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New Jersey Court of Errors and Appeals

IN CHANCERY OF NEW JERSEY

| | | |
|---|--|----|
| Between ALBERT G. HULETT, THOMAS POT- TER, ANNE M. GILLAN, MARIE E. PRUYN and JOSEPH MANN, Complainants, and THE BOROUGH OF SEA GIRT, a Municipal Corporation, Defendant. | 76-245 On Bill for Injunction Notice of Ap- peal | 10 |
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NOTICE OF APPEAL.

The complainants, Albert G. Hulett, Thomas Potter, Anne M. Gillan, Marie E. Pruyn and Joseph Mann, hereby appeal from the final decree made in the above entitled cause on May 8, 1930, by the Chancellor upon the advice of Vice Chancellor Maja Leon Berry to the Court of Errors and Appeals in the last resort in all causes.

Dated, May 12, 1930.

QUINN, PARSONS & DOREMUS,
Solicitors for and of counsel
with complainants, Albert G.
Hulett, Thomas Potter, Anne
M. Gillan, Marie E. Pruyn
and Joseph Mann.

We conceive there is good cause for appeal in the above entitled cause.

QUINN, PARSONS & DOREMUS,
Of Counsel with Complainants.

PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND
APPEALS

| | | |
|----|--|--|
| 10 | ALBERT G. HULETT, THOMAS POT- TER, ANNE M. GILLAN, MARIE E. PRUYN and JOSEPH MANN, Complainants-Appellants, vs. THE BOROUGH OF SEA GIRT, a Municipal Corporation, Defendant-Appellee. | On Appeal from the Court of Chancery |
|----|--|--|

20 *To the Honorable Court of Errors and Appeals in
the Last Resort in All Causes:*

The petition of Albert G. Hulett, Thomas Potter, Anne M. Gillan, Marie E. Pruyn and Joseph Mann, the Appellants in the above entitled cause, respectfully shows that—

1. Petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the
 30 State of New Jersey, bearing date May 8, 1930, in a certain cause in said Court of Chancery wherein Albert G. Hulett, Thomas Potter, Anne M. Gillan, Marie E. Pruyn and Joseph Mann were complainants and the said Borough of Sea Girt was defendant, in this respect, to wit: the said decree adjudges that the bill of complaint be dismissed and that temporary restraint heretofore made be dissolved and vacated, which said
 40 decree under the facts and the law applying thereto is erroneous.

Petition of Appeal

2. And petitioners appeal from the decree of the Chancellor upon the ground that the dismissal of the bill of complaint is erroneous and that the dissolution of the temporary restraint was erroneous, and further was erroneous because a permanent injunction was not granted in accordance with the facts and the law applicable thereto, and further that said dismissal was erroneous in that it failed to grant the relief prayed for in complainants' bill of complaint; and further was erroneous because under the facts and law said ordinance in question violated the restrictive covenants of complainants' deeds; and further that said injunction should have been granted because said ordinance and the work to be done thereunder prevents free access to and over the public highway in front of complainants' premises; and further because said injunction should have been granted because said ordinance and the work to be done thereunder obstructs the light, air and view to and from said public highway; and further because said ordinance authorizes a needless, improper and wanton expenditure of money; and further because the rights of complainant adjoining landowner have been violated.

Petitioners therefore pray that said decree of the Chancellor may be wholly reversed, set aside and for nothing holden, and that petitioners may have such other relief in the premises as to this Court shall seem proper.

QUINN, PARSONS & DOREMUS,
Solicitors for and of Counsel with
Appellants.

BILL OF COMPLAINT.

(Filed Nov. 12, 1929)

IN CHANCERY OF NEW JERSEY

10 *To the Honorable Edwin Robert Walker, Chan-*
cellor of the State of New Jersey:

Complainant, Albert G. Hulett, residing in the
Borough of East Orange, in the County of Essex
and State of New Jersey, complainant, Thomas
Potter, residing in the City of Newark, in the
County of Essex and State of New Jersey,
complainant, Anne M. Gillan, residing in the Bor-
ough of Summit, in the County of Union and
20 State of New Jersey, and complainants Marie E.
Pruyn, and Joseph Mann, having summer resi-
dences in the Borough of Sea Girt, in the County
of Monmouth and State of New Jersey, respect-
fully shows:

1. The said Thomas Potter is the owner of Lot
No. 12, Block #7, on Map of Property, Ocean
Avenue, Sea Girt, New Jersey; that Albert G.
Hulett is the owner of Lot No. 11, Block #7, on
30 Map of Property of Ocean Avenue, Sea Girt, New
Jersey; that Anne M. Gillan is the owner of Lots
Nos. 17, 18 and 19 in Block #7 on Map of Sea Girt
made by Charles F. Ingram and revised by Fred-
erick J. Anspach in 1887 and filed in the Mon-
mouth County Clerk's Office at Freehold; that the
other complainants are all respectively owners of
lots in Block No. 7 as shown on Map of Sea Girt,
New Jersey, and all of said lots adjoin and front
40 on Ocean Avenue, Sea Girt, Monmouth County,
New Jersey.

Bill of Complaint

2. That the lands in question, together with other lands comprising a large tract, were originally owned by the Sea Girt Land Improvement Company, a corporation of New Jersey, and on or about April 15, 1885 said company began the sale of said tract of land in separate parcels. 10

3. By deed dated April 15, 1885, acknowledged as of the same date and recorded April 21, 1885, in Book 393 of Deeds for Monmouth County, Page 33, Lots Nos. 17, 18 and 19 and 64 feet of Lot No. 16 in Block No. 7 were conveyed by the Sea Girt Land Improvement Company to one Charles B. Wright and thereafter were deeded through various conveyances finally to the complainant, Anne M. Gillan by deed dated April 11, 1927 and recorded in Book 1396 of Deeds for Monmouth County, Page 380. 20

4. In the above mentioned deed from the Sea Girt Land Improvement Company to Charles B. Wright, the following restriction was therein contained:

“And the said party of the first part do hereby covenant, promise and agree to and with the said party of the second part, his heirs and assigns, that they the said party of the first part, their successors and assign, will not erect any structure in front of the premises hereby granted and conveyed, between the same and the Ocean or therein, or use the said front of the premises otherwise than as a public Avenue and promenade.” 30

40

Bill of Complaint

Said restriction was contained and continued in every deed thereafter down to and including the deed of the complainant Anne M. Gillan, and the following reference to said restriction was made in the deed to said Anne M. Gillan, as follows:

10

“Subject to the covenants, conditions and restrictions contained in former deeds affecting the above described premises.”

20

5. In all of the deeds of all of the complainants herein mentioned the same restriction was contained and each deed in the chain of title to the respective premises in Block No. 7 belonging to complainants was made subject to the above mentioned restriction.

30

6. Before the passage of said ordinance, the Borough of Sea Girt had knowledge of said restriction; that Ocean Avenue was first laid out by the Sea Girt Land Improvement Company under and by virtue of a map entitled, “Map of Sea Girt, by Charles F. Ingham, Engineer”, in 1876, which said property was later revised by the said company under and by virtue of a map entitled “Map of Sea Girt by Charles F. Ingham, Engineer, revised by Frederick J. Anspach, Engineer”, in 1877, both of which maps included Ocean Avenue and were duly filed in the Monmouth County Clerk’s Office.

40

7. That the only title that the Borough of Sea Girt acquired to Ocean Avenue was through dedication by inference under and by virtue of the filing of the above entitled maps and the mapping and plotting of the lands referred to therein.

Bill of Complaint

8. That the Borough of Sea Girt on or about September 16, 1929 passed on final reading an Ordinance wherein it was provided that a boardwalk should be erected on the easterly 25 feet of said Ocean Avenue, as above referred to on said maps, and are about to advertise for bids for the building and erecting of said boardwalk. A copy of said Ordinance is attached hereto and marked "Schedule A". 10

9. That a referendum at the general election was held on November 5, 1929 in the Borough of Sea Girt, and the electorate voted in favor of the erection of said boardwalk.

10. Complainants charge that the Borough of Sea Girt is without legal authority to use Ocean Avenue in any way or manner excepting as provided in the deeds for properties adjoining and abutting said Ocean Avenue, and that the Borough of Sea Girt is without legal authority to sub-divide said Ocean Avenue and use any part thereof for the erection of any said structure; that notice has been served before the passage of said above mentioned Ordinance, by the complainants that they would avail themselves of their legal right to prohibit the erection of any structure in front of their respective properties on Ocean Avenue. 20 30

11. Complainants further charge that the proposed action of the Borough of Sea Girt is contrary to and in direct violation of the restriction in favor of complainants, reserving to them the right to prohibit and prevent any structure 40

Bill of Complaint

from being erected in front of their said premises.

10 12. Complainants further say that the erection of the proposed boardwalk and its approaches violates the restriction contained in their deeds and the deeds of their predecessors in title; and infringes upon their easement and private rights; that said road by such erection would be used for purposes other than originally intended; that it prevents free access to and over said public highway; that it obstructs their light, air and view over said public highway; that it depreciates the value of their premises and that the erection of
20 said boardwalk and approaches is illegal and generally violates the right of complainants.

Complainants are without adequate remedy in the Courts of Law, and therefore pray—

1. That the Borough of Sea Girt may be enjoined and restrained from erecting the boardwalk with steps and approaches thereto, as described in the above mentioned Ordinance, or taking further action relating thereto.

30 2. That the Borough of Sea Girt may be enjoined and restrained from the erection of any structure in front of the premises of complainants between the same and the ocean or therein, and that the said Borough be restrained from using said Ocean Avenue in front of the premises of the complainants otherwise than as a public avenue and promenade.

40 3. That a writ of subpoena may issue commanding said defendant to answer this bill of complaint

Bill of Complaint—Schedule A

and to abide by such decree as this Court may make in the premises, and that they may have such other and further relief as may be just and equitable.

QUINN, PARSONS & DOREMUS,
Solicitors of Complainants. 10

SCHEDULE A.

ORDINANCE

AN ORDINANCE PROVIDING FOR THE ERECTION AND CONSTRUCTION OF A BOARDWALK WITH STEPS AND APPROACHES THERETO ON THE EASTERLY SIDE OF OCEAN AVENUE IN THE BOROUGH OF SEA GIRT, FROM A POINT ONE HUNDRED FORTY TWO FEET NORTH OF THE NORTH LINE OF BEACON BOULEVARD TO THE SOUTH LINE OF TRENTON BOULEVARD; MAKING AN APPROPRIATION THEREFOR AND AUTHORIZING THE ISSUANCE AND SALE OF TEMPORARY IMPROVEMENT NOTES OF THE BOROUGH OF SEA GIRT TO PAY FOR THE SAME. 20

Whereas the Council of the Borough of Sea Girt deem it necessary and advisable for the public good to erect and construct a boardwalk with steps and approaches thereto on the easterly side of Ocean Avenue in the Borough of Sea Girt, from a point one hundred forty-two feet north of the north line of Beacon Boulevard to the south line of Trenton Boulevard. 30

Therefore, be it ordained by the Council of the Borough of Sea Girt: 40

Bill of Complaint—Schedule A

1. That Ocean Avenue, as laid out one hundred feet in width easterly from the east property lines of Blocks one to seven inclusive on the official maps of the Borough of Sea Girt, be, and the said one hundred feet width is hereby subdivided, the most eastwardly twenty-five feet width thereof being hereby apportioned for use for sidewalk, boardwalk and footway purposes from a point one hundred forty-two feet north of the north line of Beacon Boulevard to the south line of Trenton Boulevard.

2. That a boardwalk with steps and approaches thereto be erected and constructed in the Borough of Sea Girt, on the easterly side of Ocean Avenue on the easterly twenty-five foot width apportioned for sidewalk, boardwalk and footway purposes in Section 1 of this ordinance from a point one hundred forty-two feet north of the north line of Beacon Boulevard to the south line of Trenton Boulevard, all in accordance with the plans and specifications prepared by Sincerbeaux, Moore & Shinn, Consulting Engineers, which plans and specifications have been approved by the Council of the Borough of Sea Girt and are on file in the office of the Borough Clerk.

3. The estimated cost of the improvement provided for in Section 2 of this ordinance is the sum of Forty Thousand Dollars and the sum of Forty Thousand Dollars is hereby appropriated by the Borough of Sea Girt to defray the cost and expense thereof.

4. For the purpose of temporarily financing said improvement, temporary improvement notes in a

Bill of Complaint—Schedule A

sum not exceeding Forty Thousand Dollars are hereby authorized to be issued, bearing a rate of interest not exceeding six per cent per annum, the other matters in respect thereto to be determined by subsequent resolution of this Council.

5. This ordinance shall take effect when passed and published according to law. 10

NOTICE

The foregoing ordinance was introduced and passed on first reading at a regular meeting of the Borough Council held in the Council Chambers of the Borough Hall on Monday Evening, September 2nd, 1929. It will be taken up for final consideration at a meeting of the Borough Council to be held in the Council Chambers of the Borough Hall at eight o'clock, on Monday evening, September 16th, 1929, when and where objections to said ordinance, if any, will be heard. 20

C. A. BOND, Jr., Borough Clerk.

State of New Jersey, }
County of Essex. } ss:

30

Albert G. Hulett, Thomas Potter and Joseph Mann, three of the complainants in this suit, being duly sworn according to law, upon their oaths depose and say that—

1. Complainant, Albert G. Hulett resides in the Borough of East Orange, in the County of Essex and State of New Jersey, complainant, Thomas Potter, resides in the City of Newark, County and State aforesaid, and complainant, Joseph Mann, 40

Bill of Complaint—Schedule A

resides in the City of Montclair, County and State aforesaid.

2. Complainant Thomas Potter is the owner of Lot No. 12, Block No. 7, on Map of Property, Ocean Avenue, Sea Girt, New Jersey; that Albert G. Hulett is the owner of Lot No. 11, Block No. 7, on Map of Property of Ocean Avenue, Sea Girt, New Jersey; that Anne M. Gillan is the owner of Lots Nos. 17, 18 and 19 in Block #7 on Map of Sea Girt made by Charles F. Ingram and revised by Frederick J. Anspach in 1887 and filed in the Monmouth County Clerk's Office at Freehold; that the other complainants are all respectively owners of lots in Block No. 7 as shown on Map of Sea Girt, New Jersey, and all of said lots adjoin and front on Ocean Avenue, Sea Girt, Monmouth County, New Jersey.

3. That the lands in question, together with other lands comprising a large tract, were originally owned by the Sea Girt Land Improvement Company, a corporation of New Jersey, and on or about April 15, 1885 said company began the sale of said tract of land in separate parcels.

4. By deed dated April 15, 1885, acknowledged as of the same date and recorded April 21, 1885, in Book 393 of Deeds for Monmouth County, Page 33, Lots Nos. 17, 18 and 19 and 64 feet of Lot No. 16 in Block No. 7 were conveyed by the Sea Girt Land Improvement Company to one Charles B. Wright and thereafter were deeded through various conveyances finally to the complainant, Anne M. Gillan by deed dated April 11, 1927 and recorded in Book 1396 of Deeds for Monmouth County, Page 380.

Bill of Complaint—Schedule A

5. In the above mentioned deed from the Sea Girt Land Improvement Company to Charles B. Wright, the following restriction was therein contained:

“And the said party of the first part do hereby covenant, promise and agree to and with the said party of the second part, his heirs and assigns, that they the said party of the first part, their successors and assigns, will not erect any structure in front of the premises hereby granted and conveyed, between the same and the Ocean or therein, or use the said front of the premises otherwise than as a public Avenue and promenade.”

Said restriction was contained and continued in every deed thereafter down to and including the deed of the complainant Anne M. Gillan, and the following reference to said restriction was made in the deed to said Anne M. Gillan, as follows:

“Subject to the covenants, conditions and restrictions contained in former deeds affecting the above described premises.”

6. In all of the deeds of all of the complainants herein mentioned the same restriction was contained and each deed in the chain of title to the respective premises in Block No. 7 belonging to complainants was made subject to the above mentioned restriction.

7. Before the passage of said ordinance, the Borough of Sea Girt had knowledge of said restriction; that Ocean Avenue was first laid out

Bill of Complaint—Schedule A

by the Sea Girt Land Improvement Company under and by virtue of a map entitled, "Map of Sea Girt, by Charles F. Ingham, Engineer", in 1876, which said property was later revised by the said company under and by virtue of a map
10 entitled "Map of Sea Girt by Charles F. Ingham, Engineer, revised by Frederick J. Anspach, Engineer", in 1877, both of which maps included Ocean Avenue and were duly filed in the Monmouth County Clerk's Office.

8. That the only title that the Borough of Sea Girt acquired to Ocean Avenue was through dedication by inference under and by virtue of the
20 filing of the above entitled maps and the mapping and plotting of the lands referred to therein.

9. That the Borough of Sea Girt on or about September 16, 1929 passed on final reading an Ordinance wherein it was provided that a boardwalk should be erected on the easterly 25 feet of said Ocean Avenue, as above referred to on said maps, and are about to advertise for bids for the building and erecting of said boardwalk. A copy
30 of said Ordinance is annexed to the complaint and marked "Schedule A".

10. That a referendum at the general election was held on November 5, 1929 in the Borough of Sea Girt, and the electorate voted in favor of the erection of said boardwalk.

11. Complainants charge that the Borough of Sea Girt is without legal authority to use Ocean Avenue in any way or manner excepting as
40 provided in the deeds for properties adjoining and abutting said Ocean Avenue, and that the

Bill of Complaint—Schedule A

Borough of Sea Girt is without legal authority to sub-divide said Ocean Avenue and use any part thereof for the erection of any said structure; that notice has been served before the passage of said above mentioned Ordinance, by the complainants that they would avail themselves of their legal right to prohibit the erection of any structure in front of their respective properties on Ocean Avenue. 10

12. Complainants further charge that the proposed action of the Borough of Sea Girt is contrary to and in direct violation of the restriction in favor of complainants, reserving to them the right to prohibit and prevent any structure from being erected in front of their said premises. 20

THOMAS POTTER,
ALBERT G. HULETT,
JOSEPH F. MANN.

Sworn and subscribed to
before me this 9 day
of November, 1929.
(Seal) Fred W. Collier.

Sworn & subscribed to by Jos. 30
F. Mann before me this 11th
day of Nov. 1929.
Howard C. Gilman,
a Master in Chancery
of N. J.

Sworn & subscribed to by
Albert G. Hulett before me
this 11th day of Nov. 1929. 40
Wm. C. Goss, Jr.,
(Seal) Notary Public.

Bill of Complaint—Schedule A

State of New Jersey, }
 County of Union. }^{ss:}

Anne M. Gillan, one of the complainants in this
 suit, being duly sworn according to law, upon her
 10 oath deposes and says that—

1. She resides in the Borough of Summit, in the
 County of Union and State of New Jersey.

2. Complainant Thomas Potter is the owner of
 Lot No. 12, Block No. 7, on Map of Property,
 Ocean Avenue, Sea Girt, New Jersey; that Albert
 G. Hulett is the owner of Lot No. 11, Block No.
 7, on map of property of Ocean Avenue, Sea Girt,
 20 New Jersey; that Anne M. Gillan is the owner of
 Lots Nos. 17, 18 and 19 in Block #7 on Map of
 Sea Girt made by Charles F. Ingram and revised
 by Frederick J. Anspach in 1887 and filed in the
 Monmouth County Clerk's Office at Freehold; that
 the other complainants are all respectively own-
 ers of lots in Block No. 7 as shown on Map of Sea
 Girt, New Jersey, and all of said lots adjoin and
 front on Ocean Avenue, Sea Girt, Monmouth
 County, New Jersey.

30 3. That the lands in question, together with
 other lands comprising a large tract, were orig-
 inally owned by the Sea Girt Land Improvement
 Company, a corporation of New Jersey, and on
 or about April 15, 1885 said company began the
 sale of said tract of land in separate parcels.

4. By deed dated April 15, 1885, acknowledged
 as of the same date and recorded April 21, 1885,
 40 in Book 393 of Deeds for Monmouth County, Page
 33, Lots Nos. 17, 18 and 19 and 64 feet of Lot No.

Bill of Complaint—Schedule A

16 in Block No. 7 were conveyed by the Sea Girt Land Improvement Company to one Charles B. Wright and thereafter were deeded through various conveyances finally to the complainant, Anne M. Gillan by deed dated April 11, 1927 and recorded in Book 1396 of Deeds for Monmouth County, Page 380. 10

5. In the above mentioned deed from the Sea Girt Land Improvement Company to Charles B. Wright, the following restriction was therein contained:

“And the said party of the first part do hereby covenant, promise and agree to and with the said party of the second part, his heirs and assigns, that they the said party of the first part, their successors and assigns, will not erect any structure in front of the premises hereby granted and conveyed, between the same and the Ocean, or therein, or use the said front of the premises otherwise than as a public Avenue and promenade.” 20

Said restriction was contained and continued in every deed thereafter down to and including the deed of the complainant Anne M. Gillan, and the following reference to said restriction was made in the deed to said Anne M. Gillan, as follows: 30

“Subject to the covenants, conditions and restrictions contained in former deeds affecting the above described premises.”

6. In all of the deeds of all of the complainants herein mentioned the same restriction was 40

Bill of Complaint—Schedule A

contained and each deed in the chain of title to the respective premises in Block No. 7 belonging to complainants was made subject to the above mentioned restriction.

- 10 7. Before the passage of said ordinance, the Borough of Sea Girt had knowledge of said restriction; that Ocean Avenue was first laid out by the Sea Girt Land Improvement Company under and by virtue of a map entitled, "Map of Sea Girt, by Charles F. Ingham, Engineer", in 1876, which said property was later revised by the said company under and by virtue of a map
20 entitled "Map of Sea Girt by Charles F. Ingham, Engineer", revised by Frederick J. Anspach, Engineer", in 1877, both of which maps included Ocean Avenue and were duly filed in the Monmouth County Clerk's Office.

8. That the only title that the Borough of Sea Girt acquired to Ocean Avenue was through dedication by inference under and by virtue of the filing of the above entitled maps and the mapping and plotting of the lands referred to therein.

- 30 9. That the Borough of Sea Girt on or about September 16, 1929 passed on final reading an Ordinance wherein it was provided that a boardwalk should be erected on the easterly 25 feet of said Ocean Avenue, as above referred to on said maps, and are about to advertise for bids for the building and erecting of said boardwalk. A copy of said Ordinance is annexed to the complaint and marked "Schedule A".

Bill of Complaint—Schedule A

10. That a referendum at the general election was held on November 5, 1929 in the Borough of Sea Girt, and the electorate voted in favor of the erection of said boardwalk.

11. Complainants charge that the Borough of Sea Girt is without legal authority to use Ocean Avenue in any way or manner excepting as provided in the deeds for properties adjoining and abutting said Ocean Avenue, and that the Borough of Sea Girt is without legal authority to sub-divide said Ocean Avenue and use any part thereof for the erection of any said structure; that notice has been served before the passage of said above mentioned Ordinance, by the complainants that they would avail themselves of their legal right to prohibit the erection of any structure in front of their respective properties on Ocean Avenue. 10
20

12. Complainants further charge that the proposed action of the Borough of Sea Girt is contrary to and in direct violation of the restriction in favor of complainants, reserving to them the right to prohibit and prevent any structure from being erected in front of their said premises. 30

ANNA MAUDE GILLAN.

Sworn and subscribed to
before me this 12th
day of November, 1929.

Fred L. Salmon,
of N. J.

Bill of Complaint—Schedule A

State of New York, }
 County of New York. } ss:

Joseph Mann, one of the complainants in this
 suit, being duly sworn according to law, upon his
 10 oath deposes and says that—

1. He resides in the City of New York, in the
 County of New York and State of New York.

2. Complainant Thomas Potter is the owner of
 Lot No. 12, Block No. 7, on Map of Property,
 Ocean Avenue, Sea Girt, New Jersey; that Albert
 G. Hulett is the owner of Lot No. 11, Block No. 7,
 on Map of Property of Ocean Avenue, Sea Girt,
 20 New Jersey; that Anne M. Gillan is the owner of
 Lots Nos. 17, 18 and 19 in Block #7 on Map of
 Sea Girt made by Charles F. Ingram and revised
 by Frederick J. Anspach in 1887 and filed in the
 Monmouth County Clerk's Office at Freehold;
 that the other complainants are all respectively
 owners of lots in Block No. 7 as shown on Map of
 Sea Girt, New Jersey, and all of said lots adjoin
 and front on Ocean Avenue, Sea Girt, Monmouth
 County, New Jersey.

30 3. That the lands in question, together with
 other lands comprising a large tract, were orig-
 inally owned by the Sea Girt Land Improvement
 Company, a corporation of New Jersey, and on
 or about April 15, 1885 said company began the
 sale of said tract of land in separate parcels.

4. By deed dated April 15, 1885, acknowledged
 as of the same date and recorded April 21, 1885,
 40 in Book 393 of Deeds for Monmouth County,
 Page 33, Lots Nos. 17, 18 and 19 and 64 feet of

Bill of Complaint—Schedule A

Lot No. 16 in Block No. 7 were conveyed by the Sea Girt Land Improvement Company to one Charles B. Wright and thereafter were deeded through various conveyances finally to the complainant, Anne M. Gillan by deed dated April 11, 1927, and recorded in Book 1396 of Deeds for Monmouth County, Page 380. 10

5. In the above mentioned deed from the Sea Girt Land Improvement Company to Charles B. Wright, the following restriction was therein contained:

“And the said party of the first part do hereby covenant, promise and agree to and with the said party of the second part, his heirs and assigns, that they the said party of the first part, their successors and assigns, will not erect any structure in front of the premises hereby granted and conveyed, between the same and the Ocean or therein, or use the said front of the premises otherwise than as a public Avenue and promenade.” 20

Said restriction was contained and continued in every deed thereafter down to and including the deed of the complainant Anne M. Gillan, and the following reference to said restriction was made in the deed to said Anne M. Gillan, as follows: 30

“Subject to the covenants, conditions and restrictions contained in former deeds affecting the above described premises.”

6. In all of the deeds of all of the complainants herein mentioned the same restriction was 40

Bill of Complaint—Schedule A

contained and each deed in the chain of title to the respective premises in Block No. 7 belonging to complainants was made subject to the above mentioned restriction.

- 10 7. Before the passage of said ordinance, the Borough of Sea Girt had knowledge of said restriction; that Ocean Avenue was first laid out by the Sea Girt Land Improvement Company under and by virtue of a map entitled, "Map of Sea Girt, by Charles F. Ingham, Engineer", in 1876, which said property was later revised by the said company under and by virtue of a map
20 Engineer, revised by Frederick J. Anspach, Engineer", in 1877, both of which maps included Ocean Avenue and were duly filed in the Monmouth County Clerk's Office.

8. That the only title that the Borough of Sea Girt acquired to Ocean Avenue was through dedication by inference under and by virtue of the filing of the above entitled maps and the mapping and plotting of the lands referred to therein.

- 30 9. That the Borough of Sea Girt on or about September 16, 1929 passed on final reading an Ordinance wherein it was provided that a boardwalk should be erected on the easterly 25 feet of said Ocean Avenue, as above referred to on said maps, and are about to advertise for bids for the building and erecting of said boardwalk. A copy of said Ordinance is annexed to the complaint and marked "Schedule A".

Bill of Complaint—Schedule A

10. That a referendum at the general election was held on November 5, 1929, in the Borough of Sea Girt, and the electorate voted in favor of the erection of said boardwalk.

11. Complainants charge that the Borough of Sea Girt is without legal authority to use Ocean Avenue in any way or manner excepting as provided in the deeds for properties adjoining and abutting said Ocean Avenue, and that the Borough of Sea Girt is without legal authority to sub-divide said Ocean Avenue and use any part thereof for the erection of any said structure; that notice has been served before the passage of said above mentioned Ordinance, by the complainants that they would avail themselves of their legal right to prohibit the erection of any structure in front of their respective properties on Ocean Avenue. 10 20

12. Complainants further charge that the proposed action of the Borough of Sea Girt is contrary to and in direct violation of the restriction in favor of complainants, reserving to them the right to prohibit and prevent any structure from being erected in front of their said premises. 30

JOS. F. MANN.

Sworn and subscribed to
before me this 11th
day of November, 1929.
Howard C. Gilman,
A Master in
Chancery of N. J.

ANSWER.

IN CHANCERY OF NEW JERSEY

| | | | |
|----|---|---|---------------|
| 10 | Between ALBERT G. HULETT, THOMAS POT- TER, ANNE M. GILLAN, MARIE E. PRUYN and JOSEPH MANN, Complainants, and THE BOROUGH OF SEA GIRT, a Municipal Corporation, Defendant. | } | On Bill, etc. |
| 20 | | | |

The answer of the defendant, The Borough of Sea Girt, a Municipal Corporation of the State of New Jersey, to the bill of complaint in the above entitled cause, says:

1. Defendant has no information sufficient to form a belief as to the ownership of the lots of the complainants in Block 7 at Sea Girt, and therefore neither admits nor denies the same, but
 30 this defendant says that the map of Sea Girt made by Charles F. Ingham and revised by Frederick J. Anspach, showing the various lots in Block 7 on said map, was not made in the year 1887 as stated in paragraph 1, but that the Ingham map was made in the year 1875 and the Anspach revision in the year 1877.

2. Defendant admits the statement in para-
 40 graph 2 of the complaint to the effect that the lands in question, with other lands comprising a

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large tract, were originally owned by the Sea Girt Land Improvement Company, a corporation of New Jersey, but it denies the statement in said paragraph that on or about the 15th day of April, 1885, said company began the sale of said tract of land in separate parcels, and this defendant says that the Sea Girt Land Improvement Company mapped, plotted and laid out said tract of land in lots, streets and parks, and began the sale of lots on said tract long prior to the year 1885, to wit in the year 1875. 10

3. Defendant has no information sufficient to form a belief as to the allegation contained in paragraph 3 of the complaint and leaves complainants to their proofs, and says that the conveyance or conveyances referred to in said paragraph were subsequent and subject to the ownership of the defendant in the streets, avenues, parks and public places shown on said maps. 20

4. Defendant admits the restriction referred to in paragraph 4 as contained in the deed of April 15th, 1885, from the Sea Girt Land Improvement Company to Charles B. Wright, but has no information sufficient to form a belief as to the remaining statements in said paragraph. 30

5. Paragraph 5 is denied.

6. Paragraph 6 is denied.

7. Paragraph 7 is denied, and defendant says that there was a complete dedication of said Ocean Avenue effected by the making, filing and selling lots therefrom, by both the Ingham map of 1875 and the Anspach map of 1877, which dedication 40

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was ratified and confirmed by an agreement entered into between the Sea Girt Land Improvement Company and the owners of lots sold on said maps, and dated February 21st, 1878.

10 8. Paragraph 8 is admitted, and this defendant says that the ordinance referred to in paragraph 8 was, by proceedings instituted by complainants, referred to the voters of the Borough of Sea Girt on referendum, which said ordinance was duly approved by the voters of the Borough of Sea Girt at the general election held in said Borough on the 5th day of November, 1929.

9. Paragraph 9 is admitted.

20 10. Paragraph 10 is denied.

11. Paragraph 11 is denied.

This defendant, FURTHER ANSWERING THE BILL OF COMPLAINT, says that in the year 1875 the Sea Girt Land Improvement Company acquired by purchase certain tracts of land, which lands were at the time situated in the Township of Wall, Monmouth County, New Jersey, and extended
30 along the Atlantic Ocean between Newberry Pond or Stockton Lake on the south and Wreck Pond on the north; that shortly after acquiring said tracts of land said company caused the same to be laid out into lots by virtue of a map entitled "Map of Sea Girt by Charles F. Ingham, Engineer", dated 1875, which said map was later revised by said company under and by virtue of a map entitled "Map of Sea Girt by Charles F. Ingham,
40 Engineer, revised by Frederick J. Anspach, Engineer," dated 1877, both of which said maps

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included Ocean Avenue, sometimes called Atlantic Avenue, and were duly filed in the Monmouth County Clerk's Office. The Ingham map was filed on December 22nd, 1875, and the Anspach map on September 12th, 1878; that prior to the filing of the Anspach map the Sea Girt Land Improvement Company had conveyed a number of lots in Sea Girt by reference to the Ingham map of 1875, and on or about February 21st, 1878, all of the purchasers of lots in Sea Girt, in accordance and by reference to the Ingham map, entered into a written agreement with the Sea Girt Land Improvement Company, wherein and whereby the Sea Girt Land Improvement Company adopted and dedicated forever, without restriction, for public use, the streets as shown on the Anspach map including Ocean or Atlantic Avenue. In and by said agreement, all lot owners of the Borough of Sea Girt at the time of said agreement covenanted and agreed to and with the Sea Girt Land Improvement Company to release any and all right they or either of them might have or might claim to have in or to the streets, avenues or squares as shown on said map, which said agreement, with the Anspach map attached thereto, was recorded in the Monmouth County Clerk's Office on September 12th, 1878, in Book 306 of Deeds, at pages 185 &c.

Prior to the incorporation of the Borough of Sea Girt, in 1917, the streets as shown on the Ingham and Anspach maps were public streets of the Township of Wall, and upon the incorporation of the Borough of Sea Girt became public streets of the Borough of Sea Girt and the Bor-

Answer

ough of Sea Girt has ever since its incorporation taken care of and used all of said streets as public municipal streets. Ocean Avenue, then called Atlantic Avenue, was dedicated to public use long prior to the original deeds made by the Sea
10 Girt Land Improvement Company under which complainants claim title, and any covenants or restrictions contained in the original deeds for complainants' properties did not affect the prior rights of the public then being administered by the defendant and by Wall Township before the defendant Borough was incorporated, under the complete, full and express dedication by the Sea Girt Land Improvement Company and all owners
20 and persons to whom said company had sold lots at that time. The restrictions in complainants' deeds, whatever their effect may be with the Sea Girt Land Improvement Company imposing same, did not affect, abridge, curtail or limit the rights of the public previously acquired under the Ingham and Anspach maps, and by the express agreement of dedication entered into between the Land Company and the then grantees of lots from said Land Company.

30 FURTHER ANSWERING the bill of complaint, this defendant says that it has, as a duly incorporated municipality of this state, the right to use said Ocean Avenue as a public street and avenue of the Borough of Sea Girt, and which said right is not limited or qualified in any manner by the provisions contained in the deeds under which complainants claim title, which deeds were made,
40 executed and accepted many years subsequent to the dedication of said streets to the public, and

Answer

any rights of the complainants under said deeds and the covenants and restrictions therein contained were made subsequent and subject to the rights of this defendant in the streets and public places of the Borough of Sea Girt; that this defendant has the legal right and authority to designate the proper use of said Ocean Avenue, so dedicated as aforesaid, and to determine, on behalf of the public, what portions of said street or avenue shall be used for street purposes, and for footwalk or boardwalk purposes as are most needful and best adapted for the public use. 10

This defendant further says that its proposed action to improve said Ocean Avenue is not limited in any way by any private rights of the complainants, and that the proposed improvements are not in any way limited by the restrictions contained in the deeds referred to in the complainants' bill, and further that if such restrictions had not been imposed subsequent and subject to the prior dedication and rights of the public to said Ocean Avenue, that such restrictions will not be violated by the completion of the improvements provided for in the ordinance referred to in the complainants' bill. That although there is no uniformity in the alleged restrictions contained in complainants' deeds and no neighborhood scheme is established, yet this defendant states that the improvement of Ocean Avenue, as proposed, does not in any manner affect the rights of the complainants, even though such rights were prior to the right of the defendant under such dedication; that the restriction set out in complainants' bill is one whereby the 20 30 40

Answer

Sea Girt Land Improvement Company covenanted that it would not erect any structure in front of the premises conveyed or use said front of the premises otherwise than as a public avenue and promenade. The ordinance providing
10 for the proposed improvement provides only for the use of Ocean Avenue as a public avenue and promenade.

Defendant further says that the complainants and their predecessors in title have, during the ownership of their respective properties, used said Ocean Avenue as a public street and highway, used the sidewalks erected on the east and west sides thereof, and have themselves erected
20 structures, fences, summer houses or other buildings in portions of said Ocean Avenue and upon the premises on the beachfront in front of complainants' properties.

This defendant denies the right of the complainants to the relief sought in their said bill and denies all equity in said bill, and prays that it may be hence dismissed with its reasonable costs.

30

DURAND, IVINS & CARTON,
Solicitors of Defendant.

JAMES D. CARTON,
Of Counsel.

40

REPLICATION.

IN CHANCERY OF NEW JERSEY

Between

ALBERT C. HULETT, THOMAS
POTTER, ANNE M. GILLAN,
MARIE E. PRUYN and JOSEPH
MANN,

Complainants,

and

THE BOROUGH OF SEA GIRT, a
Municipal Corporation,

Defendant.

10

On Bill, &c.

20

The Complainants, by way of replication to the answer filed herein, says they deny the new matters raised therein, and join issue thereon.

QUINN, PARSONS & DOREMUS,
Solicitors of Complainants.

CONCLUSIONS.

IN CHANCERY OF NEW JERSEY

| | | |
|----|---|---|
| 10 | Between ALBERT G. HULETT, <i>et als.</i> , Complainants, and THE BOROUGH OF SEA GIRT, a Municipal Corporation, Defendant. | } On Bill for Injunction. On Final Hearing. |
|----|---|---|

SYLLABUS

- 20 Quinn, Parsons & Doremus, for Complainants.
 Durand, Ivins & Carton, for Defendants.

1. Where a tract of land is laid out in blocks and lots according to a map which is filed in the appropriate office the streets shown on that map become immediately dedicated to the public.

- 30 2. While the exercise of the public rights resulting from such dedication may be suspended and lie dormant until acted upon by the municipal authority, the landowner cannot recall that dedication, either in whole or in part, except by consent of the municipality acting in behalf of the public.

- 40 3. Where, subsequent to such dedication, the owner inserts a restrictive covenant in deeds for lots abutting on streets shown on such maps, and provides that the covenants shall be binding upon the grantor, "its successors and assigns," the municipality is neither a successor nor an assign

Replication

within the meaning of those words as used in the covenant.

4. Where the grantors covenanted in their deed that they would not "erect any structure in front of the premises hereby granted and conveyed, between the same and the ocean or therein, or use the said front of the premises otherwise than as a public avenue and promenade" and it appeared from other contemporaneous documents that the covenant was intended to prevent the raising of the grade of the avenue, to preserve an open view of the ocean and to prevent obstructions to light and air; Held, that the construction by the municipality of a boardwalk, which did not rise above the grade of the avenue as it existed at the date of the covenant, over a portion of the avenue in front of the grantee's premises, is not a violation of the covenant. 10 20

5. Where streets are dedicated to public use by the filing of a map on which land is laid out in blocks, lots and streets, and afterward conveyances of lots are made by reference to such map, the public rights arising from such dedication are superior to the private rights resulting from implied or express covenants in the deeds. 30

6. Lands dedicated to the public use may be appropriated by the municipality to any public purpose not inconsistent with the purpose of its dedication. The power of the local corporate authorities to regulate such use is unlimited and against this no mere private right can be set up.

7. Municipalities have authority under the Home Rule Act (Chapter 152, P. L. 1917) to build 40

Conclusions

a boardwalk and to acquire land for that purpose.

8. Upon acceptance of a dedication of lands for street purposes, the public right is complete
 10 and the lands may be appropriated to any use to which a street acquired in any other mode can lawfully be put.

9. A municipality may subdivide lands dedicated to street purposes and appropriate certain portions thereof for sidewalk or footway purposes and may construct sidewalks or footways, on the portions so appropriated, of wood, boards, or any other material appropriate for the purpose.

20 10. A municipality is not restricted to the use of dedicated highways for travel by means in use at the time of dedication, but may adapt them to uses by such other means as new wants and improvements of the age may render necessary or advisable.

11. Where the rights of an individual are invaded by the acts of persons clothed with authority, and who exercise that authority illegally, the
 30 persons aggrieved must seek redress by certiorari in the law courts.

BERRY, V. C.:

In September, 1929, the defendant, Borough of Sea Girt, by ordinance, authorized the construction of a sixteen feet wide boardwalk on the easterly twenty-five feet of Ocean Avenue as shown on "Map of Sea Girt, by Chas. F. Ingham, Engineer,
 40 neer, Revised by Frederick J. Anspach, Engineer,

Conclusions

1877," at a cost of \$40,000. This action was approved by referendum vote of the electorate at the general election on November 5, 1929. Shortly thereafter the complainants, who are property owners in the borough, filed this bill seeking an injunction restraining the defendant from constructing the proposed boardwalk or taking any action under the ordinance, on the ground that the erection of "the proposed boardwalk and its approaches violates restrictions contained in their deeds and the deeds of their predecessors in title and encroaches upon their easements and private rights in that said road by such erection would be used for purposes other than originally intended; that it prevents free access to and over said public highway; that it obstructs their light and air and view from said public highway and that it depreciates the value of their premises and that the erection of said boardwalk and approaches is illegal and generally violates the rights of complainants."

In 1875 the land now constituting the Borough of Sea Girt was owned by the Sea Girt Land and Improvement Company and that company mapped and plotted the entire borough, laying it out in blocks and lots as shown on the map by Chas. F. Ingham, Engineer. That map was filed in the office of the Clerk of the County of Monmouth and a number of conveyances of lots were made by the company by reference to said map. What is now Ocean Avenue was designated on the map as Atlantic Avenue. In 1877 the Sea Girt Company, desiring to make some changes in the plan of its property, had a revised map or plan

Conclusions

prepared by Frederick J. Anspach, Engineer, and in February, 1878, filed the same in the office of the Monmouth County Clerk. Coincident with the filing of the map an agreement was entered into between the company and nine individual
10 grantees of lots by reference to the Ingham map, whereby said grantees consented to the proposed changes in the plotting of said property and released whatever rights they had acquired by reason of the making and filing of the Ingham map and reference thereto in their deeds of conveyance. In consideration of this consent and release the company agreed, amongst other things, that it would adopt and dedicate forever the
20 streets and Crescent Park as shown on said map; that it would establish a set back building line on the west side of Atlantic Boulevard and that it would not in any way raise the grade of Atlantic Boulevard between Crescent Park and the ocean. It was also provided in said agreement that the revised map should be filed in the office of the Clerk of Monmouth County "as a public road and evidence of the laying out of said tract of land and dedication of said streets and Cres-
30 cent Park as thereon represented." It does not appear that the revised map made any substantial change in Atlantic Avenue as shown on the original Ingham map (except possibly in front of Block 7 which lies immediately to the eastward of Crescent Park and where the westerly line of the avenue was extended some distance to the eastward). All of the complainants are owners of lots in Block 7 as shown on the Anspach
40 map. The complainant Hulett is the owner of lot 11, Block 7. The complainant Mann owns

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lot 10, Block 7. The complainant Potter owns lot 12, Block 7. The complainant Pruyn owns lots 13, 14, 15, and the complainant Gillan owns lots 16, 17, 18, and 19, in Block 7. The original conveyances from the Sea Girt Land and Improvement Company to Hulett, Mann and Potter were made from the Ingham map prior to its revision by Anspach in 1877 and these deeds of conveyance contained no restrictions which are pertinent to this controversy. The original conveyances from the Sea Girt Land and Improvement Company for the Pruyn and Gillan lots were made in 1885 from the Anspach map. The conveyance for lot 13 in Block 7 contains no restrictions. The deeds for lots 14, 15, 16, 17, 18, and 19 contain the following restriction:

“And the said party of the first part do hereby covenant, promise and agree to and with the said party of the second part, his heirs and assigns, that they, the said party of the first part, their successors and assigns, will not erect any structure in front of the premises hereby granted and conveyed, between the same and the Ocean or therein, or use the said front of the premises otherwise than as a public Avenue and promenade.”

In 1885 Atlantic Avenue to the eastward of Block 7, or at least a considerable portion of it, was graded at what was then the natural level of the ground above mean high water mark of the abutting properties. At that time there were blue flagstone sidewalks and flag or wooden curbs constructed along the westerly side of Atlantic Ave-

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nue in front of a portion of Block 7. These sidewalks and curbs, or some of them, still remain in their original location. At the present time the elevation of Atlantic Avenue from Brooklyn Avenue south to Trenton Boulevard, and in front
 10 of Block 7, above mean high water mark, is considerably lower than it was at the time of the filing of the Ingham and Anspach maps, and in 1885, the date of the conveyances to Pruyn and Gillan. This is due to the inroads of the ocean. The elevation of the proposed boardwalk is 18.2 feet above mean tide level and this varies from eight to eleven feet above the elevation of the sand directly thereunder in front of Block 7, and
 20 it is from one to one and one-half feet below the level of the sidewalks above referred to.

The ordinance adopted by the defendant borough contained this provision:

“That Ocean Avenue, as laid out one hundred feet in width easterly from the east property lines of Blocks one to seven inclusive on the official maps of the Borough of Sea Girt, be and the said one hundred feet width is hereby subdivided,
 30 the most eastwardly twenty-five feet width thereof being hereby apportioned for use for sidewalk, boardwalk and footway purposes from a point one hundred forty two feet north of the north line of Beacon Boulevard to the south line of Trenton Boulevard.” (That such subdivision was a lawful exercise of municipal authority, see *Taintor v. Morristown*, 33 N. J. L. 57, and *Budd v. Camden Horse R. R. Co.*, 61 N. J. Equity 543.) It
 40 is proposed to construct ramp approaches to the boardwalk at each street intersection. These ap-

Conclusions

proaches are designed to be constructed on piling with a slight incline from the level of the street to the level of the boardwalk. It is proposed also to construct steps from the easterly side of the boardwalk to the strand at intervals along its entire length. The length of the proposed boardwalk is 3445 feet and it appears from the plan that there is already constructed at Beacon Boulevard a walk extending southwardly approximately one hundred feet. The proposed new boardwalk connects with this existing walk and extends both north and south. It is conceded by both parties that Atlantic Avenue is a public highway, and that the first work done by the Borough on this highway was in 1924.

The complainants seek relief upon two theories; first, that the construction of the proposed boardwalk and approaches violates the restrictions in the deeds, as above quoted; and second, that irrespective of this restrictive clause, the private rights of the complainants arising from conveyances of lots abutting Atlantic Avenue will be violated by the proposed construction. It is argued that aside from the restrictions the complainants have a right to free passage over Atlantic Avenue north, south, east and west, unobstructed and uninterfered with by the boardwalk and its approaches. It is conceded that in traversing this avenue at its depressed level in front of Block 7 in any direction, and except upon the boardwalk itself, it will be necessary to go under or over the boardwalk or its approaches. It is also conceded that at the present time Atlantic Avenue for almost its entire length is impassable

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for vehicles because of its condition, due in some measure at least to the inroads of the ocean. Abnormal high tides wash Atlantic Avenue each of Block 7.

- 10 The first question to be considered is whether or not the complainants have any right to enjoin the defendant by reason of the restrictions above quoted. It is clear that only two of the complainants, Pruyn and Gillan, have any rights under those restrictions, no such restrictions being contained in the deeds of the other three complainants or their predecessors in title. The restrictions referred to were not imposed until 1885.
- 20 Atlantic Avenue had been effectively dedicated to the public in 1875 by the filing of the Ingham map and by conveyances by reference thereto and rededicated in 1878 by the filing of the Anspach map and conveyances by reference thereto. It does not appear that there was ever any formal acceptance by the Borough of these acts of dedication, but the fact of dedication cannot be denied and once that fact is established such dedication is irrevocable, except upon express rejection or vacation by the lawfully constituted authorities.
- 30 And while the exercise of the public rights resulting from dedication "may be suspended and lie dormant until such time as, in the judgment of proper legal authority, public exigencies require their possession and use," once the owner of property dedicates it to public use he cannot recall that dedication, either in whole or in part, except by consent of the municipality acting in behalf of the public. *Dodge & Bliss v. Jersey*
- 40 *City*, 105 N. J. Equity 545; *Long Branch v. Too-*

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vey, 140 Atl. Rep. 415; *The Trustees of the Methodist Episcopal Church of Hoboken v. The Mayor and Common Council of the City of Hoboken*, 33 N. J. Law 13. The subsequent imposition by the Sea Girt Land and Improvement Company of the restriction contained in the Pruyn and Gillan deeds was an ineffectual attempt to subtract from the public right which had accrued by virtue of the previous dedication. It follows that these complainants, as against the public represented by the municipality, acquired no rights by virtue of that covenant. 10

Aside from this, however, I think it can be clearly demonstrated, and I am of the opinion that the covenant was never intended to prohibit an improvement such as is here contemplated. The agreement of February 21, 1878, provided that the Company would not raise the grade of Atlantic Avenue. *The grade referred to was that then in existence.* The boardwalk will not raise that grade. The word "structure" (or "obstruction" as it is in some of the deeds) means, in my judgment, something erected in the avenue above the grade as it existed in 1885 and which will interfere with the use of the street as a promenade or will obstruct the view of the abutting property owners. The proposed structure is not above the grade, does not obstruct the view, and does not interfere with the use of the street as "an avenue and promenade." On the contrary, it makes available for such use a portion of the street not now usable for street purposes at all. 20 30

Note, also, that the covenant is binding upon the grantor, "its successors and assigns." The 40

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dedication having preceded the covenant, it cannot be said that the municipality is either a successor or assign within the meaning of those words as used in the covenant.

- 10 I will next consider the private rights of the complainant as abutting land owners and irrespective of the restrictive covenant.

It is claimed that the complainants' private rights in Atlantic Avenue are invaded because their easements are destroyed; free access to and over the public highway is denied; light, air and view are shut off, and that their property is depreciated in value. It seems clear, however, that
20 their easements are not destroyed to any greater degree than are the easements of all other members of the public at large. They still have free access to the avenue and the passage over and on the avenue is not interfered with except to the extent that they are required to pass over or under the boardwalk or its approaches, if they choose to walk on the sand; but, as the roadway is now usable only for pedestrians, and as the proposed improvement will result in greater
30 facility in that use, it cannot be said that the complainants are injured in this respect, and there is no obstruction to complainants' air and view. The testimony shows clearly that their properties are all at an elevation considerably above the level of the sidewalks which were laid years ago and that the street level of the avenue is slightly below the sidewalk level. The proposed level of the boardwalk is from one to one and one-half
40 feet below the sidewalk level so that there is no

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possibility of any obstruction to complainants' light, air or view, except so far as the view may be obstructed when the complainants look down toward the strand.

Complainants' contention under this head is based primarily upon the language of the Court in *Booraem v. North Hudson County Railway Company*, 40 N. J. Equity 557. In that case the Court said, at page 564: 10

“the private rights of the several grantees precede the public right, and are the source from which the public right springs. * * * and this private right of way in the grantees is wholly distinct from, and independent of, the right of passage to be acquired by the public.” 20

But this language is not at all applicable to the present issue. There the Court had under consideration rights arising from a dedication of a highway by means of conveyances to private persons. Those conveyances were the source of the public right, but here the public right arises primarily, not from an implied covenant in complainants' deeds, but by dedication to the public by the filing of the Ingham and Anspach maps. The rights of the public antedate those of the complainants and are superior to them. They do not have their source in the private rights of the complainants. Under such circumstances the public right is paramount and that of the abutter subordinate. *Halsey v. Railroad Company*, 47 N. J. Equity 380. 30

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In further support of this contention, counsel for complainant cites the following New Jersey cases :

- 10 *Bechtel v. Carslake*, 11 N. J. Equity
 500.
- Barnett v. Johnson*, 15 N. J. Equity
 481.
- Bridgewater v. Ocean City*, 62 N. J.
 Equity 276.
- Lenning v. Ocean City*, 41 N. J. Equity
 606.
- Dill v. Board of Education*, 47 N. J.
 Equity 421.
- 20 *M. E. Church v. P. R. R. Co.*, 48 N. J.
 Equity 452.
- Herold v. Columbia Investment, Etc.,*
 Co., 72 N. J. Equity 857.
- United New Jersey Railroad and Canal*
 Co. v. Steel Company, 85 N. J.
 Equity 7.
- Bozarth v. Egg Harbor*, 89 N. J.
 Equity 26.
- Marlsborough Blenheim v. Atlantic*
 City, 98 N. J. Equity 130.
- 30 *Beecher v. Newark*, 64 N. J. Law 475.
- Bork v. United New Jersey Railroad*
 and Canal Company, 70 N. J. Law
 268.
- Ocean City Land Company v. Ocean*
 City, 73 N. J. Law 493.
- Atlantic and Suburban Railway Co. v.*
 State Board of Assessors, 80 N. J.
 Law 83.
- 40 *Union Towel Supply Co. v. Jersey City*,
 99 N. J. Law 52.

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I have examined all these cases and I do not consider that any of them support complainants' point. They all involve rights arising from express or implied covenants, or the decisions are based upon the doctrine of estoppel, and are not applicable here. In almost every one of the cases, however, the public right in a dedicated street is recognized as superior to the private rights of an abutting property owner. In some of the cases, notably *Barnett v. Johnson* and *Union Towel Supply Company v. Jersey City*, a purpresture was involved and the complainant asserted the public as well as his private rights. The use here complained of is a public as distinguished from a private use of the public highway which was condemned in those cases. In complainants' argument some stress is laid upon the language of Vice Chancellor Emery in *United New Jersey Railroad and Canal Company v. Steel Company*, to the effect that "until there is an acceptance of the street by some municipal act or by public usage, the public acquire no rights therein and is subject to no duties by reason of the dedication." But an examination of that case and the authorities upon which Vice Chancellor Emery relied indicates that it was not intended in any of those decisions to state the rule as broadly as is contended for by the complainants. Undoubtedly, what was meant by the language quoted was that the public acquired no rights which imposed a corresponding obligation, such as of repair, on the public.

The public rights in Atlantic Boulevard or Ocean Avenue being superior to the private rights of the complainants, it follows that the complainants are not entitled to relief so long as the mu-

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municipality is acting lawfully and in the exercise
 of powers conferred upon it by the Legislature.
 That it is so acting will be seen by reference to
 "AN ACT CONCERNING MUNICIPALITIES," Chapter
 152, P. L. 1917, page 318, 2 C. S. to C. S. Sub-
 10 ject 136, commonly known as the "Home Rule
 Act," Article XX, Sec. 2001, especially subsec-
 tions c, d and f; Article XXII, Sec. 2201, and
 Article XXV, Secs. 2501, 2540a. See also *Ninth
 Street Pier Company v. Ocean City*, 6 N. J. Misc.
 Repts. 227, where it was held that a municipal-
 ity had authority under the Home Rule Act to
 build a boardwalk and to acquire land for that
 purpose. It is elementary that a municipality
 20 has power to establish the grade of any public
 thoroughfare within its limits and to change and
 re-establish the grade as the public need requires.
 And as to what the public need requires the gov-
 erning body of the municipality are the sole
 judges. "The only restriction upon the power of
 the municipal authorities is that they cannot ap-
 propriate them (public highways) to a purpose
 incompatible with the ends for which they were
 established." *Chapman v. Albany Railroad*, 10
 30 Barb. 360, cited with approval in *Stoulinger v.
 Newark*, 28 N. J. Equity 187.

It will be noted that the language of the re-
 strictions expressly provides for "a public ave-
 nue and promenade" and the word promenade
 may reasonably be said to contemplate a board-
 walk.

In *Halsey v. Railway Company*, 47 N. J. Equity
 40 380, it was held that by the taking of land for a
 street the public acquires the right to use it for
 travel not only by such means as were in use

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when the land was acquired, but by such other means as new wants and improvements of the age may render necessary, and that any use of a street which is limited to an exercise of the right of passage, and which is confined to a mere use of the public easement, whether it be by old methods or new and which does not, in any substantial degree, *destroy it as a means of free passage common to all the people, is a legitimate use and within the purpose for which the public acquired the land; and that an individual cannot maintain an action for injury caused by an obstructed highway unless he suffer some private, direct and material damage beyond the public at large as well as damage otherwise irreparable. Mere diminution of the value of his property by the nuisance, without irreparable mischief, will not furnish any foundation for equitable relief.*

In *Trustees, Etc. v. Hoboken*, 33 N. J. Law 13, at page 19, the Court said:

“But within the limits of the purposes and uses for which the dedication is made, to regulate the use, the authority of the local corporate authorities is unlimited, *against which no mere private right can be set up.*” (Italics mine.)

In *Stoudinger v. Newark, supra*, it was held that if lands be dedicated to the public for street purposes and it is accepted, the public right is complete and the lands may be appropriated to any use to which a street acquired in any other mode can lawfully be put and that such streets might be lawfully used for the construction of sewers, whether the public right was acquired by condemnation or by dedication. And in *Sea Isle*

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Realty Company v. Sea Isle City, 79 N. J. Law 459, it was held that the language of a dedication to a seaside resort that the *locus in quo* "shall forever remain open and unobstructed for public uses" is not inconsistent with the erection
10 thereon of a music pavilion for public entertainment.

It does not appear to me that the complainant will suffer any "private, direct or material damage" from the construction of the proposed boardwalk "beyond the public at large." The use of the street as proposed by the municipality is not inconsistent with the purposes of its dedication and the Borough is clearly acting within
20 the scope of its lawful authority. The argument of complainant, based upon so-called private rights, cannot be sustained.

There is another ground, however, upon which the relief sought should be denied. While undoubtedly this Court has jurisdiction to entertain this bill because of the restrictive covenants involved, if for no other reason, "the principle is universal, that where the rights of an individual
30 are invaded, by the acts of persons clothed with authority, and who exercise that authority illegally, the persons aggrieved must seek redress by certiorari." *Tucker v. Freeholders*, 1 N. J. Equity 282. This rule has been repeatedly stated by the courts of this state and lately by Vice Chancellor Backes in this court in *Harrison Market, Inc. v. Montclair*, 105 N. J. Equity 222.

I will advise a decree dismissing the bill of
40 complaint.

Decided April 29, 1930.

FINAL DECREE.

IN CHANCERY OF NEW JERSEY

Between

ALBERT G. HULETT, *et als.*,
 Complainants,
 and
 BOROUGH OF SEA GIRT, a Mu-
 nicipal Corporation,
 Defendant.

On Bill, &c.

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This cause coming on to be heard in the presence of Quinn, Parsons & Doremus, Solicitors of the Complainants, and Durand, Ivins & Carton, Solicitors of the Defendant, and the Court having examined the pleadings, and having taken proofs orally and in open Court and heard and considered the arguments of counsel thereon; 20

And it appearing to the satisfaction of the Court that the complainants are not entitled to the relief prayed for in their bill of complaint;

It is, on this eighth day of May, Nineteen Hundred and Thirty, ORDERED, ADJUDGED and DECREED 30 that the bill of complaint be and the same is hereby dismissed, and the temporary restraint heretofore ordered be and the same is hereby dissolved and vacated.

IT IS FURTHER ORDERED that the said complainants pay to the defendant the costs of this suit to be taxed, together with a counsel fee of Five Hundred dollars, which is hereby allowed to said Defendant. 40

EDWIN ROBERT WALKER,
 Chancellor.

Respectfully advised,

MAJA LEON BERRY,

V. C.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

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|----|--|
| 10 | Between ALBERT C. HULETT, THOMAS POTTER, ANNE M. GILLAN, MARIE E. PRUYN and JOSEPH MANN, <div style="text-align: right; padding-right: 20px;">Complainants,</div> <div style="text-align: center; padding: 5px 0;">and</div> THE BOROUGH OF SEA GIRT, a municipi- pal corporation, <div style="text-align: right; padding-right: 20px;">Defendant.</div> |
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20 Transcript of stenographer's notes of proceed-
 ings in the above entitled cause before the
 HONORABLE MAJA LEON BERRY, Vice Chancellor, at
 the Chancery Chambers in Long Branch, New
 Jersey, on Thursday, March 27th, 1930, at 11
 A. M.

Appearances:

30 Messrs. Quinn, Parsons & Doremus, John J.
 Quinn, Esq., present, Solicitors of the Complain-
 ants.

Messrs. Durand, Ivins & Carton, James D. Car-
 ton, Esq., present, Solicitors of the Defendant.

Mr. Quinn: By consent, paragraph twelve is
 to be added to the bill of complaint, as follows:

40 Complainants further say that the erection of
 the proposed boardwalk and its approaches vio-
 lates the restrictions contained in their deeds and
 the deeds of their predecessors in title and en-
 croaches upon their easements and private rights

Exhibits Offered and Received

in that said road by such erection would be used for purposes other than originally intended, that it prevents free access to and over said public highway, that it obstructs their light and air and view from said public highway and that it depreciates the value of their premises, and that the erection of said boardwalk and approaches is illegal and generally violates the rights of complainants. 10

Mr. Carton: May it be understood now that our answer will be a denial of that paragraph?

Mr. Quinn: And the replication will stand as before.

If your Honor please, this bill is to enjoin the defendants, the Borough of Sea Girt, from the erection of a boardwalk and approaches which are proposed to be erected by reason of an ordinance passed in September of 1929. The boardwalk is to begin at a point some eighty feet north of Beacon Boulevard, which is the inlet as shown on this map (referring to map pinned on wall) and then proceed from that point along Atlantic Avenue, as shown on this map—which is an old map—and which is now called Ocean Avenue, and proceeding from a point north of Beacon Boulevard along Ocean Avenue, which is a public highway, to Trenton Boulevard, which brings it quite some distance past the circular outlined as shown on the map, and being Trenton Boulevard, which we will mark afterward. 20 30

The Court: That is the map of 1877, is it?

Mr. Quinn: Map of 1877.

Now, in 1875 the present land of the Borough of Sea Girt was owned by the Sea Girt Land & Improvement Company, and they mapped and 40

Exhibits Offered and Received

plotted the entire Borough and laid it out in blocks and the map was filed and known as the Ingham Map. In 1877 the then lot owners under the old Ingham Map and the Sea Girt Land & Improvement Company agreed among themselves
 10 that they would change the entire plan of the development, and they then prepared a new map known as the Anspach Map, and from the Anspach Map filed in 1878 all of the lots in the Borough of Sea Girt have been sold by reference to that map.

On the same day that the Anspach Map was filed the then lot owners under the old map also filed an agreement releasing all of their rights
 20 and interests in and to the streets under the Ingham Map. There was no release whatever as to any rights in the streets in the new map, known as the Anspach Map, and that agreement, dated February 1st, 1878, and recorded September 12th, 1878, between the Sea Girt Land & Improvement Company and Charles S. Hinchman, *et al.*, is offered in evidence. I ask that it be marked Exhibit C-3.

(Agreement referred to marked Exhibit C-3.)

30 It is stipulated and agreed between the parties hereto as follows:

(1) That the land constituting the Borough of Sea Girt was formerly owned by the Sea Girt Land & Improvement Company and was mapped and plotted under and by virtue of a map entitled the "Ingham Map" in the year 1875 and subsequently amended by a map known as the
 40 Anspach Map, which was filed in 1878, and said maps and copies of the same are offered in evi-

Exhibits Offered and Received

dence and marked respectively Exhibits C-1 and C-2.

(Maps referred to marked respectively Exhibits C-1 and C-2.)

Complainants' lots were sold to them by reference to the Anspach Map; and all other lots in this tract of land were sold by reference to this same map, with the exception of the lots that were purchased by reference to the Ingham Map. 10

(2) That on February 21, 1878, an agreement was entered into between the Sea Girt Land & Improvement Company and Charles S. Hinchman and others, which agreement was recorded in the Monmouth County Clerk's office on September 12th, 1878, in Book 306, page 185, and said agreement is offered in evidence and marked Exhibit C-3. 20

(Agreement referred to heretofore marked Exhibit C-3.)

The Anspach Map was attached to the agreement and filed in the Monmouth County Clerk's office on the same date.

(3) The following complainants received their title through other persons or corporations other than the persons mentioned in stipulation No. (2), viz: Anna M. Gillan and Marie Pruyn. 30

(4) That on the west side of Ocean Avenue in front of one half of the north section of Block 7 the sidewalks and curb still remain for a certain distance.

(5) It is stipulated and agreed that the Borough of Sea Girt, with the approval of the State Department and the United States War Depart- 40

Exhibits Offered and Received

ment, have erected a jetty about at the center of Block No. 7 on said map extending from a point twenty-three feet from the westerly line of Ocean Avenue across said Avenue to the ocean, which said jetty is now practically covered with beach sand at its westerly end. These jetties were built for the purpose of building up the beach to produce accretion where the sand had eroded on Ocean Avenue. There is also another jetty erected about five hundred feet south of the above mentioned jetty, in front of Block 7.

(6) The complainants Anna M. Gillan and Marie Pruyn have the following restriction contained in their deeds, viz:

“And the party of the first part do hereby covenant, promise and agree to and with the said party of the second part, his heirs and assigns, that they, the said party of the first part, their successors and assigns, will not erect any structure in front of the premises hereby granted and conveyed, between the same and the Ocean or therein, or use the said front of the premises otherwise than as a public avenue and promenade.”

If your Honor please, this refers to Block No. 7. The complainants are the owners of lots in Block No. 7.

Mr. Carton: Mrs. Pruyn does not have that restriction in all of her lots. She has three lots, and as I recall, the restrictions are in two of her deeds, but not in the other.

Exhibits Offered and Received

Mr. Quinn: The restrictions as to Mrs. Pruyn exist as to two of her lots, but not as to the third.

The above covenant was contained in the original deed of the Sea Girt Land—

Mr. Carton: May it not be as well to say that there are no restrictions contained in any of the deeds of any of the other complainants excepting those you mentioned? 10

Mr. Quinn: That the above covenant was contained in the original deed of the Sea Girt Land & Improvement Company and the other predecessors in title of the above named complainants, namely, Anna M. Gillan and Marie E. Pruyn.

In the deeds of the complainants Albert C. Hulett and the remaining complainants, the following clause is contained: 20

“Subject to the covenants, conditions and restrictions contained in former deeds affecting the above described premises.”

(7) In or about the year 1907 the Sea Girt Company took over all the assets, including the land holdings of the Sea Girt Land & Improvement Company and continued the sale of lots by reference to the maps above referred to. 30

(8) On or about November 18th, 1907, Frank Durand and Florence B. Durand, his wife, sold and conveyed to the Sea Girt Company, by bargain and sale deed, a tract of land described as follows:

“Bounded easterly by the Atlantic Ocean; southerly by the property known as the Beach House plot, being at the south- 40

Exhibits Offered and Received

erly side or line of Crescent or Hamilton Avenue; westerly by a line 80 feet easterly from the easterly side or line of Ocean Avenue or Atlantic Avenue; northerly by a line parallel to the southerly boundary and distant 500 feet northerly therefrom.”

10

Said above described property is eighty feet east of Ocean Avenue and in front of Block No. 7 and other properties and said deed contained the following clause:

(That is the tract under the water of the Ocean and directly opposite Block No. 7, which is right in here (indicating on map) where you see the

20

circular Crescent Park, as they call it.)

Said above described property is eighty feet east of Ocean Avenue and in front of Block No. 7 and other properties, and said deed contained the following clause:

“Said tract above described as second tract is hereby conveyed subject to the restrictions contained in deeds for lots in Block 7 on the map of Sea Girt.”

30

If your Honor please, I will say at this time that the object of introducing that deed is to show that the Borough of Sea Girt subsequently got this land in a deed which did not contain the restriction, but the restriction was contained in one of their predecessors in title.

Said above mentioned second tract with other property has since been conveyed to the Borough

40

of Sea Girt by deed from Catherine A. Yard,

Exhibits Offered and Received

widow, dated June 19th, 1923, recorded in Monmouth County Clerk's office in Book 1224 page 497, etc., which deed contained no covenant, restriction or condition.

(9) It is further stipulated and agreed that in front of complainant Gillan's property the boardwalk will be erected upon wooden piles which piling will extend from the sand approximately ten feet high and in front of all of the other lots in Block 7. Said boardwalk will be erected upon wooden piles varying from eight to eleven feet high to the surface of the boardwalk. 10

(10) It is further stipulated and agreed that the plans and specifications of said boardwalk do not include or call for any railings, lighting standards or anything else to be erected above the surface of said boardwalk or approaches. Said pilings upon which the boardwalk will be erected will average approximately ten inches in diameter. 20

It is also stipulated and agreed that in front of Block 7 there are no approaches to the boardwalk—in other words, that the entire Block No. 7 has no approach to the boardwalk, which means that they must either go under it or walk down a great number of feet to either one or the other of the streets mentioned in order to get on the boardwalk. 30

It is stipulated and agreed that in front of Block 7 there are no approaches to the boardwalk from the property lines of Block 7; that the nearest approach to the boardwalk over Block 7 is 40

Exhibits Offered and Received

the Philadelphia Boulevard and Trenton Boulevard; that the approaches on Philadelphia Boulevard and Trenton Boulevard are ramp approaches extending from the street intersections easterly to the boardwalk and these approaches
 10 will be erected on pilings approximately eight to ten feet high at the boardwalk proper and extending across Ocean Avenue at its present level to the various streets on an incline.

If your Honor please, with reference to that stipulation, all of these streets which the boardwalk runs along, whether it runs along Atlantic or Ocean Avenue, each one of these streets, has
 20 a ramp at the end of the street which runs from the sidewalk approximately eighty feet across the public highway to meet the various streets running east and west of the boardwalk. Our contention is that that violates our rights; that the street was never intended for that use, to have a ramp go over the top of it. Now, we claim that a person cannot use the street as a public highway because of these ramps running eight feet over the top at its present level —

30 The Court: Has the street been actually opened, that is, Atlantic or Ocean Avenue?

Mr. Quinn: Water pipes and sewers have been laid on the westerly side some years ago.

The Court: Is the street a paper street, or is it actually a street which is used by vehicles?

Mr. Quinn: Not used by vehicles, but used by pedestrians and some horse back riding on the beach, but no vehicles, because it is a sandy
 40 beach.

Exhibits Offered and Received

(Continuing the stipulation.)

(11) It is further stipulated and agreed that the height, level or surface of the proposed boardwalk is approximately between one-half foot and one foot and one-half below the height, level or surface of the sidewalk on the westerly side of Ocean Avenue where the same now shows in front of Block 7, and it is further agreed that if the elevation of the sidewalk on the westerly side of Ocean Avenue as now shown were continued that the boardwalk would be approximately a foot to a foot and one-half below said elevation continuing the entire length of the boardwalk. 10

(12) It is stipulated and agreed that Ocean Avenue is one hundred feet wide and that the proposed boardwalk is to be built on the easterly twenty-five feet sidewalk portion of said Ocean Avenue, but that the boardwalk itself will be sixteen feet in width and the approaches will run from that point to the various street entrances as heretofore mentioned. 20

If your Honor please, this bill is filed under the theory of *Dill vs. Board of Education and Lenning v. Ocean City*, the *Dill* case being in 47 Equity and the *Lenning* case in 41 Equity, in each case it holds that where a tract of land is laid out and plotted, that the public derives only its right by reason of the mapping and plotting and the rights of the individual land owners, and especially the adjacent land owners, are paramount to the public rights, and the public rights are subservient to the individual rights of the private owners. 30 40

Exhibits Offered and Received

It is also agreed that the first restriction with reference to Block No. 7 pertaining to the erection of any structure is contained in the deed of Sea Girt Land & Improvement Company to Charles B. Wright, April 15, 1885, which is approximately seven years after the filing of the Anspach Map.

Mr. Carton: May this be stipulated, also, Mr. Quinn: And that this deed is the first deed in which this covenant appears in any of the deeds of the Sea Girt property?

Mr. Quinn: The covenants just referred to in the Wright deed is the first deed in which this restriction appears in any of the Sea Girt deeds, and that prior to the date of this deed in 1885 about thirteen of the thirty lots in Block 7 had been sold, that is, prior to 1885, in which no covenant, restriction or condition whatever appears, except as above set forth, because there is a condition there which I read into the record, "subject to the restriction" etc.

Mr. Carton: And in the subsequent deeds to 1885 this clause appears "subject to the conditions and restrictions."

We ought to get in the record definitely what restrictions are in the lots of Block 7. That restriction referred to in the Wright deed is contained in two of the Pruyn lots and the Gillan lot, and that the restriction in the deed of lot No. 9 is a different restriction than that contained in the Wright deed.

The Court: How does it differ?

Mr. Carton: Only in this, if your Honor please, in the restriction of the Wright deed just read

George Roland Moore—Direct

by Mr. Quinn, it says that no structure shall be erected, and in the other deed it says no obstruction. Otherwise they are the same.

Mr. Quinn: If your Honor please, may I also add to our contention that we base our bill and prayer for relief upon two theories, one that it violates the restriction and covenants of the deed, and the other, that irrespective of the restriction, that the complainants' property rights are violated, as contended in paragraph twelve of the complaint. 10

GEORGE ROLAND MOORE, called as a witness in behalf of the defendant, being first duly sworn according to law, on his oath says: 20

Direct-examination by Mr. Carton:

Q. Mr. Moore, you are an engineer, are you not? A. I am.

Q. And you are the engineer of the Borough of Sea Girt? A. I am.

Q. How long have you been practicing your profession as an engineer?

Mr. Quinn: His qualifications are admitted. 30

Q. This plan or blueprint on the wall, Mr. Moore, was this prepared by you? A. It was.

Q. As the result of field measurements of the elevations, etc.? A. Yes, sir.

Q. Will you step over here and outline to the Court generally what the map shows with reference to where the boardwalk is, particularly with regard to Block No. 7 referred to? A. The board- 40

George Roland Moore—Direct

walk is proposed to be located as shown on this plan on the easterly sixteen feet width of Ocean Avenue, formerly known as Atlantic Avenue. The elevation of this boardwalk site has been carefully determined by an examination of the elevation of the lots in Block 7 fronting on Ocean Avenue, as well as of the other blocks northerly from Block 7.

Based on this study, the elevation of the boardwalk has been designed at 18.2 feet above mean tide level. The relation of the finished surface of the boardwalk at elevation 18.2 above mean tide level varies from eight to eleven feet above the elevation of the sand directly under the proposed location of the walk in front of Block 7, and from eleven feet above the sand to about two feet below the sand in the remainder of the frontage of the boardwalk. The construction of the boardwalk consists of a timber surface supported by pile beds located fifteen feet apart longitudinally under the boardwalk. The ramp approaches from the boardwalk to the various street intersections as shown on the plan consists of a wooden surface on pile beds, the piles of which are spaced ten feet apart, thus in all cases providing access on the present level of the strand wherever the boardwalk is constructed, under the boardwalk and under the ramps for pedestrians. The present condition of the strand or beach and the location of the proposed boardwalk and ramp approaches is such that at the present time it cannot be used for vehicular traffic. In addition to the construction mentioned, they are spaced from the boardwalk down to the elevation of the strand

George Roland Moore—Direct

easterly from the boardwalk at intervals as shown on the plan. The elevation of this boardwalk with relation to the blue stone curb and sidewalk which has been erected on the westerly side of Ocean Avenue and a part of Block 7 varies from one-half foot to a foot and a half below the elevation of the graded portion of the lots in Block 7 fronting on Ocean Avenue. It varies from two feet eight inches to about five feet below the approaches of the houses on the various lots in Block 7 fronting on Ocean Avenue. 10

Q. The shaded portion of your map, Mr. Moore, that you have indicated on the easterly side of Ocean Avenue, this is the proposed sidewalk, is it not? A. Yes, sir. 20

Q. And the location below the straight line, that is the surface or top of the boardwalk? A. Yes.

Q. And the broken line below it is the present sand level? A. Under the proposed location of the boardwalk.

Q. In other words, then, if Ocean Avenue were graded and curbed from the westerly line of the street to the easterly line of the street, the boardwalk would be, as I understand, from how much below the sidewalk line on the west side of the street? A. Varies from a foot and a half to half a foot where the sidewalk is in existence at the present time. 30

Q. And what is your plan for the construction of the boardwalk, what is the purpose of these ramps that you have referred to that run from the intersection of the streets to the boardwalk? A. They are temporary approaches from the 40

George Roland Moore—Direct

boardwalk so that people may go on the boardwalk with the least inconvenience from the top of the bank at the present street. If they were not put in there, persons to get on the boardwalk would have to walk down a steep bank, then there
10 would have to be steps built up to the boardwalk on the westerly side. Those ramps, of course, are only temporary.

Mr. Quinn: I move to strike that out, that those ramps are temporary. As to whether they are temporary is not the question involved here now.

Mr. Carton: The purpose of the Borough might be shown. Whether they are temporary or permanent may or may not be important. Of course, the thought in connection with the matter of this boardwalk is that the jetties being built will bring back the beach there and the street will be completed and then, of course, the ramp approaches, there will be no further purpose of them, so that in that regard they are temporary. That is the only
20 thought.
30

The Court: They may be intended as temporary, but, of course, they might be permanent.

Mr. Carton: For all present purposes they will be there.

The Court: I think I shall let it stand. I think we all understand what the structure is. If the beach should not make up
40 as you have suggested, the approaches to the boardwalk would probably remain.

George Roland Moore—Cross

Mr. Carton: That would undoubtedly be so, your Honor.

Q. This Ocean Avenue on your plan, has been stipulated as 100 feet wide, is that true? A. Sure.

Q. And the proposed boardwalk is on the sixteen feet of the easterly twenty-five feet sidewalk line of the street? A. It is the most easterly sixteen feet of the one hundred feet width of the street. 10

CROSS-EXAMINATION by Mr. Quinn:

Q. How many ramps are there altogether leading to the boardwalk, Mr. Moore? A. Under the proposed plan there are about five. 20

Q. Do those ramps run at an incline from the boardwalk to the various streets as shown on the plan? A. Yes, they run at a slight incline.

Q. At what height from the boardwalk proper does the ramp begin to run toward the street? A. At the level elevation of the entire boardwalk, elevation 18.2.

Q. I mean the height from the sand, the present level of the roadway, at what height will these ramps run from the boardwalk toward the various streets? A. At the various heights, where they are underneath them I have represented it by the distance between the line marked "finished surface of the boardwalk" and "surface of the beach" or the boardwalk center line. 30

Q. That is approximately at what height, eight to ten feet? A. Yes, in front of Block No. 7.

Q. And all of these ramps run immediately from the present level of Ocean Avenue, they are 40

George Roland Moore—Cross

erected over the top of the present level of Ocean Avenue. A person desiring to walk on the westerly side of Ocean Avenue would either have to walk under these various ramps or climb over them in order to use the public street known as Ocean Avenue? A. Near the extreme westerly side of Ocean Avenue these ramps will be practically at the grade of the existing ground. At and near the easterly end of these ramps it will be necessary to walk under them between the pile beds to pass over Ocean Avenue.

Q. Now, at certain other portions of Ocean Avenue it will be necessary, be required of a pedestrian using Ocean Avenue, to actually walk over the ramp by reason of the fact that there will not be sufficient space by which he can walk under them; do you understand what I mean? A. I understand what you mean. Of course, it is true at those locations that a pedestrian could not walk conveniently along the strand because it is on a very steep slope at the present time.

Q. In order for the owners of blocks 7, 6, 5, 4, 3, 2, and 1 to reach the ocean from their respective adjoining premises, isn't it true that they must walk under the boardwalk in order to cross over Ocean Avenue to get to the ocean? A. Yes, they would either have to walk under it or proceed to the corner and walk under the ramp and down the steps.

Q. So that persons in Block 7 in order to reach the ocean, can either walk under the boardwalk and go over Ocean Avenue, the Ocean Avenue portion of which is near the ocean, in order to reach the ocean, they must either walk under the

George Roland Moore—Cross

boardwalk or go to the two ramps, one on Trenton Boulevard and the other on Philadelphia Boulevard; is that correct? A. That is correct.

Q. Now, before your proposed plan, the owners of lots in Block 7, and all of the other blocks on which this boardwalk fronts, had free access to walk over Ocean Avenue with no obstruction; is that so? A. That is true. 10

Q. They could walk across Ocean Avenue in order to reach the ocean with absolutely no obstruction in the public highway prior to the time of the proposed boardwalk? A. That is true.

Q. What is the length of Block No. 7, Mr. Moore? A. Five hundred and twenty-five feet.

Q. So that persons on either end of Block 7, in order to get on the boardwalk would have to climb up the piling eight feet or walk several hundred feet in order to get onto it; is that right? A. That is not correct, in my opinion. 20

Q. I will withdraw that question. A person owning lot No. 16 in block No. 7 desiring to go upon this proposed boardwalk would have to walk how far and to what ramp in order to reach it?

A. To get on the boardwalk the owner of lot No. 16 would have to walk approximately 800 feet. 30

Q. Now, the only other way he could get on the boardwalk in front of his premises would be to climb up the eight feet to the boardwalk; is that not so? A. That would be true.

Q. As the owners of lots in blocks 7, 6, 5, 4, 3, 2, and 1, standing in front of their premises, can such owners see these various ramps erected at an incline from the boardwalk proper to the respective streets running east and west? A. Yes, 40

George Roland Moore—Cross

they can see them when they look in a northerly direction.

Q. Any of the lot owners? Isn't it a fact that in their view there are five ramps erected on pilings at the boardwalk eight feet high and inclining towards the streets? A. Yes, that is right.

10 Q. Prior to your proposed plan was there any such obstruction to the view of the respective owners of these adjoining lots on Ocean Avenue? A. Not to their view of the beach, no.

Q. Was there any such obstruction to their view of the beach or to the right or left or to the north or south, prior to the proposed plan? A. The ramps would be no obstruction to the view, 20 in answer to your question, because they are below the level of ground on which any such owners would be standing.

Q. All right; suppose a person is standing on Atlantic or Ocean Boulevard and looks directly down Ocean Boulevard, isn't it a fact that within his view of Ocean Boulevard are six ramps eight feet high and inclining down towards the intersecting streets? A. That is true.

30 Q. Before the proposed plan was there any obstruction of Ocean Avenue looking either north or south of Ocean Avenue? A. The only obstruction to the view is the beach hills, the beach sand dunes.

Q. That is, the beach itself, you mean? A. The sand dunes, the top of the beach.

Q. Now, the difference is, there is an eight foot ramp directly across the road? A. That is true, but that is below the line of view of the beach.

George Roland Moore—Re-direct

The Court: Has the boardwalk been built?

Mr. Quinn: No, if your Honor please, I meant "proposed."

Q. How wide are these ramps, Mr. Moore? A. 10
The ramps are eight feet in width.

Q. They are all of proportionately the same width, as I understand it? A. Yes.

RE-DIRECT EXAMINATION by Mr. Carton:

Q. You have said that if the owners in block 7 wished to go on the boardwalk they would have to go north to Philadelphia Boulevard or south to Trenton Boulevard ramp to get on it; that is true, is it not? A. On afterthought, that is not 20
absolutely true.

Q. What is there about it? A. The owners, of course, can approach the boardwalk at much shorter distances than that, because they can proceed from the lot front down over the slope, as they have always done to get on the beach, and then approach the steps on this side and walk up. The distance will be reduced very materially but they will have to go down and up.

Q. You mean the east side? A. Approach the 30
steps from the east side.

Q. Suppose the property owners wished to get to the ocean from their property, how could they go? A. Go as they always have gone.

The Court: They would either go under or over the boardwalk.

Q. They go under now? A. If the boardwalk were constructed they would proceed the same 40

George Roland Moore—Re-direct

as they always have; down the steps in front of their property, where they have one, and down to the slope, walk along the strand and under the boardwalk. There will be plenty of room under the boardwalk for them to walk without any
10 obstruction to their travel.

Q. Are there steps in front of these properties down to the strand? A. A number of the lot owners along here have steps following the abrupt slope of the strand, by which they attain access to the lower beach level from the elevation of their lots above.

Q. Is there a fence, also, maintained on the easterly curb line, on the east side of the west
20 curb line of Ocean Avenue? A. On some of the properties, quite a number of them in block 7; there is a board fence about four feet high at or near the westerly curb line of Ocean Avenue.

Q. Is that board fence four feet high, is that immediately in front of the property owners in block 7? A. Part of them, yes.

Q. You have said that these property owners, standing in front of their properties in block 7, and looking northwardly, their view would be ob-
30 structed by seven or eight ramps; is that a fact, Mr. Moore? What is the direction of the beach sand hills and dunes there? A. As I understood my former statement, the only obstruction to their view would be a downward view of the beach, the lower level of the beach. There would be absolutely no obstruction to their view on the level of the front of the lots where they are stand-
40 ing because the elevation of their eyes would be from eight to ten feet above the elevation of these ramps.

George Roland Moore—Re-cross

RE-CROSS EXAMINATION by Mr. Quinn:

Q. You, in reply to the question as to where persons in lot No. 7 would have to walk, said they could go to the east end of the boardwalk and then walk up the steps; is that so? A. The east side, yes. 10

Q. At high water mark or high tide, the water is under the boardwalk; is that not so, Mr. Moore? A. At normal high tide, no. Under extreme northeasterly storm conditions, which might occur on an average of once a year, the waves will roll up under the boardwalk with the strand at the elevation as shown under the plan.

Q. How far at normal high tide will the waves, the water be from these steps on the easterly side of the boardwalk? A. The distance varies, but it is shown approximately on the plan. The nearest location would be in front of the northerly half of block 7, in which location the normal high tide would be about fifty feet easterly from the foot of the steps. 20

Q. It is the custom there, Mr. Moore, is it not, for the owners of the adjoining lands on Ocean Avenue, and other persons, particularly during the summer time, to walk up and down Ocean Avenue on the beach sand? A. It has been the custom for years. 30

Mr. Carton: I think I shall object to the custom, if your Honor please.

The Court: He is speaking of the custom of the property owners. I think we may assume that.

If this were a municipality that was complainant here, I suppose you would call 40

Discussion

10 this boardwalk a purpresture, wouldn't you? I don't know whether I have the correct term or not. I am wondering what more right a municipality has to erect a purpresture than some individual would have as against the municipality.

Mr. Carton: Of course, the theory, if your Honor please, is that the municipality can only speak by dedication. It has a right to submit it to any proper use. At the present time the conditions are not such that it can be used for vehicular traffic up to the ocean front. So that the public may get what use they can out of it, it is proposed to erect this boardwalk where the sidewalk would be on the easterly side of the street, which they have a perfect right to do under the dedication, without interfering with the rights of others.

20 The Court: I suppose there would be no question as to the right of the municipality to raise the level of the street as it now is on the easterly side, to the level of the street as it is on the westerly side, even if it had to bulkhead the easterly side, would there?

30 Mr. Carton: There would be no question about that.

The Court: And having raised the level, they could pave it any way they wanted to.

Mr. Quinn: Under ordinary circumstances I would say that was so.

40 The Court: Even if they paved it with boards?

John Hagen—Direct

Mr. Quinn: Except here we do have in this 1878 agreement that the level of this boulevard will not be raised. What the object of it was I do not know, but it is in that agreement. Of course, that is a question that can arise later. 10

The Court: What is the level there?

Mr. Quinn: It is the beach level and that changes, varies according to the tide.

JOHN HAGEN, called as a witness in behalf of the defendant, being first duly sworn according to law, on his oath says: 20

Direct-examination by Mr. Carton:

Q. Where do you live, Mr. Hagen? A. Spring Lake Beach, New Jersey.

Q. How long have you lived there? A. Twenty-six years this coming September.

Q. How long did you live at Sea Girt? A. I went to Spring Lake in 1904. I lived there, I think, in 1889, when I went to live with Mrs. Olden. 30

Q. When did you first go to live at Sea Girt? A. 1885.

Q. 1885. Where had been your home before that? A. Philadelphia.

Q. You came from Philadelphia to Sea Girt in 1885? A. Yes, sir.

Q. Were there any houses erected in Sea Girt at that time? A. Two or three, according to my recollection. 40

John Hagen—Direct

Q. Of course, there were not many houses anywhere else at that time? A. No, except the old farm house, the Beach House, Beach Lot House over on Sea Girt Avenue.

10 Q. What was the condition of Ocean Avenue, or Atlantic Avenue it was called then when you first went to Sea Girt? A. It was Olden—we called it Olden Avenue, that is the north side of Olden's cottage there, Olden Avenue, adjoining the C. B. Wright's cottage.

Q. That is what is now Ocean Avenue? A. Yes, sir.

20 Q. What was the condition of the street, how was it made, what was it made of? A. It looked like a clay surface.

Q. What was there on the west side of the street, if anything, by way of sidewalks or curbs? A. There was not anything except C. B. Wright's cottage and Mrs. Olden's cottage to the north, a flag walk and curb.

Q. Are those walks there today? A. Yes, sir, except—

30 Q. Was there a curb east of the side walk? A. My recollection is it was a plank for a curb.

Q. Now the street itself or roadway, what was that constructed of? A. Clay, I think.

Q. Then on the east side of the clay roadway, what was there? A. There was a little fence on the east side, pedestrian walk, a little curb on the east, looked like clay, with a little gravel, with wire running from these posts.

40 Q. Was there anything to mark the end of the east side of the roadway and the beginning of the west side of the sidewalk on the east side of the

John Hagen—Direct

street, was there any curb? A. Wooden curbing, a flag curb.

Q. Wooden curbing, and then was there something east of the wooden curb; what sort of a walk was it? A. To my recollection, it was a kind of clay and gravel, but mostly clay. 10

Q. Where was the fence then with relation to that? A. East of the curb.

Q. East of the clay walk? A. No, east of the curb, about twenty feet east of the curb.

Q. And east of the clay walk was it, too? A. That was the sand hills.

Q. What do you mean, sand hills, were there sand hills east of that? A. Just east of this fence there were sand hills. 20

Q. How far out did they go at that time? A. I should judge in some places maybe 150 feet, or 200 feet.

EXAMINATION by the Court:

Q. You mean the fence was on the easterly side of the road? A. East of this road were these sand hills.

Q. Yes, I know, but between the fence and the curb was the road that you spoke of? A. No, a little walk about twenty feet and then comes that driveway, I would call it. 30

Q. What I am trying to find out, was the fence on the easterly side of the driveway? A. On the east side of the driveway, yes, sir.

Q. And between the fence and this wooden curb that you spoke of is this clay surfaced driveway? A. No, it was what I would call a pedestrian walk and then there was thirty or fifty feet of clay road from the west curb to the east curb. 40

John Hagen—Cross

Q. The fence was on the easterly side and then there was a pedestrian path to the westwardly of that and then came the driveway, which was covered with clay, as you say, and then a wooden curb on the extreme west side? A. No, it was a
10 flag curb, the east side had the wooden curb.

Q. You said there was a wooden curb a little while ago, a plank— A. If I did, I made a mistake.

Mr. Carton: He did say that, your Honor.

Q. Was that street used by pedestrians or wagons at that time? A. Certainly was all around these four cottages.

20 Q. Washed out a whole lot since that time? A. I guess it has, but that does not alter the fact that the driveway was there.

CROSS-EXAMINATION by Mr. Quinn:

Q. Would pedestrians and carriages use the driveway daily? A. As a rule we used it almost daily in July, I used to come up from where I lived—

30 Q. Would there be carriages going up and down the street? A. Yes, sir, from Olden Avenue to the C. B. Wright cottage, that must be about 550 feet long. They came and took the people out and then turned and went back.

Q. And these would walk up and down there almost daily? A. From the cottages to and from the farm, over the sand hills if you walked down east.

40 Q. It was used as a public thoroughfare since 1885? A. Yes, sir, as I recall it, we walked from

John Hagen—Re-direct
Frank Durand—Direct

the sand hills and from the Beach House until we came to the C. B. Wright cottage and then it was clay surface, but it was sand underneath it, don't misunderstand that.

Q. But whether it was sand or clay surface, since 1885 it has been used by pedestrians going back and forth on Ocean Avenue? A. Yes. 10

RE-DIRECT EXAMINATION by Mr. Carton:

Q. Olden Avenue, do you know where Philadelphia Boulevard is? A. Now, it was Olden Avenue when I lived there. It was on the north side of the Crescent.

Q. That is Crescent Park there (indicating on 20 map). A. Yes, sir.

Q. Olden Avenue was the street that came down on the north side of the park? A. That is right.

FRANK DURAND, called as a witness in behalf of the defendant, being first duly sworn according to law on his oath says:

30

Direct-examination by Mr. Carton:

Q. Mr. Durand, you are the Mayor of the Borough of Sea Girt? A. I am.

Q. How long have you been connected with the Borough officially in any way? A. Since 1921.

Q. What do you know with regard to whether there are water and sewer pipes installed in any part of Ocean Avenue? A. There are two sections where the water and sewers have been installed. 40

Frank Durand—Direct

There is a sewer and water main extending in front of Block 2 as shown on the blue print between Chicago and Beacon Boulevards, and there is also an extension of sewer and water through Ocean Avenue—not Chicago and Beacon,
10 Chicago and Brooklyn. And there is also an extension across Ocean Avenue to reach the bathing pavilion of the Borough.

Q. Where is the present bathing pavilion of the Borough? A. The bathing pavilion is located east of Ocean Avenue between Chicago and Beacon Boulevards.

The Court: You said the sewer and water was in front of Block 2, you meant Block
20 3?

Witness: I should have made a correction at the same time; it is in front of Block 3.

Q. Is that where it is marked “pavilion” on this map? A. Yes.

Q. Immediately east of the proposed line of the proposed boardwalk? A. Yes, it is.

Q. How is access had to that pavilion from the
30 street? A. There is at the present time a boardwalk surrounding the pavilion and extending from the north line of Chicago Boulevard around in front of the pavilion and then north again to the south line of Beacon Boulevard, and that boardwalk was constructed with ramps extending from the sidewalk to the boardwalk. The north ramp has since been removed because the street has been brought up to the proper grade. You can
40 reach the boardwalk without using the ramp.

Albert C. Hulett—Direct

Q. Is this part of Ocean Avenue open and accessible for use? A. Oh yes, this section adjacent to the pavilion has been graded and graveled and is used by our summer people and others who come down to use the pavilion.

Q. You don't know when the water and sewer pipes were laid, or by whom, do you, Mr. Durand? 10

A. They were laid by the Borough under the direction of the Superintendent, I think in 1924.

Q. And that is the first sewer or water that was laid in the street by the Borough? A. The first to my knowledge.

Q. Is there any record of any more in the books, could you find? A. Our Superintendent, Mr. Roberts, may have a record. I don't know of any personally. 20

Mr. Carton: I think that completes the proofs, your Honor.

The Court: Have you anything else, Mr. Quinn.

Mr. Quinn: I will call Dr. Hulett.

ALBERT C. HULETT, one of the complainants, called in rebuttal, being first duly sworn according to law on his oath says: 30

Direct-examination by Mr. Quinn:

Q. Doctor, you are one of the owners of lots in Block No. 7? A. I am.

Q. What are the numbers of your lots? A. That is a difficult thing for me to remember. 40

Albert C. Hulett—Direct

Q. Well, approximate them, we will correct you if you are wrong? A. I understand it is 6 and 7.

Q. 6 and 7? A. Yes, I believe that is correct.

Q. How long have you lived there, Doctor? A. Since about two years.

10 Q. Your lot adjoins Ocean Avenue? A. Yes.

Q. And in order to reach Ocean Avenue, has there ever been any obstruction in your way over the streets in order to reach Ocean Avenue? A. No.

Q. In order to walk on Ocean Avenue east, north or south, has there ever been any obstruction on Ocean Avenue to prevent you walking freely? A. No.

20 Q. And did you have access from Ocean Avenue and also up and down it? A. Yes.

Q. Have you always had since the time you have owned your lots? A. Yes.

Q. Have other persons using this public road had free access over it east and west and up and down it, north and south? A. Except for inequalities of the beach level due to the tide.

Q. That is the only obstruction? A. Yes, sir.

30 Q. Are there any sidewalks on the west side?
A. You are speaking of Block 7?

40 Q. Yes. A. At the northerly end of the block, yes, and to the easterly side of the sidewalk is what I would call a wind break. It seems to me it is not more than four feet and was erected by the private property owners up to a certain point as far north as Sea Bright, to prevent the sand from blowing over the lawn, especially in the winter time.

Albert C. Hulett—Cross

Q. Doctor, from lot No. 7, did you have a free and unobstructed view down Ocean Avenue? A. Yes, from my property.

Q. Does that include a view of the beach up to high water mark? A. Certainly.

Q. Is that free and unobstructed all the way down the Avenue from your place? A. Except for the undulations of the beach, yes. 10

Q. If a structure or piling twelve feet high were erected within that view you have just described, would there be a different view than what you would have gotten prior to that time? A. I would consider it so, yes.

Q. And if ramps, in number six, were erected from the proposed boardwalk and across the first half of Ocean Avenue to the other intersecting streets, would that be a different view than you had previously gotten? A. Certainly. 20

CROSS-EXAMINATION by Mr. Carton:

Q. Doctor, what is the present means of access to the ocean for bathing or other purposes from your property? A. Over the strand.

Q. Do you have steps down? A. I do.

Q. And they are out in Ocean Avenue, are they not? A. I am not an engineer, I cannot tell you where the line is. 30

Q. You know where the sidewalk is? A. I assume it is so, I am told about eight feet still remains, still is a public street.

Q. The obstruction which you say this proposed boardwalk and ramp would make for you, from what portion of your premises do you say these constructions would obstruct your view? A. I 40

Albert C. Hulett—Cross

would say any location on the premises from which you could look northeast or southwest.

Q. Suppose, Doctor, you were sitting on your porch, would your view eastward or northward be obstructed by these constructions? A. I would
10 say so, yes.

Q. Isn't it a fact, Doctor, that sitting on your porch, you could not even see the top of the board walk or the top of the ramps? A. I don't believe that.

Q. But isn't it a fact? A. No.

Q. Have you ever made any observations? A. It is quite impossible to determine it when the ramps have not yet been put there. How can you
20 determine that?

Q. It is said that they are from one-half foot to a foot and one-half below the sidewalk on the west side of the street, assuming that were so and they were built at that level, do you say notwithstanding, that sitting on your porch that would obstruct your view of the ocean? A. I would when my ground is properly graded as it should be.

Q. You mean if you graded your grounds down lower than they are now? A. No, level with the
30 part that is now graded and improved. Of course, there are the sand dunes in front of it that we are gradually taking away.

Q. Are the lands in front of your house graded?

A. For about twelve feet.

Q. And is that all you complain of here, Doctor?

Mr. Quinn: I object to that. As a matter of law it is for your Honor to decide that,
40 not what the witness might say.

Albert C. Hulett—Cross

Q. Doctor, you complain that the erection of this board-walk and the ramp would prevent the view you now have of the ocean? A. I think I have stated that, I think that is the substance of the complaint, I believe it has been signed and filed in writing. 10

Q. What is the substance of it? A. I do not retain those things—

Mr. Quinn: I object, if your Honor please.

We want to offer both of these maps, whichever your Honor thinks is the most convenient. One is the plan and the other contains the entire plan. 20

Mr. Carton: The names of the streets shown on Mr. Moore's map or blueprint are the present names of the streets, but the arrangements are exactly the same.

The Court: The location corresponds in both?

Mr. Carton: They are exactly the same.

The Court: I understand you both rest. I presume you will want to brief this matter. Have you your briefs ready? 30

Mr. Quinn: Mine is in preparation now, it will be ready in two or three days.

Mr. Carton: I will file mine within two days after I receive Mr. Quinn's.

The Court: As soon as I can after I receive your briefs I will try to dispose of this matter. I recognize the urgency of it and will give you my decision as promptly as I can. 40

STIPULATION.

IN CHANCERY OF NEW JERSEY

| | | | |
|----|--|---|---------------|
| | Between | } | On Bill, etc. |
| 10 | ALBERT C. HULETT, THOMAS POT- TER, ANNE M. GILLAN, MARIE E. PRUYN and JOSEPH MANN, | | |
| | Complainants, | | |
| | and | | |
| | THE BOROUGH OF SEA GIRT, a Municipal Corporation, | | |
| 20 | Defendant. | | |

It is stipulated and agreed between the parties hereto:

1. That the land constituting the Borough of Sea Girt was formerly owned by the Sea Girt Land Improvement Company, was mapped and plotted under and by virtue of a map entitled "The Ingham Map" in the year December 22, 1875 and subsequently an amended map known as

30 "The Anspach Map" was filed in September 12, 1878. The said maps or copies of same are offered in evidence and marked respectively exhibits one and two. Complainants' lots were sold to them by reference to the Anspach Map.

2. That on February 21, 1878 an agreement was entered into between the Sea Girt Land Improvement Company, a corporation of New Jersey, and

40 Charles S. Hinchman, Joseph B. Cooper, Hibberd Yarnall, Ellison B. Morris, Walter Hinchman,

Stipulation

Charles T. Taylor, J. A. Rippard, G. M. Reynolds and George R. Bedford which agreement was recorded in the Monmouth County Clerk's Office on September 12th, 1878 in book 306 page 185 and said agreement is offered in evidence and marked exhibit three. 10

3. The following complainants received their title through other persons or corporations other than the persons mentioned in stipulation No. 2, viz: Anna M. Gillan, Marie Pruyne.

4. That on the west side of Ocean Avenue in front of one half of the north section of Block 7 the sidewalks and curbs still remain and from that point easterly with the exception of alternate distances of between eight and twenty feet, Ocean Avenue is entirely sand beach proceeding at an incline towards the Ocean; these sidewalks and curbs were laid by the Borough of Sea Girt or its predecessors Wall Township in the year 20
This is the first attempted act of the Borough of Sea Girt or its predecessors to accept said Street.

5. It is further stipulated and agreed that when the sidewalks were laid on the west side that there was also a gravel road established and a wooden curb and clay side walks on the easterly side of Ocean Avenue on the same elevation as on the westerly side where the sidewalks and curb now show. 30

6. It is stipulated and agreed that the Borough of Sea Girt with the approval of the State Department and the United States War Department, have erected a jetty about at the center of Block No. 7 on said map extending from a point 40

Stipulation

feet from the westerly line of Ocean Avenue across said Avenue to the Ocean, which said jetty is now practically covered with beach sand at its westerly end. These jetties were built for the purpose of building up the beach to produce accretion where the sand had eroded on Ocean Avenue. There is also another jetty erected about five hundred feet south of the above mentioned jetty.

7. The complainants Anne M. Gillan, Marie Pruyt have the following restriction contained in their deeds, viz:

“And the party of the first part do hereby covenant, promise and agreed to and with the said party of the second part, his heirs and assigns, that they, the said party of the first part, their successors and assigns, will not erect any structure in front of the premises hereby granted and conveyed, between the same and the Ocean or therein, or use the said front of the premises otherwise than as a public Avenue and promenade.”

The above covenant was contained in the original deed of the Sea Girt Land Improvement Company and the other predecessors in title of the above named complainants.

In the deeds of the complainants Albert C. Hulett is contained the following clause:

“Subject to the covenants, conditions and restrictions contained in former deeds effecting the above described premises.”

Stipulation

8. On or about the year the Sea Girt Company took over all of the assets including land holdings of the Sea Girt Land Improvement Company and continued the sale of lots by reference to the maps above referred to.

10

9. On or about November 18th, 1907, Frank Durand and Florence B. Durand, his wife, sold and conveyed to the Sea Girt Company, by bargain and sale deed, a tract of land described as follows:

“Bounded easterly by the Atlantic Ocean; southerly by the property known as the Beach House plot, being at the southerly side or line of Crescent or Hamilton Avenue; westerly by a line 80 feet easterly from the easterly side or line of Ocean Avenue or Atlantic Avenue; northerly by a line parallel to the southerly boundary and distant 500 feet northerly therefrom.

20

Said above described property is eighty feet east of Ocean Avenue and in front of Block No. 7 and other properties and said deed contained the following clause:

30

“Said tract above described as second tract is hereby conveyed subject to the restrictions contained in deeds for lots in Block 7 on the map of Sea Girt.

Said above mentioned second tract with other property has since been conveyed to the Borough of Sea Girt by deed from Catherine A. Yard, widow, dated June 19th, 1923, recorded in Monmouth County Clerk's Office in Book 1224 page

40

Stipulation

497 etc. which deed contained no covenant, restriction or condition.

10 10. It is further stipulated and agreed that in front of complainant's Gillan's property the boardwalk will be erected upon wooden piles which piling will extend from the stand approximately ten feet high and in front of all of the other lots in Block 7. Said board walk will be erected upon wooden piles varying from eight to eleven feet high to the surface of the board walk.

20 11. It is further stipulated and agreed that the plans and specifications of said boardwalk do not include or call for any railings, lighting standards or anything else to be erected above the surface of said board walk or approaches. Said pilings upon which the boardwalk will be erected will average approximately ten inches in diameter.

30 It is also stipulated and agreed that in front of Block 7 that there are no approaches to the boardwalk from the property lines of Block 7; that the nearest approach to the boardwalk over Block 7 is the Philadelphia Boulevard and Trenton Boulevard; that the approaches on Philadelphia Boulevard and Trenton Boulevard are ramp approaches extending from the street intersections easterly to the boardwalk and these approaches will be erected on pilings approximately eight to ten feet high at the boardwalk proper and extending across Ocean Avenue to the various streets on an incline.

40 12. It is further stipulated and agreed that the height, level or surface of the proposed boardwalk

Stipulation

is approximately between one half foot and one foot and one half below the height, level or surface of the sidewalk on the westerly side of Ocean Avenue where the same now shows in front of Block 7, and it is further agreed that if the elevation of the sidewalk on the westerly side of Ocean Avenue as now shown were continued that the boardwalk would be approximately a foot to a foot and one half below said elevation continuing the entire length of the board walk. 10

13. It is stipulated and agreed that Ocean Avenue is one hundred feet wide and that the proposed boardwalk is to be built on the easterly twenty-five feet sidewalk portion of said Ocean Avenue but that the board walk itself will be sixteen feet in width and the approaches will run from that point to the various street entrances as heretofore mentioned. 20

14. It is stipulated and agreed that Exhibits C-1 and C-2 are the Anspach Map and the Ingham Map and the only two available are so large and cumbersome it is agreed by counsel to eliminate them from the record, but both maps have been filed with the Clerk in the event that the Court desires to make an inspection thereof. 30

QUINN, PARSONS & DOREMUS,
Solicitors of Complainants.

DURAND, IVINS & CARTON,
Solicitors of Defendant.

ADDITIONAL STIPULATION.

IN CHANCERY OF NEW JERSEY

| | | |
|----|---------|-----------------------------------|
| 10 | Between | |
| | | ALBERT G. HULETT, <i>et als</i> , |
| | | Complainant, |
| | | and |
| | | BOROUGH OF SEA GIRT, |
| | | Defendant. |

IT IS HEREBY STIPULATED that Joseph Mann and Bertha Mann, his wife, are the owners of Lot No. 10 in Block No. 7 on the Anspach map. This lot is also known as lot No. 5 Block No. 60 on the Ingham map. The chain of title for complainant Mann's property is as follows:

| | | |
|---|--|--|
| SEA GIRT LAND IMPROVE- MENT COMPANY, | | Deed dated January 15, 1876 Recorded April 1, 1876 Book 279 page 435 |
| to | | |
| CHARLES S. HINCHMAN. | | |

30

CONVEYS

Lots Nos. 5 and 6, Block 60, on Ingham map.

Under and subject nevertheless to the following conditions and restrictions that is to say, that no blacksmith shop, livery stable, glue, soap, candle, gas or starch manufactory, carpenter shop, slaughter house or other building for offensive occupation shall ever be erected or used upon the above described lot of ground or any part thereof and that no intoxicating liquors shall be sold upon the said property and that the line of any building

Additional Stipulation

erected thereon shall be distant not less than twenty-five feet from the Boulevard in front of said lots. And the said party of the first part do hereby covenant, promise and agree to and with the said party of the second part, his heirs and assigns, that at the time of the sealing and delivery hereof, they the said party of the first part, were seized in their own right of an absolute and indefeasible estate of inheritance in fee simple of and in all and singular the premises hereby granted with the appurtenances. 10

| | | |
|---|---|----|
| LYDIA S. HINCHMAN, C. RUSSELL HINCHMAN, Executors of the last Will and Testament of CHARLES S. HINCHMAN, de- ceased, and LYDIA S. HINCH- MAN, widow of CHARLES S. HINCHMAN, deceased, to ADOLPH H. HOLTHUSEN. | DEED Dated August 25, 1923 Recorded No- vember 21, 1923 Book 1241 Page 293 | 20 |
|---|---|----|

CONVEYS

BEING lot No. 5 block 60 as shown on map of Sea Girt made by Charles F. Ingham, Engineer, duly filed in the Monmouth County Clerk's Office and a strip of land fifty feet wide extending in front of said lot between what was the westerly line of Atlantic Boulevard as shown on said Ingham's map and the westerly line of Ocean Avenue as shown on the maps of Sea Girt made by F. J. Anspach, Engineer, and Frank Osborn, Engineer, respectively, both duly filed in said Clerk's office. 30 40

Additional Stipulation

Also known as lot No. 10 block 7 on map of property on Ocean Avenue Sea Girt, New Jersey, made by Frederick J. Anspach, 1877 and more particularly shown on map of Block 7 made by Singerbeaux and Moore, Engineers, Dec. 1922 and
 10 intended to be filed in said Clerk's office.

BEING part of the same property which Sea Girt Land Improvement Company conveyed unto the said Charles S. Hinchman by deed dated January 15, 1876 and recorded in said Clerk's office in Book 279 of Deeds, pages 435 etc.

UNDER and subject to the restrictions embodied in the deed from Sea Girt Land Improvement
 20 Company.

| | |
|--|---|
| ADOLF H. HOLTHUSEN and CLARA L. HOLTHUSEN, his wife, to JOSEPH F. MANN and BERTHA A. MANN, his wife. | DEED dated August 25, 1924 Recorded October 1, 1924 Book 1276 of Deeds, page 24 |
|--|---|

CONVEYS

30 BEING the southerly twenty-five (25) feet of lot No. 4 and all of lot No. 5 in Block 60 as shown on map of Sea Girt made by Charles F. Ingham, Engineer, duly filed in the Monmouth County Clerk's office and a strip of land fifty (50) feet wide extending in front of said lots between what was the westerly line of Atlantic Boulevard as shown on said Ingham Map and the westerly
 40 line of Ocean Avenue as shown on the maps of Sea Girt made by Frederick J. Anspach, Engineer

Additional Stipulation

and Frank Osborn, Engineer, respectively, both duly filed in said Clerk's office. Said lots being also known as the southerly one half of lot No. 11 and all of lot No. 10 in Block 7 on map of property on Ocean Avenue, Sea Girt, New Jersey, made by Frederick J. Anspach, 1877 and more particularly shown on map of Block 7 made by Sincerbeaux and Moore, Engineers, December 29, 1922 and intended to be filed in said Clerk's office. 10

BEING part of the same premises described in a deed from Charles S. Taylor and wife to Adolph H. Holthusen, bearing date October 2, 1923 and recorded in the Monmouth County Clerk's office in Book 1241 of Deeds pages 295 etc., November 21, 1923 and all of the premises described in a deed from Lydia S. Hinchman *et als*, Executors etc. to Adolph H. Holthusen bearing date August 25, 1923 and duly filed in said Clerk's Office in Book 1341 of Deeds pages 293 etc. November 21, 1923. 20

UNDER and subject to all the covenants, conditions and restrictions contained in former deeds for said premises.

NOTE: There is no covenant with reference to the erection of structures as set forth in complainant's bill in this title; but is contained in titles of Compls. Gillan and Pruyn. 30

IT IS HEREBY STIPULATED that Albert G. Hulett is the owner of lot No. 11 in Block No. 7 on the Anspach map. This lot is also known as lot No. 4 Block No. 60 on the Ingham map. The chain of title for complainant Hulett's property is as follows: 40

Additional Stipulation

| | | | |
|----|---------------------------------------|----|---|
| 10 | SEA GIRT LAND IMPROVEMENT COMPANY, | to | DEED dated January 15, 1876 Recorded April 1, 1876 Book 279 page 426 |
| | CHARLES S. TAYLOR. | | |

CONVEYS

Lots Nos. 3 and 4, Block 60, on the Ingham map.
Under and subject, nevertheless to the following conditions and restrictions, that is to say: that no blacksmith shop, livery stable, glue, soap, candle, gas or starch manufactory, carpenter shop, slaughter house, or other building for offensive occupation shall ever be erected or used upon the above described lot of ground, or any part thereof, and that no intoxicating liquors shall be sold upon the said property and that the line of any building erected thereon shall be distant not less than twenty-five feet from the Boulevard in front of said lots.

| | | | |
|----|----------------------------|----|---|
| 30 | CHARLES S. TAYLOR—his wife | to | DEED dated October 2, 1923 Recorded No- vember 21, 1923 Book 1241 page 295 |
| | ADOLPH H. HOLTHUSEN. | | |

CONVEYS

BEING lots Nos. 3 and 4 in Block 60 as shown on map of Sea Girt made by Charles F. Ingham,
40 Engineer, duly filed in the Monmouth County

Additional Stipulation

Clerk's office and a strip of land fifty feet wide extending in front of said lots between what was the westerly line of Atlantic Boulevard as shown on said Ingham's map and the westerly line of Ocean Avenue as shown on the maps of Sea Girt made by F. J. Anspach, Engineer and Frank Osborn, Engineer, respectively, both fully filed in said Clerk's office. Also known as lots Nos. 11 and 12 in block 7 on map of property on Ocean Avenue, Sea Girt, New Jersey, made by Frederick J. Anspach, 1877 and more particularly shown on map of block 7 made by Singerbeaux and Moore, Engineers, Dec. 29, 1922 and intended to be filed in said Clerk's office. 10

BEING the same property which Sea Girt Land Improvement Company conveyed unto the said Charles S. Taylor by deed dated January 15, 1876 and recorded in said Clerk's office in Book 279 of Deeds, page 427 etc. 20

UNDER and subject to the restrictions in said deed set forth.

| | | |
|------------------------------|-----------------|----|
| ADOLF H. HOLTHUSEN and CLARA | DEED dated | |
| L. HOLTHUSEN, his wife, | August 25, 1924 | 30 |
| | Recorded Octo- | |
| to | ber 1, 1924 | |
| DAVID CLARK THOMPSON and | Book 1276 page | |
| JEAN THOMPSON, his wife, | 21 | |

CONVEYS

BEING all of lot No. 3 and the northerly one half of lot No. 4 in block 60 as shown on a map made by Charles F. Ingham, Engineer, duly filed 40

Additional Stipulation

- in the Monmouth County Clerk's office and a strip of land fifty (50) feet wide extending in front of said lots between what was the westerly line of Atlantic Boulevard as shown on said Ingham's map and the westerly line of Ocean Avenue as shown on the maps of Sea Girt made by Frederick J. Anspach, Engineer, and Frank Osborn Engineer, respectively, both duly filed in said Clerk's office. Said lots also being known as all of lot No. 12 and the northerly one half of lot No. 11 in Block 7 on map of property in Ocean Avenue Sea Girt, New Jersey, made by Frederick J. Anspach, 1877 and more particularly shown on map of block 7 made by Sincerbeaux and Moore, Engineers, December 29, 1922 and intended to be filed in said Clerk's office.

BEING part of the same premises described in a deed from Charles S. Taylor and wife to said Adolf H. Holthusen bearing date October 2, 1923 and intended to be recorded in the Monmouth County Clerk's office in Book 1241 of Deeds, pages 295 etc., November 21, 1923.

- UNDER and subject to all the covenants, conditions and restrictions contained in former deeds for said premises.

Additional Stipulation

| | | |
|--|--|----|
| ADOLF H. HOLTHUSEN and CLARA L. HOLTHUSEN, his wife, to JOSEPH F. MANN and BERTHA A. MANN, his wife. | DEED dated August 25, 1924 Recorded Octo- ber 1, 1924 Book 1276 page 24 | 10 |
|--|--|----|

CONVEYS

BEING the southerly twenty-five (25) feet of lot No. 4 and all of lot No. 5 in Block 60 as shown on map of Sea Girt made by Charles F. Ingham, Engineer, duly filed in the Monmouth County Clerk's office and a strip of land fifty (50) feet wide extending in front of said lots between what was the westerly line of Atlantic Boulevard as shown on said Ingham Map and the westerly line of Ocean Avenue as shown on the maps of Sea Girt made by Frederick J. Anspach, Engineer, and Frank Osborn, Engineer, respectively, both duly filed in said Clerk's Office. Said lots being also known as the southerly one half of lot No. 11 and all of lot No. 10 in Block 7 on map of property on Ocean Avenue, Sea Girt, New Jersey, made by Frederick J. Anspach, 1877 and more particularly shown on map of Block 7 made by Sincerbeaux and Moore, Engineers, December 29, 1922 and intended to be filed in said Clerk's office.

BEING part of the same premises described in a deed from Charles S. Taylor and wife to Adolph H. Holthusen, bearing date October 2, 1923 and recorded in the Monmouth County Clerk's Office in Book 1241 of Deeds, page 295 etc., November 21, 1923 and all of the premises described in a deed

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Additional Stipulation

from Lydia S. Hinchman *et als* Executors etc. to Adolph H. Holthusen bearing date August 25, 1923 and duly filed in said Clerk's office in Book 1341 of Deeds page 293 etc. November 21, 1923.

- 10 UNDER and subject to all the covenants, conditions and restrictions contained in former deeds for said premises.

| | |
|--|---|
| JOSEPH F. MANN and BERTHA A. MANN, his wife, to WALTER SLACK. | DEED dated March 29, 1926 Recorded May 4, 1926 Book 1349 page 140 |
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CONVEYS

- BEING the southerly 25 feet of lot #4 in Block Sixty as shown on Map of Sea Girt made by Charles F. Ingham, Engineer duly filed in the Monmouth County Clerk's Office and a strip of land 50 feet wide extending in front of said part of lot #4 between what was the westerly line of Atlantic Boulevard as shown on said Ingham's Map and the westerly line of Ocean Avenue as
- 30 shown on the Maps of Sea Girt made by Frederick J. Anspach, Engineer and Frank Osborn, Engineer, respectively, both duly filed in said Clerk's Office. Said lot also being known as the southerly half of lot #11, in Block 7, on Map of property on Ocean Avenue, Sea Girt, N. J. made by Frederick J. Anspach, 1877 and more particularly shown on map of Block 7 made by Sincerbeaux and Moore, Engineers, December 29, 1922 and
- 40 intended to be filed in said Clerk's office.

Additional Stipulation

BEING a part of the same premises described in a deed from Adolf H. Holthusen and wife to the said Joseph F. Mann and Bertha A. Mann, bearing date August 25, 1924, recorded in the Monmouth County Clerk's office in Book 1276 of Deeds, page 24 etc. October 1, 1924. 10

Under and subject to all the covenants, conditions and restrictions contained in former deeds for said premises.

| | | |
|---|---|----|
| DAVID CLARK THOMPSON and JEAN THOMPSON, his wife, to WALTER SLACK. | DEED dated April 30, 1926 Recorded May 4, 1926 Book 1349 page 142 | 20 |
|---|---|----|

CONVEYS

BEING the northerly 25 feet of lot #4 in Block Sixty as shown on Map of Sea Girt made by Charles F. Ingham, Engineer, duly filed in the Monmouth County Clerk's office and a strip of land 50 feet wide extending in front of said part of lot #4 between what was the westerly line of Atlantic Boulevard as shown on said Ingham's Map and the westerly line of Ocean Avenue as shown on the Maps of Sea Girt made by Frederick J. Anspach, Engineer and Frank Osborn, Engineer, respectively, both duly filed in said Clerk's office. Said lot also being known as the northerly half of lot #11 in Block 7 on Map of property on Ocean Avenue, Sea Girt, N. J., made by Frederick J. Anspach, 1877 and more particularly shown on map of Block 7 made by Sincer- 30 40

Additional Stipulation

beaux and Moore, Engineers December 29, 1922 and intended to be filed in said Clerk's office.

10 BEING a part of the same premises described in a deed from Adolf H. Holthusen and wife to the said David Clark Thompson and Jean Thompson, bearing date August 25, 1924 and recorded in the Monmouth County Clerk's office in Book 1276 of Deeds, page 21 etc. on October 1, 1924.

Under and subject to all the covenants, conditions and restrictions contained in former deeds for said premises.

| | | |
|----|--|--|
| 20 | WALTER SLACK and AMY J. SLACK, his wife, to ALBERT G. HULETT. | DEED dated June 13, 1928 Recorded July 7, 1928 Book 1447 page 50 |
|----|--|--|

CONVEYS

FIRST TRACT

30 BEING the southerly twenty-five (25) feet of Lot No. 4 on Block No. 60 as shown on map of Sea Girt made by Charles F. Ingham, Engineer, duly filed in the Monmouth County Clerk's office and a strip of land fifty (50) feet wide extending in front of said part of Lot No. 4 between what was the westerly line of Atlantic Boulevard, as shown on said Ingham's Map and the westerly line of Ocean Avenue, as shown on the maps of Sea Girt made by Frederick J. Anspach, Engineer and Frank 40 Osborn, Engineer, respectively, both duly filed in

Additional Stipulation

said Clerk's office, said lot being also known as the southerly half of Lot No. 11 in Block No. 7 on map of property of Ocean Avenue, Sea Girt, New Jersey, made by Frederick J. Anspach, 1877 and more particularly shown on map of block No. 7 made by Sincerbeaux and Moore, Engineers, December 29, 1922 and intended to be filed in said Clerk's office. 10

Being the same premises described in a deed from Joseph F. Mann and wife to said Walter Slack, bearing date March 29, 1926 and recorded in the Monmouth County Clerk's Office in Book 1349 of Deeds page 140 etc., May 4, 1926.

SECOND TRACT

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BEING the northerly twenty-five feet of Lot No. 4 in Block No. 60 as shown on map of Sea Girt made by Charles F. Ingham, Engineer, duly filed in the Monmouth County Clerk's Office, and a strip of land fifty (50) feet wide extending in front of said part of Lot No. 4 between what was the westerly line of Atlantic Boulevard, as shown on said Ingham's Map, and the westerly line of Ocean Avenue, as shown on the Maps of Sea Girt, made by Frederick J. Anspach, Engineer, and Frank Osborn, Engineer, respectively, both duly filed in said Clerk's Office; said lot also being known as the northerly half of Lot No. 11 in Block No. 7, on map of property of Ocean Avenue, Sea Girt, N. J., made by Frederick J. Anspach, 1877, and more particularly shown on map of Block No. 7 made by Sincerbeaux & Moore, Engineers, December 29, 1922 and intended to be filed in said Clerk's office. 30 40

Additional Stipulation

BEING the same premises described in a deed from David Clark Thompson and wife to said Walter Slack, bearing date April 30, 1926 and recorded in the Monmouth County Clerk's office in Book 1349 of Deeds, page 142 etc. May 4, 1924.

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Subject to covenants, conditions and restrictions contained in former deeds pertaining to said premises.

Note: There is no covenant with reference to the erection of structures as set forth in complainant's bill in this title.

IT IS HEREBY STIPULATED that Thomas Potter is the owner of lot No. 12 in Block No. 7 on the Anspach map. This lot is also known as lot No. 3 Block No. 60 on the Ingham map. The chain of title for complainant Potter's property is as follows:

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| | | |
|---------------------------------------|----|---|
| SEA GIRT LAND IMPROVEMENT COMPANY, | to | DEED dated January 15th, 1876 Recorded April 1, 1876 Book 279 page 426 |
| 30 CHARLES S. TAYLOR. | | |

CONVEYS

Lots Nos. 3 and 4, Block 60, on the Ingham map.

Under and subject, nevertheless to the following conditions and restrictions, that is to say: that no blacksmith shop, livery stable, glue, soap, candle, gas or starch manufactory, carpenter shop, slaughter house, or other building for offensive

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Additional Stipulation

occupation shall ever be erected or used upon the above described lot of ground, or any part thereof, and that no intoxicating liquors shall be sold upon the said property and that the line of any building erected thereon shall be distant not less than twenty-five feet from the Boulevard in front of said lots. 10

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|--|---|
| CHARLES S. TAYLOR— his wife, to ADOLPH H. HOLTHUSEN | Deed dated October 2, 1923 Recorded November 21 1923 Book 1241 page 295 |
|--|---|

CONVEYS

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BEING lots Nos. 3 and 4 in Block 60 as shown on map of Sea Girt made by Charles F. Ingham, Engineer, duly filed in the Monmouth County Clerk's office and a strip of land fifty feet wide extending in front of said lots between what was the westerly line of Atlantic Boulevard as shown on said Ingham's map and the westerly line of Ocean Avenue as shown on the maps of Sea Girt made by F. J. Anspach, Engineer, and Frank Osborn, Engineer, respectively, both fully filed in said Clerk's office. 30

Also known as lots Nos. 11 and 12 in block 7 on map of property on Ocean Avenue, Sea Girt, New Jersey, made by Frederick J. Anspach, 1877 and more particularly shown on map of block 7 made by Sincerbeaux and Moore, Engineers, Dec. 29, 1922, and intended to be filed in said Clerk's office. 40

Additional Stipulation

BEING the same property which Sea Girt Land Improvement Company conveyed unto the said Charles S. Taylor by deed dated Jan. 15, 1876 and recorded in said Clerk's Office in Book 279 of Deeds, page 426 &c.

10 UNDER and subject to the restrictions in said deed set forth.

| | |
|---|---|
| ADOLPH H. HULTHUSEN and CLARA L. HOLTHUSEN, his wife, to DAVID CLARK THOMPSON and JEAN THOMPSON, his wife. | Deed Dated Au- gust 25, 1924 Recorded Octo- ber 1, 1924 Book 1276 page 21 |
|---|---|

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CONVEYS

BEING all of lot No. 3 and the northerly one half of lot No. 4 in block 60 as shown on a map made by Charles F. Ingham, Engineer, duly filed in the Monmouth County Clerk's office and a strip of land fifty (50) feet wide extending in front of said lots between what was the westerly line of Atlantic Boulevard as shown on said Ingham's

30 map and the westerly line of Ocean Avenue as shown on the maps of Sea Girt made by Frederick J. Anspach, Engineer, and Frank Osborn, Engineer, respectively, both duly filed in said Clerk's office. Said lots also being known as all of lot No. 12 and the northerly one half of lot No. 11 in Block 7, on map of property in Ocean Avenue, Sea Girt, New Jersey, made by Frederick J. Anspach, 1877 and more particularly shown on

40 map of block 7 made by Sincerbeaux and Moore, Engineers, December 29, 1922, and intended to be filed in said Clerk's office.

Additional Stipulation

BEING part of the same premises described in a deed from Charles S. Taylor and wife to said Adolf H. Hulthusen bearing date October 2, 1923 and intended to be recorded in the Monmouth County Clerk's office in Book 1241 of Deeds, page 295, &c. November 21, 1923. 10

UNDER and subject to all the covenants, conditions and restrictions contained in former deeds for said premises.

| | | |
|--|---|----|
| DAVID CLARK THOMPSON and JEAN THOMPSON, his wife, | DEED dated May 3, 1928 Recorded May 7, 1928 Book 1437 page 326 | 20 |
| to | | |
| EMMA E. OSBORN | | |

CONVEYS

BEING Lot #3, in Block 60, as shown on a map made by Charles F. Ingham, Engineer, duly filed in the Monmouth County Clerk's office and a strip of land fifty feet wide extending in front of said lot between what was the westerly line of Atlantic Boulevard as shown on said Ingham's 30 map and the westerly line of Ocean Avenue as shown on the maps of Sea Girt made by Frederick J. Anspach, Engineer and Frank Osborn, Engineer, respectively, both duly filed in said Clerk's office. Said Lot also being known as lot No. 12 in Block 7 on a map of property of Ocean Avenue, Sea Girt, New Jersey, made by Frederick J. Anspach, 1877 and more particularly shown on map of Block 7 made by Sincerbeaux 40

Additional Stipulation

and Moore, Engineers, December 29, 1922 and intended to be filed in said Clerk's office.

10 Being a part of the premises conveyed to the said David Clark Thompson by Adolf H. Hultusen and wife by deed dated August 25, 1924 and recorded in the office of the Clerk of Monmouth County in Book 1276 of Deeds, page 21 &c.

Together with the furniture, fixtures and other contents of the house on the said premises.

20 This conveyance is made subject to all covenants, conditions and restrictions of record affecting the said premises.

| | | |
|---|--|--|
| EMMA E. OSBORN and MUR- VIN OSBORN, her husband, | | DEED dated May 22, 1928 Recorded June 21, 1928 Book 1446 page 96 |
| to | | |
| THOMAS POTTER | | |

CONVEYS

30 Same premises by same description as described in deed made by David Clark Thompson and Jean Thompson, his wife, to Emma E. Osborn, dated May 3, 1928 and recorded in Book 1437 of Deeds, page 326.

40 Being the same premises described in a deed from David Clark Thompson and Jean Thompson, his wife, to the said Emma E. Osborn, bearing date May 3, 1928 and duly recorded in the Monmouth County Clerk's office on May 7, 1928.

Additional Stipulation

TOGETHER with the furniture, fixtures and other contents of the house on the said premises.

This conveyance is made subject to all covenants, conditions and restrictions of record affecting the said premises.

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Note: There is no covenant with reference to the erection of structures as set forth in complainant's bill in this title.

* * * * *

IT IS ALSO STIPULATED that the original deed for 1 of compl't Pruy'n's lots, viz., lot No. 13 in Block No. 7 on the Anspach map, also known as lot No. 2, Block No. 60, on the Ingham map, was a deed from the Sea Girt Land Improvement Company to Walter Hinchman, dated January 7th, 1878 and recorded in the Monmouth County Clerk's office February 6, 1878 in Book 300 of Deeds, page 57, and contains no restrictions with reference to structures &c. as set forth in complainant's bill and that the title to complainant's Pruy'n said lot does not carry the restriction with reference to structures &c. as set forth in complainant's bill.

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QUINN, PARSONS & DOREMUS,
Solicitors for Complainants.

DURAND, IVINS & CARTON,
Solicitors for Defendant.

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EXHIBIT C-3.

AGREEMENT

| | | |
|----|--|---------------------------|
| 10 | THE SEA GIRL LAND IMPROVEMENT COMPANY, a corporation of New Jersey, | Dated Feb. 21, 1878. |
| | To | |
| | CHAS. S. HINCHMAN, JOSEPH B. COOPER, HIBBERD YARNALL, ELLISTON B. MORRIS, WALTER HINCHMAN, CHARLES S. TAYLOR, J. A. RIPPARD, Trustee, G. M. REYNOLDS, GEORGE R. BEDFORD. | Ack'd Feb. 22, 1878. |
| | | Rec'd September 12, 1878. |
| 20 | | Book 306, page 185. |

WHEREAS

The said The Sea Girt Land Improvement Company'' purchased a tract of land in the County of Monmouth in the State of New Jersey for the purpose of laying the same out in lots and selling the same for the purpose of building, &c., and establishing a town or city, and did cause said tract of land to be laid out into streets and Parks and building lots and a map or plan thereof to be made by Charles F. Ingham, Engineer and filed in the office of the Clerk of said Monmouth County and proceeded and sold to the several persons being the party of the second part hereto certain lots on said plan,

And Whereas it is deemed advisable by the said The Sea Girt Land Improvement Company and believed for the best interests of all parties con-

Exhibit C-3

cerned to alter and change the said plan of map of said tract of land and to lay the same out into Streets, Parks and lots in accordance with a plan or map to be made by Frederick J. Anspach, and in order to make the same effectual so far as the same may be, the said several persons constituting the party of the second part hereto have agreed to consent thereto and to release all claims to be continuance of the said plan or map made by the said Charles F. Ingham and adopted the same plan made by the said Frederick J. Anspach upon the said company party of the first part hereto performing or agreeing to perform certain conveyances, covenants and agreements,

Now Therefore This Agreement witnesseth that the said The Sea Girt Land Improvement Company" for and in consideration of the premises and the performance of the said covenants and agreements hereinafter specified and agreed to be performed by the said party of the second part, and the further consideration of the sum of One Dollar to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged doth hereby for itself, and its successors covenant and agree to and with the said party of the second part and their heirs and assigns that it will adopt and dedicate forever, the streets and Crescent Park as shown and represented on the said map or plan made by the said Frederick J. Anspach, a copy whereof is hereunto attached, and that it will convey free of encumbrances to all the said party of the second part who have purchased or now hold lots of land on Atlantic Boulevard between said Crescent Park

Exhibit C-3

and the Atlantic Ocean the land in front of their respective lots of the full width of their lots fifty feet from the west line of said Boulevard as shown on said map or plan of said lands made by the said Charles F. Ingham to the west line of said

10 Boulevard as now adopted and shown on said map or plan made by said Frederick J. Anspach and will grant to them respectively the right or privilege of a *carraige* way to and from the rear of their respective lots into and through the said Crescent Park and will construct and continue the sewer now laid in Atlantic Avenue to the Beach House northerly through Crescent Park, near the rear of said lots of said party of the

20 second part as soon as possible and will permit no houses or buildings to be erected or built in front of said Crescent Park on a line further east than those already erected and built by Ellison P. Morris and Yarnall and Cooper, and will make all conveyances of said lots in front of said Crescent Park and between it and said Atlantic Boulevard subject to a covenant restricting the owners thereof to said building line, that it will not in

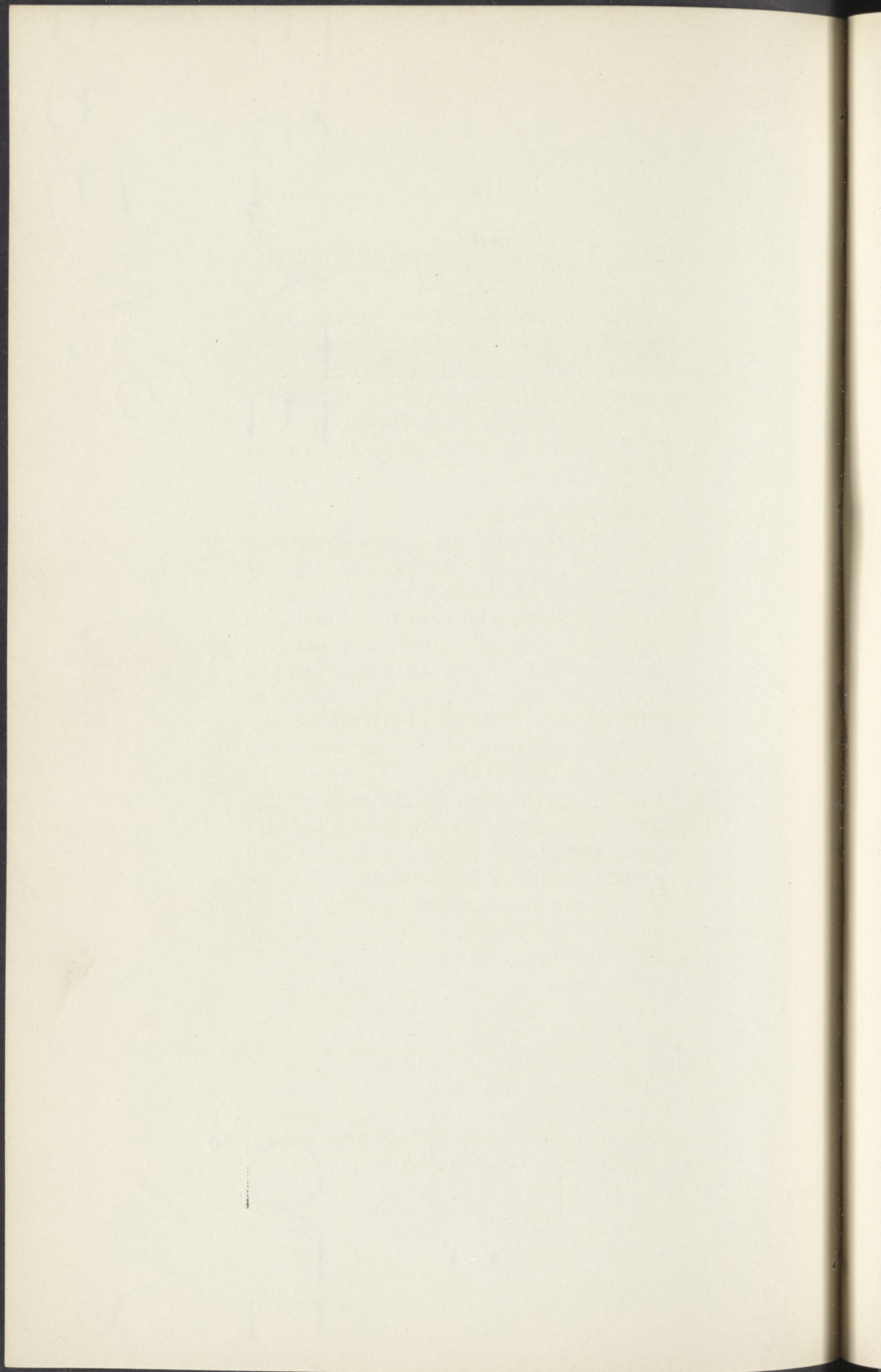
30 any way raise the grade of said Atlantic Boulevard between said Crescent Park and the Ocean, and that it will not permit any house or building to be erected on said Atlantic Boulevard north of the northerly part of said Park nearer than thirty feet to the west line of said Boulevard as shown on said map or plan of said Frederick J. Anspach and will make all conveyances of said lots on said Boulevard northward of said Park subject to a

40 covenant restricting the owners thereof to said building line and will grade, improve and keep in

Exhibit C-3

good and proper condition as a street for public travel, the avenue on said map or plan made by said Anspach running from the Railroad Depot in part on and nearly parallel with Ocean Avenue as shown on said map or plan made by said Ingham from said depot to the westerly part of said Crescent Park from and at all times after said Ocean Avenue shall be abandoned or closed. 10

In Consideration Whereof the said party of the second part being owners of lots of land in the aforesaid map or plan formerly owned by the said The Sea Girt Land Improvement Company do hereby respectively and each for himself, his heirs, executors, administrators and assigns 20 covenant and agree to and with the said The Sea Girt Land Improvement Company, its successors and assigns, that they the said party of the second part and each of them will consent and agree to the alteration and change of the said map or plan of said tract of land as shown upon the said map or plan made by the said Frederick J. Anspach, and signed by us respectively and that the same shall be filed in the Clerk's Office of the said County of Monmouth as a public road 30 and evidence of the laying out of said tract of land and the dedication of said streets and Crescent Park as thereon represented, and that we and each of us by proper deeds or conveyances made by the said The Sea Girt Land Improvement Company, its successors or assigns, or its or their counsel learned in the law will release any and all right that we or any of us may have or might have or claim in and to the Streets, Ave- 40 nues or Squares represented on the said map or plan heretofore made by the said Charles F. Ingham.



New Jersey Court of Errors and Appeals

Between

ALBERT G. HULETT, THOMAS
POTTER, ANNE M. GILLAN,
MARIE E. PRUYN and JOS-
EPH MANN,

Complainants-Appellants,

and

THE BOROUGH OF SEA GIRT, a
Municipal Corporation,
Defendant-Respondent.

On Appeal
from the Court
of Chancery.

BRIEF OF APPELLANTS.

STATEMENT.

This is an appeal from the decree of the Court of Chancery denying an injunction against the erection of a boardwalk and cross approaches eighty-four feet in length upon Ocean Avenue, a public street in the Borough of Sea Girt, which runs north and south. With but few exceptions, the facts are practically undisputed.

On or about September 16, 1929, respondent passed an ordinance (p. 9) providing for the erection of a boardwalk and cross approaches over the entire width of Ocean Avenue to said boardwalk.

Ocean Avenue is one hundred feet wide and is bounded easterly by the ocean, while all of com-

plainants are abutting landowners on the westerly side of Ocean Avenue. All of the complainants are owners of lots in Block 7 as shown on the Anspach map, upon which Ocean Avenue is laid out. The complainant Hulett is the owner of lot 11, Block 7. The complainant Mann owns lot 10, Block 7. The complainant Potter owns lot 12, Block 7. The complainant Pruyn owns lots 13, 14 and 15, and the complainant Gillan owns lots 16, 17, 18 and 19, in Block 7. The tide-waters of the ocean have depressed the easterly side of Ocean Avenue so that it is approximately eight to ten feet lower than the westerly side.

The ordinance provides for and limits the erection of a boardwalk on the eastwardly side of Ocean Avenue, but the plans and specifications provide for the erection of approaches eight feet in width, five in number, running east and west across the entire width of Ocean Avenue to meet and connect with the boardwalk.

The westerly side of Ocean Avenue is about the same grade as the other streets of the borough. The easterly side of Ocean Avenue, over its entire length, is approximately eight to ten feet lower in grade than the westerly side thereof.

The boardwalk proper is to be sixteen feet wide and approximately 2,000 feet long. The pilings upon which the boardwalk and the approaches, eighty feet in length, to be built, are between eight to ten inches in diameter, so that these two structures are permanent in character and are not intended to be temporary.

In order to walk north and south on Ocean Avenue for its entire width, it will be necessary, in the event the boardwalk and approaches are cre-

ated, to either climb over or under the ramp approaches, and this condition will exist almost the entire width and length of the avenue, because the approaches are erected over the eight foot depression above referred to, and then gradually incline toward the westerly side of the street. At present and for many years past, appellants, the abutting landowners, and the public at large could walk the entire length and width of Ocean Avenue without obstruction. The avenue has been also used for horseback riding. The complainants, the abutting landowners on the street, have always had free and unobstructed use of the highway.

If the proposed boardwalk and approaches are erected under this ordinance, the appellants, abutting landowners, when looking north or south will be confronted with a boardwalk erected on piling ten feet high, particularly on the easterly side of Ocean Avenue. From the boardwalk the cross section approaches are of the same height running the entire width across the avenue to meet the other streets of the borough.

The Borough of Sea Girt (including Ocean Avenue) constitutes land which was mapped and plotted under and by virtue of the Ingham map and the Anspach map, filed respectively in the years 1875 and 1877, and it is conceded that by reason thereof Ocean Avenue became by dedication a public street of the borough. Appellants derived title thru reference to said maps.

It is conceded by appellants that boroughs under the Home Rule Act are invested with the power to erect boardwalks, but it is contended that the Home Rule Act in this respect did not

contemplate the erection of an elevated boardwalk and approaches over the present grade of the street in such a manner as to constitute a nuisance in the highway and prevent the free and unrestricted use by abutting landowners.

The point raised in the trial below with reference to the restrictions contained in complainants' deeds, is abandoned by reason of the fact that the restrictions appeared subsequent to the dedication created by the filing of the maps above mentioned.

REVIEW OF TESTIMONY.

We think it advisable to review a portion of the testimony with reference to those facts more directly applying to appellants' contention.

The general conditions of the proposed boardwalk may be visualized through the testimony of the Borough Engineer, which, in part, is as follows:

1. The height of the proposed boardwalk above the present easterly level of Ocean Avenue is eight to ten feet (p. 65, ll. 28 to 40).
2. A person desiring to walk on the easterly side of Ocean Avenue, north or south, would be required to either walk under the ramps or climb over them (p. 66, ll. 5 to 18).
3. In order to have access to the ocean over Ocean Avenue, the abutting landowners must walk under the proposed structure (p. 66, ll. 35 to 40).
4. Before this proposed plan of structure, the abutting landowners had free access to walk over

Ocean Avenue without obstruction (p. 67, ll. 8 to 20).

5. The appellant abutting landowners, looking north, are confronted with these respective ramps rising eight feet above the present easterly grade of Ocean Avenue (p. 68, ll. 3 to 10).

6. Prior to this proposed plan, there was no obstruction to their view north and south on Ocean Avenue (p. 68, ll. 11 to 14 and ll. 22 to 40).

7. It has been the custom for many years for the abutting landowners to walk up and down Ocean Avenue (p. 71, ll. 27 to 32).

8. Part of Ocean Avenue in prior years had been used by carriages as well as pedestrians (p. 76, ll. 29 to 38).

ARGUMENT.

POINT I.

RESPONDENT'S ACTION INFRINGES UPON THE PRIVATE RIGHTS OF APPELLANTS, CAUSING SPECIAL INJURY, BECAUSE IT OBSTRUCTS THEIR LIGHT, AIR AND VIEW AND PREVENTS FREE ACCESS TO AND OVER THE HIGHWAY.

The ordinance, authorizing the proposed boardwalk and approaches, causes a special injury to appellants which is not suffered by the public at large, due to the fact that their view north and south will be obstructed by the ramp approaches to be erected across the entire width of the highway (p. 68, ll. 3 to 10); and, in addition, imposes

an additional burden upon them in the use of the highway, in being forced to climb over or walk under the ramp approaches (p. 66, ll. 5 to 18).

The contention of the respondent, which the learned Vice Chancellor sustained, was, that, inasmuch as the boardwalk and approaches and the ten foot high pilings upon which they are to be erected, will be so constructed that the height on the easterly side will be no higher than the grade of the westerly side of Ocean Avenue, that, therefore, it did not constitute an obstruction in the highway or encroach upon the rights of the abutting landowners, irrespective of the elevation ten feet above the present easterly grade of the avenue. It is urged by appellants, however, that the extent of their injury cannot be measured and that they are entitled to free use, light and access of the entire roadway, under the law applicable to the facts as found by the learned Vice Chancellor, who specifically pointed out in his findings two material instances where complainants' rights were violated, as follows (on page 42, lines 22 to 48, italics ours):

“They still have free access to the avenue and the passage over and on the avenue is not interfered with *except to the extent that they are required to pass over or under the boardwalk or its approaches, if they choose to walk on the sand.*”

The learned Vice Chancellor also said in his opinion (on page 43, lines 6 to 10, italics ours):

“So that there is no possibility of any obstruction to complainants' light, air or view except so far as the *view may be obstructed when the complainants look down toward the strand.*”

In the case of *Dill v. Board of Education*, 47 N. J. E., p. 421, the Court said, with reference to the slight injury to complainants and the rights of an abutting landowner:

“If we inquire what those rights are, we find that they are two-fold—first, a right of access from the abutting property, and a passage to and fro *over it in all its extent*; and second, a right of light, air, prospect and ventilation. These rights are quite distinct from each other and capable of being separately exercised and enjoyed. (Italics ours.)

“But, were the obstruction much less, I do not see how this Court could refuse on account of the smallness of the injury. To leave the complainants to their remedy at law (supposing that it exists) would be to say to them that they must part with their property for such price as they may realize out of an endless series of actions for damages—a result entirely contrary to right, justice and equity.

“An abutting owner necessarily enjoys certain advantages from the existence of an open street adjoining his property, which belongs to him by reason of its location, and are not enjoyed by the general public; such as the right of free access to his premises, and the free admission and circulation of light and air, and through his property.”

The Court said further, citing *Bechtel v. Carslake*, 11 N. J. E., p. 500:

“In that case there was a mere encroachment upon a private way, not amounting to a complete obstruction, and the Vice Chancellor said: ‘It is not a question of convenience—of how much space is suit-

able for the complainant—but one of right under the covenant. I think the complainants are entitled to the relief prayed for, and, I will advise a decree accordingly.’ ”

In *Interstate Com. Com. v. Cincinnati*, 167 U. S., p. 479 (cited with approval in *Union Towel Co. v. Jersey City*, 123 Atl., p. 254), it was said:

“The depriving of the public as is done in this instance, of the right to traverse the city streets to their full width, except for necessitous temporary private exigencies, is an invasion of the right of free, unobstructed public travel, which municipal corporations were impliedly created to preserve rather than to obstruct, as well as for the convenience of abutting owners, for, as was stated by Pitney, V. C., in *Metho-
dist Church v. P. R. R.*, 48 N. J. Equity, p. 454: ‘A right of way is property, and as such protected by the Constitution.’ ”

In the early case of *Barnett v. Johnson* (Err. & App.), 15 N. J. E., p. 481, commenting upon the rights of an abutting landowner, the Court said:

“The adjacent owners will not be perplexed with the questions as to who owns the roadbed, or whether this one owns half, or a quarter, or the whole. Each one gets what he is entitled to, viz., the *light and air from the whole highway, and not to a half.*” (Italics ours.)

Adopting and approving the doctrine of *Dill v. Board of Education*, *supra*, the rights of an abutting landowner were adjudicated in the case of *First National Bank of Montgomery v. Tyson*, 59 L. R. A., p. 399 (Ala.). There the obstruction consisted of the erection of pillars in front of a building, which pillars extended twenty-two inches

over the sidewalk onto the highway. The Court said:

“Pillars erected in front of a building so as to extend twenty-two inches onto the sidewalk are a public nuisance.

“The owner of a building abutting on a highway is specially injured by the erection of pillars in the street in front of an adjoining lot, so as to be entitled to an injunction, where they obstruct the light and air coming from the street to his property, and the view to and from his property along this street.

“An owner of land abutting on a public street has an *easement of view* from every part of the street, of which he cannot be deprived by encroachments placed on it by an adjacent proprietor.” (Italics ours.)

One of the most recent pronouncements on the questions involved in the instant case will be found in the case of *Armbruster, Inc. v. City of Wildwood*, 41 F. (2nd), p. 823, decided but a short time ago in the United States District Court in an opinion filed by Avis, District Judge. In that case, the highway ran parallel with the ocean front and a boardwalk was erected over this highway. The Court, holding that the plaintiffs suffered a special injury, said:

“The erection of the boardwalk in this public highway was without authority of law, and plaintiffs claim that it is a purpresture or public nuisance, but that their right to a decree is based upon the special damage or injury which the illegal erection of the boardwalk has caused to their property. * * * I am convinced that the obstruction and erections in Beach Avenue, if improperly and illegally there, are in the nature of a nuisance rather than a purpresture. * * *

"I am satisfied that the erection of the boardwalk in a public highway, constituted a public nuisance, and that its maintenance there is a continuing public nuisance. * * *

"The plaintiffs can obtain relief, only, if there is a showing that they have suffered special damage, or injury, different, and distinguishable from their injury as members of the public at large.

"It is apparent that the plaintiffs, under this principle of equity, have not been specially injured, except as the boardwalk obstructs their right of ingress to and egress from their lands which are located oceanward of Beach Avenue. It appears by the proofs that they have no access to their property, except by crossing the line of the boardwalk, which is not sufficiently high to permit vehicles to pass from the end of right angle streets, across Beach Avenue to their lands. In this, I believe, plaintiffs are irreparably injured, and entitled to relief."

In the instant case, the proposed boardwalk and cross approaches are to be erected on the easterly side of Ocean Avenue eight to ten feet higher than the present existing easterly grade of the street (p. 65, ll. 28 to 40), this easterly grade being lower by reason of the washing out by the tide waters, and the borough bases its right to erect this proposed boardwalk and its approaches eight to ten feet above the present elevation for the reason that while the erection is an elevated structure above the easterly grade, it does not, however, exceed the height of the grade on the westerly side of Ocean Avenue. We contend that this construction with cross approaches increases the general condition of disrepair of the public street, and at a sacrifice of

the eighty-four foot width of the street, it would only derive a benefit for walking purposes of 16 feet of the easterly side of the street. We find no authority in law to justify such a sacrifice.

Judge Avis, in his opinion, further said:

“The title and the right of control of the streets for street purposes are in the city. If the streets are obstructed, the city should clear them. Appellee may not take upon itself the vindication of the city’s or the public’s rights. But to have a free and unobstructed entrance is a property right—an easement appurtenant to the abutting realty. From continuous infractions of that right, appellee is entitled to relief.” (Citing *Donovan v. Pennsylvania Co.*, 199 U. S., p. 279.)

If the borough’s contention in the erection of this boardwalk and cross section approaches, on one side of a public highway to correspond with the grade on the westerly side, is logical, then for the purpose of improving a small portion of a public highway, the remaining portion of the highway could be obstructed and closed forever to public use, providing such obstruction went no higher than the established grade of other streets of the municipality. The learned Vice Chancellor, in his findings, practically bases the dismissal of the bill upon this ground.

While it is conceded that a municipality has the right to erect boardwalks, nevertheless, in accepting the dedication through the filing of the maps heretofore mentioned, the borough acquired no more rights than that given to it by the Home Rule Act and certainly was given no power to entirely demolish a public highway for ordinary

uses, for the sole purpose of making a walk of the nature contemplated here.

In the leading case of *Fessler v. Town of Union*, 67 N. J. E., p. 14 (affirmed by the Court of Errors and Appeals, 68 N. J. E., p. 657), the distinction between public and private rights, particularly with reference to an abutting landowner, was clearly laid down, and we take it to be the established law of the state. The question was whether or not a town hall and bell tower could be erected in a public square which was dedicated in practically the same manner as the public highway in question, by mapping, plotting, filing of maps and conveying lots by reference to the map. The Court said, Pitney, V. C.:

“Chancellor Zabriskie lays down the precise rights and estate of the original dedicatory, the city and the public, as follows: ‘The title or fee of the land is in the complainants. That title is subject to an easement which belongs to the public, which is the right to have it kept open and enjoyed as a public square. The defendants have no estate in it; their only right is the power and duty, as representatives of the public, to see to it that the public are not hindered in the enjoyment of their rights there.’

“The Legislature may have the right, so far as the public is concerned, to annul the dedication and yield up the right of the public; *but they have no power*, if the owners of the surrounding lots have the right as appurtenant to their lots to have this square kept open as a public square, to permit its occupation as against them for a town hall, nor to subject the title or fee, which is owned by the complainants, to a different easement from that which encumbered it when they acquired title. (Italics ours.)

“I desire to emphasize the distinction made by Chancellor Zabriskie, and which seems to me clearly to exist between the right of the public at large, including all persons who do not have land bounding upon the square in question, and the owners of lots bounding thereon. I am of the opinion, although perhaps, it is not necessary to the decision of the present case, that the owners of the lots bounding on the square have a private right *over and above that of the public at large to have the square kept open.*” (Italics ours.)

If the proposed boardwalk and cross section approaches are erected, it cannot be denied that such a structure will be permanent. When erected, Ocean Avenue will be completely destroyed for vehicular traffic, and pedestrians can only walk with difficulty by climbing over or under the cross section approaches. We submit that this is beyond the power contemplated by the Home Rule Act.

A case somewhat parallel with the case at bar will be found in *Poole v. Commissioners*, 80 Atl., p. 683. This is a Delaware opinion, and for convenience we will hereafter refer to it as the “Poole case.”

A tract of land was mapped and plotted on the ocean front, lots sold therefrom, and a street laid out paralleling the ocean. It was contended that the act of plotting the land, laying out streets, selling lots referring to the map, and the contemporaneous declarations of persons representing the corporation, constituted the dedication of the shore.

There was one material difference in this case and the case at bar in that there were verbal rep-

representations made by the original sellers of the tract in the Poole case, that the view of the ocean front would be kept free from obstructions. The principle, however, is the same, because Ocean Avenue is a public street and the abutting landowners' view and use of the highway would be secure irrespective and without the aid of any verbal representations. In the Poole case, the question involved was similar to the case at bar by reason of the view being destroyed when the abutting landowner looked to the north, there being no obstruction in the view toward the ocean.

The Court said:

“The public takes from the dedicator nothing which he did not intend to give it, but if the intention to give be clear the public may hold all that is so given.”

The Court said further:

“No part of the structure or fence is immediately in front of Poole's house, and his view directly in front, looking at right angles to the shore, is entirely unobstructed. *It is only the outlook to the north of the southerly line of Baltimore Avenue which is obstructed at all by the fence.* (Italics ours.)

“In my opinion, this structure, as it now is, is as to Mr. Poole, at least, such a substantial obstruction to his view as is prohibited by the dedication. His rights are to a full view and that no structure shall curtail it from any portion of his land.”

The tidal waves had encroached upon the dedicated land and washed it away, and as to this the Court said:

“The owners of land fronting on Surf Avenue, and other buyers of land, were

assured that the shore of the ocean would not be so occupied as to obstruct the ocean view. The right to the view is equally protected, *whether it be over Surf Avenue, or land to the east of it.* Because land east of Surf Avenue has been washed away does not give anyone a right to so build as to obstruct Poole's view of the ocean." (Italics ours.)

In the Poole case it was also contended that the structure being for public use, the Commissioners had power to do acts suitable for the promotion of the success of the locality as a seaside resort, and the Court said:

"But, however advantageous it may be to the public, property dedicated to one purpose cannot be used for another public purpose. It cannot be true, that for any public purpose the Commissioners may so use the land in question as to interfere with the use to which it was dedicated."

The gist of the finding in the Poole case will be found in the following comment by the Court:

"Where a corporation owning a large tract of land, intended as a seaside summer resort, and fronting on the ocean, divides the land into streets and building lots, duly records the plot thereof, sells lots to purchasers with the representation that the ocean front would not be so built on as to obstruct the view of the ocean, and such representations are so frequently made as to be generally recognized as an existing condition, and there appears on the plot a street parallel with the ocean and between the street and the ocean a strip of land unmarked in any way on the plot, there is a dedication of the street and strip of land to public user to be kept open

so that the ocean view be and remain unobstructed, and an owner of a lot of land and dwelling house on the street, and facing towards the ocean, may maintain a bill to prevent an obstruction of the view by bath houses and a screening tight board fence erected along the ocean front, though the structure is not immediately in front of his house."

POINT II.

THE APPELLEE, IN ACCEPTING THE DEDICATION OF OCEAN AVENUE, DID SO SUBJECT TO AN IMPLIED COVENANT NOT TO DESTROY COMPLAINANTS' RIGHTS BY THE ERECTION OF STRUCTURES IN THE HIGHWAY.

In the case of *Lennig v. Ocean City*, 41 N. J. E., p. 606, a corporation laid out, mapped and plotted its seaside property into lots, reserving a tier of blocks for religious services and tenting purposes, but subsequently it attempted to build permanent bungalows thereon. The Court said:

"That the defendant association had thereby entered into an implied covenant with the complainant that these blocks should be devoted to the uses indicated, and that it had no right to divide these blocks into lots for the purpose of leasing them for a term of years with the privilege of erecting thereon permanent cottages.

"Whenever the owner of a tract of land lays it out into blocks and lots upon a map, and on that map designates certain portions of the land to be used as streets, parks, etc., or in other modes of a general nature calculated to give additional value to the lots delineated thereon, and then

conveys those lots by reference to the map, he becomes bound to the grantees not to use the portions so devoted to the common advantage otherwise than in the manner indicated. This principle has been asserted most frequently for the purpose of supporting dedications to uses strictly public, but it is by no means necessary that such a use should be created.

“And citing *Booream v. North Hudson R. R. Co.*, 13 Stewart, p. 557, said: ‘With regard to the dedication of a highway by means of conveyances to private persons which referred to a proposed street over other lands of the grantor, the private rights of the grantees precede the public right, and are the source from which the public right springs. *By such conveyances the grantees are regarded as purchasers, by implied covenant, of the right to the use of the street as a means of passage to and from their premises, as appurtenant to the premises granted, and this private right of way in the grantees is wholly distinct from and independent of the right of passage to be acquired by the public.* The object of the principle is not to create public rights, but to secure to persons purchasing lots under such circumstances those benefits, the promise of which, it is reasonable to infer, has induced them to *buy portions of a tract laid out on the plan indicated.* (Italics ours.)

“The inquiry now presented must be, not whether the association has dedicated the blocks between Fifth and Sixth Streets to public use, but whether it has entered into an implied covenant with the complainant not to use those blocks in the mode now proposed, and has granted to him, as appurtenant to his lots, the benefits to be derived from such restriction.

“It is obvious that the use now contemplated is a very different one, and very differently affecting the complainant’s property. Instead of a camp, occupied for a few weeks only by tents, which will scarcely at all interfere with the prospect or the breeze over an open space, the ground is to be divided into small lots, on which permanent buildings are to be constructed. The contrast between the two situations covers much of the attractiveness of a seaside resort. If the present scheme of the defendant be carried out, it is certain that the complainant will lose a great portion of those advantages which the association impliedly promised him as inducements to the purchase of its lots. It is no answer to say that the use of tents at these camp meetings is now generally abandoned; that frequenters demand the accommodations of more durable places of abode, and the association must meet this demand or suspend its operations. Such considerations do not impair the binding force of bargains.”

If the proposed boardwalk and approaches are erected, complainants will still have the use of the public highway by either walking under or climbing over the boardwalk and its approaches, depending upon which side of the street they use, but the erection of such a structure, substantially destroys the free and unobstructed use of the public street with the exception of the sixteen foot wide proposed boardwalk.

With reference to a similar situation, where a municipal board attempted to erect a structure in a public highway, our courts, in *Dill v. Board of Education*, 47 N. J. E., p. 421, said:

“Indeed, whenever a dedication as a public highway is effected—as it usually is—by means of conveyances to private persons by reference to a proposed street over other lands of the grantor, *the private rights of the several grantees precede the public right, and are the source from which the public right springs.* By such conveyances the grantees are regarded as purchasers by implied covenant of the right to the use of the street as a means of passage to and from their premises, as appurtenant to the premises granted, and this private right of way in the grantees is wholly distinct from and independent of, the right of passage to be acquired by the public. (Italics ours.)

“The right to have the alley, thus described, forever preserved as a street, is a private right annexed as an appurtenant to the ownership of the land conveyed, and is entirely distinct from, and in addition to, the right of the owner as a citizen to use the street after it should become a public street by acceptance by the public authorities.”

The Court specifically states that these rights apply to all of the street and not to part of it, in this language:

“If we inquire what those rights are, we find that they are two-fold—first, a right of access from the abutting property, and a passage to and fro over it in *all of its extent*; and, second, a right of light, air, prospect and ventilation. These rights are quite distinct from each other and capable of being separately exercised and enjoyed.” (Italics ours.)

The Court said further:

“There are, it appears to me, two classes of rights, originating in necessity and in

the exigencies of human affairs, springing up coeval with every public highway, and which are recognized and enforced by the common law of all civilized nations. The first relates to the public passage; the second, subordinate to the first, but equally perfect and scarcely less important, relates to the adjoining owners. Among the latter is that of receiving from the public highway light and air.

“When people build upon a public highway, do they inquire or care who owns the fee of the roadbed? Do they act, or rely upon any other consideration except that it is a public highway, and *they the adjacent owners?* Is not this a right of universal exercise and acknowledgment of all times and in all countries, a right of necessity, without which cities could not have been built, and without the enforcement of which they would soon become tenantless? (Italics ours.)

“The same doctrine has been established, after fierce and protracted litigation, in New York in the elevated railway cases.

“An abutting owner necessarily enjoys certain advantages from the existence of an open street adjoining his property, which belong to him by reason of *its location, and are not enjoyed by the general public*, such as the right of free access to his premises, and the free admission and circulation of light and air, through his property.” (Italics ours.)

The Court, with reference to the extent of the injury, said:

“The building proposed to be erected will occupy the greater part of the alley adjoining complainants’ premises and it was admitted that it would be much higher

than the fence which has stood so many years. But, were the obstruction much less, I do not see how this Court could refuse relief on account of the smallness of the injury.”

The Court further said—citing *Bechtel v. Carslake*, 3 Stockton, p. 500:

“In that case there was a mere encroachment upon a private way, not amounting to a complete obstruction, and the Vice Chancellor said: ‘It is not a question of convenience—of how much space is suitable for the complainant—but one of right under the covenant. I think the complainants are entitled to the relief prayed for.’ ”

Following out the theory of the Dill case, *supra*, giving a right of passage to and over the street in all its extent, we find that identical condition existent in the case at bar, because the learned Vice Chancellor finds as a fact that complainants’ light, air and view are obstructed “when the complainants look down toward the strand” (p. 43, ll. 6 to 10). Also, their right of access is interfered with “to the extent that they are required to pass over or under the boardwalk or its approaches, if they choose to walk on the sand” (p. 42, ll. 22 to 28). The learned Vice Chancellor, however, felt that this was not a sufficient interference with their rights. See also, *First National Bank of Montgomery v. Tyson*, 59 L. R. A., p. 399, adopting the doctrine of *Dill v. Board of Education*, in granting an injunction to prevent the erection of pillars extending two feet onto the highway. See also, *Union Towel Supply Co. v. Mayor of Jersey City*, 123 Atl., p. 254.

In the case of *Bridgewater v. Ocean City Railroad Co.*, 62 N. J. E., p. 276, the doctrine of the Lennig case, *supra*, was approved, and the Court, citing other cases, said:

“The very object of the Courts in raising such implied covenants, and permitting their enforcement by any purchasers under the general plan, is to secure, not in damages to the actor in the enforcement, nor an ascertainment of the proportion of injury done to him, but the specific observance of the general plan, for the benefit of all who have purchased the right of that observance.

“The evidence shows that the station in question is a substantial building of fixed character. It thus interposes in nearly the centre of the space which the association agreed should be kept open, a permanent structure which cuts off the view of the ocean and thoroughfare and free passage of air through the length of the camp ground and park from either side of it.

“The suggestion that it is beneficial to the value of the complainant’s lot is of the same sort. It is no answer to his suit to restrain the proposed breach to say that it will be, in fact, beneficial to him, that there should be a breach.”

We have a similar situation here, but it is argued by appellee and found by the learned Vice Chancellor, that even though the abutting landowners must either crawl under or climb over an eight foot high structure on the greater part of the street, that they can walk more readily on the sixteen foot wide boardwalk. The *Bridgewater* case, *supra*, dispels that argument with the finding that the abutting landowners’ injury should not be proportioned.

This question, pertaining to an obstruction of a part of a public highway, was considered in the case of *Interstate Com. Com. v. Cincinnati*, 167 U. S., p. 479. The Court, in disposing of the question of the power of municipalities to regulate, said:

“This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation.

“The depriving of the public as is done in this instance, *of the right to traverse the city streets to their full width*, except for necessitous temporary private exigencies, *is an invasion of the right of free, unobstructed public travel*, which municipal corporations were impliedly created to preserve rather than to obstruct, as well as for the convenience of abutting owners, for as was stated by Pitney, V. C., in *Methodist Church v. P. R. R.*, 48 N. J. Equity, p. 454, ‘A right of way is property, and as such protected by the Constitution.’ ” (Italics ours.)

In the early case of *Barnett v. Johnson* (Err. & App.), 15 N. J. E., p. 481, the complainant owned a lot in the City of Newark, adjacent upon the line of the Morris Canal, and built a house touching the line, with windows facing the canal. The Court held that the canal was a public highway, and, in granting the injunction, said:

“This Court will restrain the defendant, holding under the company, from erecting a building over the canal so as to shut up the complainant’s windows.

“A public highway is defined to be a public passage common to all the people. There are various kinds of them, differing in their origin, their mode of construction

* * * ; our common roads, turnpikes, canals, as generally used and constructed * * * are equally, however differing in their modes of uses, public passages common to all the people."

In construing the interest of an abutting land-owner on a highway, created either by private dedication or public authority, the Court said:

"His right is still that he owns the land adjoining upon the highway, and does not depend upon who owns the whole or fractions of the roadbed, or how it was made a highway, whether by private dedication or by public authority, but upon the simple fact that *it is a public highway, and he the adjacent owner.*" (Italics ours.)

In 28 *Cyc.*, p. 856, paragraph 7, the following general rule is found:

"An abutting owner has two distinct kinds of rights in the street—the public one which he enjoys in common with all citizens, and private rights which arise from his ownership of contiguous property. Among the private rights are the right of free and unimpeded ingress and egress to and from his property; *an easement of light, air and view of which he cannot be deprived by an encroachment upon the street; and the right to have the street kept open* and continued as a public street for the benefit of his contiguous property. Even where the abutting owner has no title to the land in the street, he has an easement therein. An abutter's particular proprietary rights begin with those of the public when the street is open to use. The general rule is that while they may use the street in any manner not inconsistent with the right of the public, they cannot so use

it as to interfere with the public easement, or unreasonably interfere with the rights of an adjacent property-owner." (Italics ours.)

In 19 *R. C. L.*, p. 1150, Section 424, Note 7, we find the rule as to the right of appropriation by municipalities, as follows:

"An ordinance having the effect of unreasonably appropriating a street to a public use other than that of ordinary travel by pedestrians and vehicles is *ultra vires* and void."

In the instant case it is conceded that vehicular traffic will be prevented by the proposed boardwalk and cross section approaches and that pedestrians will be greatly impeded in using the street its entire length, which, in effect, runs counter to the proper rule of law that a public roadway should be kept open for all ordinary traffic, emergency exigencies excepted.

POINT III.

COMPLAINANTS SUFFER A SPECIAL INJURY AND THEREBY ARE ENTITLED TO EQUITABLE RELIEF, AS DISTINGUISHED FORM LEGAL REMEDY.

The learned Vice Chancellor held that complainants must seek redress in the law court and were barred from seeking equitable relief.

We submit that that rule does not apply to an abutting landowner, who suffers a private injury distinct from that suffered by the public at large; and

In the leading case, *Fessler v. Town of Union*, 67 N. J. E., p. 14, an abutting landowner complained against the erection of a building on public property in front of her premises. Pitney, V. C., in laying down the rule and its distinctions, said:

“The general rule is that any encroachment on a public highway or public square is an offence against the public, punishable by indictment only, and that one or more of the public cannot maintain an action at law or in equity therefore unless *he is so situated* as to be injured thereby in a manner and to an extent peculiar to himself as an individual, as distinguished from himself as a member of the public at large. (Italics ours.)

“The complainant is the owner of ten lots, comprising a boundary on the square in question, of one hundred and fifty feet in the immediate neighborhood of the tower in question. It is within thirty feet of her house lot, and the existence in that place of the tower and the ringing of the bell in case of fire will, in my judgment, produce an effect injurious to the enjoyment of her property, different in a marked degree to that of the inhabitants generally of the Town of Union.

“But, of course, if I am right in my conclusion that she has, by reason of her owning lands bounding on the square, a right in the nature of a private right, then she has a right in addition to her being a member of the public, which dispenses with the necessity of resorting to the doctrine of peculiar injury.”

This rule has been adopted, approved and followed in other cases and in our own and other jurisdictions. (See *Armbruster v. City of Wild-*

wood, 41 F. [2nd] p. 823; also *Dill v. Board of Education*, 47 N. J. E., p. 421.)

In the case of *United N. J. R. & Co. v. Crucible Steel Co.*, 85 N. J. E., p. 7 (at page 18), Emery, V. C., in again approving the doctrine, said:

“An objection was made in the answer of the steel company and the Hudson Railroad & Transportation Company to the jurisdiction of this court to determine this disputed right, as being purely a legal right to be settled at law, and for the violation of which the remedy was legal and not equitable. The equitable jurisdiction to enforce by injunction the private rights of way arising to grantees from dedications of streets or roads is settled. Citing *Lenig v. Ocean City Association* (Court of Errors & Appeals, *supra*), 41 Equity, p. 606, and *Herold v. Columbia Investment and Real Estate Co.* (Court of Errors & Appeals), 72 Equity, p. 857. Injunctions were granted in these cases on covenants for rights of passage in the streets, *implied by reason of conveyances referring to the streets designated on the map*. A right arising from a dedication of a street or road by express covenant is entitled to a similar equitable protection.” (Italics ours.)

The learned Vice Chancellor cites the case of *Harrison Market v. Montclair*, 105 N. J. E., p. 222 (147 Atl. p. 502), as authority for dismissing the bill on the ground that the remedy of appellants is by certiorari rather than for equitable relief.

The question involved here did not appear in the *Montclair* case. There a sidewalk was uniformly widened on both sides of the street, and was a benefit rather than a burden to the abut-

ting landowner, and, in dismissing the bill, Vice Chancellor Backes recognized the principle of special injury, and said:

“Cutting down or wholly taking away the sidewalk would not be an irreparable injury. The complainant will suffer no special damage.”

The Montclair case sustains and recognizes the contentions urged by appellants.

POINT IV.

COMMENT UPON THE OPINION OF THE COURT BELOW.

The learned Court, as authority for dismissal of the bill, comments on the case of *Halsey v. Railway Co.*, 47 N. J. E., p. 380. The Halsey case holds that a municipality cannot “in any substantial degree destroy it (a public highway) as a means of free passage common to all the people * * * that an individual cannot maintain an action for injury caused by obstructing a highway unless he suffers some private, direct and material damage beyond the public at large, as well as damage irreparable.”

An examination of the Halsey case will disclose that there was no substantial injury resulting, because the only objection was to the erection of poles on the side of the street for lighting purposes. The Court merely held that poles and wires did not impose an additional burden on the land.

The general principle, however, was laid down in the Halsey case, that a municipality cannot

destroy a public street as a means of free passage common to all the people. It is authority for the appellants' contentions, because the Vice Chancellor specifically finds as a fact in his opinion that Ocean Avenue is obstructed, and we again repeat the language of the learned Vice Chancellor:

"They still have free access to the avenue and the passage over and on the avenue is not interfered with *except that they are required to pass over or under the boardwalk or its approaches, if they choose to walk on the sand*" (p. 42, ll. 22 to 28). (Italics ours.)

"So that there is no possibility of any obstruction to complainants' light, air or view except so far as the *view may be obstructed when the complainants look down toward the strand*" (p. 43, ll. 6 to 10). (Italics ours.)

We contend that in view of this finding by the learned Vice Chancellor that injunction should be granted. Nevertheless, the learned Vice Chancellor proceeded to measure and proportion the injury sustained, which is unjustified by the law, and as said in the Dill case, *supra*:

"A right of access from the abutting property, and a passage to and fro over it *in all its extent.*" (Italics ours.)

See also, *Barnett v. Johnson, supra*.

The elevated boardwalk and the cross section approaches have been fully described in the testimony (pp. 65, 66, 67, &c.), and, having this picture in mind, if the reasoning of the learned Vice Chancellor is sound, in permitting these cross section structures on the public highway, then by

the same token, any kind of an improvement authorized under the Home Rule Act could be erected on any portion of a public highway under the guise of improving such portion of the highway, but at the same time permanently destroying the ordinary use of the balance of the road. This does not sound logical, and would open up the door to municipal action not contemplated by the fullest and most liberal construction of the law.

It is not disputed in this case that the contiguous landowners will be subjected to a different and more difficult use of the street than before this proposed erection. The answer urged by the respondent is in effect that while it will be more difficult for them to use the entire length of the street, and while their view looking north and south will be impaired by cross section ramp approaches ten feet high, nevertheless, they are benefited to the extent of having a sixteen foot wide walk which was not available before. Obviously, the cure is worse than the malady.

POINT V.

CONCLUSION.

The present action must determine whether or not a municipality, which has permitted one of its public highways to deteriorate into a state of disrepair (namely an eight to ten foot depression on its easterly side and sloping upward toward the westerly side), can further impair and increase the state of disrepair of the roadway by the erection of an elevated structure, solely for the purpose of providing a sidewalk or boardwalk on one side of the street—and in so doing sacrifice and obstruct the remaining width of the street. We submit that the logical doctrine to apply, and the one most conducive to the protection of public highways is the rule laid down in the *Armbruster case*, 41 F. (2nd) p. 823, Judge Avis, who said:

“The title and the right of control of the streets for street purposes are in the city. If the streets are obstructed, the city should clear them. * * * But to have a free and unobstructed entrance is a property right—an easement appurtenant to the abutting realty.”

In the case at bar, the municipality, rather than improving the condition of the street, has cluttered it up with ten foot high approaches running its entire width.

The learned Vice Chancellor has pointed out in his opinion two instances where the view and access of the whole street is obstructed, and upon this finding of fact, if nothing else, injunction

should issue, under the authority of the Dill case, 47 N. J. E., p. 421, stating as follows:

“An abutting owner necessarily enjoys certain advantages from the existence of an open street adjoining his property, which belong to him by reason of its location, and are not enjoyed by the general public, such as the right of free access to his premises, and the free admission and circulation of light and air, through his property.”

It is respectfully submitted that the decree should be reversed for the following reasons: (1) Appellants' light, air and view are admittedly obstructed, and the learned Vice Chancellor so found; (2) Access to and over the entire length and width of Ocean Avenue will be prevented; (3) That the manner of erection of the boardwalk and approaches constitutes the use of the street for purposes other than originally intended; (4) That an additional burden is imposed upon the easements; (5) That the proposed erection constitutes a nuisance; (6) That the appellants suffer a special injury not suffered by the public at large.

Respectfully submitted,

QUINN, PARSONS & DOREMUS,
Of Counsel with Complainants-Appellants.

NEW JERSEY COURT OF ERRORS AND APPEALS

*Between*ALBERT G. HULETT, THOMAS POTTER, ANNE M. GILLAN, MARIE E. PRUYN and JOSEPH MANN,
Complainants-Appellants,

and

THE BOROUGH OF SEA GIRT, a Municipal Corporation,
Defendant-RespondentON APPEAL
FROM THE
COURT OF
CHANCERY

10

BRIEF OF DEFENDANT-RESPONDENT

STATEMENT

This is an appeal from the decree of the Court of Chancery denying an injunction against the erection of a boardwalk sixteen feet wide on the easterly side of Ocean Avenue, a public street in the Borough of Sea Girt, on the portion of Ocean Avenue set apart and apportioned by ordinance for sidewalk, boardwalk and footway purposes.

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The complainants-appellants in the court below contended that the construction of the proposed boardwalk and approaches would violate the restrictions in the deeds of complainants, and further that irrespective of the restrictive clauses the private rights of the complainants would be violated by the construction of the proposed boardwalk. The court below found adversely to complainants-appellants contentions, and found that no private rights of the complainants would be violated by the erection of the boardwalk. The complainants-appellants have abandoned their principal contention in the court below that the erection of the boardwalk would violate the alleged restrictions in their deeds.

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Ocean Avenue in the Borough of Sea Girt is one hundred feet wide and was dedicated to the public in 1878 by the filing of the Anspach map.

10 The complainants in this suit are property owners of lots in Block 7 on the Anspach map, and some of the deeds from the original owner, the Sea Girt Land Improvement Company, to property owners in Block 7 fronting on Ocean Avenue, contain the clause that the Company would not use the front of said premises otherwise than as a public avenue and *promenade*, indicating that it was the intention of the Company to dedicate it both as a public avenue and promenade. (Italics are ours).

20 Ocean Avenue, where the boardwalk is to be erected, is unimproved, although many years ago flagstone sidewalks were erected on the westerly side thereof, in front of a portion of Block 7, and these sidewalks are still in existence. The inroads of the sea have washed away the beach to a great extent and Ocean Avenue, where the boardwalk is to be erected, and in fact over a greater part of its width, is a mass of shifting sand washed at storm tides by the ocean waves. The grade on the easterly side of Ocean Avenue is eight to ten feet below the grade of the westerly side, and the Avenue is not susceptible to use by vehicular traffic and could not be made available for vehicular traffic without great expense for bulkheads and grading from eight to ten feet above the now level of the beach, and even then, the street would be in danger of being washed away, as the Borough has been compelled to spend considerable money in the past for jetties to hold the beach as it is.

30 Ocean Avenue is, however, capable of being submitted to some use, and the municipal authorities, conceiving it to be their duty to give the public the right to any legitimate use to which the street might be put in its present condition for public convenience and accommodation, passed an ordinance in 1929,
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apportioning the easterly twenty-five feet of the avenue for sidewalk, boardwalk and footway purposes, and provided for the erection of a sixteen foot boardwalk on the easterly sixteen feet of the space apportioned for sidewalk, boardwalk and footway purposes, and also, for convenient access, provided for ramp approaches connecting the boardwalk with the intersecting streets at the grade of the intersecting streets. This ordinance was submitted to the electorate of the Borough of Sea Girt at the general election on November 5th, 1929, and the electorate voted in favor of and ratified said ordinance. Notwithstanding the contention of complainants, the plans and specifications for the boardwalk are such that the erection of a boardwalk in accordance therewith would not obstruct the light, air or view of the complainants, or their use of the street for any purposes now available. The boardwalk, according to the plans and specifications, is to be erected from one foot to one and one-half feet below the grade of the westerly side of Ocean Avenue, which is the original grade and the grade upon which the original flagstone sidewalks on the westerly side of the Avenue were laid years ago. The level of the boardwalk is below the grade of complainants' properties, and therefore cannot be an obstruction to the light, air or view of complainants. The boardwalk is merely a sidewalk on the easterly side of the Avenue elevated to a grade from one foot to one and one-half feet below the established grade of the westerly side of the avenue and the flagstone sidewalks on the westerly side of the avenue which were laid to the established grade of the adjoining property years ago. The ramp approaches are not permanent, but temporary, and will be removed whenever the street can be improved, bulkheaded and put to the grade of the intersecting streets.

A boardwalk and a pavilion were built some years ago on one block in the northerly section of the

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Borough with ramp approaches to the intersecting streets and Ocean Avenue in this block has since been brought to grade and improved and the ramps removed.

The Borough contends that it has a legal right to erect a boardwalk and that it has a legal right to erect a boardwalk on that part of Ocean Avenue apportioned by ordinance for sidewalk, boardwalk and footway purposes.

10 Nature has made it impracticable to use Ocean Avenue as a roadway under present conditions, and the Borough contends that the erection of the proposed walk will be for the benefit of the public of the Borough of Sea Girt, who are entitled to the benefits of a public walk in this seaside resort, and that the erection of the boardwalk will permit the public of Sea Girt to enjoy the benefits of Ocean Avenue for one of the purposes for which it was dedicated, namely, for a promenade along the ocean front.

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COMMENTS ON COMPLAINANTS'-APPELLANTS' REVIEW OF TESTIMONY.

The complainants-appellants, in their brief, under the heading "Review of Testimony," cite unconnected excerpts from the testimony of Engineer Moore, which, standing alone, are meaningless, but if read in the light of his entire testimony, are amplified and explained, and clearly show that the erection of a boardwalk would not be an obstruction of Ocean Avenue and would not interfere with the light, view and air of the complainants and their access to the beach front.

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Paragraph numbered "1" of complainants'-appellants' "Review of Testimony", is explained by Engineer Moore in his testimony (Case, page 62, lines 8 to 12) where he testified that the elevation

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of the boardwalk had been carefully determined by an examination of the elevation of the lots in Block 7 fronting on Ocean Avenue, as well as other blocks northerly from Block 7, and (Case, page 63, lines 6 to 16), where he testified that the elevation of the boardwalk is from one foot to one and one-half feet below the elevation of the graded portion of the lots in Block 7 fronting on Ocean Avenue and from two feet eight inches to five feet below the approaches of the houses on the various lots in Block 7 fronting on Ocean Avenue. 10

Paragraph numbered "2" of complainants'-appellants' "Review of Testimony" is explained by Engineer Moore in his testimony (Case, page 66, lines 11 to 26) to the effect that in walking north or south at or near the extreme westerly side of Ocean Avenue the ramps will be practically at the grade of the existing ground. Thus it follows that in crossing the ramps northerly or southerly near the westerly side of Ocean Avenue, a person could walk across the ramps at the natural ground level, whereas a person will walk under the ramps between pile bents with sufficient headroom in proceeding north or south at or near the easterly side of Ocean Avenue, thus, in either event, obviating any material obstruction to the use of Ocean Avenue in a northerly or southerly direction. 20

As to paragraph numbered "3" of complainants'-appellants' "Review of Testimony", we submit that it is no hardship for abutting owners to walk under a boardwalk sixteen feet wide with eight to ten feet headroom if they desire to walk on the sand to the ocean. 30

The other paragraphs in complainants'-appellants' "Review of Testimony" are answered in the testimony of Engineer Moore, which clearly establishes the fact that the ramps and the boardwalk will be no obstruction to view, as they are below the grade of the adjoining properties and below the 40

grade of the westerly side of Ocean Avenue. (Case, page 68, lines 15 to 22).

POINT 1.

10 The complainants-appellants, under this point, allege that respondent's action infringes upon the private rights of complainants-appellants, causing special injury because it obstructs their light, air and view and prevents free access to and over the highway.

20 Engineer Moore's testimony (Case page 63, lines 6 to 16) clearly states that—The elevation of the boardwalk with relation to the bluestone curb and sidewalk which has been erected on the westerly side of Ocean Avenue and a part of Block 7 varies from one-half a foot to a foot and a half below the elevation of the graded portion of the lots in Block 7 fronting on Ocean Avenue. It varies from two feet eight inches to about five feet below the approaches of the houses on the various lots in Block 7 fronting on Ocean Avenue.

Engineer Moore's testimony (Case, page 63, lines 27 to 34) states that if Ocean Avenue were graded and curbed from the westerly side of the street to the easterly side of the street the boardwalk would be from a foot and a half to half a foot below the sidewalk on the west side of the street.

30 Engineer Moore's testimony (Case, page 63, line 40, and page 64, lines 5 to 12) states that "The ramps are temporary approaches from the boardwalk so that people may go on the boardwalk with the least inconvenience from the top of the bank at the present intersecting streets. If they were not put in there, persons to get on the boardwalk would have to walk down a steep bank, then there would have to be steps built up to the boardwalk on the westerly side. Those ramps, of course, are only temporary."

40 Engineer Moore's testimony (Case, page 68, lines

15-22) state that the ramps would be no obstruction to view because they would be below the level of the grade of the adjacent owners' property.

It is apparent, therefore, that the boardwalk and ramps would be no obstruction to the light, air or view of the complainants, and the learned Vice Chancellor so stated in his opinion.

The testimony clearly shows, and the learned Vice-Chancellor found as a fact, that the erection of the boardwalk and ramps would not obstruct the free passage from the Avenue, except to the extent that complainants would have to walk over or under the boardwalk if they chose to walk on the sand. 10

Complainants-Appellants, in their brief, cite the case of *Annie F. Dill et als v. the Board of Education of the City of Camden*, 47 N. J. Equity, page 421, and rely upon that case as upholding their theory of private rights. This case, it will be recalled, was a case in which the owner of a block of land made a map of it, showing an alley or street twenty feet wide through it, and by deeds executed and delivered on the same day, conveyed to several grantees the lots situated on each side of the alley and facing on one of the main streets, and the deeds called for the alley. The Board of Education of the City of Camden attempted to erect a school house on the alley and the Court held that the erection of the school house would be restrained. It will be noted in this case that the street had never been used or accepted by the public and that the municipal authorities had assumed no jurisdiction over it, which is a far different state of facts than exists with reference to Ocean Avenue in the Borough of Sea Girt, which is a municipal street, and which the municipal authorities are attempting to use for municipal purposes. 20 30

The complainants-appellants, in their brief, also cite the case of *the First National Bank of Montgomery v. Tyson*, 59 L. R. A., p. 399 (Ala.), which was a 40

case where a private party erected pillars in a public street, which case is clearly not in point.

10 Complainants-Appellants also cite the case of
Armbruster Inc. v. City of Wildwood, 41 F. (2nd) p.
823, a recent case decided by Judge Avis in the
United States District Court. The facts in this case
are not at all analagous to the case before this Court.
In Armbruster, Inc. v. the City of Wildwood, the
facts were that Beach Avenue, upon which the
boardwalk was erected, was only seventy feet wide
and the boardwalk was erected forty feet in width
on the westerly forty feet of the seventy foot street.
The boardwalk was also erected six or seven feet
in the clear above the grade of the intersecting streets
on the west side of the boardwalk. The complain-
ants in Armbruster Inc. v. the City of Wildwood
owned the lands on the easterly side of Beach Ave-
20 nue and their ingress and egress to their lands was
completely cut off by the erection of the boardwalk
on the westerly side of Beach Avenue six or seven
feet in the clear above the grade of the intersecting
streets. The boardwalk was erected on over one-
half of the width of the street and on the westerly
side of the street, indicating clearly that the muni-
cipality had abandoned the street for highway pur-
poses, whereas in the Sea Girt case, the municipal
authorities specifically appropriated by ordinance a
small portion of the width of Ocean Avenue for side-
30 walk or boardwalk purposes, and the boardwalk
only occupies the easterly sixteen feet of a street one
hundred feet in width, and at any time that it be-
came necessary to do so, the remaining part of the
street could be put to grade and improved for eighty-
four feet in width, and the temporary ramps could be
removed, and the sixteen foot boardwalk on the
easterly side thereof would be no obstruction to the
street, in fact would become the easterly sidewalk
of said street. If the street were now graded to the
40 same grade as the westerly side of the street, the

boardwalk would still be below the level of the existing grade on the west side of the street.

By the erection of a boardwalk on the west side of Beach Avenue in Wildwood, six or seven feet above the grade of the intersecting streets, the municipal authorities created a barrier to any future use of Beach Avenue for roadway purposes and deprived the complainants of all right of ingress and egress to their properties on the east side of the street.

The other cases cited by the complainants-appellants under this point have no bearing on the right of a municipality to make a legitimate use of a dedicated street for street and promenade purposes.

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In Phillip M. Sharpless et al, Prosecutors, v. the Borough of Longport, 79 New Jersey Law, page 279, the objection urged by the prosecutors to the municipal proceedings was that a public elevated boardwalk could not be erected anywhere on the ocean front except within the bounds of a laid out street. The Court held that the Borough Act of 1897 contained ample authority for the construction of such a walk, even though it were not erected on a laid out street.

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In George A. Halsey v. The Rapid Transit Street Railway Company, 47 N. J. Equity, page 380, at pages 383, 384 and 385, the Court said—

“The question on which the decision of the case must turn is this: Has the complainant’s land in the street been appropriated to a purpose for which the public have no right to use it? It is of the first importance in discussing this question to keep constantly before the mind the fact that the locus in quo is a public highway, where the public right of free passage, common to all the people, is the primary and superior right. The complainant has a right in the same land. He holds the fee subject to the public easement. But his right is

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subordinate to that of the public, and so insignificant, when contrasted with that of the public, that it has been declared to be practically without the least beneficial interest.”

* * * * *

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“It is perfectly consistent with the purposes for which streets are acquired that the public authorities should adapt them, in their use, to the improvements and conveniences of the age.” * * * * *

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“As I understand the adjudications of this State this principle must be considered authoritatively established, that any use of a street which is limited to an exercise of the right of public passage, and which is confined to a mere use of the public easement, whether it be by old methods or new, and which does not tend, in any substantial respect, to destroy the street as a means of free passage, common to all the people, is perfectly legitimate. Such use invades no right of the abutting owners; it takes nothing from them which the law reserved to the original proprietor when his land was taken; it is simply a user of a right already fully vested in the public, and consequently, by its exercise, nothing is taken from the abutting owners which can be made the basis of additional compensation.”

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In *The Trustees of the Methodist Episcopal Church of Hoboken against the Mayor and Council of the City of Hoboken*, 33 New Jersey Law, page 13, at the bottom of page 19, the Court said—

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“But within the limits of the purposes and uses for which the dedication is made, to regulate the use, the authority of the local corporate authorities is unlimited, against which no mere private right can be set up.”

POINT II.

The complainants-appellants under this point argue that the appellee in accepting the dedication of Ocean Avenue did so subject to the implied covenant not to destroy complainants rights by the erection of structures in the highway.

We respectfully submit that the complainants would not be injured and that no rights of the complainants would be destroyed by the erection of the boardwalk and its approaches. 10

The learned Vice Chancellor found as a fact in his opinion S. C. p. 41, lines 33-38, that:

“The proposed structure is not above the grade, does not obstruct the view, and does not interfere with the use of the street as “an avenue and promenade.” On the contrary it makes available for such use a portion of the street not now usable for street purposes at all.” 20

The learned Vice Chancellor S. C. p. 42-43, lines 19 to 8, in speaking of complainants-appellants easement, said:

“It seems clear, however, that their easements are not destroyed to any greater degree than are the easements of all other members of the public at large. They still have free access to the avenue and the passage over and on the avenue is not interfered with except to the extent that they are required to pass over or under the boardwalk or its approaches, if they choose to walk on the sand; but, as the roadway is now usable only for pedestrians, and as the proposed improvement will result in greater facility in that use, it cannot be said that the complainants are injured in 30 40

10 this respect, and there is no obstruction to complainants' air and view. The testimony shows clearly that their properties are all at an elevation considerably above the level of the sidewalks which were laid years ago and that the street level of the avenue is slightly below the sidewalk level. The proposed level of the boardwalk is from one to one and one-half feet below the sidewalk level so that there is no possibility of any obstruction to complainants' light, air or view except so far as the view may be obstructed when the complainants look down toward the strand."

The learned Vice Chancellor also said S. C. p. 48, lines 12-22:

20 "It does not appear to me that the complainant will suffer any "private, direct or material damage" from the construction of the proposed boardwalk "beyond the public at large." The use of the street as proposed by the municipality is not inconsistent with the purposes of its dedication and the borough is clearly acting within the scope of its lawful authority. The argument of complainant based upon so-called private rights cannot be sustained."

30 The complainants-appellants have not attempted to point out in their brief any evidence overlooked by the Vice-Chancellor in reaching his conclusions on the facts, but on the contrary the record does show conclusively that the evidence entirely justified the findings of the Vice-Chancellor and therefore we submit, under the rule, that these findings of fact are conclusive.

40 Complainants-appellants, under this point, cite the case of *Lennig v. Ocean City*, 41 N. J. Eq. p. 606 as upholding their theory of private rights. In this

case, the Court will recall, the defendant held a public sale of lots laid down on its map and at the sale distributed maps, and the blocks between Fifth and Sixth Streets appeared to be occupied by trees with a square delineated thereon and designated "Camp Ground." The court held that the Association had thereby entered into an implied covenant with the complainant that the blocks should be devoted to the uses indicated and that it had no right to divide these blocks into lots for the purposes of leasing them for a long term of years with the privilege of erecting permanent cottages thereon. 10

The other cases cited by the complainants-appellants, under this point, were treated and discussed by the learned Vice-Chancellor who found they did not support complainants' contention. We respectfully submit that Ocean Avenue is a municipal street and that the municipality is given full statutory right and authority to regulate its use for the purpose for which it was dedicated. 20

The court will readily see that the proposed action of the Borough of Sea Girt in building a boardwalk on a portion of a street designated by an ordinance for boardwalk purposes at the grade of the sidewalk on the westerly side of the street is a far different thing from a private corporation attempting to erect permanent buildings on lands it had dedicated to lot owners for tenting and park purposes, and the cases of complainants therefore are not in point. 30

It has been held by the courts of this State that within the limits of purposes for which the dedication was made, to regulate the use, the authority of the municipal council is unlimited, against which no private right can be set up.

POINT III.

The complainants-appellants under this point argue that they suffer a special injury and thereby are entitled to equitable relief as distinguished from legal remedy.

10 The answer to this point is found in the learned Vice-Chancellor's Conclusions, S. C. 48, where he finds as a fact that complainants will not suffer any private, direct or material damage from the construction of the proposed boardwalk beyond the public at large.

In *Berdan v. Passaic Valley Sewerage Commissioners*, 82 N. J. Eq., page 235, Vice-Chancellor Backes held:

20 A court of equity may not interfere by injunction to restrain municipalities and subordinate bodies from an abuse of discretion lodged in them by the legislature, in the absence of special equities calling for such intervention; the review of such acts, except in cases where peculiar and extraordinary rights are affected, being within the jurisdiction of the supreme court.

30 In *E. H. Harrison Market, Inc. v. Town of Montclair*, 147 Atlantic, page 502, Vice-Chancellor Backes held—

40 Where municipal authorities are acting lawfully, not tortiously, pursuant to a duly enacted ordinance authorized by law, if the ordinance invades the complainant's right, the law furnishes an adequate remedy by certiorari. The Supreme Court is the established tribunal for the supervision and correction of the official proceedings of municipalities

of the state. The writ of certiorari operates as a stay.

An abutting property owner has no vested right in sidewalks as against the state or its municipalities. Cutting down or wholly taking away the sidewalk is not ordinarily an irreparable injury.

In this case, the learned Vice-Chancellor stated: 10

“The issues raise purely legal questions. The town authorities are acting lawfully, not tortiously, pursuant to a duly enacted ordinance, authorized by law (Home Rule Act, 2 Comp. St. Cum. Supp. 1924, p. 2194 sec. 136—2001 as amended), and if the ordinance invades the complainant’s right it has an adequate remedy at law by certiorari. The Supreme Court is the established tribunal for the supervision and correction of official proceedings of municipalities of the state.” 20

In *Tucker v. Freeholders of Burlington*, 1 N. J. Equity, page 282, the Court held that—

The principle is universal, that where the rights of an individual are invaded, by the acts of persons clothed with authority, and who exercise that authority illegally, the persons aggrieved must seek redress by certiorari. 30

The Chancellor, in this case, at the bottom of page 287, said—

“If the board have power to act in the premises; if they have jurisdiction over the subject matter, this court can take no cognizance of the complaints contained in the bill. The right of supervision and correction is in another 40

10 tribunal. In England, it belongs to the kings bench, and in this state to the Supreme Court. The principle is universal that wherever the rights of individuals are invaded by the act of persons clothed with authority to act, and who exercise that authority illegally, the persons aggrieved must seek redress by certiorari. It appertains to the general supervisory jurisdiction of the Supreme Court, exercising in that behalf the powers of the kings bench, to correct abuses of that character."

In *Hiram E. Budd et al v. The Camden Horse Railroad Company et al*, 61 N. J. Equity, page 543, Vice-Chancellor Gray, at page 552, said—

20 "Neither in their answer nor in their argument have the complainants denied that the statutes and ordinances do, in terms, authorize the defendants to do the acts of which complaint is made. The complainants' objection is that the authorization must be held to be void because the acts permitted work an injury to them in their use of the highway. Where the subject-matter is within the jurisdiction of the municipal authorities, and their action is in compliance with the statutory mode prescribed to them, and a privilege thus granted is used within the limitations imposed, it is not a ground for equitable relief that the use of the privilege operates as a hardship upon other persons. If an ordinance be unreasonable in its appropriation of the varied uses to be made of a highway and works loss or inconvenience to property-holders upon one side of it, their remedy lies in an application to the courts of law, which have power to correct the unreasonable conduct of the municipal body.

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40 The Supreme Court is the supervisor of the

action of inferior jurisdictions in all such cases.”

And at page 553, said—

“It has been settled in this state, by decisions in all the courts, that a street railway is but a variance in the mode of using a highway (Hinchman v. Paterson Horse Railway Co., 2 C. E. Gr. 75; Halsey v. Rapid Transit Company, 2 Dick. Ch. Rep. 380), and that the introduction of the trolley system on city streets is not an invasion of private rights. Kennelly v. Jersey City, 28 Vr. 293 (Court of Errors); Roebling v. Trenton Railway Co. 29 Vr. 667).” 10

However, these complainants, or at least one of them, have applied to our Supreme Court, attacking this improvement. 20

The complainant Hulett first applied to the Supreme Court and procured a rule to show cause why a writ of certiorari should not issue. This application was heard by Mr. Justice Bodine, resulting in an order dated the 14th day of March, 1930, dismissing the rule to show cause. Later on, one E. R. Willets, not one of the complainants-appellants herein, but a property owner in Block 7, applied to the Supreme Court and secured a rule to show cause which was also argued before Mr. Justice Bodine, and in an opinion written by Justice Bodine and filed on June 3rd, 1930, the writ was denied, without prejudice, and thereafter the application was renewed and argued before the branch court, and the application again denied, the per curiam opinion denying the application being filed on the 1st day of July, 1930. 30

POINT IV.

The statements discussed under this point have heretofore been answered in this brief and it is apparent from the evidence and the findings of fact of the learned Vice-Chancellor that complainants-appellants will sustain no special injury by the erection of the boardwalk and approaches. It is also apparent from the evidence that the complainants' 10 appellants' statement that the construction of the boardwalk will permanently destroy the use of the balance of the street is unwarranted and unfounded in point of fact.

POINT V.

Under the heading "Conclusion" the complainants-appellants state that the present action must determine whether or not a municipality, which has 20 permitted one of its public highways to deteriorate into a state of disrepair (namely an eight to ten foot depression on its easterly side and sloping upward toward the westerly side), can further impair and increase the state of disrepair of the roadway by the erection of an elevated structure, solely for the purpose of providing a sidewalk or boardwalk on one side of the street—and in so doing sacrifice and obstruct the remaining width of the street.

30 We submit that Ocean Avenue could not be entirely improved without great expense because of the inroads of the ocean, and that the Borough of Sea Girt did not permit the street to deteriorate but has spent thousands of dollars erecting jetties in order to maintain its beach front.

40 As stated before, the facts in *Armbruster Inc. v. City of Wildwood* are not analogous to the facts in the *Sea Girt* case, and the conclusions of the court in that case based on dissimilar facts are therefore not applicable.

We respectfully submit that a boardwalk erected below the established grade of a street cannot be considered as depriving the complainants of light and air as suggested by them and cannot be considered as an obstruction to their view. How a boardwalk over one hundred feet from the houses of complainants, erected at a grade from one-half to one and one-half feet below the grade of sidewalks adjoining, in front of, and below the grade of complainants' properties and houses, can be an obstruction to their light and air is inconceivable, and how it can be an obstruction to their view of the ocean is also inconceivable. It could be no obstruction to their view unless their gaze was downward, and then only an obstruction to the view of that part of the beach under the boardwalk. 10

If Ocean Avenue were put to the established grade of the Avenue and to the established grade of the intersecting streets, the ramps would be unnecessary and would be removed, as has been done in the only block in the Borough of Sea Girt which has been improved, graded and graveled, and on which a boardwalk now exists. 20

It is admitted that Ocean Avenue is a public dedicated street and it is therefore under the complete jurisdiction of the Borough authorities.

Sea Girt is a seaside summer resort, and in addition to providing facilities for its patrons to enjoy the ocean front, it must also, in competition with other resorts, make its beach front attractive to others and keep pace with the times. It is the ocean and beach front that attract people to Sea Girt. All, however, cannot afford to live on the ocean front, but are satisfied to reside at other points in the borough near the beach and wish to and are entitled nevertheless to use the beach front owned by the borough, and are entitled to have a walk constructed on a public street on the beach front, as has been done in many other municipalities in this state. 30 40

Is not the Borough of Sea Girt, representing these people, the public, within its rights in making Ocean Avenue in its present condition useful to the public in some measure at least? Ocean Avenue has a shifting beach, which cannot be traversed by vehicles because the inroads of the ocean have cut it away to such an extent that its condition would not lend itself for vehicular traffic without great expense for bulkheads and grading a street many feet above the now level of the beach. It is now capable however, of being submitted to some public use. It is a public highway and was used as such forty or fifty years ago, before the easterly portion was washed away. It is a public street and the public have a right to use it and we conceive it to be the duty of the municipal authorities to give the public the right of any legitimate use to which said street might be put in its present condition for the public convenience and accommodation. Have the complainants, as private citizens, the right to say that they shall be the only ones who shall use this road, simply because it is not practicable, or even possible, to construct the roadway at the present time for the entire width of the street? Should the Borough authorities, representing the public, therefore, be enjoined from making a practicable use of this street, indeed, one of the very uses for which it was dedicated to the public over fifty years ago, namely, as a public promenade, at the suit and instance of a few property owners in Block No. 7, who, actuated by their selfish motives, seek to deprive the residents and tax payers of the Borough of Sea Girt of an important public improvement, which has not only been authorized by the Council of the Borough of Sea Girt, but which has been ratified and confirmed by the electorate at the general election held in November, 1929? Can the Borough be prevented from utilizing the only practicable use of Ocean Avenue at this time because nature has made it impossible to use it as a roadway

under the present conditions, and thus deprive the public at large of a use needful and necessary and the use for which the street was dedicated?

In other words, under the law of this state, may a few private property owners, as such only, say to the public authorities that unless a street is graded to the established grade, levelled and improved its full width, it therefore cannot be partially used but must be left in its present useless condition? A boardwalk is nothing more nor less than a sidewalk, and if the easterly portion of Ocean Avenue were graded to the established grade of the street and to the established grade of the intersecting streets, the boardwalk would be laid on the sand and could be constructed of boards or any other material. 10

Ocean Avenue is undoubtedly under the jurisdiction of the public authorities of the Borough of Sea Girt, and these authorities have the right to make the best possible use of it under existing conditions, and this without taking into consideration at all the thought of the officials that with the erection of this walk and the jetties already built and to be built, the beach will some day be restored to its former level, and permit of adding a driveway adjacent to the proposed boardwalk and the walk on the west side of the street, and eventually enable the public to have the full use of the street for all public purposes, in which event, the ramps now made necessary in order to connect the boardwalk with the intersecting streets running east and west would be at the grade of the street and of no further use. As conditions exist at present, the street has been washed away to such an extent that the ramps are necessary, but as they are to be erected at the established grade of the street, one can readily walk under them without interference until such time as the street is improved and they are no longer necessary. 20 30

We believe the action of the Borough to be not only legal, but practical and sensible, and an effort 40

to use its property for the best and only use for which it is capable at this time, and insist that such use is not inconsistent with the use for which it was originally dedicated.

10 In construing restrictive covenants, our courts have repeatedly held that the purposes in the minds of the parties and the location and the general polity of the place and surrounding conditions control in arriving at a proper interpretation of the covenants. Here we have a street bordering on the ocean front in an enterprising community, suggesting, even without the statement in the covenant, a use such as is now proposed.

In this connection, the case of *Sea Isle Realty Co. v. Sea Isle City*, 79 N. J. Law, 459, is in point. In that case, the court held—

20 The language of a dedication to a seaside resort that the locus in quo shall forever remain open and unobstructed for public use, is not inconsistent with the erection thereon of a music pavilion for public entertainment.

30 The erection of the proposed public walk will be for the benefit of the public of the Borough of Sea Girt, who are entitled to the benefits of a public walk in this seaside resort, and the erection of said boardwalk will enable the public of Sea Girt to enjoy the benefits of Ocean Avenue for one of the very purposes for which it was dedicated, namely, a promenade along the beach front.

40 In *Ninth Street Pier Company vs. Ocean City*, 6 Misc. Rep. 227, the Prosecutor applied for a rule to show cause why a certiorari should not issue to review a boardwalk ordinance in Ocean City. The Court held that the writ was a discretionary one and that a great public work, a prime necessity to many persons, should not be suspended by the allowance of a writ and accordingly refused the writ.

The complainants in this case have shown no invasion of private rights and seek, for purely selfish reasons, to stay and delay an important public work.

The Borough of Sea Girt, by erecting a boardwalk on the easterly side of Ocean Avenue, on the portion of the Avenue designated for sidewalk or footwalk purposes, is doing nothing more or less than making Ocean Avenue available to the residents of the Borough of Sea Girt for the purposes for which it was dedicated. The servitude of Ocean Avenue is not changed in any way by the construction of a boardwalk. 10

In *Stoudinger v. City of Newark*, 28 N. J. Equity, page 187, the Court held—

If land be dedicated to the public for the purposes of a street and it is accepted, the public right is complete and the lands may be appropriated to any use to which a street acquired in any other mode can lawfully be put. 20

We submit that the dedication of a street must be intended to give to the public the right to all legitimate uses, therefore, for the public convenience and accommodation.

It is respectfully submitted that the decree of the Court of Chancery should be affirmed. 30

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