

Circuit Court for Wicomico County  
Case No.: C-22-CV-18-000501

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 1215

September Term, 2019

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MKOS PROPERTIES, LLC

v.

BRADLEY W. JOHNSON & NANCY L.  
JOHNSON

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Graeff,  
Arthur,  
Battaglia, Lynne, A.  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Battaglia, J.

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Filed: November 23, 2020

\*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This appeal raises issues regarding the demarcation of the boundary between the foreshore<sup>1</sup> and adjacent fast land,<sup>2</sup> which border navigable waters,<sup>3</sup> and the circumstances by which the public can obtain an easement to access the shoreline of navigable waters. For reasons hereinafter discussed, however, we will not be able to reach the merits of these issues and shall vacate the declaratory judgment entered herein and remand the case for proceedings consistent with this opinion.

Appellant, MKOS Properties, LLC (“MKOS”), and Appellees, Bradley and Nancy Johnson (“the Johnsons”), are riparian landowners,<sup>4</sup> who own adjacent parcels of land, which border Wetipquin Creek, near the community of Tyaskin, Maryland, located in Wicomico County.

MKOS filed a complaint sounding in trespass against the Johnsons in November of 2018. In its complaint MKOS alleged, *inter alia*, the following:

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<sup>1</sup> The term “foreshore” refers to “the strip of land between the low and high water marks which is alternately covered and uncovered by the flow of the tide.” *Clickner v. Magothy River Ass’n Inc.*, 424 Md. 253, 258 n.1 (2012) (citation omitted).

<sup>2</sup> The term “fast land” refers to land, which is adjacent to a body of water and located above the mean high water line. *See Department of Natural Resources v. Mayor and Council of Ocean City*, 274 Md. 1, 6 (1975).

<sup>3</sup> Navigable waters, as defined by the Court of Appeals, are “water[s] where the tide ebbs and flows.” *Department of Natural Resources v. Mayor and Council of Ocean City*, 274 Md. 1, 6 (1975).

<sup>4</sup> “A riparian landowner is . . . one who owns land bordering upon, bounded by, fronting upon, abutting, or adjacent and contiguous to and in contact with a body of water, such as a river, bay or running stream.” *People’s Counsel for Baltimore County v. Maryland Marine Manufacturing Co.*, 316 Md. 491, 493 n.1 (1989).

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3. [MKOS] is the owner of a 54.62 +/- acre parcel of property identified as 21516 Tyaskin Church Road, Quantico, Maryland 21856[.]<sup>5</sup>

4. [The Johnsons] are the owners of property identified as 4775 Tyaskin Road, Tyaskin, Maryland 21865 . . . , along with two (2) adjoining parcels identified as Wicomico County tax map 43, grid 24, parcel[] 42 . . . and [parcel] 43.

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6. [The Johnsons] purchased Parcel 42 on July 12, 2010.

7. [The Johnsons] purchased Parcel 43 on July 13, 2010.

8. [MKOS] purchased the MKOS Parcel on April 12, 2017.

9. At the time that [MKOS] purchased the MKOS Parcel the [Johnsons] had then constructed, without any permits: (a) a portion of a boardwalk across the MKOS Parcel; (b) a weather station on the MKOS Parcel; and (c) a bench that has been affixed to the shoreline on or immediately adjacent to the MKOS Parcel.

10. [A] Boundary Survey of the MKOS Parcel . . . show[s the Johnsons'] encroachments on the [MKOS Parcel].

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13. [MKOS] has licensed the shoreline of the MKOS Parcel through the state established processes.

14. [The Johnsons] illegally constructed bench materially interferes with the property and/or riparian rights of [MKOS].

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16. In 2017 [MKOS] placed “no trespassing” signs on the MKOS Parcel, at least one of which is believed to have been removed by the [Johnsons].

17. [The Johnsons] continue to impermissibly maintain possession of and continue use of the MKOS Parcel.

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<sup>5</sup> All references to the “MKOS Parcel” in this opinion are to the parcel located at 21516 Tyaskin Church Road.

20. [The Johnsons] have taken possession of certain portions of the MKOS Parcel by *inter alia*, constructing a boardwalk across the MKOS Parcel, constructing a weather station on the MKOS Parcel, and by constructing a bench on or immediately adjacent to the MKOS Parcel.

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23. [MKOS], as the fee simple owner of the fast land of the MKOS Parcel, has a legal right to ownership of any accretion adjacent and adjoining the said fast land.

24. [MKOS] has a further right of unimpeded access to the navigable part of the public waters adjacent to the MKOS Parcel.

25. [The Johnsons'] placement of a bench, with subterranean support, on or immediately adjacent to the MKOS Parcel constitutes an actionable trespass and/or a material interference with [MKOS]'s legal right to accretion and unimpeded access to the navigable waters of the State.

26. Accordingly, [MKOS] demands a judgment in ejectment/trespass against [the Johnsons].

MKOS asked the Circuit Court for the following relief:

- (a) [A]n Order ejecting [the Johnsons] from the MKOS Parcel, and prohibiting any further use of the same by [the Johnsons];
- (b) [A]n Order finding that [the Johnsons] have trespassed on the MKOS Parcel, and thus ordering [the Johnsons] to pay [MKOS] any and all costs and expenses for the restoration of the MKOS Parcel to the *status quo ante*; and
- (c) [A]n Order finding that [the Johnsons] are liable to [MKOS] for [MKOS]'s costs and expenses of this action, including an award of reasonable attorneys' fees; and
- (d) [A]n Order granting such other and additional relief as the Court may deem appropriate.

The Johnsons, in January of 2019, filed a Motion to Dismiss Plaintiff's Complaint, or in the Alternative for Summary Judgment regarding the MKOS claim. The Johnsons supported their Motion to Dismiss, or in the Alternative for Summary Judgment, with affidavits of several residents of the area. At the same time, the Johnsons filed a

Counterclaim seeking a Declaratory Judgment, coupled with a Motion for Summary Judgment on their Counterclaim, which was supported by two affidavits by Mr. Johnson, one of the Appellees. In their Counterclaim, the Johnsons alleged, *inter alia*, the following:

1. This is an action for declaratory judgment pursuant to § 3-409 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland, for the purpose of determining a question of actual controversy between the parties and terminating uncertainty and controversy giving rise to these proceedings.

2. There exists an actual controversy . . . involving the rights and liabilities of the parties regarding the use of the sandy beach bordering Wetipquin Creek on the east side of Tyaskin Wharf (Beach Area) at low tide for recreational purposes.

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4. The Johnsons have owned a parcel of land . . . , on which their home is situated since 1995 (“Johnson Residence”). In 2010, the Johnsons purchased two adjoining parcels of land identified as . . . , Parcels 42 . . . and 43[, which border] the Johnson Residence on the north and the MKOS Parcel on the west.<sup>[6]</sup> The Johnson Parcels border Wetipquin Creek on the southside [of the creek].

5. MKOS Properties has asserted ownership and exclusive possession over the Beach Area, even though the Beach Area is separated from the higher portions of the MKOS Parcel by marsh and is generally inaccessible, except at low tide, by boat or by crossing the Johnson Parcels.

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7. For more than twenty years, the Johnsons have used the Beach Area at low tide for recreational purposes.

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<sup>6</sup> Of the parcels owned by the Johnsons, only Parcel 43 is adjacent to the MKOS Parcel; all references to the “Johnson Parcel” are, thus, to this parcel.

9. At low tide, the Beach Area has a soft sandy bottom along the south shore and a deep swimming hole at the “point” where the creek narrows.

10. Historically, during the warm weather months, the public has used the Beach Area for walking, fishing, exercising dogs, swimming, gathering driftwood, and building campfires on the Beach Area. During colder months, the public has historically used the Beach Area for walking.

11. At high tide, the white sand of the Beach Area is not visible and Wetipquin Creek goes deep into the marsh located on the MKOS Parcel.

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15. Because the Beach Area is not accessible from either Tyaskin Park or Wharf, the Johnsons have invited Tyaskin residents to walk across the Johnson Parcels if they would like to use the Beach Area at low tide.

16. Since purchasing the Johnson Parcels, the Johnsons have repaired an old walkway perpendicular to the Beach Area. That walkway was present when the Johnsons purchased the Johnson Parcels. The Johnsons also constructed a new walkway that runs parallel to the Beach Area across Johnson Parcel 43 to provide direct access to the Beach Area (“Boardwalk”).

17. After purchasing the Johnson Parcels, the Johnsons posted no trespassing signs on their property to foster vegetative growth and limit soil erosion. The Johnsons, however, instructed Tyaskin residents they could continue their longstanding practice of walking to the Beach Area by entering the Johnson Parcels under an arbor the Johnsons built and walking across the Boardwalk.

18. In recent years, the Johnsons have constructed a bench from a fallen tree and placed a weather station on the Beach Area. . . .

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21. The [former owners of the MKOS Parcel] never specifically gave the Johnsons permission to use the Beach Area or construct the weather station or bench.

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27. MKOS Properties’ contention it owns or has exclusive possession of the Beach Area challenges the public’s historical use of the Beach Area.

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31. The Johnsons have defended against MKOS Properties' trespass claim by filing a Motion to Dismiss, or in the Alternative for Summary Judgment, advancing the following arguments:

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34. A declaratory judgment by this Court will terminate the controversy between the parties.

The Johnsons asked the Circuit Court for declaratory relief, among others:

- A. Determine and adjudicate the rights of the parties with respect to the Beach Area;
- B. Find and declare the Johnsons may make use of the Beach Area at low tide for recreational purposes;
- C. Enter an award of costs in favor of the Johnsons as deemed equitable and just; and
- D. Award the Johnsons such other and further relief as the nature of their cases may warrant.

In their Motion to Dismiss, or in the Alternative for Summary Judgment, the

Johnsons also alleged that:

1. To prevail on its trespass claim, [MKOS] must show, among other things, an intentional or negligent intrusion upon or to the possessory interest in property of another. [MKOS] has not alleged it owns or has exclusive possession of the Beach Area on which the boardwalk, weather station, and bench are situated. [MKOS] bears the burden of alleging the Beach Area is above the mean high water line ("MHWL") and fails to do so.
2. To the extent [MKOS]'s Complaint can be construed as alleging ownership of the Beach Area, the undisputed material facts show the Beach Area (on which the boardwalk, bench and weather station are situated) is below the MHWL. The waters of the State, those areas below the MHWL, are owned by the State and not the riparian landowner. Because [MKOS] cannot prove it owns or has possession of the Beach Area, judgment must be entered in favor of the Johnsons on [MKOS]'s trespass claim.
3. Even construing the facts in the light most favorable to [MKOS], [MKOS] does not have a "possessory interest" in the Beach Area sufficient

to establish trespass against the Johnsons. [MKOS]’s Offshore Blind and Shoreline License does not give [MKOS], the riparian owner, the right to control activity in public waters for any recreational pursuit other than hunting waterfowl.

4. But, even if [MKOS] could prove it owns or has possession of the Beach Area, the public may make use of the Beach Area because an easement has been created through public dedication.

MKOS answered the Johnsons’ Counterclaim and also filed a Motion for Summary Judgment on its trespass claim, which was supported by an affidavit of Douglas Jones, a professional surveyor. In April of 2019, the trial judge heard the various motions filed by the parties. At the conclusion of the hearing, the judge asked both parties to submit draft orders to the court and held the matter *sub curia*.

The Circuit Court, on July 26, 2019, issued the following Order and Final Declaratory Judgment<sup>7</sup> (the “Order”):

The Parties have filed, fully briefed and fully argued cross-motions for summary judgment. From the pleadings, and from the accompanying affidavits, it is clear [the Johnsons], along with other members of the public, have for more than twenty (20) years traversed [the Johnsons’] property, a portion of the vegetated wetlands [MKOS] recently purchased at 21516 Tyaskin Church Road, Tyaskin, Maryland 21865, and tidal wetlands owned by the State of Maryland to make recreational use of the “Beach Area.” The Beach Area consists of the sandy beach and tidal wetlands bordering Wetipquin Creek on the east side of Tyaskin Wharf running along a small portion of Plaintiff’s parcel and depicted on the diagram attached to and incorporated in this Order.

The three fixtures which are the subject of [MKOS]’s Complaint – a bench, a weather station and a portion of a boardwalk – were placed in or

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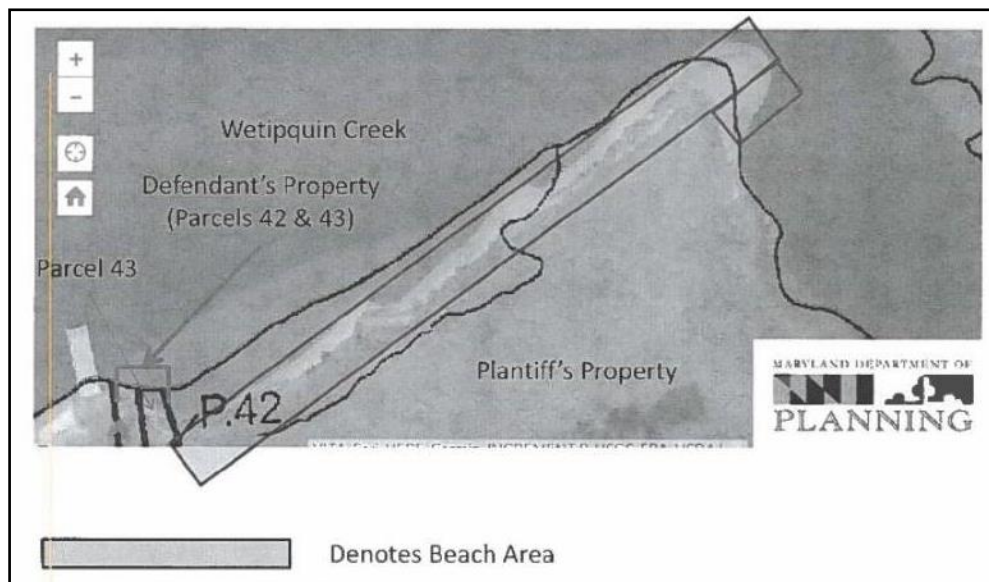
<sup>7</sup> The Order entered by the court was identical to a proposed order submitted by the Johnsons after the hearing and substantially different than another submitted by MKOS.



near the Beach Area, below the mean high water line, to facilitate public recreational activities there. By virtue of the public's long, uninterrupted usage of the Beach Area, the public and [the Johnsons] have acquired an easement to maintain the fixtures and make recreational use of the Beach Area, either by virtue of adverse possession or by virtue of an implied public dedication. Moreover, the Beach Area and the three fixtures are underwater except at low tide and, consequently, they are below the mean high water line and not subject to [MKOS]'s possessory or riparian rights. Accordingly, [MKOS]'s Motion for Summary Judgment is **DENIED**, [the Johnsons'] Motion for Summary Judgment is **GRANTED**, [MKOS]'s Complaint is **DISMISSED** and judgment is entered in favor of [the Johnsons] and against [MKOS] on [the Johnsons'] Counterclaim.

SO ORDERED, entered and adjudged, by the Circuit Court for Wicomico County, State of Maryland.

To the Order was appended the following diagram, which had been incorporated by reference:



MKOS timely filed a Notice of Appeal to this Court, presenting the following issues:

- (1) Whether the record presented on cross Motions for Summary Judgment permitted the Circuit Court to determine that the physical improvements constructed by the Johnsons lie “below the mean high water line”?
- (2) Did the Circuit Court err as a matter of law when it determined that the Johnsons’ bench, boardwalk and weather vane, as well as State owned waters immediately adjacent to the MKOS Property, are “not subject to [MKOS’s] possessory or riparian rights”?
- (3) Whether the Circuit Court erred as a matter of law and based upon misapprehension of fact when it determined that an alleged “long” and uninterrupted usage by the public of a Beach Area ripened into certain easement rights through an implied public dedication?
- (4) Whether the Circuit Court erred as a matter of law and based upon misapprehension of fact when it determined that an alleged “long” and uninterrupted usage by the public of a Beach Area ripened into certain easement rights through “adverse possession”?
- (5) Whether the Circuit Court erred as a matter of law or abused its discretion when it entered a form of final order than extended beyond the matters in dispute between the parties (namely that it applies to real property beyond that which was in dispute), and is not susceptible to application without clarification?
- (6) Did the Circuit Court err as a matter of law to the extent that it purported to grant the public and the Johnsons a right to maintain fixtures on the lands of the State of Maryland, a non-party to the action, by virtue of adverse possession or an implied public dedication?

We will not be addressing the merits of the questions raised, however, because we will be exercising our discretion to, *sua sponte*, vacate the Declaratory Judgment entered in this case, as it lacks the clarity and specificity required under the statute in order to terminate the controversy between the parties.

Section 3-409 of the Courts and Judicial Proceedings Article, entitled “Discretionary relief,” provides:

- (a) *In general.* — Except as provided in subsection (d) of this section, a court may grant a declaratory judgment or decree in a civil case, if it will

serve to terminate the uncertainty or controversy giving rise to the proceeding, and if:

- (1) An actual controversy exists between contending parties;
- (2) Antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation; or
- (3) A party asserts a legal relation, status, right, or privilege and this is challenged or denied by an adversary party, who also has or asserts a concrete interest in it.

(b) *Special form of remedy provided by statute.* — If a statute provides a special form of remedy for a specific type of case, that statutory remedy shall be followed in lieu of a proceeding under this subtitle.

(c) *Concurrent remedies not bar for declaratory relief.* — A party may obtain a declaratory judgment or decree notwithstanding a concurrent common-law, equitable, or extraordinary legal remedy, whether or not recognized or regulated by statute.

(d) *Exception as to divorce or annulment of marriage.* — Proceeding by declaratory judgment is not permitted in any case in which divorce or annulment of marriage is sought.

(e) *Speeding hearing.* — A court may order a speedy hearing of an action of a declaratory judgment and may advance it on the calendar.

Maryland Code (1973, 2013 Repl. Vol., 2016 Suppl.). The statute’s “purpose is to settle and afford relief from uncertainty<sup>[8]</sup> and insecurity with respect to rights, status, and other legal relations.” Maryland Code (1973, 2013 Repl. Vol., 2016 Suppl.), Section 3-402 of the Courts and Judicial Proceedings Article.

A declaratory judgment “must pass upon and adjudicate the issues raised in the proceeding, to the end that the rights of the parties are clearly delineated and the controversy terminated.” *Dart Drug Corp. v. Hechinger Co., Inc.*, 272 Md. 15, 29 (1974);

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<sup>8</sup> Uncertainty is “the quality, state, or condition of being in some degree of serious doubt.” Black’s Law Dictionary (11th ed. 2019). Something is uncertain if it “is indefinite, indeterminate, or dubious.” *Id.*

*Reddick v. State*, 213 Md. 18, 31 (1957) (“It is not necessary that a declaratory judgment be in any particular form, as long as the Court, *by its decree*, actually passes upon or adjudges the issues raised by the pleadings.” (emphasis in original)); *Beck v. Mangels*, 100 Md. App. 144, 157 (1994) (affirming a declaratory judgment in which “[t]he trial court made extensive findings . . . and made a declaration that passed upon and adjudicated the issues raised, thus declaring the rights of the parties.”).

A trial court must declare the rights of the parties in a separate, written document. *See, e.g., Lovell Land, Inc. v. State Highway Administration*, 408 Md. 242, 256 (2009) (citation omitted). The language of a declaratory judgment must be clear and specific, in order to “defin[e] the rights and obligations of the parties or the status of the thing in controversy.”<sup>9</sup> *Jackson v. Millstone*, 369 Md. 575, 594-95 (2002) (quoting *Allstate Insurance Co. v. State Farm Mutual Automobile Insurance Co.*, 363 Md. 106, 117 n.1 (2001)). To avoid the statutory opprobrium of “uncertainty” or “the quality or state of being in some degree of serious doubt,” the declaration must state or explain explicitly,

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<sup>9</sup> A declaratory judgment with terms that exceed what was requested may be deemed overbroad. *See Harbor Island Marina, Inc. v. Board of County Commissioners of Calvert County*, 286 Md. 303, 323 (1979). In their complaint, the Johnsons asked for a declaration that they could recreate on the Beach Area, which they described as the “the sandy beach bordering Wetipquin Creek on the east side of Tyaskin Wharf . . . at low tide for recreational purposes.” The Order exceeded their request by its inclusion of tidal wetlands in its definition of the Beach Area. In this case, the Order “may be subject to an interpretation which is broader in scope than the issue presented [by the Johnsons,]” because of the inclusion of “tidal wetlands” in its definition of Beach Area. *See id.*

fix or establish, and/or set forth the meaning of, the rights and obligations of the parties or the status of the thing in controversy, in accordance with the requirement of defining.<sup>10</sup>

In the present case, the Order and Final Declaratory Judgment lacks clarity and specificity in defining MKOS's and the Johnsons' rights and obligations and ergo, does not terminate the controversy between them. The Order fails to delineate the Beach Area, as well as the location of the three fixtures in issue and the mean high water line, in addition to the location of the easement and its origin, all of which were in controversy between the parties.

With respect to the Beach Area, the Circuit Court, in its Order, declared that the Beach Area included “the sandy beach *and tidal wetlands* bordering Wetipquin Creek on the east side of Tyaskin Wharf running along a small portion of [the MKOS P]arcel[.]” (emphasis added). The term “tidal wetlands,” in the Code of Maryland Regulations, refers to “all State and private tidal wetlands, marshes, submerged aquatic vegetation, lands, and open water within the Chesapeake Bay and its tidal tributaries, the Coastal Bays and their tidal tributaries, and the Atlantic Ocean to a distance of 3 miles offshore of the low water mark.” COMAR 26.24.01.02(57). The “diagram,” depicting the Beach Area, which the Circuit Court incorporated into the Order, compounds the Order's uncertainty because the Beach Area, as depicted, encompasses the entire northern end, as well as a

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<sup>10</sup> To “define” is to “1. To state or explain explicitly. 2. To fix or establish (boundaries or limits). 3. To set forth the meaning of (a word or phrase). Black's Law Dictionary (11th ed. 2019).

portion of the eastern end, of the MKOS Parcel, as well as portions of Wetipquin Creek and the Johnson Parcel. As a result, the Beach Area description lacks clarity and specificity.

The Order also describes the locations of the fixtures and the mean high water line solely in relation to the location of the Beach Area. The Order states “The three fixtures which are the subject of [MKOS]’s Complaint – a bench, a weather station and a portion of a boardwalk – were placed in or near the Beach Area, below the mean high water line, to facilitate public recreational activities there.” The Order merely suggests that at least one of the fixtures is located “near” the Beach Area and omits reference to the other two fixtures and as a result, the Order fails to define whether one or more of the fixtures is located on the MKOS Parcel.

The Order also states that “the Beach Area and the three fixtures are underwater except at low tide and, consequently, they are below the mean high water line.” The common law and our regulatory regime define the mean high water line. According to *Clickner v. Magothy River Ass’n Inc.*, “the mean high water line marks the division between state and private ownership of the shoreline.” 424 Md. 253, 267-68 (2012). The mean high water line is defined in Title 26 of the Code of Maryland Regulations as “the line where the land meets the water surface at the elevation of mean high water.” COMAR 26.24.01.02(32). “Mean high water,” in turn, is defined as “the average of all the high water levels observed over the national tidal datum epoch.” COMAR 26.24.01.02(31). “National tidal datum epoch,” in turn, is defined as “the specific 19-year

period adopted by the National Ocean Service as the official time segment over which tidal observations are taken and reduced to obtain mean values for tidal datums.” COMAR 26.24.01.02(35). The mean high water line, however, is not defined nor established in the Order.

The Circuit Court also declared, “By virtue of the public’s long, uninterrupted usage of the Beach Area, the public and [the Johnsons] have acquired an easement to maintain the fixtures and make recreational use of the Beach Area, either by virtue of adverse possession or by virtue of an implied public dedication.” The location of the easement, however, lacks clarity and specificity, which is a prerequisite to determining the bases for the easement. *See Stansbury v. MDR Development, L.L.C.*, 161 Md. App. 594 (2005).

An easement may arise “through express grant or implication.” *Rogers v. P-M Hunter’s Ridge, LLC*, 407 Md. 712, 729 (2009). We have found no support in statute or at common law in Maryland for an easement by adverse possession or for “long, uninterrupted usage” by the public being sufficient to imply the existence of an easement by public dedication. As a result, the Declaratory Judgment entered in this case must be vacated and the case remanded for further proceedings in accordance with this opinion.

**ORDER AND FINAL DECLARATORY  
JUDGMENT OF THE CIRCUIT COURT  
FOR WICOMICO COUNTY VACATED.  
CASE REMANDED TO THAT COURT  
FOR PROCEEDINGS CONSISTENT  
WITH THIS OPINION. COSTS TO BE  
PAID BY APPELLEES.**