ROSALYNNE R. ATTERBEARY REVOCABLE TRUST, et al.	*	IN THE
	*	CIRCUIT COURT
Plaintiffs/Counter-Defendants,	*	FOR
v.	*	ANNE ARUNDEL COUNTY
PROPERTY OWNERS ASSOCIATION OF ARUNDEL ON THE BAY, INC., et al.	*	Case No: C-02-CV-15-003736
	*	
Defendants.	*	

* * * * * * * * * * * * * * *

MEMORANDUM IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' RENEWED MOTION FOR SUMMARY JUDGMENT, AND REQUEST FOR HEARING

Defendants, Property Owners Association of Arundel on the Bay, Inc. (the "Association"), Wilbert Adams, Gail Adams, Neil Rubin, Christine Cots, Nigel Davis, Dawn Davis, Roxanne Veal, Donna Watts-Lamont, David Delia, Margaret Delia, Jane Conaway, Aris T. Allen, Jr., Alan Hinman, Judy Hinman, Pamela Bennett, Richard Peyton and Margaret Peyton (the Members and Officers of the Board of Directors of the Association and their spouses/joint property owners, collectively referred to as the "Board") (collectively, with the Association, the "Defendants"), by and through their attorneys, Council, Baradel, Kosmerl and Nolan, P.A., Wayne T. Kosmerl, N. Tucker Meneely, and Steven A. Brown, respectfully submit their Memorandum in Support of Opposition to Plaintiffs' Renewed Motion for Summary Judgment.

PROCEDURAL BACKGROUND

This case pertains to a dispute between the Association and Plaintiffs over the validity of a 1951 deed to the Association for the platted streets in Arundel on the Bay and the scope of easements over certain platted streets in Arundel on the Bay. The streets at issue are portions of platted streets known as Magnolia Avenue and Chesapeake Avenue a/k/a Walk that abut the Attearbeary Property

and the Coble Property and are located between Narragansett Avenue and the waters of the Chesapeake Bay ("Disputed Streets").

Plaintiffs sued the Association in December, 2015, initially seeking declaratory and injunctive relief as to title to the Disputed Streets (i.e., that they have superior title to the Association subject to a strictly limited right of use to pedestrian ingress and egress only for all property owners in Arundel on the Bay); adverse possession of a portion of Magnolia Avenue (i.e., that Coble has superior title to the Association and apparently all property owners in Arundel on the Bay and that no lot owners save Coble have any rights of use of that portion of Magnolia Avenue Coble claims through adverse possession); and declaratory relief strictly limiting the scope of the implied easement rights of the Association and property owners to reach the waters of the Chesapeake. *See* Complaint at Counts I - V.

The Association filed a Motion to Dismiss for failure to join necessary parties, contending, among other things, that Anne Arundel County, which held a utility easement over the Disputed Streets and all the property owners in Arundel on the Bay and their mortgagees and/or trustees were required to be joined to the litigation because the relief sought by Plaintiffs sought to bind all lot owners to a judgment limiting the use of the Disputed Streets. Plaintiffs filed an Amended Complaint and Amended Memorandum in Support of Motion for Summary Judgment thereafter.

After initially granting the Association's Motion to Dismiss in December 2016, this Court stayed its ruling and entered a final order on February 8, 2017, which modified its original Order and required that all property owners in Arundel on the Bay be joined as necessary parties to the above-captioned case.

On January 13, 2017, Plaintiffs filed a Second Amended Complaint, adding all lot owners of Arundel on the Bay as Defendants. Although a majority of Plaintiffs' claims have stayed

substantially the same, their claim relating to the rights of the Association and lot owners to use the Disputed Streets pursuant to an implied easement has significantly evolved over time. In their initial Complaint, Plaintiffs "acknowledge[d] that the AOB Plat and Revised Plat create a limited implied easement for the Association and other lot owners in Arundel on the Bay to use [the Disputed Streets] for pedestrian ingress and egress between their lots and the nearest public road and the waters of the Chesapeake Bay, and for no other purpose." Complaint, at ¶ 31. In their Amended Complaint, the implied easement apparently only applied to "certain lot owners." Amended Complaint, at ¶ 32. By their Second Amended Complaint, the implied easement now only benefitted "adjacent lot owners." Second Amended Complaint, at ¶ 35.

The Association filed an Answer to the Second Amended Complaint and, on March 1, 2017, filed a Seven-Count Counterclaim ("Association Counterclaim"), asserting claims for quiet title and declaratory relief. Plaintiffs renewed their Motion for Summary Judgment on June 15, 2017. Plaintiffs filed a Motion to Dismiss on the Association's Counterclaim on March 31, 2017, arguing that the Association's claims were barred by the doctrine of collateral estoppel due to this Court's ruling in the case of *Bellamy, et al. v. Property Owners Association of Arundel on the Bay, Inc., et al.*, Case No. C-06-115184 ("*Bellamy*"), a case involving the Association but different plaintiffs and different portions of streets than those at issue in this case. This Court held a hearing on Plaintiffs' Motion to Dismiss on June 27, 2017, finding in Plaintiffs' favor on the Association's counterclaims relating to: Count I (Quiet Title – fee simply title pursuant to presumed deed or dedication), Count II (Quiet Title – fee simple pursuant to adverse possession), and Count V (Quiet Title – enforcement of restrictive covenant and/or statutory restriction) on collateral estoppel grounds. However, this Court specifically found that factual disputes precluded judgment in favor of Plaintiffs on the Association's claims relating to Count VI (Declaratory Judgment – Plaintiffs'

claims are barred by laches), and Count VII (Declaratory Judgment – Plaintiffs' claims are barred by equitable estoppel). The Association's claims relating to Count III (Quiet Title – implied easement) and Count IV (Quiet Title – prescriptive easement) were not addressed in Plaintiffs' Motion to Dismiss and also remain.

In their Renewed Motion for Summary Judgment, Plaintiffs seek a declaration that they hold fee simple title to the Disputed Streets based on Maryland Code, Real Property Article § 2-114. Plaintiffs further argue, as they did in their Motion to Dismiss the Association's Counterclaim, that a result in their favor is mandated because of the decision of this Court in *Bellamy v. Property Owners Association of Arundel on the Bay, Inc.* Plaintiffs further seek a declaration that only the immediately abutting lot owners to the Disputed Streets, Atterbeary and Coble, have an implied easement to use the Disputed Streets. Finally, Coble seeks a declaration that it owns title to a strip of land located within Magnolia Avenue and adjacent to the Coble Property by adverse possession.

FACTUAL BACKGROUND

Historical Land Records

The original developer of Arundel on the Bay sought to develop a "sea side" resort which would provide summer cottages overlooking the Chesepeake Bay to enjoy boating, bathing, crabbing and fishing. (Arundel on the Bay Document ("AOTB") 202, 206, 207). In a May 31, 1891 Sunday Herald article, David W. Stone, the manager of the developer who created Arundel on the Bay, touted that the subdivision "proved its desirability as a summer resort at once" after 100 lots had been sold. (AOTB 210). Noting that they had subdivided 350 acres and laid out 500 lots, Mr. Stone boasted that Arundel on the Bay:

> Combines all the advantages of Bay Ridge without the annoyance of the large crowds. Arundel-on-the-Bay forms a peninsula surrounded by the waters of Fishing Cove and Oyster Bay, and from its situation on a high bluff commands an extensive view of Chesapeake Bay and the surrounding country. It can be reached by rail in

> from an hour to an hour and a half from this city and an hour from Baltimore. Annapolis, with its historic associations, is but four miles to the north. A resort for those who wish to be near the city, and at the same time enjoy the benefits of the salt air, it cannot be surpassed.

(AOTB 210). In a June 14, 1891 article, Arundel on the Bay was described as a "revelation" that presented a "rare combination of beach and woodland." The tract was:

> laid off into avenues, streets, blocks, and lots. Many cottages ha[d] already been erected and others [we]re under contract. A modern inn, a club-house and pavilion, bowling alleys, and a 600-foot pier [we]re among the designs of the owners of Arundel-on-the-Bay.

In 1890, pursuant to a deed recorded at Liber SH., No. 37, folio 509, Richard M. Chase conveyed the land presently known as Arundel-on-the-Bay to the Chesapeake and Columbia Investment Company ("Chase Deed"). (AOTB 1). In connection with that deed, the Chesapeake and Columbia Investment Company ("Original Developer") filed a plat depicting Chesapeake and Magnolia Avenues as platted streets ("1890 Plat"). (AOTB 5). Eight years later, the General Assembly established Arundel-on-the-Bay as an incorporated Town. Md. Laws 1898, Ch. 349. (AOTB 6). The boundaries of the Town of Arundel-on-the-Bay were established by reference to the Chase Deed and included all of the land depicted in the 1890 Plat. Md. Laws 1898, Ch. 349, §2.

Pursuant to Section Seventeen (17) of the aforementioned Act, the General Assembly empowered the Town Commissioners of Arundel-on-the-Bay (the "Commissioners") to "establish the limit and width of the streets of said town and to improve the same, . . . and [to] open new streets, lanes and alleys." Further, the Commissioners had "the power to provide for the payment of damages and expenses of opening, widening, and laying out, grading, improving and keeping in good condition the streets, lanes, alleys and sidewalks in said town."Pursuant to Section 32 of the aforementioned Act, the General Assembly granted control over all the streets to the Town.

A revised plat of Arundel-on-the-Bay, also showing the Disputed Streets, was filed by Arundel-on-the-Bay's then owners, Meredith Lumber Co., on August 15, 1927 ("Record Plat"). (AOTB 19).The Original Developer and its successors conveyed various lots to third parties based upon the plats filed on record from time to time. In 1949, the General Assembly repealed the charter for the Town of Arundel-on-the-Bay, effective June 1, 1949. Md. Laws 1949, Ch. 191. (AOTB 20).

The Town Trustees received title to the above referenced streets in a deed from the Town Commissioners dated May 28, 1949, and recorded June 2, 1949 ("1949 Deed"). Title to the Disputed Streets was conveyed to the Town Trustees in trust for the benefit of all property owners in Arundel-on-the-Bay. Importantly, the 1949 Deed from the Town Commissioners to the Town Trustees conveyed the streets in trust, but with "the power and authority vested in them to convey all or any part of said real property to any properly organized corporation which may be organized by the aforesaid property owners, and as directed by the aforesaid property owners…" In addition, the 1949 Deed from the Town Commissioners to the Town Trustees included the power to levy assessments or accept contributions for the maintenance of the platted streets so conveyed. (AOTB 22). .

The Association is a corporate entity formed under the laws of Maryland in 1949 and is the present record owner of certain streets in Arundel-on-the-Bay by special warranty deed dated September 11, 1951 ("1951 Deed") granted by the Town Trustees after the dissolution of the Town of Arundel-on-the-Bay and recorded in the Land Records for Anne Arundel County at Liber 825, folio 32. (AOTB 25). The deeded streets include the Disputed Streets. The validity of the 1951 Deed remained unchallenged for over fifty (50) years.

The Association is also the record owner of certain real property in Arundel-on-the-Bay known as Block 13, Lots C-I, and Block 32, Lots I, K, L, and M, as shown on the Record Plat. (AOTB 28).

The Association, at various times based upon the needs of the community, has maintained and improved portions of the Disputed Streets at issue, as well as other platted streets in Arundel-on-the-Bay. (AOTB 58-98; 213-231). The Association has conveyed title to certain streets shown on the Record Plat, as well as sewer and other utility easements, to Anne Arundel County from time to time as dictated by the needs of the community. (AOTB 39-53).

Since its inception in 1951, the Association has exercised dominion and control over the Disputed Streets in Arundel-on-the-Bay by filing suit when platted streets were blocked or encroached upon by residents. The Association has exercised dominion and control over the streets by regulating parking on the streets, establishing fire drafting sites, constructing a boat launching ramp and community pier on several waterfront street ends. The Association has also controlled waterfront development for residences abutting platted streets to ensure that any piers erected did not interfere with the Association's rights in the platted streets. (AOTB 231, 266); Affidavit of Dawn Davis, at ¶ 2.

The Association has consistently maintained its claim of ownership to certain streets (including the Disputed Streets) and regulated the use of same for the benefit of all property owners. Among other things, the Association addressed erosion problems on platted streets, established street lights, regulated the construction of private piers on platted streets, constructed a community boat launching ramp and pier on street ends, regulated the use of platted streets including activities such as fishing on Chesapeake Avenue. (AOTB 216-231, 262, 266).

The property owners in Arundel-on-the-Bay, including the Association, currently use, and historically have used, the Disputed Streets for vehicular and/or pedestrian access and/or passive recreational uses such as walking, fishing, crabbing, watching fireworks, or observing maritime and marine life on and about the Chesapeake Bay. ¶ 22 .

Disputed Facts

Plaintiffs do not set forth a statement of undisputed facts in their Renewed Motion. Instead, Plaintiffs reference their Amended Complaint, which is no longer the operative pleading, and claim that the facts set forth therein are "verified" by the affidavits attached to their Renewed Motion. Plaintiffs utterly fail to provide this Court or Defendants with any meaningful way to determine which facts are actually supported by affidavit testimony and which facts are not. To be clear, the facts relating to Plaintiffs' claim of title and use of the Disputed Streets are clearly in dispute and preclude summary judgment.

1. **The Association disputes that there was no retention by the original developer to the title in the Disputed Streets.**

In 1890, pursuant to a deed recorded at Liber SH., No. 37, folio 509, Richard M. Chase conveyed the land presently known as Arundel-on-the-Bay to the Chesapeake and Columbia Investment Company ("Chase Deed"). (AOTB 1). In connection with that deed, the Chesapeake and Columbia Investment Company ("Original Developer") filed a plat depicting Chesapeake and Magnolia Avenues as platted streets ("1890 Plat"). (AOTB 5).

Eight years later, the General Assembly established Arundel-on-the-Bay as an incorporated Town. Md. Laws 1898, Ch. 349. (AOTB 6). The boundaries of the Town of Arundel-on-the-Bay were established by reference to the Chase Deed and included all of the land depicted in the 1890 Plat. Md. Laws 1898, Ch. 349, §2. Pursuant to Section Seventeen (17) of the aforementioned Act, the General Assembly empowered the Town Commissioners of Arundel-on-the-Bay (the

"Commissioners") to "establish the limit and width of the streets of said town and to improve the same, . . . and [to] open new streets, lanes and alleys." Further, the Commissioners had "the power to provide for the payment of damages and expenses of opening, widening, and laying out, grading, improving and keeping in good condition the streets, lanes, alleys and sidewalks in said town." Pursuant to Section 32 of the aforementioned Act, the General Assembly granted control over all the streets to the Town.

A revised plat of Arundel-on-the-Bay, also showing the Disputed Streets, was filed by Meredith Lumber Co., successor to the Original Developer, on August 15, 1927 ("Record Plat"). (AOTB 19). The Original Developer and its successors had conveyed various lots to third parties based upon the plats filed on record from time to time. The deeds to these lots were subject to and governed by the law creating the Town of Arundel-on-the-Bay at the time of each conveyance. Parties to a contract, including a deed, are deemed to have contracted with reference to existing laws at the time of the contract. Between 1898 and 1949, all lots conveyed within Arundel-on-the-Bay were subject to the restrictions set forth in the aforementioned Act, namely that the Commissioners had powers to "establish the limit and width of the streets of said town and to improve the same, . . . and [to] open new streets, lanes and alleys"; that the Commissioner had "the power to provide for the payment of damages and expenses of opening, widening, and laying out, grading, improving and keeping in good condition the streets, lanes, alleys and sidewalks in said town"; and that control over all the streets was held by the Town.

The above restrictions set forth in the Act, which are deemed to have been incorporated into any deed conveyed while the Act was in existence, constituted restrictive covenants, as the covenants touch and concern the land, the original parties to the covenant intended the covenant to run, as there is no evidence of any deed excepting the restrictions set forth in the Act, there is

privity in estate between the original grantor and grantee of Counter-Defendants' lots, and the covenant was in writing, as the deeds which incorporated the Law of Maryland were in writing.

In 1949, the General Assembly repealed the charter for the Town of Arundel-on-the-Bay, effective June 1, 1949. Md. Laws 1949, Ch. 191. (AOTB 20). The Town Trustees received title to the above referenced streets in a deed from the Town Commissioners dated May 28, 1949, and recorded June 2, 1949 ("1949 Deed"). Title to the Disputed Streets was conveyed to the Town Trustees in trust for the benefit of all property owners in Arundel-on-the-Bay. Importantly, the 1949 Deed from the Town Commissioners to the Town Trustees conveyed the streets in trust, but with "the power and authority vested in them to convey all or any part of said real property to any properly organized corporation which may be organized by the aforesaid property owners, and as directed by the aforesaid property owners…" In addition, the 1949 Deed from the Town Commissioners to the Town Trustees included the power to levy assessments or accept contributions for the maintenance of the platted streets so conveyed. (AOTB 22).

The Association is the present record owner of certain streets in Arundel-on-the-Bay by special warranty deed dated September 11, 1951 (i.e., the "1951 Deed") granted by the Town Trustees after the dissolution of the Town of Arundel-on-the-Bay and recorded in the Land Records for Anne Arundel County at Liber 825, folio 32. (AOTB 25). The deeded streets include the Disputed Streets.

The Association has exercised its rights for decades as successor to the interests of the Town of Arundel-on-the-Bay in controlling the streets, including through the community approved Special Benefits Taxing District, and Shore Erosion Control District. The Association's position regarding ownership of certain platted streets and rights of use of the streets has been disseminated at community meetings, Board meetings, and to government officials including in the context of

surveying, permitting, road maintenance, drainage and the like for many decades. The Association has historically undertaken activities such as landscaping, mowing, gravelling, paving, snow removal, erecting signage, fixing holes, erosion control, tree trimming, tree removal, and similar activities on non-County owned roads in the community.

There thus exists a genuine dispute of material fact concerning the issue of whether the original grantor to Plaintiffs' predecessors in title retained any interest in the Disputed Streets. Because the original grantors of the Plaintiffs' lots, at the time, were bound by the restrictions set forth in the aforementioned Act, and the deeds would be deemed to incorporate the existing laws at the time of the execution of the deed, the interest and control over said streets, roads or highways was held by the Town. Accordingly, Plaintiffs' and their predecessors in title did not and do not have title over the Disputed Streets.

2. Plaintiffs' pleading contains concessions as to the Association's title to the Disputed Streets.

In response to the Association's Motion to Dismiss, Plaintiffs amended their complaint and, to counter the Association's contention that the County was a necessary party, Plaintiffs expressly acknowledged that Anne Arundel County "holds record title to a utility easement to parts of Magnolia Avenue and/or Chesapeake Walk pursuant to a Deed of Easement and Agreement dated November 11, 1975 and recorded among the Land Records of Anne Arundel County," which Plaintiffs stated they "acknowledge and do not dispute in this action." *See* Amended Complaint at ¶12. Plaintiffs also recanted their prior admission that the Association and other lot owners had an implied easement to use the platted streets, now arguing that only certain lot owners could use the Disputed Streets. *Id.* at ¶32.

This Court granted the Association's motion to dismiss, in part, initially finding that all lot owners and their mortgagees but not the County were necessary parties to the litigation, and later

amending its order to remove mortgagees as necessary parties. *See* November 18, 2016 Order; February 8, 2017 Order. Undoubtedly this Court's decision not to require the County's joinder in this case was based in large part upon Plaintiffs' express acknowledgement as to the validity of the County's Deed of Easement in its operative pleading, thereby negating the need for the County to be included in this case to defend its rights. This is notable given how the County came to hold record title to the Deed of Easement.

The Deed of Easement was granted to the County by the Association in 1975, to allow the County to construct and maintain sewers, storm drains, water pipes and other public utilities. (AOTB 39) (Deed of Easement). The Easement covered:

> ALL those strips or parcels of land, being and comprising utility easements . . . being the same as the streets and roads as shown on the Plat of Arundel-on-the-Bay 'Revised Plat'. . . . And being the same land comprising the streets or avenues in the town known as Arundel-on-the-Bay deeded to the Property Owners' Association of Arundel-on-the-Bay by Deed recorded in the Land Records of Anne Arundel County in Liber J.H.H., Folio 32 [i.e., the 1951 Deed].

Id. Despite challenging the validity of the 1951 Deed and the Association's ability to enforce it in this action, Plaintiffs express acknowledge and do not dispute the validity of the County's Deed of Easement, which was granted to the County by virtue of the Association's title to the streets of Arundel-on-the-Bay by virtue of the 1951 Deed. How the Deed of Easement is valid but the 1951 Deed—through which the Association was able to convey the Deed of Easement—is not valid is, of course, not explained in Plaintiffs' pleadings or papers. In addition, there are several other deeds where the Association has conveyed numerous streets in fee simple to the County. (AOTB 42, 45, 48, 53). Presently, the Plaintiffs do not challenge these deeds.

This is not the only instance of the Plaintiffs implicitly acknowledging the Association's title to the Disputed Streets in their pleading. In the very first count of their operative pleading, Plaintiffs set forth a claim for adverse possession against the Association over a portion of the Disputed Streets.

Plaintiffs contend that Coble has been in peaceable possession of a strip of land lying within Magnolia Avenue and running adjacent to the entire northern side of the Coble Property. Second Amended Complaint at ¶15. Coble "seeks to quiet title by order from this Court declaring that it is the absolute owner by adverse possession" of that particular portion of Magnolia Avenue. *Id.* at ¶21.

It follows that one (here, Coble) who claims title to a strip of land by adverse possession against a single defendant (here, the Association) is acknowledging that the defendant actually holds title to that strip of land. Coble asserts that it has "maintained all of structures and plantings in that portion of Magnolia Avenue as its own property for a period in excess of statutory period of 20 years." How can Coble adversely possess a strip of land that Coble asserts the Association does not even own?

The Plaintiffs' own pleading thus has two distinct instances of expressly acknowledging the Association's valid title or claim to the Disputed Streets.

3. Plaintiffs and/or their predecessors in title have acknowledged the Association's maintainenance, preservation and control of the Disputed Streets, as well as the Association's claim of title. The Association has repeatedly asserted title to the Disputed Streets.

It should be noted that the Association disputes Coble's claim of adverse possession over the strip of Magnolia Avenue. The Association has repeatedly and historically reminded home owners that it is custom and practice in the community for property owners to maintain property owned by the Association that is adjacent to their own but that such maintenance and use is "not adverse possession." A letter from the Association dated April 11, 1983 sent to all property owners, including Plaintiffs and/or their predecessors in title, did just that. (AOTB 65); *see also* Affidavit of David Delia, attached hereto, at ¶ 1-3. Coble should be familiar with this letter, because Wilma L. Coble ("Mrs. Coble") signed it. (AOTB 65). Coble's alleged use of the strip of Magnolia has certainly been challenged by the Association and *by Mrs. Coble herself.*

In fact, the Association's records are rife with examples of Mrs. Coble expressly acknowledging the Association's title to the Disputed Streets by virtue of the 1951 Deed or the Association otherwise notifying property owners, including Plaintiffs and/or their predecessors in title of same. (AOTB 58-75). Community newsletters also made clear the Association's claim of title to these streets. (AOTB 76-98). Mrs. Coble, during a deposition in the matter of *Property Owners Association of Arundel on the Bay, Inc. v. Durant*, Case No. C-95-24605, was asked which roads it was her understanding that the community owned, to which she responded: "Walnut Avenue, Magnolia Avenue, and Saratoga Avenue." (AOTB 118-119) (Deposition Transcript Excerpt at 20:17-21:6).

The Association, since its inception, has on numerous occasions, granted title or easement rights to Anne Arundel County without any objection or challenge from Plaintiffs or their predecessors in title, under which the County took over control of certain streets throughout the community or provided such beneficial services such as sewer and water to property owners in Arundel on the Bay. (AOTB 39-53). All such conveyances were made pursuant to the Association's clear title over the streets of Arundel on the Bay.

The Association has also historically undertaken activities such as landscaping, mowing, gravelling, paving, snow removal, erecting signage, fixing holes, erosion control, tree trimming, tree removal, and similar activities on non-County owned roads in the community of Arundel on the Bay. Affidavit at ¶2.

In addition to the foregoing, on November 5, 1988, Coble's predecessor in title, Clyde and Wilma Coble, entered into a Pier Construction Agreement ("PCA") with the Association, which expressly recognized the Association's title to the Disputed Streets and the authority to regulate the Disputed Streets. (AOTB 266). Indeed, the Association and the Cobles "agree[d] as follows":

> It is hereby expressly stated and provided that nothing herein contained shall constitute a dedication or conveyance of any part of parcel of this beach other than for purposes of access to and from and for construction of a pier therefrom subject to condition #(9); the title to such beach being hereby expressly reserved to the Association. The Association hereby expressly reserves all riparian rights appurtenant to this land it now owns and reserves the rights to hereafter develop said land as a private beach for the joint use and benefit in common for owners of lots in Arundel on the Bay (Subdivision). The Association retains full rights and authority to prescribe from time to time the manner of use of such beach and the kind and character of any structures or objects which the Association may permit on such property.

(AOTB 266).

With respect to regulating the Disputed Streets, since at least 1997, the Association's Rules and Regulations, without any known objection from Plaintiffs or their predecessors in title, have provided that "[o]nly property owners, residents and identified guests shall have access and use of community property and recreational areas," which areas "are defined as the beach, boat ramp, pier, playgrounds, and unimproved roads commonly referred to as paper roads or walks." (AOTB 243). Without question, the Association has regulated the Disputed Streets since its inception, and such regulations have been codified since at least 1997. These Rules and Regulations are regularly provided to prospective homeowners in Arundel on the Bay, who purchase homes within the interior of Arundel on the Bay with the express understanding that they are gaining the benefit of waterfront access by the Disputed Streets when they purchase their homes. (AOTB 287, 323, 331).

Arundel on the Bay has also created a Special Community Benefit Tax District ("SCBD") and a Shore Erosion Control District ("SECD"), which, as the Court is surely aware, are authorized under the Maryland Code and require a petition of a majoriy of the lot owners in the community to be established. Once established, the SCBD and the SECD each assess a yearly tax on each lot owner within the district. The funds are then used for a particular purpose. Established in 1979, Arundel on the Bay's SCBD was created "for non-shore erosion prevention and protection," "for construction,

maintenance and repair of non-county owned roads, paths, streets and/or signs and street lights," "for the establishment and maintenance of special police protection," and "for snow removal," among other things. (AOTB 213-215). On its face, the SCBD clearly benefits the Disputed Street, and the SECD's purpose is self-evident. As of 2014, all lot owners in Arundel on the Bay have paid a yearly tax of $.216 on each $100.00 of assessed value of each platted lot for the SCBD and $.02 on each $100.00 of assessed value of each plotted lot for the SECD. (AOTB 216). A yearly budget is created each year regarding the use of such funds, which clearly benefits the Disputed Streets. (AOTB 222-230). Mrs. Coble was heavily involved in the shore erosion control project. (AOTB 262, 264). Hundreds of thousands, if not millions, of dollars in taxes has been generated by the SCBD and SECD, which were clearly created for the benefit of Arundel on the Bay residents to protect and maintain the platted streets, including those which led to and abutted the waters surrounding the community, to which the Association had consistently claimed title and which all lot owners enjoyed a right of access. Furthermore, at no time during the creation and operation of the SCBD and the SECD, which substantially benefitted the Disputed Streets, did Plaintiffs or their predecessors in title raise an issue concerning the Association's claim to title or the right of access for all lot owners in Arundel on the Bay.

The material facts of whether Plaintiffs and/or their predecessors were placed on notice of the Association's claim of title to the Disputed Streets, that Plaintiffs and/or their predecessors accepted and encouraged the Association's maintenance, preservation and control of the Disputed Streets, and whether Plaintiffs and/or their predecessors in title's failure to assert their alleged property rights for 60 years constitutes an unreasonable delay are thus all seriously in dispute, precluding summary judgment.

4. There is an implied easement over the Disputed Streets, regardless of who has title to the Disputed Streets, the scope of which is, at the very least, in dispute.

In their Second Amended Complaint, Plaintiffs assert that the implied easement over the Disputed Streets is limited to "adjacent lot owners in Arundel on the Bay," as opposed to all lot owners in Arundel on the Bay. The scope of that implied easement, however, is in dispute. One needs to only look at statements from Plaintiffs or their own expert to see that. A letter from Plaintiffs's expert John J. Dowling, which was attached to Plaintiffs' initial Motion for Summary Judgment, states that the "interior lot owners would have the right to use of Chesapeak Walk and that portion of Magnolia Avenue east of Narragansett, under an implied easement theory . . . unless [Plaintiffs] can prove that they and or their predecessors in title have denied other lot owners the use of the right of way." (AOTB 120). Further, Plaintiffs contention that any such implied easement would be for ingress and egress only is belied by the historic use of the Disputed Streets dating back to the inception of the community when it was developed as a "sea side" resort which would provide summer cottages overlooking the Chesepeake Bay to enjoy boating, bathing, crabbing and fishing. (AOTB 202, 206, 207). Indeed, it is undisputed that the Disputed Streets are currently used and have historically been used for a panoply of waterfront activities.

Plaintiffs' Basis for Summary Judgment - The Bellamy Case

The focus of Plaintiffs' Renewed Motion for Summary Judgment is the case of *Bellamy, et al. v. Property Owners Association of Arundel on the Bay, Inc., et al.*, Case No. C-06-115184 ("*Bellamy*"). In *Bellamy*, the plaintiffs filed an action to quiet title to portions of Chesapeake Walk, Redwood Avenue and Walnut Avenue that abutted their respective properties. Unlike Plaintiffs in this case, the plaintiffs in *Bellamy* never claimed that the Association or the property owners of Arundel on the Bay did not have a right to use the streets; they only claimed title over portions of Chesapeake Walk, Cedar Street, Redwood Avenue and Walnut Avenue that abutted their properties,

land that is not at issue in this case. (AOTB 122-132) (*Bellamy* Opinion). The plaintiffs in *Bellamy* did not assert a claim for adverse possession over a portion of the streets at issue in that case. *Id.* Further, the plaintiffs in *Bellamy* did not explicitly acknowledge the validity of a Deed of Easement held by the County over the streets at issue in that case, which Deed of Easement could only have been granted to the County by virtue of the Association having title to the streets under the 1951 Deed.

In *Bellamy*, a determination as to whether the plaintiffs' claims were barred by laches or equitable estoppel logically did not involve a factual determination regarding the conduct of the Plaintiffs in *this* case.

Bellamy was decided on summary judgment, but before that decision was rendered, the parties entered into a settlement agreement. (AOTB 133). Under that agreement, the Association and the plaintiffs in *Bellamy* settled all disputes with regard to the rights of access to the disputed streets in that case, which are not at issue in this case. (AOTB 134). The Settlement Agreement included therein an Easement Agreement that provided that "all persons who own real property within Arundel on the Bay, as reflected on the AOB Plat, together with their guests, have a right of ingress and egress and a right of passage over the Disputed Streets for access to platted lots on the Disputed Streets and the Chesapeake Bay, reflecting the historic use of the Disputed Streets, including for walking, fishing, and enjoying the waterfront." (AOTB 136) (Paragraph 4). The Settlement Agreement also provided the Association the right to repair and maintain the disputed streets in that case. *Id.*

Judge Caroom affirmed the easement in favor of all property owners pursuant to the terms of the settlement agreement. (AOTB 122). In other words, the Association, with respect to the disputed streets in the *Bellamy* case, preserved the right of access over those disputed streets for all property owners in the community and the ability to repair and maintain those streets. Accordingly, upon the Circuit Court's grant of summary judgment in favor of the plaintiffs in the *Bellamy* case, the

Association, having already preserved the disputed streets for the community, did not have an incentive to vigorously defend the case and expend further community resources on an appeal.

Prior Cases

The *Bellamy* case is just one of several cases involving disputes between the Association and property owners involving the streets in Arundel on the Bay. Since its inception in 1951, the Association has exercised dominion and control over the streets in Arundel-on-the-Bay by filing suit when platted streets were blocked or encroached upon by residents in *Property Owners Association of Arundel on the Bay, Inc. v. Browne*, Circuit Court for Anne Arundel County No. 15,221 Equity (1962); *Property Owners Association of Arundel on the Bay, Inc. v. Durant*, Circuit Court for Anne Arundel County No. C-95-24605 (1998) (AOTB 172); and *Property Owners Association of Arundel on the Bay Inc. v. McManus*, Case No. 02-C-105032 (2007) (AOTB 186).

STANDARD OF REVIEW

Upon review of a motion for summary judgment, the Court "shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f). "A material fact is a fact the resolution of which will somehow affect the outcome of the case." *Carter v. Aramark Sports & Entm't Serv., Inc.*, 153 Md. App. 210, 224 (2003). The moving party bears the burden of establishing the absence of genuine issues of material fact. *Id.* If the facts are "susceptible of more than one permissible inference, the choice between those inferences should not be made as a matter of law." *Id*. at 225 (quoting *Porter v. Gen. Boiler Casing Co*., 284 Md. 402, 413 (1979)). When determining whether a factual dispute exists, all facts, and inferences reasonably drawn therefrom, must be viewed in a light most favorable to the party opposing summary judgment. *King v. Bankerd*, 303 Md. 98, 111 (1985).

ARGUMENT

I. PLAINTIFFS CANNOT ESTABLISH COLLATERAL ESTOPPEL AND THE FACTS OF THIS CASE DO NOT OTHERWISE WARRANT THIS COURT EXERCISING ITS DISCRETION TO APPLY THE DOCTRINE OF NON-MUTUAL COLLATERAL ESTOPPEL.[1]

A. NON-MUTUAL COLLATERAL ESTOPPEL IN MARYLAND

The doctrine of collateral estoppel provides that, "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Cosby v. Dep't of Human Res.*, 425 Md. 629, 639 (2012) (citations omitted). The doctrine is based on the principles of judicial economy and fairness, as it "protect[s] litigants from the burden of relitigating an identical issue with the same party or his privy and ... promot[es] judicial economy by preventing needless litigation." *Garrity v. Maryland State Bd. of Plumbing*, 447 Md. 359, 368 (2016) (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, (1979). The use of collateral estoppel typically contemplates "mutuality of parties," such that issuese decided in an earlier suit will have preclusive effect in a later suit involving the same parties or parties in privity to the parties from the earlier action. *Id.* (citing *Rourke v. Amchem Prods., Inc.*, 384 Md. 329, 340–41 (2004)).

The mutuality requirement, however, has been relaxed so long as other elements of collateral estoppel are met. *Id.* (noting that if plaintiff and defendant in a second proceeding are different, the application of collateral estoppel is referred to as "non-mutual") (citing *Rourke*, 384 Md. at 349). The use of non-mutual collateral estoppel is also characterized as offensive or defensive: "offensive" if used by a plaintiff, and "defensive" if used by a defendant. In this case,

[1] Defendants acknowledge that collateral estoppel was also raised in Plaintiffs' Motion to Dismiss, which this Court ruled upon during the June 27, 2017 hearing. The arguments against the application collateral estoppel are restated herein for preservation purposes.

Plaintiffs seek to utilized non-mutual collateral estoppel to bar the Association's defenses in this case, which have also been raised in its counter-claim. Accordingly, Plaintiffs' use of non-mutual collateral estoppel is offensive.

The Court of Appeals requires that four factors be affirmatively established before collateral estoppel may be applied:

> 1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?
> 2. Was there a final judgment on the merits?
> 3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?
> 4. Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?

Id. (citing *Colandrea v. Wilde Lake Cmty. Assoc.*, 361 Md. 371, 391 (2000)).

In *Garrity*, a case decided nearly 10 years after the *Bellamy* case, the Court of Appeals acknowledged in the very first sentence of its opinion that: "To date, Maryland has not adopted formally the doctrine of offensive non-mutual collateral estoppel." *Id.* at 363. There, like Plaintiffs in this case, an administrative agency sought to establish as undisputed a fact that was previously litigated adversely to the defendant by another agency. *Id.* at 369. Similarly, Plaintiffs here are attempting to establish as undisputed certain facts that Plaintiffs allege were litigated adversely to the Association by the plaintiffs in the *Bellamy* case. *See id.* (explaining the distinction between offensive and defensive non-mutual collateral estoppel).

In determining whether to adopt offensive non-mutual collateral estoppel, the Court of Appeals examined the *Parklane* case decided by the Supreme Court. *Parklane*, 439 U.S. at 324-25. In that case, shareholders of a corporation sought to establish as undisputed facts determined in a previous lawsuit filed by the SEC against the same defendants. *Id.* The Supreme Court, in determining that such use of the doctrine was permissible, recognized several concerns

concomitant with applying offensive non-mutual collateral estoppel. *Id.* at 329.

For instance, the doctrine "does not promote judicial economy in the same manner as defensive use does." *Id.* Whereas defensive collateral estoppel incentivizes inclusion of all potential defendants in a single action, offensive collateral estoppel does not: "[T]he plaintiff has every incentive to adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment." *Id.* at 330; *see also Garrity*, 447 Md. at 370 (noting that the "plaintiff can rely on that favorable judgment against the defendant but is not bound if the defendant is successful") (citing *Parklane*, 439 U.S. at 330).

Offensive use of the doctrine may also be unfair to the defendant. *Parklane*, 439 U.S. at 330. This is because a defendant "may have little incentive to defend vigorously" in the earlier action if it involved "small or nominal damages" and "particularly if future suits [we]re not foreseeable." *Id.* A defendant may not have had an incentive to defend vigorously against the first litigation if, for example, only "small or nominal damages" were previously at issue and a future suit was not foreseeable. *See id.* at 331 (noting that offensive may be unfair where where the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result)

With these factors in mind, trial courts "have broad discretion to determine when offensive non-mutual collateral estoppel should be applied." *Garrity*, 447 Md. at 371 (citing *Parklane*, 439 U.S. at 331. The general rule, however, "should be that . . . where, for the reasons discussed above or for other reasons, the ***application of offensive estoppel would be unfair*** to a defendant, a trial judge ***should not allow*** the use of offensive collateral estoppel." *Id.* (quoting *Parklane*, 439 U.S. at 331) (emphasis added).

B. PLAINTIFFS CANNOT MEET THE FACTORS NECESSARY TO ESTABLISH COLLATERAL ESTOPPEL BECAUSE THE FACTUAL ISSUES IN THIS CASE ARE NOT IDENTICAL TO THE *BELLAMY* CASE.

As a threshold matter, Plaintiffs must demonstrate the factors necessary to establish collateral estoppel, including that the issues in this case are identical to the issues in the *Bellamy* case. Here, at the very least, there are genuine disputes of material facts that preclude summary judgment.

To start, the cases involve different pieces of land and different owners. In this case, Plaintiffs concede title, or at the very least a dispute of material fact concerning title, by asserting a claim for adverse possession over portions of Magnolia Avenue. Plaintiffs also acknowledge and do not dispute the County's Deed of Easement, which was granted to the County by virtue of the Association having title to the Disputed Streets. Most importantly, the factual issues in this case, which must be determined by a trier of fact, are distinctively different than that which was presented in the *Bellamy* case. The Association's defenses and counterclaims concerning laches and estoppel each involve inquiries into the Plaintiffs and their predecessors in title, determinations on which a case involving different land and different parties has no bearing. And, on these issues, there are clearly genuine disputes of material fact which preclude summary judgment.

In *Garrity*, where the Court of Appeals first adopted non-mutual collateral estoppel, the operative facts in the separate proceedings were quite literally exactly the same, so much so that the defendant attempted to invoke a the Double Jeopardy Clause of the Constitution. 447 Md. at 363. In the first proceeding, the Consumer Protection Division of the Attorney General's Office charged Garrity with engaging in unfair and deceptive trade practices, alleging that for a period over five years, Garrity retained unlicensed plumbers, failed to obtaine permits and misrepresented that his employees were licensed, among other things. *Id.* A final order was eventually issued by

the Consumer Protection Division, sitting in a quasi judicial capacity, ordering Garrity to cease and desist engaging in unfair and deceptive trade practices, pay $250,000 in restitution to the victims, $707,900 in civil penalties and assessed costs in the amount of $65,129.54. *Id.* at 365.

In a second proceeding, the Maryland State Board of Plumbing, after reviewing the final order of the Consumer Protection Division, opened a complaint against Garrity. During the hearing, the Board relied largely on the findings and conclusions of the Consumer Protection Division. Counsel for the Board successfully argued that Garrity was collaterally estopped from relitigating the same facts that were litigated before the Consumer Protection Division. *Id.* In both proceedings, the same exact facts were at issue.

Similarly, in *Parklane*, a stockholder's class action was filed against defendant (Parklane) and 13 of its officers, directors and stockholders, for issuing a materially false and misleading proxy statement in connection with a merger. 439 U.S. at 324. Before that action came to trial, however, the SEC filed suit against the same defendants alleging that the same proxy statement was materially false and misleading in "essentially the same respects." *Id.* The plaintiff in *Parklane* thereafter sought partial summary judgment, asserting that the defendants were collaterally estopped from relitigating issues that had been resolved against them concerning the proxy statement. Again, both cases involved the exact same operative facts.

In this case, Plaintiffs seek to establish as undisputed issues decided in the *Bellamy* case. In that case, the Court found against the Association on several issues that were uniquely specific to the plaintiffs in that case and the land at issue. For instance, the Association's defenses of laches and estoppel required a factual inquiry into the actions and conduct of the plaintiffs in *Bellamy*, such that any findings in that regard simply cannot be regarded as identical to the plaintiffs. Similarly, any decisions by the Court in *Bellamy* regarding the parties' competing claims of title

necessarily involved considerations of the Association's defenses raised in that case, which were specific to the plaintiffs in that case. The Association's defenses and counterclaims regarding laches and estoppel in this case are specific to the Plaintiffs in this case such that any finding in *Bellamy* is not applicable. This Court simply did not make any determination regarding Atterbeary or Coble or their predecessors in title. Furthermore, these facts are in dispute and cannot be determined on summary judgment.

C. THIS COURT SHOULD OTHERWISE NOT ALLOW THE USE OF OFFENSIVE NON-MUTUAL COLLATERAL ESTOPPEL IN THIS CASE.

Plaintiffs cannot establish the collateral estoppel factors in this case. But, even if they could, the considerations outlined by the Supreme Court in *Parklane* and adoped by the Court of Appeals in *Garrity* clearly weigh against this Court applying offensive non-mutual collateral estoppel. As the *Garrity* Court recognized, this Court "should not" exercise its discretion to apply the doctrine if the if application of the doctrine would be unfair to the Association. *See Garrity*, 447 Md. at 371 (*Parklane*, 439 U.S. at 331). The application of the doctrine in this case would not be fair to the Association.

As the Court of Appeals recognized, the use of the doctrine may be unfair if the "judgment relied upon was "itself inconsistent with one or more previous judgments in favor of the defendant." *Garrity*, 447 Md. at 370-71 (*Parklane*, 439 U.S. at 331). The *Durant* case cited above is just one example of a prior inconsistent verdict, in which this Court ruled in the Association's favor, finding that the Defendant (Durant) did not have title to the portion of Chesapeake Walk abutting his property. (AOTB 172). The *Durant* case is clearly inconsistent with *Bellamy*, making the offensive use of non-mutual collateral estoppel unfair to the Association. Plaintiffs should not be permitted to benefit from the "wait and see" approach cautioned against by the *Garrity* Court.

In *Bellamy*, the Association reached a favorable result with the Settlement Agreement,

preserving the status quo and the rights of access for the community and the Association's ability to repair and maintain the streets at issue. This quite clearly lessened the incentive for the Community to expend community resources vigorously defending the case and filing an appeal of this Court's decision. Because the *Bellamy* case only pertained to the portions of streets abutting the properties of the plaintiffs in *Bellamy* and the Association by agreement was able to preserve the rights of access for the community at large, and given that Maryland was nearly a decade away from adopting the use of non-mutual collateral estoppel, the Association reasonably did not see the need to continue to litigate. Applying the doctrine in a case involving different properties and different Plaintiffs with unique facts that were simply not decided in the *Bellamy* case would be grossly unfair to the Association and the property owners of Arundel on the Bay.

II. THE ASSOCIATION HAS TITLE TO THE DISPUTED STREETS.[2]

A. Presumption of Deed

The Association is the present record owner of a number of streets in Arundel-on-the-Bay by the 1951 Deed granted by the Town Commissioners to the Town Trustees after the dissolution of the Town of Arundel-on-the-Bay and recorded in the Land Records for Anne Arundel County at Liber 825, folio 32. (AOTB 25). Plaintiffs posit that because there is no deed of conveyance of the Disputed Streets into the Town Commissioners, the Town Trustees could not and did not transfer title of the Disputed Streets to the Association by the 1951 Deed. Plaintiffs assert superior title by way of Md. Real Property Code Ann. §2-114, which provides that a deed granting land binding on a street or highway shall be construed to pass to the grantee all the right, title and interest of the grantor in the street for the portion on which it binds, unless there has been an express reservation of the transferor's interest in the street.

[2] Acknowledging this Court's ruling regarding collateral estoppel, the within arguments are presented for preservation purposes.

This Court has the equitable authority, however, to presume "a missing deed" consistent with the historical usage and course of development in Arundel-on-the-Bay, thus causing title to the streets to repose in the Association. The Town, commencing upon its incorporation in 1898 and, thereafter, the Association, have maintained and controlled the streets for the benefit of the property owners in Arundel-on-the-Bay. "[W]hen a party has had possession of property in such way and for such time as to make the possession adverse within the meaning of the law, a deed is presumed." *Cadwalader v. Price*, 111 Md. 310 (1909).

The roads conveyed to the Association in the 1951 Deed include the Disputed Streets. The Town Trustees received title to the above referenced streets in a deed from the Town Commissioners dated May 28, 1949, and recorded the 1949 Deed. Title to the Disputed Streets was conveyed to the Town Trustees in trust for the benefit of all property owners in Arundel-on-the-Bay. The 1949 Deed provides that the Town Trustees could only convey out title to the streets if directed to do so by the property owners in Arundel-on-the-Bay. (AOTB 22).

In instances where remote links in a chain of title may be missing, the court may presume a deed to fill the gap. "Presumptions of deeds for the protection of ancient possessions, are made upon principles of public policy. Such presumptions are founded in equity, and are always made for the promotion of justice….Length of possession is the great leading fact in presuming grants and deeds…" *The Baltimore Chemical Manufacturing Company's Lessee v. Dobbin*, 23 Md. 210 (1865). Ancient possession sufficient to allow presumption of a deed can be shown by successive grants in a deed, when possession is not susceptible of proof by living witnesses. The presumption of a grant is an inference of law, the fact finder does not have to actually believe that an actual grant was executed. *Elizabeth Casey's Lessee v. Inloes*, 1 Gill 430 (1844). The United States Supreme Court has recognized the doctrine of presumption of a deed under the lost-grant doctrine,

requiring uninterrupted and long possession of a kind indicating ownership of the fee. *United States v. Fullard-Leo,* 331 U.S. 256 (1974). Presumption of a deed has also been recognized in *Chevy Chase Land Co. of Montgomery City v. U.S.*, 37 Fed. Cl. 545 (1997), *Jeffus v. Coon*, 484 S.W. 2d 949 (Tex. 1972), and *Bull Run Development Corp. v. Jackson*, 201 S.E. 2d 400 (Va. 1959).

B. Adverse Possession

In the case at hand, the Town Commissioners were granted control over the streets by the General Assembly in 1898, including the authority to open and pave roads and remove obstructions therefrom. The Town exercised control over the streets for purposes of maintenance, lighting, snow removal and the like for over 50 years. Under these circumstances, even if there was a historic defect in the chain of title, the Town had perfected title to the streets through adverse possession prior to the time the Town Commissioner's conveyed title to the Town Trustees in 1949. In *Brady v. Mayor and City Council of Baltimore,* 130 Md. 506 (1917), the City of Baltimore's title to a platted street in Fells Point was challenged on the basis of an imperfect record title. There, numerous ordinances had been passed regarding the care and maintenance of the street. It was partially paved, lighted, and water and sewer pipes had been installed in the bed of the street. *Id.* at 509. The history of the title to the street was traced and the Court discussed the fact that before improvements could be made to the street, an ordinance provided that the proprietors had to signify their consent to the plan for improvement. The Court stated

> It does not appear from the record whether or not this assent was secured. But it does appear that the money appropriated for the work on the above condition was expended and the work done. Of course, at this far day, there is no person who could testify as to that, <u>but the presumption is that the public officials secured such assent in conformity with their expressed duties</u>…After making this street the City has treated it just as any other thoroughfare of the city. They have exercised complete control over it ever since until the present. (Emphasis supplied).

Id. at 511.

The Court, in discussing title to the streetbed, recognized that record fee to the bed was in the adjacent property owner, subject to the right of travel by the public thereover. However, a City Ordinance was passed in 1837 which purported to grant fee title in the streetbed to the City subject to preexisting rights of individuals. The Court opined:

> While this paper is very informally drawn and could hardly be considered of such legal effect as to convey the rights which it purported to assign, yet, nevertheless, it does have the effect of showing that the city thought that it was carrying out the duty imposed upon it by the ordinance, and believed that it was obtaining a fee simple title to the bed of the street already built… Acting on the belief that title had been obtained by it, the city proceeded with the work and completed in 1839 and entered into possession of it and continued in the possession of the original fifty feet.
>
> As we have said above, while this paper would have no legal effect to change the title to the street yet it does have a great effect in showing that the appellee was occupying the street under the belief that the fee to the same was vested in it, and that therefore, their occupancy was under a claim of a supposed right, and therefore adverse. The city continued from 1839 to so occupy the whole of Dock street until the year 1880, a period of over forty years, before claim was made by anyone to any portion of the thirty foot strip. We are then of the opinion that there was an abundance of evidence from which it could be found that the appellee had obtained a fee simple title to the whole of Dock street through adverse possession. *Id.* at 512 – 513.

In the instant matter, the 1949 Deed provided that <u>title could only be conveyed out from the Town Trustees if so directed by the property owners in Arundel-on-the-Bay</u>. (Emphasis supplied.) As in *Brady*, too much time has elapsed since the original conveyance to determine whether all property owners assented to the conveyance; however, such assent by all property owners can be presumed from the historical circumstances. Thus, this Court could "presume" all the property owners in Arundel-on-the-Bay consented to the Town Commissioners' conveyance of title to the streets to the Town Trustees and then to the Association. Given the subsequent fifty years of history of control by the Association over the streets, this Court is justified in presuming that valid title to the streets passed from the Town Commissioners to the Town Trustees to the Association by virtue

of the 1951 Deed. Taking the analysis one step further, it is clear that the Town Commissioners, Trustees and the Association have long occupied the streets under a claim of right and thus own the streets through adverse possession as is discussed in *Brady*.

C. Enforcement of Restrictive Covenant and/or Statutory Restriction

The Association submits that a statutory enactment concerning the Town's right and interest in the Disputed Streets existed at the time the deeds to the Atterbeary Property and Coble Property were originally conveyed to the Plaintiffs' predecessors in title and that, under Maryland law, that statutory enactment was incorporated in those deeds, thus barring Plaintiffs' claim of title under Md. Code, Real Property Article § 2-114. *See Dennis v. The Mayor and City Council of Rockville*, 286 Md. 184, 189 (1979) ("[T]he laws subsisting at the time of the making of a contract enter into and form a part thereof as if expressly referred to or incorporated in its terms, and the principle embraces alike those provisions which affect the validity, construction, discharge and enforcement of the contract.").

In 1890, pursuant to a deed recorded at Liber SH., No. 37, folio 509, Richard M. Chase conveyed the land presently known as Arundel-on-the-Bay to the Chesapeake and Columbia Investment Company. (AOTB 1). In connection with that deed, the Chesapeake and Columbia Investment Company Original Developer filed the 1890 Plat. (AOTB 5). Eight years later, upon a petition by the Original Developer and/or property owners, the General Assembly established Arundel-on-the-Bay as an incorporated Town. Md. Laws 1898, Ch. 349. (AOTB 6). The boundaries of the Town of Arundel-on-the-Bay were established by reference to the Chase Deed and included all of the land depicted in the 1890 Plat. Md. Laws 1898, Ch. 349, §2.

Pursuant to Section Seventeen (17) of the aforementioned Act, the General Assembly empowered the Town Commissioners of Arundel-on-the-Bay (the "Commissioners") to "establish

the limit and width of the streets of said town and to improve the same, . . . and [to] open new streets, lanes and alleys." Further, the Commissioners had "the power to provide for the payment of damages and expenses of opening, widening, and laying out, grading, improving and keeping in good condition the streets, lanes, alleys and sidewalks in said town." Pursuant to Section 32 of the aforementioned Act, the General Assembly granted control over all the streets to the Town.

The Record Plat of Arundel-on-the-Bay, also showing the Disputed Streets, was filed by Arundel-on-the-Bay's then owners, Meredith Lumber Co., on August 15, 1927. (AOTB 19). The Original Developer and its successors conveyed various lots to third parties based upon the plats filed on record from time to time. The deeds to these lots were subject to and governed by the law of the State of Maryland at the time of each conveyance, as parties to a contract, including a deed, are deemed to have contracted with reference to existing laws at the time of the contract. Between 1898 and 1949, all lots conveyed within Arundel-on-the-Bay were subject to the restrictions set forth in the aforementioned Act, namely that the Commissioners had powers to "establish the limit and width of the streets of said town and to improve the same, . . . and [to] open new streets, lanes and alleys"; that the Commissioner had "the power to provide for the payment of damages and expenses of opening, widening, and laying out, grading, improving and keeping in good condition the streets, lanes, alleys and sidewalks in said town"; and that control over all the streets was held by the Town.

The above restrictions set forth in the Act, which are deemed to have been incorporated into any deed conveyed while the Act was in existence, constituted restrictive covenants, as the covenants touch and concern the land, the original parties to the covenant intended the covenant to run, as there is no evidence of any deed excepting the restrictions set forth in the Act, there is privity in estate between the original grantor and grantee of Plaintiffs' lots, and the covenant was in writing, as the deeds which incorporated the Law of Maryland were in writing.

In 1949, upon petition of at least three-fourths of the property lot owners, the General Assembly repealed the charter for the Town of Arundel-on-the-Bay, effective June 1, 1949. Md. Laws 1949, Ch. 191. (AOTB 20). The Town Trustees received title to the above referenced streets in the 1949 Deed from the Town Commissioners dated May 28, 1949. (AOTB 22). Title to the Disputed Streets was conveyed to the Town Trustees in trust for the benefit of all property owners in Arundel-on-the-Bay. Importantly, the 1949 Deed from the Town Commissioners to the Town Trustees conveyed the streets in trust, but with "the power and authority vested in them to convey all or any part of said real property to any properly organized corporation which may be organized by the aforesaid property owners, and as directed by the aforesaid property owners…" In addition, the 1949 Deed from the Town Commissioners to the Town Trustees included the power to levy assessments or accept contributions for the maintenance of the platted streets so conveyed. (AOTB 22).

Chapter 101 of House Bill 147, approved on March 28, 1950, specifically authorized the County Commissioners of Anne Arundel County "to take over and maintain as public roads all the roads and streets located within . . . a town . . . known as 'Arundel on the Bay.'" Pursuant to the aforesaid power, numerous streets were deeded by the Town Trustees to the Commissioners of Anne Arundel County by the 1951 County Deed and recorded among the Land Records of Anne Arundel County at Liber 613, folio 485. Chapter 101 recognized that the streets and roads within the Town of Arundel-on-the-Bay had been dedicated to and for the benefit of the citizens of the Town, which evidenced its acceptance thereby through the maintenance, care and control of same for that period of time between 1898 and 1949. That title to said streets and roads reposed in the Town of Arundel-on-the-Bay is further evidenced by the fact that the Commissioners of Anne Arundel County accepted title to those streets and roads via the 1951 County Deed, a special warranty deed. Chapter 101, as

well as the 1951 County Deed, expressly provided that Anne Arundel County "may deed back any or all of the roads and streets acquired…to the adjacent property owners."

The Association is the present record owner of the remaining non-County roads in Arundel-on-the-Bay by special warranty deed, the 1951 Deed, dated September 11, 1951 granted by the Town Trustees after the dissolution of the Town of Arundel-on-the-Bay and recorded in the Land Records for Anne Arundel County at Liber 825, folio 32. (AOTB 25). The deeded streets include the Disputed Streets. The Association has exercised its rights for decades as successor to the interests of the Town of Arundel-on-the-Bay in controlling the streets, including through the community approved Special Benefits Taxing District, and Shore Erosion Control District. The Association's position regarding ownership of certain platted streets and rights of use of the streets has been disseminated at community meetings, Board meetings, and to government officials including in the context of surveying, permitting, road maintenance, drainage and the like for many decades. The Association has historically undertaken activities such as landscaping, mowing, gravelling, paving, snow removal, erecting signage, fixing holes, erosion control, tree trimming, tree removal, and similar activities on non-County owned roads in the community.

Because the original grantors of the Counter-Defendants' lots, at the time, were bound by the restrictions set forth in the aforementioned Act, and the deeds would be deemed to incorporate the existing laws at the time of the execution of the deed, the interest and control over said streets, roads or highways was held by the Town. Accordingly, Counter-Defendants' predecessors in title—and, now, Plaintiffs—did not have title over the Disputed Streets under the common law or Md. Code, Real Property Article § 2-114.

For the foregoing reasons, this Court must deny Plaintiffs' Renewed Motion for Summary Judgment with respect to title to the Disputed Streets.

III. THERE ARE OTHERWISE GENUINE DISPUTES OF MATERIAL FACT THAT PRECLUDE SUMMARY JUDGMENT ON PLAINTIFFS' SECOND AMENDED COMPLAINT AND PLAINTIFFS ARE OTHERWISE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW.

The disputed facts in this case demonstrate, among other things that: (1) there is a dispute of material fact as to whether the original grantor retained title or otherwise had granted rights, title or interest in the roads, streets, alleys or avenues in the subdivision to any other party; (2) Plaintiffs appear to concede in their own pleadings the validity of the 1951 Deed given their adverse possession claim and acknowledgment as to the validity of the County's Deed of Easement; (3) that for over 60 years, Plaintiffs and/or their predecessors in title were on notice of the Association's claim of title under the 1951 Deed and acknowledged and benefited from the Association's maintanence and control over the Disputed Streets without objection; (3) the Association has historically reminded lot owners that the maintanence and upkeep of Community-owned property is custom and practice but does not constitute adverse possession; and (4) that the implied easement over the Disputed Streets is for the benefit of all lot owners within Arundel on the Bay. *See* Disputed Facts, supra. These disputed facts preclude summary judgment in Plaintiffs' favor on the Association's Counterclaim *and* on Plaintiffs' own claims.

A. DEFENDANTS' DEFENSES OF LACHES, EQUITABLE ESTOPPEL AND WAIVER PRECLUDE SUMMARY JUDGMENT ON PLAINTIFFS' TITLE CLAIMS CONCERNING THE DISPUTED STREETS.

This Court correctly found that factual disputes precluded summary judgment in Plaintiffs' favor on the Association's declatatory claims relating to laches and equitable estoppel. That conclusion, likewise, precludes summary judgment on Plaintiffs' claims of title to the Disputed Streets. Plaintiffs are estopped from asserting title to the Disputed Streets or otherwise barred by laches from doing so. Laches is defined as:

[A]n inexcusable delay, without necessary reference to duration, in the assertion of

> a right, and, unless mounting to the statutory period of limitations, mere delay is not sufficient to constitute laches, if the delay has not worked a disadvantage to another. Before the defense of laches may be successfully invoked, two elements must be shown: (1) an undue lapse of time; and, (2) some disadvantage or prejudice to the party asserting the defense.

Weidner v. Weidner, 78 Md. App. 367, 374–75 (1989) (internal quotations omitted). On the other hand, "[e]quitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded both at law and in equity, from asserting rights which might perhaps have otherwise existed ... as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse and who on his part acquires some corresponding right, either of property, of contract, or of remedy." *Knill v. Knill*, 306 Md. 527, 534 (1986); *see also Olde Severna Park Improvement Ass'n, Inc. v. Barry,* 188 Md. App. 582, 595 (2009) ("Three essential and related elements are generally necessary to establish equitable estoppel: 1) voluntary conduct or representation; 2) reliance; and 3) detriment.") (citation omitted).

These equitable principles apply in cases involving disputes over title. *See Savonis v. Burke*, 241 Md. 316, 320 (1966) (estoppel to title); *Hawkins v. Chapman*, 36 Md. 83, 100 (1872), ("Courts of equity have established the doctrine, that after a great lapse of time and long peaceable possession, they ought not to interfere to grant relief; for the policy of the law is to give quiet and repose to titles; and courts of justice ought not to countenance laches or long delays on the part of claimants. Indeed, after a great lapse of time, courts of equity will raise a presumption of some legal or equitable extinguishment of the adverse title, if the circumstances of the case will enable them to support it.").

Here, the Association has repeatedly and historically reminded home owners that it is custom and practice in the community for property owners to maintain property owned by the Association that is adjacent to their own but that such maintenance and use is "not adverse possession." Such a

reminder was sent by the Association (signed by Wilma Coble) on April 11, 1983 to all property owners, including Plaintiffs and/or their predecessors in title. (AOTB 65); *see also* Affidavit of Dawn Davis, at ¶ 1-3. Coble's alleged use of the strip of Magnolia has certainly been challenged by the Association and *by Mrs. Coble herself*.

In fact, the Association's records are rife with examples of Mrs. Coble expressly acknowledging the Association's title to the Disputed Streets by virtue of the 1951 Deed or the Association otherwise notifying property owners, including Plaintiffs and/or their predecessors in title of same. (AOTB 58-75). Community newsletters also made clear the Association's claim of title to these streets. (AOTB 76-98). Mrs. Coble, during a deposition in the matter of *Property Owners Association of Arundel on the Bay, Inc. v. Durant*, Case No. C-95-24605, was asked which roads it was her understanding that the community owned, to which she responded: "Walnut Avenue, Magnolia Avenue, and Saratoga Avenue." (AOTB 118-119) (Deposition Transcript Excerpt at 20:17-21:6).

The Association, since its inception, has on numerous occasions, granted title or easement rights to Anne Arundel County without any objection or challenge from Plaintiffs or their predecessors in title, under which the County took over control of certain streets throughout the community or provided such beneficial services such as sewer and water to property owners in Arundel on the Bay. All such conveyances were made pursuant to the Association's clear title over the streets of Arundel on the Bay.

The Association has also historically undertaken activities such as landscaping, mowing, gravelling, paving, snow removal, erecting signage, fixing holes, erosion control, tree trimming, tree removal, and similar activities on non-County owned roads in the community of Arundel on the Bay. Delia Affidavit at ¶2. Such undertakings inherently required the use of AOTB resources and

time, which compounded for over 60 years, obviously would be to the severe disadvantage and prejudice of the Association.

The material facts of whether Plaintiffs and/or their predecessors were placed on notice of the Association's claim of title to the Disputed Streets, that Plaintiffs and/or their predecessors accepted and encouraged the Association's maintenance, preservation and control of the Disputed Streets, whether Plaintiffs and/or their predecessors in title's failure to assert their alleged property rights for 60 years constitutes an unreasonable delay, and whether the Association was disadvantaged and/or prejudiced are thus all seriously in dispute. This Court correctly denied summary judgment on equitable estoppel and laches as they were raised in the Association's Counterclaim. The same result is warranted on Plaintiffs' Renewed Motion for Summary Judgment as to all quiet title claims.

In addition, Coble's claims are further barred by the doctrine of waiver. As set forth above, on November 5, 1988, Coble's predecessor in title, Clyde and Wilma Coble, entered into a PCA, under which the Cobles expressly acknowledged that the Association held title to the Disputed Streets and agreed that the Association had the right to develop and regulate the land for the "joint use and benefit in common for owners of lots in Arundel on the Bay. (AOTB 266). The PCA is recorded in the land records and clearly operates to bar any claims specifically raised by the Cobles concerning title to the Disputed Streets. Coble, given that the PCA was recorded in the land records and based on who its predecessors in title are, was certainly on notice of the PCA when it acquired title to its property.

B. DISPUTED FACTS AND WELL-SETTLED LAW ON IMPLIED EASEMENTS PRECLUDE SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF CONCERNING THE IMPLIED EASEMENT RIGHTS OF THE ASSOCIATION AND DEFENDANT PROPERTY OWNERS.

Before addressing the merits of the implied easement arguments raised in Plaintiffs'

Renewed Motion for Summary Judgment, Defendants present the following quotes, which the Court may find illuminating:

> Although there is a dispute between Plaintiffs and the Association as to who holds superior title to the platted streets in Arundel on the Bay that abut Plaintiffs' properties, there is no disagreement between the parties regarding the *use* of those streets. Both parties agree that all lot owners in Arundel on the Bay have a right of way in common over the Disputed Streets in order to access the platted lots and the Chesapeake Bay for normal waterfront activities, including walking, swimming and fishing, in accordance with well-established principles of property law.

-Plaintiffs' Counsel, on behalf of the Plaintiffs in *Bellamy v. Property Owners Association of Arundel on the Bay, Inc. See* Bellamy Plaintiffs' Motion for Summary Judgment (AOTB 350).

> "[T]he interior lot owners in Arundel on the Bay have a right to the use of Chesapeake Walk and that portion of Magnolia Avenue east of Narragansett Avenue to access the water under an implied easement theory. . . ."
>
> -John Dowling, Plaintiffs' Expert Witness. *See* Dowling Affidavit at ¶ 28, attached to Plaintiffs' Renewed Motion for Summary Judgment.
>
> "The interior lot owners would have the right to use of Chesapeake Walk and that portion of Magnolia Avenue east of Narragansett, under an implied easement theory as stated in cases such as Koch v. Strathmeyer, 348 Md. 525, unless your clients can prove that they and or their predecessors in title have denied other lot owners the use of the right-of-way for a period exceeding twenty years."
>
> -John Dowling. *See* Letter to Planitiffs' Counsel, attached to Plaintiffs' Renewed Motion for Summary Judgment.

In the *Bellamy* case, Judge Caroom confirmed that an easement existed over the Disputed Streets:

> In *Adams v. Commissioners of Town of Trappe*, a chancellor determined that a public easement existed because boundary lines in the street had been in existence for thirty five years, and used by the public for the entire time. . . . Because the lot owners of Arundel on the Bay generally utilized the streets without interruption beyond the requisite twenty years, the disputed streets herein are subject to an easement by these lot owners and their successors. . . . Because lot owners within Arundel on the Bay have used the platted streets of Arundel on the Bay, those streets are subject to an easement in common by all lot owners in Arundel on the Bay. . . ."

(AOTB 125-126). Plaintiffs seek the benefit of Judge Caroom's opinion with respect to the <u>title</u> of

the Disputed Streets but wish to avoid the burden of his decision regarding an easement over the Disputed Streets.

The foregoing quotes, coupled with the evolving nature of Plaintiffs' claims concerning the implied easement rights of the Association and Defendant lot owners, demonstrate that Plaintiffs do not seriously believe what they are arguing to this Court. That becomes even more clear when you look at the purpose for which Arundel on the Bay was developed and the law on implied easements.

As the Court of Appeals recognized in *Boucher v. Boyer*,

> An easement is broadly defined as a nonpossessory interest in the real property of another and arises through express grant or implication. Easements by implication may be created in a variety of ways, such as by prescription, necessity, the filing of plats, and implied grant or reservation where a quasi-easement has existed while the two tracts are one. An implied easement is based on the presumed intention of the parties at the time of the grant or reservation as disclosed from the surrounding circumstances rather than on the language of the deed.

301 Md. 679, 688 (1984) (internal citations omitted).

1. All Lot Owners in Arundel on the Bay Have an Easement Over the Disputed Streets.

In waterfront developments, all interior lot owners have a right of way over platted streets to reach community waterfront areas, and such rights of way may not be blocked. *Klein v. Dove*, 205 Md. 285, 291 (1954). In *Klein*, the Court held that there was "there [wa]s no readily perceptible reason for the ten-foot right of way between what appear[ed] to be the main road of the development and the lake area except to give the owners or occupants of interior lots on this waterfront development access to boating, bathing, swimming and fishing. *Id.* In *Lindsay v. Annapolis Roads Prop. Owners Ass'n*, 431 Md. 274, 301 (2013), the Court of Appeals commented on *Klein*, noting that it relied on a "common sense reading of the plat, to determine the grantor's intentions." Similarly, in *Koch v. Strathmeyer*, 357 Md. 193 (1999) the Court found that access to

the water is essential in a waterfront community, and thereby found that the scope of the implied easement was such that all lot owners enjoyed an easement to access the water. *Koch*, 367 Md. at 201, 203. In addition, [i]t is an established law in Maryland that the existence of a public way may be established by evidence of an uninterrupted use by the public for twenty years, the presumption being that such long continued use and enjoyment of such a way by the public had a legal rather than an illegal origin." *Adams v. Commissioners of Town of Trappe*, 204 Md. 165, 176 (1954) (holding that easement existed where "lifelong residents of Trappe testified that the boundary lines of the street had been as they now are for at least 35 years and during that entire time the street had been used by the public.").

This concept of access to water as essential to a waterfront community has been restated numerous times. *See e.g.*, *Simon Distributing Corp. v. Bay Ridge Civic Ass'n*, 207 Md. 472, 114 A.2d 829 (1955) (involving water access via a community path in the Bay Ridge Community in Anne Arundel County). In *Simon Distributiong*, the Circuit Court for Anne Arundel County found that even an unpaved and grown over path not fit for use by automobiles but leading to the water shown on the record plat was subject to an easement of the lot owners in Bay Ridge "to get to and from Lake Ogleton and for any other purpose reasonably incident to the proper use and enjoyment of their lots." *Id*. at 476. The Court further implied that scope of the implied easement in the path to the water could include boating or bathing facilities. *Id*. at 478. The scope of "normal waterfront activities" in the context of an implied easement to reach the water has been described as "accessing the river for normal waterfront activities, as in *Klein v. Dove* – boating, swimming, fishing." *Kobrine LLC v. Metzger*, 380 Md. 620, 641 (2004).

The standard of proof necessary to establish an implied easement is the "clear manifestation" of the intent of the common grantor. *Williams Realty Co. v. Robey*, 175 Md. 532,

539 (1938). As the Court of Appeals stated in *Scholtes v. McColgan*, 184 Md. 480, 489 (1945), intention " is a question of fact," and the surrounding circumstances of the case must be analyzed in order to truly understand an unexpressed intention. *Turner v. Brocato*, 206 Md. 336, 351 (1955) (concerning the intention to adopt a general scheme of development).

The original developer of Arundel on the Bay sought to develop a "sea side" resort which would provide summer cottages overlooking the Chesepeake Bay to enjoy boating, bathing, crabbing and fishing. (AOTB 202, 206, 207). The streets and street ends in Arundel on the Bay almost all lead to the water as the community is a large peninsula surrounded on three sides by water. (AOTB 19). The Association, since its inception, has maintained and regulated the non-County owned streets in Arundel on the Bay, including the Disputed Streets. The lot owners in Arundel on the Bay have historically enjoyed the use of the Disputed Streets for various waterfront activities. (AOTB 271-347). The lot owners of Arundel on the Bay, pursuant to their use of the Disputed Streets and other areas of the Community, took the extraordinary step of creating a Special Community Benefit Tax District and a Shore Erosion Control District, whereby all lot owners (including interior lot owners) would pay a yearly tax, generating millions of dollars to be used for maintanence and repair of "non-county owned roads," "snow removal," and to address shore erosion in the community, which by the very purposes for which these taxing districts were created, included the Disputed Streets. (AOTB 213-215).

There is no "readily perceptible reason" to have all the streets on the recorded plats lead to the Chesapeake Bay and/or the waters of Fishing Creek and/or community waterfront recreation areas on the Chesapeake Bay and/or Fishing Creek except to give all lot owners of Arundel on the Bay access to these waterfront areas. Historical documents confirm such a purpose. (AOTB 202, 206, 207, 209, 211). That, coupled with the manner in which the community has been presented to

the public since its inception, and how the community has always operated, demonstrates a clear manifestation of intent to create a waterfront community where all lot owners, including interior lot owners, can access and enjoy the Chesapeake Bay and Fishing Creek by the platted streets in Arundel on the Bay, including the Disputed Streets.

Beyond their expert witness's affidavit testimony confirming that all interior lot owners have an easement over the Disputed Streets, Plaintiffs provide this Court with no facts supported by affidavit concerning their implied easement claims and arguments. Plaintiffs otherwise rely almost entirely on tortured reading of *Koch v. Strathmeyer*, which should not be given any credence by this Court.[3] Without discussing the legion of cases holding that implied easement to waterways exist for interior lot owners, Plaintiffs carefully quote *Koch* to argue that such an implied easement would only apply to lot owners in Arundel on the Bay that abutted the Disputed Streets (i.e., only Plaintiffs). In doing so, Plaintiffs place emphasis on the fact that, unlike the interior lot owners in the present case, "all" lot owners in the subdivision in *Koch* were contiguous to the platted right-of-way that led to the waterway. Plaintiffs' Motion, at 12. This would perhaps be significant in this case but for the fact that the subdivision in *Koch* consisted of only four lots: two waterfront lots and two interior lots. The Court, therefore, based on the specific facts of that case found that *all lot owners*—indeed, all *four* of them—with property abutting the road in question enjoyed an implied easement to access the County Road and the waterway. *Koch*, 367 Md. at 201. The *Koch* Court was therefore not even asked to decide the issues present in the current case.

Nevertheless, in *Koch*, the Court expressly recognized that courts also look to other factors

[3] Notably, this case was in existence well before the *Bellamy* case, wherein Plaintiffs' counsel declared without qualification that, under well-established principles of property law, "all lot owners in Arundel on the Bay have a right of way in common over the Disputed Streets in order to access the platted lots and the Chesapeake Bay for normal waterfront activities, including walking, swimming and fishing." (AOTB 350).

to understand the intent of the grantor. 357 Md. at 202 (noting that, in *Klein*, the "intention of the common grantor to grant access to the beach for the 'mutual use and benefit' of the entire community was clear, based upon the recorded plat and the nature of the property itself. After all, this Court said, a waterfront development can only be a waterfront development with a waterfront."). The subdivision in *Koch* simply cannot be compared to Arundel on the Bay, which by its recorded plat and the nature of the property itself, demonstrates the clear intention of the common grantor to grant access to the Disputed Streets for the mutual use and benefit of the entire community. Plaintiffs' reliance on *Koch* is thus misguided.

In light of the historical evidence regarding the nature of Arundel on the Bay as a waterfront community, and based on the prior conduct of Plaintiffs, the arguments of their counsel in the *Bellamy* case, and their own expert's opinoin, it strains credulity for them to argue now that there exists no implied easement for all Arundel on the Bay lot owners to enjoy the full panoply of waterfront activities in addition to ingress and egress and for the Association to maintain and regulate the Disputed Streets. The facts demonstrating the existence of an implied easement are not in dispute, and the "well-established principles of property law" provide that all lot owners in Arundel on the Bay have an implied easement over the Disputed Streets in order to access the platted lots and the Chesapeake Bay for normal waterfront activities, including walking, swimming and fishing.

What is more, it is undisputed that the platted streets in Arundel on the Bay, including the Disputed Streets, have been in existence since its inception and, during that time, have been used by all lot owners within the community. (AOTB 290) (Interrogatory answer of Aris T. Allen, Jr., noting that he "remembers back 50 years that the Disputed Roads have been used recreationally by children and adults for playing, fishing and viewing the sites."). An easement therefore exists,

at the very least, under the principles set forth in *Adams*, as recognized by Judge Caroom in the *Bellamy* opinion.

Accordingly, not only must Plaintiffs' Renewed Motion for Summary Judgment be denied as to their claims for relief concerning an implied easement over the Disputed Streets, but this Court should enter judgment in favor of Defendants (and all lot owners of Arundel on the Bay) on this issue and enter a declaration affirming what Plaintiffs and their counsel already know: that "all lot owners in Arundel on the Bay have a right of way in common over the Disputed Streets in order to access the platted lots and the Chesapeake Bay for normal waterfront activities, including walking, swimming and fishing, in accordance with well-established principles of property law." *See* Rule 2-501(f) (providing that the "court shall enter judgment in favor of *or against* the moving party if the motion and response show that there is no genuine dispute as to any material fact and that *the party in whose favor judgment is entered is entitled to judgment as a matter of law*.).

2. The Association Has an Implied Easement to Regulate, Control and Maintain the Disputed Streets as a Result of the Dedication from the Original Grantor to the Town of Arundel on the Bay.

The Association has a right to maintain and control the Disputed Streets by virtue of the dedication of the streets outlined on the plat when the Town of Arundel on the Bay was created. The incorporation of Arundel on the Bay by the General Assembly with reference to the recorded plat of Arundel on the Bay resulted in a public dedication of all streets and street ends. Acceptance of that dedication was evidenced through the maintenance, care and control of the streets by the Town Commissioners for that period of time between 1898 and 1949. Upon dissolution of the Town of Arundel on the Bay, the Town Commissioners granted control and title to the Trustees of the Town as set forth in the 1951 County Deed. Said Deed specifically authorized those trustees to convey title and control over those dedicated streets to the County Commissioners, which they did by virtue of

the 1951 Deed. The title and control over those streets and street ends not so conveyed were transferred to the Association, which to this day, has exercised such control and regulation. The evidence of the Association's control and regulation of the Disputed Streets is overwhelming.

3. The Defenses of Laches, Equitable Estoppel and Waiver Bar Plaintiffs' Claims Concerning the Easement Over the Disputed Streets.

The undisputed factual record and the law on implied easements demonstrates that all lot owners in Arundel on the Bay enjoy a right of way to access and use the Disputed Streets. This Court should grant summary judgment in favor of Defendants and all lot owners on that issue alone. Nevertheless, any such claim by Plaintiffs seeking to cut off an implied easement to lot owners in Arundel on the Bay would clearly be barred by laches and/or equitable estoppel, and with respect to Coble, by waiver.

As detailed above, Arundel on the Bay has set up an SCBD and an SECD, whereby all lot owners have paid a yearly tax. (AOTB 216). A yearly budget is created each year regarding the use of such funds, which clearly benefits the Disputed Streets. (AOTB 222-231). The Community passes a yearly budget to protect, maintain and repair platted streets including the Disputed Streets for the community as a whole to enjoy and use. Since the creation of the districts until the filing of the Complaint in this action, Plaintiffs and/or their predecessors in title sat back and enjoyed the fruits of their neighbors' contributions to the Disputed Streets, and the Association's control and regulation thereof, and never once, until recently, disputed the Association's title to the Disputed Streets or the right of all lot owners to access and use the Disputed Streets. Mrs. Coble herself touted her involvement in shore erosion control efforts, stating that "[p]rotection of the peninsula's shores has thus been an accepted principle for funding from both taxes and bond issues in AotB, a Special Taxation District of the County. Keeping the Chesapeake where it is remains a priority for the entire community, residents of the littoral as well *as the interior*." (AOTB 264).

Certainly, interior lot owners in Arundel on the Bay would never have voluntarily executed a petition to establish *more* taxes for themselves except to protect and maintain property from which they benefited.

The delay in bringing a claim as to title and to cut off the implied easement rights of their neighbors and the Association is inexcusable. The disadvantage to all lot owners and the Association is demonstrated by the hundreds of thousands of dollars contributed to the SCBD and the SECD, which directly benefited the Disputed Streets. Thus, for decades, Plaintiffs or their predecessors in title slept on their supposed claims of title to the Disputed Streets and their ever-evolving claim concerning the scope of the implied easement over the Disputed Streets. And they did this while accepting the generosity of their interior-lot-owner neighbors, who voluntarily contributed money out of their own pockets to protect and maintain the Disputed Streets, which Plaintiffs now contend no one but Plaintiffs own and can access.

Coble's active involvement in the Association and the use of funds contributed by interior lot owners further demonstrates that Coble's claims are barred by equitable estoppel. The Association's records demonstrate that Mrs. Coble sought power within the Association and repeatedly communicated to the lot owners and the public concerning the use of SCBD and SECD funds as well as the status of title to the Disputed Streets. (AOTB 64, 65, 68, 69, 71, 72, 250, 252).

While Mrs. Coble was Chairman of the Board, and during a meeting held at the Coble residence on September 5, 1985, the Board discussed a motion made at a General Meeting, where a motion was made that the Board establish a policy for the repair and maintenance of "community-owned roads." (AOTB 251). The "general consensus of the Board" chaired by Mrs. Coble was that "the Association should be responsible for repairs and that the Special Community Benefit Tax should be used to pay the cost." (AOTB 251). Following that, Mrs. Coble repeatedly submitted

budget proposals to lot owners and the County, setting forth expenditures for "community owned" roads. (AOTB 256, 258, 260). The Cobles repeatedly volunteered that the Disputed Streets were owned by the Association, the lot owners reasonably relied on those representations to their detriment in the form of decades of taxes under the SCBD or the SECD.

Coble's claims are further barred by the doctrine of waiver. As set forth above, on November 5, 1988, Coble's predecessor in title, Clyde and Wilma Coble, entered into a PCA, under which the Cobles expressly acknowledged that the Association held title to the Disputed Streets and agreed that the Association had the right to develop and regulate the land for the "joint use and benefit in common for owners of lots in Arundel on the Bay." (AOTB 266). The PCA is recorded in the land records and clearly operates to bar any claims specifically raised by the Cobles concerning title to the Disputed Streets, the right of the Associatoin to regulate the use of the Disputed Streets, and the rights of all lot owners to enjoy the use of the Disputed Streets. Just as they did prior to the PCA, in the nearly 30 years since, the Association has steadfastly developed and regulated the Disputed Streets for the use and benefit in common for owners of lots in Arundel on the Bay. Coble cannot, 30 years later, challenge title, rights to regulate and rights of use, which they clearly ceded in the PCA in 1988. Coble, given that the PCA was recorded in the land records and based on who its predecessors in title are (Mr. and Mrs. Coble), was certainly on notice of the PCA when it acquired title to its property.

This Court should grant summary judgment in favor of Defendants and all lot owners on the implied easement issue, but at the very least, the doctrine of laches and/or equitable estoppel bars Plaintiffs' claims concerning the implied easement and, with respect to Coble, by waiver.

C. GENUINE DISPUTES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT ON COBLE'S ADVERSE POSSESSION CLAIM.

Coble claims to have acquired title to an eight (8) foot strip of land lying withing Magnolia

Avenue by adverse possession. Nothwithstanding the fact that Coble's adverse possession claim implicitly recognizes that the Association has title to the Disputed Streets, there are, at the very least genuine disputes of material fact that preclude summary judgment in Coble's favor. To support its claim, Coble argues that, during the 1980s, it installed a concrete driveway and sidewalk, planted trees and bushes, and has maintained all structures and plantings in that portion of Magnolia Avenue for a period in excess of 20 years. Second Amended Complaint, at ¶ 17.

Association records, many of which were authored by Mrs. Coble herself, demonstrate that the Association has repeatedly and historically reminded home owners that it is custom and practice in the community for property owners to maintain property owned by the Association that is adjacent to their own but that such maintenance and use is "not adverse possession." (AOTB 65). The audacity of Coble's adverse possession claim is further demonstrated by the Association's meeting minutes from April 20, 1987. The meeting was held at the Coble's residence and was called to order by Chairman of the Board of Directors, Mrs. Coble. During the meeting, the Board was presented with the Board Chairman's Report, where Mrs. Coble reported that the owners of two properties were attempting to claim title to "community property" and to improve same. Mrs. Coble reported:

> The owners of two properties on Narragansett Ave., expressed the desire to improve the community property between their homes and claim access to it. In this regards, the Board will send a letter to inform them that they may improve that strip of land, but can not claim it as imminent [sic] domain. It was further moved and seconded that it be made a permanent policy that the Board notify property owners as a part of the Annual Encroachment Notice, that while property owners are encouraged to beautify the community property adjacent to theirs, they must seek the Board's approval before clearing trees, and erecting structures of any kind. The vote was carried.

(AOTB 352) (emphasis in original). And, despite asserting in the Second Amended Complaint that the installation of a concrete driveway evidences adverse possession, the Association's records

demonstrate that the Cobles sought and were granted permission by the Board of Directors to extend their driveway in 1987. (AOTB 253). Accordingly, there is clearly a genuine dispute of material fact as to whether Coble has adversely possessed the portion of Magnolia Avenue as stated in the Second Amended Complaint.

WHEREFORE, for the foregoing reasons, Defendant, Property Owners Association of Arundel on the Bay, Inc., respectfully requests an Order from this Honorable Court:

A. Denying Plaintiffs' Renewed Motion for Summary Judgment;

B. Granting summary judgment in favor of Defendants and all lot owners in Arundel on the Bay on Count IV of Plaintiffs' Second Amended Complaint and find and declare that all lot owners in Arundel on the Bay have a right of way in common over the Disputed Streets in order to access the platted lots and the Chesapeake Bay for normal waterfront activities, including walking, swimming and fishing, in accordance with well-established principles of property law;

C. Granting summary judgment in favor of Defendants and all lot owners in Arundel on the Bay on Count V of Plaintiffs' Second Amended Complaint;

D. Granting any and such other relief as the Court deems just and proper.

Respectfully submitted,

COUNCIL, BARADEL,
KOSMERL & NOLAN, P.A.

By: /s/ *Wayne T. Kosmerl*

Wayne T. Kosmerl
N. Tucker Meneely
Steven A. Brown
125 West Street, 4th Floor
Annapolis, MD 21401
(410) 268-6600
(410) 269-8409 fax
Kosmerl@CouncilBaradel.com
Meneely@CouncilBaradel.com
Brown@CouncilBaradel.com
Attorneys for Defendants, Property Owners Association of Arundel on the Bay, Inc., Wilbert Adams, Gail Adams, Neil Rubin, Christine Cots, Nigel Davis, Dawn Davis, Roxanne Veal, Donna Watts-Lamont, David Delia, Margaret Delia, Jane Conaway, Aris T. Allen, Jr., Alan Hinman, Judy Hinman, Pamela Bennett, Richard Peyton and Margaret Peyton

RULE 20-201(F)(1) CERTIFICATE

I HEREBY CERTIFY that the foregoing submission does not contain any restricted information.

/s/ *Wayne T. Kosmerl*
Wayne T. Kosmerl

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of July, 2017, a copy of the foregoing paper was served upon all parties registered to receive service via MDEC, e-mailed to Defendant lot owners who have provided e-mail addresses, and served on all property owners of Arundel on the Bay by posting on the community website.

/s/ *Wayne T. Kosmerl*
Wayne T. Kosmerl