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September 19, 2012

Dianne Hill, Clerk
York County Courthouse
45 Kennebunk Road
P.O. Box 160
Alfred, ME 04002-0160

RE: *Almeder, et al. v. Town of Kennebunkport, et al.*
Docket No. RE-09-111

Dear Ms. Hill:

Enclosed for filing in the above matter please find TMF Defendants' Proposed Findings of Fact and Conclusions of Law.

A copy of the same was served upon the parties noted below.

Sincerely,

André G. Duchette

AGD:rl
enclosure

cc: (with enclosure)
Justice G. Arthur Brennan
Sidney St. F. Thaxter, Esq. (electronically)
Amy K. Tchao, Esq. (electronically)
Neal L.Weinstein, Esq. (electronically)
Paul Stern, Esq. (electronically)
Christopher E. Pazar, Esq. (electronically)
Nicholas S. Strater, Esq. (electronically)
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Thomas Ramsey
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Mary Jane and Jason Mulvihill
Michael and Donna Kelly
William Lee Joel, II
Robert and Lois Baylis
Allison W. Phinney
Barbara Russell
Peter Wasserman Trust of 1993
Jennifer B. Wasserman Trust of 1993
Anthony J. Aversa, M.D.
Carolyn Sherman
Joanne Gustin
Luanne Paley

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	)	TMF DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

NOW COME TMF Defendants, by and through their undersigned counsel, and respectfully submit the following Proposed Findings of Fact and Conclusions of Law.

Based upon the evidence presented at trial, these are the Findings of Facts and Conclusions of Law.

FINDINGS OF FACT

1. There exists a Goose Rocks Beach Zone, defined generally as bordered by Route 9, the Batson River, the Little River, and the Atlantic Ocean.

2. All Parties acknowledged the existence of the Goose Rocks Beach Zone, and the Town of Kennebunkport regulated matters differently in that Zone.

3. The TMF Defendants' deeds make reference to property being located in "Goose Rocks" or at "Goose Rocks Beach." See TMF Defendants' Exhibits 1-175, 364, 367.

4. TMF Defendants are representatives of a class of persons with property in the Goose Rocks Beach Zone.

5. TMF Defendants participated in numerous recreational activities on the wet and dry sand of Goose Rocks Beach, including but not limited to running, walking, swimming, sunbathing, bocce, whiffleball, volleyball, softball, golf, bike riding, reading, socializing, fires, cookouts, waterskiing, stargazing, cross-country skiing, capture the flag, fort building, sand castles, zim-zam, lacrosse, Frisbee, bird watching, tidal pool play, horseshoes, picnicking, horseback riding, and dog walking.

6. The place of each of these activities depended upon the season, the weather, the tides, and the participants.

7. All backlot owners have used Goose Rocks Beach for recreational activities.

8. This use has been at all times of the year, although the use is more prevalent in the summer months.

9. This use has been on the wet sand, and on the high dry sand.

10. TMF Defendants engaged in these activities alone, and with or near other backlot owners, beachfront owners, and members of the general public.

11. TMF Defendants have engaged in these activities on what is popularly known as the West End of Goose Rocks Beach, in the Middle Section of Goose Rocks Beach and on the East End of Goose Rocks Beach, and all points in between.

12. There were generally other people engaging in similar activities in all areas of Goose Rocks Beach while TMF Defendants recreated, and this use was uninterrupted.

13. TMF Defendants generally accessed the beach via private and public rights of ways that spread across the entire length of Goose Rocks Beach.

14. Much of the use of the beach was uncontested in many areas. Indeed, Plaintiffs failed to put on evidence to rebut use across a wide portion of the beach, including those areas where Plaintiffs live, but did not testify.[1]

15. Peter Gray testified that he does not object to recreational activities on his property and never objected to recreational use of the beach in front of his property. Linda Rice never objected to any use on the beach in front of her house. John Gallant never asked anyone to leave the beach in front of his house, even if he objected to the behavior. Michael Sandifer testified that back lot owners did not need his permission to use the beach in front of his house. Janice Fleming testified that back lot owners used the beach in front of her property without permission. Edwina Hastings testified that at no time did any back lot owner request permission to use the beach in front of her house. Donna Lenki testified that since her ownership, back lot owners and beachfront owners have used the beach for recreational activities without any express permission.

16. Use of the beach by TMF Defendants has been without the permission of any beachfront owner. Carl Schmaltz testified that asking for permission to use the beach is like "asking for permission to breathe."

17. The only time TMF Defendants have discussed beach use with Plaintiffs was when their use was outside of the norm of the everyday recreational activities

[1] There was no testimony from Plaintiffs Robert F. Almeder, Virginia S. Almeder, Willard Parker Dwelley, Jr., W. Parker Dwelley, III, John H. Dwelley, Kristen B. Raines, J. Liener Temerlin, Karla Sue Temerlin, Susan Flynn, Mark E. Celi, William E. Brennan, Jr., Shawn McCarthy, Steven Wilson, John Parker, Jeanette Parker, Anne Clough, Paul J. Hayes, Sharon K. Hayes, David L. Eaton, Jennifer Scully-Eaton, and Heather Vicenzi.

(e.g., storing a boat up against the seawall, or having a large family gathering). In those instances, TMF Defendants discussed such use with the beachfront owner as a courtesy.

18. While the beach spanned over 2 miles, there were few instances over a 100 year period where people interfered with the use of the beach by beachfront owners, and in the majority of these instances, the interfering conduct ceased when addressed.

19. Outside of Barbara Rencurrel, who is not a party to this suit and is no longer an owner, there are no Plaintiffs that have expressed any objection to use by a TMF Defendant to use the beach in front of their property for recreational use.

20. Despite her objections, Barbara Rencurrel did not object every time a TMF Defendant was recreating on the beach in front of her home. In addition, Barbara Rencurrel testified that prior to her ownership, she and her family rented backlot property at Goose Rocks Beach and would use the beach in front of other beachfront owner's homes without requesting permission and without objection.

21. Any objection has been related to use outside of recreational activities on Goose Rocks Beach; for example, Meredith Asplundh testified that she objected when kids were climbing on the sea wall because that was dangerous. Edwina Hastings objected to the use of acrobatic stunt kites with large strings that could potentially hurt someone.

22. Tellingly, four beachfront owners (Walt Wiewel, Joanne Gustin, Edmund Case, and William Joel) found the very idea of people in the Goose Rocks Beach Zone needing permission to use the beach "offensive".

23. Some beachfront owners rent their property; some beachfront owners also own backlot property, and rent that as well.

24. In no instance did Plaintiffs instruct renters, whether they were renting the beachfront or the backlot, on where the renters were permitted to go on the beach, nor did they instruct their rental agent (where applicable) to do the same.

25. In no instance did Plaintiffs instruct renters, whether they were renting the beachfront or the backlot, on what the renters were restricted from doing on the beach, nor did they instruct their rental agent (where applicable) to do the same.

26. Maria Junker, who served as rental agent for several beachfront owners and several Plaintiffs, testified that no instructions were ever given to renters as to where they could go or what they could do on Goose Rocks Beach.

27. Maria Junker also testified that if she was visiting a beachfront owner that she knew, she would certainly wait for an invitation or seek permission if she was visiting them in their home, but would not do so if she was meeting them on the beach.

28. In each instance where a TMF Defendant rented property prior to ownership, they testified that they were never instructed where they could go on the beach or what they could do on the beach. Many TMF Defendants rented multiple properties over their rental tenure. Indeed, Paul Hogan rented twelve separate places at all areas of the Goose Rocks Zone.

29. The General Store on Dyke Road, which was owned by a Plaintiff's family, published a brochure for years on appropriate beach conduct, including taking

care to remove trash. This brochure provided no guidance on prohibited areas of the beach or prohibited activities on the beach.

30. All Goose Rocks Beach owners would not have purchased their backlot homes if use of the beach was restricted in any way.

31. TMF Defendants (and Plaintiffs who rent backlots) would not be able to rent their homes in the manner that they do if use of the beach was limited in any way.

32. Plaintiffs who owned backlots would not have purchased the backlots if use of the beach was restricted.

33. Many TMF Defendants utilized deeded rights of way to access the beach; however, no TMF Defendant restricted their use of the beach to the bounds of the right of way.

34. None of the rights of way provided any guidance as to where the person using the right of way could go once on the beach or what they could do once on the beach. See e.g. TMF Defendants' Exhibits 180, 183, 189, 258.

35. TMF Defendants have recreated on Goose Rocks Beach for over a century, with many families having five or six generations of use at Goose Rocks Beach.

36. Joan Junker testified that her family purchased a cottage at Goose Rocks Beach in the early 1920s. This home was lost in the 1947 fire that destroyed several properties at Goose Rocks Beach.

37. Joan Junker started coming to Goose Rocks Beach in 1931, and lived at Goose Rocks year round beginning in 1976.

38. Joan Junker recreated "up and down the beach" with her group of friends, which included Barbara Rencurrel and Bob and Annette Scribner.

39. In her 81 years of use, Joan Junker never received any permission to use the beach, never received any objection as to her recreational use of the beach, and was never asked to move. This did not change whether she was with a beachfront owner or not.

40. Many families are at Goose Rocks Beach for their entire summer, while others come for several weeks at a time.

41. No TMF Defendant was ever told they could not utilize the beach, or needed to restrict their activities to the so-called "public" section of the beach as was told to certain members of the public using the beach.

42. TMF Defendants were often on the beach with Plaintiffs, and never saw a Plaintiff remove another person from the beach or ask them to move to the so-called "public" section of the beach.

43. While some of the Plaintiffs and TMF Defendants were friends, this was not true of all Plaintiffs and TMF Defendants.

44. Some Plaintiffs testified to putting up "private property" or "no trespassing" signs on the beach.

45. TMF Defendants (e.g. Judge Howard Whitehead) testified that they ignored these signs.

46. Plaintiffs testified that these signs were often gone "missing" after being up for only a short period of time.

47. TMF Defendants averred that the focal point of their families' recreational activities while at their home in the Goose Rocks Beach Zone was the beach itself. By way of example, Stu Flavin, who has been coming to Goose Rocks

Beach since 1963, testified that at a minimum he would come for two weeks and he, his family and guests would play volleyball, build sandcastles, have lobster bakes, sunbathe, read, swim and chase tidal pools the entire length of the beach.

48. TMF Defendants never made any distinction between activities on the wet sand or dry sand, except to the extent an activity was better suited for that particular kind of sand (e.g., beach volleyball on dry sand, softball on wet sand).

49. Stu Flavin, Richard Johnson, William Junker, Peter Smith, Judge Whitehead and Walt Wiewel specifically recall large softball games on the east and west ends of Goose Rocks Beach, waterskiing in the river, parties and bonfires in all areas of Goose Rocks Beach without any deference to whose house they were in front of and without any deference to these activities taking place on the wet or dry sand.

50. Plaintiff Robert Scribner was born in 1956 and acknowledged at trial that he has been walking the length of the beach and recreating on the beach since he was a kid without obtaining the permission from other beachfront owners.

51. Plaintiffs Robert Scribner, Christopher Asplundh and Meredith Gardner all testified that they believed that they had "the right" to run and/or walk the length of the beach.

52. Plaintiff Robert Scribner claimed that he had the right to walk the beach "because he had always done so."

53. Plaintiffs could point to no written or unwritten agreement that permitted others to walk on the beach.

54. Other beachfront owners (including Walter Wiewel, Joanne Gustin, and Ed Case) also affirmed that they were aware of no such agreement.

55. When asked whether the beach adjacent to his home was his private beach, William Joel asserted "[t]hat was unthinkable."

56. Some Plaintiffs testified "absolutely not" when asked if backlot owners had different rights to use the beach than beachfront owners. Meredith Asplundh testified that her backlot friends did not have different rights than she did as a beachfront owner. Jennifer Eaton testified that she made no distinction between the rights of backlot and beachfront owners.

57. Plaintiffs are often able to distinguish backlot owners from members of the general public, particularly those backlot owners whose property is near Plaintiffs and have private rights of ways leading to the beach.

58. Photos of Goose Rocks Beach show varying degrees of use over the seasons and over the years, and do not establish conclusively that use has been increased or decreased over the years or that only certain areas of Goose Rocks Beach are utilized for recreational activities by the TMF Defendants. See e.g. TMF Photo Exhibits 310, 316, 318, 330, 335.

59. There was credible testimony from longstanding beach users (Robert Pearce, William Joel, Joan Junker, etc.) that there was no appreciable increase in the amount of use of Goose Rocks Beach over their 80+ years summering in Goose Rocks.

60. Joan Junker testified that there was more activity at Goose Rocks Beach prior to the 1947 fire.

61. Some Plaintiffs (Forrest, Almeder, Lewis) sought to grant permission to select backlot owners only after entering the litigation. They were told (by Maria Junker, Bob Pearce, etc.) that permission wasn't needed.

62. Plaintiffs do not universally limit their activities to the beach in front of their house, or in front of the homes of people they know.

63. Backlot owners testified to not making a distinction with regard to whose house in front of which they were recreating, and it did not matter if they had a friendly relationship or not with those beachfront owners.

64. When walking on Goose Rocks Beach from the Batson River to the Little River, people tend to stop and sit or socialize with others, on wet and dry sand.

65. Plaintiffs and TMF Defendants testified that their time, place, and manner of uses of the beach did not change when they went from renting to owning property, and from being backlot owners to beachfront owners.

66. Ed Case owned back lot property at Goose Rocks since 1986 and eventually purchased beachfront property. He testified that his rights were no different as a beachfront owner versus a back lot owner.

67. At the time they purchased their property, if not before, Plaintiffs were on notice that the beach was being used. In fact, Jule Gerrish testified that she has been on notice since 1967 that her ownership rights might be impacted with respect to use of the beach by backlot owners for recreational purposes.

68. Goose Rocks Beach has been historically, and remains to this day, a peaceful beach.

69. Plaintiffs did not object to backlot owner use, even where they did not know a backlot owner and provided no permission to use the beach in front of their property.

70. Backlot owners used the beach without the need to request permission, treating it as if it were their own. Tellingly, Norman Merrill, who is a backlot owner and testified on behalf of the Plaintiffs, stated that if certain Plaintiffs revoked the permission they apparently gave him, he would still use the beach for recreation.

71. Plaintiffs did take action when they found certain things objectionable with respect to certain activities taking place on the beach (e.g. drinking, public indecency, storage of boats), yet never objected to recreational beach use by TMF Defendants.

72. Former Chief of Police Joe Bruni testified that in his many years of patrolling Goose Rocks Beach, outside of Barbara Rencurrel, there were only two other instances where a beachfront owner asked someone to leave, and the person that was asked to leave in one instance was a renter of another beachfront house.

73. Plaintiffs and Defendants testified uniformly that they were drawn to Goose Rocks Beach by its natural beauty and great sense of community.

74. On a typical summer day, there are people "up and down the beach".

75. The TMF Defendant class uses the beach in a very respectful way.

76. Plaintiffs claim that permission was implied; however, Plaintiffs did object to certain uses they found objectionable and testified they would object if someone was using, for example, other parts of their property such as their lawn or driveway.

77. When backlot owners and beachfront owners engaged in beach activities, there were often other groups doing the same, some of whom the backlot owners or beachfront owners did not recognize.

78. Parents of young kids on Goose Rocks Beach would tend to congregate where their children were, whether it be tidal pools or with other friends.

79. Goose Rocks Beach has always been an inclusive, family beach community. No distinction has ever been made between backlot owners and beachfront owners in use of beach, Goose Rocks Beach Association activities, etc.

80. Some backlot owners (Judge Gordon) knew that some beachfront owners claimed ownership or had deeded ownership to the low water mark, but they did not care and that did not impact their use.

81. Beachfront owner Joanne Gustin testified that the only greater right she acquired when she also became a beachfront owner was a "shorter walk".

CONCLUSIONS OF LAW

"[A] party asserting an easement by prescription must prove (1) continuous use (2) for at least 20 years (3) under a claim of right adverse to the owner, (4) with his 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, 244. "[T]he permissible uses of an easement acquired by prescription are necessarily defined by the use of the servient land during the prescriptive period." Id. at ¶ 41 (quoting Gutchen v. Becton, 585 A.2d 818, 822 (Me. 1991)). Goose Rocks Beach has been used for recreational purposes for well over 100 years.

"Continuous possession and use requires only the kind and degree of occupancy (i.e., use and enjoyment) that an average owner would make of the property." Stickney v. City of Saco, 2001 ME 69, ¶ 18, 770 A.2d 592, 601. In this instance, there is ample evidence and credible testimony that the TMF Defendants recreated on Goose Rocks Beach in the same manner and in the same frequency, if not more, than the Plaintiffs themselves. Like any beach in the State of Maine, Goose Rocks Beach is more heavily used in the summer and on nice weekends and holidays. In addition, some TMF Defendants testified to cross-country skiing on Goose Rocks Beach in the winter time and horseback riding in the fall or spring. There was credible testimony that Plaintiffs, in fact, were present when TMF Defendants were using the beach and did not object to this use. There is also ample evidence that the TMF Defendants, as a class, engaged in recreational use of Goose Rocks Beach for a period spanning at least 20 years, some of which dating back to the 1920s and 1930s.

The party claiming a prescriptive easement must prove that their use of the property was under a claim of right that is adverse to the owner. Androkites v. White, 2010 ME 133, ¶ 16, 10 A.3d 677, 682. "Using the property 'under a claim of right' means that the claimant 'must be in possession as the owner, intending to claim the land as [their] own, and may not be in recognition of or subordination to the record title owner." Id. (quoting Jordan v. Shea, 2002 ME 36, ¶ 23, 791 A.2d 116, 122). "The claimant's use of the property is 'adverse to the owner' only when the claimant 'has received no permission from the owner of the soil, and uses the way as owner would use it, disregarding [the owner's] claims entirely, using it as though [they] owned the property [themselves].'" Id. (quoting Stickney v. City of Saco, 2001 Me. 69, ¶ 21, 770 A.2d 592, 602). The testimony of both Plaintiffs and TMF Defendants clearly establish that no

permission was ever given or received prior to the commencement of this litigation, and TMF Defendants used the beach for recreational purposes just as the beachfront owners did.

In satisfying the last element of a prescriptive easement claim, the TMF Defendants have proven that the Plaintiffs had knowledge and acquiesced to their use of the beach in front of their property. Given the nature of Goose Rocks Beach as a community, the fact that many Plaintiffs witnessed recreational use of the beach prior to their ownership[2] , and Plaintiffs own recreational use of Goose Rocks Beach in front of other beachfront owners' homes, the Plaintiffs had knowledge of the recreational use. It is ironic that, without a doubt, walking and jogging along Goose Rocks Beach is the least disputed activity that occurs by both Plaintiffs and Defendants alike. Even in the Plaintiffs' Complaint they make no objection to walking on Goose Rocks Beach. While it seems to be a use recognized as long-standing by all, Plaintiffs through their testimony claim the right to stop such activity in front of their home at their discretion. As such, there is a disconnect between what the Plaintiffs are seeking, the right to prescribe certain activities in front of their home, and what was said in Court, Plaintiffs have the right to walk on Goose Rocks Beach without permission of other beachfront owners.

"Acquiescence...means passive assent such as consent by silence and does not encompass acquiescence in the active sense such as...by means of the positive grant of a license or permission." See Jacobs v. Boomer, 267 A.2d 376, 378 (Me. 1970). The only Plaintiffs that gave any sort of permission for recreational use of the beach in front of their property came after the lawsuit was filed. As for all other testimony with respect to permission, it was not permission to recreate on Goose Rocks Beach, but rather, was for some other use such as using the beachfront owner's private steps to access the beach or store a boat on the beach. Even then,

[2] In some instances, Plaintiffs testified that they themselves used Goose Rocks Beach without permission and without objection from landowners prior to their ownership.

TMF Defendants testified that any request to store a boat was out of courtesy and respect and not because they felt they needed that permission. In fact, there was credible testimony that many TMF Defendants stored kayaks, dinghies and sailboats on the beach without any request for permission from the beachfront owner to do so.

Furthermore, when the first and third elements of a prescriptive easement are established, as is the case here, a presumption arises that the use of the property is under a claim of right adverse to the owner, but the presumption will not arise if there is an explanation of the use that contradicts the rationale of the presumption. Id. at ¶ 17,10 A.3d at 682-683; see also Lyons v. Baptist Sch. Of Christian Training, 2002 ME 137, ¶ 18, 804 A.2d 364, 370; Jacobs v. Boomer, 267 A.2d 376, 378 (Me. 1970). The presumption applies in this instance in that the prescriptive easement is not claimed as between family members and does not involve wild or uncultivated land. See e.g. Lyons, 2002 ME at ¶ 18, 804 A.2d at 370; Weeks v. Krysa, 2008 ME 120, ¶ 2, 955 A.2d 234, 235 ("casual, seasonal, use of an undeveloped waterfront lot…"); Androkites, 2010 ME at ¶ 16, 10 A.3d at 682 (the prescriptive use was not adverse to the owner due to the fact that at one point the servient estate was owned by a family member and thus, the use was deemed permissive). The facts of this case are clearly distinguishable from Androkites in that the Plaintiffs and TMF Defendants are not related and are clearly distinguishable from Weeks in that the use is not casual, seasonal use of undeveloped property.

While the Plaintiffs might cite to Lyons, Weeks, or Androkites in support of their argument that the Plaintiffs did not have knowledge and the use was permissive, all factors must be looked at to determine if the elements of a prescriptive easement are established, including, but not limited to, "the nature of the land, the uses to which it can be put, its surroundings, and various other circumstances." See Falvo v. Pejepscot Indus. Park, Inc., 1997 ME 66, ¶ 8, 691

A.2d 1240, 1243. Furthermore, because the Lyons presumption of permissive use merely operates to negate the usual presumption of adversity, the Lyons presumption of permissive use cannot constitute "implied permission" that would defeat the proof of the element of a "claim of right adverse to the owner" that the presumption of permissive use operates to create. Instead, "implied permission" is more than mere silence and must be impled by some writing, statement, familial or fiduciary relationship between the parties. See e.g. S.D. Warren Co. V. Vernon, 1997 ME 161, ¶¶ 10-11, 697 A.2d 1280, 1283 (employment relationship between property owner and prescriptive use insufficient to create "implied permission" of use); Hamlin v. Niedner, 2008 ME 130, ¶¶ 12-14, 955 A.2d 251, 255 (familial relationship can give rise to "implied permission," while mere neighborliness does not).

Unlike Weinstein v. Hurlbert, another case cited to by the Plaintiffs, this case involves more than "limited seasonal lawn mowing, the planting and pruning of several bushes, minimal gardening [and] a single instance in which building supplies were stored on the property…". Weinstein v. Hurlbert, 2012 ME 84, ¶ 11, 45 A.3d 743, 746. The instant case involves the long-standing historic use of all two miles of Goose Rocks Beach, of the dry and wet sand, from the Batson to the Little River, by backlot and beachfront owners alike. As previously stated, the facts of this case, including the community nature of Goose Rocks, the use of the beach, and the fact that Plaintiffs and Parties-in-interest acquiesced to its use by TMF Defendants, is what gives rise to the presumption that the use was under a claim of right adverse to the owner. As such, the burden of proof then shifts to the property owner to rebut the establishment of a prescriptive easement by showing that the use was permissive. The Plaintiffs have not met this burden in this case.

Even if the presumption does not apply in this case, the TMF Defendants have met their burden of proof that the use was under a claim of right adverse to the owner. There was proof of adversity[3] and actual notice to the true owner. Many Plaintiffs also have long family history of use at Goose Rocks Beach as both renters and owners of beachfront and backlot properties and were well aware of the use of Goose Rocks Beach for recreational purposes by those living in Goose Rocks. In fact, one Plaintiff (Gerrish) testified that she was on notice beginning in 1967 that her property rights might be affected by the use of the beach in front of her property. Other Plaintiffs testified that they believed their rights were no different than backlot owners' rights. Despite the occasional presence of "private property" and "no trespassing" signs, TMF Defendants continued to use Goose Rocks Beach and testified that they told Plaintiffs that they didn't need permission to use Goose Rocks Beach.

The Plaintiffs argue that the use of the beach has increased over time and as a result of this overburdenment, no prescriptive easement can be established. When a change in the use does not manifest itself in some greater burden on the servient estate, it is not considered an overburdening of the easement. Eaton v. Town of Wells, 2000 ME 176, ¶41, 760 A.2d 232, 244. In addition, the Plaintiffs would have to show that any change in use or scope of use has somehow increased traffic to sufficiently argue an overburdenment of the easement. See e.g. Lakeside at Pleasant Mountain Condominium Association v. Town of Bridgton, 2009 ME 64, ¶18-19. The evidence does not support a finding that the use has sufficiently changed over time. In fact, the testimony of Joan Junker is of particular note in that there were more commercial

[3] The element of "adversity" does not require a "heated controversy or a manifestation of ill will" toward the owner or that the claimant was in any sense an enemy of the owner of the servient estate. See Lyons, 2002 ME 137 ¶ 26, 804 A.2d at 372; Wood v. Bell 2006 ME 98, ¶ 13, 902 A.2d 843, 849. Rather, it involves use, without permission, in the same way as the owner would use it, using it as though they owned the property themselves. See Androkites, 2010 ME 133, ¶ 16, 10 A.3d 677, 682. Clearly, the TMF Defendants have met this standard.

operations (such as a dance hall, several general stores and multiple hotels) at Goose Rocks Beach prior to the 1947 fire. There has been no change in the use or scope of the easement.

The remaining matter to address is whether or not the TMF Defendants have met their burden as a class. The Law Court held in Flaherty v. Muther that the Maine statute detailing adverse possession allows that a class of persons may acquire an easement through prescriptive use. 2011 ME 32, 17 A.3d 640;14 M.R.S.A § 812 (2011). In Flaherty, the Court noted that it had "decided numerous cases regarding acquisition of prescriptive easements by individuals and the public." Id. at ¶ 81 (citing Lyons v. Baptist Sch. of Christian Training, 2002 ME 137, 804 A.2d 364 (discussing public prescriptive easements); Blackmer v. Williams, 437 A.2d 858 (Me. 1981) (affirming an individual's easement by prescription); Town of Kennebunkport v. Forrester, 391 A.2d 831, 833 n.2 (Me. 1978). However, the Law Court, until that point, had never discussed how a class of persons that is separate from the public can establish the prescriptive element of continuity. In providing guidance, the Law Court stated that "[i]n the absence of relevant prior decisions, [the Court] seeks guidance from the Restatement, which provides: 'A servitude should be interpreted to give effect to the intention of the parties ascertained from . . . circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created.'" Id. at ¶83 (citing Restatement (Third) of Prop.: Servitudes § 4.1(1)). "When the circumstances surrounding the creation of an easement are prescriptive in nature, 'the adverse use that leads to creation of the servitude provides the basis for determining its terms.'" Id. (citing Restatement (Third) of Prop.: Servitudes § 4.1 cmt. a.).

> Since the servitude created by adverse use arises from the failure of the landowner to take steps to halt the adverse use, interpretation of the prescriptive servitude focuses on the reasonable expectations of the landowner. 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 before the prescriptive period had run.

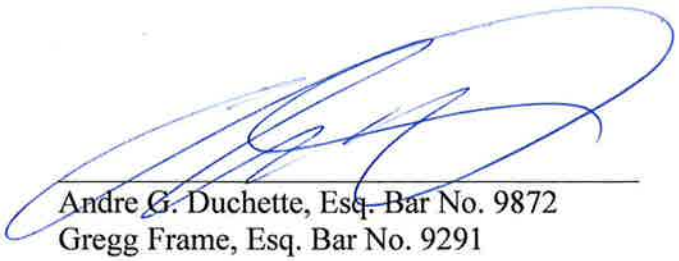
Id. (citing Restatement (Third) of Prop.: Servitudes § 4.1 cmt. h.).

"This approach is consistent with the idea that the '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.'" Id. (citing Great N. Paper Co. v. Eldredge, 686 A.2d 1075, 1077 (Me. 1996)).

Adopting this view, the objective expectations of the Plaintiffs *and not the type of use* becomes central to determining whether, as a matter of law, the conduct by the TMF Defendants established a prescriptive easement as a class of persons in Goose Rocks Beach. "Those expectations rest on the actual use of [Goose Rocks Beach] during the prescriptive period." Id. at ¶ 89. The objective expectations of the Plaintiffs should rest on the twenty-plus years of continuous, uninterrupted, recreational use of Goose Rocks Beach as testified to by the TMF Defendants, which was clearly observed by the Plaintiffs as owners of beachfront property.

The Plaintiffs were drawn to an inclusive community and are now trying to make it exclusive. The evidence at trial in this case demonstrates that Plaintiffs were well aware of the longstanding use of Goose Rocks Beach by the TMF Defendants sufficient to give the owners notice that a prescriptive easement was being acquired. The evidence at trial demonstrates that the TMF Defendants and their families have been recreating on the beach for many decades, and such use is more than sufficient to put Plaintiffs, and their predecessors in title, on notice that a prescriptive easement was being acquired and their rights were in jeopardy. The evidence in this trial overwhelmingly leads to a prescriptive easement for recreational use of Goose Rocks Beach in favor of the TMF Defendants.

DATED: September 19, 2012



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