





that terminate on the beach. There are also a number of north-south streets, the most easterly one running along an area shown on the map as “Bluff”, which adjoins another area mapped as “Beach”. After filing the map in 1885, the developers began selling each lot along with an easement over “a part of Beach and Bluff” with specific reference to the map. The history of the village notes an 1887 restrictive covenant against fences over four feet high. The story picks up about a century later.

Sophie Bubis and her late husband bought a property in Loch Arbour in 1978. Their home had a view of the beach and ocean until 1995, when Jack and Joyce Kassins moved in across from them, on the beach side of the street. The new neighbors constructed a berm about 14 feet high, topped with closely planted trees and shrubs, that blocked all view of anything but the new and very large vegetated sand dune. Mrs. Bubis, now a widow, instituted a suit to have this dune considered a violation of both a local ordinance against fences over six feet high and the deed restriction in all Loch Arbor deeds prohibiting fences over four feet high. (She had previously also raised the issue of the easement over “a part of Beach and Bluff”, which New Jersey’s Superior Court dismissed in 1999 since that area

lay completely below the mean high water mark by the time of the suit.)

The Kassins disputed Mrs. Bubis’ label of their construction as a fence, since a non-fence would not fall under any deed or local restrictions. In August of 2005, after many contrary decisions, Mrs. Bubis prevailed in the New Jersey Supreme Court (*Bubis v. Kassins*, 878 A. 2d 815, 2005). The majority opinion looked to a number of references to find a definition for *fence*, as the term had not been specified in either the restrictive covenant or the zoning ordinance. In five dictionaries, only one of them being of the legal variety, *fence* is variously defined. However, the two common elements throughout are (1) that there is no limit to the type of material from which a fence can be made, and (2) that the use or the purpose is the primary defining feature. The judges state, “As long as the structure marks a boundary or prevents intrusion or escape, then it is a fence, regardless of the material from which it is forged.”

Noting the location of the Kassins’ tall berm, the court next observed that it satisfied the definition of a fence, as it is clearly a partition that separates their property from the street, shielding them “from the invasive gaze of their neighbors and other passers-by.”

Although the Kassins argued that their construction is a dune, theirs is not built in a way to protect the beach from erosion because there is no sand behind it. The fact that they had acquired a permit from the Department of Environmental Protection to create and maintain a dune (because of the site’s location within area subject to New Jersey’s Coastal Area Facility Review Act) “does not determine whether in fact the Kassins actually constructed a dune, a fence, or both.”

Having determined that this large sand dune is in fact a fence, it was a short step to identify violations of both local zoning ordinances and deed restrictions. The case was remanded to the Superior Court, Chancery Division, to “grant relief in compliance with this decision.” Because a chancery court is a court of equity, this could mean that the resolution will be “a balancing of the equities” rather than merely an order to remove the berm/fence. What is the value of a long-enjoyed and now denied view of the sea, a view that was one of the reasons Sophie Bubis and her husband had moved to their home in Loch Arbor long before the Kassins arrived in town? What is the cost of moving all those tons of sand? More importantly, what features will we locate next time we perform a site survey? *AS*