STATE OF MAINE **YORK, ss.**	**SUPERIOR COURT** **CIVIL ACTION** **DOCKET NO. RE-09-111**
ROBERT F. ALMEDER et al., **Plaintiffs,** **v.** **TOWN OF KENNEBUNKPORT and ALL PERSONS WHO ARE UNASCERTAINED,** **Defendants.**	**PLAINTIFFS' POST-TRIAL BRIEF AS TO THE DEFENDANT TOWN OF KENNEBUNKPORT'S COUNTERCLAIMS OF PRESCRIPTION AND CUSTOM**

INTRODUCTION

For over 100 years, from the original development of Goose Rocks Beach, through the fire of 1947, and until 2005, Goose Rocks Beach was a relatively quiet, undisturbed beach community that had developed a way for everyone to enjoy the beach while at the same time honoring the private property rights of beachfront property owners. The Town of Kennebunkport's (the "Town") own Comprehensive Plans stated that most of Goose Rocks Beach was private and specifically acknowledged the need to balance the opposing interests of promoting beaches for tourism and protecting the rights of beach owners. In 2005, the Town decided to ignore the property rights of the owners to further its own interest of promoting tourism for commercial benefit. Soon thereafter, the community was confronted with the problems that caused this lawsuit. Unfortunately for the Town, its surreptitious attempt to establish a prescriptive easement claim over the beachfront property owners' properties was exposed in 2008. However, once exposed, and even though typically they have not been troubled by sharing their beach property for recreational activities with responsible and polite individuals,

Plaintiffs had no choice but to act to protect their rights or risk being deemed to have lost important the right to exclude others from their property.

Problematic for the Town is the fact that Goose Rocks Beach is two-plus miles of beach and is not just one monolithic lot from end to end owned by one entity or person. It consists of 110 lots owned by many families or entities. The bold attempt by the Town to lay claim to the entire beach, without presenting specific evidence as to each individual property, ignores both the facts and the burden the Town has to prove.

The Town takes the position that it has always treated the entirety of Goose Rocks Beach as a public beach. If that is true, why did the Town's Comprehensive Plans state the opposite? Why had the Town acknowledged that it would not enforce its dog leash laws against private beach owners on their own beach? Why did the Town police historically respond to beach complaints and ask the public users to move to the "public" section of the beach? Why didn't the Town ever confront Barbara Rencurrel or other beachfront owners over their private property signs on the beach? Most importantly, if everyone treated the beach as a public beach, why would beachfront owners object to the 2008 letter from the Town that merely asserted what the Town now claims had always been true: that the beach was not private? The Town's recent arguments in response to Plaintiffs' complaint cannot contradict these facts. The clear evidence is that before 2005, the privately held portions of Goose Rock Beach were always treated as a private beach.

The Town has done a disservice to all its citizens by inserting itself for the benefit of the tourist industry into what prior to 2005 had been a peaceful, quiet, and private community. Although the court need not address the Plaintiffs' testimony of how they will act in the future, past performance is the best predictor of the future. In the past—that is before the Town's

intervention beginning in 2005—the beach community was at peace. The generosity of beachfront owners had allowed everyone to find their own quiet place to use and enjoy the beach without interfering with the beachfront owner's use. Maine law has specifically acknowledged such generosity and understandably protects it though a presumption of permission so that owners do not lose their property rights by being neighborly. Plaintiffs ask this Court to follow the law, apply the presumption and protect Plaintiffs' private property rights and their generosity.

STATEMENT OF FACTS

The facts presented in this case over the duration of the three week trial are far too numerous to recite here. Plaintiffs have submitted under separate cover detailed proposed findings of fact. Here, references to specific facts, as necessary, will be to the exhibit numbers that support them and/or to witness testimony summaries that Plaintiffs have provided this Court. However, a brief overview of the facts pertaining to the Town's claims for a recreational easement to the beach by prescription or by custom is in order as the facts show the Town has not met its burden of proof.

For years, members of the Goose Rocks Beach community tried hard to keep its existence unknown to the throngs of tourists that descend on other beaches in Maine. However, starting in the late 1990's through the 2000's, Goose Rocks Beach saw increasing numbers of renters at beachfront and non-beachfront properties. N. Merrill (8-27-12); B. Mazeika (8-30-12); C. Rodden (8-31-12); L. Rice (8-22-12 and 8-23-12); T. O'Connor (8-23-12); L. Vandervoorn (8-24-12); M. Sotir (8-24-12); J. Fleming (8-27-12); J. Bruni (8-22-12). Around 2005, the public use of the beach intensified when the Town began to allow vehicles to park up and down Dyke Road in numbers that had not been seen even a decade before. E.g. M. Sotir (8-24-12); N. Merrill (8-27-12); B. Zagoren (8-23-12); P. Gray (8-22-12); S. Flavin (8-28-12) (testifying that when he

was a lifeguard in 50s and 60s, no parking on Dyke Road); B. Mazeika (8-30-12); E. Case (8-31-12); C. Rodden (8-31-12). At the same time, a backlot owner, John "Mic" Harris refused to leave Barbara Rencurrel's property when asked to do so, claiming that he had a "right" to be there. Pl. Ex. 87A; J. Bruni (8-22-12). This confrontation sparked a discussion amongst the Town Selectman, Town Manager, and Town attorney about how to deal with issues facing Goose Rocks Beach. Pl. Ex. 87A; J. Bruni (8-22-12).

Instead of seeking to preserve a balance between [1] the interests of the private property owners on the beach and [2] the Town's interests in promoting tourism on its beaches—a consideration important enough to merit specific attention within the Town's own Comprehensive Plan (Pl. Ex. 2)—the Town took a bold and unprecedented step: it decided to begin to lay the groundwork for what they hoped would be an eventual prescriptive easement so as to take without compensation private property owners' rights to their beach properties. E.g., TMF Ex. 92 (2005 Ltr. Tchao to Nathan Poore); see Pl. Ex. 163 (new 2005 police policy regarding beach complaints).

The Town did not notify the beachfront owners of its 2005 change in attitude and policy. Instead, the policy change and the Town's position can fairly be characterized as surreptitious. On the one hand, the Town officials publicly stated that the public had no recreational rights on the private beach and required owner permission before any fire permits were issued on the "private" beach. Pl. Ex. 8; Pl. Ex. 162. On the other hand, the Town slowly and surely encouraged more and more public use of the beach by allowing parking up and down Dyke Road, by installing seasonal bathroom facilities on King's Highway, and by having the Town's attorney secretly re-write the Town's police policy so that police would stop enforcing beach trespass laws and acknowledging that the beach was private property. TMF Ex. 92; J. Bruni (8-

22-12); Pl. Ex. 163. Town officials in fact tried to stop using the term "public beach" to describe the area of beach owned by the Kennebunkport Conservation Trust. L. Mead (9-5-12) ("I try not to use that term [public beach] anymore.").

In the fall of 2008, Janice Fleming received a phone call from Town Manager, Larry Mead. J. Fleming (9-5-12). He told Janice that the Town had a problem with a sign that she placed at the end of a private right of way from King's Highway to the Beach. Id. The sign indicated the beach and right of way was private. Pl. Ex. 49. In response to Mrs. Fleming's demand that Mr. Mead state the Town's position in writing, he sent Mrs. Fleming a letter stating that the Town did not recognize any claim of private ownership of the beach. Pl. Ex. 49. This letter made the rounds amongst beachfront owners and put many beachfront owners on notice for the first time that their private property rights were in jeopardy.

SUMMARY OF THE ARGUMENT

"I don't have a problem with people using my beach. I have a problem with people claiming that they have a right to use my property."
-Barbara Rencurrel

The Town has failed to meet its burden to prove that the public has a recreational easement over Plaintiffs' beachfront properties through prescription or custom. The Town has failed to overcome the presumption of permissive use that arises in cases of public recreational prescriptive claims and has failed to meet its burden to prove acquiescence on the part of each individual plaintiff. However, this Court need not even reach the issue of the presumption or acquiescence because within the last 20 years, the Town has repeatedly recognized the Plaintiffs' ownership and rights to their respective portion of the beach and the fact that the public did not have any recreational rights to the privately held portions of the beach.

The following examples of undisputed facts demonstrate that the Town has not—as it must—proved that for the period of twenty consecutive years, it "disregarded the owner's claims entirely" and that it was not "in recognition of or subordination to the record title owner." First, for the past few decades, the Town's own Comprehensive Plans have specifically distinguished between the "public" and "private" portions of the Beach and recognized that the majority of the beach is private and that the public does not have a right to recreate on the private beach. Second, during negotiations over a contract zoning measure in 2007 for the Tides Inn, the Town Manager acknowledged that the public does not have a legal right to be on the beach in front of beachfront owner's homes. Pl. Ex. 8. Third, the Town's own fire permit policy explicitly recognizes two portions of Goose Rocks Beach: the "private" section and the "public" section. Pl. Ex. 162; B. Forrest (9-6-12). In the "private" portion of Goose Rocks Beach, no permit will be issued unless the applicant can show express, written permission from the beachfront owner. Id. Fourth, the Town police department has historically responded to beachfront owner's complaints and has asked users to move to the public beach. Pl. Exs. 159, 161, 163; J. Bruni (8-22-12).These facts alone prevent the Town from prevailing in its prescriptive easement claim, notwithstanding the fact that the Town also has failed to rebut the presumption that any recreational use of Plaintiffs' beach properties were with the owner's implied permission.

With respect to the Town's evidence of the extent of the public's use of the beach, the Town did not even attempt to meet its burden of proving use as to each and every individual Plaintiff's property. Goose Rocks Beach is over two miles long: far longer than the beaches at issue in either Bell or Eaton. Generalized assertions of use of the entire beach without testimony as to dates and frequency of use are clearly insufficient evidence to deprive individual private property owners of their right to exclude others from their beach property. This Court

specifically addressed this issue in its December 22, 2011 Order on motions for summary judgment and stated that the TMF class must prove evidence against "each individual Plaintiff." The same burden exists for the Town.

The Town has failed to meet this burden. The Town failed to present evidence that each individual Plaintiff has "acquiesced" to adverse use by the public. To the contrary, numerous police reports and testimony by Plaintiffs prove that Plaintiffs have repeatedly granted individuals permission to use their beach property, have asked users to refrain from certain activities or move, and in many cases have called the police for assistance in this regard. Therefore, the Town has not met its burden to prove acquiescence and its prescriptive claim must fail.

Finally, the Law Court has never formally recognized the doctrine of custom in Maine and even if it had, the Town has failed to produce evidence of each and every element of custom. The Town has not proved that the recreational use of Goose Rocks Beach has occurred for "so long as the memory of man runneth not to the contrary" nor has it proved that such recreational use has been free of controversy. In fact, the Town's own police summaries and testimony by Plaintiffs and other witnesses prove that the recreational use of the beach was, at times, quite controversial.

Since the Town has failed to prove all the necessary elements of prescriptive easement or custom, Plaintiffs respectfully request this Court enter judgment for Plaintiffs and Parties-in-Interest.

ARGUMENT

I. The Town Has Not Proved Each and Every Element of a Prescriptive Easement.

The Town has failed to prove each and every element of a public recreational prescriptive easement. The elements are: "(1) continuous use; (2) by people who are not separable from the public generally; (3) for at least twenty years; (4) under a claim of right adverse to the owner; (5) with the owner's knowledge and acquiescence; or (6) a use so open, notorious, visible, and uninterrupted that knowledge and acquiescence will be presumed." Lyons v. Baptist School of Christian Training, 2002 ME 137, ¶ 15, 804 A.2d 364, 369 (citing Eaton v. Town of Wells, 2000 ME 176, ¶ 33, 760 A.2d 232, 244).

A. The Town has failed to prove that its use of the beach was sufficiently adverse to put Plaintiffs on notice that their property rights were in jeopardy.

1. An extremely high standard of proof is required in public recreational easement cases.

Generally, a party claiming a prescriptive easement must prove that its use was adverse to the true owner of property by "demonstrat[ing] intention by the adverse user to claim title or a right to use property." Id. ¶ 17 (quoting Jordon v. Shea, 2002 ME 36, ¶ 30, 791 A.2d 116, 124). A use is generally deemed adverse "when a party . . . has received no permission from the owner of the soil, and uses the way as the owner would use it, disregarding his claims entirely, using it as though he owned the property himself . . . ." Id. (quoting S.D. Warren Co. v. Vernon, 1997 ME 161, ¶ 11, 697 A.2d 1280, 1283) (emphasis added). The claimant "may not be in recognition of or subordination to the record title owner." Androkites v. White, 2010 ME 133, ¶ 16, 10 A.3d 677, 682 (emphasis added). This standard is equally applicable to claims of prescription and adverse possession and is not influenced by the claimant's subjective intent or state of mind. See id. ¶ 16 n.7 ("The adversity issue is treated the same in adverse possession

cases and prescriptive easement cases. Accordingly, the prescriptive user's state of mind is no longer relevant in prescriptive easement cases.") (internal citations omitted). Therefore, as a basic first step, the Town must prove that it is has disregarded Plaintiffs' claims entirely and has not recognized Plaintiffs' claims to their property.

Notwithstanding the general rule, when a party claims a prescriptive easement for public recreational use, that party must satisfy a heightened standard of proof by overcoming a presumption that such use occurred with the permission of the owner. Maine case law historically recognized that recreational use of open, unenclosed land is presumed to be permitted by property owners. See Lyons, 2002 ME 137, ¶¶ 18–24. In Lyons, the Law Court stated that the rebuttable presumption of permissive recreation arose from the "public recreational uses of the land, not the nature of the land alone." Id. ¶¶ 20, 24. The presumption "that public recreational uses are presumed to be permissive is predicated on the notion that such [recreational] use by the general public is consistent with, and in no way diminishes, the rights of the owner of the land." Id. ¶ 19 (citing Town of Manchester v. Augusta Country Club, 477 A.2d 1124, 1130 (Me. 1984)) (internal quotation omitted) (emphasis added).

This rule in Lyons was arguably a departure from past Maine precedent, which had generally recognized the presumption in cases where the recreational use took place on land that was characterized as "wild and uncultivated" or "open and unenclosed." Id. ¶ 21 n.2–4. The Dissent took issue with the Court's new focus on the use of the land, rather than the character of the land. Under the heading "The Court's New Presumption," Justice Calkins stated that:

> The Court today creates a new presumption to negate the presumption of adversity in prescriptive easement cases, holding that public recreational use of private land is presumed to be permissive. Because this new presumption is based on the use of the land instead of the character of the land, it departs significantly from our established case law.

Id. ¶ 42 (Calkins, J., dissenting) (emphasis added). However, the Majority opinion explained that if the presumption rested on the nature of the land rather than the use of the land, "the law would invite the perverse result that a public easement claim could fail when land was undeveloped but become viable as land was developed." Id. ¶ 21. The Majority noted that in many of its past precedents, the land at issue could hardly be characterized as "wild" or open and unenclosed. See id. (citing Town of Kennebunkport v. Forrester, 391 A.2d 831 (Me. 1978) (where land at issue abutted Ocean Avenue in Kennebunkport)). Therefore, Lyons made clear that since recreational use is generally not sufficiently "adverse" claimants, such as the Town, must overcome the presumption that the recreational use of Plaintiffs' property was permissive.

To prove that the use was "under a claim of right" and "hostile" enough to overcome a presumption, a claimant, such as the Town, must prove that the use was: "(1) without the express or implied permission of the owners; (2) with the intent to displace or limit the owner's rights to the land; and (3) undertaken in a manner that provided the owners with adequate notice . . . that the owner's property rights are in jeopardy." Id. ¶ 26 (internal citations and quotations omitted) (emphasis added).[1]

In Lyons, the Law Court addressed the "claim of right" element and concluded that over twenty years of recreation use property owned by the Baptist School for "hunting, fishing, snowmobiling, and other recreational activities" was not sufficiently adverse to prove each element and overcome the presumption. Id. ¶¶ 7,16.[2] The witness testimony in Lyons bears a striking resemblance to the testimony presented in this case. In Lyons, the claimants "neither

[1] In Weeks v. Krysa, the Law Court applied this standard to claims to waterfront property. In vacating the trial court's compulsion, it held that, "an abutter's children playing on land, or persons crossing a lot to access the shorefront, other lots, or a local store, are not acts that demonstrate an intent to displace or limit the true owners of the land . . . ." 2008 ME 120, ¶¶ 16, 955 A.2d 234, 238–39 (citing Lyons, 2002 ME 137, ¶¶ 26–30).

[2] Although the court noted that acquiescence was not disputed, proof of acquiescence alone was insufficient to overcome the presumption that the use was without the owner's implied permission. Id. ¶ 27.

requested permission nor believed they needed to receive permission." Id. ¶ 8. Most thought that they had a right to use the property for recreation. Id. ¶ 9. The witnesses acknowledged a tradition that "people have implicit permission to traverse and use other persons' open fields and woodlands without seeking express permission" and stated that they were never told to leave nor asked permission of the Baptist School to use its property. Id. ¶ 10. The property owners testified that "we always let people go. We want to be good neighbors." Id. at ¶ 11. On a few instances when people's use of the Baptist School property interfered with the owner's use through loud noise and use of alcohol, they were "requested to and did leave the property." Id.

In applying the presumption of permission to the public recreational use prescriptive claims in Lyons, the Law Court vacated the trial court's decision granting a prescriptive easement and held that the claimants failed to present evidence of "open and demonstrated hostile intent to limit the Baptist School's right in the land." Id. ¶ 27. The Law Court reasoned that

> none of the witnesses testified to any overt act of hostility that could have placed the Baptist School on notice that the plaintiffs' use was extending beyond the accepted land use traditions and was seeking to establish a public easement or otherwise limit the Baptist School's capacity to control access to and through its property

Id. (emphasis supplied).[3]

[3] Although the trial court in Flaherty v. Muther, stated in a dicta footnote that the presumption of permission does not apply to intertidal land because it is not "wild" and "uncultivated," such a decision is clearly erroneous given the Law Court's decision in Lyons—which focuses on the use of the land rather than the character of the land—and further ignores the fact that even if the presumption applied only to open and unenclosed land, intertidal beach property clearly meets that definition. Me. Super.Ct. No. RE-08-098, at *24 n.16 (July 30, 2009). Further, Justice Crowley's decision ignores the fact that the presumption was specifically applied to lakefront beach property by the Law Court in Town of Manchester v. Augusta Country Club, 477 A.2d 1124 (Me. 1984) and to an oceanfront beach in Bell v. Town of Wells, 1987 Me. Super. LEXIS 256, *43. In fact, it is impossible for a property owner to enclose their intertidal beach property with signage and fences as one could do on most property because the action of the tide and waves would remove such structures every 6 hours. See Houghton v. Johnson, 71 Mass. App. Ct. 825, 838 (2008) ("[T]idal action makes any attempt to fence off or enclose [owner's] beachfront futile . . . [Owner's] beachfront is open and unenclosed.").

The Law Court specifically distinguished this "public easement" case from the facts in Eaton v. Town of Wells, 2000 ME 176, 760 A.2d 232, where the evidence of use was sufficient to overcome the presumption of permission. The court noted that the "century-long history of Town maintaining, patrolling and enforcing laws on the contested beach" in Wells, a 2,200 parcel which was owned by a single property owner, combined with evidence of many large Town gatherings on the beach unrelated to the landowners, put the owners on notice that "their rights were in jeopardy." Lyons, 2002 ME 137, ¶ 28 (citing Eaton v. Town of Wells).

In Eaton, the Town placed lifeguard stands and garbage cans on the beachfront owner's property for over 40 years. 2000 ME 176, ¶¶ 36-38. Additionally, the Town hired police officers for the specific purpose of patrolling the beach, had hired somebody to clean and maintain the beach for close to 60 years, took an active role in protecting endangered species on the Eaton's beach, and enforced leash laws on Eaton's beach property. Id. ¶¶ 35–8. Perhaps most importantly, no evidence was ever presented that the Town of Wells ever acknowledged any of Eaton's private property rights through any official Town documentation or action other than the fact that it used eminent domain to take a small portion of the property to install a pipe and store dredging sand ten years before the lawsuit. Id. ¶ 40.[4]

Thus, Lyons and Eaton stand for the proposition that in order to overcome the presumption of permission, public recreational claimants on beaches must prove longstanding, adverse control over Plaintiffs' properties as well as placement of physical structures, proof of

[4] In Eaton, the Law Court distinguished the "adversity" element in prescriptive easement cases from the "adversity" element in an adverse possession claim. 2000 ME 176, ¶ 40. However, subsequent Law Court decisions and statutory amendments have eliminated any distinction in "adversity" between a prescriptive easement and adverse possession case. See Jordon v. Shea, 2002 ME 36, ¶ 31, 791 A.2d 116 ("The adversity issue is treated the same in adverse possession cases and prescriptive easement cases."); Weeks v. Krysa, 2008 ME 120, ¶¶ 15–16, 955 A.2d 234, 239–239 (using language from prescriptive easement cases and applying those rules to the "adversity" element of an adverse possession claim); Androkites v. White, 2010 ME 133, ¶ 16, n.7, 10 A.3d 677, 682 (quoting Jordon v. Shea and explaining how statutory changes to 14 M.R.S. § 810-A had the effect of harmonizing the "adversity" elements in adverse possession and prescription cases).

longstanding maintenance of Plaintiffs' property, and other open, notorious acts demonstrating a "claim of right." This is an extremely difficult standard to prove and has been applied in numerous prescriptive claims since Eaton. Decisions in Lyons, Weeks, Androkites, and most recently in Weinstein v. Hurlbert all rested on whether the use of the property was sufficiently adverse to put the true owner on notice that their property rights were in jeopardy. In each of these cases, the trial court held that they were. However, despite the high degree of deference provided to trial court determinations, each and every one of those decisions was overturned by the Law Court. Lyons, 2002 ME 137; Weeks, 2008 ME 120; Androkites, 2010 ME 133; Weinstein v. Hurlbert, 2012 ME 84. The message that the Law Court is sending to claimants is clear: you may not demonstrate any recognition of the owner's rights to their property and your use of the owners' property must demonstrate such adverse hostility that no owner should be expected to endure them without knowing that in doing so, they are forfeiting their property rights forever.

2. The Town has failed to prove "adverse" use of Plaintiffs' properties under either the general standard of prescriptive easements or under the heightened standards applicable to claims for a recreational prescriptive easement.

The Town has clearly demonstrated "recognition of or subordination to the record title owner," Androkites, 2010 ME 133, ¶ 16, and therefore its prescriptive claim must fail. The Town's own policies, comprehensive plans, and public statements by Town officials specifically recognized that the Plaintiffs own their respective beach and that the public does not have the right to use the "private" beaches for recreation. This evidence is clear proof that the Town specifically recognized Plaintiffs' claims to their beach properties and as a result, the Town's recreational public easement claims must fail.

In Eaton, the Town had always treated the beach as public and did not recognize that the public did not have a right to be there. Conversely, in this case, the Town's 1996 and 2009 Comprehensive Plan states that "although the privately-owned areas of the beach are not open to recreational use other than walking, the public beach receives heavy use." Pl. Exs. 2 at 92, 3 at 68. The Town police recognized private property rights by historically responding to beach complaints on the "private" beach and "used tact" to encourage the user to move to the "public beach." J. Bruni (8-22-12). Rather than proving the Town's intent to "displace or limit the owner's rights to the land," which the Town must prove—element two— to overcome the presumption, the police's historic response to beach complaints proves that the Town helped enforce the owners' right to displace or limit *the public*.

Further, in an affirmation that the Town viewed Plaintiffs' properties as private, it attempted to secure a large section (16 lots) of the beach for the purpose of preserving public use during the 1970's and 1980's. Pl. Exs. 15, 16 (documents evidencing the efforts to acquire what is referred to as the "public beach"). Such recognition of the beach property as "private property" that is not open to the public continued well into the 2000s. Having failed to get the Tides Inn beach property dedicated during the seventies, the Town tried to acquire the property through a contract zone. E.g., M. Henricksen (8-27-12); Pl. Exs. 8–9. During public hearings on the contract zone, attended to and watched by many Plaintiffs, backlot owners, and members of the public, Town Manager Larry Mead stated:

> There are many places along Kings Highway where you can legally get access to the beach. And once you walk out onto the beach, you can't legally sit there, you have to keep moving, and sometimes I'm sure people have, many people out there in the audience and watching on television, may have been on the beach and been asked by someone from the property to move along, because its their property.

Pl. Ex 8. Under the Law Court's standard in Lyons and Androkites, these acts, individually, defeat the Town's claims because they expressly recognize that Plaintiffs own their property and that Plaintiffs have the right to exclude others and have exercised that right. Taken collectively, the Town's repeated recognition of Plaintiffs' private properties over the last 100 years creates an insurmountable hurdle for the Town on its prescriptive easement claim.

In an attempt to draw a similarity to Eaton, the Town presented evidence that it regulates the use of Goose Rocks Beach, specifically noting the Town's dog leash laws. L. Mead (9-5-12). However, during the late 1970s, the Town officially recognized that since Plaintiffs owned property to the low water mark, that it would not enforce the Town's leash laws on a dog owners' private beach property. Pl. Ex. 64 (letter to Eugene Gray concerning Town's position on leash law enforcement). Again, this fact alone defeats the Town's claims. Aside from this obvious example, Town regulation of private property pursuant to its police powers does not give rise to prescriptive rights in favor of the public.

In an effort to draw attention away from its express recognition of Plaintiffs' property rights, the Town presented evidence purporting to show public use and control of the Beach including old photographs taken before the 1950's and evidence of lifeguard patrols on the beach. The evidence presented at trial clearly establishes that the lifeguard station was placed on the portion of the beach now owned by the Town and Kennebunkport Conservation Trust and referred to as the "public beach." Pl. Ex. 19 (photo of stand). Further, the Town's evidence points to the existence of only sporadic, rather than consistent, lifeguard presence on the public portion of the beach. To the extent the Town presented evidence of life bouy stands down the beach, the only photos of their existence corroborate Stu Flavin's testimony that they were located at the ends of rights of way leading to the beach and not in front of Plaintiffs' properties.

S. Flavin (8-28-12); Town Ex. 177 (photo located half way through exhibit depicting the life ring at the end of a right of way). Both lifeguards testified that they only walked up and down the beach at the beginning and end of the day to "check the life rings," not to actually patrol the beach. W. Joel (9-4-12); S. Flavin (8-28-12). Indeed, during the busiest time of day at the beach, Mr. Joel taught "seven swimming lessons a day" and "swam the entire length of the beach twice a day," proving that Mr. Joel was not "patrolling" the entire beach. W. Joel (9-4-12). Evidence of lifeguard duty at Goose Rocks Beach is not remotely similar to the facts in Eaton, where the Town of Wells proved that it regularly maintained multiple lifeguard stands on the owners' single property for over 40 continuous years.

In an effort to document longstanding historic public use of Goose Rocks Beach, the Town introduced many photos that help prove Plaintiffs case that there was relatively little public use of Goose Rocks Beach for much of the 20th Century. During its direct examination of Richard Johnson, the Town introduced Town exhibit 177, which included a photo on page 5 depicting roughly thirty people on a hundred linear yards of Goose Rocks Beach property just east of Mr. Johnson's property. R. Johnson (9-4-12); Town Ex. 177. Mr. Johnson testified that the photo was taken from his house and depicted "public use" on a normal day at the beach. Id.

It was not until cross examination that Mr. Johnson testified that the photo depicted people in front of Ivory Emmons' camping and parking area and that Mr. Emmons charged those members of the public ten cents to park there to access the beach. Id. On his own, Mr. Johnson referred to the Emmons' operation as a "private enterprise." Id. Looking past the beach property in front of Mr. Emmons' "private enterprise," the photo depicts an empty beach. Id. Barbara Barwise supported Mr. Johnsons' testimony about Mr. Emmons' parking and camping area and

provided a map depicting the old Emmons area covering what are now roughly five beachfront properties. B. Barwise (9-4-12); Town Ex. 133(a).

The Town also presented a photograph as Town's Exhibit 264, which William Joel testified depicted a typical day of use of the beach. The photograph depicts a section of the beach spanning from the Fleming's right of way, past the Dyke Road extension and the Norwood Lane right of way but Mr. Joel had trouble identifying any houses in that area. W. Joel (9-6-12). The photo depicts between 25 and 40 people on the beach. Mr. Joel could not identify, on a given day, how many of those were beachfront owners. Id. Indeed, the photo depicts a maximum of forty people in an area comprised of roughly thirty beachfront lots and lacks testimony regarding the time of year, time of day, or time of week Mr. Joel believes is "typical" as represented by this photograph. The Town's presentation of photos such as the Town's Exhibit 264 is an effort to throw as much evidence at this Court as possible without providing requisite proof as to what the evidence actually is. Such vague evidence in support of attenuated arguments is not sufficient to for the Town to prove such adverse hostility that no owner should be expected to endure them without knowing that in doing so, they are forfeiting their property rights forever.

B. The Town failed to prove that Plaintiffs' acquiesced to the public's adverse use for the twenty year prescriptive period.

1. A break in "silence" by denials, remonstrances, or permission once in twenty years, interrupts the Town's claims.

The prescriptive claimant must prove that the landowner acquiesced to the adverse use of the property. Glidden v. Belden, 684 A.2d 1306, 1317 (Me. 1996) ("Proof of the owner's acquiescence is an essential element in the establishment of a prescriptive easement."). Acquiescence is "consent by silence." Dartnell v. Bickwell, 98 A. 743, 745 (Me. 1916). Although a claimant must show acquiescence, a "prescriptive easement may also be interrupted

by proof of nonacquiescence." Dowley v. Morency, 1999 ME 137, ¶ 23, 737 A.2d 1061, 1069 (citing Town of Manchester v. Augusta Country Club, 477 A.2d 1124, 1130 (Me. 1984)).

Unlike the standard for adverse possession, which requires proof of an "interruption" of the claimants' use, in a prescriptive easement claim, a landowner simply has to "break the silence by denials and remonstrances" once in a twenty year period to interrupt the prescriptive period. Dartnell, 98 A. at 745. "Absence of acquiescence on the part of the owner may be evidenced by verbal protest alone." Mumme v. Clark, 1998 Me. Super. LEXIS, *9 (quoting Falvo v. Pejepscot Indus. Park Inc., 1997 ME 66, ¶ 13, 691 A.2d 1240, 1244)(emphasis added). Acquiescence may also be disproved through permission. The claimant has the burden of proving that use was made without a "license or permission given [by the landowner] with the intention that the licensee's use may continue only as long as the owner continues to consent to it." Stickney v. City of Saco, 2001 ME 69, ¶ 23, 770 A.2d 592, 602.

In Dartnell, the defendant claimed that he had a prescriptive easement over the plaintiff's land by way of use for over twenty years when the evidence suggested that he physically built a road across plaintiff's property. Dartnell, 98 A. at 745. However, within the twenty year period, the Plaintiff protested by sending a letter to the defendant, demanding that the defendant cease construction of the road on his private property. Id. Although the letter failed to stop the defendant's conduct, the Law Court held that the letter of protest, by itself, was "sufficient evidence of the plaintiff's non-acquiescence" to defeat the prescriptive claim. Id. at 745–6; see also Dowley, 1999 ME 137, ¶ 23; Mumme v. Clark, 1998 Me. Super. LEXIS *9.

In Lyons, a case that primarily dealt with the "adversity" element, the court also recognized that although the Baptist School had not opposed most public recreational use of the property, there were a "few incidents where individuals, who were misbehaving on the property,

were asked to leave and did so." Lyons, 2002 ME 137, ¶ 30. The Law Court declined to consider this testimony to be evidence of adversity and instead considered it "consistent with the withdrawal of a conditional privilege." Id. Such language is clearly indicative of a "license or permission given [by the landowner] with the intention that the licensee's use may continue only as long as the owner continues to consent to it." Stickney v. City of Saco, 2001 ME 69, ¶ 23, 770 A.2d 592, 602. Therefore, any evidence of a "break in silence" in twenty years, including an objection to a particular use or express permission to a claimant, defeats a prescriptive easement.

2. The Town has failed to prove that Plaintiffs' acquiesced to the recreational use of their beach properties and has failed to rebut specific evidence of non-acquiescence presented by many of the Plaintiffs.

Even assuming, *arguendo*, that the Town had presented evidence of "adversity," Plaintiffs presented evidence of a "break in silence" that proves non-acquiescence during the prescriptive period. Each and every Plaintiff testified that they have asked a beach user to refrain from certain uses of their property. Some Plaintiffs have posted their properties with "private property" or "no trespassing" signs. B. Rencurrel (8-21-12); R. Scribner (8-21-12). Others have told beach users to fill in holes or pick up after themselves. E.g., L. Rice (8-22-12, 8-23-12); L. Vandervoorn (8-24-12); J. Eaton (8-24-12); J. Fleming (8-27-12). On occasions, Plaintiffs asked users to take down volleyball nets, stop drinking and partying, or to simply leave the property. E.g., D. Lencki (8-28-12); W. Forrest (8-27-12); M. Sotir (8-24-12); L. Vandervoorn (8-24-12); J. Eaton (8-24-12); P. Hogan (8-29-12)(admitting that a beachfront owner asked him to get off their property); Pl. Ex. 152(Mrs. Merrill's complaint when she was told to get off property).

On more than a few occasions, Plaintiffs have called the police to remove the individuals. E.g., B. Rencurrel (8-21-12)(to remove "Mic" Harris); D. Lencki (8-28-12)(testifying she only called police on the rare occasions that people would not comply with her requests). Letters to

and from Town officials and Police reports submitted in this case provide undisputed documented proof of Plaintiffs' non-acquiescence in the rare event that they have had difficulty controlling the use of their property. See Pl. Exs. 35, 45, 66, 68, 75, 87, 87A–90, 95A, 99, 102, 104–110, 112, 115, 148–150, 153, 155, 156, 157, 158, 160–161. The Town also admitted to Plaintiffs' non-acquiescence when Larry Mead stated that many people "have been asked by someone from the property to move along, because it's their property." Pl. Ex. 8 (remarks at Tides Inn contract zone meeting).

Plaintiffs have also evidenced non-acquiescence by providing backlot owners with verbal or written permission to use their beach property. Leaving aside implicit permission, numerous Plaintiffs have presented evidence that they granted various parties explicit permission to use their property. E.g., C. Rodden (8-31-12); J. Eaton (8-24-12); P. Gray (8-22-12); J. Fleming (8-27-12); Pl. Exs. 50 (Fleming letter to neighbors, 6-15-08), 27–31 (permission from Almeders to Town, Audubon, and others).

Maine law recognizes that one act demonstrating non-acquiescence during the twenty year prescriptive period defeats a claim for a prescriptive easement. During the three weeks of trial, Plaintiffs presented overwhelming and uncontested evidence of specific acts of non-acquiescence and therefore, the Town's prescriptive claim must fail as a matter of law.

II. The Town Failed to Provide Evidence Against Each Individual Beachfront Property.

The Town has not presented evidence of public recreational use on each individual beachfront property. Unlike the facts in Eaton, Goose Rocks Beach is composed of over one hundred private lots spread out over a distance of over two miles. In Eaton, one property owner owned the entire 2,200 foot long beach in question. Eaton v. Town of Wells, 2000 ME 176, 760 A.2d 232. Thus, any evidence of use in Eaton, such as a lifeguard stand or trash can on that

property, regardless of the location of use—be it on one end or the other end of the single property—put the property owner on notice of the public's adverse claims.

This Court clearly recognized that "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." Decision on Motions for Summary Judgment, Case No. RE-09-111, *20 (Dec. 22, 2011). In addressing the TMF Class claims, this Court further recognized that "acting as a class does not absolve the TMF Group from having to prove a claim against each individual Plaintiff." Id. *21. This burden makes perfect sense. Such a standard acknowledges that "the right to exclude [others is] `one of the most essential sticks in the bundle of rights that are commonly characterized as property'" and that one property owner cannot lose the rights to their property through evidence of public use of another's property. Nollan v. California Coastal Comm'n, 483 US 825, 831 (1987) (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U. S. 419, 433 (1982)). For example, any use by the public of Bob Scribner's property cannot be used to impute "notice" on Bob Almeder, over a mile and a half away, where the Town has failed to present any clear evidence of the public's use of Bob Almeder's property at all.

In this case, the Town has failed to show consistent public use of each and every one of Plaintiffs' beach properties. The Town failed to even contest testimony by backlot owners that the west end of the beach was "the quiet end." M. Junker (9-5-12); W. Junker (8-28-12). Instead, the Town presented photos of individuals on the beach without any testimony as to whether the people in the photo were beachfront owners, backlot owners, or members of the general public. Additionally, the Town relied on testimony of backlot and beachfront owners that members of the public used the beach. E.g., S. Flavin (8-28-12); M. Junker (9-5-12); B. Joel (9-6-12). These

witnesses admitted that they simply assumed that if they did not recognize the individuals, they assumed they were members of the general public. Id.

It goes without saying that members of the public have used a portion of Goose Rocks Beach. The Town's burden in this case was to prove public use on each property that satisfied all the elements of a prescriptive easement. The Town chose not to do so and instead made broad assertions about the use of the entire beach without identifying time, frequency, or location of that use in such a way as to prove that each Plaintiff was objectively on notice of the public's adverse claims. Since the Town has failed to even present evidence of use as to each and every property, it has not met the standards established by this Court or by the constitutional protections of Due Process and therefore its claim for easement by prescription fails.

III. The Town Has Failed to Prove that the Public Has Acquired a Right to Use the Beach Through Custom.

The doctrine of custom is not a simple substitute for a claim for prescriptive easement and the Town has failed to present sufficient evidence of custom to acquire a recreational easement over Plaintiffs' properties. In Maine, the Law Court has never adopted the doctrine of custom. Piper v. Voorhees, 130 Me. 305, 311, 155 A. 556, 559 (1931) ("In Maine, there never has been affirmation of the recognition of a right of way by custom"); Bell v. Town of Wells, 1987 Me. Super. LEXIS 256, *36 ("our Law Court has never formally approved the doctrine [of custom]"). Custom is an ancient doctrine that was meant to allow for evidence of a lost governmental act of public nature or grant by the land owner through evidence of "immemorial usage in favor of the inhabitants" for the use claimed. Voorhees, 130 Me. 305, 311. Such "immemorial usage" was presented as the "best evidence" available to prove a lost grant or governmental act, the physical documentation of which had long since "perished." Id. In that sense, the doctrine of custom arose from the same concerns that have led to the doctrine of

easement by implication or the "lost grant" presumption espoused in Crooker v. Pendleton, 23 Me. 339 (1843).

Justice Brodrick noted that custom may have been incorporated into Maine common law through the Colonial Ordinance, which was present in the Laws and Liberties of 1648, a document that recognized the English common and that at the time, contained the doctrine of custom. Bell, 1987 Me. Super. LEXIS 256, *37. In addressing the doctrine, Justice Broderick determined that the Town of Wells failed to prove each of seven elements of custom as outlined in the Oregon case of State ex. Rel. Thorton v. Hay:

1. The custom must have been in effect "so long as the memory of man runneth not to the contrary";
2. The Right must have been exercised without interruption;
3. The use must be peaceable and free from dispute;
4. The use must be reasonable;
5. The land impressed with the custom must have boundaries;
6. The custom must be obligatory; and
7. The custom must not be repugnant to other customs or law.

Id. (citing State ex. Rel. Thorton v. Hay, 254 Ore. 584, 462 P.2d 671 (Ore. 1969)). Justice Broderick concluded that the Town had failed to meet its burden with respects to elements one and three.

In addressing element one, Justice Broderick noted that the Town had failed to produce evidence of widespread recreational use, besides walking, over the length of the entire beach for as long as any eyewitness could remember and noted that the evidence of use in the 1800's did not prove widespread recreational use across the whole beach. Id. **38–40. Broderick noted that the eyewitnesses stated that there were "hundreds" of people on the beach during the 1950's and 1960's but that "hundreds of people on a beach one mile long and 500 to 600' wide at low tide is very few people. They could be accounted for almost entirely by the occupants of the then existing ocean front cottages . . . ." Id. *40.

Justice Broderick also noted that the use was not free of dispute. Neither side agreed as to whether the beach had always been thought of as "private" or "public." Id. The only disinterested witness testified that it was "private." Id. Further, the fact that the Town only placed lifeguards in the area of the "public beach" section near Moody Beach was evidence that "the Town of Wells itself was not totally convinced that Moody Beach was a public beach." Id. *41. Finally, Justice Broderick noted that since many beachfront owners had objected to the public's increased use of the beach, the Town clearly failed to prove element three, which requires use that is "free of dispute." Id.

In this case, the Town has failed to prove recreational use of Goose Rocks Beach for "so long as the memory of man runneth not to the contrary." Id. *37. Indeed the only evidence of use during the colonial period running all the way up to the "hotel" period, was testimony of circumstantial evidence of use of some portion of the beach as a road, and the existence of commercial activities such as hauling seaweed. E. Churchill (9-4-12). Mr. Churchill presented no evidence whatsoever of recreational use of Goose Rocks Beach before the "hotel" period and his testimony is therefore irrelevant to the Town's claims. E. Churchill (9-4-12). The Town failed to provide evidence of recreational use during the 1700s and 1800s that would evidence a lost grant or governmental act of public nature.

Additionally, just as in Bell, the Town cannot prove that recreational use of Plaintiffs' properties was "free of dispute." The police reports and the overwhelming evidence of disputes presented during the testimony in this case prove that the use was, in fact, disputed. Finally, the recreational use claimed for the beach, runs directly afoul to the Law Court's long standing recognition that the public only has an easement to fish, fowl, and navigate on intertidal lands in

Maine. Maine common law's adoption of the Colonial Ordinance and its repeated affirmation by the Law Court proves that the Town cannot prove the last element of custom.

Since the Town has not proved "immemorial usage" that suggests a lost grant or "governmental act of public nature" and has specifically failed to prove elements 1, 3, and 7 of an easement by custom, even if custom is viable in Maine as a means for at Town to acquire private property rights without compensation, it cannot prevail on these claims.

CONCLUSION

After more than three years of litigation, the Town has failed to provide evidence of adversity or acquiescence on the part of the beachfront owners for 20 continuous years; has failed to provide evidence of public recreational use on each individual beach property; and has failed to satisfy all elements under the doctrine of custom. In fact, Larry Meads' testimony demonstrates the Town knew that the public had no rights to Plaintiffs' properties. That property owners have provided implicit permission for others to respectfully use their beach is entirely consistent with the presumption applicable to recreational uses on private property; the law encourages this attitude, as it should, and is not intended to punish private property owners who permit respectful public recreational use on their land.

Justice Broderick acknowledged the law's recognition of such generosity in the concluding paragraph on prescription in Bell:

> [The beachfront owners] have taken the position that the public has permission to share their beach so long as the public does not abuse the privilege. This generosity of spirit should be encouraged and will be protected by Maine's presumption of permission on privately owned beaches until it becomes factually clear that the public is making an adverse claim.

Bell, 1987 Me. Super. LEXIS 256, *43 (emphasis added).

The Town's letter to Janice Fleming in the fall of 2008 made clear its adverse claim. However, this claim was 19 years short of the twenty year period of adversity that the Town had the burden of proving in this case. Therefore, Plaintiffs respectfully respect this Court hold that the Town has not proved by a preponderance of the evidence its prescription and custom claim and enter judgment in favor of Plaintiffs on the Town's Counterclaim IV (Easement by Prescription) and Counterclaim VI (Easement by Custom).

Dated: September 21, 2012

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