

STATE OF MAINE
YORK, ss.

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

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

Plaintiffs

v.

TOWN OF KENNEBUNKPORT, et al.,

Defendants

**DEFENDANT TOWN OF
KENNEBUNKPORT'S PROPOSED
FINDINGS OF FACT AND
CONCLUSIONS OF LAW RELATING
TO ITS PRESCRIPTIVE EASEMENT
AND CUSTOM CLAIMS**

Defendant Town of Kennebunkport hereby submits the attached proposed findings of fact and conclusions of law relating to its prescriptive easement and custom claims, specifically Counts IV and V of the Town's counterclaims in the above-referenced action.

FINDINGS OF FACT

I. BACKGROUND

1. The Town of Kennebunkport (the "Town") has a year-round population of approximately 3,720 people according to the 2000 census, but the Town's population swells considerably during the summer tourist season such that summer retail sales figures run more than ten times higher those in the winter months. **Plaintiffs Exh. 3, pp. 9, 48-49.**¹

2. Goose Rocks Beach is located within the Town, and is advertised to the general public by the Town and others as a recreational destination with two miles of sandy beach beginning at the Batson River and extending to the Little River between the man-made sea wall, or vegetation line, and the low water mark of the Atlantic Ocean ("Goose Rocks Beach").

¹ True copies of all of the admitted trial exhibits referenced herein, including Plaintiffs' admitted trial exhibits (hereinafter "Plaintiffs Exh."), the Town's admitted trial exhibits (hereinafter "Town Exh.") and TMF Defendants' admitted trial exhibits (hereinafter "Plaintiffs Exh.")

3. There are currently ninety-five (95) beachfront property owners at Goose Rocks Beach and one hundred and nine (109) distinct beachfront lots along Goose Rocks Beach.

4. This case concerns a dispute over whether the public has acquired rights by virtue of its longstanding use of Goose Rocks Beach either by prescriptive easement or custom.

5. The Town has also asserted counterclaims against the owners of 29 beachfront properties at Goose Rocks Beach who are plaintiffs in this case, including counterclaims for prescriptive easement and custom.

6. The Town has also asserted other counterclaims, including but not limited to a claim that it holds fee title to all of Goose Rocks Beach from river to river, including the dry sand and intertidal zone, and Plaintiffs have no right, title or interest in Goose Rocks Beach. The Town's remaining counterclaims, including its claim to fee ownership of Goose Rocks Beach, have been preserved and will be tried in a separate trial at a later date.

7. The owners of 29 beachfront properties at Goose Rocks Beach are plaintiffs in this case, and along with the owners of 7 beachfront properties who are parties-in-interest, they dispute that the Town and the public have acquired an easement, by either prescription or custom, along the Goose Rocks Beach.

8. In contrast, the owners of 62 beachfront lots and owners of 186 back lots have reached a resolution regarding the public's recreational use of Goose Rocks Beach and entered into a stipulated judgment in this case. **See August 27, 2012 Stipulated Judgment.**

9. There are 11 beachfront properties at Goose Rocks Beach that are not currently part of the Stipulated Judgment, and will not be expressly named in the Court's judgment on the disputed claims in this case.

10. Plaintiffs Robert F. Almeder, Virginia S. Almeder, Willard Parker Dwelley, Jr., W. Parker Dwelley, III, John H. Dwelley, Kristen B. Raines, Deborah Kinney, J. Liener Temerlin, Leslie Josselyn-Rose, Karla Sue Temerlin, Susan Flynn, Mark E. Celi, William E. Brennan, Jr., Shawn McCarthy and Steven Wilson, and Parties-in-interest John Parker, Jeannette Parker, Anne Clough, and Heather Vicenzi did not testify at the trial.

11. Although Barbara Rencurrel lives at 251 Kings Highway at Goose Rocks Beach, she is not a beachfront property owner at Goose Rocks Beach and is not a plaintiff or party in interest in this case.

12. The State of Maine (the “State”) claims that the public has certain rights to use the intertidal zone at Goose Rocks Beach pursuant to the Public Trust Doctrine. *See, e.g., McGarvey v. Whittredge*, 2011 ME 97, 28 A.3d 620.

13. TMF Defendants own property within the Goose Rocks Zone, which is located between the Batson River to the east and the Little River to the west, and between Route 9 to the north and the Atlantic Ocean to the south (“Goose Rocks Zone”), and they claim that they have acquired a private easement by prescription over Goose Rocks Beach.

14. The Kennebunkport Conservation Trust (“KCT”) owns 8 undeveloped, beachfront lots at Goose Rocks Beach between Dinghy Point/Gardiner Point and the intersection of Kings Highway and Broadway Avenue. **Plaintiffs Exh. 16.**

15. The KCT acquired the beachfront lots by gift beginning in 1981, and acquired the last of its beachfront lots in 1999. **Plaintiffs Exh. 16.**

16. The Town owns one undeveloped, beachfront lots at Goose Rocks Beach between Dinghy Point/Gardiner Point and the intersection of Kings Highway and Broadway Avenue, which lot was acquired by the Town in 1977. **Plaintiffs Exh. 16.**

17. Plaintiff Donna Lencki and Parties-in-interest Marie Henriksen and Mary Lou Emmons also own undeveloped, beachfront lots at Goose Rocks Beach between Dinghy Point/Gardiner Point and the intersection of Kings Highway and Broadway Avenue.

18. There are approximately 25 public and private access ways spread across the entire length of Goose Rocks Beach. **Town Exh. 3; Plaintiffs Exh. 14.**

19. Whether a particular access way is public or private is not at issue in this case, but the testimony of witnesses at trial established that the public access ways provide access to the western, middle and eastern sections of Goose Rocks Beach and include, at a minimum, the following: (a) Jeffery's Way on the east end of Goose Rocks Beach by Sand Point; (b) Broadway Avenue, Old Proctor Way and Edgewood Avenue, Belvidere Avenue and Bel-Air Avenue in the "open area" of Goose Rocks Beach between Dinghy Point and Jeffery's Way; (c) Bartlett Avenue to the west of Dinghy Point between Dinghy Point and Dyke Road; (d) Dyke Road in the center of Goose Rocks Beach; and (e) the Rachel Carson Preserve public access way at the west end of Goose Rocks Beach. **See also Town Exh. 3; Plaintiffs Exh. 14.**

20. Currently, there is no public parking lot located near Goose Rocks Beach, but the Town has maintained and regulated designated public parking spaces which facilitate public access in a number of locations along the length of Goose Rocks Beach and located in the vicinity of all of the aforementioned access points since at least 1933.

21. There are currently a total of one hundred and seventy three (173) parking spaces available to the public and facilitating public access to Goose Rocks Beach according to the testimony of the Town Manager, Larry Mead.

II. HISTORIC USE OF GOOSE ROCKS BEACH BY THE PUBLIC

A. Public Use of Goose Rocks Beach from 1630 to 1870

22. Historical evidence dating at least as far back as the seventeenth century demonstrates that Goose Rocks Beach has been used by the public for over 300 years.

23. The Court heard testimony from historian, Edwin Churchill, regarding the significant role of Goose Rocks Beach, along with other beaches in southern Maine, as a public highway beginning in colonial times when it served as the only passable thoroughfare for the public to travel along the Maine coast.

24. Dr. Churchill testified that public use of Goose Rocks Beach as a means of travel continued until at least 1868. **See also Town Exh. 241a.**

25. Goose Rocks Beach was also historically used for public pasturing, and driving of livestock. **Town Exh. 261.**

26. Town records from as early as the 1790s demonstrate that the Town was regulating and maintaining Goose Rocks Beach, including preventing “cattle & horses from running on the beach and marsh between Badsons & Little Rivers . . .” **Town Exh. 261.**

27. Town votes between 1791 and 1866 demonstrate that the Town repeatedly voted to employ “beach drivers” to police cattle and livestock along Town beaches, including Goose Rocks Beach. **Town Exh. 261.**

28. The salt water and fresh water marshes by Goose Rocks Beach were economically important to the Town, and historic records show that the Town took steps to protect these marshes. Churchill Testimony; **see also Town Exh. 261.**

29. Town records also demonstrate that the Town took responsibility for, as early as 1773, regulation of the hauling of seaweed and caretaking of clam beds on Goose Rocks Beach.

Town Exh. 261.

30. Seaweed gathering at Goose Rocks Beach continued for generations, and sketches maintained by the Kennebunkport Historical Society depict kelp gathering at Goose Rocks Beach around 1890. **Town Exh. 152 (1&2) and 261.**

31. Ralph Smith and his grandfather drove a horse cart along Goose Rocks Beach in the 1920s and gathered seaweed and kelp to be used by his grandfather for fertilizer at his farm.

32. Mr. Smith testified that his grandfather did not seek or obtain permission from beachfront owners to gather the seaweed and kelp along Goose Rocks Beach.

B. The Rise of Tourism at Goose Rocks Beach: 1870-1947

33. Evidence introduced by the Town at trial demonstrates that the public was using Goose Rocks Beach for recreational purposes as far back as 1870. **See, e.g., Town Exh.**

134a&b.

34. The August 20, 1870 diary entry of Edwin Walker, a resident of Kennebunk, indicates that he and several others went to Goose Rocks Beach, “a place for sea bathing and tourist resort in Kennebunkport.” **Town Exh. 134a.**

35. The August 21, 1872 diary entry of William Walker, a resident of Arundel, states that “[o]ur young folks all went to the Goose Rock Beach in company with 8 or 10 carriages from this vicinity.” **Town Exh. 134b.**

36. The Town also presented numerous historic photos from as early as 1912-13, and continuing through the 1920s, 1930s and 1940s, showing crowds of people, including the general

public, using all of Goose Rocks Beach from river to river, including both the dry sand and intertidal zone, for recreational activities, including but not limited to walking, horseback riding, sunbathing, picnicking, building sandcastles, swimming, boating and other general recreational activities. **Town Exh. 136 and 152; TMF Exh. 316 and 349.**

37. Ralph Smith specifically recalled recreating with his family at Goose Rocks Beach, particularly the west end of Goose Rocks Beach, beginning in the 1920s, and he continued to use Goose Rocks Beach for recreational purposes up until about 2002 – even proposing to his wife on the west end of the beach in 1950.

38. Mr. Smith testified that he would drive to the beach via Dyke Road and park along Kings Highway on the west end of Goose Rocks Beach.

39. Joan Junker testified at trial that she began coming to Goose Rocks Beach in the 1930s and recreated “up and down the beach” with her “gang of friends,” which included Barbara Rencurrel and Bob and Annette Scribner, the parents of Plaintiff Robert Scribner, where they would go waterskiing, swimming, build sand castles, play frisbee, and she also recalled playing in the tide pools as a little child at Goose Rocks Beach, particularly on the eastern end of Goose Rocks Beach, including Sand Point.

40. Between 1930 and 1950, as well as afterwards, Ms. Junker testified that she observed members of the public also using Goose Rocks Beach in the same manner that Ms. Junker and her “gang of friends” used the beach.

41. Mrs. Junker testified that, over the course of the last 81 years, she was never given permission by any beachfront owner to recreate on Goose Rocks Beach, and no beachfront owner ever objected to her recreational use of the beach or asked her to move.

42. Mrs. Junker also testified about the dances at the casino and going bowling at the bowling alley by Goose Rocks Beach before the fire of 1947.

43. Historic photos from the 1930s depict the Jefferys Auto Trailer Camp on the west end of Goose Rocks Beach with cars parked in the grass adjacent to Goose Rocks Beach and members of the public recreating on the western part of Goose Rocks Beach. **Town Exh. 136, pp. 12-14.**

44. Barbara Barwise, Wayne Fessenden, William Joel, Mary Davis and Richard Johnson all testified about the Ivory Emmons parking area/Jefferys Auto Trailer Camp on the west end of the beach to the west of Norwood Lane, and Mr. Johnson noted that Ivory Emmons charged 10 cents per car for parking.

45. Historic photos dated July 10, 1939, July 24, 1941 and August 7, 1942 also show numerous cars parked along King's Highway on the east end of Goose Rocks Beach and members of the public recreating on the beach in the background. **Town Exh. 136, pp. 9-11.**

46. Historic photos and brochures introduced at trial, along with the testimony of Barbara Barwise, Wayne Fessenden, Joan Junker, Mary Davis and others, demonstrate that, prior to 1947, there were significantly more businesses and places of public accommodation, including stores, hotels and campgrounds, located in the vicinity of Goose Rocks Beach along both the western and eastern sections of the beach, open to the public and facilitating public use of Goose Rocks Beach than there are today. Several of the brochures for these commercial establishments advertise Goose Rocks Beach as a public attraction and tourist destination. **Town Exh. 133a and 158.**

47. Prior to 1947, the Beachwood Casino and bowling alley were both operating at Goose Rocks Beach, along with numerous stores, including the General Store, Davis' Store,

Echo Rock Novelty Store, Campbell's Store, Holt's Notions Shop, Alice Jeffery's Gift Shop, Silver Crane Gift Shop, White Cap Gifts, Acorn Tearoom, Bayberry Teahouse, Durgin's Store and the Westerly Casino. **Town Exh. 133a.**

48. The hotels and campgrounds that were located in the vicinity of Goose Rocks Beach prior to 1947 included the New Belvidere (now known as the Tides Beach Club), Beachwood House, the Homestead, Goose Rocks House Annex, Davis Cabins and Ivory Emmons campground a/k/a Jeffery's Auto Trailer Camps. **Town Exh. 133a.**

49. The locations of the historic businesses are depicted in a report created by Barbara Barwise, entitled "Goose Rocks Beach – Commercial Properties." **Town Exh. 133a.**

50. A 1900 brochure for the Goose Rocks House, which was located at the eastern end of Goose Rocks Beach near Sand Point, advertises its proximity to "a broad hard beach, unsurpassed for driving or walking and which offers unusual facilities for bathing, the gradual inclination avoiding the much dreaded and dangerous undertow." It also advertises walks to Timber Island, which would require its guests to cross portions of Goose Rocks Beach not owned by, or directly adjacent to, the Goose Rocks House. **Town Exh. 133a and 158.**

51. A 1911 brochure for the New Belvedere, which was located at the property now known as the Tides Beach Club, advertises that the "[b]athing is ideal, a long sandy beach with no undertow." **Town Exh. 133a and 158.**

52. The 1911 brochure shows a horse drawn buggy on the beach with a caption "A Buckboard Party starting on one of the many Picturesque Drives." **Town Exh. 158.**

53. A 1913 brochure of the Homestead, which was located Jeffery's Way and New Biddeford Road, advertises the "delightful surf bathing is one of the most popular outdoor diversions, which can be enjoyed without danger, as there is no undertow." **Town Exh. 158.**

54. A 1920's brochure for the New Belvidere states that it is "situated mid-way, within a stone's throw of the water, on a beautiful crescent shaped beach, two miles in length. This beach during the last decade has been known as 'Beachwood,' but in the vernacular of the older inhabitants and since the days of the early settlers, as 'The Goose Rocks.'" **Town Exh. 158.**

55. A photo in the 1920's brochure captioned "A Porch View from The Belvedere" shows people recreating on Goose Rocks Beach, and another photo shows people playing tennis on Goose Rocks Beach. **Town Exh. 158.**

56. A 1939 brochure of the Beachwood House, which is located on property now owned by Party-in-interest Marie Henriksen and immediately to the west of the property that now constitutes the Tides Beach Club, specifically states there's "no better bathing beach in New England" than Goose Rocks Beach (formerly known as Beachwood). **Town Exh. 133a and 158.**

57. The 1939 brochure also states, "[n]ature presents at Goose Rocks Beach a wonderful natural playground. The receding tide leaves several square miles of hard-paved white sand. This makes the finest possible park for golf practice, beach tennis, horseback riding, kite flying, etc. Surrounded by groves of woodlands a few steps brings the hiker to rustic lanes a picturesque farmlands." **Town Exh. 158.**

58. The same brochure specifically notes that people "come with their families to enjoy the wonderful two-mile beach and bathing, as well as the ideal climate. There is a Casino for dancing and bowling, stores, public tennis courts, daily mail, etc." **Town Exh. 158.**

59. The aforementioned evidence and testimony of witnesses at trial demonstrates that there were more businesses and places of public accommodation located in the vicinity of

Goose Rocks Beach prior to the 1947 fire than there are now. This fact, coupled with the brochures and advertisements of such commercial properties promoting the entire “2-mile stretch” of Goose Rocks Beach as a popular tourist destination for members of the public, demonstrate that a substantial number of people, including members of the public, came to Goose Rocks Beach during this period of time to enjoy recreational activities on the beach while benefiting from the commercial infrastructure that had developed over time.

60. Prior to 1947, the Town of Kennebunkport helped attract the public to Goose Rocks Beach by investing public funds for publicity relating to Goose Rocks Beach. **Town Exh. 59a-t.**

61. Town records introduced at trial document the Town’s expenditures and specifically reference the large numbers of people who were using Goose Rocks Beach. **Town Exh. 59a-t.**

62. Specifically, in 1887-88, the General Remarks in the Annual Report of the Town of Kennebunkport included the following, “[a]nd in closing we may say that in view of the fact that former residents and many others are making large out lays for summer and possibly permanent homes in various parts of the town, and the increased popularity of our place as a Summer resort, coupled ere long we trust with some manufacturing interest we shall experience in the coming years, revived prosperity in our much loved Town . . .” . **Town Exh. 59a.**

63. In 1892-93, the General Remarks in the Annual Report of the Town of Kennebunkport noted improvements to roads in the Goose Rocks area, and specifically stated “[t]his road leads to Forest beach, better known as Goose Rocks, where the summer tourist seeks a restful life with enduring pleasure.” **Town Exh. 59b.**

64. At the Annual Town Meeting on March 4, 1929, the Town voted, in Article 47, to “grant and raise the sum of \$300.00 to help defray the expenses of the Kennebunk and Kennebunkport Publicity Bureau to be located at ‘Cozy Corner’ so-called in Wells, with a vote count of 30 in favor and zero opposed. **Town Exh. 61c.**

65. Thereafter, from 1929 to 1947, the Town consistently spent public funds on publicity advertising Goose Rocks Beach. **Town Exh. 59c-t.**

66. In the 1931-32 Town Annual Report, the Report of the Kennebunk-Kennebunkport Information Bureau highlights the Town’s publicity efforts, stating “[i]n these depression times it is more necessary than ever to advertise and give out information about our towns as a resort...Our location, three miles off the State Road, requires that we maintain an information bureau, that we may give information to and direct people to our resorts, whether it be a farmhouse in the country or a hotel at the shore . . . After all is said and done, the resort business is our bread and butter.” **Town Exh. 59f at p. 46.**

67. In 1937-38, the Selectmen’s narrative in the Town Annual Report notes the presence of many visitors, and specifically states that “[t]he police account has been over-drawn because of many disorders at Goose Rocks Beach. Out-of-town people, making a nuisance of woods, highways and beach caused these disturbances. To protect our property in that district, it became necessary to assign extra police each weekend.” **Town Exh. 59k at p. 2.**

68. The Selectmen’s narrative further states that, “[i]f we are to compete with other resort towns in securing our fair share of summer business, it would seem that we ought to elect or appoint a planning board to arrange ways and means by which our summer visitors may receive entertainment during their stay. The time of advertising bathing, boating and fishing has

gone, and we must do something to satisfy the people after they have been brought here.” **Town Exh. 59k at p. 2.**

69. The Publicity Committee’s report in that same year noted an appropriation of \$1,500, noting that it “received 1,000 letters from all over the country specifically inquiring about Kennebunkport, Cape Porpoise and Beachwood [Goose Rocks Beach] in response to our newspaper advertising alone; and our reflection signs on the highway were an added benefit.” **Town Exh. 59k at p. 33.**

70. In 1939-40, the Town Annual Report includes an appropriation of \$1,200.00 for the Publicity Bureau, and the report of the Publicity Committee described the following results, “4983 people have made inquiries at the Bureau, since opening the office on June 26th, 1939. Several hundred people have expressed their intention to return another season, and have asked why we do not better advertise our section. Many insist that the entrance to Route 9 at Cozy Corner is not what it should be, and that we should put an information office, with rest rooms, at this point, with someone in charge who could sell the Kennebunkport, Cape Porpoise, and Goose Rocks Beach facilities to the motoring public. . . .” **Town Exh. 59m at p. 32.**

71. The 1939-40 report further details that inquiries came from 25 states and Canadian provinces, including Massachusetts, New Hampshire, and as far away as California, Texas, and Arizona, and states that “[i]t is the impression of your Directors that, while the newspaper advertising in itself is worth continuing, an effort should be made to contact the thousands of motorists travelling Route 1, who now go on through to other sections of Maine, and to sell them thoroughly on Kennebunkport, Cape Porpoise, and Goose Rocks Beach. Route 9, the Shore Route to Portland, has everything – why go further?” **Town Exh. 59m at p. 32.**

72. In 1940-41, the Town Annual Report includes an appropriation of \$1,300.00 for the Publicity Bureau, and the report of the Publicity Committee described the erection of a small building at Route 1 at Cosey Corner, and “5222 Tourists called at the Bureau for information, and many of this number we were able to re-route through [Route] 9, the Shore Line, to Kennebunkport, Cape Porpoise, and the Goose Rocks.” **Town Exh. 59n at 34.**

73. Town records also demonstrate that, prior to 1947, the Town made substantial investment of public resources in various improvement and construction projects at Goose Rocks Beach, including repairs to the man-made seawall in 1933 and the installation in 1910 of a public drinking fountain at the intersection of Kings Highway and Jeffreys Way. **Town Exh. 61d (Art. 46-47) and 62.**

74. The Town began regulating public parking at Goose Rocks Beach in 1933, and has been regulating public parking by Goose Rocks Beach ever since then according to the testimony of Town Manager, Larry Mead. **See also Town Exh. 61d (Art. 62) and 64.**

75. At a Town Meeting on March 6, 1933, voters approved an “Ordinance relating to Parking Vehicles at Goose Rocks Beach,” which approved restrictions limiting parking to two hours only from Little River to Batson River during the months of June-September each year. **Town Exh. 61d (Art. 62) and 64.**

76. Police protection specific to the Goose Rocks Beach area began as early as 1904, when voters approved at the Annual Meeting a warrant article “for police services . . . at Goose Rocks,” and Town records show that the Town began employing extra police for the summer tourist season beginning in 1933. **Town Exh. 61a, p. 587, and Town Exh. 61d (Art. 19).**

C. Public Use of Goose Rocks Beach After the Fire of 1947

77. According to a number of witnesses, a fire destroyed most of the commercial and residential structures located in the vicinity of Goose Rocks Beach in 1947.

78. Although many of the commercial businesses were destroyed in the fire in 1947, the evidence introduced by the Town and the testimony of numerous witnesses at trial demonstrates that the public continued to use Goose Rocks Beach for recreational purposes.

79. Historic photos and brochures from 1940s, 1950s, 1960s and 1970s depict crowds of people, including the general public, using all of Goose Rocks Beach from river to river, including both the dry sand and intertidal zone, for recreational activities, including but not limited to walking, horseback riding, sunbathing, picnicking, building sandcastles, swimming, waterskiing, fishing, rafting, boating, bonfires, volleyball games and other general recreational activities. **Town Exh. 136, 152, 158, 175, 177, 180, 262 and 264; Plaintiffs Exh. 19 and 21 (3 & 11); TMF Exh. 310, 316, 330, 335 and 349.**

80. Plaintiff William Forrest acknowledged at trial that he used the whole length of Goose Rocks Beach as a member of the public for over 30 years from 1969 to 2004, including walking the beach, hanging out with his friends, water skiing, and playing volleyball and frisbee, and he never sought permission to do so from any beachfront owner.

81. No beachfront owner ever objected to William Forrest's use of the beach except for one time where he and his friends were having a party and drinking beers on the beach, and they were told by the beachfront owner to move along.

82. William Forrest bought his beachfront property at 239 Kings Highway in 2004 from the Roddens, who had purchased the property in 1961.

83. Chris Rodden testified at trial that, as beachfront owners, the Roddens “want[ed] to be able to use the beach and we want[ed] everyone else to be able to use it as well.” The Roddens did not object to public use of the beach.

84. 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.

85. Mr. Scribner and Plaintiffs 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, and Plaintiffs Robert Scribner and Peter Gray both believe that the public has the right to do so.

86. Mr. Scribner claimed that he had a right to walk the beach “because he had always done so.”

87. According to a number of the plaintiffs, including Robert Scribner, Linda Rice and Lawrence Vandervoorn, beachfront owners have “passively assented” to the public’s recreational use of Goose Rocks Beach.

88. A number of plaintiffs, including John Coughlin, John Gallant, Meredith Gardner, Peter Gray, Linda Rice and Lawrence Vandervoorn, as well as Party-in-interest Susan Lewis, acknowledged that they sometimes gave express permission to people to park in their driveways, to cross their lawn and use their beach stairs, or to store boats on the beach next to the seawall, but they did not give express permission to the public recreate on the beach even though members of the public were recreating on the beach in front of their homes.

89. The Flemings gave someone express permission to have a wedding in front of their house, but did not give express permission to others who engaging in recreational beach activities in front of the Flemings’ beachfront house at Goose Rocks Beach.

90. None of the plaintiffs or parties-in-interest who testified could point to any written or unwritten agreement between beachfront owners giving them, and their friends, families, renters and invitees, the right to walk and recreate on Goose Rocks Beach but not members of the public, and other beachfront owners who testified at trial, including Walter Wiewel, Joanne Gustin and Ed Case, specifically testified that they were not aware of any such agreement between beachfront owners.

91. Plaintiffs John Gallant, Meredith Gardner, Jule Gerrish and Terrence O'Connor all testified that they objected to some public recreation on the beach adjacent their properties, but the public continued to recreate on the beach adjacent their properties, and they had not asked members of the public to leave their beach property despite their objections.

92. Mrs. Gerrish, who owns property in the vicinity of Norwood Lane, specifically testified at trial that "I would not go down [to the beach in front of her home] with three people there because I would be interfering with their privacy. If I wanted to go out and sunbathe, I would have to go to my neighbor's property or ask them to leave. I don't want to do that."

93. Mrs. Gerrish also testified at trial that she was aware that the public had rights to use the property pursuant to the Colonial Ordinance when she purchased her property at Goose Rocks Beach in 1967.

94. Wayne Fessenden, Stuart Flavin, Richard Johnson, William Junker, Peter Smith, Howard Whitehead and Walter Wiewel all testified that they grew up at Goose Rocks Beach and knew members of the public who were recreating without the permission of beachfront owners all along the beach from "river to river," specifically recalling the large softball games on the east and west ends of Goose Rocks Beach, waterskiing on the river, parties and bonfires, and just hanging out with their friends from town.

95. They and other witnesses also testified about numerous other recreational activities that have been taking place all over Goose Rocks Beach as long as these witnesses can remember, including but not limited to running, walking, swimming, sunbathing, bocce, whiffleball, volleyball, golf, bike riding, reading, stargazing, cross-country skiing, capture the flag, fort building, building sand castles, collecting sea shells, playing zim-zam, lacrosse, frisbee, bird watching, tidal pool play, horseshoes, picnicking, horseback riding and dog walking.

96. They and other witnesses observed other people, including members of the public, engaging in similar activities in all areas of Goose Rocks Beach, from river to river and including both the dry sand and the intertidal zone, for as long as they have been recreating at Goose Rocks Beach themselves.

97. Recreational use of Goose Rocks Beach by these witnesses and the people they observed, including members of the public, occurred all throughout the year, although more frequently during the summer months, depending upon the season and the weather.

98. Wayne Fessenden has been a year round resident at Goose Rocks Beach nearly all his life (from the 1950's on) and testified that he has observed the following off-season uses and activities on Goose Rocks Beach: walking (including walking dogs), clamming, fishing, horseback riding, riding bicycles, cross-country skiing and sea grass burning and beach clean-up activities in the early spring before the summer residents arrived for the season.

99. They and other witnesses who testified at trial stated that they never distinguished between the high dry sand and intertidal area while recreating at Goose Rocks Beach.

100. Stuart Flavin, Richard Johnson, William Junker, Peter Smith, Howard Whitehead and Walter Wiewel and most of the other witnesses who testified at trial never observed a beachfront owner at Goose Rocks Beach object to the recreational use of the beach by members

of the public, or ask a member of the public to leave the area of the beach adjacent to the beachfront owner's home.

101. According to Mr. Flavin, public use of the beach was heavier in the vicinity of the so-called "public beach" as that term was used by witnesses at trial because of the proximity of the public parking spaces in that area.

102. Other witnesses testified that the area around the so-called "public beach" was also historically referred to as the "open area" of Goose Rocks Beach, as well as the "east end" of Goose Rocks Beach.

103. Mr. Flavin and others testified that the term "private beach" was not used at Goose Rocks Beach until recently.

104. Howard Whitehead and his family have owned property at 2 New Biddeford Road since it was built in 1958 or 1959, and they recreated all over Goose Rocks Beach, especially in the vicinity of Jeffery's Way and Sand Point.

105. From 1954 to 1976, William Junker stayed with his family at his grandparent's house near Sand Point at Goose Rocks Beach, and they also recreated all over Goose Rocks Beach, especially in the vicinity of Jeffery's Way and Sand Point. According to Mr. Junker, Goose Rocks Beach is "part of the fabric of my being."

106. Mr. Whitehead and Mr. Junker, as well as a number of other witnesses, testified at trial about the "massive softball games" in the vicinity of Sand Point and Jeffery's Way, and they also observed members of the public recreating all over Goose Rocks Beach, including in the vicinity of Jeffery's Way and Sand Point.

107. Mr. Whitehead and Mr. Junker never asked for permission to use Goose Rocks Beach, and no one ever objected to their use of the beach.

108. Carl Schmaltz testified at trial that asking for permission to use the beach is like “asking for permission to breathe.”

109. Joanne Gustin and William Joel are both beachfront owners who own or have owned, individually or with their family, beachfront property at 233 and 235 Kings Highway in the middle of Goose Rocks Beach between Dinghy/Gardiner Point and Dyke Road for over fifty years, and they each testified at trial that the public has been recreating on the beach between Dinghy/Gardiner Point and Dyke Road as long as they have lived at Goose Rocks Beach.

110. According to Mrs. Gustin and Mr. Joel, no one ever asked for permission to use Goose Rocks Beach, and no one ever objected to the use of the beach by the public.

111. Mrs. Gustin specifically testified at trial that, as a beachfront owner, she “doesn’t have greater rights, just a shorter walk.”

112. When asked whether the beach adjacent to his home was his own private beach, Mr. Joel asserted “[t]hat was unthinkable.”

113. Edmund Case has been visiting Goose Rocks Beach since 1971, and he has owned or rented beachfront and back lot properties, particularly in the vicinity of Norwood Lane, since the 1979. He currently owns beachfront property at 123A Kings Highway between Norwood Lane and Dyke Road, and he testified that people “have the right to use the beach in front of the Case property. They are not restricted in any way.”

114. Richard Johnson testified at trial that he has been coming to Goose Rocks Beach since the 1950s and his family generally rented on the western part of the beach near Norwood Lane where they did “everything imaginable” on the beach. **See Town Exh. 177.**

115. Mr. Johnson also recalled softball games down by the Batson's River in front the Almeders' property at low tide "where kids came from all areas...It included people from outside Goose Rocks Beach. We used to play a team from Kennebunk on the beach."

116. Mr. Johnson also discussed his family cookouts and lobster bakes at Goose Rocks Beach, including one where "65 or 70 people came....There were a lot of beachfront owners and families. Also people from town outside Goose Rocks Beach."

117. Historic photos and brochures, and the testimony of numerous witnesses at trial, including Wayne Fessenden and Alex Lachiatto, demonstrate that the members of the public have been using Goose Rocks Beach in the vicinity of Dinghy Point/Gardiner Point (to the west of the Tides Inn) since at least 1947 to store dinghies to access their boats moored off of Goose Rocks Beach. **Town Exh. 136, 152, 158, 177; TMF Exh. 335.**

118. The dinghies, as well as other types of boats, were stored in the dry sand in the vicinity of Dinghy Point/Gardiner Point. **See also Town Exh. 136, 152, 158, 177; TMF Exh. 335.**

119. Historic photos and brochures, and the testimony of numerous witnesses, including Stuart Flavin, William Joel, Richard Johnson, William Junker, Walter Wiewel, Plaintiffs Robert Scribner, Matthew Sotir, Lawrence Vandervoorn and Beth Zagoren, and Party-in-interest Susan Lewis also demonstrate that there was a lifeguard employed the Town at Goose Rocks Beach, as well as a life guard chair, boat and other equipment, beginning in 1947 and continuing until 1992 with the exception of 1948-49, the first summer after the fire at Goose Rocks Beach. **Town Exh. 177, 180 and 264; Plaintiffs Exh. 19.**

120. Although most witnesses agree that the lifeguard chair and boat were generally located in the vicinity of the Tides Inn, several witnesses testified that it moved around from year to year between the Tides Inn and Proctor Avenue to the east.

121. Photos from the 1950s depict a lifeguard chair and boat at Goose Rocks Beach in the vicinity Edgewood Avenue and Old Proctor Way, and life stations – structures installed by the Town with ring buoys – located both on the west end of the beach and at east end of the beach by Jefferys Way, and Stuart Flavin, William Joel, Richard Johnson, William Junker all testified that they specifically remember the Town’s life stations along the length of Goose Rocks Beach with the ring buoys. **Town Exh. 177, 180 and 264; Plaintiffs Exh. 19.**

122. Mr. Joel testified that when he was the Town lifeguard in the summers of 1952 and 1953, there were approximately 6 lifeguard stations placed on the beach at quarter mile intervals, including one at each end by the rivers.

123. The Court also heard testimony from many witnesses at trial, including Stuart Flavin, William Joel, William Junker, Plaintiffs Robert Scribner and Lawrence Vandervoorn, and Party-in-interest Susan Lewis that they had observed lifeguards employed by the Town patrolling Goose Rocks Beach from the 1950s to the 1980s.

124. Town records show public expenditures for lifeguards, lifeguard supplies, including the chairs, wetsuits, life preservers, a boat, and a surfboard, and repairs to the equipment from 1947 to 1992. **Town Exh. 59u-59nnn.**

125. The Town employed William Joel as a lifeguard at Goose Rocks Beach in 1952 and 1953, and he testified at trial that the patrolled the beach “river to river” twice a day when he was not giving swimming lessons. **Town Exh. 59z-59aa.**

126. According to Mr. Joel, his lifeguard territory extended east to west from river to river along the entire length of Goose Rocks Beach, and his duties included checking the ring buoys at the life stations when he patrolled the beach.

127. As the lifeguard at Goose Rocks Beach, Mr. Joel testified that he made two rescues, including the rescue of police from Biddeford Pool after his search for someone missing in the fog off of the west end of Goose Rocks Beach (and area known today as “Western Goose Rocks”), and a rescue to the west of Dinghy Point (and the location of the life guard chair).

128. Both of these rescues were located well west of the lifeguard stand and rescue boat in the so-called “public section” or “open area” of Goose Rocks Beach.

129. The Town employed Stuart Flavin as a lifeguard at Goose Rocks Beach from 1957 to 1960, and he also testified that he patrolled the beach “river to river.” **Town Exh. 59ee-59hh.**

130. As the lifeguard at Goose Rocks Beach, Mr. Flavin made a rescue by Timber Island off of Sand Point on the eastern end of Goose Rocks Beach.

131. In 1993, the Town made the decision to replace the lifeguard with a beach patrol officer who patrolled at Goose Rocks Beach. **Town Exh. 59ooo (Art. 35).**

132. The Police Department Report in the Town’s Annual Report in 1994 specifically describes “a new program at Goose Rocks Beach . . . The 1994 summer saw the position of a Beach Patrol Officer established at Goose Rocks Beach. This position took the place of the lifeguard position. As with most new programs, there are rough spots that need attention. Summer Officer Robert Hunt was the officer at the beach and deserves the credit for making the first season successful.” **Town Exh. 59ppp at p. 85.**

133. Historic photos, and the testimony of Wayne Fessenden and other witnesses, establish that Wayne's mother, Viv Fessenden, gave swimming lessons throughout the 1960s and 1970s to many people, including members of the public, at Goose Rocks Beach in the area to the west of Dinghy Point/Gardiner Point. **Town Exh. 262.**

134. A raft was moored just to the west of Dinghy Point that was used by Mrs. Fessenden for the lessons, and according to Wayne Fessenden, the parents of children taking lessons, including some members of the public, would watch the swimming lessons on the beach to the west of Dinghy Point in front of the Gardiner's cottage, which is now owned by the Sandifers.

135. Historic photos and brochures introduced at trial, along with the testimony of Barbara Barwise, Wayne Fessenden, Joan Junker, Mary Davis and others, demonstrate that, even after the 1947 fire, there were still more businesses, including stores, hotels and campgrounds, located in the vicinity of Goose Rocks Beach, open to the public and facilitating public use of Goose Rocks Beach than there are today. **Town Exh. 133a and 158.**

136. This fact above, coupled with the brochures and advertisements of such commercial properties promoting the entire "2-mile stretch" of Goose Rocks Beach as a popular tourist destination for members of the public, demonstrate that a substantial number of people, including members of the public, came to Goose Rocks Beach during this period of time to enjoy recreational activities on the beach while benefiting from the commercial infrastructure that had been rebuilt after the 1947 fire and had developed over time.

137. There were a number of stores, hotels and campgrounds that were still operating in the vicinity of Goose Rocks Beach after the 1947 fire, but which are no longer operating today, including but not limited to the following: Anchorage Bed & Breakfast, Beachwood

Motel, Butts on the Rocks, Bye-the-Sea Apartments, Byram Gift Shop, Chip's Place, Cummings-Reando Cottages, Davis Cabins, Dever's Cottages, Goose Ledge Cottages, Goose Rocks Beach Club & Motor Court, Goose Rocks Beach Motor Inn, Helmut's Beauty Salon, Margaret McGrath's Art Gallery, Norwood Cottages, Ocean Point Cottages, The Pebble, Verrier's Cottages, Verrier's General Store and Beauty Salon. **Town Exh. 133a.**

138. The locations of the historic businesses are depicted in a report created by Barbara Barwise, entitled "Goose Rocks Beach – Commercial Properties." **Town Exh. 133a.**

139. A brochure for the Norwood Cottages, which was located on the west end of Goose Rocks Beach, advertises that the Norwood Cottages are "located in a pine grove with salt water practically surrounding them. A river on one side, where boats are available, and a three-minute walk to a beautiful beach of soft white sand where the receding tide leaves several square miles of hard-paved sand, making possible a natural playground for golf practice, tennis, kite flying, etc." **Town Exh. 133a and 158.**

140. After the 1947 fire, the Town of Kennebunkport also continued to invest public funds for publicity relating to Goose Rocks Beach, and Town records document the Town's yearly expenditures on publicity until 1969. **Town Exh. 59u-59qq.**

141. Town records also show annual public expenditures on clearing or cleaning the beach for each year between 1948 and 1974, including burning and clearing sea grass, removing trash and rubbish, clearing dead seals and whales, and addressing the residue of an oil spill that occurred in the 1970s, **Town Exh. 59v-59vv**, and the Town has placed and expended public resources to maintain and collect trash barrels at Goose Rocks Beach since the 1950s. **Town Exh. 59w-59rrr.**

142. Barbara Barwise testified that the expenditures for trash removal at Goose Rocks Beach during this time was for removal of trash in connection with the use of the beach itself rather than trash removal from individual homes located in the Goose Rocks Zone, which was not a town service provided to Goose Rocks residents at that time.

143. The 1972 Annual Report's Report of the Selectmen specifically highlighted the efforts of the Town to clean up the beach following an oil spill, stating the "Town's three-man highway crew under Ernest Leach, Commissioner, worked 'flat out' for a weekend to rake and pick up the beach, and shorefront. Additional cleanup was necessary during the following week. The Goose Rocks Association provided more than 100 willing people to augment the Cannon Engineering cleanup crew. The Town received \$1,500.00 from Cannon Engineering for rental of our equipment." **Town Exh. 59tt at p. 8-9.**

144. Several witnesses, including Stuart Flavin, Wayne Fessenden and Plaintiff Robert Scribner, recalled the Town's efforts to clean Goose Rocks Beach, and burn the sea grass, over the years.

145. Town records also show that the Town invested substantial public monies in other health and safety measures at Goose Rocks Beach, including treating the beach for green head flies and mosquitoes in the 1950s, 1960s and 1970s. **Town Exh. 59ee-59rr and 61f (Art. 65).**

146. The Town continued to regulate public parking at Goose Rocks Beach after the 1947 fire, and at a Town Meeting on March 5, 1956, enacted a parking regulation providing that, "[d]uring the months of June, July, August, and September it shall be unlawful for any person to park a motor vehicle: 1. On the northwesterly or land side of the King's Highway, or Town Road, located between the new Biddeford Road and Bartlett Avenue at Goose Rocks Beach. 12. On a space fifty feet long on the Southeasterly or ocean side of above road opposite the ends of

Edgewood Avenue, Proctor Avenue, and Belvedere Avenue,” and providing for a fine for violations of the new parking regulations. **Town Exh. 61e (Art. 59) and 64.**

D. Public Use of Goose Rocks Beach from the Mid 1970s and the Mid 1990s

147. Beginning in 1974, the Town, KCT and certain beachfront property owners who owned beachfront lots at Goose Rocks Beach that were no longer buildable began discussing the conveyance of these beachfront lots to the KCT for tax reasons. **Plaintiffs Exh. 15.**

148. The historic evidence introduced by the Town at trial, and the testimony of numerous witnesses, demonstrates that the public had been using Goose Rocks Beach for over 300 years by the time any beachfront property was transferred to KCT in 1981, and the public had been using Goose Rocks Beach for recreational purposes for at least 100 years.

149. After the KCT began acquiring beachfront property in 1981, the evidence introduced by the Town and the testimony of numerous witnesses at trial demonstrate that the public continued to use all of Goose Rocks Beach for recreational purposes. **Plaintiffs Exh. 16.**

150. The testimony of witnesses at trial and numerous old family photos depict crowds of people, including the general public, using all of Goose Rocks Beach from river to river, including both the dry sand and intertidal zone, for recreational purposes, including but not limited to walking, horseback riding, sunbathing, picnicking, building sandcastles, collecting seashells, playing in tide pools, kite flying, swimming, waterskiing, snorkeling, boogie boarding, rafting, boating, playing volleyball, whiffleball, football, fishing, cookouts, bonfires, and other general recreational activities. **Town Exh. 152, 175 and 177; TMF Exh. 310, 316, 318, 330, 335 and 349.**

151. Although many beachfront owners, including plaintiffs and parties-in-interest, frequently recreate with their friends at Goose Rocks Beach, all of the plaintiffs and parties-in-interest who testified at trial acknowledged that there were people recreating at Goose Rocks Beach who they did not recognize.'

152. Many other witnesses, including witnesses for both TMF Defendants and the Town, testified that they recreated all over Goose Rocks Beach, observed others doing the same, including members of the public, and did not distinguish whether they were recreating by the house of a beachfront owner with whom they were friends.

153. Paul Hogan testified at trial that he started coming to Goose Rocks Beach as a member of the public in 1980 (when he rented hotel rooms in town), and he and his wife would drive to Goose Rocks Beach, park on the west end of Kings Highway and access the beach over the dunes from Kings Highway.

154. A photograph of then-President George H.W. Bush, perhaps the Town's most famous resident, was photographed walking Goose Rocks Beach as a member of the public, and the photo was published in the *Chicago Tribune* on February 20, 1990. **Town Exh. 178.**

155. The Town's 1982 Comprehensive Plan confirms that there was a lifeguard at Goose Rocks Beach at that time. **Plaintiffs' Exh. 1 at p. 9.**

156. A 1975 Town Annual Report contains a "Report of the Recreation Commission" which references Town-sponsored trips to Goose Rocks Beach for local children, specifically stating that "[b]us service provided transportation to many youth throughout Kennebunkport, Cape Porpoise and Goose Rocks, and there was a staff of eight college students." **Town Exh. 59ww at p. 24.**

157. On September 21, 1978, the Selectmen's meeting minutes of the Town include a review by the Selectmen of "rights-of ways at GRB" to discern whether "they are adequate to get the vehicle needed for rescue purposes down onto the Beach. The only one that needs to have rocks removed is the one by John Dever's and this will be taken care of in the near future."

Town Exh. 65b at p. 4.

158. According to the testimony of Joan Junker and Town Manager, Larry Mead, the Town became embroiled in litigation in the late 1980s and early 1990s when some Goose Rocks Beach property owners declared that "Jeffery's Way" was a private right of way, which they called "Sandy Lane," but the York County Superior Court determined that Jeffery's Way was, in fact, a public access way providing public access to Goose Rocks Beach.

159. On December 5, 1989, in the case of *Town of Kennebunkport v. Goose Rocks Beach Association*, Docket No. CV-89-56, the York County Superior Court specifically ruled that Jeffery's Way "is a town way; that the Town has the exclusive right to police and maintain it for the benefit and use of the inhabitants of the Town for all purposes consistent with its status as a town way." **December 5, 1989 Order at 2.**²

160. The Town also continued to regulate public parking at Goose Rocks Beach between 1974 and 1994, and passed a new parking regulation at the Annual Town Meeting on March 10, 1979 "to allow parking at the Goose Rocks Beach area of Kennebunkport by Sticker Permits only." **Town Exh. 61g and 64.**

161. The "Parking Policy for Goose Rocks Beach" subsequently adopted by the Selectmen on May 10, 1979 reflects the Town's careful consideration of the parking issue at Goose Rocks Beach, including an observation that "the greater part of the parking problems and

² The Court stated at trial that it was taking judicial notice of the case of *Town of Kennebunkport v. Goose Rocks Beach Association*, Docket No. CV-89-56, and so the Town did not introduce a copy of the December 5, 1989 Order as an exhibit in this case.

fire safety concerns exits on the east end of Goose Rocks Beach,” although the parking policy was not exclusive to the east end of Goose Rocks Beach. **Town Exh. 64.**

162. A month later, on June 14, 1979, the Town issued regulations implementing the Goose Rocks Beach Parking Stickers, noting that the goals of the program were to “promote public safety and the social and aesthetic well-being of the residents and guests of the Town of Kennebunkport . . .” **Town Exh. 64.**

163. Further regulations by the Town on May 20, 1985 reflect new policies regarding the cost of parking stickers for different groups, including Kennebunkport residents and taxpayers, hotel and inn owners, and non-residents. **Town Exh. 64.**

164. The Town’s parking regulations do not distinguish beachfront owners or Goose Rocks Zone residents from Kennebunkport residents generally. **Town Exh. 64.**

165. In addition to the Town’s regulation of parking at Goose Rocks Beach, Town records demonstrate that the Town has been regulating dog use on Goose Rocks Beach since at least 1976. **Town Exh. 64.**

166. On June 9, 1976, the Town adopted a Dog Ordinance prohibiting dogs on “any beach in the Town of Kennebunkport,” including Goose Rocks Beach, between the hours of 8:00 A.M. and 6:00 P.M. from June 15th through September 15th. **Town Exh. 64.**

167. Minutes from the November 10, 1983 Selectmen’s meeting document that “[b]each signs have been ordered. Tad moved Carl seconded to erect three signs at Goose Rocks Beach stating that dogs are not allowed on beach and also shall always be on a leash.” **Town Exh. 65c.**

168. The Dog Ordinance remains in existence to this day, and testimony of numerous witnesses at trial demonstrated that there are signs relating to the Ordinance posted at public and private access ways all along Goose Rocks Beach.

169. Plaintiffs Christopher Asplundh, Peter Gray, Linda Rice and Lawrence Vandervoorn, Parties-in-interest Susan Lewis and Mary Lou Emmons, as well as Joseph Bruni, the Town's former Police Chief, all acknowledged at trial that the Town post signs and enforces the Dog Ordinance on Goose Rocks Beach.

E. Public Use of Goose Rocks Beach since the Mid 1990s

170. Around 1994, the Town replaced the lifeguard at Goose Rocks Beach with a beach patrol officer, and police continue to patrol on Goose Rocks Beach by bicycle and by foot to this day. **Town Exh. 59000 and 59ppp.**

171. Numerous witnesses, including Plaintiffs William Forrest, Robert Scribner, Lawrence Vandervoorn, as well as Chief Bruni, confirmed that they had observed the Town's police patrolling Goose Rocks Beach by foot and on bicycles.

172. Chief Bruni testified that he was not aware of any other "private property" in the Town where there is a police patrol.

173. In 2005, following a complaint by Barbara Rencurrel, the Town adopted a written policy to address complaints by beachfront owners about public use of Goose Rocks Beach, which policy provides that the "Kennebunkport Police Department shall not make arrests for trespass upon private land when members of the public make reasonable public use of Goose Rocks Beach." **Plaintiffs' Exh. 87A and 163.**

174. According to Chief Bruni, the public was recreating on the entire length of Goose Rocks Beach while he was on the Town's police force from 1980 until the incident in 2005, and there were very few problems with public recreation at Goose Rocks Beach.

175. Prior to the incident in 2005, there had been about a dozen complaints by beachfront owners concerning public recreation at Goose Rocks Beach, and most of the complaints had been made by Barbara Rencurrel.

176. According to Chief Bruni, the Town's unwritten policy prior to 2005 had been to try to avoid problems at Goose Rocks Beach, and that unwritten policy continued after 2005.

177. On August 21, 2000, the Town adopted a bonfire policy requiring that anyone seeking a permit must obtain a beachfront owner's permission for a bonfire in front of the beachfront owner's home. **Plaintiffs Exh. 95.**

178. Previously, the Town had not required permission, but specifically notified anyone seeking a bonfire permit anywhere on the beach that "GOOSE ROCKS BEACH IS A PUBLIC PLACE," and so alcohol consumption is prohibited there. **Town Exh. 250.**

179. Most of the witnesses who testified at trial believe that Goose Rocks Beach is used by the public today in the same way that it always has been.

180. Plaintiffs Michael Sandifer and Beth Zagoren, and Christopher Rodden recalled public weddings at Goose Rocks Beach.

181. Plaintiff Michael Sandifer recalled weddings in 2004 and 2005 with as many as 200 people on the beach in front of his property to the west of Dinghy Point where he did not know they wedding parties or guests. They did not seek permission from him or his beachfront neighbors to use Goose Rocks Beach, and he did not object.

182. Plaintiff Beth Zagoren testified about a wedding involving who people she did not know in the vicinity of her house and Dyke Road at Goose Rocks Beach that “happened out of nowhere” in 2008.

183. Plaintiffs Lawrence Vandervoorn, Parties-in-interest Linda Eaton and Marie Henriksen, Robert Pearce, William Joel and Joan Junker, as well as other witnesses, believe that the use of Goose Rocks Beach has gradually increased over time up to the time the lawsuit was filed against the Town in 2009.

184. William Junker testified that “the uses people are doing on the beach are the same but it is busier today than it was in the [19]60s. The increase has been gradual over time.”

185. Part of the increase in use, according to many witnesses, including Plaintiffs Robert Scribner and Meredith Gardner, is due to the change in historic rental patterns at Goose Rocks Beach from long term rentals to weekly and bi-weekly rentals.

186. A number of witnesses also explained that many of the older cottages at Goose Rocks Beach had been replaced in recent years by new, much larger, houses that could accommodate a larger number of people.

187. According to the Town manager, Larry Mead, there are currently 173 public parking spaces located in the vicinity of Goose Rocks Beach, and the number of public parking spaces has remained more or less the same since the Town began requiring that the public parking permits at Goose Rocks Beach in 1979.

188. The Town manager and several other witnesses at trial, including William Junker, Plaintiff Deborah Kinney and Party-in-interest Marie Henriksen, observed that, since the lawsuit was filed by Plaintiffs, several parking spaces in the vicinity of the intersection of Dykes Road and Kings Highway have been eliminated in recent years.

189. Designated public parking spaces are located all along Kings Highway – from New Biddeford Road on the east end of Goose Rocks Beach to the Batson’s River on the west end – with some public parking also available on Dyke Road and New Biddeford Road (and two handicapped parking spaces at Jeffery’s Way.

190. In 2004, the Town’s Annual Report includes a report of the Parks & Recreation Department discussing the installation of “an accessible boardwalk at Goose Rocks Beach” to be put in place each year between May and October. **Town Exh. 59qqq.**

191. On August 22, 2002, the Town’s selectmen “approve the location of a handicap accessible beach ramp” at Goose Rocks Beach and determined that it should be placed at Edgewood Avenue after considering nine distinct possible sites for the ramp along Goose Rocks Beach. **Town Exh. 65d.**

192. Beginning in 2005, the Town began monitoring water quality at Goose Rocks Beach, and at the July 28, 2005 Selectmen’s meeting, the Town Manager’s “thanked all employees and volunteers for their work pertaining to water quality at Goose Rocks Beach. He explained they will continue to test daily. He said that they added two more beach warning signs, and we now have a total of 11 signs up.” **Town Exh. 65e.**

193. In 2006, the Town voted to spend \$30,000 for water quality testing, the bird protection program and the beach profiling program, and the Town’s Annual Report details the Town’s efforts, noting that “[w]ork continued during the past year on water quality monitoring efforts at Goose Rocks Beach. Voters approved funding for an extensive study of potential sources of bacterial infiltration throughout portions of the watershed.” **Town Exh. 59rrr and 61i.**

194. Maria Junker testified at trial that she has been working for Beachwood Realty and renting properties at Goose Rocks Beach for over 25 years, including beachfront and back lot properties owned by a number of plaintiffs – specifically, the Almeders, the Celis, the O’Connors and the Sotirs.

195. According to Mrs. Junker, beachfront and back lot properties at Goose Rocks Beach are advertised and marketed by her and other rental agents as having the benefit of all of Goose Rocks Beach – river to river.

196. Prospective renters are not told by Mrs. Junker or other rental agencies that there are public and private areas of Goose Rocks Beach.

197. The Almeders and Sotirs have never asked Mrs. Junker to instruct any of their renters, including the renters of non-beachfront property owned by the Almeders and Sotirs, that there are public and private areas of Goose Rocks Beach.

198. None of the plaintiffs who rent their properties instructed tenants that they could object to members of the public recreating on Goose Rocks Beach, or ask such members of the public to leave the beach adjacent to the rental property.

199. In recent years, Barbara Rencurrel and a few of the plaintiffs, including Michael Sandifer, Robert Scribner, Matthew Sotir, Lawrence Vandervoorn and Beth Zagoren, have posted “No trespassing” and “private property” signs on the beach, but such signs have generally been located by plaintiffs adjacent to the seawall or vegetation line separating the beach from their upland property, or on the stairs or access path to the beach.

200. In 2008, Plaintiff Janice Fleming posted a sign that stated “Reserved access. Private beach. No public access.” **Plaintiff Exh. 49.**

201. The Town of Kennebunkport wrote to Ms. Fleming on October 31, 2008 to communicate that the “Town believes that this attempt to restrict access to and use of the Beach is contrary to the traditional and long-established patterns of open public recreational use of Goose Rocks Beach that have existed without interruption for generations of residents and visitors. Extensive areas of Goose Rocks Beach have been used by the general public without explicit permission from property owners and without restriction continuously for much of the past 100 years.” **Plaintiff Exh. 49.**

CONCLUSIONS OF LAW

I. PRESCRIPTIVE EASEMENT

1. An organized governmental entity, such as the Town, has standing to assert a prescriptive easement on behalf of the public, but it is the public-at-large, through public use, that acquires the prescriptive easement. *Town of Manchester v. Augusta Country Club*, 477 A.2d 1124, 1128-29 and n. 6, (Me. 1984); *see also Lyons v. Baptist Sch. of Christian Training*, 2002 ME 137, ¶ 22 n. 5, 804 A.2d 364, 371, n. 5.

2. “The doctrine that the public-at-large is capable of acquiring a non-possessory interest in land has long been accepted in Maine.” *Town of Manchester*, 477 A.2d at 1128.

3. “The party claiming a prescriptive easement has the burden at trial of proving by a preponderance of the evidence each of the following elements: (1) continuous use for at least twenty years; (2) under a claim of right adverse to the owner; (3) with the owner's knowledge and acquiescence, or with a use so open, notorious, visible, and uninterrupted that knowledge and acquiescence will be presumed.” *Androkites v. White*, 2010 ME 133, ¶ 14, 10 A.3d 677, 681; *Lyons*, 2002 ME 137, ¶ 15, 804 A.2d at 369; *Stickney v. City of Saco*, 2001 ME 69, ¶¶ 16, 18-23, 770 A.2d 592, 601; *Eaton v. Town of Wells*, 2000 ME 176, ¶ 32, 760 A.2d 232, 244.

4. “The test of a public use is not the frequency of the use, or the number using the way, but its use by people who are not separable from the public generally.” *Eaton*, 2000 ME 176, ¶ 32, 760 A.2d at 244. “‘Continuous’ means ‘occurring without interruption.’ 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*, 2001 ME 69, ¶ 18, 770 A.2d at 601.

5. The Town has proven in this case by a preponderance of the evidence that people who are not separable from the public generally, including people that live outside the Goose Rocks Zone, people who live inside the Goose Rocks Zone, and beachfront owners who used the beach other than immediately adjacent to their own property, have continuously used and enjoyed Goose Rocks Beach, dry sand and intertidal zone, from river to river for recreational purposes for over 100 years in the same manner and degree that the average owner of beachfront property at Goose Rocks Beach has made of that property during that period.

6. The numerous photographs depicting heavy use of the beach are corroborative of other evidence that the beach has been used by members of the general public, including those that live outside the Goose Rocks Zone, inside the Goose Rocks Zone, and on portions of Goose Rocks Beach itself. *Daley v. Town of Swampscott*, 11 Mass. App. Ct. 822, 827, 421 N.E.2d 78, 82 (1981) (“Although there is no way of ascertaining from the pictorial evidence whether those using the beach are members of the general public in Swampscott or guests or employees of the New Ocean House, it is, however, corroborative of the other evidence that this beach has been open to others than those claiming under the abutters for a good part of this century.”)

7. Use under a claim of right adverse to the owner occurs “when a party ... has received no permission from the owner of the soil, and uses the way as the owner would use it, disregarding the owner's claims entirely, using it as though he owned the property himself.”

Stickney, 2001 ME 69, ¶ 21, 770 A.2d at 602; *see also Lyons*, 2002 ME 137, ¶ 17, 804 A.2d at 369-70. “[W]hether discussing prescriptive easements or adverse possession, the element of ‘hostility’ or ‘adversity’ does not require a ‘heated controversy or a manifestation of ill will’ toward the owner.” *Androkites*, 2010 ME 133, ¶ 21, 10 A.3d at 684.

8. The Town has proven by a preponderance of the evidence in this case that people who are not separable from the public have used Goose Rocks Beach for recreational purposes without the permission of the beachfront owners as though the public had a right to use the beach for recreational purposes, regardless of any beachfront owner’s claim of ownership of the soil.

9. “Acquiescence implies passive assent or submission to the use, as distinguished from the granting of a license or permission given with the intention that the licensee's use may continue only as long as the owner continues to consent to it. Acquiescence is ‘consent by silence.’” *Stickney*, 2001 ME 69, ¶ 23, 770 A.2d at 602 (internal citations and quotations omitted); *see also Androkites*, 2010 ME 133, ¶ 15 n. 6, 10 A.3d at 681 n. 6; *see also Dartnell v. Bidwell*, 115 Me. 227, 230, 98 A. 743, 745 (1916) (“Acquiescence . . . does not mean license or permission in the active sense. It means passive assent, or submission . . . It is consent by silence.”).

10. The Town has proven by a preponderance of the evidence that beachfront owners at Goose Rocks Beach and their predecessors in title knew of the public use of the beach for recreational purposes and the Town’s use, maintenance, regulation and control of Goose Rocks Beach. Such actions undertaken by the public and the Town were so open, notorious, visible, and uninterrupted that knowledge and acquiescence will be presumed for those beachfront owners and/or their predecessors in title for whom actual knowledge of such use was not proven. The public and the Town did not ask for, or receive, permission from the beachfront owners,

who consented by silence to the public use for recreational purposes and the Town's control and maintenance of the beach, the use, control and maintenance of the beach commenced and continued for a period of time in excess of 20 years without beachfront owners ever granting a license or permission to the Town and the public.

11. Furthermore, the testimony of some plaintiffs and parties-in-interest that they found use of the beach in front of their homes by members of the public to be objectionable, but never objected to such use at the time, further demonstrates that these plaintiffs and parties-in-interest acquiesced to reasonable recreational use of Goose Rocks Beach by members of the public, as well as the Town's use, maintenance, regulation and control. *Lyons*, 2002 ME 137, ¶ 28, 804 A.2d at 373 (no implied permission where there is "some indication of landowner dissatisfaction with some of the public uses").

12. Maine law is straight forward regarding the first and third elements of a prescriptive easement, specifically the elements of: (1) continuous public use for at least twenty years; and of (3) actual or presumed landowner knowledge and acquiescence. It is, however, more complicated in terms of what evidence is necessary to prove the second element, specifically "under a claim of right adverse to the owner," or whether the second element can be satisfied by a presumption arising out of the first and third elements. *See, e.g., Town of Manchester*, 477 A.2d at 1129-30 ("[E]asements in favor of the public, when asserted for recreational purposes over beaches and shorelands, evoke complex evidentiary considerations.") *citing generally* Note, *Coastal Recreation: Legal Methods for Securing Public Rights in the Seashore*, 33 Me.L.Rev. 69 (1981) (discussing evidentiary issues and presumptions regarding "claim of right adverse to the owner" in detail on pages 85-91); *Eaton*, 2000 ME 176, ¶¶ 32 and 40, 760 A.2d at 246; *Stickney*, 2001 ME 69, ¶ 11, 770 A.2d at 600; *Lyons*, 2002 ME 137, ¶¶ 17-

31 and 35-41, 804 A.2d at 374-77 (majority opinion and opinion of Calkins, J. dissenting) (discussing the presumption of adversity and the presumption of permission); *Dombkowski v. Ferland*, 2006 ME 24, ¶¶ 23 n. 6, 24, 893 A.2d 599; 605 (holding that the Maine Legislature has displaced portions of the common law, such that “the intent requirement [i.e., that the claimant have the specific intent to claim the land of another] for adverse possession claims is eliminated.”); *Androkites*, 2010 ME 133, ¶ 16 n. 7, 10 A.3d at 682 n. 7 (holding that in proving adverse use under a claim of right for a prescriptive easement “the prescriptive user's state of mind is no longer relevant in prescriptive easement claims,” even when applying a presumption of permissive use in the context of use by family members); *see also* Bruce A. McGlaufflin, *Some Confusing Things Happened on the Way to Modernizing Maine's Adverse Possession Law*, 25 Me. B.J. 38 (2010).

13. In 2002, the Law Court clarified that, in determining whether to apply a presumption of adversity or a presumption of permission regarding use “under claim of right adverse to the owner,” both the nature of the land and the nature of the use are important. *Lyons*, 2002 ME 137, ¶¶ 18 and 24, 804 A.2d at 372 (“application of [] a presumption [of adversity] to a public, prescriptive easement claim for recreational uses is inappropriate when that claim applies to open fields or woodlands and the ways traversing them” and “it is the public recreational uses of land, *not the nature of the land alone*, that triggers application of the rebuttable presumption of permissive use in public prescriptive easement cases”) (emphasis added).

14. Goose Rocks Beach is obviously not an open field or woodland, nor can it be characterized as “wild and uncultivated” or “of trifling value.”

15. The difficulty in reconciling the use of presumptions in beach cases has led at least one Superior Court Justice to conclude that “the *Bell I*, *Bell II*, and *Eaton*, decisions

displace any general rule regarding beaches as wild uncultivated lands and presumptions therein.” *Flaherty v. Muther*, CUMSC-CV-2008-98, at *25 n.16, (Crowley, J., Maine Super. Ct., Cum Cty., July 30, 2009). If so, Goose Rocks Beach would not be subject to any presumption of permissive use as outlined in *Lyons*.

16. Moreover, even where applicable, the “presumption of permissive use does not result in burden shifting. It leaves with the [Town] the burden of proving adversity through a claim of right hostile to the owner's interest, without benefit of any presumption of adversity arising from long term public recreational uses of the land.” *Lyons*, 2002 ME 137, ¶ 25, 804 A.2d at 372.

17. In *Lyons*, the Law Court stated that under Maine common law, when the presumption of permissive use negates the presumption of adversity, “proving the hostile claim of right element does require a showing that the use was: (1) without the express or implied permission of the owner; (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.” *Lyons*, 2002 ME 137, ¶ 26, 804 A.2d at 372.

18. The Law Court subsequently held, however, that the Maine Legislature overruled a portion of Maine’s common law by eliminating the need to prove the second *Lyons* element—the intent to displace or limit the owner’s rights to the land. *Androkites*, 2010 ME 133, ¶ 16 n. 7, 10 A.3d at 682 n. 7 (“the prescriptive user's state of mind is no longer relevant in prescriptive easement claims.”) citing *Dombkowski*, 2006 ME 24, ¶¶ 23 n. 6 and 24, 893 A.2d at 605 (“the intent requirement [i.e., that the claimant have the specific intent to claim the land of another] for adverse possession claims is eliminated” by act of the Legislature) (alterations in original).

19. After *Androkites* and *Dombkowski*, the test articulated in *Lyons* for affirmatively proving adversity under a claim of right when the presumption of permissive use negates the presumption of adversity has been modified, leaving two elements that the Town must prove by a preponderance of the evidence: that the public recreational use was (1) “without the express or implied permission of the owner;” and was (2) “undertaken in a manner that provided the owners with adequate notice that the owner's property rights are in jeopardy.” *Id.*

20. Because “consent by silence” is an element of affirmatively proving the third public prescriptive easement element of “knowledge and acquiescence,” such “consent by silence” cannot at the same time constitute “implied permission” so as to disprove the second public prescriptive easement element of “claim of right adverse to the owner.” *Stickney*, 2001 ME 69, ¶ 23, 770 A.2d at 602; *Lyons*, 2002 ME 137, ¶ 26, 804 A.2d at 372.

21. Furthermore, because the *Lyons* presumption of permissive public use merely operates to negate the usual presumption of adversity and create the need to prove use under a claim of right adverse to the owner, *Lyons*, 2002 ME 137, ¶¶ 25-26, 804 A.2d at 372, the *Lyons* presumption of permissive public use cannot simultaneously constitute the very “implied permission” that would defeat the proof of the element of “claim of right adverse to the owner,” that the presumption of permissive use operates to create.

22. Instead, “implied permission” is more than mere silence and must be implied by some direct or circumstantial evidence of some writing, statement, familial or fiduciary relationship between the parties. *See 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); *Northland Realty, LLC v. Crawford*, 2008 ME 92, ¶¶ 18-20, 953 A.2d 359, 365 (neighborliness and discussions of a right of first refusal insufficient to create “implied permission” of occupancy); *Wood v. Bell*, 2006 ME 98, ¶¶ 14-16, 902 A.2d 843, 849 (A writing discussing future sale of the property but not expressly granting permission of occupancy can support a judicial finding of implied permission of occupancy up until the point of the writing, but not does not mandate a jury finding of implied permission thereafter). *See also Reitsma v. Pascoag Reservoir & Dam, LLC*, 774 A.2d 826, 832 (R.I. 2001) (“no inference of permission from the lake owner could be drawn from the mere fact that it allowed the use to continue” where the use was public access of a state-built boat ramp on the lake owner’s property); *Garrett v. Gray*, 266 A.2d 21 (Md. 1970) (“Mere failure to protest is not permission but acquiescence. . . . Acquiescence is the inactive status of quiescence or unqualified submission to the hostile claim of another, and is not to be confused with permission” in the context of a public prescriptive easement).

23. The requirement of some direct or circumstantial evidence necessary to constitute implied permission beyond simply what a landowner testifies after the fact was permissive in his or her mind also makes sense from an evidentiary standpoint. *See Stickney*, 2001 ME 69, ¶ 23, 770 A.2d at 602; *Jacobs v. Boomer*, 267 A.2d 376, 378 (Me. 1970) (“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”); *Dartnell v. Bidwell*, 115 Me. 227, 93 A. 743 (1916); *see also Mavromoustakos v. Padussis*, 112 Md. App. 59, 71-72 (1996) (“Evidence of permissive use, however, cannot come from the owner’s testimony on the stand regarding what he or she thought of the use at the time. . . . [Otherwise, s]ilence would

never be properly interpreted as ‘acquiescence’ because the servient owner would always testify that he or she thought the use permissive at the time. This is certainly the wrong result.”).

24. There are no independent circumstances in this case that accompanied the silence of plaintiffs and parties-in-interest as they observed, and sometimes even silently objected, to members of the public using beach areas in front of their homes that would suggest that the public’s use of Goose Rocks Beach was permissive, and the fact that some, but not all, of the beach users were friends of beachfront owners is insufficient to constitute implied permission for all public use of Goose Rocks Beach. *Lyons*, 2002 ME 137, ¶ 28, 804 A.2d at 373 (no implied permission where there is “some indication of landowner dissatisfaction with some of the public uses”); *Hamlin*, 2008 ME 130, ¶¶ 12-14, 955 A.2d at 255 (familial relationship can give rise to “implied permission,” where mere neighborliness would be insufficient).

25. Importantly, the *Lyons* court cited to the cases of *Eaton* and *Stickney* as two examples of when use “under a claim of right adverse to the owner” is sufficiently proven because the use is “undertaken in a manner that provided the owners with adequate notice that the owner's property rights are in jeopardy,” specifically holding:

In *Eaton*, the Town of Wells was a party and was asserting a public easement. There was a century-long history of the Town maintaining, patrolling, and enforcing laws on the contested beach. There was also an extensive history of large public gatherings planned and conducted by the town and other groups unrelated to the landowners, and there was some indication of landowner dissatisfaction with some of the public uses. This evidence was sufficient in *Eaton* to give the owners notice that a public easement was being acquired and that their rights were in jeopardy. ...

Likewise, in *Stickney*, the city was a party asserting the public easement. There was a more than forty-year history of city maintenance and public use and, most importantly, the court made an explicit finding of actual, not presumed, adversity—a disregard of the owner's claims entirely.

Lyons, 2002 ME 137, ¶¶ 28-29, 804 A.2d at 373.

26. The evidence introduced at trial here demonstrates a long history of the Town's enforcement of laws and regulations on Goose Rocks Beach, such as the dog leash law and the horseback riding ordinance, and well over a half century of the Town's maintenance, control and improvement of the beach as described above, including lifeguards and beach officers patrolling the beach, rubbish removal and periodic beach clean-up, and the installation and maintenance of improvements intended specifically to accommodate use of the beach by members of the public, such as portable toilets, public parking spaces and public access ways. There was also historical evidence of some large public gatherings on the beach by groups unrelated to the beachfront owners, including but not limited to Town-sponsored bus service "to many youth throughout Kennebunkport, Cape Porpoise and Goose Rocks, [including] a staff of eight college students" for public use, weddings and similar gatherings that took place on the beach without permission by a beachfront owner, and swimming lessons, cookouts and softball games on the beach that included not only beachfront owners, but back lot owners and members of the public. The evidence further showed some indication of dissatisfaction from beachfront owners with some of the public uses of the beach as described above. The Court finds that this evidence supports a finding of actual, not presumed, adversity.

27. In *Flaherty v. Muther*, the Law Court held that, when an access easement extends to the high tide line and is subsequently used for recreational access to a beach without objection, a reasonable inference can be drawn that the purpose of the easement is "to create access to [the] Beach for recreational purposes." *Flaherty v. Muther*, 2011 ME 32, ¶57, 17 A.3d 640, 656. Likewise, it can reasonably be inferred that the purpose of the public and private access ways along Goose Rocks Beach is to provide recreational access to the beach generally, and that the

existence and use of such access ways provided additional notice to beachfront owners that a public easement was being acquired outside the access ways and on Goose Rocks Beach itself.

28. Statements in the Town's comprehensive plan do not undermine the claim that the public was using the Goose Rocks Beach under a claim of right adverse to the owner. In *Eaton*, the Law Court held that when a "Town's actions represented an acknowledgement that the [upland owners] are the owners of the beach, those actions did not mean that the public or the Town were asking permission to use the beach for recreational or maintenance purposes," and its actions do not negate a claim of right regarding "the use for recreational purposes and the use for maintaining the beach in terms of placing lifeguard stands, trash bins, etc." *Eaton*, 2000 ME 176, ¶ 40, 760 A.2d at 246. Accordingly, the Town's comprehensive plans and other records to portions of the Goose Rocks Beach being "private" or "privately owned" do not negate the public's claim of right regarding "the use for recreational purposes and the use for maintaining the beach in terms of placing lifeguard stands, trash bins, etc." at Goose Rocks Beach.

29. Furthermore, a comprehensive plan is not a legislative document and cannot "control the allowable uses of land [or] set the standards by which those uses are permitted" nor can it create or destroy rights or obligations of private citizens or members of the public (including Goose Rocks Beach users): a comprehensive plan merely imposes an obligation on the Town to enact a regulatory ordinance scheme that is in "basic harmony" with the comprehensive plan as a whole. *Nestle Waters N. Am., Inc. v. Town of Fryeburg*, 2009 ME 30, ¶¶ 22-24, 967 A.2d 702, 710. The Court finds that statements in the comprehensive plan cannot serve as an act "evinced a clear intention to abandon" public rights in the beach, nor can they provide notice regarding "the allowable uses of land" or "the standards by which those uses are

permitted.” The court further finds that the comprehensive plan cannot serve as notice of anything to anyone who did not actually read the comprehensive plan.

30. In this case, the actions by members of the public, for a century or more, to use the beach for recreational activities, combined with the Town’s longstanding actions to maintain, patrol and enforce laws on Goose Rocks Beach, collectively support a finding of actual, not presumed adversity. *Lyons*, 2002 ME 137, ¶¶ 28-29, 804 A.2d at 373.

31. A property interest created by prescription or adverse possession, including a prescriptive easement, vests immediately by operation of law upon completion of the statutory period, even if the judicial decree establishing such a right does not occur until much later. *Lewis v. Maine Coast Artists*, 2001 ME 75, ¶ 24, 770 A.2d 644, 652 citing *Colquhoun v. Webber*, 684 A.2d 405, 410 (Me.1996). *S.D. Warren Co.*, 1997 ME 161, ¶ 11, 697 A.2d at 1283 (holding that a prescriptive easement established prior to an act that could otherwise defeat the acquisition of the prescriptive easement does not retroactively eliminate the perfected easement). The evidence introduced at trial demonstrates that the Town and public had already acquired a prescriptive easement to Goose Rocks Beach for recreational use and for the maintenance, regulation and control of Goose Rocks Beach by at least the mid 1970s. Subsequent actions by the Town or the public neither abandoned, nor overburdened, this easement.

32. In order to prove abandonment of a public prescriptive easement, a party must prove by clear and convincing evidence “a history of nonuse coupled with an act or omission evincing a clear intention to abandon.” *Stickney*, 2001 ME 69, ¶¶ 50-52, 770 A.2d at 609. There was no “history of nonuse” of Goose Rocks Beach that could support a finding of abandonment of a public prescriptive easement for the beach.

33. Furthermore, “[i]n order to remain useful to the dominant estate it serves, a prescriptive right of way must encompass some flexibility of use, and adapt to natural and foreseeable developments in the use of the surrounding land. When presented with an alleged overburdening of a prescriptive easement, the factfinder must balance the prior use of the right of way established during the prescriptive period against any later changes in the method of use that unreasonably or unforeseeably interfere with the enjoyment of the servient estate by its current owner.” *Gutcheon v. Becton*, 585 A.2d 818, 822-23 (Me. 1991). The Court finds that the recent use of the beach is not so different from the historical public use of the beach as to constitute a change that unreasonably or unforeseeably interferes with the enjoyment of the servient estate by its current owner. *See also Bray v. Grindle*, 2002 ME 130, ¶¶ 13-20, 802 A.2d 1004, 1008-10, *Eaton*, 2000 ME 176, ¶¶ 41-42, 760 A.2d at 246-47.

II. CUSTOM

34. Maine courts and statutes have recognized the doctrine of acquisition of an easement by local custom, although no Maine Court has upheld an easement on that basis to date. *See, e.g., McGarvey v. Whittredge*, 2011 ME 97, ¶45, 28 A.3d 620, 633 (The [*Bell II*] court also concluded that the public had not acquired a common law easement for general recreational use and found insufficient evidence to establish a public easement by local custom to use the beach for recreational purposes); 14 M.R.S.A. § 812 (“If a person apprehends that a right-of-way or other easement in or over his land may be acquired by custom, use or otherwise by any person, class of persons or the public”)

35. “If the doctrine [of custom] were a viable one in the State of Maine, this case presents the facts appropriate to its adoption.” *Eaton v. Town of Wells*, RE-97-203, at *13-14

(Kravchuck, J., Me. Sup. Ct., York Cty, October 20, 1999)). The most detailed description of the doctrine of custom by a Maine court appears in the trial court decision *Bell v. Town of Wells*, in which the court notes:

The law of custom was part of English common law and was recognized in the Laws and Liberties of 1648, which, of course, contain the Colonial Ordinance. It was also recognized in the 1801 History of Land Titles by James Sullivan, attorney general of Massachusetts. It has also been implicitly recognized by the Maine Legislature in its posting statute *14 M.R.S.A. § 812, 812-A*. It has also been recognized in other jurisdictions. *Puffer v. City of Beverly*, *187 N.E.2d 840, 345 Mass. 396 (1963)*; *Knowles v. Dow*, *22 N.H. 387 (1851)*. Our Law Court has recognized the role of custom in shaping our State's general common law. *Conant v. Jordan*, [107 Me. 227, 77 A. 938 (1910)], and the Colonial Ordinance has become part of our common law. If an ancient common law doctrine like local custom is to be abrogated, it should be done by the Legislature or the Law Court, not by the Superior Court.

Neither the Law Court nor the Legislature has abrogated the doctrine of local custom. *Bell v. Town of Wells*, *557 A.2d 168, 179 (Me. 1989)* (“We affirm the judgments of the Superior Court, but we do not find it necessary to decide whether the court was correct in holding that under the common law of Maine the public may acquire by local custom an easement over privately owned land.”).

To prove a local custom, defendant Town of Wells must prove by a preponderance each of seven facts.

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.

Bell v. Town of Wells, 1987 Me. Super. LEXIS 256 ** 37-38 (Sept. 14, 1987) citing *State ex. rel.*

Thornton v. Hay, *254 Ore. 584, 462 P.2d 671 (Ore. 1969)* (paraphrasing 1 Blackstone,

Commentaries *75-*78); *See also McGarvey*, 2011 ME 97, ¶ 57, 28 A.3d at 636 (Saufley J. concurring) (Rejecting an artificially rigid interpretation of the elements of fishing fowling and navigation and instead, “as have the jurists before us, we would continue to strike a reasonable balance between private ownership of the intertidal lands and the public's use of those lands”).

36. The historical testimony and evidence introduced by the Town at trial in this case is uncontroverted and demonstrates that Goose Rocks Beach was used by the public for purposes of travel, seaweed harvesting, and driving animals from the early 1600s into the 20th Century, and for swimming, bathing and general recreation since at least 1870, which establishes public use of Goose Rocks Beach “so long as the memory of man runneth not to the contrary.”

37. The Court finds that public use was without interruption for as long as people lived on or near Goose Rocks Beach, and it has been peaceable and free from dispute for this period. Although there may have been a few instances of “disputed” activities on Goose Rocks Beach dating back to the 1970s, and immediately prior to this lawsuit, the majority of public use of Goose Rocks Beach has been peaceable and free from dispute since the 1600s.

38. The public’s use of Goose Rocks Beach has also been reasonable, including sitting, strolling, swimming, and surfing and other such incident and related activities, which are a reasonable balance of public access to the ocean with the private rights of the beachfront owners. *See also McGarvey*, 2011 ME 97, ¶ 57, 28 A.3d at 636 (Saufley J. concurring) (Rejecting an artificially rigid interpretation of the elements of fishing fowling and navigation and instead, “as have the jurists before us, we would continue to strike a reasonable balance between private ownership of the intertidal lands and the public's use of those lands”). The land impressed with the custom is Goose Rocks Beach between the Batson and Little Rivers, and from the Atlantic Ocean to the seawall or landscaped portion of the beachfront property.

39. “The sixth requirement is that a custom must be obligatory; that is, in the case at bar, not left to the option of each landowner whether or not he will recognize the public's right to go upon the dry-sand area for recreational purposes. The record shows that the dry-sand area in question has been used, as of right, uniformly with similarly situated lands elsewhere, and that the public's use has never been questioned by an upland owner so long as the public remained on the dry sand and refrained from trespassing upon the lands above the vegetation line.” *State ex rel. Thornton v. Hay*, 254 Or. 584, 597, 462 P.2d 671, 677 (1969). In this case, the customary use of Goose Rocks Beach did not vary from beachfront owner to beachfront owner, but instead was obligatory on all beachfront owners at Goose Rocks Beach. So for example, the testimony established that all beachfront users could walk and recreate from river to river in a similar manner on all portions of the beach without worry that an individual beachfront owner could arbitrarily block such a use.

40. Finally, the public’s recreational use of Goose Rocks Beach is not repugnant to other customs or laws, and there is no evidence that there has ever been a custom of excluding the public from Goose Rocks Beach.

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