STATE OF MAINE

YORK, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO: RE-09-111

ROBERT F. ALMEDER and VIRGINIA S. ALMEDER, et al.,

Plaintiffs

v.

TOWN OF KENNEBUNKPORT and ALL PERSONS WHO ARE UNASCERTAINED,

Defendants

ORDER

Approximately twenty-six owners of lots fronting Goose Rocks Beach in the Town of Kennebunkport have brought this action seeking a declaration that they hold fee title to the low-water mark and a judgment quieting that title. They do not dispute any interests in the beach established by deed in the York County Registry. The named defendants are the Town of Kennebunkport and "all persons who are unascertained, not in being, unknown or out of the State, heirs or legal representative of such unascertained persons, or such persons as shall become heirs, devisees or appointees of such unascertained persons who claim the right to use or title in Plaintiffs' Property other than persons claiming ownership or easement by, through, or under an instrument recorded in the York County Registry of Deeds."

A variety of motions relating to service, intervention, joinder, and various counterclaims and defenses are before the court.

RE-09-111

1. **Notice and Service**

The plaintiffs filed their complaint on October 26, 2009, and on November 17, 2009 filed notice that they would provide the unascertained defendants with notice by publication in the Journal Tribune, a newspaper published in York County. An advertisement titled "Notice to Persons Who Are Unascertained and to the General Public Pursuant to 14 M.R.S. § 6653" was published among the paper's legal notices on November 20, 2009, November 27, 2009, and December 4, 2009. The plaintiffs did not request the court's permission to serve process by publication or obtain an order authorizing the action as Rule 4 requires. The defendant Town of Kennebunkport objects to the plaintiffs' action on the grounds that they failed to personally serve ascertainable potential claimants and failed to follow the appropriate procedure to permit notice by publication.

"Service of process serves the dual purposes of giving adequate notice of the pendency of an action, and providing the court with personal jurisdiction over the party properly served. . . . 'Any judgment by a court lacking personal jurisdiction over a party is void.'" *Gaeth v. Deacon*, 2009 ME 9, ¶ 20, 964 A.2d 621, 626 (quoting *Brown v. Thaler*, 2005 ME 75, P 10, 880 A.2d 1113, 1116). At hearing, the parties agreed through counsel to collaboratively effect personal service on the sixty-five owners of property on Goose Rocks Beach who are not currently named in this litigation. These are necessary parties subject to personal service of process who must be joined pursuant to Rule 19 if feasible. *See Eaton v. Town of Wells*, 2000 ME 176, ¶ 47, 760 A.2d 232, 248.

The parties also agreed to work collaboratively to provide notice to "unascertained" parties, by means of Rule 4(g) or other equally effective procedures. The court approves of these actions and will reserve ruling on the Town's objection to notice while they are underway. The parties will work together to create a new

scheduling order, and discovery shall proceed among those already named in this litigation.

2. The State of Maine's Motion to Intervene

The State seeks to intervene as a defendant pursuant to Rule 24, citing the public interest in maintaining access to Maine's beaches and its past involvement in the cases of *Eaton v. Town of Wells*, 2000 ME 176, 760 A.2d 232, *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989) ("*Bell II*"), *Bell v. Town of Wells*, 510 A.2d 509 (Me. 1986) ("*Bell I*"); *Opinion of the Justices*, 437 A.2d 597 (Me. 1981), and more recently *Flaherty v. Muther*, Cumb. Cty. Super. Ct. No. RE-08-098 (July 30, 2009) (Crowley, J.). In *Bell v. Town of Wells*, the Law Court recognized "that the Attorney General, as the chief law officer of the State, has the power and duty to institute, conduct and maintain such actions and proceedings as he deems necessary for the protection of public rights and to defend against any action that might invidiously interfere with the same." *Bell I*, 510 A.2d at 519 (quoting *In re Estate of Thompson*, 414 A.2d 881, 890 (Me. 1980)) (quotations omitted).

Like *Bell*, the resolution of this case "will affect the rights of the public at [this] beach and may through the persuasive authority of that decision affect public rights at other Maine beaches." *Id.* This broad public interest in Maine's coast is distinct from the Town's particular interest in Goose Rocks Beach, and cannot adequately be defended by unascertained members of the public at large. The State's motion to intervene is granted. As both the State and the Town will be representing the public's interest in the beach, the court declines the Town's suggestion to appoint a guardian ad litem to represent unascertained parties at this time.

3. The TMF Interveners; Richard & Mary Steiger's Motion to Intervene; Christopher & Janice Tyrrell's Motion to Intervene; Robert & Leslie Sullivan's Motion to Intervene; and Defendant Mark Smith's Motion to Substitute Counsel

RE-09-111

The so-called TMF interveners are some 171 parties being represented by the law firm of Taylor, McCormack, & Frame, LLC. The original group consisted of 167 parties, but has grown to include Robert and Leslie Sullivan, Richard and Mary Steiger, Christopher and Janice Christo Tyrrell, and Mark W. Smith.[1] Also, three additional parties submitted responsive filings after the deadline to respond or intervene. These are Roger C. and Nancy H. Allen; Kendall and Linda Burford; and David Green and Jean French. Their answers and counterclaims are essentially identical to those of the TMF interveners, and they will be treated in kind.

All of the TMF parties appear to have some connection to the Goose Rocks Beach area of Kennebunkport, Maine, but none claim any deeded title to the beach itself. Instead, their proposed counterclaims assert that the fee title in the beach resides in the Town of Kennebunkport, and in the alternative that they the beach-going public have obtained easement rights under various theories. They seek to intervene as defendants and counterclaimants pursuant to Rule 24, asserting that they are the "unascertained persons . . . who claim the right to use or title in Plaintiffs' Property" and that while their interests overlap with the Town's, they are not currently being adequately represented.

The plaintiffs oppose the TMF interveners' motion on the grounds that they lack standing to assert a claim and have not met the requirements of Rule 24. The TMF interveners' alleged interest is essentially the public interest, which the plaintiffs argue is already being fully represented by the Town and the State. The plaintiffs also fear that allowing the TMF parties to intervene in the litigation would add significant

[1] Mr. Smith had been in the case as a pro se litigant, but now seeks to join the TMF group through his motion for substitution of counsel. His claims appear to overlap with those of the TMF group and his motion is granted. The plaintiffs' motion to strike his responsive documents is moot and denied. The Sullivans', Steigers', and Tyrrells' motions to intervene are identical to that of the original TMF group and they will be treated together.

complication and delay without any commensurate benefit to either the current parties or the interveners. The plaintiffs note that they would not object to granting the TMF interveners *amicus curiae* status, nor would they object to a group of interveners able to assert personal, rather than public, claims.

The TMF interveners have not cited any statutory right to participate in this litigation, so they may only enter the case if they satisfy Rule 24(a)(2) or receive permission under Rule 24(b). Rule 24(a)(2) requires the interveners to demonstrate an interest in the subject property, a likelihood that the resolution of this case will impair their ability to protect their interest, and that their interest is not already being adequately represented. Rule 24(b) allows the court to permit intervention if the would-be interveners show that they have a claim or defense that shares a common question of law or fact with the main action, and that their intervention will not unduly delay or prejudice the rights of the existing parties. These rules presuppose that the intervener has standing to bring an independent claim.

"Standing of a party to maintain a legal action is a 'threshold issue'" and a prerequisite to judicial relief. *Ricci v. Superintendent, Bureau of Banking*, 485 A.2d 645, 647 (Me. 1984). While the concept of standing may be somewhat amorphous, it generally requires that a party have an interest in a controversy "that is 'in fact distinct from the interest of the public at large.'" *Nergaard v. Town of Westport Island*, 2009 ME 56, ¶ 18, 973 A.2d 735, 740 (quoting *Ricci*, 485 A.2d at 647); *see Nichols v. Town of Rockland*, 324 A.2d 295, 296 (Me. 1974) (standing is an amorphous concept relating to presence of a justiciable controversy capable of specific, conclusive relief). The 171 TMF interveners have not attempted to assert any individualized interests in the beach area subject to this litigation. Rather, they claim that the Town owns the beach or alternatively that they have collectively acquired a public easement. These claims merely assert the public

RE-09-111

interest in the beach, which is already being adequately represented by the Town of Kennebunkport and the State of Maine. *See Bell I*, 510 A.2d at 518 n.18, 519 (Town may assert rights of public to beach, and the Attorney General has the power and duty to protect public rights). The TMF interveners' pleadings fall short of showing the particularized injury or claim required to obtain standing.

The court grants the law firm of Taylor, McCormack, & Frame, LLC, permission to participate in discovery *de bene esse*. However, before any of the firm's clients is granted intervener status, that intervener must provide a factual basis showing an individualized claim and must satisfy the requirements of Rule 24. *See e.g. Bell v. Town of Wells*, YORSC-CV-84-125 (Me. Super. Ct., Yor. Cty., Sept. 14, 1987 (Brodrick, J.) (allowing participation by group of forty parties claiming private and personal easements by prescription based on their unique personal history of use).

Roger C. and Nancy H. Allen; Kendall and Linda Burford; and David Green and Jean French do not appear to have joined the TMF parties or sought representation from Taylor, McCormack, & Frame, LLC. Like the TMF interveners, however, they have failed to show any individualized interest in the beach necessary to acquire standing. The plaintiffs' motion to strike or dismiss these pleadings is granted.

4. Agnes McNamee and John and Sonia Dalton's Motions to Withdraw

Agnes McNamee and John V. and Sonia M. Dalton request to withdraw their filings. Both Ms. McNamee and Mr. and Mrs. Dalton appear to have joined the TMF interveners since filing their original answers, defenses, and counterclaims. As their original pleadings do not assert any individualized claims and are identical in substance to the claims of the TMF group, the requests are granted. The plaintiffs' motion to strike their pleadings is thus moot and denied.

RE-09-111

5. Plaintiffs' Motion to Dismiss the Defendant Town of Kennebunkport's Counterclaim Counts VI (Custom) and IX (Offset Taxes) Pursuant to Rule 12(b)(6); Motion to Strike Affirmative Defenses 9 (Custom), 12 (Abandonment), and 16 (Property Taxes), and a portion of the Town's prayer for relief pursuant to Rule 12(f); and Request for Rule 11 Sanctions

Among the Town's counterclaims are its Count VI asserting that the Town or the public has acquired rights in the plaintiffs' property through the doctrine of custom, and its Count IX requesting that the court assess the plaintiffs for back-taxes in the event they are adjudged to hold title to the beach. The plaintiffs argue that the doctrine of easement by custom does not exist in Maine, and that the Superior Court has no authority to assess and impose property taxes. The plaintiffs object to the Town's affirmative defenses numbered 9 and 16 insofar as they rest on the same theories of custom and tax, respectively. The plaintiffs also object to the Town's affirmative defense number 12 on the grounds that the law of abandonment does not apply to fee ownership. Regarding the Town's requested relief, the plaintiffs contend that the Town has not properly pleaded the elements required for an action to quiet title and should thus receive no relief pursuant to 14 M.R.S. § 6651, and that the Town has likewise failed to establish any basis to request attorney's fees. Finally, the plaintiffs request that the Town be compelled to pay the legal fees and costs incurred in opposing its Count IX.

"A motion to dismiss tests the legal sufficiency of the complaint." *Heber v. Lucerne-in-Maine Village Corp.*, 2000 ME 137, ¶ 7, 755 A.2d 1064, 1066 (quoting *McAfee v. Cole*, 637 A.2d 463, 465 (Me. 1994)). The Court examines "the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Id.* (quoting *McAfee*, 637 A.2d at 465). "For purposes of a 12(b)(6) motion, the material allegations of the complaint must be taken as admitted." *McAfee*, 637 A.2d at 465.

"Dismissal is warranted when it appears beyond a doubt that the plaintiff is entitled to no relief under any set of facts that [s]he might prove in support of [her] claim." *Johanson v. Dunnington*, 2001 ME 169, ¶ 5, 785 A.2d 1244, 1245–46.

Where Rule 12(b) tests the sufficiency of the complaint, Rule 12(f) provides "the means for testing the legal sufficiency of a defense." 1 Field, McKusick & Wroth, *Maine Civil Practice* 255 (2d ed. 1970). Under Rule 12(f) "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." M.R. Civ. P. 12(f).

The Town of Kennebunkport has asserted that it holds an easement by custom in Count VI of its complaint and as part of its affirmative defense number 9. The plaintiffs contend that the doctrine does not exist in Maine. Old English common law allowed the public to obtain an easement over private property where the public usage occurred "so long as the memory of man runneth not to the contrary" without interruption; was reasonable, "peaceable and free from dispute;" occurred within a bounded area; the custom was obligatory; and it was not "repugnant to other customs or law." *Eaton v. Town of Wells*, YORSC-RE-97-203 at 13–14 (Me. Super. Ct., Yor. Cty., Oct. 25, 1999) (Kravchuk, C.J.) (quoting *State ex. Re. Thornton v. Hay*, 462 P.2d 677 (Ore. 1969)). A right by custom,

> unlike a prescriptive right, never was assumed to arise from a grant by the land owner of an easement in it, but to have come, if at all, from some governmental act of a public nature, the best evidence of which had perished, or of which there never had been, as in the case of a charter from some feudal lord or ecclesiastical corporation, a public record. "Custom" was an invention to surmount the incapacity of a fluctuating body, as the inhabitants of a manor or barony, to take by grant.

Piper v. Voorhees, 130 Me. 305, 311, 155. A. 556, 559 (1931).

In *Bell v. Town of Wells*, the trial court accepted that the Town could establish a public easement over the plaintiff beach-owners' land, but found that the Town had

failed to meet its burden of proof. *Bell II*, 557 A.2d at 179. On appeal, the Law Court affirmed the judgment but explicitly reserved the question of whether the doctrine is part of Maine's common law. *Id.* The Court noted that "[v]ery few American states recognize the English doctrine of public easements by local custom," and that there was "a serious question whether application of the local custom doctrine to conditions prevailing in Maine near the end of the 20th century is necessarily consistent with the desired stability and certainty of real estate titles." *Id.*

Both the Town and the plaintiffs cite *Bell* to support their positions on the doctrine of custom. The Town claims that *Bell* implicitly supports the doctrine's existence, while the plaintiffs argue that *Bell* implicitly bars the doctrine's application. In fact, the state of the law is ambiguous because the Law Court has neither adopted nor rejected the doctrine. *Id.*; *Piper*, 130 Me. at 311, 155. A. at 559. This court similarly declines to rule on the doctrine's viability at this early stage of the proceedings. The plaintiffs' motion to dismiss Count VI and strike defense 9 is denied, without prejudice to reconsideration as the facts are developed.

The Town's Count IX alleges that the plaintiffs have never paid taxes on the land in question, suggests this is a sign of their intent to abandon the property, and requests that the court order the plaintiffs to pay back taxes if they are found to hold title in the beach. The Town's affirmative defense 12 raises the issue of abandonment, and defense 16 states that the plaintiffs "have failed to pay property taxes on all or any portion of Goose Rocks Beach." The plaintiffs attack these claims and defenses as legally deficient and seek attorney's fees in connection with the tax question.

First, the plaintiffs correctly argue that the theory of abandonment is not relevant to this litigation. An easement may be extinguished through abandonment if a party shows "a history of nonuse coupled with an act or omission evincing a clear intent to

abandon" the right of way. *Canadian N. Ry. v. Sprague*, 609 A.2d 1175, 1179 (Me. 1992). However, "'a perfect legal title cannot be lost by abandonment.'" *Town of Sedgwick v. Butler*, 1998 ME 280, ¶ 6, 722 A.2d 357, 358 (quoting *Picken v. Richardson*, 146 Me. 29, 36, 77 A.2d 191, 194 (1950)). The plaintiffs in this case claim to have perfect title in the disputed beach and have not advanced any theory of easement. If they do in fact hold the fee interest, they could not abandon it. *Picken*, 146 Me. at 36, 77 A.2d at 194. The Town's affirmative defense number 12 is thus stricken as irrelevant, and Count IX dismissed insofar as it relates to abandonment.

Second, the plaintiffs are also correct that the question of property taxes is not properly before the court. To begin, the Town concedes that it has never assessed the plaintiffs or their predecessors in title for property taxes on the beach. The assessment and collection of property taxes is entrusted to the State Tax Assessor and the respective municipalities by statute. 36 M.R.S. §§ 501–65; 701–66. The legislature has similarly prescribed statutory processes for tax collection. 36 M.R.S. §§ 751–66, 891–1084. Even if the Town had assessed the plaintiffs on their beach property and the plaintiffs were delinquent, this in itself would have no bearing on their title to the property. The procedure for imposing and foreclosing a tax lien is codified in sections 552 and 941 through 948. The court rejects the Town's attempt to analogize unassessed taxes to damages and cannot impose extra-statutory taxation in the guise of damages. Affirmative defense 16 is stricken and Count IX dismissed in its entirety. The plaintiffs' request that Rule 11 sanctions be imposed on the Town for its taxation argument is denied.

Finally, the plaintiffs' motion to strike portions of the Town's requested relief is denied.

In summary, the plaintiffs' motion to dismiss Count VI (custom); to strike defense 9 (custom) and the requests for relief pursuant to 14 M.R.S. § 6651 and for attorney's fees; and the plaintiffs' request for Rule 11 sanctions is denied. The plaintiffs' motion to dismiss Count IX (property taxes) and to strike defenses 12 (abandonment) and 16 (property taxes) is granted.

6. Plaintiffs' Motion to Dismiss the Defendants Alexander M. and Judith A. Lachiatto's Counterclaim Counts III (Acquiescence), V (Dedication and Acceptance), VI (Custom), VII (Easement), and VIII (Implied/Quasi Easement) Pursuant to Rule 12(b)(6); Motion to Strike Affirmative Defenses 2 (Standing), 7 (Public Trust), 9 (Custom), 15 (Consideration), and 16 (Property Taxes), and a portion of the Lachiattos' prayer for relief pursuant to Rule 12(f)

Defendants Alexander M. and Judith A. Lachiatto are interveners who own a back-lot property near Goose Rocks Beach in Kennebunkport, Maine. They have agreed to withdraw Counts III, V, and VI of their counterclaim, affirmative defenses 2, 15, and 16, and their request for relief pursuant to 14 M.R.S. § 6651. They maintain, however, Counts VII for easement and VIII for implied easement, their defenses asserting the public trust doctrine and easement by custom, and their right to seek attorney's fees later in the proceedings.

The doctrine of easement by custom was addressed above. The Lachiattos' defense number 9 is identical to the Town's, and the plaintiffs' motion to strike it is denied. The same is true of their request for attorney's fees and costs. The Lachiattos' Count VII merely recites the theories of easement by prescription, implication, and the public trust doctrine, which are already raised by their Counts IV, VIII, and defense 7 respectively. Count VII is thus dismissed as being duplicative or unduly repetitive.

Count VIII asserts that an easement for local residents and/or the public was created through implication by a prior quasi-easement. An easement can be created in this way if:

> (1) the property when in single ownership [was] openly used in a manner constituting a "quasi-easement," as existing conditions on the retained land that are apparent and observable and the retention of which would clearly benefit the land conveyed; (2) the common grantor, who severed unity of title, . . . manifested an intent that the quasi-easement should continue as a true easement, to burden the retained land and to benefit the conveyed land; and (3) the owners of the conveyed land . . . continued to use what had been a quasi-easement as a true easement.

Northland Realty, LLC v. Crawford, 2008 ME 92, ¶ 13, 953 A.2d 359, 364 (quoting *Robinson v. Me. Cent. R.R. Co.*, 623 A.2d 626, 627 (Me. 1993)) (alterations and omissions in original). The same test can be applied to determine if an easement burdening the conveyed land was created. *Connolly v. Me. Cent. R.R. Co.*, 2009 ME 43, ¶ 8 n.1, 969 A.2d 919, 922 n.1.

The Lachiattos allege that the "[p]laintiffs' predecessors in title are the common grantors of lots in the vicinity of Goose Rocks Beach and Goose Rocks Beach itself," and that "[t]he circumstances at the time of conveyance of the lots located adjacent to, and in the vicinity of, Goose Rocks Beach imply the intent of the [p]laintiffs' predecessors in title to subject . . . Goose Rocks Beach" to an easement favoring the Town, the public, or the defendants." Under Maine's rules of notice pleading, the Lachiattos have broadly alleged circumstances that, developed through discovery, could show that a common grantor marketed and conveyed the plaintiffs' properties in a way that created a quasi-easement in the Lachiattos' favor. The plaintiffs' motion to dismiss Count VIII is denied.

The Lachiattos' affirmative defense number 7 asserts that the public trust doctrine bars the plaintiffs' claims to the extent that the doctrine includes the public right to use the beach for general recreational purposes. The issues raised by this case clearly implicate the public trust doctrine, and the court will not bar discussion of the doctrine at this early phase of litigation. The plaintiffs' motion to strike affirmative defense 7 is denied.

To summarize, the Lachiattos have withdrawn Counts III (acquiescence), V (dedication and acceptance), and VI (custom), affirmative defenses 2 (standing), 15 (consideration), and 16 (property taxes), and their request for relief pursuant to the quiet title statute. The plaintiffs' motion to dismiss Count VIII (implied easement) and strike defense 9 (custom), defense 7 (public trust), and the request for attorney's fees is denied. The motion to dismiss Count VII (easement) is granted.

7. Plaintiffs' Motion to Dismiss Defendants Richard J. and Margarete K.M. Driver's Counterclaim Count I (Fee Simple) Pursuant to Rule 12(b)(6); Motion to Strike Affirmative Defenses 2 (Standing), 7 (Public Trust), 9 (Custom), 15 (Consideration), and 16 (Property Taxes), and a portion of the Drivers' prayer for relief pursuant to Rule 12(f)

Defendants Richard J. and Margarete K.M. Driver are interveners who own back-lot property in the Goose Rocks Beach area of Kennebunkport, Maine. Count I of their counterclaim asserts that the "[f]ee simple title to Goose Rocks Beach has resided in Defendants Town of Kennebunkport, and/or the public, continuously for over 100 years" and seeks a declaration affirming the Town's ownership. The plaintiffs correctly argue that the Drivers do not have standing to assert the Town's interest.

As discussed above, a party may only litigate personal interests that are distinct from the interest of the public at large. *Ricci*, 485 A.2d at 647. In Count I of their counterclaim, the Drivers attempt to litigate the interests of the Town of Kennebunkport and the general public. While they do allege that the "[d]efendants, and/or the public, have acquired fee simple title . . . by prescription," the referenced "defendants" appear to be the "Defendants Town of Kennebunkport, and/or the public." The Drivers themselves interpret their complaint this way and explain that "Count I is plead to encompass our rights as members of the general public." The Town is already a party to this litigation and will adequately represent its interest. Both the Town and the State

will represent the public at large. The Drivers, as individuals, may not separately litigate these broad civic interests and their Count I is dismissed.

The plaintiffs also seek to strike a number of the Drivers' affirmative defenses. "An affirmative defense is one 'raising new facts or arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all allegations in the complaint are true.'" *Estate of Cilley v. Lane*, 2009 ME 133, ¶ 13, 985 A.2d 481, 486 (quoting Black's Law Dictionary 430 (7th ed. 1999)). The Drivers have agreed to withdraw defense 15. Defense number 2 asserts that the plaintiffs lack title to the beach and therefore lack standing to assert their claims. This is a denial of the plaintiffs' claims rather than an affirmative defense because its merit rests on disproving the allegations in the plaintiffs' complaint. It effectively duplicates the Drivers' answer, and the plaintiffs' motion to strike it is granted.

The Drivers' affirmative defense number 7 is identical to the Lachiattos' defense number 7 and contends that the plaintiffs' claims are barred to the extent the public trust doctrine reserves a public right to use the beach for general recreation. The plaintiffs' motion to strike defense 7 is denied.

Affirmative defenses 9 and 16 concern the doctrine of custom and property taxes, respectively. These issues have already been discussed. The motion to strike is denied on defense 9, but granted on defense 16. Finally, the motion to strike the request for attorney's fees is denied.

In summary, the Drivers' have withdrawn defense 15 (consideration). The motion to strike defense 7 (public trust), defense 9 (custom), and the Drivers' request for attorney's fees is denied. The motion to dismiss Count I (fee simple) and strike defenses 2 (standing) and 16 (property taxes) is granted.

RE-09-111

8. Plaintiffs' Motion to Dismiss Defendants Sharon Ann Eon-Harris and John Michie Harris's Counts III (Acquiescence), V (Dedication and Acceptance), VI (Custom), VII (Easement), VIII (Implied Easement), X (Harassment), XI (Interference with Economic Advantage), and XII (Loss of Property Value) Pursuant to Rule 12(b)(6); Motion to Strike Affirmative Defenses 2 (Standing), 7 (Public Trust), 9 (Custom), 15 (Consideration) and 16 (Property Taxes), and a Portion of the Harrises' prayer for relief pursuant to Rule 12(f); and Request for Rule 11 Sanctions

Defendants Sharon Ann Eon-Harris and John Michie Harris are interveners who own back-lot property in the Goose Rocks Beach area. Count III of their counterclaim asserts an interest in the beach through the plaintiffs' acquiescence. Title can be obtained through acquiescence if a party can show by clear and convincing evidence:

> (1) possession up to a visible line marked clearly by monuments, fences or the like; (2) actual or constructive notice of the possession to the adjoining landowner; (3) conduct by the adjoining landowner from which recognition and acquiescence, not induced by fraud or mistake, may be fairly inferred; and (4) acquiescence for a long period of years, such that the policy behind the doctrine of acquiescence—that a boundary consented to and accepted by the parties for a long period of years should become permanent—is well served by recognizing the boundary.

Hamlin v. Niedner, 2008 ME 130, ¶ 7, 955 A.2d 251, 254. The plaintiffs object that while the Harrises have pleaded the general elements of acquiescence, they have not alleged any specific facts entitling them to their requested relief.

Each claim in a pleading must set forth "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." M.R. Civ. P. 8(a). "Where a Maine Rule of Civil Procedure is identical to the comparable federal rule, '[the courts] value constructions and comments on the federal rule *as aids* in construing our parallel provision.'" *Bean v. Cummings*, 2008 ME 18, ¶ 11, 939 A.2d 676, 680 (quoting *Me. Cent. R.R. Co. v. Bangor & Aroostook R.R. Co.*, 395 A.2d 1107, 1114 (Me. 1978)) (emphasis added in *Bean*). Rule 8(a) is "practically identical to the comparable federal rule[]." *Id.*

Pleadings do not need to allege specific facts to survive a 12(b)(6) motion to dismiss unless required to do so by Rule 9(b). However, the United States Supreme

Court recently instructed that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . . Factual allegations must be enough to raise a right to relief above the speculative level . . . ." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (alteration in original) (citations omitted).

The Harrises' counterclaim recites the elements of a claim of title by acquiescence, but does not allege any facts to satisfy those elements. At minimum, they have failed to indicate what visible line delineates the area they have possessed or by what conduct the plaintiffs indicated their acquiescence to the Harrises' occupation. Without this information the plaintiffs do not have notice of the Harrises' grounds for recovery and are hampered in their ability to prepare a defense. *See Twombly*, 550 U.S. at 555. The Harrises' Count III is dismissed.

Count V of the Harrises' counterclaim asserts that the plaintiffs have dedicated their beach property to the public and that the dedication has been accepted. Dedication and acceptance is one way for the public at large to acquire an easement or right of way over private property. *Manchester v. Augusta Country Club*, 477 A.2d 1124, 1128–29 (Me. 1984). "To prove dedication, two conditions must be shown: that the land in question was 'dedicated' by the grantor for a public purpose; and that the public 'accepted' the dedication by some affirmative act." *Id.* at 1129. While the Town of Kennebunkport or the State of Maine clearly have standing to raise this claim as the public's representative, it is far less clear that the Harrises are similarly situated. They are private citizens who lack standing to litigate claims on behalf of the general public. As such, Count V is dismissed.

The Harrises' Counts VI for custom, VII for easement, and VIII for implied easement are identical to those claims brought by the Town and the Lachiattos. These

RE-09-111

are addressed above. The motion to dismiss Counts VI and VIII is denied, but the motion to dismiss Count VII is granted. Counts X through XII are unique to the Harrises. Count X asserts a claim for harassment stemming from an incident in which one or more of the plaintiffs allegedly reported the Harrises to the police for trespassing over the beach area. The plaintiffs correctly point out that there is no general common law cause of action for harassment in Maine. The Harrises have not pleaded any facts showing entitlement to protection or recovery under Maine's Protection from Harassment statute, and in any event such actions must be brought in District Court. 5 M.R.S. §§ 4651–52. Count X is dismissed.

Count XI alleges that the plaintiffs have tortiously interfered with an economic advantage. The apparent basis for this is the harassment identified in Count X, which has allegedly damaged the Harrises' relationship with their tenants and decreased the value of their rental property. "Tortious interference with a prospective economic advantage requires a plaintiff to prove: (1) that a valid contract or prospective economic advantage existed; (2) that the defendant interfered with that contract or advantage through fraud or intimidation; and (3) that such interference proximately caused damages." *Rutland v. Mullen*, 2002 ME 98, ¶ 13, 798 A.2d 1104, 1110. The Harrises' have not sufficiently pleaded fraud, so their case must rest on intimidation.

"Interference by intimidation involves unlawful coercion or extortion. . . . [A] person who claims to have, or threatens to lawfully protect, a property right that the person believes exists cannot be said to have intended to deceive or to have unlawfully coerced or extorted another simply because that right is later proven invalid." *Id.* at ¶ 16, 798 A.2d at 1111. Read generously, the Harrises' complaint alleges that the plaintiffs contacted the police and wrongfully accused the Harrises or their tenants of trespassing. The Harrises do not allege that the plaintiffs did so in bad faith, only that it

was wrongful. If the allegations are true they still fall short of showing the fraud or intimidation necessary to support a claim of tortious interference and the Harrises' Count XI is dismissed.

The Harrises Count XII asserts a claim for the loss of property value allegedly resulting from the plaintiffs' actions. While lost value may be an element of damages, there is no independent tort claim for diminished property value caused by another's lawful assertion of a property right. Count XII is dismissed. The plaintiffs' request for Rule 11 attorney's fees and costs in relation to Counts XI and XII is denied.

The plaintiffs' motion to strike affirmative defenses 2 (standing), 7 (public trust), 9 (custom), and 16 (property taxes), has been discussed above and the same considerations apply to the Harrises as to the other defendants. The motion to strike is denied on defenses 7 and 9, but granted on defenses 2 and 16. The same is true of their requests for relief pursuant to the quiet title statute and for attorney's fees and costs, and the motion to strike these requests is denied. Affirmative defense number 15 asserts that the plaintiffs' claims are barred by lack of consideration. The only relevance this theory could have to this litigation would be to show that the plaintiffs do not actually hold title to the contested beach, and therefore it is not an affirmative defense. *Estate of Cilley*, 2009 ME 133, ¶ 13, 985 A.2d at 486 (affirmative defense defeats claim even if plaintiffs' allegations are true). The plaintiffs' motion to strike defense 15 is granted.

To summarize, the court denies the motion to dismiss Count VI (custom) and Count VIII (implied easement); denies the motion to strike defense 7 (public trust), defense 9 (custom), and the Harrises' requested relief; and denies the plaintiffs' request for Rule 11 sanctions. The court grants the motion to dismiss the Harrises' Counts III (acquiescence), V (dedication and acceptance), VII (easement), X (harassment), XI

(tortious interference), and XII (loss of property value); and grants the motion to strike defenses 2 (standing), 15 (consideration), and 16 (property taxes).

The entries are:

- The court retains the Town of Kennebunkport's objection to notice and service under advisement.
- The State of Maine's motion to intervene is granted.
- The TMF interveners' motion to intervene is denied. Their attorneys, Taylor, McCormack, & Frame, LLC, are granted standing to participate in discovery *de bene esse*. Individual interveners may request to join this litigation pursuant to Rule 24 if they can show a factual basis for an individualized claim.
- The plaintiffs' motion to strike the responsive documents of Roger C. and Nancy H. Allen; Kendall and Linda Burford; and David Green and Jean French is granted.
- Mark W. Smith's motion to substitute counsel is granted.
- Agnes McNamee and John and Sonia Dalton's motions to withdraw their individual court filings are granted.
- The plaintiffs' motion to strike the responsive documents of Mark W. Smith; Agnes McNamee; and John and Sonia Dalton is denied.
- The plaintiffs' motion to dismiss the defendant Town of Kennebunkport's Counterclaim Count IX and to strike affirmative defenses 12 and 16 is granted. The motion is otherwise denied.
- Defendants Alexander M. and Judith A. Lachiatto voluntarily withdraw their Counterclaim Counts III, V, and VI; and their affirmative defenses 2, 15, and 16; and their request for relief pursuant to the quiet title statute. The plaintiffs' motion to dismiss their Counterclaim Count VII is granted, and the motion is

RE-09-111

otherwise denied.

- Defendants Richard J. and Margarete K.M. Driver voluntarily withdraw their affirmative defense 15. The plaintiffs' motion to dismiss their Counterclaim Count I and to strike their defenses 2 and 16 is granted. The motion is otherwise denied.
- The plaintiffs' motion to dismiss defendants Sharon Ann Eon-Harris and John Michie Harris's Counterclaim Counts III, V, VII, X, XI, and XII; and to strike their affirmative defenses 2, 15, and 16 is granted. The motion is otherwise denied.

DATE: 8/17/10

G. Arthur Brennan
Justice, Superior Court

PLEASE REFERENCE ATTACHED LIST OF ATTORNEYS FOR THIS CASE.

Attorneys for RE-09-111 – as of 08/27/10
Robert F. Almeder vs. Town of Kennebunkport

PLAINTIFFS ATTORNEYS

Sidney Thaxter, Esq.
Regan Haines, Esq.
David Silk, Esq.
CURTIS THAXTER STEVENS BRODER & MICOLEAU
One Canal Plaza
PO Box 7320
Portland, ME 04112

Christopher Pazar, Esq.
DRUMMOND & DRUMMOND
One Monument Way
Portland, ME 04101

DEFENDANTS ATTORNEYS

Brian D. Willing, Esq.
Amy Tchao, Esq.
Melissa Hewey, Esq.
DRUMMOND WOODSUM & MACMAHON
84 Marginal Way, Suite 600
Portland, ME 04101

Neal Weinstein, Esq.
LAW OFFICES OF NEAL WEINSTEIN
32 Saco Ave.
PO Box 660
Old Orchard Beach, ME 04064

Thomas R. McNaboe, Esq.
LAW OFFICE OF THOMAS R MCNABOE
13 Sea Cove Road
Cumberland, ME 04110

Gregg R. Frame, Esq.
Andre Duchette, Esq.
TAYLOR MCCORMACK & FRAME LLC
4 Milk St., Suite 103
Portland, ME 04101

STATE OF MAINE
YORK, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO: RE-09-111

ROBERT F. ALMEDER and VIRGINIA S. ALMEDER, et al.,

Plaintiffs,

v.

TOWN OF KENNEBUNKPORT, ALL PERSONS WHO ARE UNASCERTAINED, not in being, unknown or out of the State, heirs or legal representatives of such unascertained persons, or such persons as shall become heirs, devisees or appointees of such unascertained persons who claim the right to use or title in Plaintiffs' Property other than persons claiming ownership or easement by, through, or under an instrument recorded in the York County Registry of Deeds, et al.

Defendants

ORDER FOR SERVICE OF PROCESS AND SERVICE BY PUBLICATION

(Title to Real Estate Involved)

The plaintiffs own beachfront properties on Goose Rocks Beach in the Town of Kennebunkport. They have brought this action to obtain a declaration that they own fee titles in the beach to the low-water mark and may exclude the public from their land, and to obtain judgment quieting their titles. The Town of Kennebunkport, on behalf of the general public, opposes the plaintiffs and is asserting counterclaims to establish the general public's right to use Goose Rocks Beach for recreational purposes. The State of Maine has joined the Town of Kennebunkport on behalf of the

public, and the following parties have intervened to claim private rights to the beach: Sharon & John Michie Harris; Alexander & Judith Lachiatto; and Richard & Margarete K.M. Driver. Many other individuals, corporations, and trusts are also seeking to intervene in the proceeding.

On July 21, 2010, the court heard argument on the defendant Town of Kennebunkport's objection to the method and adequacy of the plaintiffs' service of process. "Service of process serves the dual purposes of giving adequate notice of the pendency of an action, and providing the court with personal jurisdiction over the party properly served. . . . 'Any judgment by a court lacking personal jurisdiction over a party is void.'" *Gaeth v. Deacon*, 2009 ME 9, ¶ 20, 964 A.2d 621, 626 (quoting *Brown v. Thaler*, 2005 ME 75, P 10, 880 A.2d 1113, 1116). After due consideration the court orders:

1. Service by Publication

The court finds that service in person or by mail cannot practicably be made upon all persons who are unascertained, not in being, unknown or out of the State, heirs or legal representatives of such unascertained persons, or such persons as shall become heirs, devisees or appointees of such unascertained persons who claim the right to use or title in Plaintiffs' Property other than persons claiming ownership or easement by, through, or under an instrument recorded in the York County Registry of Deeds. To serve, notify, and bind these persons, including persons owning non-beachfront property in the so-called "Goose Rocks Zone" of the Town of Kennebunkport, the court orders service to be made by publication as prescribed by Maine Rule of Civil Procedure 4(g). The plaintiffs shall publish in the Portland Press Herald the legal notice attached to

and incorporated into this order as Exhibit A. This notice shall be published once a week for three consecutive weeks, with the first publication occurring within twenty days after the date of this order. Service by publication shall be complete on the twenty-first day after the first publication. The plaintiffs shall file with the court an affidavit that publication has been made. This publication shall be the responsibility of and at the expense of the plaintiffs.

2. Personal Service

The law requires that any person subject to service of process be joined as a party to an action if that person claims an interest relating to the subject matter of the action and if their absence may leave any existing parties subject to a substantial risk of incurring inconsistent obligations. Property rights pertaining to Goose Rocks Beach's intertidal zone are in dispute. Approximately sixty-five owners of beachfront properties on Goose Rocks Beach are not parties to this litigation and will not necessarily be bound by its outcome. If the plaintiffs succeed in quieting their titles in the beach, the non-party owners' titles will remain open to challenge. Conversely, if the Town of Kennebunkport succeeds in establishing the public's right to use the intertidal zone of the plaintiffs' property for recreational purposes, the non-party owners' could attempt to exclude the public from their own land in the future. Either result creates a checkerboard of uncertainty regarding the public and the Town of Kennebunkport's rights to use Goose Rocks Beach.

To ensure that complete relief may be accorded to all the named parties in this case and to avoid the risk of duplicative future litigation, the court orders the plaintiffs and the Town of Kennebunkport to jointly serve process on each owner of beachfront property on Goose Rocks Beach not already named as a party in

conformity with Maine Rule of Civil Procedure 4(c)(1). Per the rule and within twenty days after the date of this order, the plaintiffs and the Town of Kennebunkport shall jointly mail a copy of the summons, the complaint, and the Town of Kennebunkport's counterclaim (by first-class mail, postage prepaid) to each person to be served, together with two copies of a notice and acknowledgment form and a return envelope, postage prepaid, addressed to the sender. If no acknowledgement of service is received within twenty days after the date of mailing, personal service shall be made in accordance with the Rule. Any owner of beachfront property on Goose Rocks Beach who does not wish to join as a plaintiff shall be joined as a defendant. The plaintiffs and the Town of Kennebunkport shall each bear one-half the cost of service.

Nothing in this order should be read to prohibit any party from taking additional, independent measures to notify potential litigants of these proceedings.

DATE: 8/30/10

G. Arthur Brennan
Justice, Superior Court

EXHIBIT A

NOTICE TO PERSONS WHO ARE UNASCERTAINED AND TO THE GENERAL PUBLIC
14 M.R.S. § 6653

PURSUANT to 14 M.R.S. §§ 6653–6654, and by order of the York County Superior Court, PLEASE TAKE NOTE that on October 26, 2009, a complaint was filed in the Office of the Clerk of the York County Superior Court, Alfred, Maine, Docket No. ALFSC-RE-2009-00111, titled: *Robert F. Almeder et al. v. Town of Kennebunkport*.

The plaintiffs in this lawsuit are as follows: Robert F. Almeder and Virginia S. Almeder, Trustees of the Almeder Living Trust, 113 Kings Highway, York County Registry of deeds ("YCROD") Book 15659, Page 864; Christopher Asplundh, 17 Sandpoint Road, YCROD Book 1979, Page 551; John T. Coughlin and Priscilla M. Coughlin, Trustees of P.M.C. Realty Trust, 115 Kings Highway, YCROD Book 3085, Page 5; Louise S. De Mallie, as Trustee of the Louise S. De Mallie Revocable Trust u/a dated November 12, 2002, 287 Kings Highway, YCROD book 12173, Page 221 and Book 14675, Page 862; Willard Parker Dwelley, Jr. and W. Parker Dwelley, III and John H. Dwelley, Co-Trustees of the Joan H. Dwelley Testamentary Trust, 23 Sandpoint Road, YCROD Book 12248, Page 9 and Book 15577, Page 679; Janice M. Fleming, 227 Kings Highway, YCROD Book 13696, Page 59; John O. Gallant and Sharon A. Gallant, 219 Kings Highway, YCROD Book 8413, Page 198; Jule C. Gerrish, 173 Kings Highway, YCROD Book 1819, Page 32; Eugene R. Gray, Trustee of the Qualified Personal Residence Trust, 183 Kings Highway, YCROD Book 14656, Page 916; Edwina D. Hastings, Trustee of the Edwina D. Hastings Revocable Trust, 221 Kings Highway, YCROD Book 14999, Page 766; Leslie A Josselyn-Rose, Trustee of the LAJR Trust, 251 Kings Highway, YCROD Book 15587, Page 491; Deborah J. Kinney, 223 Kings Highway, YCROD Book 9721, Page 278; Terrence G. O'Connor and Joan M. Leahey, 195 Kings Highway, YCROD Book 13253, Page 87; Kristen B. Raines, 249 Kings Highway, YCROD Book 14147, Page 614; Linda M. Rice, 193 Kings Highway, YCROD Book 7955, Page 127; Michael J. Sandifer and Alice B. Sandifer, Co-Trustees of the Alice B. Sandifer Trust, 253 Kings Highway, YCROD Book 14627, Page 144; Eleanor A. Scribner and Robert H. Scribner, Trustees of the Eleanor A. Scribner Qualified Personal Residence Trust, 291 Kings Highway, YCROD Book 14225, Page 139; Carolyn K. Sherman, 109 Kings Highway, YCROD Book 9721, Page 281; Steven H. Wilson and Shawn B. McCarthy, Trustees of the Twombly Family Trust u/d/t dated January 24, 2002, as amended, 165 Kings Highway, YCROD Book 15516, Page 1121; Richard M. Vandervoorn, Lawrence W. Vandervoorn and Robert O. Clemens, Trustees of The Cornelius J. Vandervoorn Qualified Personal Residence Trust, 177 Kings Highway, YCROD Book 15718, Page 584; and Beth G. Zagoren, 215 Kings Highway, YCROD Book 5931, Pages 340.

The present defendants in this lawsuit are: the Town of Kennebunkport; the State of Maine; Alexander M. Lachiatto and Judith A. Lachiatto; John Michie Harris and Sharon Eon-Harris; Richard J. Driver and Margarete K.M. Driver; and

all persons who are unascertained, not in being, unknown or out of the State, heirs or legal representatives of such unascertained persons, or such persons as shall become heirs, devisees or appointees of such unascertained persons who claim the right to use or title in the plaintiffs' property other than persons claiming ownership or easement by, through, or under an instrument recorded in the York County Registry of Deeds.

The Town of Kennebunkport, the Lachiattos, the Drivers, and the Harrises have asserted counterclaims claiming ownership of Goose Rocks Beach, the general public's right to the use of Goose Rocks Beach for any general recreation purpose, and individual private rights to the use of Goose Rocks Beach.

The plaintiffs complaint seeks a declaratory judgment under 14 M.R.S. §§ 5951–5963 and to quiet title pursuant to 14 M.R.S. §§ 6651–6653 in order to remove any cloud of apprehension over plaintiffs' title to their respective properties, including intertidal and upland property situated at Goose Rocks Beach, Town of Kennebunkport, York County, State of Maine.

IMPORTANT WARNING

IF YOU WISH TO OPPOSE the claims of the plaintiffs, you or your attorney MUST PREPARE AND DELIVER A WRITTEN ANSWER to the complaint or counterclaim WITHIN 41 DAYS from the date of first publication. An answer must be delivered in person or by mail to Diane Hill, Clerk of Courts, York County Superior Court, 45 Kennebunk Road, P.O. Box 160, Alfred, Maine 04002-0160. On or before the day the answer is delivered to the Clerk of Courts, a copy of your answer must be mailed to the plaintiffs' attorney, Sidney St. F. Thaxter, Esq., Curtis Thaxter, LLC, One Canal Plaza, Suite 1000, P.O. Box 7320, Portland, Maine, 04112-7320. IF YOU INTEND TO OPPOSE THIS LAWSUIT, YOU MUST ANSWER WITHIN THE REQUIRED TIME. FAILURE TO DO SO WILL RESULT IN THE FORFEITURE OF YOUR CLAIMS. Failure to answer will not affect the public's rights.

Attorneys for RE-09-111 – as of 08/27/10
Robert F. Almeder vs. Town of Kennebunkport

PLAINTIFFS ATTORNEYS

Sidney Thaxter, Esq.
Regan Haines, Esq.
David Silk, Esq.
CURTIS THAXTER STEVENS BRODER & MICOLEAU
One Canal Plaza
PO Box 7320
Portland, ME 04112

Christopher Pazar, Esq.
DRUMMOND & DRUMMOND
One Monument Way
Portland, ME 04101

DEFENDANTS ATTORNEYS

Brian D. Willing, Esq.
Amy Tchao, Esq.
Melissa Hewey, Esq.
DRUMMOND WOODSUM & MACMAHON
84 Marginal Way, Suite 600
Portland, ME 04101

Neal Weinstein, Esq.
LAW OFFICES OF NEAL WEINSTEIN
32 Saco Ave.
PO Box 660
Old Orchard Beach, ME 04064

Thomas R. McNaboe, Esq.
LAW OFFICE OF THOMAS R MCNABOE
13 Sea Cove Road
Cumberland, ME 04110

Gregg R. Frame, Esq.
Andre Duchette, Esq.
TAYLOR MCCORMACK & FRAME LLC
4 Milk St., Suite 103
Portland, ME 04101

STATE OF MAINE

YORK, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. RE-09-111
GAB -YOR- 12/22/2011

ROBERT F. ALMEDER, et al.,

Plaintiffs

v.

ORDER

TOWN OF KENNEBUNKPORT and
ALL PERSONS WHO ARE
UNASCERTAINED,

Defendants

DECISION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Pending are seven motions for summary judgment. Oral argument was held on November 18, 2011. The Town of Kennebunkport, the plaintiffs, the State, and the TMF Group were all represented by counsel. The Lachiatto and Driver defendants represented themselves. Also, there are two outstanding motions regarding the summary judgment filings.

BACKGROUND

On October 26, 2009, the plaintiffs, a group of beach-front land owners in Kennebunkport ("Plaintiffs"), brought a quiet title and declaratory judgment action against the Town of Kennebunkport and all persons unascertained who may have a claim to the high dry sand and intertidal zone of Goose Rocks Beach that is claimed by the Plaintiffs.

The procedural history of this case is extensive and complicated. Therefore, only a brief outline of that history related to the motions for summary judgment is provided here.

Turning first to the motions for summary judgment seeking judgment for fee title to the beach, the procedural history is as follows. The Defendant Town of Kennebunkport ("Town") filed its Motion for Summary Judgment ("Town MSJ") along with supporting documents on March 21, 2011. This motion seeks summary judgment against the relief requested in Counts I and II of the Plaintiffs' Complaint (declaratory judgment and quiet title to Goose Rocks Beach) and granting the relief requested in Count I of the Town's Counterclaim (fee simple ownership of Goose Rocks Beach).

On April 6, 2011, Paul and Sharon Hayes filed a memorandum opposing the Town's motion and joining the Plaintiffs reasoning.[1] On April 29, 2011, the Plaintiffs filed a "Joint Memorandum of Law in Opposition to Defendant Town of Kennebunkport's Motion for Summary Judgment" ("Joint Opp.") and a "Joint Opposition to Defendant Town of Kennebunkport's Statement of Undisputed Material Facts" ("Joint OSMF"). In support of this Joint Opposition, the Plaintiffs also submitted "Plaintiffs' Joint Statement of Material Facts" with exhibits tabbed as 1-6 ("Joint SMF"). The Plaintiffs also filed the "Plaintiffs' Motion for Partial Summary Judgment" ("Pls. MPSJ") seeking the relief requested in Counts I and II of their Complaint (only as to fee simple title) against the Town and any other defendant to be ascertained and "Plaintiffs' Motion for Summary Judgment" ("O'Connor/Leahey/Fleming MSJ") seeking judgment in their favor on Count I of the Town's Counterclaim. These motions are also

[1] Paul and Sharon Hayes refer to themselves as third party defendants. However, the Town has treated them as plaintiffs because they have adopted the allegations of the Plaintiffs' complaint. *See* Town MSJ 2, n.1.

supported by the "Plaintiffs' Joint Statement of Material Facts" with exhibits tabbed as 1-6.

On June 10, 2011, the group of intervenors *de benne esse*, known as the TMF Group, filed a "Reply to Plaintiffs' Motion for Partial Summary Judgment with Incorporated Memorandum of Law" ("TMF Group MSJ") and "TMF Defendant's Opposition to Plaintiffs' Statements of Material Fact" ("TMF SMF"). The Plaintiffs subsequently filed a Motion to Strike the TMF Group's Reply ("Pls. Mot. Strike") and also filed a response to the TMF Group's "Statements of Additional Fact" ("Pls. TMF OSMF"). The TMF Group then filed a reply to the motion to strike ("TMF Group Reply").

On June 14, 2011, the Town filed a "Consolidated Memorandum of Law" ("Consol. Mem.") in opposition to the Plaintiffs' motions for summary judgment and in reply to the Plaintiffs' Opposition to the Town's Motion for Summary Judgment, accompanied by a reply to the Plaintiffs' Joint Statement of Undisputed Material Fact ("Town OSMF"). On June 14, 2011, the State of Maine opposed the Plaintiffs' Motion for Partial Summary Judgment by adopting the position of the Town. The Plaintiffs filed a reply to the Town's opposition on June 30, 2011 ("Pls. Reply").

Turning next to the claims of the TMF Group and other individual back-lot owners, the procedural history is as follows. On June 10, 2011, the Plaintiffs filed "Plaintiffs' Motion for Partial Summary Judgment Against Lachiatto, Driver, Harris, and TMF Group" on all remaining counts in each of these parties' counterclaims. The Plaintiffs also filed Statements of Material Fact ("Pls. TMF SMF") and a Memorandum of Law ("Pls. TMF MSJ"). The TMF Group responded with an Opposing Statement of Material Facts on July 11, 2011 ("TMF Group SMF") and a Memorandum of law ("TMF Group Mem.") on July 18, 2011. Also, on July 11, 2011, the Lachiatto and Driver

Defendants filed a Response and Cross-Motion for Summary Judgment and Memorandum of Law in support ("L/D MSJ"), and Statement of Material Facts. The Plaintiffs filed an opposition to the Lachiatto/Driver Statement of Material Facts and Memorandum in Opposition on July 19, 2011. On July 29, 2011, the Plaintiffs responded to the TMF Group's opposition ("Pls. TMF Reply"). And finally, on August 9, 2011, the Lachiatto/Driver Defendants submitted a Supplemental Statement of Material Facts with record citations ("L/D Supp. SMF") along with a Motion for Enlargement of Time for filing these statements of fact.

The State of Maine, as intervenor, filed a Motion for Summary Judgment and Memorandum of Law on May 4, 2011, requesting a ruling that general recreational activity in the intertidal zone, not incidental or related to fishing, fowling, or navigation, is permitted under the Maine public trust doctrine, the decision in *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989), notwithstanding. The Plaintiffs filed an opposing Memorandum of Law on May 13, 2011. On May 16, 2011, the Surfrider Foundation filed a Motion for Summary Judgment joining the arguments of the State of Maine which was opposed by the Plaintiffs on May 19, 2011. The State filed a Reply on May 25, 2011. The State has since filed a supplement to its Memorandum and the Plaintiffs have replied.

DISCUSSION

I. Summary Judgment Standard

Granting summary judgment is proper if there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. M.R. Civ. P. 56(c). "A material fact is one that could potentially affect the outcome of the suit." *Farrington's Owners' Ass'n v. Conway Lake Resorts, Inc.*, 2005 ME 93, ¶ 9, 878 A.2d 504. "A genuine issue exists when sufficient evidence supports a factual contest to

require a factfinder to choose between competing versions of the truth at trial." *Baillargeon v. Estate of Dolores A. Daigle*, 2010 ME 127, ¶ 12, 8 A.3d 709. The court should consider the facts in the light most favorable to the non-moving party and the court is required to consider only the portions of the record referred to and the material facts set forth in the parties' Rule 56(h) statements. *See e.g., Johnson v. McNeil*, 2002 ME 99, ¶ 8, 800 A.2d 702.

II. Town of Kennebunkport's Motion for Summary Judgment on Count I of its Counterclaim.

The Town's Motion for Summary Judgment seeks judgment that the Town is the fee simple owner of the high dry sand and intertidal zone of Goose Rocks Beach. The argument is based on the legal significance of a document executed in 1684 by Thomas Danforth, then governor of the Province of Maine. (Town SMF ¶ 2.) The Town argues that this document conveyed from Massachusetts to the Town all of the common and undivided land within the boundaries of the Town. This land had been acquired by Massachusetts through its purchase of the previously un-granted lands within Maine from Ferdinando Gorges, and included the claimed areas of Goose Rocks Beach. (Town SMF ¶ 2.) The Town argues that after acquiring Goose Rocks Beach through this conveyance, it never subsequently conveyed any part of the beach into private hands. (Town SMF ¶¶ 36-98.)

The interpretation of a deed is a question of law. *Bennett v. Tracy*, 1999 ME 165, ¶ 7, 740 A.2d 571. When construing a deed the courts "are to give effect, if possible, to the intention of the parties, so far as it can be ascertained in accordance with legal canons of interpretation... [and] are to consider all the words of the grant in the light of the circumstances and conditions attending the transaction." *McLellan v. McFadden*, 95 A. 1025, 1028 (Me. 1915). The court must first attempt to construe the language of the deed by looking only within the "four corners" of the document and give the words in a deed

their "general and ordinary" meaning to determine if they create any ambiguity. *Pettee v. Young*, 2001 ME 156, ¶ 8, 783 A.2d 637. An ambiguity exists if the language in the deed is reasonably susceptible to different interpretations. *Labonte v. Thurlow*, 2008 ME 60, ¶ 9, 945 A.2d 1237. "If the language of the deed is unambiguous, then the court must construe the deed without considering extrinsic evidence of the intent of the parties." *Id.* However, the deed may be read in light of the surrounding circumstances in order to better understand the intent of the parties. *Emery v. Webster*, 42 Me. 204, 206 (1856).

Because the court may consider the circumstances attendant to the execution of a deed in order to provide context for the plain language without having to make a finding of ambiguity, the court may consider the historical context as explained by the parties. In short, by 1684, the year in which this document was executed, the land within what is now the State of Maine had been under the control of several different and competing political entities. (Joint SMF ¶ 10; Town OSMF ¶ 10.) The status of private titles in this area was in doubt because of the nullification of the grants of some proprietors and the continual need for each successive political entity to confirm any prior grants of title. (Town SMF ¶ 113; Joint SMF ¶¶ 10, 47-51; Town OSMF ¶ 49.) The Town of Cape Porpoise was incorporated as a political entity in 1653 under the Massachusetts Bay Colony Charter. (Joint SMF ¶ 8.) In 1678, Massachusetts Bay Colony purchased all of the previously ungranted land within the Province of Maine from the successors to the Gorges Patent, originally granted by King James I in 1622 and confirmed by successive monarchs. (Joint SMF ¶¶ 50-51.)

On its face, this document has the appearance of a deed, but it is a deed that only acted to confirm legal title to lands previously conveyed to the Town's earliest settlers. First, the deed sets out the parties and the date on which it was executed. Next, it sets

out the authority under which Danforth could convey property. The Massachusetts Colony, the then "proprietor" of Maine, in May 1681 granted to Danforth the power to "make legal confirmation" to the inhabitants of the Province of Maine "all their Lands or proprieties to them justly appertaining or belonging within the Limitts or Bounds of the said Province." This language gives Danforth authority to confirm the titles that had been previously granted ("all their lands to them justly appertaining"). Following the authority clause, the deed recites the granting clause through which Danforth does "clearly and absolutely give, grant, and confirm" the property described in the deed. The granting clause must be interpreted in the context of the document itself.

The deed also clearly describes the property conveyed. It states:

> All that Tract or parcell of Land within the Township of Cape Porpus in said Province according to the Bounds & Limitts of the s^{d} Township to them formerly granted by S^{ir} Ferdinando Gorges Knight or by any of his Agents or by the General assembly of the Massachusetts with all Priviledges and Appurces to the same appertaining or in any Wise Belonging...

This description first limits the grant to only that land within the boundaries of Cape Porpoise. It then limits the grant to that land that had been previously granted by Sir Ferdinando Gorges, by his agents, or by the General Assembly of Massachusetts to any of the inhabitants of the Town.

Despite the use of the terms "give" and "grant" in the granting clause, the property description in this document clearly limits the "grant" to those lands that had been previously granted. The Law Court, in *Banton v. Crosby*, 50 A. 86 (Me. 1901), held that when a deed, by its own terms suggests a prior grant of title, the granting clause "give, grant, convey and confirm" does nothing more than evidence the grant or act as an identification or confirmation of title. *Id.* at 86-87. The property description in this deed clearly and unambiguously references the prior grants of title made by Gorges, his agents, or the General Assembly of Massachusetts. Furthermore, under the terms of the

grant from Gorges to the Massachusetts Bay Colony, Massachusetts only acquired those lands that had not yet been previously granted into private hands. Using the parties' oft-quoted axiom that you can only convey that which you own, Massachusetts could not have "conveyed" to the Trustees the lands described. At the same time, given the lack of land records and the confused state of title, Massachusetts could not be sure exactly what lands were acquired through its purchase. Hence, there was a need for Massachusetts to acknowledge these previous titles and promise to not interfere with those interests.

Because the court concludes that the 1684 document does not convey any grant of new title, specifically the common and undivided lands within the Town boundaries, to the Town, the court does not need to address remainder of the Town's argument as to why fee simple title remains vested in the Town.

III. Plaintiffs' Motion for Summary Judgment on Count I of Town's Counterclaim

While the Plaintiffs have successfully opposed the Town's motion for a ruling that the fee simple title to the beach is vested in the Town, nevertheless the Plaintiffs' own motion on the same issue must be considered independently to determine if the Plaintiffs are entitled to judgment. The Plaintiffs base their argument on conveyances made in the 1640s and 1650s to the Plaintiffs' predecessors in title by Alexander Rigby, through his agent George Cleeves. They argue that the 1684 deed did not convey new title in undivided lands to the Town but, to the extent that it did, the Beach was not part of the undivided lands. (O'Connor/Leahey/Fleming MSJ 4-6.) If, instead, the 1684 deed only confirmed prior title, the Town would have to prove a grant of the beach existing prior to the 1640s and 1650s, in order to obtain title via the 1684 deed. (Id.)

The Colonial Ordinance of 1641-47 declared that the owner of land adjoining places "about and upon salt water where the sea ebbs and flows" shall also own the

property to the low-water mark. *Snow v. Mt. Desert Island Real Estate Co.*, 24 A. 429, 430 (Me. 1891). After the enactment of the ordinance, conveyance of the upland presumably also conveyed the flats. *Id.* However, the intertidal zone can always be conveyed separately from the upland so there must be a call to the tidal water in order for the presumption to apply. *Storer v. Freeman*, 6 Mass. 435, 439 (1810). The terms "ocean, " "sea," "cove," or "river" (when referring to a river affected by the tides) are treated as calls to the tidal water raising the presumption of the Colonial Ordinance. *Ogunquit Beach Dist. v. Perkins*, 21 A.2d 660 (Me. 1941); *Britton v. Dept. of Conservation*, 2009 ME 60, ¶ 6, 974 A.2d 303. The terms "beach," "shore," and "sea-shore" refer to the intertidal zone bordered on one side by the high-water mark and on the other by the low-water mark. *Storer*, 6 Mass. at 439. The context of the description must be evaluated in order to determine which side of the "shore" was intended to be the boundary. *Dunton v. Parker*, 54 A. 1115, 1118 (Me. 1903). In addition to the terms used in the description, the court must also look for any evidence within the deed suggesting that there was a motive or reason for separation, such as a natural separation, value of the beach apart from the upland, separate occupation, or quasi-cultivation. *Snow*, 24 A. at 430.

The Plaintiffs claim title through Alexander Rigby who obtained title to Goose Rocks Beach through his 1643 purchase of the "Lygonia Patent," a subdivision of Ferdinando Gorges' grant received from the Plymouth Council of New England in 1622. (Joint SMF ¶ 10.) The Plaintiffs offer evidence of deeds from George Cleeves, acting as agent for Alexander Rigby, to original settlers Howell, Jeffrey, Bush, and Moore. (Joint SMF ¶¶ 15-46.) They argue that these deeds exemplify an intention by Rigby to convey the whole of Goose Rocks Beach. (O'Connor/Leahey/Fleming MSJ 17-24.) Based on later deeds that reference other conveyances, the Plaintiffs argue that additional deeds

to John Bush, Roger Willine, and Joseph Bowles can be presumed to have been made by Rigby and to exemplify that same intent. (O'Connor/Leahey/Fleming MSJ 9-10.)

Cleeves made a deed to Richard Moore and to John Bush, both on December 19, 1648 and both describing the same parcel. The Moore deed is recorded at Book I Folio 41, York County Registry of Deeds. (Joint SMF ¶ 40; Ross Aff.¶ 53, Ex. 13.) The Bush deed is recorded at Book I, Folio 36/37, York County Registry of Deeds. (Joint SMF ¶ 40, Ross. Aff. ¶ 52, Ex. 14.) These deeds describe 400 acres of land "to begine at the south west side of the little River betwixt Cape Porpus & Saco...at the point of the grove of pine trees neare unto ye sea & adjoining unto the said River, & from thence to runne upon a straight line to the sea banke southwest...." The Plaintiffs argue that the pine trees are used, not as a boundary, but as a physical monument to fix a direction and bring you to the "sea banke." *See Erskine v. Moulton*, 66 Me. 276 (1877) (when a deed uses a monument on the bank of a stream and then describes the seaward boundary as "thence by the stream" the monument is meant to give the direction of the line from the upland but not meant to restrict the boundary to the upland). The grove of pine trees in this description is not located at the sea bank. The grove marks the marsh side boundary and, therefore, cannot serve as a directional marker as contemplated in *Erskine*. Furthermore, the use of "to the sea banke" means that the sea bank is excluded from the conveyance. *See Snyder v. Haagen*, 679 A.2d 510, 514 (1996). However, nothing within the deed description gives the court context for determining the meaning of "sea bank" other than the fact that the deed also separately uses the word "sea," suggesting that the terms have different meanings.

The deed to Gregory Jeffrey was made by George Cleeves on November 1, 1651 and is recorded at Book I Folio 36, York County Registry of Deeds. (Joint SMF ¶ 40; Ross Aff. ¶ 52, Ex. 11.) That deed describes 200 acres by first describing the marsh-side

boundary and then the sea-side boundary as follows: "beginning at the south west side of the Lott of land granted to Joseph Bush...to run four score poole bredth Southwesterly towards Cape Porpus, & from the sea banke is to run Northwesterly four hundred pooles...." The remainder of the description states: "all the marsh ground in the said four hundred pooles in breadth between the sea and the wood side, to be contained in this grant...." The Plaintiffs argue that the use of the word "sea" in this last phrase suggests that the terms "sea" and "sea banke" are equivalent. This interpretation would trigger the presumption of the Colonial Ordinance to the effect that the deed conveyed the intertidal zone. The parallel structure of the sentence suggests that this phrase could be read "between the sea side and the wood side," thus excluding the flats by establishing the boundary on the natural separation that is the "sea bank."

The court finds that the use of the term "sea bank" in these two deeds creates an ambiguity. In other cases, the term "bank" has been interpreted as "not the sea" and "not the shore" but the "land adjacent to the shore": that is, extending "to the margin of the shore, as in case of a fresh water river the bank extends to the margin of the water." *Proctor v. Me. Central Railroad Co.*, 52 A. 933, 937 (Me. 1902). Although the term "shore" can mean either the water-side or upland-side, the phrase "to the margin of the shore" suggests that the upland-side was the intended boundary. Given this case law, the fact that each deed used both the terms "sea" and "sea bank" suggesting that each carries a different meaning, and the implication of the plain language (that a "sea bank" is an embankment of land by the sea and not the sea itself) the court cannot conclude as a matter of law that the deeds convey the flats.

The only other existing recorded conveyance from this period was made by Cleeves to Morgan Howell on April 17, 1648 and is recorded at Book I, Folio 136/137 in the York County Registry of Deeds. (Joint SMF ¶ 16; Ross Aff. ¶ 14, Ex. 3.) This deed describes 100 acres, 10 of which are marsh, 30 acres are upland, and the remaining 60 acres appear not to be adjacent to these other parts. As this deed, along with the other deeds, was copied and put into typeface, there are words missing from the description making it difficult to determine the actual description. The only reference to the "sea side" appears to be describing the 60 acres which are not located at Goose Rocks Beach ("and soe to take the other sixty Acres vp the Easter River, next to Cape Porpus on the East side along by the River to runne Thyrty poole East by the sea side..."). Regardless, none of the Plaintiffs claim that this grant is within their chain of title. The Plaintiffs only include it to suggest that Rigby had a common plan of conveying all of the land up to the sea. However, the ambiguity in the language of the above noted deeds belies this argument.

The Plaintiffs have not conclusively proven that Goose Rocks Beach was conveyed into private hands before the Town was incorporated or before the 1684 deed was executed. Although the court finds that the Town has not proven that the 1684 deed granted title to the undivided lands to the Town, the Plaintiffs have not proven that the Beach was not part of this common and undivided land. Evidence presented to the court, suggesting that the Town of Cape Porpoise made conveyances of common lands within the boundaries of the Town, implies that title to the common and undivided lands was vested in the Town at some point. (Town OSMF ¶ 56.)[2] Thus, the Plaintiffs have not conclusively proven that they are entitled to judgment as a matter of

[2] The Town also stated at oral argument that the Plaintiffs have not shown Massachusetts to have made any subsequent grants of the common and undivided land after the 1684 deed and that the records show that only the Town made such grants.

law on the question of whether the Town has a claim for fee simple title to Goose Rocks Beach.

IV. Plaintiffs' Motion for Summary Judgment on Counts I and II of their Complaint

The Plaintiffs rest their motion for summary judgment on their declaratory judgment and quiet title actions on the argument that ancient conveyances dated in the 1640s and 1650s acted to convey into private hands all of the land area of Goose Rocks Beach down to the low-water mark and that their current deeds also include the beach. (Pls. MPSJ ¶ 12.) The Plaintiffs also argue that, whatever title the Town may have had in the beach, a grant into the Plaintiffs' chain of title can be presumed based upon possession of the beach for a prolonged period of time. (Id. 7-9.)

To the extent that the Plaintiffs rely on three recorded conveyances from George Cleeves as agent for Alexander Rigby to their predecessors in title of some of the area of Goose Rocks Beach to prove that they currently have title to the high dry sand and the intertidal zone, the court finds that these conveyances are not conclusive. The parties agree that the chain of title for each of the Plaintiffs cannot be completely traced back to the 1640s and 1650s. Therefore, even if these ancient grants did convey the high dry sand and intertidal zone, the Plaintiffs have not proven that the beach was not severed from the upland at some later point.

The Plaintiffs' remaining argument is that, under the doctrine of "presumption of a lost grant," the court should quiet title to the low-water line by virtue of their modern title. This argument is based on the Maine Title Standard Number 201 and on *Crooker v. Pendleton*, 23 Me. 339 (1843). (Pls. MPSJ 3.) Title Standard Number 201 states that a party has good title if a title examiner can trace the chain of title back 40 years for a warranty deed and 60 years for a quitclaim deed. In *Crooker v. Pendleton*, the Law Court was asked to determine which party had title to an island in Penobscot Bay because

both had deeds describing the property. The plaintiff claimed title by virtue of an 1829 grant from Massachusetts and Maine. The defendant claimed title by virtue of deeds from family members who had been in possession of the island since 1776, supposedly under a grant from the colonial government of Massachusetts which had been lost over time. The Law Court held that lost grants can be presumed against individuals and against the State, although a longer period of time may be required to use the doctrine against the State. *Id.* at 341-42. It stated that the purpose of the doctrine is similar to that of a statute of limitations and is designed to provide repose and quiet ancient possessions. *Id.* at 342. This doctrine, therefore, is analogous to the doctrine of adverse possession, except it may be used against the sovereign. *Note: The Doctrine of the Presumption of a Lost Grant as Applied Against the State*, 29 Harv. L. Rev. 88, 89-90 (1915).

In order to rely on the doctrine of presumptive grant, the Plaintiffs must, first, show that their current deeds actually describe the high dry sand and the intertidal zone and, second, show that their chain of title describing that land and the actual possession of the land goes back for a number of years. The *Crooker* case does not stand for the proposition that the court may presume a lost grant from the Town when the current owners do not have record title, even if they have been in possession for a long period of time.[3]

The court notes that some of the Plaintiffs' current deeds either do not unambiguously describe the high dry sand and intertidal zone as part of the property, or convey the property solely by reference to a recorded subdivision plan.[4] For those Plaintiffs whose current deeds do describe the beach, the Plaintiffs have not put before the court the preceding chain of title to prove that those Plaintiffs and their

---

[3] That argument sounds in adverse possession and may not be raised against the Town. *Portland Water Dist. v. Town of Standish*, 2006 ME 104, ¶ 15, 905 A.2d 829.

[4] *See e.g.* Sherman (Scannell Aff. Ex. B); Coughlin (Scannell Aff. Ex. D); Gray (Scannell Aff. Ex. L) Hastings (Scannell Aff. Ex. Q). *See also* TMF Group MSJ 2-7, 7.

predecessors in interest have been in possession under the presumed lost grant for a sufficient number of years.

The court is unaware of any established time frame that the Plaintiffs must use to prove their title. The Plaintiffs suggest that the Maine Title Standard 201 provides a guide. Although the Town is correct to note that the Maine Title Standards are not law, the forty to sixty-year timeframe described by the title standards provides a reasonable guide for the court to begin examination. As noted in *Crooker*, however, the time frame for presuming a lost grant against a sovereign may be longer than against an individual.

Based on the Plaintiffs' motion for summary judgment on their quiet title and declaratory judgment claims, the Plaintiffs have not conclusively proven that they are entitled to judgment as a matter of law.

V. Plaintiffs' Motion for Summary Judgment Against the TMF Group/Harris/Driver/ Lachiatto

This group of motions for summary judgment involves the claims of the Lachiatto, Driver, and Harris defendants and the TMF Group ("Defendants") to certain rights in the beach as asserted in the parties' various counterclaims. If the Plaintiffs are successful in disposing of the remaining counterclaims to title in the beach through this motion for summary judgment, the Lachiattos, Drivers, Harris, and TMF Group will no longer have standing to challenge the Plaintiff's title in the beach.[5]

[5] The TMF Group sought to intervene in this case and was denied status as an intervenor but was granted standing *de bene esse* during discovery in this court's August 17, 2010 order. In this court's August 30, 2010 order, the court required the Plaintiffs make additional service by publication on all those unascertained persons, including persons owning non-beachfront property in the so-called Goose Rocks Zone. The TMF Group argues that this order eliminated the need for them to file individual motions to intervene. (TMF Reply to Mot. Strike 2-3.) The TMF Group filed an Answer and (Second) Counterclaim within the 41 days required by the publication notice, to which the Plaintiffs responded by filing a Motion to Strike. The court held argument on the Motion to Strike and declined to rule, instructing the Plaintiffs to file a Motion for Summary Judgment on the Counterclaims. Because the court did not strike the Answer and Counterclaims and ordered the Plaintiffs to file a Motion for Summary Judgment on the Counterclaims, the court intended to entertain the arguments made by the TMF Group.

A. Prescriptive Easement

The Lachiatto/Driver/Harris Defendants and the TMF Group all claim an interest in the beach through prescriptive easement. The Plaintiffs argue that no prescriptive easement can be obtained because the defendants' use is not distinct from that of the general public; because one cannot obtain a prescriptive easement when the use has not been exclusive of the public; and because the individual defendants are unable to prove each element of a prescriptive easement claim against every one of the Plaintiffs. (Pls. TMF MSJ 12-24.)

1. Standing

As a threshold requirement to bringing any claim, a party must demonstrate that it has standing to bring the claim. In Maine, standing is prudential rather than constitutional, meaning that the courts may limit access to those who are best suited to bring a particular claim. *Lindermann v. Comm'n on Governmental Ethics & Election Practices*, 2008 ME 187, ¶ 8, 961 A.2d 538. For a party to prove that they are best suited to bring a claim, it must, at a minimum, at the commencement of litigation demonstrate a sufficient personal stake in the controversy. *Mortgage Electronic Registration Systems, Inc. v. Saunders*, 2010 ME 79, ¶ 7, 2 A.3d 289. This requirement has also been articulated as requiring a particularized injury, that being an effect on a party's property, pecuniary, or personal rights. *Nergarrd v. Town of Westport Island*, 2009 ME 56, ¶ 18, 973 A.2d 735. "A person suffers a particularized injury only when that person suffers injury or harm that is 'in fact distinct from the harm experienced by the public at large.'" *Id.* (quoting *Ricci v. Superintendent, Bureau of Banking*, 485 A.2d 645, 647 (Me. 1984)).

The Plaintiffs argue that the Defendants do not have standing because their injury is the same as that of the general public and the Town is the better-suited party to

bring that claim. The TMF Group argues that it is both factually and legally[6] distinct from the public in a way that establishes their standing. The TMF Group asserts that as property owners in the area of Kennebunkport known as the "Goose Rocks Zone" or "Goose Rocks Area," they are distinguishable from the general public because of

> their location to the beach, their treatment of the beach as if it were their own, their ability to access the beach without permits (parking), their ability to rent their homes based on their proximity to the beach, their inflated tax assessed values based on their location...and their ability to access the beach through various public and private rights of way....

(TMF Group Mem. 11.) The Defendants have submitted sufficient evidence to support the claim that there is a distinct area called "Goose Rocks Beach." (*See* TMF Group SMF ¶¶ 22, 38, 40.)

The Defendants have demonstrated a particularized injury both individually and as a class of people known as Goose Rocks Beach residents. If the claimants are not permitted to bring this claim, they will be deprived of their individual and/or collective interest in the beach, which is distinct from the public's interest in the beach. Their injury would be a loss of a property right, whereas the consequence to the public would be a loss of use of the beach. Therefore, they have standing to assert these rights.

2. Use Along with the General Public

The Plaintiffs claim that Maine law prohibits "a private prescriptive easement [from arising] where the use has been exercised with the public." (Pls. TMF MSJ 16-17 (citing Hermansen & Richards, *Roads and Easements* § 4.5.2 (2003).) However, the case law does not clearly support this conclusion. Rather, the cases simply state that when a public prescriptive easement is established, no private easement in the same property

---

[6] The TMF Group asserts that they are legally distinct from the public because of the different elements required to prove a private and a public easement. (TMF Group Mem. 12.) That difference being that there is no presumption of adversity when there has been continuous use with knowledge and acquiescence when claiming a public prescriptive easement. *Lyons v. Baptist School of Christian Training*, 2002 ME 137, ¶¶ 18-19, 804 A.2d 364.

for the same purpose can be established. *See Hill v. Lord*, 48 Me. 83 (1861) (claimant was claiming a prescriptive easement as a member of the public, not in his individual capacity); *Wadsworth Realty Co. v. Sundberg*, 338 A.2d 470, 474 (Ct. 1973); *Garmond v. Kinney*, 579 P.2d 178, 179 (N.M. 1956).

The holdings of these cases are essentially a re-articulation of the standing requirement: the Defendants have to prove that they used the beach in a way that is distinct from the public in order to obtain a private prescriptive easement. The Defendants are not precluded from establishing a private prescriptive easement simply because the general public also used the location in question.

3. Elements of the Claim

To obtain a prescriptive easement, a claimant must prove (1) continuous use, (2) for at least 20 years (3) under a claim of right adverse to the owner, (4) with the owner's knowledge and acquiescence, or (5) a use so open, notorious, visible, and uninterrupted that knowledge and acquiescence will be presumed. *Eaton v. Town of Wells*, 2000 ME 176, ¶ 32, 760 A.2d 232. This is a mixed question of law and fact. *Striefel v. Charles-Keyt-Leaman P'shp*, 1999 ME 111, ¶ 7, 733 A.2d 984 (citations omitted).

> In the abstract what acts of dominion will result in creating title by adverse possession is a question of law. In this field the powers of the court are primary and plenary. Whether those acts were really done, and the circumstances under which they were done, raise questions of fact. In this field the powers of the jury, in the first instance, are primary and plenary.

Webber v. Barker Lumber Co., 116 A. 586, 587 (Me. 1922).

"Continuous use means occurring without interruption" and only requires the kind and degree of possession that an average owner would make of the property. *Stickney v. City of Saco*, 2001 ME 69, ¶ 18, 770 A.2d 592.

The term "under claim of right" means that the claimant is in possession as an owner intending to claim the land as their own and without recognition or

subordination to the true owner. *Androkites v. White*, 2010 ME 133, ¶ 16, 10 A.3d 677. There is a presumption that use is under a claim of right when the claimant has proven continuous possession for 20 years with the owner's knowledge and acquiescence. *Id.* at 17. This presumption does not arise when there is an explanation of the use that contradicts the rationale of the presumption. *Id.*

"Acquiescence...means passive assent such as consent by silence and does not encompass acquiescence in the active sense such as when a use is acquiesced in by means of the positive grant of a license or permission." *Jacobs v. Boomer*, 267 A.2d 376, 378 (Me. 1970). "[T]he 'open, notorious, [and] visible' element of establishing a prescriptive easement is required 'to give notice to the owner of the servient estate that the user is asserting an easement.'" *Flaherty v. Muther*, 2011 ME 32, ¶ 83, 17 A.3d 640 (citing *Great N. Paper Co. v. Eldredge*, 686 A.2d 1075, 1077 (Me. 1996).

a. Individualized Claims

The Plaintiffs argue that the Defendants' responses to interrogatories and assertions in their counterclaims are insufficient to prove the elements of prescriptive easement for the 205 individually claimed prescriptive easements against each of the Plaintiffs. First, the Plaintiffs assert that proving an easement between each Defendant and each Plaintiff is a monumental task and that the claimants' answers to interrogatories, alleging generalized use of the entire length of the beach, are clearly insufficient to meeting this burden. (Pls. TMF MSJ 20.) Second, the Plaintiffs specifically claim that the Defendants have not used any specific portion of the beach in a manner hostile and in such a way as to put the Plaintiffs on notice that there were 205 individual claims being made. (Pls. TMF MSJ 20.) And, third, the Plaintiffs argue that the Defendants' responses to interrogatories are too broad to satisfy the requisite proof of a prescriptive easement. (Pls. TMF MSJ 20-21; Pls. TMF SMF ¶ 1.)

The use that the TMF Group members allege to have made of the beach is not sufficient to establish an individual prescriptive easement against all or any of the individual Plaintiffs. The generalized allegations of use that do not target each Plaintiff's lot are insufficient to have put any one Plaintiff on notice of an individual claim against their property such that the owner can be deemed to have had knowledge and acquiesced to that use. *See Bell v. Inhabitants of the Town of Wells*, 1987 Me. Super. LEXIS 256 * 63-64 (Sept. 14, 1987) (the back-lot owners made similarly general claim and the court noted that even where some had claimed to use the same general area each time, it was not fair to allow a person to establish a prescriptive easement on a particular lot when they never have used that lot or at least not on a consistent basis).

b. Class Claim

The TMF Group claimants also claim a prescriptive easement as a class of persons. The statute of limitations makes clear that a class of persons can obtain a prescriptive easement. 14 M.R.S. § 812 (2010). The only Maine case to consider whether a class of person acquired a prescriptive easement is *Flaherty v. Muther*, 2011 ME 32, 17 A.3d 640. In that case, the court considered whether use by three households was sufficient to establish a prescriptive easement for a class of nineteen lot owners. Quoting the Restatement (Third) of Property: Servitudes, section 4.1, the court states, "The relevant inquiry is what a landowner in the position of the owner of the servient estate should reasonably have expected to lose by failing to interrupt the adverse use...." *Id.* at ¶ 83. The court found that the actual use of the claimed area was "quite limited" and was insufficient to provide notice to the owner that the entire neighborhood was asserting an easement because only a few people were using her property. *Id.* at ¶ 84.

As distinguished from *Flaherty*, this case requires the court to determine if the beachfront owners should have been on notice of a class easement as opposed to a public prescriptive easement. The evidence that the TMF Group has put forth suggests that these residents of the Goose Rocks Beach Area can be distinguished from the general public in that many used access-ways within the neighborhood to reach the beach rather than coming from the public access; that the Plaintiffs acknowledged the Goose Rocks Area as a specific area; and the presumably more intense use of the beach by residents of the Goose Rocks Beach Area as compared to the general public. (TMF Group SMF ¶¶ 37-38.)

Acting as a class does not absolve the TMF Group from having to prove a claim against each individual Plaintiff. Where the individual claims seem deficient on the "continuous use" element, the class claim, at least potentially, could satisfy this element. The TMF Group can rely on the whole class's use of each lot to establish "continuous use." Also, the TMF Group has put forth evidence that their use of the beach was not interrupted or objected to by the Plaintiffs. (TMF Group SMF ¶¶ 21, 23, 25-27, 39.) A fact finder could find that the Plaintiffs had notice of this class of people using the beach and that they acquiesced to that use. The fact finder could also find that the Plaintiffs should reasonably have expected to at least be subjecting their ownership to an easement in favor of the back lot owners.

iii. Lachiatto/Driver

The Lachiattos and Drivers are not part of the TMF Group. They have asserted claims to individual prescriptive easements. The Lachiatto/Driver claimants state that they have proven the elements for obtaining a prescriptive easement because they have (1) used the whole of Goose Rocks Beach (L/D Supp. SMF ¶¶ 3a, 3b, 5; Driver Aff. ¶¶ 4,7; Lachiatto Aff. ¶¶ 4, 6) for activities such as walking, jogging, sunbathing, and

swimming (Id.), (2) for 40 years (L/D Supp. SMF ¶ 4), (3) that the Plaintiffs have admitted in their Complaint that this was under a claim of right (Pls. Compl. ¶¶ 29, 51), (4 or 5) and that by the very nature of the beach, their use was open and notorious (L/D Mem. 7).[7] This claim fails for the same reasons as stated above regarding the individual claims of the TMF Group. However, to the extent that the Lachiatto and Driver defendants are part of the class defined as those owning property in the Goose Rocks Zone, they may continue to pursue the claim of prescriptive easement as members of a class of people.

B. Estoppel

An easement by estoppel arises when (1) acts, words, or silence amounting to fraud induces one party, (2) the reliance on the misleading action or statement was reasonable and foreseeable, and (3) the inducement provides a benefit to the misled party that is unfair to deny. *Martin v. Me. C.R. Co.*, 21 A. 740, 742 (Me. 1890). This may arise when a lot owner takes title by reference to a recorded plan that shows subdivision amenities. *See Arnold v. Boulay*, 147 Me. 116, 121 (1951).

Herbert and Judith Cohen, who purchased their home from the Almeders, have asserted that when they rented the same house from the Almeders nothing was said about limited use of the beach. And later when they purchased the home, nothing was said about limited use of the beach. (TMF Group SMF ¶ 23.) This allegation demonstrates silence that potentially induced the Cohen's into renting and subsequently purchasing a house from the Almeders. If they can prove that the Almeders knew that the Cohens used the beach while they were renters, then sold without indicating that there are no beach rights, estoppel may be appropriate. The

[7] The Statements of Material Facts on which the Lachiatto and Driver defendants rely were not timely and do not appear to have been served on the Plaintiffs. There is a pending motion for extension of time to file statements of material fact. The court grants that motion and the supplemental statements of material fact are considered by the court.

Plaintiffs deny the statements. (Pls. TMF Reply OSMF ¶ 23.) This is an issue of material fact. However, the Cohens are the only members of the TMF Group that have alleged such conduct.

An easement by estoppel can also arise when lots are conveyed by reference to a subdivision plan that depicts some areas within the subdivision as common areas or amenities for the use of those owning land within the subdivision. *Arnold v. Boulay*, 83 A.2d 574, 577 (Me. 1951). The Law Court has stated

> From this doctrine it, of course, follows that such distinct and independent private rights in other lands of the grantor than those granted may be acquired, by implied covenant, as appurtenant to the premises granted, although they are not of such a nature as to give rise to public rights by dedication. The object of the principle is, not to create public rights, but to secure to persons purchasing lots under such circumstances those benefits, the promise of which, it is reasonable to infer, has induced them to buy portions of a tract laid out on the plan indicated.

Id.

Several of the TMF Group defendants have asserted that they acquired title by reference to a recorded subdivision plan. There is a factual dispute about the subdivision plan drafting conventions in the early 1900s. (*See* Buisman Aff. ¶ 9; Town SMF ¶¶ 55-57, 61.) Although interpretation of a subdivision plan, like the interpretation of a deed, is a question of law, the drafting conventions are questions of fact that must be resolved before the court can interpret the plans.

C. Other Claims

The counterclaims for fee simple ownership, adverse possession, custom, nuisance, and quasi-easement all fail as a matter of law because the defendants who assert them fail to establish at least one element of each claim. In fact, the Lachiatto and Driver defendants do not even appear to pursue their claim to fee-simple ownership and the Harris defendants do not appear to pursue their nuisance claim. No evidence has been put before the court to support either claim. Adverse possession requires that

the claimant be in possession of the disputed property to the exclusion of the true owner. *Striefel v. Chaarles-Kent-Leaman P'ship*, 1999 ME 11, ¶ 17, 773 A.2d 984. This element is clearly not present in this case. Custom is not a recognized cause of action for a private easement in Maine. *Piper v. Voorhees*, 155 A. 556 (Me. 1931). Lastly, quasi-easement requires the claimant to provide evidence that the claimant's land was in common ownership with the servient land and that before land was divided the owner used the "servient" estate in the manner equating an easement. *Connolly v. Me. Cent. R.R. Co.*, 2009 ME 43, ¶ 8, 969 A.2d 919. The defendants have not properly controverted the Plaintiffs' statements of material facts asserting that none of the properties were in common ownership or asserting that there is no proof of conduct by former owners suggesting an easement.

VI. The Lachiatto/Driver Cross-Motion for Summary Judgment on their Counterclaim for Prescriptive Easement

As noted above, the Plaintiffs brought a motion for summary judgment in their favor on this claim and the Lachiatto and Driver defendants have cross-claimed on the same issue. For the reasons stated above, the Lachiatto and Driver defendants have failed to prove their claim for individual prescriptive easements against the Plaintiffs, however, they may continue to present their case for a class prescriptive easement.

VII. The State of Maine and Surfrider Foundation's Motion for Summary Judgment

The State of Maine answered the Plaintiffs' Complaint and asserts as a defense that the public, as a whole and as individual members, has public trust rights over the intertidal zone for general recreational purposes, thus barring the Plaintiffs' claims. The Plaintiffs' Complaint recognizes that the title that it seeks to quiet in this action is subject to the public rights to fishing, fowling, and navigating as limited by Colonial Ordinance of 1647. The State's original motion seeks to preserve for future review the argument that *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989), was wrongly decided. In

its supplemental motion, the State asks the court to hold that the public trust doctrine includes "the rights to stroll, swim and surf in the intertidal zone, and when doing so to engage in incidental activities such as sitting and standing." (State Supp. Mot. 14.)

The Plaintiffs have not disputed that their ownership of the beach is subject to the rights of the public under the public trust doctrine as limited by the Colonial Ordinance of 1641-1647. The State is asking the court to expand the scope of the public's use rights as described in *Bell* and most recently in *McGarvey, Jr., et al. v. Whittredge*, 2011 ME 97. This issue cannot be resolved on summary judgment.

The entries are:

The Plaintiffs' Motion to Strike the TMF Group Reply to Plaintiffs' Motion for Summary Judgment is DENIED. The members of the TMF Group are defendants in this case.

The Lachiatto/Driver Motion for Enlargement of Time to file its response to the Plaintiffs' Statements of Material Fact is GRANTED.

The Town of Kennebunkport's Motion for Summary Judgment on Count I of its Counterclaim and Counts I and II of the Complaint is DENIED.

The Plaintiffs' Motion for Summary Judgment on Count I of the Town of Kennebunkport's Counterclaim is DENIED.

The Plaintiffs' Motion for Partial Summary Judgment on Counts I and II of its Complaint is DENIED.

The Plaintiffs' Motion for Partial Summary Judgment Against Lachiatto, Driver, Harris and TMF Group is GRANTED as for all counterclaims raised by these parties except that of a prescriptive easement by a class and easement by estoppel which remain.

The Lachiatto/Driver Cross-motion for Summary Judgment on their claims is DENIED.

The State of Maine and Surfrider Foundation Motions for Summary Judgment are DENIED.

DATE: 12/22/11

G. Arthur Brennan
Justice, Superior Court, Active Retired

ALFSC-RE-09-111

ROBERT F. ALMEDER, ET AL

Plaintiffs

v.

TOWN OF KENNEBUNKPORT and
ALL PERSONS WHO ARE
UNASCERTAINED,

Defendants

PLAINTIFFS' (ALMEDER, ET AL) ATTORNEY:
SIDNEY S.F. THAXTER, ESQ.
CURTIS THAXTER, LLC
ONE CANAL PLAZA SUITE 1000
PORTLAND ME 04112

DEFENDANT TOWN OF KENNEBUNKPORT'S ATTORNEY:
AMY TCHAO, ESQ
DRUMMOND WOODSUM & MACMAHON
84 MARGINAL WAY, SUITE 600
PORTLAND, ME 04101

DEFENDANTS' TMF GROUP'S ATTORNEY:
ANDRE G. DUCHETTE, ESQ
TAYLOR MCCORMACK & FRAME, LLC
30 MILK STREET, 5TH FLOOR
PORTLAND, ME 04101

INTERVENOR STATE OF MAINE'S ATTORNEY:
PAUL STERN, AAG
OFFICE OF THE ATTORNEY GENERAL
6 STATE HOUSE STATION
AUGUSTA, ME 04333

DEFENDANT SURFRIDER FOUNDATION'S ATTORNEY:
NEAL WEINSTEIN, ESQ.
LAW OFFICE OF NEAL WEINSTEIN
32 SACO AVENUE
OLD ORCHARD BEACH, ME 04064