STATE OF MAINE

YORK, ss.

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

ROBERT F. ALMEDER, et al.,

Plaintiffs

v.

PARTIAL JUDGEMENT

TOWN OF KENNEBUNKPORT and
ALL PERSONS WHO ARE
UNASCERTAINED,

Defendants

PROCEDURAL HISTORY

In October 2009 the Plaintiffs, owners of beach front property at Goose Rocks Beach in Kennebunkport, Maine, brought an action seeking a declaration that they hold fee title to the low water mark and seeking to quiet that title. The original named defendants were the Town of Kennebunkport and all persons known and unknown who claim ownership or easement rights to the property.

Certain issues arose relating to service of process on non-plaintiff beach front property owners and the general public. As a result, an order issued on August 30, 2010 requiring the parties to serve process on all beach front owners and for service by publication on the general public.

The State of Maine moved to intervene citing the public interest in maintaining access to Maine's beaches. This motion was granted and the State joined as a party to the case. The State seeks to have the scope of the public easement pursuant to the

public trust doctrine expanded in light of recent decisions of the Maine Supreme Judicial Court.

A group of owners of property located within the Goose Rocks zone of the Town but not on the beach front moved to intervene. This group of "back-lot" owners was represented collectively by the law firm of Taylor, McCormack and Frame (TMF). Originally they were granted provisional status to participate in pre-trial proceedings and, eventually, granted intervenor status collectively as parties in the case.

Several back-lot owners, not represented by TMF, also moved to intervene. Of these only the Lachiattos and the Drivers actively pursued the motion. They participated in the proceedings as members of the "back-lot" class.

The Town answered and counterclaimed that it holds title to the beach front property. The Town also counterclaimed for an easement by prescription or by custom. The TMF Group and the Lachiattos and Drivers likewise counterclaimed on the theory of easements by prescription.

Cross-motions for summary judgment on the competing title claims failed and following a conference an order issued on July 9, 2012 setting the counterclaims relating to easement issues for trial first and reserving the claims related to title for later consideration.

Trial commenced on August 20, 2012. An issue arose concerning the non-plaintiff beach-front owners who had been served but had not answered or otherwise actively participated in the litigation. The parties and the court agreed that the judgment in this case would bind only the Plaintiffs, the Town, members of the TMF Group and the State. Beach-front property owners joined as parties-in-interest only would not be bound by this judgment unless they expressly agreed to be so bound.

The trial relating to the easement counterclaims was conducted between August 20th and September 6th, 2012. The parties filed proposed findings of fact and conclusions of law on September 21st and closing arguments were held on September 25th. Following trial, judgement will enter in favor of the Town and the TMF Group and the State's request for findings on the public trust doctrine in the intertidal zone will be Granted.

FACTS

Goose Rocks Beach is a two-mile stretch of sandy beach lying between the Batson River and the Little River in Kennebunkport, Maine. There are 110 beach-front lots owned by 95 owners. Nine of these are vacant lots owned by either the Town or the Kennebunkport Conservation Trust. The developed lots are separated from the beach by either a seawall or landscaping. The vacant lots are situated in approximately the middle of the beach and the area seaward of these lots has been referred to by many as the "public beach".

The Plaintiffs are 29 beach-front owners who claim ownership of the beach to the low-water mark. They recognize that a public easement exists over the intertidal zone for purposes of fishing, fowling and navigating, but assert that the general public and members of the TMF group have no easement rights over their properties for general recreational purposes. In addition to the Plaintiffs, seven beach-front owners, joined as parties-in-interest, have expressly agreed to be bound by this judgment. These are:

1) David L. Eaton & Jennifer L. Scully-Eaton;

2) Susan K. Lewis, Trustee of the Amended and Restated Susan K. Lewis Resident Trust;

3) Heather Vicenzi, Trustee of the George A. Vicenzi Trust;

4) Mary L. Emmons, Emmons Family Realty Trust;

5) Anne E. Clough;

6) John A. Parker and Jeannette M. Parker; and

7) Marie B. Henriksen.

By agreement of the active parties to the case, and with the court's approval, the other parties-in-interest will not be bound by this judgment.[1]

The Goose Rocks zone is a discreet area within the Town. It is bounded by Route 9, the Dyke Road, the New Biddeford Road and the beach. The beach front properties stretch along the Kings Highway. From the road there are more than 20 public and private access ways to the beach. There are at least 5 public access ways spread across the beach front. Public parking is permitted on Kings Highway and along sections of Dyke Road. Currently there are 173 parking spaces available for public use.

In colonial times beaches, including Goose Rocks Beach, were used as public highways for safety reasons. They were also used for driving livestock, harvesting seaweed, clamming and they provided access to marshland for cutting hay. Town records disclose that regulations relating to these activities were established before the Revolutionary War.

By the late 1800's Goose Rocks Beach began to emerge as a tourist destination. Town records from the 1890's comment on the growing tourist trade at Goose Rocks Beach. In the early 1900's various guesthouses and hotels were available to tourists and these commercial ventures advertised the virtues of the beach for a wide range of recreational activities. In the 1920's and 1930's a variety of tourist related businesses were in operation at the Beach: a casino, bowling alley, a general store and several gift

[1] The Town and certain beach-front owners and back-lot owners have reached a settlement of their claims. None of the Plaintiffs have joined in that settlement.

shops and restaurants. Several witnesses, notably Joan Junker and Ralph Smith, testified to their own use of the Beach and the use of the Beach by members of the general public for recreational purposes during the 1920's and 1930's. There were two "auto-trailer" camps on beach front lots. Members of the public could park at these camps for a fee and use the Beach. In addition, numerous photographs from the 1930's and 1940's depict cars parked along the length of Kings Highway adjacent to the Beach during summer days. The evidence is clear that beginning in the late 1800's up through the 1940's Goose Rocks Beach was a popular tourist destination for members of the general public from surrounding towns and from other states. The Beach was the attraction. People used the Beach for a full range of recreational activities, including walking, swimming, sun bathing and a variety of beach related games.

In 1947 a major forest fire swept across Maine and a significant number of residential and commercial structures at the Beach were destroyed. As property owners rebuilt, the Beach became more residential and less commercial. However, the general public continued to use the Beach for a full range of recreational activities. Also, more intense development of the back-lot properties began after the fire. Typically, these properties are rented for some portion of the summer season. This has tended to increase the number of people using the Beach. A number of beach front properties have been remodeled and enlarged. Many of these too are rented during the summer, further contributing to increased use of the Beach.

Beginning in the 1700's and continuing to the present the Town has imposed regulations on the use of the Beach. Town records demonstrate that regulations were established with respect to livestock on the Beach, clamming and seaweed harvesting. More recently the Town has established regulations concerning dogs on the Beach and fire regulations. In the early 1900's the Town provided extra police protection at the

Beach during the summer. The Town began establishing parking regulations at the Beach in the early 1930's. The Town maintains the public access ways to the Beach; has constructed seawalls; provides waste containers for litter and continues to provide extra police presence during the summer. Beginning in the 1950's and continuing until the 1990's the Town provided lifeguard service at the Beach. There was a lifeguard stand at or near the "public" area of the Beach and a series of ring buoys placed strategically up and down the length of the Beach. William Joel testified that he served as a lifeguard at the Beach during the summers of 1952 and 1953. He was expected to traverse the full length of the Beach at least twice a day and check on the ring buoy stations. He also gave swimming lessons, which were available to the general public. Several other Town employees gave swimming lessons over the years. In 1994 the Town discontinued the lifeguard service and replaced it with a police officer dedicated to serve the Beach.

Beginning in the late 1920's and continuing, the Town appropriated funds to promote the use of the Beach by tourists. For some period the Town provided bus service and supervision for children from the Town to the Beach for summer recreation. The evidence is clear that at least from the early 1900's the Town has consistently encouraged and facilitated the use of the Beach by the general public.

Sixty-six witnesses testified at trial. These included beachfront owners, back-lot owners and members of the general public. The court will not undertake to summarize each witness's testimony. However, the overwhelming weight of this testimony, whether from beach-front owners or back-lot owners, or others, was that while people tended to use the area in front of their own properties or near a public access point most frequently, nearly all used the Beach "from river to river" frequently depending on what activity was being undertaken at the time. Many walked the

beach daily; many walked to certain locations so children could play in tidal pools; some walked to certain spots to collect sand dollars or search for crabs. Beyond the general recreational uses associated with the beach itself, for decades the public has used the beach for a variety of ocean-based activities: boating, water-skiing, tubing, rafting snorkeling and, more recently, kayaking, surfing, wind-surfing and paddleboarding. Nobody felt restricted to stay within the confines of their own property or near the public access right-of-ways. None of the witnesses testified that they asked for, or thought they needed to ask for, permission from beach front owners to engage in ordinary recreational activities such as walking, swimming or beach games. Beach-front owners did not object to the use of their property for ordinary beach type recreational activities. Only when someone wanted to use property beyond ordinary recreational purposes – such as storing a boat on the dry sand or holding an event like a wedding or large family party – was permission sought from the beach front owners and only when beach users were engaged in disruptive or objectionable behavior – drinking, rowdiness or potentially dangerous activities – did beach front property owners request that the offending parties leave their property.

Nearly every witness expressed the view that they had a right to use the beach for ordinary recreational purposes. They felt no need to ask permission from beach-front owners and, absent objectionable behavior, they were never asked to leave the Beach. Norman Merrill expressed the view – held by many – that if he saw a "no trespassing" sign on the Beach he would ignore it and continue to use it as he always had.

Several beach-front owners in recent years have placed no trespassing signs on or about their property. These have been placed more to prevent people from coming off the dry sand and onto their landscaped property, or to prevent people from using

private access ways to or from the Beach, rather than to prevent people from using the Beach itself for ordinary recreational purposes. There are a few examples of occasional requests by beach-front owners for people on the beach to "move along", as Robert Scribner testified. But from among the testifying witnesses, this was a rare exception and not the rule.

While there was more intense use of the Beach in the "public" area, this is likely attributable to the fact that the beach-front lots in that area are vacant; on-street parking is available and the Tides Inn, a hotel, is across the street. The general public, back-lot owners and other beach-front owners used the entire beach, both dry and wet sand. Howard Whitehead, a back-lot resident since 1958 testified to large softball games at the Little River end of the beach and Richard Johnson testified to softball games with teams from the Town at the Batson River end of the beach. Many of the witnesses testified they roamed freely on the Beach, from one end to the other, depending on what type of activity they were engaged in at the time.

The Beach was used by the public year round. While summer brought the most intense use, there was testimony concerning horseback riding on the beach in the off-season. People walked the beach in all seasons. Occasionally people cross-country skied on the Beach. Richard Johnson showed a photograph of a plane on the beach. Wayne Fessenden testified he learned how to drive on the Beach. The evidence is clear that the general public, including the back-lot owners used the entire Beach, both wet and dry sand, for recreational activities, albeit that some areas – the "public" area for example – were used more intensely than other areas.

Many of the Plaintiffs rent their properties for periods during the summer and some own back-lot properties as well as beach front properties. Most use a rental agent to handle these short-term rentals. Maria Junker has acted as a rental agent since

the mid-1980's. Access to the entire beach is the major attraction for renters, who are members of the general public. Advertising materials used to attract renters emphasize access to the entire Beach. No instructions were given to renters limiting their use of the Beach to the confines of the property lines – they could use the entire Beach. The Plaintiffs were aware of this pattern of use and acquiesced in this practice.

William Forrest's testimony is instructive on how people understood their Beach use right. Mr. Forrest grew up in Kennebunkport and as a child and young adult used the Beach with friends for a full range of recreational activities. He never asked for permission from beach front owners to use the beach and, accept for one occasion when his group was rowdy, he was never asked to leave the beach. He moved away after college, but moved back to Kennebunkport in 1988. He and his family used the Beach either as members of the public or as seasonal renters until 2004, when he purchased beach-front property. He has given permission to neighbors to store a boat on the dry sand on his property and he has called the police when late night rowdy behavior was occurring on the beach in front of his property, but he does not object to ordinary recreational activity on the beach in front of his property. He expressed the view that it would be impractical to ask people engaged in ordinary recreational activities – walking, sunbathing, and picnicking – to leave his property. That was the general attitude of the Plaintiff group. It would be impractical to object to the public using the Beach for general recreational purposes, so they acquiesced in that use.

In a variety of settings, the Town has acknowledged that beach-front owners have fee title to the mean low water mark of their property. The Town's Comprehensive Plan states that the Beach is private. During certain zoning hearings the Town Manager made reference to the Beach as being private. Certain police department policies relating to enforcement procedures at the Beach describe the Beach

as private property. The Plaintiffs assert these statements undermine the Town's claim for a prescriptive easement. However, as discussed later, these statements are not determinative of the issue.

CONCLUSIONS RELATING TO TOWN'S COUNTERCLAIMS

At issue in this phase of the case are Counts IV for prescriptive easement and Count VI for easement by custom. Essentially, the Town seeks to establish that the general public has acquired rights to use the entirety of Goose Rocks Beach – both wet and dry sand – for ordinary recreational purposes notwithstanding that the Plaintiffs may own the fee title to the low-water mark. The Town has standing to assert this claim on behalf of the general public. *Town of Manchester v. Augusta Country Club*, 477 A.2d 1124 (Me. 1984).

Maine law provides that beach front owners hold title to the high-dry sand and intertidal zone subject to a public easement to fish, fowl, navigate and undertake uses reasonably incidental thereto within the intertidal zone. *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989).

To succeed on its claim for prescriptive easement, the Town must prove that the public 1) continuously used the Beach for at least 20 years, 2) under a claim of right adverse to the owner, 3) with the owners knowledge and acquiescence, or 4) a use so open, notorious, visible and uninterrupted that knowledge and acquiescence will be presumed. *Eaton v. Town of Wells*, 2000 ME 176; 760 A.2d 232. When land is wild and uncultivated, Maine applies the rule that open and continuous use for the prescriptive period raises a rebuttable presumption that the use was permissive. *Eaton*, supra. The test of public use is not the frequency or intensity of the use, but use by people who are not separable from the general public. *Eaton*, supra.

There is no question here that members of the general public have been using Goose Rocks Beach from "river to river" for general recreational purposes for at least one hundred years. While this use has been more intense in some areas – the "public" area and around public access points – nevertheless, the great majority of witnesses testified to a variety of typical beach recreational activities that extended across the entire length of the Beach.

The great majority of the witnesses – beach-front owners, back-lot owners or members of the public testified that they believed they had a right to use the full extent of the Beach for general recreational purposes. They never asked for permission to use the Beach or thought they had to ask and, except for some isolated incidents, beach-front owners did not object to this use. When objections arose, they related to objectionable behavior such as drinking or rowdy behavior. Only in cases when someone contemplated activity beyond usual beach activity – such as storing boats, or holding a wedding ceremony – did they ask permission from a beach-front owner.

Beginning in the early 1900's, the Town has consistently acted with the understanding that the public had a right to use the Beach for general recreational purposes. The Town has appropriated funds to promote tourism at the Beach; it has created and maintained access ways and other facilities for public convenience at the Beach; for significant periods it has provided lifeguard and dedicated police service at the Beach; it has established a variety of regulations for parking and other uses at the Beach; it has utilized the Beach to provide recreational opportunities for children from other sections of Town.

The evidence is clear that the Town and the general public have claimed a right to use the entire Beach, both wet and dry sand, for general recreational purposes for

approximately one hundred years or more and this use has been open and visible to the Plaintiffs or their predecessors in title.

The more challenging issue for the Town is proving that the public recreational use occurred with the knowledge and acquiescence of the Plaintiffs or their predecessors in title, rather than permissively. When a public easement is at issue, the presumption that acquiescence may be proven by open, notorious, visible and uninterrupted use for the prescriptive period alone is negated and a rebuttable presumption of permissive use arises. The Town must prove acquiescence by proving that the use was without the express or implied consent of landowners and has been undertaken in a manner that provided the owners with adequate notice that the owner's property rights were at risk. *Eaton*, supra; *Lyons v. Baptist School of Christian Training*, 2002 ME 137, 804 A.2d 364. Clearly, the Plaintiffs or their predecessors knew the extent to which the public used the Beach.

Acquiescence is consent by silence. It may be inferred when there is a long history of passive assent or submission to a use. *Stickney v. City of Saco*, 2001 ME 69, 770 A.2d 602. Logically, silence alone cannot constitute implied consent. The great majority of witnesses, many of whom had used the Beach for decades, testified that they believed they had a right to use the Beach for general recreational purposes and this right – except in cases of objectionable behavior – was never challenged by the Plaintiffs. It was, as William Forrest said, impractical to attempt to prevent the public from engaging in non-disruptive general recreational activities on the Beach. The Court finds and concludes that the Town has proven that the public has used the entirety of Goose Rocks Beach, including the wet and dry sand, continuously for approximately 100 years with the knowledge and acquiescence of the Plaintiffs or their predecessors in title.

Two other points raised by Plaintiffs in their defense against the Town's claim of prescriptive easement warrant further comment.

The Plaintiffs argue that beginning in the mid-1970's various acknowledgements by the Town in Town publications, at public meetings or in police policy statements to the effect that the Beach is private property fatally undermine the Town's claim for a prescriptive easement. First, here, as in *Eaton*, the fact that the Town acknowledges that the Plaintiffs own their property does not mean that the public has no claim to the lesser interest of an easement. Further, these various statements by the Town all occurred after the mid-1970's. The public prescriptive easement found to exist here matured most likely before 1947, when the commercial uses at the Beach were more intense, but clearly matured before any of these statements were published. Once the easement attached, subsequent statements by the Town would not affect its continued existence.

The Plaintiffs argue that the Town has failed to prove the elements necessary to establish a prescriptive easement with respect to each discrete parcel of property owned by each Plaintiff. While accurate that the Town must establish the elements of its claim against each Plaintiff, that does not mean that the proof requires a showing that the Beach was used every day during the prescriptive period, or that the same members of the public used the same area for the same purpose on a continuous basis. Here, as in *Eaton*, supra, the evidence establishes that the general public used the entire Beach for a broad range of general recreational purposes continuously throughout the prescriptive period.

CUSTOM

There is no Law Court case clearly recognizing that an easement can be acquired through custom. Indeed, the Law Court's comments on the subject suggest that this

theory is disfavored. *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989). However, in the interests of completeness the issue will be addressed.

To acquire an easement by local custom the Town must prove:

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.

The evidence establishes that the Beach has been used for public purposes going back to the 1600's. It was first used as a roadway for travel for both people and livestock. It was used as a source of seaweed and for harvesting clams. Beginning in the late 1800's and continuing uninterrupted until today, the Beach has been a tourist destination used by the general public, most intensely during the summer, but during the rest of the year as well. The most senior witness at trial (age 90) testified to harvesting seaweed with his grandfather at the Beach during the late 1920's and then using the Beach for recreational activities with his family for many years thereafter. Numerous witnesses testified to family histories of beach use going back to the early 1900's. The Beach has been used for public purposes for as long as anyone can remember.

This use has been uninterrupted. The great fire of 1947 destroyed many, but not all, the cottages and businesses at the Beach. While much was lost, life continued at the Beach and it continued to be used by the public for general recreation.

The use has been peaceable. Indeed virtually every witness testified that the great attraction to the Beach was the sense of a harmonious community. Former Police Chief Bruni testified that during his long career as a member of the police department there were very few incidents at the Beach. Other than occasional disruptive behavior by individuals, the Beach was a quiet, peaceful place. Only this litigation has undermined that tranquility.

The use was reasonable – ordinary recreational activity common to any each beach setting.

The Beach has defined boundaries – from the Little River to the Batson River, from the ocean to the seawall.

The custom was obligatory – the public – which when they left the confines of their own properties included the Plaintiffs – used the entire Beach without asking permission and without objection.

The custom was not repugnant to either custom or law. The use was entirely consistent with the use of beaches throughout the State.

I find and conclude that if easement by custom is a viable claim under Maine law, then the Town has proven facts to establish that claim in this case.

TMF GROUP'S COUNTERCLAIM

The Goose Rocks Beach zone is well defined as the area between Route 9 and the ocean and the Batson and Little Rivers. TMF Group members own property within this zone. As a group, they claim to have acquired a prescriptive easement to use Goose Rocks Beach in its entirety for general recreational purposes. 14 M.R.S.A. §812. There are approximately 180 members of the TMF Group.

Members of the TMF Group used the entire Beach, both wet and dry sand, for a wide range of general recreational activities: walking, swimming, boating, tide pool

wading, sand castle building and a variety of games. They also used the Beach for a variety of ocean-based activities: boating, water-skiing, kayaking, surfing, rafting and paddleboarding. By virtue of their proximity to the Beach, they likely used the Beach more frequently and more intensely then members of the public at large.

Group members accessed the Beach using public access points, but many also had deeded access rights not available to the general public. Thus, group members were dispersed all across the Beach.

The Group members who testified all stated that they never asked for permission to use the Beach and their rights to use it were never challenged except in cases of disruptive behavior. They sought permission from beach front owners only when a use would involve more than general recreation – for example storing a boat, or conducting a large gathering such as a wedding or large family cookout.

Group members testified to this pattern of use going back decades: Stuart Flavin to the 1940's; Joan Junker testified to historical family use going back to the 1920's and personal use going back to the 1930's.

As was the case for the Town's claim of a public prescriptive easement, the TMF Group must prove: 1) Continuous use for at least 20 years; 2) under a claim of right adverse to the owners; 3) with the owners knowledge and acquiescence; or 4) a use so open, notorious visible and uninterrupted that knowledge and acquiescence will be presumed. *Eaton*, supra. Without question, substantial numbers of the TMF Group having been using the Beach without interruption in a continuous, open and visible manner for eighty or more years. The Group members who testified stated they believed they had a right to use the Beach – indeed Norman Morell testified that if he saw a no trespassing sign he would ignore it and continue using the Beach.

The Plaintiffs argue that because many of the members of the TMF Group were their neighbors and friends, the presumption of permissive use mandated by *Lyons* when a public, rather than a private, easement is claimed is particularly strong here. However, a great many of Group members rented their properties to strangers for portions of the summer. The renters were members of the general public who did not share bonds of friendship with the Plaintiffs.

As in the Town's prescriptive easement claim, the TMF Group has proven that the Plaintiffs have long known that Group members and the public who rented from Group members used the entire Beach for general recreational purposes and have acquiesced in that use.

STATE CLAIMS

The State sought and was granted intervenor status to advocate on behalf of the public, citing the public interest in maintaining access to Maine's beaches. While recognizing that *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989) currently remains the law, it wishes to preserve for review the argument that *Bell* was wrongly decided. It also argues that the scope of the public's rights delineated in *Bell* has been expanded by the more recent decision in *McGarvey v. Whittredge*, 2011 ME 97. It seeks a declaration describing the extent to which the public's rights have thus been expanded.

Access to the ocean and use of tidal lands by the public has been controversial since the founding of this country in nearly every state bordering the ocean. It has been confirmed that the public does have a right, pursuant to the public trust doctrine, to use the ocean in Maine. *See, e.g., McGarvey v. Whittredge*, 2011 ME 97, ¶ 12, 28 A.3d 620; *Britton v. Dep't of Conservation (Britton I)*, 2009 ME 60, ¶¶ 2, 10 n.5, 974 A.2d 303, 305, 307; *Norton v. Town of Long Island*, 2005 ME 109, ¶¶ 21, 32, 883 A.2d 889, 896, 899; *see generally Andrews v. King*, 124 Me. 361, 362-63, 129 A. 298, 298-99 (1925); *see also Marshall*

v. Walker, 93 Me. 532, 536-37, 45 A. 497, 498 (1900), and cases cited therein. However, this right is not without limit.

The right of the public to reach and use the ocean depends on the zone of property in which the public's activities take place: The high dry sand, above the mean high-water mark; the submerged land, below the mean low-water mark; or the intertidal area, which exists between the mean high-water mark and the mean low-water mark. *McGarvey*, 2011 ME 97, ¶13, 28 A.3d 620. The owner of the upland property holds title down to the mean low-water mark, including any area of high dry sand. *Id* at ¶15; *Bell v Town of Wells (Bell II)*, 557 A.2d 168, 171, (1989). The State of Maine owns the submerged land below the mean low-water mark, holding the land in trust for the public. *McGarvey*, 2011 ME 97, ¶14, 28 A.3d 620; *Britton II*, 2011 ME 16, ¶ 6, 12 A.3d 39, 42. The intertidal zone is held by the upland owner subject to certain uses by the public reserved in the public trust by early English Law. *McGarvey*, 2011 ME 97, ¶16, 28 A.3d 620. The question at hand is how the intertidal zone may be used by the public under the common law of the public trust doctrine, given the facts proven at trial.

The Colonial Ordinance of 1641-47 of the Massachusetts Bay Colony, enacted prior to Maine's separation from Massachusetts, codified these property rights. Whittlesey, *Law of the Seashore, Tidewaters and Great Ponds in Massachusetts and Maine* at xxxvi-xxxvii; *The Book of the General Lauus and Libertyes Concerning the Inhabitants of the Massachusets* (1648), *reprinted in The Laws and Liberties of Massachusetts* 35 (1929). The Colonial Ordinance designated the rights to the property down to the mean low-water mark in the upland fee holder, reserving for the public the right to fish, fowl and navigate in the intertidal zone. *Id.* In the 1810 case, *Storer v. Freeman,* the Massachusetts Supreme Judicial Court incorporated the Colonial Ordinance into common law. *Bell v. Town of Wells (Bell I)*, 510 A.2d 509 (1986); *Storer v. Freeman*, 6 Mass. 435, 438 (1810). In

1820, this law was incorporated into Maine law by the Maine Constitution when Maine separated from Massachusetts. Me. Const. art. X, §§3-5; *Bell I*, 510 A.2d at 513-514.

Over the past nearly two centuries, there has been much contest about what activities are permissible by the public in the intertidal area. In *Bell II*, the Law Court described their interpretation of the Colonial Ordinance over time as "sympathetically generous." *Bell II*, 557 A.2d at 173.

> For example, the operator of a power boat for hire may pick up and land his passengers on the intertidal land, *Andrews v. King, 124 Me. 361, 129 A. 298 (1925)*; and "navigation" also includes the right to travel over frozen waters, *French v. Camp, 18 Me. 433 (1841)*, to moor vessels and discharge and take on cargo on intertidal land, *State v. Wilson, 42 Me. at 24*; and, after landing, "to pass freely to the lands and houses of others besides the owners of the flats," *Deering v. Proprietors of Long Wharf, 25 Me. 51, 65 (1845)*. Similarly, we have broadly construed "fishing" to include digging for worms, *State v. Lemar, 147 Me. 405, 87 A.2d 886 (1952)*, clams, *State v. Leavitt, 105 Me. 76, 72 A. 875 (1909)*, and shellfish, *Moulton v. Libbey, 37 Me. 472 (1854)*.

Id. However, in that same case, the Law Court limited the rights and activities allowed by the public in the intertidal zone to only those rights listed, namely the rights to fish, fowl and navigate, and activities pursuant to fishing, fowling and navigating, in the intertidal zone. The Court expressly held that there was no public right to engage in general recreational activities. *Bell II*, 557 A.2d at 180.

In 2011, the Law Court revisited its holding in *Bell II* in order to determine whether scuba diving could be considered "navigation" under the Colonial Ordinance and therefore a permissible use by the public in the intertidal zone. *McGarvey*, 2011 ME 97, ¶¶5-7, 28 A.3d 620. The Court unanimously held that there existed a public right to cross the intertidal zone in order to scuba dive. *Id.* at ¶1. However, the six justices who participated split evenly on the issue of whether the public's right to cross the intertidal zone to scuba dive was because scuba diving is a form of navigation and therefore a right reserved to the public under the Colonial Ordinance, or because the public has

rights to use the intertidal zone for activities beyond fishing, fowling, and navigating under the Colonial Ordinance, thus expanding the holding in *Bell II*. *Id.* at ¶¶1, 71, 51.

In Justice Levy's opinion, as joined by Justices Alexander and Gorman, Justice Levy narrowly interpreted *Bell II* and preceding case law on the public's rights within the intertidal zone. *McGarvey*, 2011 ME 97, ¶¶59, 70, 78, 28 A.3d 620. Justice Levy determined that scuba diving falls within the Colonial Ordinance's definition of navigation. Similar to traditional navigational activities, scuba diving requires specific equipment such as a breathing device, swim fins, and a weight belt. *Id.* at ¶75. Furthermore, it can be differentiated from bathing or swimming, activities not reserved for the public under the Colonial Ordinance, because scuba divers, unlike bathers or swimmers, "pass[] freely over and through the water without any use of the land underneath." *Id.* at ¶76; *Butler v. Attorney Gen.*, 195 Mass. 79, 84, 80 N.E. 688, 689, (1907).

In Chief Justice Saufley's opinion, as joined by Justices Mead and Jabar, Chief Justice Saufley determined that the public has rights to the intertidal zone beyond fishing, fowling and navigating, including crossing the intertidal zone in order to scuba dive. *McGarvey*, 2011 ME 97, ¶51, 28 A.3d 39. As far back as Lord Hale's Treatise in 1787 and under Colonial Ordinance itself, the public had the right to walk across the intertidal zone in order to engage in recreational activities. *Id.* at ¶¶35-41. "Until our decision in *Bell II*, 557 A.2d at 173, we had never treated the language of the Colonial Ordinance as permanently defining or circumscribing the sum of the public's rights to the intertidal zone." *Id.* at ¶38.

The State has asked this Court to consider, given the evidence presented, whether the public has the right to engage in certain activities in the intertidal zone. Pursuant to *McGarvey*, the Court finds and concludes that the public has the right to engage in, or cross over in order to engage in "ocean-based activities" which can be

categorized as fishing, fowling or navigating in the intertidal zone. *Id.* at ¶¶51, 71. This includes the right to cross the intertidal zone for such "ocean-based", waterborne activities as jet-skiing; water-skiing, knee-boarding or tubing; surfing; windsurfing; boogie boarding; rafting; tubing; paddleboarding; and snorkeling. This does not include swimming, bathing or wading; walking; picnicking or playing games in the intertidal zone.

The entries will be as follows:

1) On Counts IV and VI of the Town's counterclaim, Judgement for the Town to the effect that it has established easements by prescription and custom for general recreational activities on the entirety of Goose Rocks Beach, both wet and dry sand.

2) On the TMF Group's counterclaim, Judgement for the TMF Group as a class, but not individually, for a prescriptive easement for general recreational activities on the entirety of Goose Rocks Beach, both wet and dry sand.

3) The Lachiattos and the Drivers as members of the TMF class, but not individually, have prescriptive rights co-extensive with the rights of members of the TMF class to use Goose Rocks Beach.

4) The State as intervenor on behalf of the public has established that the public, under the public trust doctrine, has rights to use the intertidal zone at Goose Rocks Beach for the ocean-based activities described above.

Dated: October 16, 2012

G. Arthur Brennan
Justice, Superior Court, Active Retired

A TRUE COPY ATTEST

CLERK