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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SWANN KEYS CIVIC ASSOCIATION, Petitioner, v. MICHAEL DIPPOLITO, JOSEPH W. MANNING, SHARON MANNING, THERESA A. CORRICK, ROBERT C. DUFFY, III, and JESSICA L. DUFFY, Respondents.	)	C.A. No. 2020-0614-SG

PETITIONER SWANN KEYS CIVIC ASSOCIATION'S POST-TRIAL OPENING BRIEF

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PRELIMINARY STATEMENT

For decades, the Swann Keys Civic Association and the property owners in Swann Keys have utilized their two community boat ramps to launch and load their boats and personal watercraft. In fact, since the conclusion of a 1980s class action lawsuit that resulted in the formation of the Swann Keys Civic Association, the Association and its residents have used, operated and maintained the two community boat ramps.

Unfortunately, certain title questions regarding the community boat ramps have recently come to light and the Respondents in this action are attempting to utilize these title questions to permanently shut down the two community boat ramps that have been in existence for half a century. While the Swann Keys Civic Association does not dispute that Respondents raised a title question, the Association and its residents do dispute that title to and/or the right to use the community boat ramps, belongs to anyone other than the Swann Keys Civic Association and its residents.

First, the Swann Keys Civic Association was formed pursuant to a settlement agreement resolving a class action lawsuit between the property owners in Swann Keys and the Association's predecessor in title, BET, Inc. At the conclusion of the class action, the parties executed a settlement agreement stating that BET, Inc. would convey to the Swann Keys Civic Association "two concrete boat ramps…all the

roads…and lagoons" located in the Swann Keys community. This settlement agreement was adopted by and incorporated into the final order and judgment issued by the Court, conveying the "two concrete boat ramps…all the roads…and lagoons" to the Swann Keys Civic Association.

Second, and in the alternative, evidence presented at trial clearly demonstrated that the Swann Keys Civic Association is entitled to an order quieting title in the name of the Swann Keys Civic Association based on adverse possession. Testimony presented by both Petitioner and Respondents established that the Swann Keys Civic Association has used, operated and maintained the boat ramps in an adverse, open and notorious, exclusive and continuous manner for more then twenty years.

Third, and in the alternative, the Swann Keys Civic Association argues that even if the Court is not satisfied that the resolution of the class action resulted in the conveyance of the "two concrete boat ramps…all the roads…and lagoons" to the Swann Keys Civic Association, the Association is entitled to an easement regarding the community boat ramps, either by estoppel or by prescription. As established at trial, and explained in further detail below, the prior property owners of the Swann Keys community, the Swann Keys Civic Association and the residents of the Association have used, maintained and operated the boat ramps in question for a half century.

STATEMENT OF FACTS

A. The Boat Ramps

This is a dispute about two boat ramps in Swann Keys, one of Sussex County's older waterfront communities. The two boat ramps have been utilized by the residents of Swann Keys for approximately a half century since the creation of the Swann Keys community. The two boat ramps are often referred to as the "West Ramp" or "Boat Ramp 1" and the "East Ramp" or "Boat Ramp 2." For the sake of consistency and clarity, Petitioner will refer to the ramps as the "West Ramp" and the "East Ramp," or, collectively, the "Boat Ramps."

The West Ramp is located on Swann Drive between Blue Bill Drive and Laws Point Road. The East Ramp is located on Swann Drive one lot east of the intersection of Blue Teal Road and Swann Drive. The Boat Ramps are formally depicted on surveys dated February 3, 2021 (West Ramp) and June 11, 2021 (East Ramp) and prepared by Russell T. Hammond Surveying, L.L.C. (the "Westerly Survey," the "Easterly Survey," and collectively, the "Surveys"). (JX: 1-2).

B. The Parties

Petitioner, Swann Keys Civic Association (the "Association"), is the homeowners association for Swann Keys, a waterfront community located in Sussex County, Delaware on Derrickson Creek, a tributary of the Little Assawoman Bay, near Fenwick Island (the "Community"). For ready reference, Exhibit A to this Opening Brief is a chain of title beginning with the Swann family and concluding

with the Association and the Respondents' current deeds.

Respondent Michael Dippolito ("Dippolito") is the record owner of Lot 1, Block B in Swann Keys which is a corner lot located on the westerly side of the East Ramp at the intersection of Blue Teal Road and Swann Drive. (JX: 411). Dippolito purchased this property in Swann Keys in April 2019. Opposite the Dippolito Property, on the easterly side of the East Ramp, is another corner lot—Swann Keys Lot 1, Block A, owned by Russell G. Shaffer and Marcia M. Shaffer (collectively the "Shaffers"). (JX: 2).

Respondents Joseph W. Manning, Sharon Manning and Theresa A Corrick (collectively "Manning/Corrick") are the record owners of Lot 1, Block G in Swann Keys, a corner lot located on the westerly side of the West Ramp at the intersection of Blue Bill Road and Swann Drive. (JX: 425). The Manning/Corrick's parents purchased the property in Swann Keys in 1977 and the Manning/Corrick's inherited the property after the death of their father.

Respondents Robert C. Duffy III and Jessica L. Duffy (the "Duffys") are the record owners of Lot 2, Block F in Swann Keys, the second lot on Laws Point Road on the easterly side of the West Ramp. (JX: 440). The Duffys have owned their property in Swann Keys since June 2010.

William R. Mattern, Jr. (a/k/a William R. Mattern IV) and Linda S. Mattern (the "Matterns") are the record owners of Lot 1, Block F in Swann Keys, the first lot

on Laws Point Road on the easterly side of the West Ramp. (Collectively, Dippolito, the Shaffers, Manning/Corrick, the Duffys and the Matterns are referred to as the "Neighboring Property Owners").

The Matterns and the Shaffers, two of the Neighboring Property Owners, are not parties to this suit because they executed Corrective and Confirmatory Deeds formally confirming the Association's ownership of the Boat Ramps. (TR: 11). This suit occurred because the remaining Neighboring Property Owners (Dippolito, Manning/Corrick and the Duffys) took steps to close the Boat Ramps and refused to sign the Corrective and Confirmatory Deeds prepared and sent to them like with the Matterns and Shaffers.

C. The History of Swann Keys

The Swann Keys Community has a storied and creative history as the Association was formed by way of court order in *Atkinson and Swann Keys Civic Association v. BET, Inc.*, C.A. No. 852 (Del. Ch. 1985) (the "Class Action") following a class action lawsuit initiated by its residents. What began as a straightforward lawsuit by the residents against the current developer, Bet, Inc. ("BET") to resolve a dispute regarding a deed restriction evolved into years of litigation and instability in the community, with the Court categorizing the legal problems at issue as "almost insurmountable title problems." *Atkinson v. B.E.T., Inc.*, 1984 WL 159375, *2 (Del. Ch. Dec. 4, 1984). The irony of this matter is that the

Court's 1984 decision indicated that the remaining issue was title to the common areas, stating:

> The only real issue to be determined in this lawsuit now revolves around a determination of how the nonprofit corporation is to obtain title to the common facilities and the amount of any sum to be paid to defendants as reimbursement for some or all of the costs of the common facilities it constructed after it became the owner of most of the lots. *Id.* at *5.

Within a year of the Court's 1984 decision, the Class Action was resolved through a "Compromise and Settlement Agreement" dated September 10, 1985 (the "1985 Settlement Agreement"). (JX: 565-580). Paragraph 1 of the 1985 Settlement Agreement states as follows:

> BET, Inc. will convey all of the common areas and amenities at Swann Keys to the Swann Keys Civic Association for the sum of Three Hundred Thousand Dollars ($300,000)., payable at date of settlement as hereafter provided. The property to be transferred includes the pool, the recreation area, the wells, the water treatment plant, sewer lines and attendant equipment, and any franchise, licenses or permits necessary to maintain or operate the water system, sewer system and common areas. It also includes the purchase of the basketball court, playground equipment, pool, clubhouse, tennis courts, **two concrete boat ramps**, entrance gatehouse and mobile home office, equipment and furniture. The water system includes an estimated 18,000 lineal feet of lines, water treatment system and buildings, all storage tanks, and there is an estimated 18,000 lineal feet of sewer lines with park lift stations. **In addition, the property subject to the purchase covers all the roads and street lights at Swann Keys and there is approximately 10.03 acres of roadbeds. The real estate includes the lagoons and Lots 101 through 113, inclusive, Block D, Lots 1 through 15, inclusive, Block E of the land plotted in File Case 1, page 51, as noted in the deed from Exten Associates, Inc. to BET, Inc., dated May 27, 1975, of recorded in Deed Book 748, page 649.** The **roads** are referenced in a deed from Exten Associates, Inc. to BET, Inc. by deed dated May

> 16, 1978, of record in Deed Book 896, page 46. The land known as Parcel "A" also is part of this purchase. The real property subject to this transfer is further described in a survey of Swann Keys prepared by C. Kenneth Carter and Associates dated March, 1978, recorded in Plot Book 14, pages 99-100 in the Office of the Recorder of Deeds in and for Sussex County at Georgetown, Delaware, as reference thereto will more fully appear. [Emphasis added] (JX: 580).

The 1985 Settlement Agreement was the resolution of the Class Action against BET and naturally required a court order in order to conclude the lawsuit. The Order and Final Judgment resolving the Class Action is dated December 23, 1985 (the "1985 Court Order"). (JX:551-564). The 1985 Settlement Agreement is referenced in, adopted by and incorporated within the 1985 Court Order, Paragraph 4 of which specifically states as follows:

> The Compromise and Settlement Agreement dated September 10, 1985, and filed in this Court, is hereby approved and confirmed as being fair, adequate and reasonable, and the Register in Chancery is directed to enter and docket this Order and Final Judgment in the Action. (JX: 569).

Prior to the resolution of the Class Action against BET, counsel for the Association provided notice of the pendency of the Class Action, the proposed settlement, the date of the settlement hearing and the property owners' right to appear at the settlement hearing (the "Class Action Notice") by mailing notice to all property owners and running a three-week publication of the notice in the *Sussex Countian* newspaper. (JX:457-550).

Paragraph 3 of the Class Action Notice states that the restrictions at issue in

the lawsuit did not speak as to "ownership or title to the utilities, streets, Park or common areas of the Park…[and] the common areas are undefined." (JX:460-461). Paragraph 7 of the Class Action Notice listed the specific amenities/improvements that would be conveyed to the Association as a result of the proposed settlement, including "two concrete boat ramps…all the roads…and lagoons." (JX: 462).

According to Court documents, Respondents' predecessors in title were all provided with the Notice. Specifically, Joseph C. Fersterman (prior owner of the Duffy Property) (JX: 519), William Manning (prior owner of the Manning-Corrick Property) (JX: 520, 527), and Charles H. Murtaugh and Venetia M. Murtaugh (prior owners of the Dippolito Property) were all recipients of the Class Action Notice by mail. (JX: 522).

In fact, all Swann Keys property owners at the time of settlement received notice by mail and publication of the specific amenities that would be conveyed to and considered the property of the Association as part of the resolution of the lawsuit. There is no record of any property owner (specifically, and most importantly, the Respondents' predecessors in title) expressing any objection to the conveyance or to Swann Keys assuming ownership of the specific amenities listed in the 1985 Settlement Agreement. (JX: 457-564).

In addition to the documents obtained from the courthouse regarding the Class Action, the documents presently of record in the Office of the Recorder of Deeds—

the 1985 Settlement Agreement (JX: 565) and the 1985 Court Order (JX: 551) the Court heard testimony from Ronald Young who owned property in Swann Keys during the Class Action. Mr. Young is the son-in-law of John F. Atkinson and Oleita N. Atkinson, the lead plaintiffs in the Class Action, who testified to reading both the publicized Class Action Notice and receiving the Class Action Notice at his primary residence in Maryland. (JX: 457-550, 520; TR: 89-91).

D. The Association's Use of the Boat Ramps

Since the conclusion of the Class Action in 1985, the Association through its members and their invitees has used, operated and maintained the Boat Ramps. The Association's operation and maintenance of the Boat Ramps includes numerous repairs to the Boat Ramps over the years, commissioned for and paid for by the Association. (JX: 40-53, 232-274). During trial, Leo Winterling testified regarding the work he performed for the Association at the East Ramp. (TR: 116-121). In addition, the Association has allotted approximately $65,000 for additional (and necessary) repairs to the Boat Ramps. (JX: 146; TR: 32). Unfortunately, the title questions associated with this lawsuit have prevented the Association from moving forward with the repairs until the instant dispute is resolved. (TR: 32).

Most importantly, the residents of Swann Keys have regularly used the Boat Ramps to launch and load their boats and personal watercraft for decades, some as far back as the 1970s (even prior to the official formation of the Association). (JX:

275-306). More specifically, during trial, the Court heard firsthand from Ronald Young who testified to using the Boat Ramps since 1969 (TR: 91) and from Leo Winterling who testified to use of the Boat Ramps beginning in 1979 (TR: 112-113). In addition, the Court received fifteen affidavits of long-time residents who confirm the long-standing use of the Boat Ramps, more specifically, that use was confirmed since the following dates:

- Todd Lightfoot, 1981 (JX: 275).;
- Clement J. Hoeger, 1971 (JX: 279).;
- Kathryn Elizabeth Hickman, 1971 (JX: 281).;
- Carolyn L. Kress, 1971 (JX: 283).;
- Gail A. Young, 1975 (JX: 285).;
- Beatrice Antonini, 1977 (JX: 287).;
- Howard P. Landgraf, Jr., 1979 (JX: 289).;
- Carol Lynn Harper, 1979 (JX: 291).;
- Gordon W. Emminizer, 1979 (JX: 293).;
- Jeanette E. Evans, 1981 (JX: 295).;
- Catherine S. Wells, 1983 (JX: 297).;
- Mable M. Bents, 1984 (JX: 299).;
- Dorothy Ruth Stevens, 1984 (JX: 301).;
- Barbara B. Stockard, 1989 (JX: 303).; and
- Elizabeth L. Meyers, 1993 (JX: 305).

In addition to maintaining and repairing the Boat Ramps over the years, the Association has maintained a lock on the Boat Ramps in order to prevent non-residents from accessing the Boat Ramps. This lock could only be accessed using a combination that was confidentially distributed to the residents of Swann Keys. (JX: 34-38, 324-339). Ronald Young testified that the lock had been on the Boat Ramps since 1968 or 1970. (TR: 96). More recently, the Association has also posted and

disseminated boat ramp rules and regulations to its residents to ensure proper use of the Boat Ramps. (JX: 34-38).

During trial, the long-term use of the Boat Ramps was not challenged by Respondents. Instead, Respondents appeared to take issue with the amount of maintenance performed on the Boat Ramps and challenged the policing of the Boat Ramps by questioning whether there was a guard. (TR: 134-139, 162-166, 190-191, 209-210, 224, 234). Ironically, Respondents did not present any evidence of their own maintenance of the Boat Ramps or efforts to stop the obvious use of the Boat Ramps until Mr. Dippolito installed the jersey barrier in October 2020.

E. Respondents Testimony.

At trial, Respondents and their witnesses all testified to the problems that have been experienced by Respondents regarding the Boat Ramps. The testimony was that there was a change of "atmosphere" since days gone by, and that people are not as considerate as in prior years. (TR: 132-133, 189, 215, 222). Notably, the complaints coincide with when Mr. Dippolito shut down the East Ramp forcing all boats and personal watercraft to use the West Ramp. More importantly, upon cross-examination, each witness admitted that they did not know who was using the Boat Ramps (residents, residents' guests or invitees) and that they did not report their complaints to the police or to the Association except for one complaint. (TR: 144-145, 150, 157, 175-176, 185, 216, 243). The testimony further demonstrated that

the one complaint that was reported to the Association was resolved by the Association when it found the person who acted un-neighborly and contacted him. (TR: 216). Thereafter, the un-neighborly individual contacted the Duffys and apologized.

F. The Instant Boat Ramp Dispute

The instant dispute arose in October 2020 when Dippolito informed the Association that he owned part of the East Ramp and he would be closing it. (JX: 330). Shortly after communicating this to the Association, Dippolito placed a concrete "jersey" barrier on the East Ramp that prevented anyone from using the East Ramp. (JX: 3).

After Dippolito blocked the East Ramp, the Association contacted Dippolito and the other Neighboring Property Owners regarding title to and use of the Boat Ramps. Counsel for the Association sent numerous communications to the Neighboring Property Owners, indicating that the Association would be willing to indemnify the Neighboring Property Owners and assume all of the costs associated with properly confirming title of the Boat Ramps in the name of the Association. (JX: 310-316).

Ultimately, the Matterns and the Shaffers, two of the Neighboring Property Owners, executed Corrective and Confirmatory Deeds formally confirming the Association's ownership of the Boat Ramps. (TR: 11). To date, the Association has

been unable to obtain the signatures of the other Neighboring Property Owners (Dippolito, Manning/Corrick and the Duffys) on Corrective and Confirmatory Deeds prepared and sent to them to confirm the ownership of the Boat Ramps.

On July 15, 2021, the Association filed its Verified Petition to Quiet Title and Other Relief. On or about August 4, 2021, shortly after being served, Respondents Jessica L. Duffy, Robert C. Duffy III, Joseph W. Manning, Sharon Manning, and/or Theresa A. Corrick, installed a chain barrier that prevented anyone from using the West Ramp. (JX: 336-337). Respondents also removed the signage the Association had placed at the Boat Ramps and erected a sign explaining why they felt it was necessary to "close down the boat ramp." (JX: 4-6).

In response to the closure of the West Ramp which resulted in both Boat Ramps being closed, on August 13, 2021, the Association filed a Motion for Expedited Proceedings and a Temporary Restraining Order. A hearing was held on August 17, 2021, and the Court granted the Association's Motion ordering the proceedings to be expedited and entering a temporary restraining order enjoining Respondents from interfering with the Association's use of the Boat Ramps.

Trial was held on February 3, 2022. This is Petitioner's Post-Trial Opening Brief.

ARGUMENT

I. QUIET TITLE

The Association seeks an order quieting title to the Boat Ramps in accordance with the 1985 Settlement Agreement and 1985 Court Order resulting from the Class Action. Longstanding, court-approved documentation that has been of record in the Office of the Recorder of Deeds plainly states that title to the Boat Ramps was conveyed to the Association by way of the 1985 Settlement Agreement and 1985 Court Order. In addition to the 1985 Settlement Agreement and 1985 Court Order, Respondents' predecessors in title never objected to the conveyance of the Boat Ramps and the current deeds for Mr. Dippolito and the Duffys expressly state that they are subject to all "agreements of record." (JX: 411 & 440).

In the alternative, should the Court determine that the 1985 Settlement Agreement and 1985 Court Order did not convey title to the Boat Ramps to the Association, the Association seeks an order quieting title to the Boat Ramps by way of adverse possession.

A. SETTLEMENT OF THE CLASS ACTION

The Class Action was a lengthy lawsuit that resolved a number of issues. As set forth in the Class Action Notice, the suit began with a declaratory judgment action seeking "one restriction to apply to all the lot owners of Swann Keys" because BET was the third developer and there was an original restriction and a modified restriction making it unclear whether all lot owners were part of the same

"association." (JX: 459-460). After describing the original and modified restriction, the introductory paragraphs to the Class Action Notice state as follows:

> 3. Neither restriction speaks about ownership or title to the utilities, streets, Park or common areas of the Park. The common areas are undefined and BET, INC. managed the Park since 1975. (JX: 460-461).

Five years after the Class Action began, the parties resolved it pursuant to the terms of the 1985 Settlement Agreement. There is no dispute that the 1985 Settlement Agreement specifically identifies "two concrete boat ramps" as part of the common areas being purchased from BET. (JX: 565-580, 566). The only testimony presented at trial was that the East Ramp and West Ramp were the only two concrete boat ramps in the community. (*See* the 15 Affidavits, JX: 275-306, along with the testimony of Ronald Young at TR: 91). No evidence was presented of other boat ramps within the community. Therefore, the only evidence is that the East Ramp and the West Ramp are the "two concrete boat ramps" sold to the Association as part of the 1985 Settlement Agreement incorporated into the 1985 Court Order. This is dispositive in favor of the Association.

In the face of this, Respondents have never identified any colorable counterargument. Respondents previously argued that BET could not convey title because it was not the underlying owner of the Boat Ramps. This argument ignores the Class Action suit as summarized in the Class Action Notice and then resolved through the 1985 Settlement Agreement and 1985 Court Order. The Class Action

Notice expressly confirms that the common areas were previously "undefined" but then expressly lists them as part of the purchase by the Association.

Significantly, the Class Action Notice was disseminated to all existing Swann Keys property owners (including the predecessors in title to the Respondents' respective properties) both by mail to their primary addresses and by publication in a local newspaper. The Class Action Notice states that the "two concrete boat ramps…all the roads…and lagoons" in the Community would be part of the conveyance to the Association if the 1985 Settlement Agreement was approved by the Court. Specifically, Paragraph 7 of the Class Action Notice listed the specific amenities/improvements that would be conveyed to the Association as a result of the proposed settlement, including "two concrete boat ramps…all the roads…and lagoons." (JX: 462).

As stated above, the Court records from the Class Action contain an Affidavit of Notice that included the Respondents' predecessors in title. (*See generally*, Exhibit A and JX: 457-550; *see also*, JX: 519, 521, 528). The time for an objection to be raised was in 1985, not more than 35 years later. There is no way to read the 1985 Settlement Agreement, other than that the Court, the Association and BET all believed that BET was conveying the Boat Ramps to the Association. This is further supported by the language in the deed from BET to the Association dated March 14, 1986, and recorded in the Office of the Recorder of Deeds in and for Sussex County

in Deed Book 1400, Page 96. This deed conveyed to the Association "the beds of the streets or roads….being known as Swann Drive, Blue Teal Road, Canvasback Road, Laws Point Road, Blue Bill Drive and Pintail Drive including not only these roadways but all canals and/or lagoons." (JX: 398). While the deed does not specifically state that any boat ramps were conveyed, it conveyed the roads and the lagoons, both of which are and were connected via the Boat Ramps at issue. It would be illogical to execute a deed to convey the lagoons and roads while omitting the boat ramps that provide access to the lagoons.

However, even if BET was not the record owner of the Boat Ramps in 1985, the record owners (*i.e.* Swann Keys property owners, namely Respondents' predecessors in title) were put on notice of the pending transfer, and did not voice any objection to the conveyance. Therefore, because proper notice was sent individually to all Swann Keys property owners and published in the newspaper, and BET was a consenting party to the 1985 Settlement Agreement, the record owner(s) were given proper notice that title to the "two concrete boat ramps…all the roads…and lagoons" would be transferred to the Association upon the conclusion of the Class Action.

Even ignoring this settled history, Respondents have also failed to explain away language in their own deeds. Both the Dippolito and Duffy record deeds expressly state that their title is taken subject to *all agreements of record*. The 2019

conveyance to Dippolito states as follows: "SUBJECT to any and all restrictions, reservations, conditions, easements and agreements of record in the Office of the Recorder of Deeds in and for Sussex County." (JX: 412). Similarly, the 2010 conveyance to the Duffys states as follows: "SUBJECT to any and all restrictions, reservations, conditions, easements and agreements of record in the Office of the Recorder of Deeds in and for Sussex County, State of Delaware." (JX: 441). Finally, the Manning-Corrick Respondents' parents took title to their property subject to the restrictive covenants that were at issue in the Class Action and were ultimately resolved by the 1985 Settlement Agreement and 1985 Court Order. Therefore, all the Respondents were either included in the 1985 Settlement Agreement and 1985 Court Order by direct participation in the Class Action or took title thereafter, subject to the 1985 Settlement Agreement and 1985 Court Order. As such, the Association is entitled to an order quieting title to the Boat Ramps with the Association.

B. ADVERSE POSSESSION

Even assuming that the recorded documents did not provide sufficient evidence to quiet title to the Boat Ramps in favor of the Association, the Association is nonetheless entitled to an order quieting title to the Boat Ramps based upon adverse possession. "The elements of a valid claim to title through adverse possession are well established…plaintiffs must show that they have had open, notorious, hostile, exclusive, adverse possession of land continuously for the

prescribed period [of twenty years]." *Tumulty v. Schreppler*, 132 A.3d 4, 23 (Del. Ch. 2015) (internal citations omitted) *see also*, *State v. Phillips*, 400 A.2d 299, 304 (Del. Ch. 1979). Notably, the burden of proof for adverse possession is only a preponderance of the evidence, rather than clear and convincing evidence, as required for a prescriptive easement. *Id.* at 24.

1. CONTINUOUS

The first element of a claim for adverse possession is continuous use for at least twenty years. The twenty-year requirement is a bright-line inquiry. *Tumulty*, 132 A.3d at 23. The Delaware Supreme Court previously held that the "uninterrupted and continuous enjoyment of land to constitute adverse possession does not require the constant use thereof." *Id*. (quoting *Lewes Trust Co. v. Grindle*, 170 A.2d 280, 282 (Del.1961)).

Here, the Association's use of the Boat Ramps was and remains continuous. Two witnesses testified during trial that they first used the Boat Ramps as Swann Keys residents as early as 1969 and 1979. Ronald Young testified that he and his in-laws first used the Boat Ramps as far back as 1969 and that he continues to use the Boat Ramps to this day. (Tr. 91). Similarly, Leo Winterling testified that he used the Boat Ramps, specifically the West Ramp, approximately four times per year from 1979-1990 and 2002-2010. (Tr. 112). One of the Respondents, Theresa

Shoulders,[1] also testified that members of the community had used the Boat Ramps since her parents purchased their property in 1977. (Tr. 131).

Since the Association was created via court order at the conclusion of the Class Action in 1985, the Association, by and through more than 600 members, has continued to regularly use, operate and maintain the Boat Ramps. (JX: 10-11; 552-564). The Association also presented evidence by way of fifteen Affidavits of longtime Swann Keys residents that the Boat Ramps at issue in this case have been in existence in the Swann Keys community for decades—the earliest date being 1971. (*See*, JX: 275-306).

When questioned during trial regarding the usage by members of the Association, President Jeff Markiewicz testified that in August 2021, the Association counted approximately 200 boats or personal watercraft located in the Swann Keys' lagoons and approximately 80 boats or personal watercraft on trailers on Swann Keys' properties. (Tr. 50). No evidence was presented to indicate that the Association's use of the Boat Ramps has been interrupted or otherwise contested since 1985.

While the uninterrupted use since 1985 more than satisfies the twenty-year requirement for adverse possession, the Association can add another sixteen years

[1] Upon information and belief, Theresa Corrick is the former married name of Respondent Theresa Shoulders.

to that figure because of the testimony establishing the usage of these boat ramps back to 1969 through the testimony of Ronald Young. (TR: 91). Further, within the fifteen affidavits there are several that place the Boat Ramps in the Community in 1971. If Respondents' arguments regarding title are to be believed, then the adverse possession began before BET's operation of the Community (1975) and adds even more time through tacking. *See*, *Matter of Campher*, 1985 WL 21134, at *2 (Del. Ch. Mar. 20, 1985) (holding that the 20-year period may be established by tacking on the periods when the property was held by successive adverse holders).

Based on the only evidence before the Court regarding the historical use of the Boat Ramps, the Association has established its claim of adverse possession for twenty-years by an extra fifteen years and adding the prior developers' claims, more than thirty years in addition to the required twenty. The uncontroverted half century of use of the Boat Ramps easily satisfies this first element of a claim for adverse possession.

2. EXCLUSIVE

The second element of adverse possession is that the adverse use must be exclusive. The exclusivity element does not require absolute exclusivity. *Tumulty*, 132 A.3d at 26. Rather, exclusive possession means that the adverse possessor must show exclusive dominion over the land and an appropriation of it to his or her benefit. *Tumulty*, 132 A.3d at 26.

Both the Association and Respondents provided witness testimony to demonstrate that the Association has exercised dominion over the Boat Ramps by posting signage; maintaining locks and chains on the Boat Ramps; periodically changing the lock combination and sharing the new combination with Swann Keys residents; and even attempting to enforce a boat sticker policy. (Tr. 33-35, 83, 96, 162; *see also*, JX: 34-35). Witnesses Jeff Markiewicz, Richard Schofield, Ronald Young, Beverly Dennis and Gerald Barron all provided testimony that the Association has maintained a lock and chain on the Boat Ramps. (Tr. 33-35, 83, 96, 162). Ronald Young testified that he remembered a chain at the Boat Ramps as far back as 1968 or 1970. (Tr. 96).

Richard Schofield testified that he has approached individuals who are not residents (or guests of residents) of Swann Keys to inform them that use of the Boat Ramps is limited to use by members of the Association. (Tr. 82). Nancy Flacco testified that she has been a Swann Keys resident since 2002 and has always been aware of the Association's use of the Boat Ramps. (Tr. 159-168). Witness Nancy Flacco further testified that she became concerned the Boat Ramps were being used by individuals outside of the Swann Keys community so she prepared a report for the Association's Board of Directors with suggestions as to how the Association "could protect its asset," *i.e.*, the Boat Ramps. (Tr. 162).

In addition to the use of the Boat Ramps, the Association also presented evidence that the Association has been solely responsible for repairs to the Boat Ramps over the years. Ronald Young testified that he recalled work on the Boat Ramps as far back as 1985 and Leo Winterling described the work that he had performed on the Boat Ramps for the Association over the years. (Tr. 81, 94, 112-122). No evidence was presented to indicate that any Respondents, or other residents of Swann Keys, ever performed repairs or maintenance on the Boat Ramps themselves or contributed payment for the repairs or maintenance beyond payment of their annual dues to the Association.

With respect to the issues of operation and maintenance of the Boat Ramps, during trial, Respondents were critical of how the operation was policed (claiming that individuals from outside Swann Keys use the Boat Ramps) and maintained (claiming that the Association is not doing a good job of maintaining the Boat Ramps). While a property owners association could likely always do better in maintaining a common area, Respondents' argument misses the point. The agreed upon fact that the Association was setting rules, putting up chains, maintaining to any extent, etc., particularly compared to the lack of any efforts in this regard by Respondents or their predecessors demonstrates adverse possession.

Finally, Respondents Theresa Shoulders, Jessica Duffy and Robert Duffy and Nancy Flacco all testified that until 2020, they all believed that the Boat Ramps were

common property and a Swann Keys amenity. (Tr. 131, 168, 215, 228). Respondent Michael Dippolito who purchased in 2019 testified that he did not know who the Boat Ramps belonged to, but he did not think that he owned any portion of them. (Tr. 241). In their Pre-Trial Brief, Respondents argued the doctrine of "neighborly accommodation." This argument is contradicted by the Respondents' testimony that they believed the Boat Ramps were owned by the Association. The Respondents were not giving permission because they were on friendly terms with the 600 plus members of Swann Keys and their guests and invitees. Instead, the adverse use was so well established that Respondents believed the Boat Ramps were a community amenity owned by the Association.

Therefore, the evidence demonstrates what the long-time residents confirmed in their affidavits—the exclusive use by the Association—which was further confirmed by the newcomers (*i.e.*, the Respondents) who were convinced until the start of this dispute that the Boat Ramps were an amenity of the Community.

3. OPEN AND NOTORIOUS

The third element that must be established for adverse possession is that the possession was open and notorious. "Open and notorious means that the possession must be public so that the owner and others have notice of the possession…[i]f possession was taken furtively or secretly, it would not be adverse and no title possession could be acquired." *Tumulty*, 132 A.3d at 27.

The evaluation of this element is individualized for each claim. In *Marvel*, the Court described this evaluation as follows:

> As a general rule it will be sufficient if the land is so used by the adverse claimant as to apprise the community in its locality that it is in his exclusive use and enjoyment, and to put the owner on the inquiry as to the nature and extent of the invasion of his rights and this is especially true where the property is so situated as not to admit of permanent improvement. In such cases, if the possession comports with the usual management of similar lands by their owners, it will be sufficient. Neither actual occupation, cultivation, nor residence is necessary where neither the situation of the property nor the use to which it is adapted or applied admits of, or requires, such evidences of ownership. *Marvel v. Barley Mill Road Homes, Inc.*, 104 A.2d 908, 912 (Del. Ch. 1954).

As stated by the Respondents themselves during their testimony as well as their witness Nancy Flacco, they all believed the Boat Ramps were part of the common area of the Community. (Tr. 131, 168, 215, 228). This is the clearest demonstration that the Association's use of the Boat Ramps had been open and notorious since 1985 and that the developers' use prior to 1985 was similarly open and notorious. The Association consists of over 600 properties whose residents have used the Boat Ramps on a regular basis. As stated above, the Association presented evidence that it has used a lock and chain to demonstrate its ownership of the Boat Ramps along with trying a sticker program. (Tr. 33-35, 83, 96, 162).

The success of any of these programs does not determine whether or not the use was open and notorious. Rather, the development and implementation of these programs throughout a community of owners, including the Respondents and their

predecessors in title was an open and notorious display of possession. The Association also presented evidence that they have been solely responsible for repairs to the Boat Ramps over the years. (Tr. 81, 94, 112-122). .

The Respondents and their witnesses' testimony demonstrate that the Association has established this third element of adverse possession.

4. ADVERSE

The final element of a claim for adverse possession is that the use must be "hostile." A hostile claim goes "against the claim of ownership of all others, including the record owner." *Tumulty*, 132 A.3d at 27 (quoting *Ayers v. Pave It, LLC*, 2006 WL 2052377, at *2 (Del. Ch. July 11, 2006)). But "it is not necessary that one entering a property must expressly declare his intention to take and hold the property as his own…[t]he actual entry upon and the use of the premises as if it were his own, to the exclusion of all others, is sufficient." *Lewes Trust Co.*, 170 A.2d at 282. Once a party claiming title or rights by adverse possession has met the burden of proof, "it is incumbent on the holder of record title to establish that the possession or use was permissive." *David v. Stellar*, 269 A.3d 203, 204 (Del. 1970).

The Association presented the testimony of Ronald Young and Leo Winterling that they used the Boat Ramps as Swann Keys residents without asking permission from the adjacent property owners since the 1970s. (Tr. 92, 114).

Witnesses Jeff Markiewicz and Richard Schofield also testified that they never asked permission from the adjacent property owners to use the Boat Ramps. (Tr. 40, 79).

Respondents Theresa Shoulders, Jessica Duffy and Robert Duffy all testified that they believed that the Association was the title owner of the Boat Ramps until the end of 2019 or early 2020, *i.e.*, the beginning of this dispute. (Tr. 131, 168, 215, 228). Respondent Michael Dippolito testified that he did not know who the Boat Ramps belonged to, but he did not think that he owned any portion of them. (Tr. 241). In fact, there was no evidence presented at trial that the Association's use was permissive or otherwise permitted by Respondents or their predecessors in title.

Therefore, because all the evidence supports the conclusion that the Association's use of the Boat Ramps is adverse and hostile, this element is satisfied.

Based on the facts and evidence presented at trial, the Association has demonstrated by a preponderance of the evidence that the Association's use of the Boat Ramps was continuous, open and notorious, exclusive and adverse for a period vastly exceeding twenty years. Therefore, the Association is entitled to an order quieting title in the Boat Ramps to the Association by way of adverse possession.

II. EASEMENT

Should the Court find that the Association is not the record holder of title to the Boat Ramps pursuant to either the recorded 1985 Settlement Agreement and 1985 Court Order or adverse possession, the Association is entitled to an easement, either by prescription or estoppel, to continue its use of the Boat Ramps.

A. PRESCRIPTIVE EASEMENT

The elements of a prescriptive easement are identical to the elements for adverse possession, that is, the Association must demonstrate that it has used the Boat Ramps: (i) openly, (ii) notoriously, (iii) exclusively, and (iv) adversely to the rights of others for an uninterrupted period of twenty (20) years." *Dewey Beach Lions Club, Inc. v. Longanecker*, 905 A.2d 128, 134 (Del. Ch. 2006). The difference between establishing a claim for adverse possession and a claim for an easement by prescription lies in the burden of proof. In order to successfully establish the elements for a prescriptive easement, a petitioner must establish them by clear and convincing evidence. *Ayers*, 2006 WL 2052377 (Del. Ch. July 11, 2006) (holding that Delaware law requires proof of an easement by prescription by clear and convincing evidence).

As stated above in Section I(B), the written and oral record in this matter demonstrates that the Association's use of the Boat Ramps (and the developers prior to the Association) was continuous, open and notorious, exclusive and adverse for a

period exceeding twenty years. While the legal standard is different, the Association meets the higher burden of proof for a prescriptive easement because Respondents failed to present evidence contesting these claims. Instead, Respondents' testimony confirmed the historic use of the Boat Ramps.

B. EASEMENT BY ESTOPPEL

The final theory by which the Association would have an easement to use the Boat Ramps is by estoppel. This argument is only applicable if the Court finds that Respondents were able to establish giving permission for the use of the Boat Ramps. As described previously, during trial, Respondents testified that they did not realize they owned their respective portions of the Boat Ramps until this dispute. (Tr. 131, 168, 215, 228). Therefore, it would be illogical to conclude that the Respondents were granting permission to use something they did not believe they owned. However, should the Court find that the Boat Ramps were used in a permissive manner, the Association would be entitled to an easement by estoppel.

Pursuant to Delaware law, an easement by estoppel is created when: (1) a promisor's representation that an easement exists has been communicated to a promisee; (2) the promisee believes the promisor's representation; and (3) the promisee acts in reliance upon the promisor's representation. *Hionis v. Shipp*, 2005 WL 1490455, *4 (Del. Ch. June 16, 2005) (citing *Hammond v. Dutton*, 1978 WL 22451 (Del. Ch. Dec. 20, 1978)). As stated above, the individual owners of Swann

Keys' properties prior to the Class Action, the Association and its residents since the Class Action have used, operated and maintained the Boat Ramps at issue for decades. (JX: 39-306). During this time, neither Respondents, nor their predecessors in title, voiced any opposition to the Association's use of the Boat Ramps until 2020 when Mr. Dippolito installed the jersey barrier on the East Ramp.

More importantly, there was no objection to the settlement of the Class Action even after receiving notice by mail and publication that the "two concrete boat ramps…all the roads…and lagoons" were being conveyed to the Association. Instead, business continued as usual with residents of Swann Keys launching and loading their boats and personal watercraft as they have since at least 1969. As was acknowledged by Respondent Duffy in an on-line post this past August, when he bought the property, he "knew there was a boat ramp there" and he has not "complain[ed] about the boat ramp for the last 10 years" prior to the instant dispute. (JX: 343).

Furthermore, the Association, acting in reliance on its belief that it was entitled to use and maintain the Boat Ramps, spent thousands of dollars commissioning repairs to the Boat Ramps to ensure that the residents are able to continue their use of the Boat Ramps. (JX: 40-53, 232-274).

One example of the permission of the adjacent property owners is from Charles Murtaugh, the prior owner of Dippolito's property. In 2005, Mr. Murtagh

signed a letter of no objection to the Association's installation of a "new boat ramp with a permanent breakwater … next" to his property. Emphasis added (JX: 244). The testimony at trial was not that the use was permissive; however, if Respondents resort to arguing that the use was permissive, then the Association would have an easement by estoppel for the use of the Boat Ramps.

III. NUISANCE

In their pretrial brief, Respondents argued that the Association's members' use of the Boat Ramps was a nuisance and should be stopped. Delaware law recognizes two types of private nuisance: nuisance *per se* and nuisance-in-fact. The facts of this matter do not support either of the nuisance doctrines.

A. NUISANCE-IN-FACT.

The doctrine of nuisance-in-fact applies to situations where a defendant, acting lawfully on their own property, permits acts or conditions "which becomes nuisances due to the circumstances or location or manner of operation or performance." *Beam v. Cloverland Farms Dairy, Inc.*, 2006 WL 2588991, *2 (Del. Ch. Sept. 6, 2006) (internal citations omitted). In order for this doctrine to apply, the Association must be operating the Boat Ramps in a manner allowing the launching and loading of boats to become a nuisance. While the Court heard testimony from the Respondents with complaints about the use, the Respondents all admitted that they did not contact the Association about their concerns—except in one instance where the Duffys complained to the Association and the Association procured an apology from the un-neighborly individual. (JX: 216). Strangely, Mr. Dippolito testified that he did not notify the Association about alleged damage from the use of the Boat Ramps because he heard the Duffys' claims of damage were

rejected by the Association—a fact contradicted by the Duffys' testimony. (TR: 243).

At various times, Respondents have indicated that their newfound concern is liability—a concern for any property owner. However, Respondents failed to present any evidence of increased lability other than Mr. Dippolito's unsupported testimony that he contacted unknown insurance companies and could not get coverage—information he admitted that he failed to share during discovery. (TR: 242-243).

Assuming there is a new "atmosphere" in the Community, that "atmosphere" arose when the East Ramp was closed and all boats and personal watercraft were using the West Ramp. Further, proposals by the Association to discourage individuals launching and loading boats have been rejected by Respondents. (TR: 218). There is no evidence to support a claim that the launching and loading of boats at the Boat Ramps is being done in a manner creating a nuisance-in-fact.

B. NUISANCE *PER SE*.

Pursuant to Delaware law, a nuisance *per se* can occur in three situations: (1) when there is a violation of a safety statute; (2) when the defendant is engaged in an abnormal or hazardous activity; and (3) when the defendant makes an intentional interference for their own purposes which is clearly unreasonable in its surroundings.

Patton v. Simone, 1992 WL 398478, *9 (Del. Ch. Dec. 14, 1992) (internal citations omitted).

The first potential application of a nuisance *per se* involves the violation of a safety statute. As Respondents' allegations of a nuisance center around the Association's alleged trespassing on their property, this application does not apply.

The second potential application of a nuisance *per se* may exist where the defendant has engaged in "abnormal or hazardous activity." *Patton*, 1992 WL 398478 at 9 (internal citations omitted). Delaware law characterizes ultrahazardous activity as "that which necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of utmost care and is not a matter of common usage." *Artesian Water Co. v. Gov't of New Castle Cnty*, 1983 WL 17986, *18 (Del. Ch. Aug. 4, 1983) (citing Section 520 of the 1938 Restatement of Torts). The use of a boat ramp to launch boats and personal watercraft, while an activity that requires care and finesse, hardly constitutes an activity involving a risk of harm which cannot be eliminated with the exercise of due care. Furthermore, the launching of boats and personal watercraft via boat ramp is an extremely common usage, especially in the coastal areas of Sussex County.

This leaves the third potential application of the nuisance *per se* doctrine. That is, when a party makes an intentional interference for their own purposes which is clearly unreasonable in its surroundings. First, it can hardly be argued that the

Association's use of the Boat Ramps to launch boats and other personal watercraft is "clearly unreasonable in its surroundings." The Boat Ramps have been in existence and used by the Association for decades and the use of Boat Ramps and the lagoons to launch boats and other watercraft is the most reasonable use of the Boat Ramps.

Furthermore, only recently have the Respondents expressed any opposition or frustration to the use of the Boat Ramps. The Manning-Corrick Respondents visited and owned property in the Swann Keys community since their parents (William and Mary Manning) purchased the property in 1977 and it was not until recently that they expressed any frustration or opposition to the use of the Boat Ramps. Similarly, as stated above, Respondent Duffy acknowledges that he "knew there was a boat ramp there" and he has not "complain[ed] about the boat ramp for the last 10 years." (JX: 343) Finally, upon information and belief, Dippolito owned his Property for eighteen months prior to becoming aware of the title issue and expressing opposition to the Association's use of the Boat Ramps. Furthermore, as noted previously, the prior owner of the Dippolito Property, Charles Murtaugh, did not complain about the use of the Boat Ramps but instead consented in writing to the Association's repairs to the East Ramp next to his property. (JX: 244).

Finally, Respondents Duffy and Dippolito both purchased their respective properties in the past 11 years with full knowledge of the presence and use of the

Boat Ramps. (JX: 411, 440). By purchasing property adjoining the Boat Ramps, the Duffys and Dippolito knowingly purchased property with foreseeable and reasonable issues associated with a boat ramp operating in close proximity to their property. Therefore, the Respondents' claims of nuisance are unsupported and must fail.

CONCLUSION

For the foregoing reasons, the Association respectfully requests that the Court grant judgment in its favor quieting title to the other half of the East Ramp and West Ramp shown on the Surveys confirming the recorded 1985 Settlement Agreement and 1985 Court Order. This quieting of title will align with both the actual usage of the Boat Ramps for the last half century as well as the other half of the Boat Ramps which the neighboring property owners already confirmed title to by virtue of confirmatory deeds.

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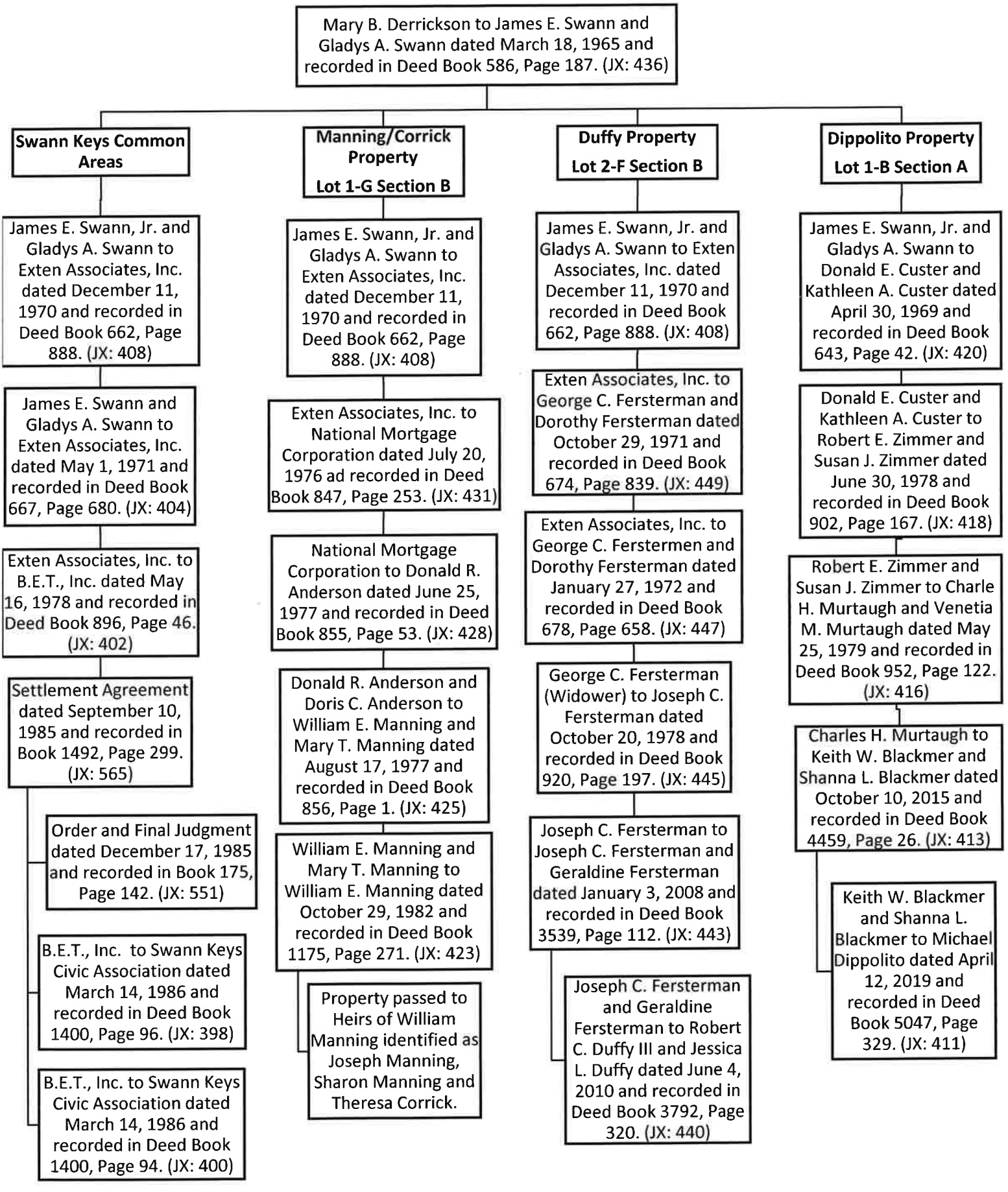
EXHIBIT A


Mary B. Derrickson to James E. Swann and Gladys A. Swann dated March 18, 1965 and recorded in Deed Book 586, Page 187. (JX: 436)
Swann Keys Common Areas
James E. Swann, Jr. and Gladys A. Swann to Exten Associates, Inc. dated December 11, 1970 and recorded in Deed Book 662, Page 888. (JX: 408)
James E. Swann and Gladys A. Swann to Exten Associates, Inc. dated May 1, 1971 and recorded in Deed Book 667, Page 680. (JX: 404)
Exten Associates, Inc. to B.E.T., Inc. dated May 16, 1978 and recorded in Deed Book 896, Page 46. (JX: 402)
Settlement Agreement dated September 10, 1985 and recorded in Book 1492, Page 299. (JX: 565)
Order and Final Judgment dated December 17, 1985 and recorded in Book 175, Page 142. (JX: 551)
B.E.T., Inc. to Swann Keys Civic Association dated March 14, 1986 and recorded in Deed Book 1400, Page 96. (JX: 398)
B.E.T., Inc. to Swann Keys Civic Association dated March 14, 1986 and recorded in Deed Book 1400, Page 94. (JX: 400)
Manning/Corrick Property Lot 1-G Section B
James E. Swann, Jr. and Gladys A. Swann to Exten Associates, Inc. dated December 11, 1970 and recorded in Deed Book 662, Page 888. (JX: 408)
Exten Associates, Inc. to National Mortgage Corporation dated July 20, 1976 ad recorded in Deed Book 847, Page 253. (JX: 431)
National Mortgage Corporation to Donald R. Anderson dated June 25, 1977 and recorded in Deed Book 855, Page 53. (JX: 428)
Donald R. Anderson and Doris C. Anderson to William E. Manning and Mary T. Manning dated August 17, 1977 and recorded in Deed Book 856, Page 1. (JX: 425)
William E. Manning and Mary T. Manning to William E. Manning dated October 29, 1982 and recorded in Deed Book 1175, Page 271. (JX: 423)
Property passed to Heirs of William Manning identified as Joseph Manning, Sharon Manning and Theresa Corrick.
Duffy Property Lot 2-F Section B
James E. Swann, Jr. and Gladys A. Swann to Exten Associates, Inc. dated December 11, 1970 and recorded in Deed Book 662, Page 888. (JX: 408)
Exten Associates, Inc. to George C. Fersterman and Dorothy Fersterman dated October 29, 1971 and recorded in Deed Book 674, Page 839. (JX: 449)
Exten Associates, Inc. to George C. Ferstermen and Dorothy Fersterman dated January 27, 1972 and recorded in Deed Book 678, Page 658. (JX: 447)
George C. Fersterman (Widower) to Joseph C. Fersterman dated October 20, 1978 and recorded in Deed Book 920, Page 197. (JX: 445)
Joseph C. Fersterman to Joseph C. Fersterman and Geraldine Fersterman dated January 3, 2008 and recorded in Deed Book 3539, Page 112. (JX: 443)
Joseph C. Fersterman and Geraldine Fersterman to Robert C. Duffy III and Jessica L. Duffy dated June 4, 2010 and recorded in Deed Book 3792, Page 320. (JX: 440)
Dippolito Property Lot 1-B Section A
James E. Swann, Jr. and Gladys A. Swann to Donald E. Custer and Kathleen A. Custer dated April 30, 1969 and recorded in Deed Book 643, Page 42. (JX: 420)
Donald E. Custer and Kathleen A. Custer to Robert E. Zimmer and Susan J. Zimmer dated June 30, 1978 and recorded in Deed Book 902, Page 167. (JX: 418)
Robert E. Zimmer and Susan J. Zimmer to Charle H. Murtaugh and Venetia M. Murtaugh dated May 25, 1979 and recorded in Deed Book 952, Page 122. (JX: 416)
Charles H. Murtaugh to Keith W. Blackmer and Shanna L. Blackmer dated October 10, 2015 and recorded in Deed Book 4459, Page 26. (JX: 413)
Keith W. Blackmer and Shanna L. Blackmer to Michael Dippolito dated April 12, 2019 and recorded in Deed Book 5047, Page 329. (JX: 411)

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Case No. 2021-0614-SG

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SWANN KEYS CIVIC ASSOCIATION,	:	
	:	C.A. No.: 2021-0614-SG
Petitioner,	:	
v.	:	
MICHAEL DIPPOLITO, JOSEPH W. MANNING, SHARON MANNING, THERESA A. CORRICK, ROBERT C. DUFFY III, and JESSICA L. DUFFY,	:	
Respondents.	:	

CERTIFICATE OF SERVICE

I, David C. Hutt, Esq., hereby certify that a copy of the foregoing Petitioner Swann Keys Civic Association's Post-Trial Opening Brief was served via *File & ServeXpress* upon the following:

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Dated: March 7, 2022