaches within the boundaries of the Incorporated Village of Quogue, including enforcement of any provisions of the Rules and Regulations for the Management and Products of the Waters of the Town of Southampton, except in the management of the specific activities and uses reserved to

the inhabitants of the Town of Southampton under L 1818, ch 155, and L 1831, ch 283, is unlawful, unenforceable, and null and void.

The plaintiffs constitute the duly elected Trustees of the Freeholders and Commonalty [*2]of the Town of Southampton (hereinafter collectively the Trustees). The Trustees "are the successors to the original Trustees of the freeholders and commonalty of the Town of Southampton whose proprietary rights to certain lands and waters of the Town of Southampton and their right to legislate and control the same as a body politic is derived from antique, royal land grants and patents which have been repeatedly confirmed and upheld throughout the history of this State for over 300 years by both the framers of the State Constitution and the Legislature despite various specific attacks upon such authority" (*State of New York v Trustees of Freeholders & Commonalty of Town of Southampton,* 99 AD2d 804, 805; *see Brookhaven Baymen's Assn, Inc. v Town of Southampton,* 85 AD3d 1074, 1078). By L 1818, ch 155 (hereinafter the 1818 Law), and L 1831, ch 283 (hereinafter the 1831 Law), the New York State Legislature divested the Trustees of all authority to regulate activities on the subject ocean beach land, reserving to the Trustees their authority over the "the waters . . . the fisheries, the seaweed, or any other productions of the waters of said town," and the right to protect the "privilege" reserved to the Town's inhabitants "of taking seaweed from the shores of any of the common lands of said town, or carting or transporting to or from, or landing property on said shores, in the manner heretofore practiced" (L 1818, ch 155, § IV, continued by L 1831, ch 283 § 5; *see Trustees of Southampton v Betts,* 163 NY 454, *affg* 21 App Div 435). The Court of Appeals recognized this "privilege" to be in the nature of a public "easement" (*Trustees of Southampton v Betts,* 163 NY at 460).

The Trustees commenced this action against the defendant, Incorporated Village of Quogue, which is located within the borders of the Town, seeking, inter alia, a judgment declaring that the Village must comply with various permit requirements contained in the Rules and Regulations for the Management and Products of the Waters of the Town of Southampton, enacted by the Trustees, before performing activities such as dune restoration and erosion control projects on the ocean beach lands located within the Village. The Trustees contend that they have the sole authority to regulate activities on

the subject ocean beach lands, based on a patent issued in 1686 (hereinafter the Dongan Patent) by Thomas Dongan, the Royal Governor of the Province of New York, acting by authority of King James II of England. The Village moved for summary judgment, contending, among other things, that the Trustees were divested of all authority to regulate activities on the subject ocean beach land by the 1818 Law, except to continue the management of the specific activities and uses within the so-called "easement." In an order and judgment dated May 9, 2012, the Supreme Court granted the Village's motion for summary judgment dismissing the complaint, and declared that the Trustees do not possess the right to regulate the subject ocean beaches to protect their easement over them, to the extent that the beaches lie north of the high-water mark in the vicinity of the Atlantic Ocean. The Trustees thereafter requested the Supreme Court to clarify that they still had the power to institute legal action to protect the easement, and thus moved for leave to reargue. The Village raised no objection to that contention. In an order and judgment dated December 11, 2012, the Supreme Court, upon reargument, adhered to its prior determination granting the Village's motion for summary judgment dismissing the complaint, but also declared that the Trustees have "the right to regulate activities to protect their easement as to that area south of the crest of the primary dune and north of the high water mark."

We agree with the Village's contention that, upon reargument, the Supreme Court improperly granted relief to the Trustees that was different from the relief requested by Trustees, and was not requested by any of the parties herein (*see Matter of Myers v Markey*, 74 AD3d 1344, 1345). Therefore, the Supreme Court should not have declared that the Trustees have "the right to regulate activities to protect their easement as to that area south of the crest of the primary dune and north of the high water mark."

In any event, we also agree with the Village that the broad declaration made by the Supreme Court exceeds the authority reserved to the Trustees under the 1818 Law, which was extended in the 1831 Law. The language of the 1818 Law "only relates to the use of the beach or shore, by taking seaweed from it and carting or transporting to and from or landing property on such shore" and "makes no reference to the management or regulation of the lands constituting the beach or shore . . . , but merely provides for the [Trustees'] management and regulation of the waters, fisheries, and

taking of seaweed and the productions of the waters" (*Trustees of Southampton v Betts,* 21 App Div 435, 439, *affd and quoted in* 163 NY at 459). Accordingly, the Village was entitled to [*3]a judgment declaring, inter alia, that the Trustees have no lawful governmental or regulatory power to grant or deny permits in connection with (i) the placement and grading of sand and earth, and (ii) the development, construction, maintenance, and use of structures and lands located anywhere upon the ocean beaches situated within the boundaries of the Village.

Contrary to the Trustees' contention, our determination herein is not inconsistent with our decisions in *Matter of Allen v Strough* (301 AD2d 11), and *Matter of Poster v Strough* (299 AD2d 127), as neither of those two cases involved the issue of the subject matter of the Trustees' regulatory jurisdiction but, instead, involved the issue of the Trustees' territorial or geographical jurisdiction.

RIVERA, J.P., LEVENTHAL, HINDS-RADIX and BARROS, JJ., concur.

ENTER:

Aprilanne Agostino

Clerk of the Court

Docket No. 2013-01619

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION

SECOND DEPARTMENT

JON S. SEMLEAR, FREDERICK C. HAVEMYER, ERIC SCHULTZ, EDWARD J. WARNER, JR., and WILLIAM PELL, as Trustees of the Freeholders and Commonalty of the Town of Southampton,

Plaintiffs-Respondents,

- against -

INCORPORATED VILLAGE OF QUOGUE,

NOTICE OF ENTRY OF DECISION & ORDER ON APPEAL

NICA B. STRUNK

ATTORNEY AT LAW

OFFICE:

37 WINDMILL LANE, SOUTHAMPTON, NY 11968

MAILING:

P.O. BOX 5087, SOUTHAMPTON, NY 11969

PHONE: (631) 482-9925

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ORDER OF HONORABLE PETER H. MAYER, DATED DECEMBER 11, 2012, APPEALED FROM [4-7]

INDEX No. 10-30131

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 7-13-12
ADJ. DATE 7-24-12
Mot. Seq. # 002 - MG; CASEDISP

----------X

JON S. SEMLEAR, FREDERICK C. HAVEMYER, ERIC SCHULTZ, EDWARD J. WARNER, JR., and WILLIAM PELL, as Trustees of the Freeholders and Commonalty of the Town of Southampton,

Plaintiffs,

-against-

INCORPORATED VILLAGE OF QUOGUE,

Defendant.

----------X

CAHN & CAHN, LLP
Attorney for Plaintiffs
22 High Street, Suite 3
Huntington, New York 11743

ESSEKS, HEFTER & ANGEL, LLP
Attorney for Defendant
108 East Main Street
P.O. Box 279
Riverhead, New York 11901

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the plaintiffs, dated June 27, 2012, and supporting papers; (2) Affidavit in Opposition by the defendant, dated July 20, 2012, and supporting papers; (3) Reply Affidavit by the plaintiffs, dated July 23, 2012, and supporting papers; (4) Other Supplemental Affidavit by the defendant, dated July 26, 2012, and supporting papers ~~(and after hearing counsels' oral arguments in support of and opposed to the motion)~~; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows:

Having considered the papers submitted in support of and in opposition to the within motion, the application for leave to reargue the motion which resulted in the Court's decision dated May 9, 2012 is granted, and upon reargument, it is

ORDERED that the motion by the defendant, Incorporated Village of Quogue, for an order granting summary judgment pursuant to CPLR 3212 dismissing plaintiff's claims in their entirety is granted.

Although plaintiffs failed to attach a complete copy of the papers filed with the Court in this motion for leave to reargue and, generally without a complete copy of the underlying motion papers, it is unclear what arguments were raised and what evidence was submitted by the parties with the prior motion for

summary judgment (*see* CPLR 2221 [d]; CPLR 2214 [c]; *see generally* ***Amato v Lord & Taylor, Inc.***, 10 AD3d 374, 781 NYS2d 125 [2d Dept 2004]), the Court, in this instance, was able to access the necessary papers to make a determination. However, movants should be aware that this Court does not usually retain the papers following the disposition of a motion and the Court is not compelled to retrieve the clerk's file in connection with its consideration of subsequent motions (*see* ***Sheedy v Pataki***, 236 AD2d 92, 663 NYS2d 934 [3d Dept 1997], *lv denied* 91 NY2d 805 [1998]; *see also* CPLR 2214 [c]).

Plaintiffs instituted this action for an injunction pursuant to CPLR Article 63, enjoining the defendant from placing hard or semi-hard structures, or moving, placing, depositing, or scraping sand in the ocean beach area within the Village of Quogue without a permit from or consent from the plaintiffs; enjoining the defendant from interfering with plaintiffs' easement over the ocean beach; and for a judgment declaring the "Trustees' Rules and Regulations" to be valid and binding upon the defendant. Plaintiffs, the duly elected members of the Board of Trustees of the Freeholders and Commonalty of the Town of Southampton, allege that as a result of a certain patent issued on December 6, 1686 (the Dongan Patent) by the King of England to the Governor of the Provinces of New York, and thereafter, through various legislative acts and court rulings, they have possessed an easement over the beaches and have exercised the power to regulate the use of the beaches within the Town of Southampton. As a result thereof, plaintiffs maintain that the Village of Quogue, the defendant herein, undertook a series of acts in violation of their Rules and Regulations and that the defendant refuses to acknowledge the plaintiffs' right to enforce regulations with respect to the portion of the ocean beach area that lies within its boundaries.

The defendant requests an order granting summary judgment dismissing plaintiffs' complaint on the ground that plaintiff trustees have no regulatory jurisdiction over ocean beaches in the Village of Quogue, that the State of New York and the Village of Quogue have been given the regulatory power over the ocean beach activities within the village (and that the town and its trustees have no regulatory power within the village's boundaries), and that the plaintiffs have failed to show that there has been an interference with the public's "easement".

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see,* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141[1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*).

The Town of Southampton, Suffolk County, New York, was created by royal charter, the first patent of the town being granted by Governor Andros in 1676, the second by Governor Dongan ten years later. "[B]y progressive legislative acts of the Colonial Legislatures and subsequent Legislatures, this State has continued the legal existence of the trustees, has recognized their legal title to the lands and confirmed their power" (***Knapp v Fasbender***, 1 NY2d 212, 228, 151 NYS2d 668 [1956]). The Trustees continue to have the right to pass such rules and regulations as affect the management of the property within their jurisdiction (*see* ***People v Lagana***, 13 Misc3d 110, 827 NYS2d 433 [App Term, 2d Dept 2006], *lv denied,* 8 NY3d 882, 832 NYS2d 494 [2007]). As case law has evolved in connection with the property within the jurisdiction of the trustees, we know that when bordering on navigable waters, the title of the adjoining property owner extends to the "high-water mark" (***The Trustees of Brookhaven v Strong***, 60 NY 56 [1875]). The land under the waters was owned by the town, and, along with the product of the waters, was managed and controlled solely by the trustees (***People v Jessup***, 160 NY 249 [1899]; ***The Trustees of the Freeholders and Commonalty of the Town of Southampton v The Mecox Bay Oyster Co.***, 116 NY 1 [1889]; ***The Trustees of Brookhaven v Strong***, *supra*). Although Chapter 155 of the Laws of 1818 declared that the beach was part of the undivided land, over which the Town proprietors would manage, the act made a reservation with respect to public easements and privileges and understood that the plaintiffs' had a right to an easement (***The Trustees of the Freeholders and Commonalty of the Town of Southampton v Betts***, 163 NY 454, 460 [1900]; *see,* ***Dolphin Lane Assoc v Town of Southampton,*** 72 Misc2d, 868; 339 NYS2d 966 [1971]).

In ***Allen v. Strough,*** 301 AD2d 11, 752 NYS2d 339[2nd Dept. 2002], the Board of Trustees of the Freeholders and Commonalty of the Town of Southampton were alleged to have exceeded their jurisdiction in denying an application by Susan Allen and her neighbor John Poster for permission to construct rock revetments the protection of which, they alleged, protected their houses from destruction. These claims were made in a hybrid Article 78, Declaratory Judgement proceeding. Determination of the issue revolved around the definition of ocean beach area. Pursuant to local law (Rules Art. I) the "ocean beach area" is the area bounded on the north by the crest of the primary dune and on the south by the high water mark of the Atlantic Ocean. Petitioner ***Allen*** had alleged that her proposed revetment was landward of the primary dune. Supreme Court accepted this proof and found that no permit was required and thus annulled the Board's denial of the permit. The Appellate Division found that the record below in both the ***Allen*** and ***Strough*** cases were unclear as to where the northern limit of the "ocean beach area" was(Rules Art. I), and remanded the cases for a hearing to determine this northern limit and further decide the related question as to whether a permit from the plaintiffs would be required to construct the revetment.

Although the ***Allen*** case concerned the jurisdiction of the Trustees to issue permits that regulate activities taking place in the relevant areas of the ocean beaches, it is persuasive in the context of the plaintiff's rights to enforce its easement. The definition of the ocean beach is the same in the instant case as in the ***Allen*** case. Under Town Law (Rules Art. I) the ocean beach area is that area "along the Atlantic Ocean bounded on the north by the crest of the primary dune;... on the south by the high-water mark of the Atlantic Ocean." Thus, the trustees have the right to control the ocean beach for the protection of its easement area that is south of the crest of the primary dune and north of the high water mark of the ocean. The trustees retain the title to the lands under water and have the power to grant rights to erect structures on those submerged lands and to take shellfish from them (***Knapp v Fasbender***, *supra*).

However, they do not have unfettered control of all of the shores and beaches along the Atlantic Ocean.(*see, The Trustees of the Freeholders and Commonalty of the Town of Southampton v Betts, supra*; *Allen v Strough, supra*).

The jurisdiction of the trustees is not limited by the authority of the State because Navigation Law §2 (4) specifically excluded "tidewaters bordering on and lying within the boundaries of Nassau and Suffolk counties" from the navigable waters of the state (the basis of the exemption being derived from the various patents and their progeny) (*see Rottenberg v Edwards*, 103 AD2d 138, 478 NYS2d 675 [2d Dept 1984]). Although the defendant Village would generally have jurisdiction of the areas within its territorial limits, because of the various colonial land grants which have been confirmed by the state and federal legislatures, the lands lying on or bordering the tidewaters are not under its jurisdiction as they remain under the jurisdiction of the town or its trustees (*see Inc. Village of Manorhaven v Ventura Yacht Services, Inc.*, 166 AD2d 685, 561 NYS2d 277 [2d Dept 1990]; *compare Malloy v Inc. Village of Sag Harbor*, 12 AD3d 107, 784 NYS2d 141 [2d Dept 2004]).

In the instant matter, plaintiffs' complaint makes no reference to the crest of the primary dune and the high-water mark but states in general that it has jurisdiction over the "Ocean Beach Area." Thus, that portion of plaintiffs' complaint which seeks a declaration that they possess the right to regulate the subject beaches to protect their easement over them cannot be granted, as it is clear that they possess only the right to regulate for the protection of their easement that portion of the beach which may be south of the crest of the primary dune and north of the high-water mark of the Atlantic Ocean.

Similarly, in connection with their request for an injunction, plaintiffs fail to show that their "easement rights" have been or are in danger of being obstructed. Finally, although the Rules and Regulations of the Trustees may be valid and enforceable, as stated in the portion of the complaint which seeks a declaratory judgment, the plaintiffs have failed to set forth a valid cause of action against the defendant since no allegation is made that the actions of the defendant affected the land or waters below the crest of the primary dune. Accordingly, as plaintiffs are without jurisdiction to maintain any of the causes of action alleged in their complaint, defendant's motion for an order granting summary judgment dismissing the complaint is granted.

The Court declares that the plaintiffs have the right to regulate activities to protect their easement as to that area south of the crest of the primary dune and north of the high water mark.

This constitutes the Order and Judgment of the Court.

Dated: 12/11/12

Peter H. Mayer
PETER H. MAYER, J.S.C.

[ ] FINAL DISPOSITION

[X] NON FINAL DISPOSITION

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ORDER OF HONORABLE PETER H. MAYER, DATED MAY 9, 2012 [8-11.1]

SHORT FORM ORDER

INDEX No. 10-30131

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PUBLISH

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 12-20-11
ADJ. DATE 2-7-12
Mot. Seq. # 001 - MG; CASEDISP

JON S. SEMLEAR, FREDERICK C. HAVEMYER, ERIC SCHULTZ, EDWARD J. WARNER, JR., and WILLIAM PELL, as Trustees of the Freeholders and Commonalty of the Town of Southampton,

Plaintiffs,

-against-

INCORPORATED VILLAGE OF QUOGUE,

Defendant.

CAHN & CAHN, LLP
Attorney for Plaintiffs
22 High Street, Suite 3
Huntington, New York 11743

ESSEKS, HEFTER & ANGEL, LLP
Attorney for Defendant
108 East Main Street
P.O. Box 279
Riverhead, New York 11901

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant, dated November 4, 2011, and supporting papers (including Memorandum of Law dated November 4, 2011); (2) Affidavit in Opposition by the plaintiffs, dated December 6, 2011, and supporting papers (including Memorandum of Law dated December 6, 2011); (3) Reply Memorandum of Law by the defendant, dated February 6, 2012; (4) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by the defendant, Incorporated Village of Quogue, for an order granting summary judgment pursuant to CPLR 3212 dismissing plaintiff's claims in their entirety is granted.

Plaintiff's instituted this action for an injunction pursuant to CPLR Article 63, enjoining the defendant from placing hard or semi-hard structures, or moving, placing, depositing, or scraping sand in the ocean beach area within the Village of Quogue without a permit from or consent from the plaintiffs; enjoining the defendants from interfering with plaintiffs' easement over the ocean beach; and for a judgment declaring the "Trustees' Rules and Regulations" to be valid and binding upon the defendant. Plaintiffs, the duly elected members of the Board of Trustees of the Freeholders and Commonalty of the Town of Southampton, allege that as a result of a certain patent issued on December 6, 1686 (the Dongan Patent) by the King of England to the Governor of the Provinces of New York, and thereafter,

through various legislative acts and court rulings, they have possessed an easement over the beaches and have exercised the power to regulate the use of the beaches within the Town of Southampton. As a result thereof, plaintiffs maintain that the Village of Quogue, the defendant herein, undertook a series of acts in violation of their Rules and Regulations and that the defendant refuses to acknowledge the plaintiffs' right to enforce regulations with respect to the portion of the ocean beach area that lies within its boundaries.

The defendant requests an order granting summary judgment dismissing plaintiffs' complaint on the ground that plaintiff trustees have no regulatory jurisdiction over ocean beaches in the Village of Quogue, that the State of New York and the Village of Quogue have been given the regulatory power over the ocean beach activities within the village (and that the town and its trustees have no regulatory power within the village's boundaries), and that the plaintiffs have failed to show that there has been an interference with the public's "easement".

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see, **Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141[1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see **Alvarez v Prospect Hosp.**, supra*).

The Town of Southampton, Suffolk County, New York, was created by royal charter, the first patent of the town being granted by Governor Andros in 1676, the second by Governor Dongan ten years later. "[B]y progressive legislative acts of the Colonial Legislatures and subsequent Legislatures, this State has continued the legal existence of the trustees, has recognized their legal title to the lands and confirmed their power" (***Knapp v Fasbender***, 1 NY2d 212, 228, 151 NYS2d 668 [1956]). The Trustees continue to have the right to pass such rules and regulations as affect the management of the property within their jurisdiction (*see **People v Lagana***, 13 Misc3d 110, 827 NYS2d 433 [App Term, 2d Dept 2006], *lv denied*, 8 NY3d 882, 832 NYS2d 494 [2007]). As case law has evolved in connection with the property within the jurisdiction of the trustees, we know that when bordering on navigable waters, the title of the adjoining property owner extends to the "high-water mark" (***The Trustees of Brookhaven v Strong***, 60 NY 56 [1875]). The land under the waters was owned by the town, and, along with the product of the waters, was managed and controlled solely by the trustees (***People v Jessup***, 160 NY 249 [1899]; ***The Trustees of the Freeholders and Commonalty of the Town of Southampton v The Mecox Bay Oyster Co.***, 116 NY 1 [1889]; ***The Trustees of Brookhaven v Strong***, *supra*). The beach was part of the undivided land over which the town proprietors, and not the trustees, were given to manage as a result of New York Chapter 155 of the Laws of 1818, as "[it was] quite clear, as disclosed by the case,

that the terms 'undivided lands' and 'common lands' were used interchangeably to refer to the uplands and to the beaches as well" (***The Trustees of the Freeholders and Commonalty of the Town of Southampton v Betts***, 163 NY 454, 460 [1900]). The trustees, who retain the title to the lands under water and have the power to grant rights to erect structures on those submerged lands and to take shellfish from them, do not have control of the shores and beaches (***Knapp v Fasbender, supra***). As is defined by Southampton Town law (at Rules Article I), the ocean beach area is that area "along the Atlantic Ocean bounded on the north by the crest of the primary dune, ... on the south by the high-water mark of the Atlantic Ocean." Thus, the trustees control the land in the vicinity of the Atlantic Ocean within their township that is south of the high-water mark of the Atlantic Ocean, and not the beach area north of the high-water mark.

The jurisdiction of the trustees is not limited by the authority of the State because Navigation Law §2 (4) specifically excluded "tidewaters bordering on and lying within the boundaries of Nassau and Suffolk counties" from the navigable waters of the state (the basis of the exemption being derived from the various patents and their progeny) (***see Rottenberg v Edwards***, 103 AD2d 138, 478 NYS2d 675 [2d Dept 1984]). Although the defendant Village would generally have jurisdiction of the areas within its territorial limits, because of the various colonial land grants which have been confirmed by the state and federal legislatures, the lands lying on or bordering the tidewaters are not under its jurisdiction as they remain under the jurisdiction of the town or its trustees (***see Inc. Village of Manorhaven v Ventura Yacht Services, Inc.***, 166 AD2d 685, 561 NYS2d 277 [2d Dept 1990]; ***compare Malloy v Inc. Village of Sag Harbor***, 12 AD3d 107, 784 NYS2d 141 [2d Dept 2004]).

To the extent that a party or entity desires to build, construct, or affect the land or waters south of the high-water point in the vicinity of the Atlantic Ocean within the Village of Quogue, the plaintiff trustees would be authorized to regulate that activity. Here, however, plaintiffs' complaint makes no reference to the high-water mark but states in general that it has jurisdiction over the "Ocean Beach Area", which is not the case. Thus, that portion of plaintiffs' complaint which seeks a declaration that they possess the right to regulate the subject beaches and to protect their easement over them cannot be granted, as it is clear that they possess only the right to regulate that portion of the beach which may be south of the high-water mark and not all of the ocean beach areas in the township. Similarly, in connection with their request for an injunction, plaintiffs fail to show that their "easement rights" have been or are in danger of being obstructed. Finally, although the Rules and Regulations of the Trustees may be valid and enforceable, as stated in the portion of the complaint which seeks a declaratory judgment, the plaintiffs have failed to set forth a valid cause of action against the defendant since no allegation is made that the actions of the defendant affected the land or waters below the high-water mark of the Atlantic Ocean. Accordingly, as plaintiffs are without jurisdiction to maintain any of the causes of action alleged in their complaint, defendant's motion for an order granting summary judgment dismissing the complaint is granted; and, the Court declares that plaintiffs do not possess the right to regulate the subject beaches to protect their easement over them, to the extent that the beaches lie north of the high-water mark in the vicinity of the Atlantic Ocean.

Dated: 5/9/12

Peter H. Mayer
PETER H. MAYER, J.S.C.

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ADDENDUM

IN THE MATTER OF THE CLAIM OF

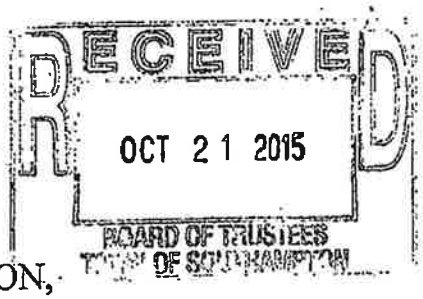
KATHLEEN ARASKOG THOMAS,
ANDREW S. THOMAS, RAND V. ARASKOG,
AND JESSIE M. ARASKOG,

Claimants,

- against -

TRUSTEES OF THE FREEHOLDERS AND
COMMONALTY OF THE TOWN OF SOUTHAMPTON,
VILLAGE OF SOUTHAMPTON, AND
NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION.

NOTICE OF CLAIM



To: Trustees of the Freeholders and Commonalty of the Town of Southampton
Southampton Town Hall
116 Hampton Road
Southampton, NY 11968

Clerk
Village of Southampton
23 Main Street
Southampton, NY 11968

New York State Department of Environmental Conservation
625 Broadway
Albany, NY 12233

PLEASE TAKE NOTICE that the claimants herein hereby make, claim and demand against the TRUSTEES OF THE FREEHOLDERS AND COMMONALTY OF THE TOWN OF SOUTHAMPTON, the VILLAGE OF

SOUTHAMPTON and the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION as follows.

1. **The name and post-office address of the claimants, and their attorney.**

Claimants: Kathleen Araskog Thomas (fee owner)
Andrew S. Thomas
Rand V. Araskog
Jessie M. Araskog
2150 Meadow Lane
Southampton, NY 11968

Attorney: Nica B. Strunk, Attorney at Law
P.O. Box 5087
Southampton, NY 11969

2. **The nature of the claims.**

Claims are asserted against the Trustees of the Freeholders and Commonalty of the Town of Southampton (the "Town Trustees") and the Village of Southampton for:

(a) a declaration that all those regulations which purport to designate the ocean-beach area of the Village of Southampton between Road F and the western boundary of the Village of Southampton, in which claimants' real property known as 2150 Meadow Lane is located, as a daytime driving and parking area for 4x4 trucks and sport utility vehicles ("SUVs"), are unlawful and invalid;

Articles XI and XII of the "Blue Book" Rules and Regulations for the Management and Products of the Waters of the Town of Southampton," a regulatory document enacted and promulgated by the Town Trustees, generally prohibits motor vehicle operation on ocean beaches in the Town of Southampton between the hours of 9 a.m. and 6 p.m. during the summer months, but carves out an exception, in subsection "A" of Section 1 of Article XII, as follows: "All day 4x4 vehicle use is permitted between Roads F & G, along the eastern boundary of Shinnecock East County Park . . . ." Similarly, the Code of the Village of Southampton prohibits daytime operation of motor vehicles on ocean beaches within the Village but carves out an exception in § 80-1(D)(4) for the area between Road F and the western boundary of the Village of Southampton, in which daytime beach driving and parking in the summer months are permitted. Claimants' home is located between Roads F and the western boundary of the Village of Southampton and is squarely situated in the area which the Town Trustees and Village of Southampton have designated for daytime beach driving and parking.

These Town Trustee and Village of Southampton regulations, together, allow any resident or property owner within the entire Town of Southampton to obtain, for an annual fee of $20, permits to drive and park their truck or SUV on the ocean beach area of claimants' real property and properties adjacent thereto, between Road F and the western boundary of the Village of southampton — an

area containing approximately 2,000 linear feet of ocean beach frontage. Upon information and belief, in excess of 2,500 such permits were issued during 2015, allowing driving and parking in this ocean-beach area, and the Town Trustees and Village of Southampton make no effort to limit or control the number of vehicles that occupy this area at any given time. Upon information and belief, the number of vehicles that parked on this 2,000-foot long stretch of ocean beach during the summer of 2015 exceeded, at peak times, 500 vehicles, parked in up to five rows parallel to the Atlantic Ocean. Vehicles and tents erected by persons driving those vehicles are regularly so densely packed as to effectively prohibit free and unimpaired access by claimants from their home at 2150 Meadow Lane over their own property to the Atlantic Ocean.

In addition, the Village has failed and neglected to enforce its own regulations, applicable to all ocean beaches in the Village, upon members of the public using this 2,000-foot-long stretch of ocean beach designated for daytime beach driving and parking, and has allowed, *inter alia*, unsafe overcrowding, uncontrolled public intoxication, urination, defecation and littering on claimants' private property, outdoor fires, unleashed dogs, and an illegal thoroughfare across claimants' land for ingress and egress to Suffolk County's Shinnecock East Park.

The establishment of this daytime beach parking and driving area on claimants' property by the Town Trustees is illegal and *ultra vires* because the

Town Trustees have no proper regulatory power on ocean beaches except in connection with fishing and the gathering of seaweed.

The establishment of this daytime beach parking and driving area on claimants' property by the Village of Southampton and the Town Trustees constitutes a violation of the equal protection of the laws guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and comparable provisions of the New York State Constitution because there is no rational basis to single out claimants and eight other private oceanfront homeowners for such intensive vehicle use of ocean beach lands, in contrast to all other privately-owned ocean beaches within the Town and Village of Southampton where daytime vehicle operation is prohibited during the summer months.

The establishment of a public driving and parking area on claimants' real property constitutes a physical appropriation of their property for public use as a daytime vehicle parking lot without just compensation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and comparable provisions of the New York State Constitution.

The NYSDEC has apparently allowed the establishment of this public driving and parking area on claimants' ocean beach lands and adjacent properties notwithstanding its own regulations which prohibit motor vehicle operation on beaches throughout the State landward of the debris line, and has thereby failed in

its responsibilities as the ultimate regulatory authority with regard to the environmental protection of coastal areas in New York State.

The Town Trustees, Village of Southampton and NYSDEC have created a public and private nuisance on and adjacent to claimants' real property by facilitating and permitting *inter alia*, unsafe overcrowding, uncontrolled public intoxication, urination, defecation and littering on claimants' private property, outdoor fires, unleashed dogs, and an illegal thoroughfare across claimants' land for ingress and egress to Suffolk County's Shinnecock East Park.

WHEREFORE, we respectfully request that our claim be reviewed and allowed as provided by law.

Dated: October 16, 2015
Southampton, New York

Kathleen Araskog Thomas

Andrew S. Thomas

Rand V. Araskog

Jessie M. Araskog

STATE OF NEW YORK)
) ss.:
COUNTY OF ~~SUFFOLK~~ NY)

I, Kathleen Araskog Thomas, am one of the claimants in the foregoing claim. I have read the foregoing Notice of Claim and know the contents thereof. The contents are true to my own knowledge except as to matters therein stated to be alleged upon information and belief, and as to those matters, I believe them to be true.

Kathleen Araskog Thomas

Subscribed and sworn to before
me on this 20 day of October, 2015.

Notary Public

KYLE L KENNEDY
Notary Public - State of New York
NO. 01KE6328065
Qualified In New York County
My Commission Expires Jul 20, 2019

STATE OF NEW YORK)
) ss.:
COUNTY OF ~~SUFFOLK~~ NY)

I, Andrew S. Thomas, am one of the claimants in the foregoing claim. I have read the foregoing Notice of Claim and know the contents thereof. The contents are true to my own knowledge except as to matters therein stated to be alleged upon information and belief, and as to those matters, I believe them to be true.

Andrew S. Thomas

Subscribed and sworn to before
me on this 20 day of October, 2015.

Notary Public

KYLE L KENNEDY
Notary Public - State of New York
NO. 01KE6328065
Qualified In New York County
My Commission Expires Jul 20, 2019

STATE OF FLORIDA)
) ss.:
COUNTY OF PALM BEACH)

I, Rand V. Araskog, am one of the claimants in the foregoing claim. I have read the foregoing Notice of Claim and know the contents thereof. The contents are true to my own knowledge except as to matters therein stated to be alleged upon information and belief, and as to those matters, I believe them to be true.

Rand V. Araskog

Subscribed and sworn to before me on this 16 day of October, 2015.

MARLETTE KUNKLE
Notary Public - State of Florida
My Comm. Expires Apr 4, 2018
Commission # FF 100951

Notary Public

STATE OF FLORIDA)
) ss.:
COUNTY OF PALM BEACH)

I, Jessie M. Araskog, am one of the claimants in the foregoing claim. I have read the foregoing Notice of Claim and know the contents thereof. The contents are true to my own knowledge except as to matters therein stated to be alleged upon information and belief, and as to those matters, I believe them to be true.

Jessie M. Araskog

Subscribed and sworn to before me on this 16 day of October, 2015.

MARLETTE KUNKLE
Notary Public - State of Florida
My Comm. Expires Apr 4, 2018
Commission # FF 100951

Notary Public

IN THE MATTER OF THE CLAIM OF
KATHLEEN ARASKOG THOMAS, ANDREW S. THOMAS, RAND V. ARASKOG, AND JESSIE M. ARASKOG,
Claimants,
- against -
TRUSTEES OF THE FREEHOLDERS AND COMMONALTY OF THE TOWN OF SOUTHAMPTON,
VILLAGE OF SOUTHAMPTON, AND NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION.

NOTICE OF CLAIM

NICA B. STRUNK
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