To be Argued by:
NICA B. STRUNK
(*Time Requested: 15 Minutes*)

Supreme Court of the State of New York

Appellate Division – Second Department

Docket No.:
2013-01619

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

Plaintiffs-Respondents,

- against -

INCORPORATED VILLAGE OF QUOGUE,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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<u>QUESTIONS PRESENTED</u>

1. Whether Chapter 155 of the Laws of 1818 (the "1818 Act") divested the Trustees of the Freeholders and Commonalty of the Town of Southampton (the "Trustees") of ownership of and regulatory power over ocean beach lands in the Town of Southampton, as specifically held in *Trustees of the Freeholders and Commonalty of the Town of Southampton v. Betts*, 163 N.Y. 454 (1900).

<u>Answer of the Court below</u>: The Court below declared that the Trustees continue to possess regulatory power over ocean beaches notwithstanding the provisions of the 1818 Act and the holding of the Court of Appeals in *Betts*, even within an incorporated village such as Quogue.

2. Whether the reservation in the 1818 Act of rights on the part of the inhabitants of the Town to access the shores of the Atlantic Ocean to gather seaweed and land boats (often referred to as an "easement"), gives the Trustees regulatory power over ocean beaches within the Incorporated Village of Quogue, allowing said Trustees to require that permits be obtained from them for dune restorations and other activities already regulated and controlled by the Village and the New York State Department of Environmental Conservation.

<u>Answer of the Court below</u>: The Court below declared that this "easement" gave the Trustees the power to regulate land use on ocean beaches "as to that area

south of the crest of the primary dune and north of the high water mark [of the Atlantic Ocean]", even within an incorporated village such as Quogue.

3. Whether the exclusion of "tidewaters bordering on and lying within the boundaries of Nassau and Suffolk Counties" from the definition of "Navigable waters of the State" contained in New York Navigation Law § 2(4) indicates that the Trustees have regulatory jurisdiction over ocean beaches in the Village of Quogue.

Answer of the Court below: The Court below stated that the aforesaid exclusion of certain "tidewaters" from the definition of "Navigable waters of the State" meant that the purported regulatory jurisdiction of the Trustees over beach lands adjacent to the Atlantic Ocean "is not limited by the authority of the State" and also that "lands lying on or bordering the tidewaters" are not under the Village's jurisdiction.

NATURE OF THE ACTION AND THE FACTS

A. The Village's Dune-Restoration Activities Pursuant to DEC Permit

In recent years, the Incorporated Village of Quogue has undertaken or authorized certain coastal projects along the shores of the Atlantic Ocean to restore and strengthen the dunes on ocean beaches within its territory. (R-15) It has undertaken this work with full approval of the New York State Department of Environmental Conservation ("DEC"). (R-16) On August 7, 2007, the DEC authorized a beach scraping program, whereby sand was scraped from dry beach area and added to dune areas to increase their size. (R-34-42). On March 25, 2010, following severe coastal storms which caused avulsion of dune areas within the Village, the DEC authorized emergency dune stabilization and restoration of storm-damaged dunes on the Village beach with large textile-covered sandbags known as geocubes. (R-17-33)

B. The Trustees' Complaint

On September 2, 2010, Plaintiffs-Appellees Jon S. Semlear, Frederick C. Havemyer, Eric Schultz, Edward J. Warner, Jr., and William Pell, as Trustees of the Freeholders and Commonalty of the Town of Southampton (the "Trustees") commenced an action against the Incorporated Village of Quogue, alleging that the Trustees' "Rules and Regulations for the Management and Products of the Waters of the Town of Southampton" required the Village to seek and obtain a permit for

the dune-restoration work that it had done pursuant to the DEC permits cited above. (R-60-71) The Trustees' Complaint sought:

- injunctive relief enjoining the Village of Quogue "from moving, placing, depositing or scraping sand or placing hard or semi-hard structures, or conducting related activities, in the Ocean Beach Area [i.e., the area south of the crest of the primary dune and north of the high-water mark of the Atlantic Ocean] within the Village without a permit from the Trustees";
- a judgment "declaring the Trustees' Rules & Regulations to be valid and binding upon the Village and its residents"; and
- a permanent injunction barring the Village "from interfering in any way with or obstructing the easement over the Ocean Beach Area held by the Plaintiffs for the benefit of the town's inhabitants." (R-69-70)

C. The Village's Motion for Summary Judgment

On November 4, 2011, the Village of Quogue moved for summary judgment dismissing the Trustees' complaint in its entirety. (R-13-14) The Trustees had not sought any preliminary injunction and the work authorized by the DEC's permits had been completed before the Complaint was filed. (R-16) The Mayor of the Village of Quogue submitted an affidavit stating that "no adverse impact to the beach or to the access rights of the public has been suffered" as a result of the Village's dune-restoration work. *Id*. This statement was not disputed by the

Trustees in opposition to the summary-judgment motion, and the Trustees submitted no evidence to the effect that the Village's dune-restoration activities interfered with the public's right to access the shoreline.

The briefing of the motion focused instead on pure issues of law — namely, whether the Trustees had jurisdiction to regulate ocean beaches within an incorporated village. The Village's position was based on Chapter 155 of the Laws of 1818 (the "1818 Act"), by which, as discussed further below, the New York State Legislature divested the Trustees of their prior powers of ownership and management of all lands throughout the Town of Southampton, leaving to the Trustees only a power of ownership and management of the waters of the Town. The Village's position was further based on the holding of the New York State Court of Appeals in *Trustees of the Freeholders and Commonalty of the Town of Southampton v. Betts*, 163 N.Y. 454, 457 (1900), which confirmed that the 1818 Act had divested the Trustees of ownership of and regulatory power over ocean beach lands.

In opposition, the Trustees claimed that the Trustees had the right to regulate land-use and dune-protection activities on ocean beaches, based upon powers bestowed upon them in 1686 by Thomas Dongan, a colonial governor under King James II of England. They argued that, contrary to the holding of *Betts*, the 1818 Act had not divested them of regulatory jurisdiction over ocean beaches, which,

they claimed, they had been regulating for centuries. They also argued that regulatory jurisdiction over ocean beaches was necessary for the protection of their "easement." Finally, they argued that this Court's decisions in the cases of *Allen v. Strough*, 301 A.D.2d 11, 752 N.Y.S.2d 339 (2d Dep't 2002) and *Poster v. Strough*, 299 A.D.2d 127, 752 N.Y.S.2d 326 (2d Dep't 2002) mandated a determination that the Trustees possessed regulatory powers over ocean beaches, even within the boundaries of an incorporated village.

D. Justice Mayer's First Decision — In Favor of the Village on the Jurisdictional Question

On May 9, 2012, Justice Peter H. Mayer of the Supreme Court, Suffolk County, issued a Short Form Order granting the Village's motion for summary judgment in its entirety. In this decision, Justice Mayer came down squarely on the side of the legal arguments made by the Village to the effect that the Trustees did not have regulatory jurisdiction over ocean beaches in the Village of Quogue. Citing the Court of Appeals decision in *Betts*, Justice Mayer held:

> "The beach was part of the undivided land which the town proprietors, and not the trustees, were given to manage as a result of New York Chapter 155 of the Laws of 1818, as '[it was] quite clear, as disclosed by the case, that the terms 'undivided lands' and 'common lands' were used interchangeably to refer to the uplands and to the beaches as well' (*The Trustees [] v Betts*, 163 NY 454, 460 [1900]). The trustees, who retain the title to the lands under water and have the

power to grant rights to erect structures on those submerged lands, and to take shellfish from them, do not have control of the shores and beaches (*Knapp v Fasbender, supra*)." (R-9-10)

Justice Mayer thus determined that "plaintiffs are without jurisdiction to maintain any of the causes of action alleged in their complaint." (R-10) He dismissed the Trustees' injunctive claim, holding: "plaintiffs fail to show that their 'easement rights' have been or are in danger of being obstructed." (R-10) He concluded his decision with the following declaratory judgment: "the Court declares that plaintiffs do not possess the right to regulate the subject beaches to protect their easement over them, to the extent that the beaches lie north of the high-water mark in the vicinity of the Atlantic Ocean." (R-10).

E. The Trustees' Motion for Reargument — Solely for Clarification on the Easement Issue

The Trustees moved to reargue Justice Mayer's Short Form Order on a limited basis. They did not seek reargument of Justice Mayer's determination of their first two causes of action, which concerned their claim of regulatory jurisdiction over ocean beaches (they were at that time in the process of appealing that determination to this Court). Their motion pertained only to their third cause of action, for interference with the public easement on ocean beaches, and they asked for reargument only "to the extent that the said decision and order held or implied that the [Trustees] lack the power to protect and preserve the easement

over the ocean beaches in the Town of Southampton enjoyed by the inhabitants of the said Town . . . ." (R-606) They asked the Court to make clear that their cause of action for interference with the easement was dismissed on a failure of proof, and not on any other ground.

In response to the Trustees' reargument motion, the Village submitted that it was, in fact, the Trustees who had caused the confusion by conflating their claims of regulatory power with their so-called "easement" rights (R-622), and suggested a slight modification to the language of Justice Mayer's decision to address the Trustees' concern (R-622-24). The Village also took the opportunity to make Justice Mayer aware of problems in a portion of his Order which had stated that the Trustees controlled land "south of the high-water mark of the Atlantic Ocean," (because that land is, in fact, owned by the State of New York) as well as statements appearing to apply provisions of the Navigation Law concerning "tidewaters" to the Atlantic Ocean (R-10), which is not a "tidewater" but part of the "high seas" regulated by the State Law. (R-624-25)

In reply, the Trustees agreed with the Village's statements regarding the State Law and Navigation Law. (R-627 ¶ 3). The Trustees further asked Justice Mayer to clarify his decision by deleting the last paragraph of his Short Form Order and substituting the following language:

> "Thus, the Court hereby dismisses the plaintiffs' First Cause of Action for injunctive relief based upon the defendant's failure to obtain a permit from the Town Trustees. On the plaintiffs' Second Cause of Action which seeks a declaration that the Trustees possess the right to regulate the subject beaches, the Court hereby declares that they lack such jurisdiction. The Court further dismisses plaintiffs' Third Cause of Action on the grounds that the evidence submitted by plaintiffs in this case fails to show that there has been an interference with the public easement." (R-627-28, emphasis added.)

The decretal paragraph proposed by the Trustees accurately summarized the relief sought by the Village in its motion for summary judgment and was not objectionable. (R-629-30)

F. Justice Mayer's Second Decision — Reversing Himself on the Jurisdictional Question and Ruling in Favor of the Trustees

Justice Mayer could have resolved the reargument motion simply by amending his decision in a manner that had virtually been stipulated to by the parties. But that is not what he did. Instead, on December 11, 2012, Justice Mayer issued a new decision in which he reversed his prior holding on the issue of whether the Trustees have regulatory jurisdiction over ocean beaches — notwithstanding that the Trustees had not even asked for reargument of that issue. The reversal appeared to be based on his reading of this Court's decision in *Allen v. Strough*, 301 A.D.2d 11, 752 N.Y.S.2d 339 (2d Dep't 2002):

> "Although the *Allen* case concerned the jurisdiction of the Trustees to issue permits that regulate activities taking place in the relevant areas of the ocean beaches, it is persuasive in the context of the plaintiff's rights to enforce its easement. The definition of the ocean beach is the same in the instant case as in the *Allen* case. Under Town Law (Rules Art. I) the ocean beach area is that area 'along the Atlantic Ocean bounded on the north by the crest of the primary dune, . . . on the south by the high-water mark of the Atlantic Ocean." Thus, the trustees have the right to control the ocean beach for the protection of its easement area that is south of the crest of the primary dune and north of the high water mark of the ocean. (R-6-7, emphasis added.)

Justice Mayer's reversal of his holding on the issue of whether the Trustees have regulatory jurisdiction over ocean beach areas could not have been more stark. Where he had ended his first decision by holding: "the Court declares that the plaintiffs do not possess the right to regulate the subject beaches . . ." (R-10), he ended his second decision by holding: "The Court declares that the plaintiffs have the right to regulate activities to protect their easement as to that area south of the crest of the primary dune and north of the high water mark." (R-7)

Justice Mayer preserved the portion of his prior decision regarding the Navigation Law (R-7, first full paragraph), despite the fact that the Village had pointed out — and the Trustees had agreed — that the Atlantic Ocean is not a "tidewater" under the Navigation Law but part of the "high seas" covered by the State Law.

Despite his 180-degree U-turn on the jurisdictional issue, Justice Mayer nonetheless preserved his grant of summary judgment in favor of the Village on technical grounds, by holding that the Trustees' complaint was insufficiently detailed to withstand summary judgment because it merely made reference to "Ocean Beach Area" and did not include specific pleadings situating that area between the crest of the primary dune and the high-water mark of the ocean:

> "In the instant matter, plaintiffs' complaint makes no reference to the crest of the primary dune and the high-water mark but states in general that it has jurisdiction over the 'Ocean Beach Area.' Thus, that portion of plaintiffs' complaint which seeks a declaration that they possess the right to regulate the subject beaches to protect their easement over them cannot be granted, as it is clear that they possess only the right to regulate for the protection of their easement that portion of the beach which may be south of the crest of the primary dune and north of the high water mark of the Atlantic Ocean." (R-7)

Justice Mayer dismissed the Trustees' second claim (for a declaration that their Rules and Regulations are binding on the Village and its residents) on similar technical grounds, stating that "although the Rules and Regulations of the Trustees may be valid and enforceable," the Trustees had failed to make reference to the "crest of the primary dune." (R-7) He further dismissed their injunctive claim because "plaintiffs fail to show that their 'easement rights' have been or are in danger of being obstructed." (R-7).

Thus, while Justice Mayer technically ruled in favor of the Village by granting its motion for summary judgment, his declarations to the effect that the Trustees have authority to regulate ocean beach areas between the crest of the primary dune and the high-water mark of the Atlantic Ocean gave the Trustees precisely the judicial approval that they had sought through this litigation.

On January 16, 2013, the Village, aggrieved by Justice Mayer's declarations, appealed. (R-2) The Trustees' appeal from the first order was withdrawn, and they took no cross-appeal.

ARGUMENT

The issues raised on this appeal may appear, at first blush, complex or confusing, until the history of the law applicable to the Trustees is unearthed, dusted off, and examined. That history, laid out below, shows plainly and unmistakably that the New York State Legislature divested the Trustees of their powers of ownership and management of all the lands of the Town of Southampton in Ch. 155 of the Laws of 1818 (the "1818 Act"). One hundred and thirteen years ago, in *Trustees of the Freeholders and Commonalty of the Town of Southampton v. Betts*, 163 N.Y. 454, 457 (1900), the Court of Appeals considered the precise question of what powers the Trustees retained over ocean beaches after the passage of the 1818 Act, and it concluded that the 1818 Act had divested the Trustees of their rights of ownership *and management* of ocean beach lands. The 1818 Act and the decision of the Court of Appeals in *Betts* govern the issues in this case.

As this very litigation demonstrates, the Trustees are actively invested in aggrandizing their regulatory powers. They would prefer that the old law which reduced their powers so substantially would remain unread and forgotten. They would like the courts to simply take their word that they still have had authority from the Dongan Patent in 1686 to regulate the ocean beaches. But the longer the Trustees succeed in their efforts to make property owners go to them for permits for dune-restoration work and other activities, the more widely accepted the notion

that they have the power to exercise regulatory jurisdiction on ocean beaches becomes. This mythology then becomes harder to dislodge from the public mind, creating a vicious cycle that prolongs the resolution of the legal problem.

This problem is apparent from this Court's decisions in *Allen v. Strough*, 301 A.D.2d 11, 752 N.Y.S.2d 339 (2d Dep't 2002) and *Poster v. Strough*, 299 A.D.2d 127, 752 N.Y.S.2d 326 (2d Dep't 2002). Both of these cases involved the denial by the Trustees of applications that had been made to them by oceanfront property owners in the Village of Southampton for permits for erosion-control structures. Although the cases went up to this Court on appeal, nowhere in the briefs or record was the asserted authority of the Trustees to require permits for activities on ocean beaches ever questioned. The impact of the 1818 Act and the decision of the Court of Appeals in *Betts* showing that it had divested the Trustees of jurisdiction over ocean beaches were not even argued. Instead, the argument on appeal — and this Court's decisions — focused only on the narrow technical issue of whether the erosion-control structures were located landward or seaward of the crest of the dune. The foundational question of whether the Trustees had underlying jurisdiction to regulate ocean beaches between the crest of the dune and the high-water mark of the Atlantic Ocean was not decided because it was never challenged by the property owners who — quite understandably — presumed that if the

Trustees required permit applications for activities on ocean beaches, then they must have authority to regulate ocean beaches. That presumption is wrong.

Confusion over the extent of the Trustees' powers over ocean beaches also infected Justice Mayer in his two decisions below, where he issued two decisions that were the polar opposites of one another. Justice Mayer correctly held the *Betts* case to be determinative of the issue in his first decision (R-10), but in his second decision, he seemed to be convinced that this Court's decision in *Allen* mandated a different result.[1] But *Poster* and *Allen* do not, in fact, stand for that proposition, because in those cases the underlying issue of the Trustees' regulatory power was never raised, argued or decided.

Another source of confusion stems from the Trustees' misleading appropriation of the concept of an "easement." As explained in more detail below, the 1818 Act made clear that all the inhabitants of the Town retained the right to access the shorelines of the waters of the Town to fish and collect seaweed as they as they had previously done — a right that has come, over time, to be referred to as an "easement." No one disputes the right of the public to access the ocean

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[1] The technicality on which Justice Mayer balanced his second decision granting summary judgment in the Village's favor while simultaneously declaring that the Trustees possessed regulatory jurisdiction over ocean beaches — i.e., whether the activities were located between the crest of the primary dune and the high-water mark of the Atlantic Ocean was not pleaded — was not, in fact, the issue on summary judgment. The motion here was made on the basis that the Trustees did not have regulatory jurisdiction even *assuming* that the activities were located between those boundaries.

beaches, and if it were shown that the public's access actually was obstructed, it is possible that the Trustees might have standing to enjoin that obstruction. That question is not raised on this appeal, however, because the record shows that the public's right of access was *not* obstructed by the dune-restoration activities in this case, and the Trustees did not argue otherwise.

But the Trustees (with help from the Town Board of the Town of Southampton) have gone further and asserted that this easement belongs to *them*, and that the easement *itself* endows them with regulatory power over ocean beaches. This argument carried the day with Justice Mayer below, who declared that that the Trustees have the right to regulate activities on ocean beaches "to protect their easement." (R-7) But an easement alone (even one in favor of a public body or agency) does not confer any regulatory power, and the suggestion that it does is a dangerous one. In any case, a careful reading of the *Betts* case shows that the notion that the reservation of a public easement for ocean beach access gave the Trustees regulatory power over ocean beach lands was specifically rejected 113 years ago by the Court of Appeals.

It is high time for the Trustees' assertion of regulatory jurisdiction over ocean beaches to have a proper review by this Court with full briefing of all of the historically-applicable law that limits their powers. Improper assertion of

regulatory power is a serious matter and this Court should put an end to the legal confusion that has facilitated the Trustees' overreaching.

I.

The Legal History Shows that the Trustees of the Freeholders and Commonalty of the Town of Southampton Have Not Had Regulatory Jurisdiction over Ocean Beach Lands Since 1818.

The Trustees claim regulatory power over ocean beaches not based on any modern statutory scheme adopted by the New York State Legislature, such as the Town Law or the Environmental Conservation Law, but based on a regulatory power that was granted to them by King James II of England through the Dongan Patent in 1686, and which, they claim, has continued in full force throughout the intervening 327 years, without ever having been altered or revoked by acts of the New York State Legislature. This position is belied by a close examination of the legal history.

A. Legal Framework for the "Dual Political System" in Southampton and Other East-End Towns: *Knapp v. Fasbender* and the Principle of Absolute Control by the Legislature.

The Town of Southampton has a dual system of government, in that it has both a Town Board established pursuant to New York Town Law, and a board of "Trustees," established during colonial times. (East Hampton and Southold also have similar dual systems with colonially-established boards of "trustees" operating parallel to town boards.) A similarly anachronistic situation used to exist

in the Town of Huntington (until the State Legislature ended it in 1962), and was examined carefully by the Court of Appeals in *Knapp v. Fasbender*, 1 N.Y.2d 212 (1956), which upheld the dual system, although not without reservations.

Knapp is a critical case because it makes clear that the extent of the Trustees' powers is determined not by custom or practice, as they argued in the court below, but exclusively by the acts of the New York State Legislature, which is the ultimate source of all regulatory power in this State. As set forth in the New York State Constitution:

> "no authority shall, on any presence whatever, be exercised over the people or members of this State but such as shall be derived from and granted by them . . . . [T]he supreme legislative power within this State shall be vested in two separate and distinct bodies of men; the one to be called the assembly of the State of New York, the other to be called the senate of the State of New York; who together shall form the legislature . . . ." Constitution of 1777, paras. I and II (emphasis added).

The Trustees argue that the Dongan Patent gives them a special status and puts them beyond the control of the State, but *Knapp v. Fasbender* shows this position to be wrong. Just like any other arm or agency of government in New York State, the Trustees operate based on a grant of authority by the State Legislature, which has the full power not only to grant regulatory power but to take it away — even from a "body-politic" chartered by the King of England in 1686.

In *Knapp*, the Court faced the question of whether the Trustees of the Town of Huntington possessed the power to contract with respect to public lands "free from the restraints of the provisions of the Town Law, which requires a resolution of the town board and the approval of the qualified electors to engage in certain town improvements." 1 N.Y.2d at 218. The Court said yes, but only because the Trustees had been specifically granted those powers by the New York Legislature, free from the constraints of the Town Law.

The supreme power of the State Legislature to control the authority of colonial boards of trustees — and, indeed, all boards and agencies with regulatory and governmental powers in this State — is the bedrock principle on which the Court of Appeals based its difficult decision in *Knapp*. The Court explained that, following the American Revolution, at the time of the formation of the State of New York, the State Constitution recognized existing colonial boards of trustees on a provisional basis: "The New York State Constitution of 1777 confirmed and ratified the proprietary and governmental powers in the trustees 'until otherwise directed by the legislature.'" 1 N.Y.2d at 221. The Court further explained that the Legislature had full authority to "define, clarify and confirm powers of the trustees or to deprive them of their powers." 1 N.Y.2d at 230. The Court's decision repeatedly emphasized that the Legislature's control over the exercise of governmental and regulatory power within the State is absolute:

> "The Constitution thus entrusted the Legislatures with the authority of preserving boards of trustees or abolishing them, of creating towns and town boards, with specified powers, or abolishing them, of enlarging or curtailing powers granted to towns and town boards or to boards of trustees." *Id.*, 1 N.Y.2d at 221.

The Court of Appeals in *Knapp* questioned the Legislature's decision to allow the Huntington Trustees to operate outside of the restraints that applied to the Huntington Town Board under the Town Law, but it stuck to its job and applied the legislative acts as written:

> "Although the wisdom of continuing the coexistence of a dual political system is open to question, this court has not substituted and cannot substitute its judgment in the place of the judgment of the Legislature." 1 N.Y.2d at 222.

A few years later, the New York State Legislature abolished the Trustees as a separate board in Huntington and consolidated their powers in the Town Board, citing, in the legislative history, the Court's criticism of the "dual political system" in *Knapp v. Fasbender* as justification. 1962 N.Y. Laws Ch. 865. The existence of separate boards of trustees has been abolished in many other Long Island towns, but in Southampton (and East Hampton and Southold), the "dual political system" continues.

B. The Act of 1818 Divested the Southampton Trustees of Power Over Undivided Lands, Reserving to Them Only Control over the Waters of the Town.

While the Trustees of the Freeholders and Commonalty of the Town of Southampton continue to exist as a separate body from the Town Board, the Legislature has, in fact, limited their powers substantially over time. The story of how their powers came to be limited has been related in several judicial decisions.

Originally, the Trustees of the Freeholders and Commonalty of the Town of Southampton had been granted, by the Andros and Dongan Patents, all of the undivided lands and waters in the Town, "in trust for the original purchasers and proprietors, their heirs and their assigns." *Betts*, 163 N.Y. 454, 457 (1900). But over time, as the population of the Town grew, a controversy developed between the "proprietors" and new inhabitants who were not "proprietors," and an act was passed by the New York State Legislature in 1818 to address that controversy:

> "By reason of the increase of the population of the town, by the advent of new inhabitants who were not proprietors, in later times, some friction existed in the community as to the respective rights and interests of the proprietors and of those of the inhabitants who had no interest in the unallotted lands of the town. The act of 1818 was then passed, as a measure of compromise agreed to by the parties." *Id.*, 163 N.Y. at 457.

In the 1818 Act (1818 N.Y. Laws Ch. 155), the State Legislature recognized a new board of trustees, called the "Trustees of the Proprietors" and divided

authority between them and the Trustees of the Freeholders and Commonalty of the Town of Southampton, who represented the Town at large. The division effected by the 1818 Act was simple: the Trustees of the Proprietors were given control over the *lands* of the Town, and the Trustees of the Freeholders and Commonalty of the Town were given control of the *waters*. As explained by Justice Geiler, in the landmark *Dolphin Lane* case, this was the political compromise effected by the 1818 Act:

> "A committee was appointed to confer with the committee of the Proprietors, that if the Proprietors will give up their exclusive right to the waters in said Town, the Town at large will give up their right to the undivided land and meadows which the Proprietors claim. Also, for the Town at large to have free access to the waters in any part of said Town when they please, and to have all products arising from said waters."

Dolphin Lane Assocs. v. Town of Southampton, 72 Misc.2d 868, 872-73, 339 N.Y.S.2d 966 (Sup. Ct. Suffolk Co. 1979), *aff'd*, 43 A.D.2d 727, 351 N.Y.S.2d 364 (2d Dep't 1973), *mod. on other grounds*, 37 N.Y.2d 299, 372 N.Y.S.2d 52 (1975). The Court of Appeals confirmed in *Trustees of the Freeholders and Commonalty of the Town of Southampton v. Mecox Bay Oyster Co*., 116 N.Y.1, 13 (1889):

> "Since the enactment of [the 1818 Act] the common lands have been managed by the trustees elected by the proprietors, and the waters and their product have been managed by the town."

The 1818 Act established the procedures by which the Trustees of the Proprietors were to operate, and made clear that they had full powers of ownership *and management* of all of the "undivided lands" (i.e., lands which were not already "the property of individuals") of the Town:

> "the said trustees [of the Proprietors] shall have the full power to sell, lease, or to partition, and to make such rules and regulations, and by-laws for managing the said lands, meadows, mill streams, and meadows that may hereafter make in the waters of said town . . . ."
> 1818 Act, Article II (R-76).

The only limitation on the Legislature's grant of the undivided lands to the Proprietors was a proviso that such grant would not impair the rights of the inhabitants of the Town at large to access the *shorelines*, for the purpose of gathering seaweed (which was then used as fertilizer) and landing "property" (i.e., boats, seins, etc.) on those shores. As for the powers reserved to the Trustees of the Freeholders and Commonalty (i.e., the same Trustees who are Plaintiffs in this case), they were strictly limited to the control and management of the waters and fisheries of the Town:

> "Provided nevertheless, that nothing in the afore recited act shall be construed to give the proprietors or their trustees any power to make any laws, rules or regulations, concerning the waters (other than mill streams), the fisheries, the sea-weed, or any other productions of the waters of the said town, or in any manner or way to debar the

> inhabitants of said town from the privilege of taking sea weed from the shores of any of the common lands of said town, or carting or transporting to or from, or landing property on said shores, in the manner heretofore practiced; which waters, shall be managed by the trustees of the freeholders and commonalty of the Town of Southampton, for the benefit of said town, as they had the power to do before the passing of this act . . . ." 1818 Act, Art. IV (R-77-78)

It is this reservation in the 1818 Act of the right of the "inhabitants" of the Town to access the shores for fishing and seaweed-gathering which the modern-day Trustees have come to refer to as *their* "easement," and their attempts to increase their powers over ocean beach lands by reference to this "easement" is discussed further below.

In 1831, the Legislature enacted another law specifying the procedures to be followed by the Trustees of the Freeholders and Commonalty of the Town of Southampton, and confirming that they had "sole control" over the waters and productions of the waters of the Town, as well as the other powers granted to them by the Dongan Patent — except those "now belonging to the Proprietors by virtue of [the 1818 Act]":

> "The said Trustees shall have the sole control over the fisheries, fowling, sea-weed, waters and the productions of the waters within the said Town not the property of individuals, and all the property, commodities, privileges and franchises granted to them by the Charter

> of Governor Dongan in 1686, <u>except so far as are abrogated, changed and altered by the laws of this state, passed in conformity to the Constitution and not now belonging to individuals, nor to the proprietors by virtue of an Act entitled 'An Act relative to the common and undivided lands and marshes in Southampton, in the County of Suffolk,' passed April 15, 1818</u>, and they shall have power to make rules, orders, and by laws for the management thereof and the regulation of their affairs." 1831 N.Y. Laws Ch. 283 (R-80) (emphasis added).

There can be no question that the 1818 Act constituted a major reduction in the Trustees' powers, divesting them of all of their prior authority over the lands of the Town and consigning them only to the ownership and management of the Town's waters. In its 1913 decision in *People ex rel. Squires v. Hand*, 158 A.D. 510, 143 N.Y.S. 1138 (2d Dep't 1913), this Court described the 1818 Act as a "radical modification" of the colonial patents, stating that it "took from the trustees the greater part of their powers":

> "All these charters have been the subject of legislative modification. No court has questioned this power to make such changes, as such grants are not private but public and governmental. That in its radical modification of the powers of the Southampton trustees, the Legislature responded to a popular demand in 1818, does not detract from its exercise of the right to interfere with these officials. <u>It then took from the chartered town trustees the greater part of their powers,</u>

which it conferred upon the newly formed board of proprietors." 158 A.D. at 516 (emphasis added.)

C. The Court of Appeals Confirmed in *Trustees v. Betts* that the 1818 Act Divested the Trustees of Power over Ocean Beach Lands.

In 1890, the State Legislature adopted the first comprehensive Town Law, creating what was the predecessor of the modern town board to govern towns. 1890 N.Y. Laws Ch. 569 § 190. That same year, the Trustees of the Proprietors disbanded, having by then sold off all of the remaining undivided lands in the Town. (R-63) In the following decade, right around the turn of the last century, four cases went up to the Court of Appeals concerning the powers of the Trustees of the Freeholders and Commonalty of the Town of Southampton. Three of those cases dealt with the Trustees' powers over waters and lands under waters — precisely the regions where power was reserved to them in the 1818 Act. Those three decisions uniformly held that the Trustees had the right to exercise both proprietary and governmental authority over waters and lands under water within the Town of Southampton:

- *Trustees of the Freeholders and Commonalty of the Town of Southampton v. Mecox Bay Oyster Co.*, 116 N.Y. 1 (1889) (Trustees have fee title to Mecox Bay and the lands underneath it and could eject a grantee of the Proprietors)

- *People ex rel. Howell v. Jessup*, 160 N.Y. 249 (1899) (Trustees own and control the Great South Bay and had the power to grant a private landowner the right to build a bridge even if it would reduce navigability)
- *Trustees v. Jessup*, 162 N.Y. 122 (1900) (Trustees own lands under water and have the power to regulate them like a government; dealt with lands under the Great South Bay).

In contrast to the three cases cited above, the fourth case — *Betts* — dealt with ocean beach lands. In 1881, C. Wyllys Betts purchased ocean beach lands from the Trustees of the Proprietors, and built in the dunes several cottages for summer residents as well as a church (St. Andrew's Dune Church, which still stands on the beach in Southampton today). 163 N.Y. at 457. This type of use of ocean beach lands was, at that time, a relatively new phenomenon: it was at this historical moment in the late 19th Century, after the extension of railroad service in the 1870s, that Southampton was beginning its transformation from an insular agrarian and fishing community to a major summer resort. Ocean beach lands started to take on a new importance as valuable property in a resort environment, and the Trustees of the Freeholders and Commonalty of the Town of Southampton wanted to play a more powerful role on those beaches (much as they do today). So, in 1891, the Trustees brought suit to eject Frederick H. Betts (C. Wyllys's

successor) and St. Andrew's Dune Church from the beach, arguing that it was they — and not the Proprietors — who were given control over the ocean beaches by the Legislature in the 1818 Act. The decisions of the First Department and Court of Appeals in the *Betts* case constitute the fullest discussion on record of the impact of the 1818 Act on the Trustees' rights over ocean beach lands, and a careful review of the holdings in *Betts* is critical to evaluating the Trustees' current claims of regulatory jurisdiction over ocean beaches.

The First Department, in a lengthy decision that was affirmed by the Court of Appeals, explained that the Trustees acknowledged that the 1818 Act took from them the power to sell and manage the undivided lands in the Town, but argued that the beaches were not part of those lands because they were of such a common nature that they were excepted from the Legislature's transfer of power to the Proprietors and remained under the power of the Trustees:

> "The plaintiff does not claim that since the act of 1818 it has had power to sell any of the undivided lands which have been held in trust for the proprietors. It concedes that such power which it did possess and exercise prior to the act of 1818 was taken away from it and conferred upon the trustees for the proprietors by that act. What it does claim is, that prior to the act of 1818 the beach or seashore had, by the acts and consent of the parties, become public property and had come to be held by the town trustees, not for the proprietors, but for the general public, so that it could not be sold or dealt with for the

> benefit of the proprietors at all; and that, by the act of 1818, it was excepted and reserved from the common, undivided lands, so called, which the trustees for the proprietors were given the power to manage and sell."

21 A.D. at 437.

In support of this argument, the Trustees argued that the proviso in the 1818 Act reserving to the inhabitants of the Town a right of access to the shores (i.e., the public easement), and providing that the Trustees of the Freeholders and Commonalty would continue to exercise ownership and management over the waters of the Town, showed that the Legislature intended for the Trustees to continue to exercise power and control over ocean beaches on behalf of all of the people of the Town. To this, the First Department said no:

> "We find in the act no intent to except the beach or seashore from the undivided lands which the trustees of the proprietors were given the power to sell. . . . . The *first* proviso, so far as lands are concerned, only relates to the *use* of the beach and shore, by taking seaweed from it and carting or transporting to and from or landing property on such shore . . . [I]t is quite clear that that reference [to "common lands" in the proviso] is not by way of taking from the new trustees the right to manage the common lands, but only limiting that right so that they shall not deprive the inhabitants of the right to take seaweed from them. Indeed, the very proviso necessarily involves the proposition that, but for it, the right to manage the common lands in their entirety is given to these new trustees [of the proprietors], as indeed it is. The

> only limit to that right is found in this proviso, and that is, that their management shall not extend to take away from the inhabitants of the town the privilege of taking seaweed. In all other respects their [i.e., the Trustees of the Proprietors'] right to manage is not affected, but the right to take seaweed from the shore is to be controlled by the old trustees [i.e., the Trustees of the Freeholders and Commonalty], as they had been accustomed to do."

21 A.D.2d at 439-40 (emphasis added).

The holding of the First Department was unmistakable. The 1818 Act granted to the Proprietors the exclusive authority to own *and regulate* the ocean beaches of the Town, which were part of the "undivided lands" transferred to the Proprietors in the 1818 Act. The proviso regarding a public easement of access to the shores was not an indication that the ocean beaches were carved out as an exception to the lands given to the Proprietors to manage (as the Trustees argued), but simply provided that the Proprietors could not exercise their rights of ownership and management of ocean beaches in such a way as would infringe upon the inhabitants' right to fish and gather seaweed along the shore. The First Department rejected the Trustees' claims that powers were reserved to them to manage the ocean beach lands, holding that the Trustees' power there was limited to controlling "the right to take seaweed from the shore."

Another important passage in the First Department's decision concerns the "cotemporaneous construction" of the parties in the years immediately following the 1818 Act. Reviewing that history from its vantage point in 1897 (much closer in time than we are today), the First Department held that after the passage of the 1818 Act, the new Trustees of the Proprietors commenced to control *and regulate* the ocean beaches without objection by the Trustees of the Freeholders and Commonalty for nearly seventy years:

> "So far as cotemporaneous construction of this statute by the parties interested is concerned, it appears that, from the time of the passage of the act, <u>the new trustees elected by virtue of it controlled the beaches and made regulations with regard to them, and that no objection was made to this until 1885, and no claim was made by the trustees of the freeholders to any right whatever to the management of these lands</u>."

21 A.D. at 441 (emphasis added).

The Court of Appeals affirmed the First Department's decision in all respects, quoting from it at length. It reviewed the Trustees' claim that the ocean beaches were of such a common and public character that they were excepted from the lands which the Legislature transferred to the control of the Proprietors in 1818, and it followed the reasoning of the First Department in rejecting that claim. It devoted much of its decision to discussion of the nature of the public right of access that was reserved to the inhabitants of the Town, stressing that this proviso simply preserved "privileges and an easement enjoyed by the public" and allowed

them to use the beaches "for sea fishing and purposes incidental thereto, . . . in ways which would be usual to the inhabitants of a fishing village or settlement." 163 N.Y. at 458-59. The Court of Appeals held that the proviso did *not* indicate, as the Trustees argued, that the Legislature intended for the Trustees to remain in control of the ocean beaches: "I think that the evidence neither supports the theory of the plaintiff's action, nor is of that character which is attributed to it." 163 N.Y. at 458. Thus, more than a hundred years ago in the *Betts* case, the Courts rejected the Trustees' attempt to use the 1818 Act's preservation of public easement of access to shores as a pretext for giving them control of the ocean beaches.

Justice Mayer recognized that *Betts* was important to the question of regulatory jurisdiction at issue here: he cited it in his first decision as holding that the Trustees "do not have control of the shores and beaches" (R-10). He also cited *Betts* in his second decision, but he watered down his description of the case as holding that the Trustees "do not have <u>unfettered</u> control of all of the shores and beaches along the Atlantic Ocean" (R-7, emphasis added). Justice Mayer got it right the first time. The *Betts* case compels the rejection of the Trustees' attempts to revive arguments that were foreclosed by the Court of Appeals in 1900.

II.

In 1998, the Trustees Renewed Their Attempt to Regulate Ocean Beaches, Through Amendment of Their "Rules and Regulations"

The Trustees maintain a document entitled "Rules and Regulations for the Management and Products of the Waters of the Town of Southampton," which they call their "Blue Book" (referred to herein as their "Rules and Regulations"). For many decades after the *Betts* case, the Trustees appear to have complied with the Court's holding that they did not have power over ocean beach lands, and they limited the subject matter of their Rules and Regulations to the waters and fisheries of the Town, where they had proper jurisdiction. But, as shown below, in 1998 they added new provisions to their Rules and Regulations requiring that permits be obtained from them for activities on ocean beaches — lands which their Rules and Regulations had never previously attempted to cover.

Copies of the current version of the Trustees' Rules and Regulations are made available to the public at the Trustees' office in the Southampton Town Hall, and copies are also available on the website of the Town of Southampton (http://www.southamptontownny.gov/filestorage/596/598/1613/5337/SH-TRST-BlueBook.pdf, retrieved May 30, 2013) and on the Trustees' separate website (http://www.southamptontrustees.com/forms/blue_book.pdf, retrieved May 30,

2013).[2] The Town of Southampton's website also contains the Trustees' "Minutes and Records Books" from 1741-2007, at http://www.southamptontownny.gov/content/596/598/1613/3844/default.aspx (retrieved May 30, 2013).

As shown by those records, the Trustees have amended their Rules and Regulations frequently in recent decades. While not all of the versions of their Rules and Regulations are available online, the "1977-1980 Trustees Records" contains a complete copy of the Rules and Regulations adopted on May 2, 1977. (*See* www.southamptontownny.gov/FTP/Trustees/1977-80-TrusteesRecords.pdf, retrieved May 30, 2013). Consistent with their authority over the waters of the Town (and true to their title, "Rules and Regulations for the Management and Products of the *Waters* of the Town of Southampton"), the 1977 Rules and Regulations were confined to regulation of fishing, shellfishing, and the use of Town waters and lands under water.

In 1977, only the following activities required permits from the Trustees, pursuant to Article VI Section 2(A) of their Rules and Regulations:

> "No person shall dig, dredge or change the bottom of any of the waters in the Town of Southampton, nor drive or place therein any bulkheading, dock, mooring or obstruction, nor deposit any material

[2] As of May 30, 2013, the Town of Southampton's website carried the version of the Trustees' Rules and Regulations adopted on December 3, 2012, whereas the Trustees' separate website carried the version of their Rules and Regulations adopted on January 3, 2011.

> whatsoever nor empty any drain or sewage, in said waters, nor dig any boat channel or basin in any upland to afford access to any of said waters, nor cause same to be done unless authorized by a Permit issued by the Trustees." (www.southamptontownny.gov/FTP/Trustees/1977-80-TrusteesRecords.pdf, emphasis added.)[3]

In 1977, the Trustees' had no Rules and Regulations pertaining to the use of ocean beach areas, and they did not require permits for dune restorations or other activities on ocean beach lands. In fact, the Trustees' Rules and Regulations did not contain any references to ocean beach areas or an ocean beach "easement" at all until 1998, when they amended them to add a definition of "ocean beach area," and to impose permit requirements for activities thereon. *See* Minutes of March 16, 1998, setting a public hearing on April 6, 1998, regarding amendments to the Rules and Regulations adding definitions of "bay beach area" and "ocean beach area," and "clarifying the Town Trustees' permit requirements" (http://www.southamptontownny.gov/FTP/Trustees/1998-1999_Trustees Records.pdf, retrieved May 30, 2013).

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[3] This Court may, of course, take judicial notice of legislative history and public records. *See State v. Green*, 96 N.Y.2d 403, 408 n. 2 (2001) (court may take judicial notice of laws and their legislative history); *Siwek v. Mahoney*, 39 N.Y.2d 159, 163 n. 2 (1976) ("Data culled from public records is, of course, a proper subject of judicial notice"); *Seidel v. Board of Assessors*, 88 A.D.3d 369, 378 (2d Dep't 2010) ("this Court may take judicial notice of the Bill Jacket even though it is not part of the record").

By the time the Trustees commenced this action twelve years later, in 2010, they had adopted extensive new regulations of land use activities on ocean beaches. These Rules and Regulations now contained, in Article IA, a broad definition of Ocean Beach Area, encompassing even lands within incorporated villages such as Quogue:

> "'**Ocean Beach Area**' shall mean all those premises along the Atlantic Ocean bounded on the north by the crest of the primary dune, on the east [by the] East Hampton Town line, on the south by the high-water mark of the Atlantic Ocean and on the west by the Brookhaven town line, including those areas within incorporated villages. Said area shall be the easement held in favor of the Freeholders and Commonalty of the Town of Southampton." (R-64, emphasis added.)

Over this swath of land, the Trustees' Rules and Regulations now imposed the following permitting requirements, set forth in Article VII:

> "**Section 1 – Permits Required**
>
> A) No person shall engage in any of the following activities in . . . [the] ocean beach area as defined herein unless authorized by a permit issued by the Board of Trustees of the Freeholders and Commonalty of the Town of Southampton.
>
> 1) Clear, dig, dredge or in any way add[] to, alter or remove any material;

> 2) Place or deposit, or permit to be placed or deposited, any debris, fill, sand, gravel, artificial beach nourishment or other material, including vegetation, rocks and rip-rap;
>
> 3) Erect, construct, reconstruct, alter, engage, drive or place any structure, including a dock, pile, tie-off poles, moorings, or other obstruction, or bulkhead, jetty, retaining wall, groin, revetment, rip-rap, ramp, catwalk, walkway, stairs or any structure constructed for the purpose of providing access to and from the shoreline." (R-63-64).

Thus, by 2010, the rights reserved in the 1818 Act in favor of the "inhabitants" of the Town of Southampton, allowing them to continue to exercise "the privilege of taking sea weed from the shores of any of the common lands of said town, or carting or transporting to or from, or landing property on said shores, in the manner heretofore practiced," had morphed into an easement purportedly held by the Trustees over all the beach lands in the Town and incorporated villages between the high-water mark of the Atlantic Ocean and the crest of the primary dune. Onto this "easement," the Trustees had bootstrapped a requirement that a permit be obtained from them for a broad range of activities including stairs, walkways, dune-restoration work, bulkheads and other erosion-control structures — activities far beyond the contemplation of the Legislature when it reserved to the people an easement of access to the shores for fishing and seaweed-gathering in 1818. Just as in the *Betts* case more than a hundred years earlier, the Trustees were

again using the public easement as a pretext to expand their power on ocean beaches.

III.

In the 1990s, the Southampton Town Board Attempted to Bolster the Trustees' Exercise of Jurisdiction on Ocean Beaches — Although Not Within Incorporated Villages

The Town Board of the Town of Southampton took action in the 1990s to bolster the Trustees' efforts to assert regulatory jurisdiction over ocean beach lands, although it never went as far as the Trustees in asserting that such regulatory jurisdiction applied within the boundaries of incorporated villages. In 1990, it adopted a definition of "ocean beach area" in its Town Code that *excluded* incorporated villages:

> "OCEAN BEACH AREA
> Those premises along the Atlantic Ocean bounded on the north by the crest of the primary dune, on the east by the easterly Town line, on the south by the high-water mark of the Atlantic Ocean and on the west by the westerly Town line, excluding incorporated villages, and the Suffolk County Beach known as "Shinnecock Inlet East." This area is a right of way controlled by the Town Trustees."

Code of the Town of Southampton § 111-31 (emphasis added; originally adopted as part of Local Law 11 of 1990).

By enacting this definition of "Ocean Beach Area," the Town Board facilitated the aggrandizement of the Trustees' powers and helped to revive the fiction rejected in *Betts* (whose holding had, apparently, by this time been long since forgotten), that the public easement of access reserved in the 1818 Act gave the Trustees regulatory power over ocean beach lands. The Town Board went further and stated in its Code that the ocean beaches from the high-water mark of the ocean to the crest of the primary dune constituted "*a right of way controlled by the Town Trustees*" — a quantum leap from the limited rights of fishing and seaweed-gathering reserved to the inhabitants of the Town in 1818.

Then, in 1996, the Town Board amended the beach chapter of its Town Code to include a requirement that permits be obtained from the Town Trustees for activities on ocean beaches, as follows:

> "No dock, spile, bulkhead, jetty, retaining wall, revetment, catwalk, walkway, stairs, steps, artificial beach nourishment or fill, upland retaining wall or any other structure shall be constructed or placed within the bay beach area <u>or ocean beach area, as defined in this chapter</u>, without first obtaining a permit from the Town Trustees."

Code of the Town of Southampton, § 111-30(A) (emphasis added; emphasized portions adopted as part of Local Law 10 of 1996). Thus, in 1996, the Town Board of the Town of Southampton delegated authority to the Trustees to regulate activities on ocean beach lands — although, as noted above, that delegation did not

extend to ocean beach lands within incorporated villages, which were explicitly excluded from the definition of "Ocean Beach Area" in the Town Code.

In 2008, the Southampton Town Board went even further and adopted § 111-37 of its Town Code, in which it attempted to legislate a blanket approval of the Trustees' Rules and Regulations and incorporate them by reference into the Code: "[e]very person shall comply with the regulations as provided in the Rules and Regulations for the Management and Products of the Waters of the Town of Southampton promulgated by the Board of Trustees of the Freeholders and Commonalty of the Town of Southampton in all matters." But § 111-37 has since been held by the First Department to be an improper open-ended delegation, because it "permits the Trustees, from time to time, at their prerogative, to amend their regulations and . . . compliance with them would be required, without the Town Board ever having reviewed and voted on the amended regulations." *Brookhaven Baymen's Ass'n, Inc. v. Town of Southampton*, 85 A.D.3d 1074, 1078, 926 N.Y.S.2d 594 (1st Dep't 2011).

While the entire scheme by which the Town Board has attempted to delegate authority over ocean beaches to the Trustees is suspect in light of the First Department's holding in the *Brookhaven Baymen's* case, the exclusion of land within incorporated villages from the definition of "Ocean Beach Area" is consistent with the important principle of municipal law which holds that a Town

cannot legislate within the boundaries of an incorporated village. This fundamental principle permeates the laws of the State of New York:

- Town Law § 60 ("Town board constituted") states: "it is not intended to extend the power of said [town] board within the limits of any incorporated village of city . . . ."
- Town Law § 132 ("Effect of town ordinances limited") states: "A rule, regulation or ordinance of a town shall be effective and operative only in that portion of such town outside of any incorporated village of city therein, except as otherwise specifically provided by statute."
- Town Law § 261 ("Grant of power; appropriations for certain expenses under this article") grants town boards power to regulate land use within the town" provided that such regulations shall apply to and affect only such part of a town as is outside the limits of any incorporated village or city . . . ."
- Municipal Home Rule Law § 11(3) states: "any local law adopted by a town board shall be effective and operative only in that portion of such town outside of any village or villages therein . . . ."

This case presents only the question of whether the Trustees have regulatory power over ocean beaches within the boundaries of incorporated villages. Because of the Town Board's delegation of power to the Trustees over beaches in the

Town, the Trustees' assertion of jurisdiction in the Town raises distinct legal issues. But whether or not that delegation is valid, by its terms it does not apply within an incorporated village such as Quogue, and in this case the Trustees cannot point to the Town Code as authority for their purported regulatory power. Clearly, the Town Board recognized its lack of jurisdiction within incorporated villages when it excluded those lands from its definition of "Ocean Beach Area." But the Trustees refuse to recognize any such limitation and seek in this lawsuit, to enforce the permit requirements that they adopted in 1998 upon ocean beach lands even within incorporated villages such as Quogue.

IV.

This Court's 2002 Decisions in *Poster* and *Allen* Do Not Stand for the Proposition that the Trustees Have Regulatory Jurisdiction Over Ocean Beaches Within Incorporated Villages Because the Underlying Jurisdictional Issues Were Not Raised, Argued or Decided.

Shortly after the Trustees adopted their new Rules and Regulations in 1998 regarding ocean beach areas, Susan Allen, an owner of oceanfront property in the Village of Southampton, made an application to the Trustees for a permit to construct a rock revetment on her property. In November, 1998, the Trustees denied her application. *Allen v. Strough*, 301 A.D.2d 11, 16, 752 N.Y.S.2d 339 (2d Dep't 2002). A few months later, on April 5, 1999, the Trustees denied a similar application for a rock revetment submitted by Allen's next-door neighbor, John

Poster. *Poster v. Strough*, 299 A.D.2d 127, 129, 752 N.Y.S.2d 326 (2d Dep't 2002).

Both permit denials were challenged judicially in hybrid Article 78 proceeding/actions which (1) demanded that the Trustees be directed to grant approval of the permit applications; (2) sought a declaration that the denial of the permit applications constituted a taking of private property without just compensation; and (3) demanded damages for violations of the property owners' due-process and equal-protection rights. (The pleadings in the *Poster* and *Allen* cases appear in the Record at R-81-112.) The cases were assigned to different Justices of the Supreme Court, Suffolk County, who made different rulings: Justice Underwood dismissed the Petition/Complaint in the *Poster* case (*see* 299 A.D.2d at 134); but Justice Klein in the *Allen* case determined that because the proposed revetment was "landward of the primary dune," it was outside the "Ocean Beach Area" as defined in Article I of the Trustees' Rules and Regulations, and thus no permit was required. 301 A.D.2d at 344. Both cases were appealed to this Court, which issued companion opinions in the cases on October 15, 2002.

Throughout the entire proceedings in *Poster* and *Allen*, including in the briefs and arguments submitted on appeal to this Court, it was never argued that the Trustees did not possess regulatory power over ocean beaches within an incorporated village. All of the pleadings, papers and arguments accepted the

Trustees' premise that they had authority to regulate activities on ocean beaches between the high-water mark of the Atlantic Ocean and the crest of the primary dune. The only jurisdictional argument advanced in the case was that because the revetments were proposed to be constructed landward of the primary dune, they were outside of the definition of "Ocean Beach Area" contained in the Trustees' Rules and Regulations. The underlying question of whether the Trustees had any authority to regulate on ocean beaches at all — and particularly on ocean beaches located within the boundaries of an incorporated village — was simply never raised. There was no discussion of the divestiture of power over the lands of the Town accomplished by the 1818 Act, nor was the *Betts* case even cited by counsel for Poster and Allen in his appeal briefs (reproduced in the Record at R-113-141), or by this Court in its opinions.

Because no challenge was asserted, the Court took at face value the Trustees' assertion that they had the right to regulate the lands at issue between the ocean and the crest of the dune, and it characterized the cases as instances of the Trustees seeking to exercise regulatory jurisdiction "pursuant to certain local laws which confer upon [them] virtually absolute discretion to grant or deny permits in connection with the proposed construction of defined structures, including revetments, within defined areas, including within the 'ocean beach area' (Rules art I)." *Poster*, 299 A.D.2d at 135. The Court itself emphasized that it was not

intending to pass on the underlying validity of the "local laws" by which the Trustees purported to regulate ocean beaches, because that validity was not challenged:

> "In the case at hand, we are not concerned with whether the local laws which allegedly require Poster to obtain a permit prior to constructing his revetment are in conflict with state or federal laws; no such issue is raised in the combined petition and complaint." *Poster*, 299 A.D.2d at 140 (emphasis added).

Because the issue of whether the Trustees actually have power to regulate ocean beaches between the high-water mark of the ocean and the crest of the primary dune was not raised, this Court's decisions cannot be construed as binding precedent on that issue. It is well established that "a case is precedent only as to those questions presented, considered and squarely decided." *Wellbilt Equip. Corp. v. Fireman*, 275 A.D.2d 162, 168, 719 N.Y.S.2d 213 (1st Dep't 2000); *People v. Bourne*, 139 A.D.2d 210, 216, 531 N.Y.S.2d 899 (1st Dep't 1988), *lv denied*, 72 N.Y.2d 955 (1998).

Unfortunately, because of the limited nature of the briefing, a number of important points were not brought out and, as a result, some of the confusion that has often characterized the law pertaining to the Trustees made its way into the Court's opinions. One point of confusion concerns the status of the Trustees' Rules and Regulations, which do not, in fact, qualify as "local laws" (a point that,

again, was not raised). The Trustees themselves have made clear in other cases that their "Rules and Regulations" are *not* local laws. *See Brookhaven Baymen's Ass'n v. Town of Southampton et al.*, 24 Misc.3d 1239A (Sup. Ct. Suffolk Co., Mayer, J., 2009), *mod,* 85 A.D.3d 1074, 926 N.Y.S.2d 594 (1st Dep't 2011): "Defendants also argue that neither the Town Law nor the Municipal Home [Rule] Law are applicable to the process by which the Trustees adopt the Rules and Regulations and point to the express language of each." The Rules and Regulations do not comply with the requirements for "local laws" in many respects: for example, they are not filed with the Secretary of State but are simply maintained by the Trustees.

On pages 135-36 of its opinion (in 299 A.D.2d), the Court reviewed the three "local laws" on which the Trustees based their assertion of regulatory jurisdiction over ocean beaches. The first of those was Town Code article IV, § 111-30(A), which, as noted above, the Town Board enacted by local law in 1996 to require a permit from the Trustees for certain activities within the defined "ocean beach area." But the Court did *not* note that the "ocean beach area," as specifically defined in Town Code § 111-31, *excluded* land within incorporated villages from its coverage — a important point that should have been brought to the Court's attention in a case that concerned land within the boundaries of the Incorporated Village of Southampton. Because the most important underlying questions were

not raised, the Court was not made aware that the very provisions of the Town Code on which the Trustees relied did not, by their own terms, apply to the land at issue.

The second "local law" considered by the Court was "Rules, article VII, § 1(A)(3)," which, as noted above, was adopted by the Trustees as part of their Rules and Regulations in 1998, purporting to require a permit from them for a number of activities on the "ocean beach area," which the Trustees (unlike the Town Board) defined in Article I of their Rules and Regulations to include incorporated villages.

The third "local law" considered by the Court was Village Code, article II, § 49-6, the "coastal erosion hazard area" provisions of the Code of the Village of Southampton adopted pursuant to New York State Environmental Conservation Law Article 34 (a statutory scheme that is discussed further below). The Court determined, correctly, that the Trustees' reliance on this provision as a source of jurisdiction "is not well founded, for the simple reason that it does not address in any way the powers of the Board, the local government which is claiming the right, in the present case, to pass on Poster's application." 299 A.D.2d at 136.

Thus, of the three "local laws" on which the Trustees relied on for their authority to regulate ocean beaches, only one — their own self-serving "Rules and Regulations" — actually purported to give them authority over ocean beaches within an incorporated village, and it was not a "local law." But because of the

limited nature of the points argued on the appeal, the Trustees succeeded in glossing over such important details, perpetuating the confusion and misunderstanding which has characterized this area of the law.

Counsel for Poster and Allen did make the point that the Trustees were exceeding whatever powers they might assert in reliance on the public easement over ocean beaches, but the Court held that those arguments were misplaced because that was not the source of power on which the Trustees were relying:

> "This is not a case in which the Board is seeking an injunction to prohibit interference with the public's right to enjoy the beach, in which the Board would have the burden of proving its entitlement to such relief. Instead, this is a case where the Board has asserted jurisdiction pursuant to certain local laws . . . ."

Poster, 299 A.D.2d at 135. The Court elaborated on the distinction between easement rights and police power, and held that the Trustees' authority depended on the latter and not the former:

> "[t]he Board in this case is purporting to act pursuant to local laws enacted by it pursuant to the police powers delegated to it from the State. Poster's argument to the effect that the Board's jurisdiction depends on the Town's having title to, or an easement over, the area in question is thus without merit. Poster's rights as a landowner, including his rights as a riparian landowner, 'must yield to the [Town's] exercise of police power' (*Matter of Haher's Sodus Point Bait Shop v. Wigle, 139 AD2d 950, 951, 528 N.Y.S.2d 244*)."

The State has unquestionably delegated police power over lands in the Town of Southampton to the Southampton Town Board, and over lands in the Village of Quogue to the Board of Trustees of the Village of Quogue. But there is no authority for the proposition that the State has delegated police power over ocean beach lands within the Incorporated Village of Quogue to the Trustees of the Freeholders and Commonalty of the Town of Southampton. To the contrary, the 1818 Act and the *Betts* case show that the State has made no such delegation.[4] But again, the premise that the Trustees possessed police power over ocean beaches was never challenged in the arguments made to this Court.

The only jurisdictional issue which was actually raised, briefed and argued in *Poster* and *Allen* was the narrow issue of whether the proposed revetments were located landward of the crest of the primary dune, and thus, outside of the "Ocean Beach Area" as the Trustees themselves defined it: "Counsel argued that, pursuant to the governing regulations and local laws, the [Trustees] had no jurisdiction over the area landward (north) of the line which reflected the top of the dune as of September 26, 1994." *Poster*, 299 A.D.2d at 133. But because there had been

---

[4] The Appellate Term has held that there has been "no cession by the State to [the] Trustees of its police power over the land and waterways conferred under the Dongan Patent other than as set forth in section 130(18) of the Town Law" (which, as noted below, concerns only shellfish regulations). *People v. Lagana*, 13 Misc.3d 110, 112-13, 827 N.Y.S.2d 433 (App. Term, 2d Dep't 2006).

severe avulsion of the primary dune in coastal storms, this Court was confronted with the question of how to locate the crest of the primary dune:

> "The problem presented in this case, as well as in *Allen*, is simply this: the dune has largely or totally disappeared in the vicinity of the subject properties; therefore, the key line of reference contained in the governing legislation which defines the northern border of the [Trustees'] jurisdiction has likewise disappeared."

Poster, 299 A.D.2d at 137. In answer to this problem, the Court fashioned a workable approach for determining the location of the dune crest "by reference to the crest of those portions of the dune which remain, both to the east and to the wets of the interrupted portion or portions of the dune, and closest to it or them." *Poster*, 299 A.D.2d at 137; *see also Allen*, 301 A.D.2d at 17-18. It remanded the cases to the Supreme Court for hearings on that specific factual issue.

The issue on this appeal is distinct: i.e., whether the Trustees have regulatory power *at all*, even within their asserted boundaries of the high-water mark of the Atlantic Ocean and the crest of the primary dune. That fundamental issue was not considered or decided in *Poster* and *Allen* and should finally be resolved now.

V.

The Village of Quogue and the New York State DEC Regulate Ocean Beaches in the Village of Quogue — Not the Town Trustees

The Trustees claim that their unique experience and expertise is necessary on the ocean beaches, and that only they can properly determine whether dune-restoration projects such as those authorized in Quogue should be allowed. But this argument ignores that the State Legislature has established a comprehensive statutory framework in the Environmental Conservation Law for regulating activities on ocean beaches and that extensive regulations and permitting requirements adopted by the State, the New York State DEC and the Village of Quogue are already in place to protect the environment on ocean beaches and to guard against erosion and other hazards.

Pursuant to Article 34 of the ECL, the New York State DEC has mapped a zone on the beach lands fronting on the Atlantic Ocean called the "Coastal Erosion Hazard Area" ("CEHA"). ECL Article 34 allows regulation of activities within the CEHA by "local government," which is defined in ECL § 34-0103(7) as "a village, town (outside the area of any incorporated village), city or county." Regulation of ocean beach erosion issues by colonial boards of trustees is not part of the State's comprehensive statutory scheme for regulating coastal erosion; within an

incorporated village such as Quogue, only the State and the Village are authorized to regulate under ECL Article 34.

The Environmental Conservation Law requires that the standards and criteria promulgated pursuant to its authority shall include "regulation of activities or development, including placement of erosion protection structures or use of non-structural measures so there will be no measurable increase in erosion to the development site or at other locations." ECL § 34-0108(3)(b). Both the Village and the DEC determined that the dune-restoration projects at issue in this case met that standard, and the DEC's approval included extensive monitoring requirements to ensure that the standard would be met going forward over time — up to and including removal of the "geocubes" if it proved to be necessary. (R-30-31)

The State Legislature knows how to acknowledge the Trustees' regulatory powers in areas that are appropriate. In Town Law § 130 ("Ordinances"), it allows Trustee regulation of shellfishing — a matter fully within the Trustees' jurisdiction under the Acts of 1818 and 1831:

> "18. Shellfish. a. Regulating the taking and the manner of taking clams, oysters, scallops and other shellfish from the lands of or from waters over the lands of
>
> (1) a town vested with the title to, or holding a lease on, lands under tidewater in any harbor, bay or creek, and vested with the right of fishing, or

(2) <u>the trustees of the freeholders and commonalty of a town in which such trustees are vested with title to such lands and the right of fishing, provided that such trustees shall file with the town clerk an application in writing therefor</u>."

Town Law § 130(18) (emphasis added). But nowhere in the Environmental Conservation Law or any of the laws of this State is there any similar reference to regulation of ocean beaches by the Trustees. To the contrary, the ECL establishes that erosion issues on ocean beaches in the Village of Quogue are governed by the DEC and the Village, and not the Trustees.

VI.

Justice Mayer's Decision Was Infected with Multiple Errors.

When Justice Mayer issued his second decision on December 11, 2012, reversing his prior determination that the Trustees do not have regulatory jurisdiction over ocean beaches in the Village of Quogue, his change of opinion seemed to be based on his reading of this Court's decision in *Allen v. Strough* as standing for the proposition that the so-called Trustees' easement gives them regulatory power over ocean beaches. He declared that the Trustees "have the right to regulate activities <u>to protect their easement</u> as to that area south of the crest of the primary dune and north of the high water mark [of the Atlantic Ocean]." (R-7, emphasis added.)

Like the Trustees, Justice Mayer blurred the concept of an easement and a regulatory power. The two concepts are and should remain entirely distinct. There are many governmental and quasi-governmental entities which hold easements over land throughout this State (for example, railroads and public utilities), but it has never been held that an easement carries with it a power of regulatory jurisdiction allowing the easement holder to subject the property owners to permitting requirements for land-use activities. The suggestion that an easement should be equated with the power to enact and enforce environmental and land-use regulations in the same fashion as a municipality or a State agency acting pursuant to statutorily-granted power is dangerous. It is directly contrary to the established law of this State, which holds that all municipal power to regulate land use must emanate from a delegation by the State legislature. *See Kamhi v. Planning Board of the Town of Yorktown*, 59 N.Y.2d 385, 389, 465 N.Y.S.2d 865 (1983); *Golden v. Planning Board of the Town of Ramapo*, 30 N.Y.2d 359, 369-70 (1972).

Although Justice Mayer cited this Court's decision in *Allen* as authority for the blurring of an easement with a regulatory power, this Court in fact drew a careful distinction between those two concepts. As explained above, this Court made clear in *Poster* and *Allen* that it was not upholding the Trustees' powers based on its asserted "easement" rights, but rather pursuant to "local laws," the validity of which the property owners did not challenge. Justice Mayer thus erred

by holding that this Court's decision in *Allen* required a determination that the Trustees have the right to regulate ocean beaches "to protect their easement."

Justice Mayer further held: "Under Town Law (Rules Art. I) the ocean beach area is that area 'along the Atlantic Ocean bounded on the north by the crest of the primary dune,…on the south by the high-water mark of the Atlantic Ocean." (R-6) But there *is* no "Town Law (Rules Art. I)." There is the Town Law, a comprehensive statute enacted by the State Legislature applicable to all towns in this State, and then there are the Trustees' Rules and Regulations which are not State laws and not even local laws or ordinances. Once again, the glossing over of these important details contributes to the confusion that has characterized this area of the law and created such fertile ground for the Trustees' overreaching.

Justice Mayer's decision also contains an extremely problematic paragraph, holding as follows:

> "The jurisdiction of the trustees is not limited by the authority of the State because Navigation Law § 2(4) specifically excluded 'tidewaters bordering on and lying within the boundaries of Nassau and Suffolk counties' from the navigable waters of the state (the basis of the exemption being derived from the various patents and their progeny) (*see Rottenberg v Edwards*, 103 AD2d 138, 478 NYS2d 675 [2d Dept 1984]). Although the defendant Village would generally have jurisdiction of the areas within its territorial limits, because of the various colonial land grants which have been confirmed by the state

> and federal legislatures, the lands lying on or bordering the tidewaters are not under its jurisdiction as they remain under the jurisdiction of the town or its trustees (*see Inc. Village of Manorhaven v Ventura Yacht Services, Inc.*, 166 AD2d 685, 561 NYS2d 277 [2d Dept 1990]; *compare Malloy v Inc. Village of Sag Harbor*, 12 AD3d 107, 784 NYS2d 141 [2d Dept 2004]). (R-7)

The first problem is that this paragraph starts with the misguided statement that "[t]he jurisdiction of the trustees is not limited by the authority of the State . . . ." To the contrary, as the Court of Appeals held in *Knapp v. Fasbender*, the jurisdiction of the Trustees is *entirely* limited and controlled by the authority of the State.

Second, Justice Mayer cited the Navigation Law's exclusion of "tidewaters" in Nassau and Suffolk Counties from its definition of "navigable waters of the state" as justification for the conclusion that the lands "lying on or bordering the tidewaters" are not under the jurisdiction of the Village of Quogue but remain "under the jurisdiction of the town or its trustees." But, as the Village pointed out on reargument, this case concerns ocean beach *lands* and the Atlantic Ocean is not a "tidewater." *See Town of Islip v. Powell*, 78 Misc.2d 1007, 358 N.Y.S.2d 985 (Suff. Co. Sup. Ct., Lazer, J., 1974) (the term "tidewater" is usually not applicable to open sea but to bays, coves and rivers). Under State Law § 7-a(1) and (2), the State of New York owns the lands under the Atlantic Ocean up to "a line three

geographical miles distant from its coast line," as stated in the Submerged Lands Act, 43 U.S.C. § 1312. The Trustees, who never claimed to own or regulate the Atlantic Ocean or lands underneath it, *agreed* with these points. (R-627 para. 3.) And yet Justice Mayer's second decision preserved this incorrect holding.

But by far the most significant error in Justice Mayer's decision was his failure to properly appreciate the significance of the 1818 Act and the decisions of the First Department and Court of Appeals in *Betts*. It is those authorities which control the issue of whether the Trustees can properly exercise regulatory jurisdiction over ocean beaches, and it is those authorities which answer that question with a simple "no."

Conclusion

For the foregoing reasons, the declarations made by Justice Mayer in his Order of December 11, 2012, to the effect that the Trustees "have the right to regulate activities to protect their easement" on ocean beaches in the Incorporated Village of Quogue should be reversed, and this Court should declare that the Trustees possess no regulatory jurisdiction on ocean beaches within incorporated villages.

/S/

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR Section 670.10.3(f) that the foregoing brief was prepared on a computer using Microsoft Word.

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To be Argued by:
NICA B. STRUNK
(*Time Requested: 15 Minutes*)

Supreme Court of the State of New York
Appellate Division – Second Department

Docket No.: 2013-01619

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

Plaintiffs-Respondents,

- against -

INCORPORATED VILLAGE OF QUOGUE,

Defendant-Appellant.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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The Trustees' Respondents' Brief attempts to justify their illegal and *ultra vires* exercise of regulatory jurisdiction over ocean beach lands within incorporated villages by presenting a muddled and inaccurate version of history and the applicable law. While this approach has sometimes worked for them in the past, the Court should put an end to it now, because on rigorous examination, it simply falls apart.

I.

The Dongan Patent Did Not Create Any "Easement."

The Trustees have built up such a mythology surrounding the Dongan Patent that they seem to expect that the mere invocation of that colonial-era document will carry the day. But it appears that the Trustees have not actually read the Dongan Patent, because if they had, they would see that they are seriously misconstruing it in their Respondents' Brief.

In 1686, the year it was granted, the Dongan Patent was simply the instrument by which the English crown recognized and ratified the founding of Southampton (which had been settled starting in 1640), and authorized the purchase by the original settlers (known as the "Proprietors") of lands from the natives. Justice Cardozo described its genesis as follows:

> "Southampton in its beginnings was without a royal patent, though its inhabitants like true precursors of the thought of Hobbes and Locke,

> had organized themselves already into a political community. The defect in the documents was supplied by the Andros patent of 1676 and the Dongan patent a decade later. By these, the title to the town lands was vested in a public corporation, the Trustees of the Freeholders and Commonalty of the Town of Southampton. From time to time thereafter, the Trustees allotted shares or portions of the common lands to the use of the 'proprietors.'"[1]

Beers v. Hotchkiss, 256 N.Y. 41, 46 (1931).

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[1] In Justice Cardozo's brief snapshot of 17th century Southampton, we can see the foreground of the political problem that would develop over the next century and come to be resolved in the 1818 Act. The Proprietors were the descendants (or transferees) of the first settlers who had originally purchased the land in the Town, and they owned all the Town lands in varying shares (as Cardozo notes, in another passage in *Beers*, a share was referred to as a "fifty"). Periodically, the Proprietors would survey and divide up chunks of land; that process was called an "allotment" and is also discussed in *Beers*. But there remained significant "undivided" lands which had not previously been allotted, and those were owned by the Proprietors in common, in accordance with their shares.

Under the Dongan Patent, however, those undivided lands were managed by the Trustees of the Freeholders and Commonalty of the Town of Southampton, who were elected by the Town at large. In the early days, all Trustees were also Proprietors, but by 1818, the ranks of non-Proprietors in the Town had grown substantially, and non-Proprietors had begun to be elected as Trustees, creating some conflict with the Proprietors whose lands they were charged with managing. This conflict was resolved in the political compromise achieved by the 1818 Act, whereby the Trustees were divested of their power over the undivided lands but granted full control over the waters and production of the waters of the Town, on behalf of the Townspeople at large, and a new board of Proprietors was established to manage the undivided lands which the Proprietors owned, and which had previously been managed by the Trustees (including ocean beaches). *See* David Goddard, *Colonizing Southampton*, SUNY Press 2011 (also cited in the Respondents' Brief at fn. 8, p. 13).

On page 8 of their Brief, the Trustees describe the Dongan Patent as follows: "In 1686 the Dongan Patent conveyed all the lands and waters in the Town of Southampton to the Trustees, created the Trustees as a 'body politic,' and conferred governmental power upon them to 'make such acts and orders in writing for the more orderly Doeing of the premises as they . . . shall and may think CONVENIENT.'" While that description ignores the necessity of the colonists to purchase the land from the natives, it is otherwise a reasonable summary of the Dongan Patent. Together with the Andros Patent, it represented the legal authorization by the English crown for the founding of the town of Southampton as an English colony.

But the Dongan Patent did *not*, as the Trustees argue repeatedly throughout their brief, grant the Trustees an "easement" over ocean beach lands. At page 5 of their Brief, the Trustees state that the right of the Town residents to use ocean beaches was "a right conferred upon them in the form of a perpetual easement by the Dongan Patent of 1686." On page 13, they modify this statement and say that "easement" was not actually conferred upon the Townspeople but upon *them* (the Trustees), describing it as "the easement of access to the waters which the Dongan Patent had granted to the Town Trustees". On page 18 they expand on this theme, claiming: "The original easement rights were conveyed directly to the Trustees,

who were the grantees named in the Dongan Patent." And on page 25 they take the argument still further:

> "In 1686, the Trustees were the grantees of the easement along the ocean beaches not only within the future Village of Quogue but in all other parts of Southampton, and there is no reason why their right to do so [*sic*] should stop at the boundary of any village in the town, particularly since all were incorporated long after the Trustees were first invested with those duties."

In fact, the Dongan Patent in 1686 said absolutely nothing about an "easement" over ocean beaches — in favor of the Trustees, the townspeople, or anyone else. The Trustees have not provided a copy of the Dongan Patent to the Court in their papers, but it is readily available in numerous sources, including the Trustees' own website referenced in footnote 4 of their Brief. It contains no provisions regarding an easement, right-of-way or any other similar rights over ocean beaches. The closest it comes to even mentioning the area that we refer to today as ocean beach is when it states, in its description of the boundaries of the premises granted: "their southern bounds being the sea." The lands granted by the Dongan Patent extended on their south boundary to the "sea" — that is, to the Atlantic Ocean — just as it extended on the east to Wainscott and on the west to "a place called Seatuck where a stake was sett". In 1686, the Trustees owned the ocean beaches, just as they owned everything else in Southampton. But the

concept that the Dongan Patent in 1686 gave the Trustees particular — much less "perpetual" — "easement" rights over the beach lands bordering the Atlantic Ocean is simply a fiction. There is nothing of the sort anywhere in the document.

In this argument we can see the level of mythology that the Trustees have created around the Dongan Patent, which they have cultivated as a tool for aggrandizing their powers. Such mythology should be rejected here, in the face of clear law and fact.

II.

All of the Trustees' Arguments to the Effect that They Retained Regulatory Land-Use Power on Ocean Beaches After Passage of the 1818 Act Fail.

What has come, over time, to be known as an "easement" giving the inhabitants of the Town of Southampton a right of access to the shores of the Atlantic Ocean came not from the Dongan Patent in 1686, but from the reading of 1818 N.Y. Laws Ch. 155 (the "1818 Act") set out in the governing case of *Trustees of the Freeholders and Commonalty of the Town of Southampton v. Betts*, 163 N.Y. 454 (1900). It was the Court of Appeals in 1900 in *Betts* — and not the Dongan Patent or even the 1818 Act itself — that first characterized the 1818 Act's reservation of a right in favor of the *inhabitants* of the Town to access the shoreline for fishing, gathering seaweed and other traditional purposes as in the nature of an

"easement." *See Betts*, 163 N.Y at 460. This reservation of the inhabitants' rights of access to the shoreline was explicitly set up as an exception to the main force of the 1818 Act, which was to divide power in the Town, with the Proprietors getting ownership and management power over the undivided lands, and the Trustees retaining only ownership and management power over the waters and the products of the waters. As noted in *People ex rel. Squires v. Hand*, 158 A.D. 510, 143 N.Y.S. 1138 (2d Dep't 1913), the 1818 Act was a "radical modification" of the colonial patents, and "took from the . . . trustees the greater part of their powers, which it conferred upon the newly formed board of proprietors." 158 A.D.at 516. [2]

The Trustees go to great lengths in their Brief to convince the Court that the 1818 Act did not do what it (and the *Betts* decisions) said it did — i.e., divest them of power over the lands of the Town including ocean beaches, while reserving to them control of the waters of the Town. The only regulatory power in the Trustees recognized in the 1818 Act itself is over the "waters, fisheries, sea-weed and production of the waters." (R-78) There is no language whatsoever in the 1818 Act stating that the Trustees retained regulatory power over ocean beaches or any other lands. To the contrary, in the 1818 Act all lands were given to the

[2] For a full discussion of the political compromise which led to the 1818 Act, the provisions of the Act itself, and the *Betts* case, *see* pp. 21-32 of Appellant's Brief.

Proprietors to own and manage, and *Betts* makes clear that those lands included the ocean beaches.

Because there is no language in the statute supporting their position (and the governing case in fact refutes it), the Trustees resort to a series of convoluted arguments to the effect that, even though the Legislature did not explicitly say so, it must have *implicitly* intended for the Trustees to retain regulatory jurisdiction over the ocean beaches. Each one of those arguments fails, as follows.

A. The Argument Based Upon the Fiction that the Dongan Patent Gave the Trustees an "Easement"

The first of their arguments is based on the fallacy (discussed in Point I above) that the Dongan Patent had granted them an "easement" over ocean beaches in 1686. On this point, they argue that the Legislature must not have intended to divest them of jurisdiction over ocean beaches because it "preserved" the "easement" granted under the Dongan Patent in 1686:

> "In preserving the easement of access to the waters which the Dongan Patent had granted to the Town Trustees, the Legislature necessarily preserved the Town Trustees' pre-existing powers under the Patent to protect the inhabitants' rights under that easement." Respondent's Brief, p. 13.

Thus, a major part of their argument to the effect that jurisdiction over ocean beaches survived the 1818 Act is based on the mythology that the Dongan Patent

granted the Trustees an "easement" over ocean beaches in 1686 — which, as explained above, is an entirely false premise.

B. The Argument Attempting to Distinguish "Management" from "Regulatory" Power

The Trustees argue that although the 1818 Act "gave power to 'manage' the beaches to the Proprietor's Trustees, the Legislature did not use the word 'regulate'" and therefore the Act could not be held to have divested the Trustees of regulatory power. (Respondent's Brief, p. 21). The Court of Appeals did not split hairs so finely when it decided *Betts* in 1900. To the contrary, it referred to the "management or regulation of the lands, constituting the beach or shore" and thereby recognized those two words for what they are: interchangeable terms. 163 N.Y. at 459 (emphasis added).

C. The Argument that the Legislature Could Not Have Intended for the Proprietors to Supplant the Trustees' Authority on Ocean Beaches Because the Proprietors Were Not a Body Politic with Regulatory Land-Use Power

The Trustees' most elaborate argument regarding the 1818 Act is based on their complaint that the Proprietors — who were explicitly granted ownership of and management authority over all the lands of the Town in 1818 — were not a governmental "body politic" with the authority to regulate land use on ocean beaches. They note that although the proviso in the 1818 Act of a right of public

access to the shores prohibited the Proprietors from interfering with public access, the Act "did not charge the Proprietors' Trustees with any affirmative duty to protect access to the beaches." (Respondent's Brief, p. 12.) They argue that the Legislature could not possibly have intended to leave a regulatory void on ocean beaches, where the Townspeople had important rights of access, and must therefore have intended for the Trustees to retain regulatory jurisdiction in order to "protect" those rights: "Logic . . . dictates the conclusion that the Legislature intended for the Town Trustees to retain the regulatory authority to protect this public prerogative [i.e., the right of access to the shore] . . . ." (Respondent's Brief, p. 16.)

If it is inconceivable to the Trustees that the Legislature in 1818 would allow the ocean beaches of the Town of Southampton to be deprived of a "body politic" to enact and enforce environmental and land-use regulations, then not only do they not understand the Dongan Patent, they do not understand the history of land-use law. In fact, the regulations that the Trustees seek to impose today were unimaginable in 1818. It was not until nearly 100 years later, in 1916, that a comprehensive zoning ordinance (one of the first in the country) was adopted in New York City. The Town of Southampton did not adopt a zoning ordinance until 1957. New York State first adopted the Tidal Wetlands Act in 1973; before that, wetlands were completely unregulated. And erosion on ocean beaches was not

regulated until the adoption of the Shoreowner's Protection Act in 1981 (Article 34 of the Environmental Conservation Law, entitled "Coastal Erosion Hazard Areas") — 163 years after the passage of the 1818 Act. The concept that the Legislature in 1818 could not have intended to entrust the Proprietors with the sole power to regulate land use on ocean beaches and must, therefore, have intended for the Trustees to exercise regulatory jurisdiction notwithstanding all the language of the Act to the contrary has no basis in historical reality.

Of course, long before environmental and land-use regulation began to be considered as a subject for lawmaking in the 20th century, the State Legislature put into place a modern scheme, continuing to this day, which delegated police power and land-use power in towns to the town board and in villages to the village board of trustees. New York adopted its first comprehensive Town Law in 1890, creating what is the predecessor of the modern town board to govern towns. The powers of town boards set forth today in Town Law § 60 trace their derivation to 1890 N.Y. Laws ch. 569 § 190. Thus, by the time that issues of coastal erosion and the impact upon the ocean beaches of erosion-protection structures and other improvements began to be considered by lawmakers in the late 20th century, there was already in place a longstanding statutory scheme by which the State had explicitly delegated land-use and police powers to town and village boards, putting them (and not the Trustees) in a fully authorized position to regulate those issues

— which they then did. In addition, in 1970, the State established the Department of Environmental Conservation, with power under the Environmental Conservation Law to regulate tidal wetlands and coastal erosion hazards on ocean beaches.[3]

In contrast, the Trustees "management" powers referred to in the 1818 Act over the waters and the products of the waters comprehended, among other things, the regulation of shellfishing rights (oysters grown in the bays and ponds were a major commodity at that time).[4] They also controlled the opening and closing of "cuts" or channels between the bays and ponds (which the Trustees owned and still own) and the Atlantic Ocean, which was (and still is) a mechanism for managing

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[3] For a full discussion of the comprehensive statutory scheme currently in place regulating erosion and land use on ocean beaches, *see* pp. 51-53 of Appellant's Brief.

[4] The Court of Appeals in 1899 described the Trustees' management of the waters of the Town over the preceding centuries as follows:

> "The trustees . . . leased the fisheries to particular persons, generally on condition that the fish be sold only to inhabitants of the town; prohibited the taking of fish, clams and oysters during certain periods of the year; enforced such prohibitions by penalties; leased lands under water for oyster planting, agreeing to indemnify and defend the lessees against assertion of hostile rights in the leased property; sold the seaweed from the beaches; given consents to the erection of wharves and docks, and regulated the use thereof."

People ex rel. Howell v. Jessup, 160 N.Y. 249, 252 (1899).

salinity and water level and a matter of obvious importance to fishing and shellfishing.[5]

As far as the "management" of the lands of the Town, the history books (one of which was referenced in Respondents' Brief at fn. 8) recount that fencing and gates to enclose cattle were an important issue in those days as well as the right to mow, harvest and sell grasses that grew on the "meadows" between the ocean and the bays. *See* Goddard, *Colonizing Southampton* 2011. Some of that regulation and management is described in the transcript of the *Betts* case provided by the Trustees in the Record, for example, in the testimony of Edwin Post, who had been a member of the Trustees of the Proprietors. Post testified regarding the Proprietors' fencing of the undivided meadows and the sale of grass from those meadows, as well as the actions taken by the Proprietors to impound stray cattle found on the beaches. (R-234-39) In its decision in *Betts*, the First Department concluded that it was the Proprietors — and *not* the Trustees — who, in fact, exercised regulatory power over ocean beaches following the 1818 Act:

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[5] The many pages of descriptions in Respondents' Brief of acts taken by the Trustees which, they claim, constituted regulation of the ocean beaches, in fact concerned cuts, canals or channels leading to Mecox Bay, Shinnecock Bay, Sagg Pond and other bays and ponds where the Trustees, indisputably, have title to the lands under water and regulatory power to "manage." Those acts were in furtherance of the Trustees' management of the waters and production of the waters of the Town and do not constitute a basis for holding that they have authority from the State to regulate land-use powers over ocean beaches and dunes.

> "So far as cotemporaneous construction of this statute by the parties interested is concerned, it appears that, from the time of the passage of the act, the new trustees [i.e., the trustees of the Proprietors] elected by virtue of it controlled the beaches and made regulations with regard to them, and that no objection was made to this until 1885, and no claim was made by the trustees of the freeholders to any right whatever to the management of these lands."

Trustees of the Freeholders and Commonalty of the Town of Southampton v. Betts, 21 A.D. 435, 441 (1st Dep't 1897) (emphasis added). Thus, whether or not the Proprietors were technically a "body politic," the 1818 Act gave them the right to regulate and manage those issues then considered important concerning the undivided lands of the Town, including the ocean beaches, and they (and not the Trustees) actually did so.

There was simply no conception in 1818 that in order to "protect" and ensure the Townspeoples' easement of access to the ocean shores a regulatory "body politic" known as the Trustees had to be in place with regulatory land-use power over land use on ocean beaches. The development of ocean beaches with houses and other structures did not even begin until the last decades of the 19th century, when the earliest summer residents, including Betts, began to build summer cottages (and a church) in the dunes. And it was at that time that the First

Department and Court of Appeals put to rest in *Betts* the Trustees' claim of power over ocean beaches in the Town of Southampton.

But in 1998, nearly a century later, the Trustees decided to reassert their long-rejected claim over ocean beaches by adding regulations to their "Blue Book" requiring permits for activities on ocean beaches. (The Trustees do not dispute in their Brief that their "Rules and Regulations for the Waters and Products of the Waters of the Town of Southampton" did not contain any regulations pertaining to ocean beach areas prior to 1998.) They then brought this case to enforce those regulations, which are patently *ultra vires* in light of the 1818 Act and the *Betts* case.

D. *Poster* and *Allen* Did *Not* Decide the Issue of Whether the Trustees Have Proper Regulatory Jurisdiction on Ocean Beaches Within Incorporated Villages.

The Trustees argue that the question of whether the 1818 Act divested the Trustees of regulatory jurisdiction over ocean beach lands was "explicitly" and "squarely" before this Court when it decided *Poster v. Strough*, 299 A.D.2d 127, 752 N.Y.S.2d 326 (2d Dep't 2002) and *Allen v. Strough*, 301 A.D.2d 11, 752 N.Y.S.2d 339 (2d Dep't 2002). (Respondents' Brief, p. 26.) They make this argument notwithstanding the total absence in the briefs and decisions in *Poster* and *Allen* of *any* discussion of the impact of the 1818 Act or the *Betts* case on the jurisdiction of the Trustees over ocean beaches (particularly within an incorporated

village, where there could be no question of delegation by the Town Board). They base their position upon two quotes from the Trustees' briefs in those appeals (at R-537-38), as follows:

> "The decision not to issue a permit to the petitioner for the construction of the revetment was based upon the Board's concern with the effects that such a structure would have on *the public beaches whose condition is well within the jurisdictional authority of the Town Board*."
>
> * * *
>
> "The Act of 1818 reserved to the inhabitants of Southampton a public easement over the beaches in perpetuity. Because the Town Board is vested with the responsibility and duty to protect the shore areas of the community from environmental degradation, it has a large measure of discretion in deciding how to administer to the lands within its jurisdiction." (Respondents' Brief, p. 26, emphasis in original.)

Both of those statements are true — as to the *Town Board* of the Town of Southampton. The Town Board *does* have jurisdictional authority over beaches within its boundaries (although not within the boundaries of an incorporated village). And because the State of New York has vested the Town Board with land-use power in § 60 of the Town Law, and with the power to regulate coastal-erosion issues in accordance with Article 34 of the Environmental Conservation Law, it does exercise a degree of discretion in its determinations. But the Trustees

of the Freeholders and Commonalty have been delegated no such authority by the State.

The references to the "Town Board" in the Trustees' brief on that prior appeal cannot be explained away as a mere typo, as the Trustees now suggest. The muddling of the distinction between the Town Board and the Trustees infected this Court's decision, when it relied on the provisions of the Southampton Town Code as providing the Trustees with jurisdiction over ocean beaches in the Village of Southampton even though the Town Code expressly excluded areas within incorporated villages from its coverage. *See Poster*, 299 A.D.2d at 135-36 (discussed at pp. 46-47 of Appellant's Brief). It is characteristic of the Trustees' arguments to treat such distinctions as unimportant details, but it is the accumulation of many such errors and confusions that has contributed over time to legitimizing their improper exercise of jurisdiction over ocean beaches.

III.

The "Easement" Does Not Constitute a Legitimate Authorization for the Trustees' Extensive Land-Use Regulation of Ocean Beaches.

In a neat syllogism, the Trustees claim (a) that they have regulatory power because they have an easement; and (b) that the extent of their regulatory power is whatever is conceivably necessary to "protect" that easement. But an easement — even an easement in favor of the public — does not give rise to a regulatory power

on the part of the easement holder. The remedy for prohibiting acts that interfere with an easement *or threaten to interfere with it* is to seek injunctive relief. The easement holder, even if a governmental body, is not bestowed with police power, zoning power, or land-use power as a result of its easement rights. An easement alone does not give even a governmental or quasi-governmental body the authority to enact the equivalent of a zoning code requiring permits from them for a plethora of activities within the easement area, as the Trustees have done in their "Rules and Regulations for the Waters and Products of the Waters of the Town of Southampton." (*See* the list of activities on ocean beaches for which the Trustees' Rules and Regulations purport to require a permit, quoted on pp. 36-37 of Appellant's Brief.) To the contrary, the law of easements is clear that the owner of the servient tenement maintains full rights to use and improve his or her own property so long as the use and enjoyment of the easement is not impaired. *See Lewis v. Young*, 92 N.Y.2d 443, 449 (1998) ("in the absence of a demonstrated intent to provide otherwise, a landowner burdened by an express easement of ingress and egress may narrow it, cover it over, gate it or fence it off, so long as the easement holder's right of passage is not impaired").

A. The Trustees' Land-Use Regulations Go Far Beyond Any Rights They Could Properly Assert as an Easement Holder.

The distinction between an easement and a regulatory power, so badly blurred by the Trustees in their legal papers, is critical to maintain. This Court did precisely that in *Poster*, when it took pains to emphasize that it was considering the Trustees' actions as an exercise of regulatory jurisdiction "pursuant to local laws enacted by it pursuant to the police powers delegated to it by the State" and *not* as a claim of interference with easement rights:

> "The is not a case in which the Board is seeking an injunction to prohibit interference with the public's right to enjoy the beach, in which the Board would have the burden of proving its entitlement to such relief. Instead, this is a case where the Board has asserted jurisdiction pursuant to certain local laws . . . ."

Poster, 299 A.D.2d 135.

As this Court recognized in that quote from *Poster*, there is an immense difference in the legal standard under which easement infringement is considered, and the legal standard under which administrative permit approvals or denials are reviewed in an Article 78 proceeding. In the first, the easement holder seeking injunctive relief bears the burden of proving a likelihood of success on the merits, irreparable harm absent the issuance of the requested injunction, and that the equities balance in his or her favor. *See, e.g., Rentar Dev. Corp. v. New York*, 160

A.D.2d 860, 554 N.Y.S.2d 293 (2d Dep't 1900). In the second, courts review the action under highly deferential standards in which actions only disturbed if they are arbitrary and capricious, an abuse of discretion, or unsupported by substantial evidence. CPLR 7803.

The extensive, almost unlimited regulatory power which the Trustees claim they are entitled to exercise to "protect" "their" easement vastly exceeds any legally cognizable rights they could legitimately exercise to control activity on the servient tenement under the law of easements. On page 18 of their Respondent's Brief, the Trustees state that they have the right to require permits for any activity that has "the distinct potential of inhibiting or preventing" the public's access to the ocean beaches. On page 20 they take the argument further, proclaiming: "We submit that the Trustees' power to regulate encompasses the power to prohibit any and all activities that in any way threaten the public's enjoyment of the beach easement that was confirmed by the 1818 law.[6]

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[6] Although the Trustees did not submit any evidence to the court below to demonstrate that Appellant's dune-restoration activities had any possibility of negatively affecting the public's easement rights, they have attempted to insert an environmental argument into this appeal by alluding, in a lengthy footnote on p. 5-6, to a 1997 study which was apparently part of the record in the *Poster* case but was not relied upon by the Trustees in this case. Not only is that material *dehors* the record here, but by the Trustees' own description it concerned structures such as sea-walls, bulkheads, groins and jetties, and not the geotextiles which Appellant in this case used to for its dune restoration (which are, essentially, large sandbags).

But under the law of this State, more than a “distinct potential” or vague threat of inhibition must be shown by the holder of easement rights before the servient estate can be compelled to refrain from using or improving his or her property. To the contrary, for the holder of easement rights to enjoin activity on the part of the servient tenement, irreparable harm must be proven, and not by speculative or conclusory means. *See Bonnieview Holdings, Inc. v. Allinger*, 263 A.D.2d 933, 935-36 (3d Dep’t 1999) (holder of easement failed to show that it would suffer irreparable harm if the owner’s allegedly interfering use of the easement area were not enjoined); *Schrabal v. Holiday Beach Property Owners Ass’n*, 150 A.D.2d 670 (2d Dep’t 1989) (easement holder was not entitled to preliminary injunction because he did not demonstrate unreasonable interference with his rights); *Copart of Conn., Inc. v. Long Is. Auto Realty, LLC,* 42 A.D.3d 420, 421 (2d Dep’t 2007) (injunctive relief denied where allegations of irreparable harm were speculative and unsupported by evidence).

Understandably, the Trustees would prefer to have the land-use controls that they are attempting to exercise over oceanfront owners’ properties be judged under the more deferential Article 78 standard. (*See* pp. 31-32 of their Respondent’s Brief.) But that standard applies only to land-use decisions made by municipal bodies operating under an explicit delegation of power from the State. There is no authority for the proposition that actions taken to protect against impairment of an

easement are subject to the same Article 78 standards. Nor could there be. Easement law is entirely different from Article 78 law. This Court recognized that difference in *Poster*, and it should reject the Trustees' attempts to conflate those two areas of law in this case.

B. Simply Because the Trustees Have Been Permitted to Regulate Seaweed and Beach Driving, It Does Not Follow that They Have the Power to Regulate All Activity on Ocean Beaches.

The Trustees argue that because they have the right to regulate seaweed, they must also have the power to regulate virtually all activities on ocean beaches that could potentially impact beach access, because "access would, of course, be necessary in order to take seaweed." (Respondents' Brief, p. 20.) They complain that Appellant has failed to articulate a "principled basis" for the distinction between the regulation of seaweed and the regulation of dune-restorations, catwalks and other activities. But there *is* a principled basis, and that principle comes from the 1818 Act itself, which reserved to the Trustees regulatory power over the "waters, fisheries, sea-weed and production of the waters." (R-78). Seaweed is a product of the waters. If the Trustees wanted to limit and control how much seaweed people gathered from the ocean beaches, as they did in the 19th century, that would be clearly within the powers reserved to them in 1818. Requiring permits for dune-restorations a different matter.

The Trustees also argue that § 118-29(B) of the Code of the Village of Quogue, which prohibits operation of a motor vehicle on the ocean beach without a permit issued by the Town Trustees constitutes an acknowledgement by the Village of the Trustees' regulatory powers on ocean beaches. But in fact, in a letter from Village Attorney Richard E. DePetris to the Trustees enclosing the Village's beach-driving law (R-572-73), the Village made clear its position that the Trustees' approval of its law was *not* required. This letter explains that the Town Justice at that time refused to enforce the Village's local law without authorization of the Trustees, but the Village Attorney clearly stated his position that he did not agree with the Justice's position, and he submitted the law for review to the Trustees only so that "the matter can be resolved without creating any legal precedent, and without the need for litigating the issue." (R-572) Given that background, the Village clearly did not acknowledge or acquiesce in the Trustees' assertion of regulatory jurisdiction in connection with its beach-driving regulations.

Even if (purely for argument's sake), it were shown that the Village did, at one time, acquiesce in the Trustees' assertion of regulatory power over ocean beaches, that would be irrelevant to the question of whether the Trustees actually possess proper regulatory jurisdiction, which can only come from the State and

cannot be created by the acquiescence of a village under some vague notion of estoppel.

IV.

At Bottom, the Trustees Claim That Their Governmental Powers Are Beyond the State's Control.

There is a strong undercurrent in the Trustees' arguments to the effect that their governmental powers exist independently, outside the scope of the Legislature's control. They claim that because their establishment dates back to Dongan Patent, predating the American Revolution and the rejection of English monarchical rule, their governmental powers are of "independent validity," and are unaffected by such matters as the incorporation of villages or the Municipal Home Rule Law. The Trustees purport to exist in a perpetually untouchable realm of their own immutable power:

> "The Trustees' powers are not dependent upon the Town Law or upon the municipal powers of the Town of Southampton or any other entity, but have independent validity based upon the Dongan Patent, the laws of 1818 and 1831, the Trustees' status as a body politic, and upon the custom and practice of all interested parties during the three centuries that followed." Respondent's Brief, pp. 24-25.

The central problem with the Trustees' argument is that it ignores the fundamental principle that the basis of regulatory and land-use power in this State

comes not from Thomas Dongan, Governer of King James II of England, but from the People of the State of New York through the State legislature. It is beyond dispute that all municipal power to regulate land use in the State of New York must emanate from a delegation by the State legislature. *See Kamhi v. Planning Board of the Town of Yorktown*, 59 N.Y.2d 385, 389, 465 N.Y.S.2d 865 (1983); *Golden v. Planning Board of the Town of Ramapo*, 30 N.Y.2d 359, 369-70 (1972). The Trustees are not exempt from this most basic jurisdictional requirement.

Any question as to whether the Trustees' powers are beyond the reach of the State legislature to control should be put to rest by the decision of the Court of Appeals in *Knapp v. Fasbender*, 1 N.Y.2d 212 (1956), which held:

> "The Constitution thus entrusted the Legislatures with the authority of preserving boards of trustees or abolishing them, of creating towns and town boards, with specified powers, or abolishing them, of enlarging or curtailing powers granted to towns and town boards or to boards of trustees."

1 N.Y.2d at 221.

Notwithstanding the language quoted above, the Trustees argue that *Knapp* should not be read for the proposition that the extent of the Trustees' power is controlled by the legislature. Instead, they argue that it should be remembered only for the passages which noted that the early State Constitutions ratified the patents and recognized the Trustees' powers. Understandably, they prefer those

passages to language like the following: "The New York State Constitution of 1777 confirmed and ratified the proprietary and governmental powers in the trustees 'until otherwise directed by the legislature.'" 1 N.Y.2d 221 (emphasis added). But they cannot avoid the fundamental principle that the State legislature has the power to control and "curtail" the Trustees' governmental powers (as it did in 1818), which is clearly a central part of the holding in *Knapp*.

The fact that the origin of the Trustees' proprietary and governmental powers can be traced back to the colonial era does not exempt them from the fundamental requirement that all regulatory power must come from the legislature of the State of New York. As stated by the Court of Appeals, "[t]he Dongan and Montgomerie charters have no peculiar sanctity because they were granted under the sovereigns of England. They were public charters granted for public purposes, and are as much subject to legislative control as charters of the same kind granted by the Legislature of the State." *Demarest v. City of New York*, 74 N.Y. 161, 166 (1878).

It cannot seriously be argued that the regulatory power of the Trustees was fixed for all time by the Dongan Patent in 1686. As stated by the Second Department in *People ex rel. Squires v. Hand*, (and quoted with approval by the Court of Appeals in *Knapp v. Fasbender*), to hold that the extent of the Trustees'

regulatory powers was forever fixed by the King's governor in 1686 would be antithetical to our most fundamental principles of government:

> "But this charter did not surrender control over the town officials or erect independent governmental agencies that should forever remain beyond the reach of the Legislature. Such a perpetual *imperium in imperio* would have been as repugnant to British colonial administration as its inequality and favoritism are opposed to our present political standards.
>
> "All these charters have been the subject of legislative modification. No court has questioned this power to make such changes, as such grants are not private but public and governmental." 158 A.D. at 515-16.

A similar issue was considered by Justice Leon Lazer nearly 40 years ago, in *D'Addario v. McNab*, 73 Misc.2d 59, 342 N.Y.S.2d 342 (Sup. Ct. Suff. Co. 1973), in which the Trustees of the Town of Brookhaven argued that the provisions of Town Law § 85 regarding dividing a town into separate election wards did not apply because "the Dongan Patent of 1686 provided for the selection of trustees of the freeholders and commonalty of the town 'by the majority of voices of the freeholders and freemen of the Towne of Brookhaven.'" 73 Misc.2d at 63. Justice Lazer frankly ridiculed this argument:

> "[I]t would shock the people of Brookhaven if they were told that His Majesty, James II, still controls their governmental destinies through the patent issued by his Royal Governor, Thomas Dongan. If indeed

> the Dongan Patent is a contract which must remain inviolate, and it may not be impaired by the Brookhaven electorate or anyone else, because of the protection of section 10 of article 1 of the United States Constitution, then it follows that the form of government provided in it may be changed solely by the following means: authorization from Queen Elizabeth II of Great Britain, or amendment of the Federal Constitution to permit King James' Patent to be impaired. Fruitless are the ageless words of Thomas Jefferson declared by our Continental Congress on July 4, 1776: 'That these United Colonies are, and of right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be totally dissolved, and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and do all other Acts and Things which Independent States may of right do." 73 Misc.2d at 63-64.

The question of whether the Trustees have regulatory jurisdiction over ocean beaches in the Village of Quogue is not determined by the colonial patents or 300 years of "custom and practice," as the Trustees argue. It is determined exclusively by the acts of the legislature of the State of New York, which explicitly divested the Trustees of their ownership of and regulatory power over all lands of the Town, including ocean beaches, in 1818.

Conclusion

For the foregoing reasons, the declarations made by Justice Mayer in his Order of December 11, 2012, to the effect that the Trustees "have the right to regulate activities to protect their easement" on ocean beaches in the Incorporated Village of Quogue should be reversed, and this Court should declare that the Trustees possess no regulatory jurisdiction on ocean beaches within incorporated villages.

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CERTIFICATE OF COMPLIANCE

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