

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

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROPOSED FINDINGS OF FACT

¹ Plaintiffs and David L. Eaton & Jennifer L. Scully-Eaton; Susan K. Lewis, Trustee of the Susan K. Lewis Residence Trust; Heather Vicenzi, Trustee of the George A. Vicenzi Trust; Mary L. Emmons, Trustee of the Emmons Family Realty Trust; Anne E. Clough; John A. Parker and Jeannette M. Parker; and Marie B. Henriksen, General Partner of Sea Rose Family Limited Partnership, parties in interest, will hereinafter be referred to as Plaintiffs.

filing an application for a wetlands alteration permit: “to protect dunes and deter storm tides from private property”).

Through the work of the Town, nine lots of beach were acquired for “perpetual public use”: eight lots of which are owned by the Kennebunkport Conservation Trust and one lot owned by the Town. That effort was instigated by the Town, began in 1974, and was not complete until the final conveyance in 1999. Plaintiffs’ Exs 15-16. These nine lots cover an area which has always been referred to as the “public beach.” Plaintiffs’ Ex 1-3. Plaintiffs own 36 lots which are dispersed from the west end of the beach to the east end. See Plaintiffs’ Demonstrative Exhibit.

Plaintiffs filed their Complaint on October 26, 2009, and the Town filed and served an answer and counterclaim on or about November 19, 2009. A group or class of back lot property owners from the Goose Rocks Beach Zone (“GRB Zone”) which consists of the area southward of Route 9 between the Batson River and Little River made several filings, the last of which was an answer and counterclaims. Defendants Richard J. Driver, Margarete K.M. Driver, Alexander M. Lachiatto and Judith A. Lachiatto appeared and filed counterclaims. While the court has called the TMF Group a class², their status as a class and their burden of proof to be applied remains a question.³ Also in this case is the State of Maine who was granted intervenor status over the objection of Plaintiffs to represent the broader general public.

² The individual claims of the TMF Group were denied after Plaintiffs filed a motion for summary judgment and the TMF Group, as individuals, failed to present sufficient evidence of any usage of each Plaintiff’s lot for the required 20 year period. Order at 19-20, 21-22 (Dec. 22, 2011). The court allowed them to continue as a class although it is unclear under Flaherty v. Muther, 2011 ME 32, 17 A.3d 640, whether they are or can be a class under these circumstances.

³ The court previously ruled that to the extent that Lachiatto and Driver defendants are part of the class defined as those owning property in the Goose Rocks Zone, they may continue to pursue the claim of prescriptive easement as members of a class of people. Order at p. 22 (Dec. 22, 2011). Lachiatto and Driver are hereinafter referred to as part of “TMF” or “TMF Class”.

Plaintiffs' title interests, which have been challenged by the Town, are to be determined in the second phase of this case. In order to proceed with the prescriptive easement claims of TMF and the Town, the Plaintiffs are presumed to have good title *de bene esse* with the issue to be tried in phase 2 of this litigation.

The Town and TMF have pressed for a uniform finding for all of Plaintiffs' properties as part of the whole beach and seek to be relieved of the burden of proving this case as to each Plaintiff's lot. They cannot do that. They must prove this case as to each Plaintiff's lot. Unlike Eaton, where there was one owner and one piece of land 2200 feet in length, here there are 36 Plaintiffs dispersed over two-plus miles of open beach. Clearly under Lyons v. Baptist School of Christian Training, 2002 ME 137, 804 A.2d 364, and Weeks v. Krysa, 2008 ME 120, 955 A.2d 234, the defendants' burden is to establish their claim as to each lot. For example, their evidence of use two miles down the beach near the Scribner's lot cannot be imputed to the Coughlin lot where no evidence of use by the public without interruption exists.

Proceeding down the beach from west to east the court will discuss the evidence as to each Plaintiff's property:

1. Coughlin is the P.M.C. Realty Trust (Plaintiffs' Ex 38), 115 Kings Highway (west end). The evidence through John Coughlin, Ellen Nixon, and others is that the west end of the beach was a small community of friends who socialized up on each other's beachfront properties. The Gregorys, Junkers, Nixons, Coughlins, Almeders and Celis were all friendly and would occasionally get together on one another's property. Ellen Nixon's testimony, far from showing adversity, confirmed in pictures (TMF Ex 327) and by testimony that all use of each other's property was not with adversity but with permission. Nor did Nixon even approach showing 20 years of adverse use on any one particular property. Occasional adverse use of a

property does not meet the standard. Mr. Coughlin testified that when he found objectionable use of his property by non-neighbors, he interrupted their use and asked people to leave. There was therefore insufficient evidence of uninterrupted adverse use and there was evidence of neighborly permissive use.

2. Almeder is the Almeder Living Trust (Plaintiffs' Ex 25), 113 Kings Highway (west end). Although Almeder did not testify, the documents in evidence show that he specifically gave written permission for Maine Audubon (Plaintiffs' Exs 28-30) and the Town (Plaintiffs' Ex 31) to use his property. The Almeders were friends with the Junkers and other west end folks, including the Coughlins and Nixons, and is shown socializing on their property with their friends (Ellen Nixon – TMF Ex 327). There was little other evidence of any public use of the Almeders' property and there was evidence of annual posting by the Almeders to protect their interests. (Plaintiffs' Ex 26). The evidence presented shows what use there was, was neighborly and permissive. Indeed Ellen Nixon's pictures (TMF 327) show her family adjacent to her right of way or on her friend's, the Gregorys, property and also shows the neighbors socializing with the Almeders on their property.

3. Celi is The Celi Kennebunkport Real Estate Trust No. 1 (Plaintiffs' Ex 34), 123 Kings Highway (west end). While Celi didn't testify, there was little to no evidence of any public use sufficient to raise a claim of prescriptive easement. One neighbor (Judy Jose-Roddy) tried to make use of his property, but it was clear that her use was of her aunt's property, now owned by Edmund Case, and through which she had a right of way. TMF Ex 244. She presently has a right of way between the two properties. TMF Ex 244. Ms. Jose-Roddy's pictures (TMF Ex 310) do not establish any continuous or adverse use of the Celi property. While she may have on occasion crossed over the Celi property, the use was intermittent and not adverse to Celi.

Further her pictures show her family mostly in front of her aunt's property next door and show the Celi property being deserted, hardly the evidence needed for a prescriptive easement. TMF Ex 310. The evidence in any case was not sufficient to establish 20 years of continuous adverse use.

4. Sotir is Goose Rocks Beach Holdings LLC (Plaintiffs' Ex 126), 149 Kings Highway (west end). This property is near a right of way where some back lot owners have access to the beach. There was little testimony as to any continuous use and only a few witnesses testified to occasional intermittent use. Matt Sotir, whose family has many properties, both back lot and beachfront, testified regarding their granting of permission and there was no testimony to contradict his. Matt Sotir testified about many of the five Sotir family properties, which include the family store. He testified that the family used several of their properties and rented others. Matt Sotir testified that generally they exercised their private property rights and people complied. He always understood that the beach was private and did not think that could change until served with the Town's claims. There was a combination here of permissive use and interruption of any claimed acquiescence.

5. Susan Flynn (Plaintiffs' Ex 52), 161 Kings Highway (west end). Flynn is four lots east of Norwood Lane. TMF witness Mary Kudaroski testified as to usage in the area, but the pictures (Plaintiffs' Ex 316) actually confirm she is near The Westerly, which used to belong to her family, and there is no evidence by photographs at least of the Flynn property. Flynn did not testify directly and there was no evidence of any use by the public or backlot owners. Testimony at best only suggests that there may have been occasional or intermittent use but not use sufficient to establish notice to the owner. There was a failure here to establish 20 years of use by anyone.

6. Wilson/Twombly is The Twombly Family Trust (Plaintiffs' Ex 134), 165 Kings Highway (west end). There was really no testimony regarding this property, some passing mention but nothing sufficient to even discuss. The testimony of Matt Sotir about use near where Norwood Lane residents sit on beach would confirm that while the Norwood Lane residents do sometimes spread out when the beach is crowded, they rarely go more than one or two lots away on either side of Norwood Lane. Ed Case testified he only had to spread out past one lot from Norwood Lane to find a quiet, private spot. Here again there was a failure to provide evidence of use of this particular property.

7. Jule Gerrish (Plaintiffs' Ex 58), 173 Kings Highway (west end). Jule Gerrish came to Goose Rocks Beach in 1962 when she married. She visited her brother-in-law Randolph Gerrish and his wife Barbara. They bought property in 1968 and built a house in 1984. In 1968 it was a quiet beach with no one there. This continued until after 2000. Her pictures confirm that there was no one there. Plaintiffs' Exs 59, 60, 61. She didn't mind when people occasionally used her beach. Her testimony, confirmed by Robert Gordon's pictures show him on one occasion in front of the Gerrish house in 1992 but the only other pictures that show the house is dated 1987 and was taken from the Norwood Lane are shows empty beach in front of the Gerrish residence. Ed Case also has one picture (TMF 284) of her home in the background with a vacant beach. A second picture shows her house but the young boy is not in front of it. The beach is otherwise empty and his other pictures confirmed Norwood Lane residents don't move too far from the right of way.

The limited use of this property was clearly with Ms. Gerrish's implied permission and not adverse. Additionally, the evidence shows only occasional use and not the type sufficient to put her on notice that her property rights were in jeopardy.

8. Gray is The Eugene R. Gray Qualified Personal Residence Trust (Plaintiffs' Ex 62), 183 Kings Highway (west end). Peter Gray testified that to the extent there was any public use of his family property he would take proper action to correct uses he objected to. He made clear he understood it was his family's property and that he did what was required to protect it. The use by any members of the public who were not his friends or family was extremely limited.

Peter Gray testified that his family has owned their property at 183 Kings Highway since 1959. There was rarely anyone but his family on the beach. He testified that a picture in 2005 shows a couple people which was unusual and not a typical day. Plaintiffs' Ex 69. He didn't mind a few people using his beach, especially some friends and neighbors who were not an issue, but TMF defendants or public rarely, if ever, were there. A 1978 incident and arrest of Mrs. Gray who was arrested for Peter having the family's dog on their beach without a leash (Plaintiffs' Ex 64) heightened his awareness of property rights and their ownership. The Town acknowledged they had no right to enforce the dog control ordinance against beachfront property owners using their own beach. Plaintiffs' Exs 63, 64. There is no record that the Town's position on enforcement of the dog ordinance has ever changed. What limited use there was of this property was clearly with the owner's permission. Ownership and control was not an issue for the Gray family until the 2005 Amy Tchao letter (part of Plaintiffs' Ex 92) raised some concern and then the 2008 letter to Jan Fleming (Plaintiffs' Ex 49) also raised that concern. At that time they appropriately sought to protect their private property rights.

9. Vandervoorn is The Cornelius J. Vandervoorn Qualified Personal Residence Trust (Plaintiffs' Ex 130), 177 Kings Highway (west end). The family has owned it since 1971. There is a right of way, path, and beach steps on western side of the property and neighbors have deeded access over the right of way. It is far from the public part of the beach. Occasionally if

someone camped out and interfered with his use he would ask them to move. He asked that a volleyball net be removed and the users complied. Like the Grays there was scant testimony of use and the owners clearly protected their property rights with any use being permissive.

10. Linda Rice and Anne Clough, 191 and 193 Kings Highway. Linda Rice owns 193 Kings Highway (Plaintiffs' Ex 118). Her aunt, Anne Clough, owns 191. The family has owned property since 1895. The area used to be desolate and quiet until mid-nineties. Ms. Rice doesn't mind people using her beach. Plaintiffs' Ex 118 depicting her husband playing golf shows how empty the beach was in mid-nineties. The use started to increase in the last 5-7 years, so now she puts out chairs and has asked people to fill in sandcastle holes. Clearly there was little or no use until the last five-seven years and any such use was permissive. No Town actions or the public have occurred that would be sufficient to put her on notice until recently.

11. O'Connor is Terrance G. O'Connor and Joan M. Leahey (Plaintiffs' Ex 114), 195 Kings Highway. He bought his property at 195 Kings Highway in 2003. While there has been some public or back lot use of his property, it was not too busy in the summer of 2003 because the house is 400 yards from Dyke Road right of way. His pictures confirm that there was hardly anyone near his beach, even into 2008. Plaintiffs' Ex 116. He has affirmed that he permitted public usage but was first alerted to public claims by the 2005 Amy Tchao letter (part of Plaintiffs' Ex 92). He researched his property rights and understood that he could permit people to use his property without fear of his rights to exclude them being diminished. He knew his property rights were in jeopardy when he saw the 2008 letter to Janice Fleming (Plaintiffs' Ex 49) and he acted appropriately. Prior to that time any use was with this owner's permission.

12. Goose Rocks Beach Holdings LLC (Plaintiffs' Ex 126), 201 and 207B Kings Highway. There was little testimony about these properties except through Matt Sotir. Any

public use of this property was not significant. In the next 10 years there was a large increase in use of these properties and increase in parking around Sotir area. The Sotirs own the general store where Dyke Road intersects with Kings Highway. The Sotirs have generally allowed public use of the property but when their (the Sotirs) use was interfered with they did ask persons to either leave or modify their use. Testimony of any public usage of any Sotir property has been spotty. What limited use there was has been with the owner's permission.

13. Beth Zagoren (Plaintiffs' Ex 135), 215 Kings Highway Rear. Ms. Zagoren's parents are the Gilpatrics who came to the beach before the fire of 1947. They rented 215 Kings Highway in 1957 and bought it in 1963. Facing the Atlantic Ocean, the house is on the right of the Dyke Road right of way. Through 1990 summer usage is as depicted in an aerial photograph (Plaintiffs' Ex 136) which was taken August 24, 1994 at noon. She testified that the beach was not that crowded even into 2006 (Plaintiffs' Ex 137, Nos. 7 and 10). In 2008 everything changed. Plaintiffs' Ex. 137, No. 12. When it changed, Zagoren used chairs to protect her space. She had no problem with the public until the dramatic increase in 2008. Ms. Zagoren allowed some public use until it got out of hand and when in 2008 it took on an adverse aspect due to the number of people, she interrupted that use and protected herself by putting out chairs and joining this lawsuit. Prior to 2008 she permitted limited public use.

14. John O. Gallant and Sharon A. Gallant (Plaintiffs' Ex 56), 219 Kings Highway (former Mitchell lot). The Gallants are the neighbor of Hastings. In 1992 when he purchased the property, the beach was quiet. Gallant remembers using his beach for whiffle and other ball games. He and his children had all the space they needed in front of their house. Gallant confirmed Mrs. Davis asked people to leave and he also did so if they interfered with his use of

his property. He had no problems using his beach without interference until recently. Mr. Gallant when his rights were at issue acted to protect them by joining this lawsuit.

15. Hastings is The Edwina D. Hastings Revocable Trust (Plaintiffs' Exs 71, 72), 221 Kings Highway. Mary Davis, Edwina Hastings' mother, came to the beach in late 1920. Mrs. Davis remembered mostly family and friends on the beach. Unidentified members of the public were asked to leave by her husband. Edwina Hastings continued over the years, after her father died, to advise people that the beach was private and continued to rake and clean the beach as her father had. Her pictures in 1992 confirm no one was there. Plaintiffs' Ex 73. They posted a private property sign when crowds increased after 2000. When there was an incident in 2002 involving kites, her husband called the police and they realized that their property rights might be in jeopardy. Plaintiffs' Ex 75. There simply is no evidence of public use on the property and to the extent there was any use, it was challenged.

16. Deborah J. Kinney (Plaintiffs Ex 96), 223 Kings Highway. She is neighbor to Hastings and LAJR Trust (Rencurrel). She didn't testify but given the testimony of Hastings and her neighbor Jennifer Eaton, they all took care of their property and permitted friends and neighbors to use it. There was no evidence of anyone else using the property other than testimony of friends of permissive use.

17. David L. Eaton and Jennifer L. Scully-Eaton (Plaintiffs' Ex 47), 225 Kings Highway. The Eatons are between the Fleming and Kinney properties. The Eatons purchased the property in 2004 although they had previously come to beach. They shared their property with friends and neighbors and did not see objectionable numbers of people on their property until it changed dramatically in the last few years. Jennifer Eaton testified that she does ask people to leave the beach. The Eatons were friends with many who used their beach, such as the

Merrills, Lessners, Fitzgeralds, Siderell, and Kings. The Eatons permitted most uses and objected to uses that interfered with their ownership rights. Jennifer Eaton testified that she let back lot owners use her beach to be a “good neighbor”.

18. Janice Fleming (Plaintiffs’ Ex 48), 227 Kings Highway. Janice and Jack are neighbors of the Eatons. They first rented in the early 1970s and purchased 227 Kings Highway in 2001. They have permitted neighbors to use their beach and objected to behavior they found unacceptable. Indeed they have given specific permission to neighbors such as Norman Merrill and have given written permission to back lot owners across the street. With the increase in the number of people, they posted a sign in 2008 on their land in the private right of way facing the road saying “Private Beach No Public Access”, but before doing that they notified all their neighbors in writing that the neighbors could continue to use their beach. Plaintiffs’ Ex 51. There was no evidence from other witnesses of continuing adverse use as all use was either with friends and neighbors or with permission, and objectionable use was stopped if needed.

19. Forrest/Julian is William (Bill) Forrest and Nancie Julian (Plaintiffs’ Exs 54, 54A), 239 and 241 Kings Highway (2 lots). This family owns two properties side by side adjacent to Bartlett Avenue right of way. Bill Forrest grew up in Kennebunkport and was familiar with the beach and the public and private areas. He has granted numerous neighbors and friends permission to use his beach and has permitted public use to the extent it does not interfere with his use. He has given specific permission to some backlot owners, for example Chris Rodden and her mother Suzanne Hill Wilson, to keep their boats there. He has asked people who leave boats on his property without his express permission to move them to Bartlett Avenue right of way. They have also called police because of late night noise and drinking. Bill recognized his property rights were in jeopardy when the police chief Joe Bruni told him he had

to remove a tent from the beach for which he had obtained a permit. Before that assertion by the Town of its ownership he simply didn't believe the Town or public could be claiming public rights and control of his property. There was no evidence of use by the public without his expressed or implied permission.

20. Lewis is of The Amended and Restated Susan K. Lewis Residence Trust (Plaintiffs Ex 111), 243 Kings Highway. Lewis is on the other side of the Bartlett Avenue right of way from Forrest/Julian. Her grandparents owned the property before her and she has been coming to Goose Rocks Beach since 1954. When she was a child her parents rented beachfront homes including the present Fleming house. Her father sold their house in 1971 and she repurchased it in 1991. She was there all summer in 2000, 2001, and 2002 but began renting it out in 2003. She rents elsewhere in town during the summer but does come to the beach. She has given neighbors like the Pearces permission to use her property and to store kayaks. She has told some families that kayaks are limited to one per family and she has moved kayaks to the right of way when they were on her property without her permission. She knows her neighbors and has permitted them to use the beach. The Pearces, who did use her beach, are shown in Plaintiffs' Ex 113 where she is sitting with them at a cook out. They have asked her for permission, including during that cookout. One of the Pearce's asked "it's ok if we have the cookout, isn't it?"

Things changed in 2008 when more people from far away started coming down. In 2006 the Bartlett Avenue pathway had been widened by cutting the bitter sweet. She met with the Town CEO who stopped the cutting and confirmed they had never in previous 18 years cleared or cut Bartlett Avenue right of way. There was more use of her property than some others but use was either with her explicit or implied permission. She did not know her ownership was in

question until she talked to Barbara Rencurrel. Susan Lewis had by her testimony permitted public use when she wanted to. She limited use when she chose to do so, for example by instructing one kayak per family and moving unwanted kayaks. She also put out chairs.

21. Raines/Rencurrel/Sandifer. Kristen Raines (Plaintiffs' Ex 117) owns property at 249 Kings Highway; Rencurrel is the LAJR Trust which owns property at 251 Kings Highway; and Sandifer is The Alice B. Sandifer Trust which owns property at 253 Kings Highway. These three properties, Raines/LAJR-Rencurrel/Sandifer, all abut each other. Sandifer, who comes only one month a year, acquired his house in 1981 and has followed the lead of Rencurrel in posting his property. Rencurrel has watched after it for him. There is no question that Rencurrel, a former Town selectman and active in Town policies, understands and has protected her property interests. Her family rented properties beginning in 1938 and purchased her present house at 251 Kings Highway in 1946. She grew up summers on the beach and socialized with friends up and down the beach, as Joan Junker confirmed. There are numerous police reports that confirm her actions in asking those people who she did not want on her beach to leave. Plaintiffs' Exs 87, 87A, 88, 89, 90, 91, 152. Indeed she was the one who was challenged by John Michie Harris in 2005. Plaintiffs' Exs 87A, 93. The response to his challenge resulted in the Town's change in enforcement policy (Plaintiffs' Ex 92) and set into motion a series of actions by the Town which were the genesis of this lawsuit.

There was no evidence of any use of the LAJR-Rencurrel property by anyone who did not have permission or whom she didn't ask to leave. She lives there full time and her testimony was not contradicted.

Sandifer did testify that he followed Barbara Rencurrel's lead after he purchased the house in 1981 with his brother in law. Since he was only there for a month each summer, he

would post the property and he would keep in touch with Barbara to check on the house. He was proactive when there was use to which he objected and never had to call police because people left. It was very quiet until 2005 with more people which have grown progressively to today.

Dinghies on Dinghy Point (Plaintiffs' Ex 121, photos 3 and 4) shows dinghies on the Dicescare beach property⁴. The Dicescare beach property is a large pie shaped piece that covers all of so-called Dinghy Point. It angles in from the Sandifer and Vicenzi properties. There has been much testimony about the property but the Dicescare family didn't participate in the case.

Sandifer's kayaks are shown in front of his house. From the pictures which show his family, there is no evidence of use by others and none was introduced except by oblique references.

There was simply no evidence of any use for any period regarding the Rice property, perhaps because of the vigilance of her neighbor Barbara Rencurrel, there was little to no evidence.

22. Vincenzi is The George A. Vicenzi Trust (Plaintiffs' Ex 132), vacant beach property Kings Highway (Map/Lot 35-10-33). She did not testify and while there was some testimony from the Pearce family and one other of use of her property, their pictures do not confirm much use. Barbara Rencurrel testified that Mrs. Parrot, the previous owner, had posted the property. Jan Fleming said Mrs. Parrot told her she was welcome to use the property any time. This property is one of the properties that David Walley (Plaintiffs' Ex 15-16) for the Town attempted to solicit in the 1970s to be a part of the effort to create a true public beach. That effort on behalf of the Town and the Kennebunkport Conservation Trust continued through 1999, so that fact in conjunction with the 2007 efforts of the Town to acquire ownership of the

⁴ The Dicescare property consisted of both a beach property and the property on the northwest side of Kings Highway from the beach which was formerly an inn called the Anchorage. Town Ex 133(a), map.

Tides property certainly gave her no reason to be concerned that her property rights were in question. There were a few witnesses and pictures which showed very limited of episodic use of this property but obviously her predecessor in title Mrs. Parrot posted and gave explicit permission.

23. Henriksen is Sea Rose Family Limited Partnership, vacant beach property Kings Highway (Map/lot 35-10-32). Henriksen also owned the abutting Tides Inn property. She bought her present property at 252 Kings Highway in 1977. Both properties were largely used by guests. When she did see people coming from elsewhere across the sea grass she set out to protect the sea grass by posting and asking people to move. There were kids at times making noise and drinking and she did call the police. She did correct people when they referred to the public beach as being in front of the Tides. The Town and Kennebunkport Conservation Trust have on two occasions tried to acquire her beach. The first being in the 1970s and the next in 2007 when she was asked to convey her beach to the Town in exchange for a contract zone. Larry Mead, Town Manager, told the selectmen her beach was private and the public could walk across it but not sit. Plaintiffs' Ex 8. She had no reason until 2008 to feel her property was in jeopardy because of claimed public use. Since her 60 plus guests were using her property it was impossible to find that any one on her property who was not one of her guests or was not there with her permission.

24. Lencki is The Donna Lencki Revocable Trust of 1993 (Plaintiffs' Ex 101), vacant beach property Kings Highway (Map/Lot 35-10-30) and also 256 Kings Highway. The town also attempted to acquire her property from the previous owner in the 1970s. Plaintiffs' Ex 15, 16. One parcel is the beach parcel on which she pays taxes separately. She bought the property in 1995 after having stayed at the Tides Inn nearby. Over the years, she has contacted Town

Manager and Chief Bruni to enforce her property rights (Plaintiffs' Exs 104, 106, 107). She has complained about boats and Hidden Pond dropping people off and setting up chairs on her property which stopped after she wrote Hidden Pond and told them to stop. Plaintiffs' Ex 103. She remembers an incident sometime around 2005 when Bruni said the lack of enforcement was out of his hands. She became concerned about her property rights in 2007 when she saw what the Town was asking for from Marie Henriksen.

While she allows people like the Parkers and Roberts to use her property, she asks people to leave and when she does they leave. No specific evidence other than a few pictures have identified use of her property much less use on a consistent basis. This is another case of an owner giving permission and when there was something objectionable she exercised her right as an owner.

25. Emmons is Emmons Family Realty Trust (Plaintiffs Ex 165), vacant beach property Kings Highway (Map/Lot 35-10-29). Mrs. Emmons is 86 years old and the property at 258 Kings Highway was purchased by her husband's aunt Helen Emmons Reoch in 1925. She and her husband came to the beach and stayed with Aunt Helen until she died in 1982 and left it to them. She lives in another family property nearby that has been in the family since 1777. In recent years she doesn't go to the beach much. Her family does use their beach and they clean it and take care of it. They don't mind use by others since it hasn't interfered with their use. They did object to a catamaran left on their beach and in their view. Their property abuts the Kennebunkport Conservation Trust property. Aunt Helen Reoch was approached in the late 1970s by the Town to contribute the beach parcel to the Kennebunkport Conservation Trust. Plaintiffs' Exs 15, 16. She has been contacted again recently. While they have given permission

to others, there was no testimony established specifically identifying adverse use of this property for any uninterrupted 20 year period.

26. John A. Parker and Jeannette M. Parker (Plaintiffs' Ex 171), 287 Kings Highway. The Parkers recently bought the DeMallie parcel and joined as a Party In Interest. The Asplundhs (Christopher and daughter Meredith) testified they rented this property in the 1970s and no one was there. There were only a few oblique references to their property and certainly no testimony of 20 years of continuous public use.

27. Scribner is The Eleanor A. Scribner Qualified Personal Residence Trust (Plaintiffs' Ex 122), 291 Kings Highway (Rear). This family has owned land in the area of the beach since 1900. The houses burned in the 1947 fire and the house on the shorefront lot was built in 1948. There is a private right of way that runs along the Scribner land (Plaintiffs' Ex 124) and the Scribners in 1990 specifically deeded to eight neighbors access to the beach over their right of way. The Town has never done any work on the right of way or beach. Bob Scribner testified that his grandmother would ask any people who weren't neighbors (now described in easement deed) to move along. They have posted both the right of way and the beach with private property signs. Bob Scribner doesn't remember any members of the public on his beach. Public use was never really an issue until recently. Baseball games with part of the outfield in front of his house were played in the intertidal zone and he sometimes participated. Bob Scribner grew up on the beach and had many friends who he would visit. He didn't believe there was any ulterior motive when friends visited or when baseball games were played.

People may have used his property without his explicit permission but rarely did so and it was not an issue. There was a change in overall beach use when families no longer stayed for

whole summers and renters increased in number and had a different attitude and understanding. Whatever use was permissive and there was really no testimony of adverse use. The Scribners clearly protected their property rights but wanted to be good neighbors.

28. Sand Point Properties: Christopher Asplundh (Plaintiffs' Ex 32), 17 Sand Point Road and The Joan H. Dwelley Testamentary Trust (Plaintiffs' Ex 44), 25 Sand Point Road; and Temerlin is The Temerlin 1988 Family Trust (Plaintiffs' Ex 128), 29 Sand Point Road.

Chris Asplundh testified that he had rented what is now the Parker house in the early 1970s and built his present house in 1974. In the 1980s and 1990s his family was there all summer and there was no one else there. Prior to 2000 they never had to ask anyone to leave. Walking has occurred and it was never an issue. There were no life guards or police other than the dog police on his property. After 2000 he did ask group of young men playing football to move along with the beer coolers and after discussion they did leave. He has seen softball games. His daughter Meredith Gardner confirmed that during the 1980s and 1990s she doesn't recall anyone using the beach who she didn't know. She described her years with her Sandpoint buddies as quiet and a group of neighbors and friends having fun together. Meredith Asplundh testified that all of that changed in 2005 when suddenly there were more people.

There was testimony of people going to the Little River to waterski but no one identified what property they sat in front of and how often it happened.

There was no testimony regarding the Dwelley property, but his pictures confirm what the Asplundhs testified to. The pictures show a deserted beach (Plaintiffs' Ex 46) with the Dwelleys sitting in front of their house. The only police report filed by Dwelley was in 2007 (Plaintiffs' Ex 45) which is consistent with Asplundh's testimony that no one was up their way until after 2005.

There was no testimony as to Temerlin's property directly except that some folks claim to have waterskied off Sand Point. Where, when, and whether that has continued is unclear. What is clear is that when Janet Weston appeared in front of his home to test the water, he graciously invited her in for coffee.

There is glaring lack of testimony as to use of these properties by the public for any period. When after 2005 the use did increase, owners Dwelley and Asplundh clearly did interrupt the use by calling the police in one case and asking the football players to leave in another.

Given the evidence noted above, the court finds as follows:

1. The Town's Comprehensive Plans state that "although the privately-owned areas of the beach are not open to recreational use other than walking, the public beach receives heavy use."
2. Prior to 2005, the Town police recognized private property rights by historically responding to beach complaints on the "private" beach and "used tact" to encourage the user to move to the "public beach."
3. During the late 1970's through 1999, the Town secured large sections of the beach for the purpose of preserving public use. Nine beach properties were acquired during this effort in the area referred to as the "public beach."
4. Having failed to get the Tides Inn beach property dedicated during the seventies, the Town tried to acquire the property through a contract zone. During public hearings on the contract zone, attended to and watched by many Plaintiffs, backlot owners, and members of the public, Town Manager Larry Mead stated:

There are many places along Kings Highway where you can legally get access to the beach. And once you walk out onto the beach, you can't legally sit there, you

have to keep moving, and sometimes I'm sure people have, many people out there in the audience and watching on television, may have been on the beach and been asked by someone from the property to move along, because its their property.

Plaintiffs' Ex 8.

5. Many landowners in the Goose Rocks Zone attended the Tides contract zoning meetings or watched the recordings of the meeting on TV.

6. Following a dispute concerning the Town police patrolling the Beach by ATV, the former police chief sent Peter Gray a letter on Town letterhead where he stated that the public does not have the right to be on private beach property for recreation except for walking.

7. The Town Code Enforcement Officer told Peter Gray that the Town would not clean seaweed off the beach after a storm because it was private property.

8. The Town fire permit policy separates the beach into a "public" section and a "private" section. In order to get a fire permit on the "private" section, an applicant must receive written permission from the landowner or the landowner must call the Town and affirm their consent to the fire on their property.

9. The prescriptive uses the Town and TMF Class seek in this action are recreational uses.

10. The lifeguard stand was on the "public beach" section now owned by the Kennebunkport Conservation Trust property.

11. The Town has only hired lifeguards on and off but not since the 1980s.

12. The lifeguard's duties included checking on life rings from river to river but lifeguards did not patrol the "private" beach during the day.

CONCLUSIONS OF LAW

1. Both the Town and TMF Class must overcome a presumption, expressed in Lyons v. Baptist School of Christian Training and Weeks v. Krysa, that their recreational use of Plaintiffs' properties were with the permission of the landowner. 2002 ME 137, 804 A.2d 364; 2008 ME 120, 955 A.2d 234.

2. The Town and TMF Class have failed to overcome the presumption by proving that the recreational use was: "(1) without the express or implied permission of the owners; (2) with the intent to displace or limit the owner's rights to the land; and (3) undertaken in a manner that provided the owners with adequate notice . . . that the owner's property rights are in jeopardy." Lyons v. Baptist School of Christian Training, 2002 ME 137, ¶ 26, 804 A.2d 364 (internal citations and quotations omitted) (emphasis added).

3. The Town police's historic response to beach complaints confirm that the Town intended to uphold—rather than displace or limit—the owner's rights to the land.

4. The Town and TMF Class have not met the basic and lower standard for "adversity," which requires them to prove that they were not "in recognition of or subordination to the record title owner." Androkites v. White, 2010 ME 133, ¶ 16, 10 A.3d 677, 682.

5. The Town and TMF Class have failed to prove adversity by showing that they "received no permission from the owner of the soil, and use[d] the way as the owner would use it, disregarding his claims entirely" Lyons, 2002 ME 137, ¶ 17.

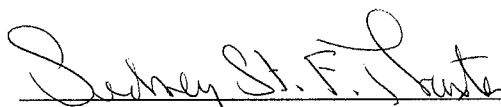
6. The TMF Class has not proved sufficient numbers of users on each individual property for 10 continuous years such that an individual Plaintiff was on notice of an adverse claim by a class of individuals comprised of over 180 properties.

7. The police reports in evidence as well as testimony by Plaintiffs and other witnesses regarding verbal objections to certain beach use and express permission to users prove that Plaintiffs' have not "acquiesced" to the uses by backlot owners or the public.

8. The Town has not proved each and every element of easement by custom because it has failed to show that the recreational use of Plaintiffs' properties satisfied the following three elements of custom: that the recreation use (1) ran "for as long as man's memory runneth," (2) was without dispute, and (3) is not repugnant of other laws and customs. Bell v. Town of Wells, 1987 Me. Super. LEXIS 256, *36 (citing State ex. Rel. Thorton v. Hay, 254 Ore. 584, 462 P.2d 671 (Ore. 1969)). The Town did not present evidence of recreational use through the 1700 or 1800s through a historical witness. The use of the property was often disputed by the Plaintiffs. Finally, such a custom runs contrary to the limitations on intertidal use of fishing, fowling, and navigation.

9. The Town and TMF Class have failed to prove their claims as to each of plaintiffs' properties which they must. To the extent that their claims are to the entire beach, they have failed to prove that also.

Dated: September 21, 2012



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