In The

STATE OF MAINE

SUPREME JUDICIAL COURT

Sitting as the Law Court

DOCKET No. YORK-12-599

ROBERT ALMEDER et al,

Plaintiffs/Appellants,

v.

TOWN OF KENNEBUNKPORT et al,

Defendants/Appellee

ON APPEAL FROM THE SUPERIOR COURT, YORK COUNTY

BRIEF FOR APPELLEE TMF DEFENDANTS

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INTRODUCTION

This has been a contentious and protracted case that has shook the very fabric of a community, and the Superior Court's decision has gone a long way toward restoring that fabric. Goose Rocks Beach is a bucolic stretch of land approximately two miles long that borders the Atlantic Ocean. It has been a haven for hundreds of Maine families for over a century, including many TMF Defendants who trace their Goose Rocks Beach roots back several generations.

This litigation was initiated by a small group of the beachfront owners at Goose Rocks Beach, who sued "the Town of Kennebunkport and all others claiming a right to use Goose Rocks Beach," with the crux of the Appellants' argument being that they owned the beach and sought through litigation to have the right to exclude people from using it. The Town of Kennebunkport ultimately responded and countersued, claiming it owned the beach. TMF Defendants are made up of 178 separate families and properties, some beachfront, but primarily back-lot owners[1], who answered the Complaint given their interest in preserving their historic use of Goose Rocks Beach that had started generations before. Through a torturous motion practice, the Appellants incredibly sought to deny TMF Defendants' right to participate in the litigation (even though the successful outcome of the litigation for Appellants would have been the extinguishing of TMF Defendants' rights to use Goose Rocks Beach). TMF Defendants prevailed in their quest to be heard regarding the retention of a right they collectively enjoyed for decades; namely, the right to recreate on Goose Rocks Beach.

This right was the foundation upon which the desire to live or vacation at Goose Rocks Beach was premised upon. Indeed, Appellants and TMF Defendants alike testified to a beach

[1] The Superior Court adopted the use of the term "back-lot owner" to signify those parties who owned a home in the Goose Rocks Beach zone – as bordered by Route 9, the Batson River, the Atlantic Ocean, and the Little River - but excluding beachfront owners.

community where the use had been consistent throughout the years, and the ability to use the beach was a driving force in the purchase of Goose Rocks Beach property by back-lot owners and front-lot owners alike. There was lengthy testimony from parties who rented on Goose Rocks Beach and subsequently purchased property, and that testimony came from beachfront owners and back-lot owners. Not lost on the Court was the irony of a party testifying as to their use of Goose Rocks Beach as a back-lot renter, falling in love with Goose Rocks Beach, purchasing beachfront property, and now seeking to exclude people that were on a remarkably similar journey as they once were on.

Despite this understanding of (and acquiescence to) the long-established pattern of usage by back-lot owners (indeed, several front-lot owners either owned or rented on the back-lot, and used the beach extensively when in those back-lot homes), 27 of the 129 front-lot owners sued the Town of Kennebunkport, claiming ownership of the beach and the right to exclude anyone from the beach. The caption of the pleading was clear: the Defendants were "the Town of Kennebunkport and all persons who are unascertained, not in being, unknown or out of the State, heirs or legal representatives of such unascertained persons, or such persons as shall become heirs, devisees or appointees of such unascertained persons *who claim the right* to use or title in Plaintiff's Property other than persons claiming ownership or easement by, through, or under an instrument recorded in the York County Registry of Deeds." (italics added).

As a result of this frontal assault on the way of life and very fabric of the Goose Rocks Beach community, TMF Defendants sought to enter the litigation, and were initially permitted to do so *de bene esse* and then, ultimately, as Defendants. Appellants were attempting to grossly expand the bundle of rights they knowingly acquired when they purchased their beachfront property. Specifically, there has been a consistent history and pattern of use of Goose Rocks

Beach, from the Batson River to the Little River, on the wet and dry sand, for decades and, indeed, for over a century.

This has been a lengthy and expensive litigation, avoidable though it may have been, spearheaded by the desire of a self-appointed few to obtain a power that was ceded generations ago if, in fact, it had ever been obtained in the first place. The lower court appropriately ruled in favor of the TMF Defendants' prescriptive easement, finding that TMF Defendants:

- "never asked for permission to use the Beach" App. 364
- "rights to use [the beach] were never challenged except in cases of disruptive behavior" Id.
- established a "pattern of use going back decades" Id.
- "were dispersed all across the Beach" Id.
- "used the entire beach, both wet and dry sand, for a wide range of general recreational activities" Id.
- "have been using the Beach without interruption in a continuous, open and visible manner for eighty or more years" Id.

Perhaps even more telling was the testimony of Norman Merrill, a back-lot owner who was not a party to the case, but testified (ostensibly on behalf of the Plaintiffs). Mr. Merrill testified in response to a hypothetical question that "if he saw a no trespassing sign he would ignore it and continue using the beach." App. 355. Mr. Merrill's testimony was not inconsistent with others, who testified about their right to use the beach, no matter what obstacles may be placed in their way. This was the mindset of beachfront and back-lot owners alike. Further, the court noted that "Plaintiffs have long known that [TMF] Group members and the public who rented from group members used the entire beach for general recreational use and have

acquiesced to that use." App. 365. The court therefore concluded that "on the TMF Group's Counterclaim, Judgment for the TMF Group as a class, but not individually, for prescriptive easement for general recreational activities on the entirely of Goose Rocks Beach, both wet and dry sand." App. 369.

Appellants now seek to overturn the lower court's rulings that 1) the TMF Defendants were permitted to participate in the very litigation that adjudicated their own property rights and that was brought by Appellants for the purpose of taking away those very rights; 2) TMF Defendants were appropriately a class of persons under 14 M.R.S.A. § 812 (2012); and 3) that TMF Defendants had proven a prescriptive easement over Appellants' properties.

The Superior Court's decision holding that TMF Defendants had established as a class of persons a prescriptive easement over the wet (intertidal zone) and dry sand (upland) of Goose Rocks Beach was a reasoned and considered decision after nearly three weeks of witness testimony, and resulting closing arguments and briefing. The Superior Court had the ability to determine the credibility and veracity of all witnesses, including numerous Appellant witnesses, and Appellants have not and cannot show that the Court's determination of factual issues was clearly erroneous. The Court was provided with voluminous exhibits, the majority of which were stipulated to by the parties, and the Court made reasoned and considered decisions on what offered evidence to admit and what offered evidence to exclude. Indeed, objections to evidence were noticeably scarce for such a lengthy trial.

STATEMENT OF FACTS

The TMF Defendants, which are made up of both back-lot and beachfront owners, live in a well defined zone known as Goose Rocks Beach, which is defined generally as bordered by Route 9, the Batson River, the Little River, and the Atlantic Ocean. App. 352. The parties to

this case acknowledged the existence of the Goose Rocks Beach Zone, and the Town of Kennebunkport regulated matters differently in that Zone. See e.g. App. 630; App. 710 . Furthermore the TMF Defendants' deeds, similar to the Appellants' deeds, make reference to property being located in "Goose Rocks," "Goose Rocks Beach," or "Beachwood."[2] See e.g. App. 2277-79.

Those living in Goose Rocks were part of (and remain) a community, and many, including Appellants, belonged to the Goose Rocks Beach Association and participated in numerous recreational activities, both in the community and on the beach. See e.g. App. 558, 1104-05. The Goose Rocks Beach community did not distinguish between beachfront owner and back-lot owner. See e.g. App. 665 (Appellant Meredith Asplundh Gardner testifying that children of back-lot owners did not have different rights than children of beachfront owners such as herself); App. 1109-10 (TMF Defendant Joan Junker testifying that when playing on the beach with friends, such as Barbara Rencurrel, she did not feel as though her rights as a back-lot owner were any different than the rights of beachfront owners to recreate on the beach). TMF Defendants generally accessed the beach via private and public rights of ways that spread across the entire length of Goose Rocks Beach. See e.g. App. 2278, 2281-82.

For a period of time dating back to the 1920s, the TMF Defendants have been able to demonstrate recreational use of property abutting Goose Rocks Beach. See e.g. App. 1099, 1402, 1909. The fact that reference was often made to a "public beach" has little bearing on this case as this area was privately owned until the 1970s. App. 1867. Even it was determined that there was in fact a defined "public" area of the beach, this did not impact the TMF Defendants'

[2] For a period of time Goose Rocks Beach was commonly referred to as Beachwood. See e.g. App. 2278 (Deed description of TMF Defendants William and Joan Junker).

recreational use of the "private" portions of Goose Rocks Beach. TMF Defendants recreational activities included, but were not limited to, running, walking, swimming, sunbathing, bocce, whiffleball, volleyball, softball, golf, bike riding, reading, socializing, fires, cookouts, waterskiing, stargazing, cross-country skiing, capture the flag, fort building, sand castles, zim-zam, lacrosse, Frisbee, bird watching, tidal pool play, horseshoes, picnicking, horseback riding, and dog walking. See e.g. App. 1194; App. 1555; App. 1923.

The places on the beach where these activities took place depended upon the season, the weather, the tides, and the participants. That being said, the TMF Defendants were able to demonstrate that these activities occurred over the entirety of Goose Rocks Beach, in the dry sand and wet send, and over each Appellants' property, despite Appellants' contentions otherwise. See e.g. App. 989 (testimony of Stuart Flavin regarding recreating on the Gerrish property, Vandervoorn property, Twombly property and Almeder property on the west end of the beach); App. App. 1108-09 (Testimony of Joan Junker recreating on the Appellant's Scribner property, Asplundh property, Dwelley property and Temerlin property on the east end of the beach); App. 1368 (Testimony of Maureen Somers recreating on the Appellant's Lewis property and Forrest property in the middle section of the beach).[3] Even the Appellants testified to backlot owners using the beach in front of their homes without permission. App. 720.

The recreational use of Goose Rocks Beach was at all times of the year, but the use was naturally busiest in the summer. App. 356. This use was uninterrupted, unobstructed and without permission or objection. App. 355. The only objections consisted of protecting the plovers, and specific non-recreational use of the property, such as staying off the rocks or not

[3] At trial, TMF Defendants and other members of the class utilized a demonstrative exhibit, which displayed each Appellants' property, how they would access the beach, and where their activities took place. This demonstrative exhibit was at Justice Brennan's disposal in determining whether TMF Defendants could provide evidence of use in front of each Appellants' property. See e.g. App. 1622-23.

crossing across someone's back lawn to access a port-a-potty. See e.g. App. 703-04. Any objection has been related to use outside of traditional recreational activities on Goose Rocks Beach; for example, Meredith Asplundh testified that she objected when kids were climbing on the sea wall because that was dangerous. App. 665. Edwina Hastings objected to the use of acrobatic stunt kites with large strings that could potentially hurt someone. App. 559. Tellingly, Appellants failed to put on any evidence to rebut use across a wide portion of the beach, including those areas where Appellants live, but did not testify. Specifically, there was no testimony from Appellants Robert F. Almeder, Virginia S. Almeder, Willard Parker Dwelley, Jr., W. Parker Dwelley, III, John H. Dwelley, Kristen B. Raines, J. Liener Temerlin, Karla Sue Temerlin, Susan Flynn, Mark E. Celi, William E. Brennan, Jr., Shawn McCarthy, Steven Wilson, John Parker, Jeanette Parker, Anne Clough, Paul J. Hayes, Sharon K. Hayes, David L. Eaton, Jennifer Scully-Eaton, and Heather Vicenzi.

Further to the point, Appellant Peter Gray testified that he does not object to recreational activities on his property and never objected to recreational use of the beach in front of his property. App. 646. Appellant John Gallant never asked anyone to leave the beach in front of his house, even if he objected to the behavior in his own head. App. 714. Appellant Michael Sandifer testified that back lot owners did not need his permission to use the beach in front of his house. App. 729. Appellant Janice Fleming testified that back lot owners used the beach in front of her property without permission. App. 857. Appellant Edwina Hastings testified that at no time did any back lot owner request permission to use the beach in front of her house. App. 565. This was also true of Appellant Christopher Asplundh. App. 658. Appellant Donna Lenki testified that since her ownership, back lot owners and beachfront owners have used the beach for recreational activities without any express permission. App. 877, 894. Perhaps put most

concisely, TMF Defendant Carl Schmaltz testified that asking for permission to use the beach would be akin to "asking for permission to breathe." App. 1537.

The only time TMF Defendants have discussed beach use with Appellants was when their use was outside of the norm of the everyday recreational activities (e.g., storing a boat up against the seawall, or having a large family gathering). In those instances, TMF Defendants notified the beachfront owner as a courtesy. App. 1030. Tellingly, four beachfront owners (Walt Wiewel, Joanne Gustin, Edmund Case, and William Joel) found the very idea of people in the Goose Rocks Beach Zone needing permission to use the beach "offensive". See e.g. App. 1698.

While many Appellants testified to renting their property and some Appellants testified to owning and renting back-lot property, in no instance did Appellants instruct renters, whether they were renting the beachfront or the back-lot, on where renters were permitted to go on the beach, nor did they instruct their rental agent (where applicable) to do the same. See e.g. App. 842. Further, in no instance did Appellants instruct renters, whether they were renting the beachfront or the back-lot, on what the renters were prohibited from doing on the beach, nor did they instruct their rental agent (where applicable) to do the same. App. 1917. In each instance where a TMF Defendant rented property prior to ownership, they testified that they were never instructed where they could go on the beach or what they could do on the beach. See e.g. App. 1131, 1134 (TMF Defendant Herb Cohen testifying to his rental history at Goose Rocks Beach, including renting Appellant Almeder's residence, and never being instructed on where he could recreate on the beach or who he needed permission from in order to recreate on the beach). Many TMF Defendants rented multiple properties over their rental tenure. Indeed, TMF Defendant Paul Hogan rented twelve separate places at all areas of Goose Rocks Beach and no

instructions were given on where he could or could not go on Goose Rocks Beach or what recreational activities he could engage in. App. 1201, 1205.

While some of the Appellants and TMF Defendants were friends, this was not true of all Appellants and TMF Defendants. All of the TMF Defendants who testified averred that the focal point of their families' recreational activities while at their home in the Goose Rocks Beach Zone was the beach itself. See e.g. App. 1638. TMF Defendants never made any distinction between activities on the wet sand or dry sand, except to the extent an activity was better suited for that particular kind of sand (e.g., beach volleyball on dry sand, softball on wet sand). See e.g. App. 1840. Appellant Robert Scribner acknowledged at trial that he has been walking the length of the beach and recreating on the beach since he was a kid (over 50 years) without obtaining the permission from other beachfront owners. App. 546. Appellants Robert Scribner, Christopher Asplundh and Meredith Asplundh Gardner all testified that they believed that they had the right to run and/or walk the length of the beach. See e.g. App. 662. Appellant Robert Scribner claimed that he had the right to walk the beach "because I had always done it." App. 551. Appellant Meredith Asplundh Gardner even testified that back-lot owners did not have different rights to use the beach than beachfront owners, as her objection appeared to be geared towards the public at large. App. 665. See also App. 759 (Jennifer Eaton testified that she made no distinction between the rights of back-lot and beachfront owners).

Appellants are often able to distinguish back-lot owners from members of the general public, particularly back-lot owners with property near Appellants and private rights of ways leading to the beach. App. 546. When walking on Goose Rocks Beach from the Batson River to the Little River, people tend to stop and sit or socialize with others, on wet and dry sand. App. 985, 1027. Appellants and TMF Defendants testified that their time, place, and manner of uses

of the beach did not change when they went from renting to owning property, and from being back-lot owners to beachfront owners. App. 1817. Beachfront owner (and TMF Defendant) Ed Case owned back lot property at Goose Rocks since 1986 and eventually purchased beachfront property. He testified that his rights were no different as a beachfront owner than as a back-lot owner. App. 1671. Beachfront owner Joanne Gustin testified that the only greater right she acquired when she became a beachfront owner was a "shorter walk". App. 1817.

At the time they purchased their property, if not before, Appellants were on notice that the beach was being used for recreational purposes. In fact, Appellant Jule Gerrish testified that she has been on notice since 1967 that her ownership rights might be impacted with respect to use of the beach by back-lot owners for recreational purposes. App. 798.

Former Chief of Police Joe Bruni testified that in his many years of patrolling Goose Rocks Beach, outside of Barbara Rencurrel, there were only two other instances where a beachfront owner asked someone to leave and the person that was asked to leave in one instance was a renter of another beachfront house, not a back-lot owner. App. 631.

PROCEDURAL HISTORY

In 2009, Appellants filed a lawsuit against the Town of Kennebunkport and "all persons who are unascertained…who claim the right to use Plaintiff's property". App. 379. The Appellants' filing was purposely broad, a tactical ploy that they would alternatively trumpet and seek to silence. On the one hand, Appellants sought to cast a broad net, and include in the litigation anyone (such as TMF Defendants) who possibly could lay claim to a right to use Goose Rocks Beach. On the other hand, Appellants vociferously sought to exclude TMF Defendants from participating in the very litigation that would adjudicate their rights.

While the very essence of the Appellants' Complaint is to preclude TMF Defendants from continuing their historic use of Goose Rocks Beach, the Appellants argue now, for a fourth time, that TMF Defendants have no right to even be permitted to defend these rights. By contrast, Maine's Proceedings to Quiet Title specifically provide that the TMF Defendants are the very people that *must* be made a party to this action. *See* 14 M.R.S.A. § 6651 *et seq*. (emphasis added).

TMF Defendants originally filed a Motion to Intervene and corresponding Answer on June 4, 2010 on behalf of 171 land owners in the "Goose Rocks Beach Zone" asserting rights to use Appellants' property.[4] Appellants objected to TMF Defendants' Answer and on August 17, 2010, the Superior Court issued an Order indicating that a party must have an "interest in a controversy 'that is in fact distinct from the interest of the public at large.'" (*quoting* Nergaard v. Town of Westport Island, 2009 ME 56, ¶ 18, 973 A.2d 735, 740). The Superior Court stated that the TMF Defendants did not assert any individualized interest in the beach area separate and distinct from those claims being asserted by the general public. However, the Superior Court did state that the TMF Defendants could participate *de bene esse,* and before any TMF Defendants would be granted intervener status, the TMF Defendants had to provide a factual basis showing an individualized claim. App. 309

On August 30, 2010, the Superior Court issued another Order with respect to Service by Publication, recognizing that there are many other individuals, corporations and trusts who were also seeking to intervene in these proceedings. In its Order, the Superior Court stated that to "serve, notify, and bind [unascertained persons], including person owning non-beachfront property in the so-called "Goose Rocks Zone" of the Town of Kennebunkport, the court orders

[4] TMF Defendants are currently comprised of 178 lot owners.

service to be made by publication." The Superior Court provided that if these persons "wish to oppose the claims of the plaintiffs, you or your attorney must prepare and deliver a written answer to the complaint … within 41 days from the date of first publication." August 30, 2010 Superior Court Order, Docket No. RE-09-111. Based on the Superior Court's August 17, 2010 and August 30, 2010 Orders, the TMF Defendants filed an Answer on October 27, 2010, establishing with greater specificity the TMF Defendants' use of Goose Rocks Beach.

Once again, the Appellants filed a Motion to Strike the TMF Defendants' Answer on November 24, 2010, but the court declined to rule on the Appellants' Motion, resulting in the Appellants filing a Motion for Summary Judgment reiterating (yet again) their argument that TMF Defendants' cannot assert their claims on June 10, 2011. App. 326, 338. After oral arguments conducted on November 18, 2011, the Superior Court entered an Order on December 22, 2011 finding that if the TMF Defendants were not afforded an opportunity to bring their claims, they would be deprived of their collective interest in the beach. App. 340. The TMF Defendants' injury "would be a loss of property right, whereas the consequence to the public would be a loss of use of the beach." App. 324.

A Bench Trial was held over 21 days in August 2012, and 63 witnesses testified on the issues of the scope of the easement, the extent of Appellants' ownership, other proposed restrictions on the use of the easement, and whether a Permanent Injunction should be issued. App. 349. Following the Bench Trial and Closing Arguments, the Superior Court asked the parties to submit proposed findings of fact and conclusions of law. The Superior Court selected findings and made its own findings and conclusions, which were included in the Partial Judgment of October 16, 2012, which became a Final Judgment on November 29, 2012. App. 375.

STATEMENT OF ISSUES

I. **WHETHER THE TRIAL COURT'S DETERMINATION THAT TMF DEFENDANTS CONSTITUTED A CLASS OF PERSONS UNDER 14 M.R.S.A. § 812 SHOULD BE AFFIRMED?**

II. **WHETHER THE TRIAL COURT'S FINDINGS AND CONCLUSIONS CONCERNING THE TMF DEFENDANTS' PRESCRIPTIVE EASEMENT SHOULD BE AFFIRMED?**

III. **WHETHER THE ENTRY OF FINAL JUDGMENT WAS PROPER?**

SUMMARY OF ARGUMENT

The Appellants have sought, through a series of legal arguments and their course of action, to alter the historic and traditional and well-established scope and use of Goose Rocks Beach by TMF Defendants. TMF Defendants joined this suit because they, their heirs, devisees, legal representatives or predecessors in title claimed a right to use Goose Rocks Beach that is separate and distinct from the general public's claim being asserted by either the Town of Kennebunkport or the State of Maine. All TMF Defendants purchased or acquired their property with the understanding that they had access to, and the right to use, Goose Rocks Beach, in both the intertidal zone and dry-sand area, for general recreational purposes. TMF Defendants own property in a demographically defined area that is generally known as the "Goose Rocks Zone." This area is reflected in the Town of Kennebunkport Tax Maps Numbers 32, 33, 34, 35, 36, 37 and 41 and lies generally south of Mills Road (Route 9) and is accessed by New Biddeford Road, Winter Harbor Road or Dyke Road. Goose Rocks Beach has its own fire station and is separately zoned by the Town of Kennebunkport. Virtually all of TMF Defendants' deeds state language similar to the following: "A certain lot or parcel of land situated in that part of the Town of Kennebunkport known as 'Goose Rocks Beach', in the County of York and State of

Maine." Therefore it is abundantly clear that all parties consider Goose Rocks Beach to be a unique and separate enclave easily distinguishable from other parts of Kennebunkport.

The rationale for TMF Defendants to seek inclusion in this litigation was clear. If the TMF Defendants were not allowed to assert their prescriptive easement claims and the Town of Kennebunkport's or the State of Maine's claim for public access to Goose Rocks Beach was denied, the preclusive effect of this would be to severely limit TMF Defendants' ability to ever adjudicate their rights, however they were acquired. This is a convenient corner that Plaintiffs sought to paint TMF Defendants into, a procedural shell game that was properly denied by the Superior Court.

Appellants challenged: the rights of TMF Defendants to bring their prescriptive easement claim as a class of persons and the Superior Court's affirmation of that right; the scope of the prescriptive easement and the Superior Court's affirmation of TMF Defendants' prescriptive easement for recreational activities over the entirety of Goose Rocks Beach, both on the wet and dry sand; and the Superior Court's entry of a Final Judgment on all of these issues. When the TMF Defendants were successful in their attempt to become a party, the Appellants focused on limiting the scope and use of Goose Rocks Beach and the activities the TMF Defendants could engage in while on Goose Rocks Beach.

The Superior Court's determination that a prescriptive easement had been established was bedrocked on exhaustive testimony about the nature and extent of the use of Goose Rocks Beach for decades and decades by generations of TMF Defendants. Despite the Appellants' standing arguments related to the TMF Defendants, the evidence at trial proved that Goose Rocks Beach residents are distinguishable from the public generally. Their rights are separate and distinct from the public because they have been acquired as a "class of persons." *See* 14

M.R.S.A. § 812 (*stating* "[n]o person, *class of persons* or the public shall acquire a right-of-way or other easement through, in, upon or over the land of another by the adverse use and enjoyment thereof, unless it is continued uninterruptedly for 20 years"). The Superior Court refused to engage in revisionist history or turn back the clock on the tradition and history that made Goose Rocks Beach so special, and continues to make it a haven for these families.

STANDARD OF REVIEW

Appellants improperly state the standard of review in their Brief. By either ignoring the procedural history or misapplying Maine Rules of Civil Procedure Rule 52, Appellants seek for this Court to apply a heightened standard of review; essentially, Appellants are arguing that because they filed a Motion pursuant to Rule 52(b), the Superior Court's Order must be vacated. This argument is all too convenient for the Appellants, but it is more importantly erroneous.

At the conclusion of trial, extensive Proposed Findings of Facts and Conclusions of Law were filed by the Town, the State of Maine, the TMF Defendants and the Appellants. In addition, Appellants filed a Post Trial Brief as to the Town of Kennebunkport's Claims of Prescription and Custom, the TMF Class Claims of Prescription, and included a Witness Summary and Exhibit Notebook with its Proposed Findings and Conclusions of Law.[5] The Proposed Findings and Conclusions of Law were provided at the request of the Court prior to the oral arguments scheduled for September 25, 2012. After oral arguments, the Court requested Post-Hearing Briefs to address particular issues, namely, does the presumption that the prescriptive use by the TMF Defendants is under a claim of right adverse to the owner apply in this case, and whether or not the TMF Defendants met their burden of demonstrating that the

[5] While this filing certainly went beyond what the Superior Court had requested and what the parties agreed to, it provides ample support against any argument that the Appellants were not able to "tell their story."

Plaintiffs were on notice of their use giving rise to a prescriptive easement claim. These are the very issues that the Appellants are now seeking to reverse on appeal.

Appellants actually filed a Rule 52(b) Motion to Amend, which despite their argument, appears to be more in line with a Rule 52(a) Motion.[6] When there are requests for findings, the trial court is not required to adopt whatever findings are requested. Instead, the trial court may adopt findings contrary to those requested, or it may determine, as the trial court determined here, that it had already made findings on all essential issues, in which case no further findings are required. See Sewall v. Saritvanich, 1999 ME 46, ¶ 10, 726 A.2d 224, 226; Peters v. Peters, 1997 ME 134, ¶ 12, 697 A.2d 1254, 1258.

The Superior Court's Judgment is twenty-one (21) pages long. Of those twenty-one pages, more than seven (7) pages are devoted to Findings of Fact. While the Appellants are correct to assert that they are entitled to findings of fact sufficient to allow for appellate review, what they are actually seeking is not further findings of fact, but the rationale used by the Superior Court to reach the conclusions that it reached; that they are not entitled to. See e.g. Dargie v. Dargie, 2001 ME 127, ¶ 3, 778 A.2d 353, 355. See also Wandishin v. Wandishin, 2009 ME 73, ¶ 19, 976 A.2d 949, 954 (The Court is "not required to explain the rationale used to support each finding of fact or conclusion of law," and so "requests for additional fact-findings pursuant to M.R.Civ.P. 52(b) should not be used to…reargue points that were contested at trial.").

The Superior Court made sufficient findings of fact such that intelligent appellate review is not precluded in this case. As such, the proper standard of review for a prescriptive easement

[6] A Rule 52(a) Motion would have had to be filed five (5) days after the Court's decision. Plaintiffs' Motion was not filed within that time frame. M.R.Civ.P. 52(a).

claim is clear error, and the court's Findings of Fact should be affirmed if there is any competent evidence in the record to support it. Gutcheon v. Becton, 585 A.2d 818, 821 (Me. 1991).

ARGUMENT

I. THE TRIAL COURT'S DETERMINATION THAT TMF DEFENDANTS CONSTITUTED A CLASS OF PERSONS UNDER 14 M.R.S.A. § 812 SHOULD BE AFFIRMED.

A. TMF Defendants are distinguishable from the public at large.

From the moment the TMF Defendants filed their Answer and Counterclaims in this matter, the Appellants have sought to have TMF Defendants' claims dismissed by arguing that the TMF Defendants' use of the beach was indistinguishable from the public at large, but the Appellants' own Complaint acknowledges the fact that "unlawful use of Plaintiffs' property by individual defendants under claim of right without plaintiffs' consent" has occurred. App. 388. Furthermore, Appellants testified at trial to an understanding of the "Goose Rocks Zone" and the Goose Rocks Community. See e.g. App. 710 (Appellant Edwina Hastings testified that the Goose Rocks Zone is accessed by Dyke Road or New Biddeford Road and that she knew "half a dozen back-lot people"); App. 720 (Appellant John Gallant testified to back-lot owners that he knows and recognizes using the beach).

Despite the fact that the Appellants have specifically identified this class as Defendants in their Complaint, and testified to their use at trial, they have repeatedly sought to prevent TMF Defendants from asserting these very rights and continue to do so on appeal. The Appellants, through their Complaint caption, broadly named all TMF Defendants as a party, thereby guaranteeing the preclusive effect of any final judgment against those same TMF Defendants, but then sought to affirmatively deny the right of TMF Defendants to participate in the litigation

affecting their rights and to assert a prescriptive right to use the beach as a class of persons, despite the fact that Appellants acknowledged that the very class exists.

TMF Defendants are not merely members of the general public. They are part of a greater beach community and actual users of the beach. As such, TMF Defendants differ from the public at large both in fact and in law. Factually, TMF Defendants are distinguishable from the general public because of their location to the beach, their consistent use of the beach, their treatment of the beach as if it were their own, their ability to access the beach without permits (parking), their ability to rent their homes based on their proximity to the beach, their inflated tax-assessed values based on their location in the "Goose Rocks Zone," and their ability to access the beach through various private rights of way, to name a few. Indeed, Appellant Mary Davis, who started coming to Goose Rocks Beach in 1925, and whose deposition was entered as testimony at trial, made a sweeping and important distinction between those in the Goose Rocks Beach area versus the public at large, claiming that "insiders" are those that "owned property there or rent, they are owners of beach property, they are owners of Goose Rocks Beach property," and this consisted of those people who own property "right near the beach" including those on the opposite side of Kings Highway from the beach and two houses back from that. App. 604. When specifically asked if Goose Rocks Beach is its "own little community", Ms. Davis testified, "Yes. I always have thought of that like that." Id.

The Appellants appear to be arguing that the TMF Defendants cannot assert a prescriptive claim if the Town is also asserting rights to Goose Rocks Beach. The Plaintiffs cite to Hill v. Lord for the proposition that "if such custom, with any other evidence in the case, establishes any prescriptive right in the town, in its corporate capacity, for the use of the inhabitants, the plaintiff cannot recover." 48 Me. 83, 96 (1861). The facts in Hill, however, are

completely inapposite to the present case. In Hill, the plaintiff asserted an action of trespass to recover the value of seaweed taken by the defendant from the shore owned by the plaintiff. Id. at 91. In his defense, the defendant in Hill alleged that, "at the time of the taking, the title to the property was in the Town of Kennebunkport, and not in the plaintiff; and that the defendant, as one of the inhabitants, entered thereon and took the seaweed by the permission of the Town." Id.

The TMF Defendants in this case are not asserting that the Town of Kennebunkport has fee interest in Goose Rock Beach or any other ownership interest in Goose Rocks Beach, nor are the TMF Defendants contending that their rights derive by nature of their status as members of the general public. Rather, the TMF Defendants are asserting that they have acquired a private easement, as a class, by prescription, based on the uncontested facts which have been asserted and proven at trial. Should it be found in this case that the Town of Kennebunkport owns the property in fee or has acquired a public prescriptive easement, then the TMF Defendants would agree with the long-held principle that the Plaintiffs are asserting, specifically that an individual cannot acquire a prescriptive right in publicly-held land. See e.g. Portland Water Dist. v. Town of Standish, 2006 ME 104, ¶17, 905 A.2d 829, 833-834 (holding the common law rule that a party cannot assert a claim of title by adverse possession or prescriptive easement against a governmental entity); Sandmaier v. Tahoe Dev. Group, Inc., 2005 ME 126, ¶ 8, 887 A.2d 517, 519 (the assertion of a prescriptive easement against a municipality is prohibited in great part because the acts of possession that establish prescriptive easement are generally even less obvious than those that establish adverse possession, as it would be difficult to monitor publicly held lands, many of which are extensive, to interrupt adverse uses). To be clear, the Appellants here are not asserting that the Town of Kennebunkport has an interest in Goose Rocks Beach.

Rather, they are asserting that Goose Rocks Beach is owned by private beachfront owners (Appellants) to the exclusion of everyone else.

Appellants take an unsupported, narrow view of the TMF Defendants and generally those individuals who own property in the "Goose Rocks Zone," and seek to assert that the TMF Defendants rights are no different than those being asserted by the general public. However, the TMF Defendants are in fact different from the public, and have rights different from those being asserted by the public generally. In addition to the previously stated facts, the TMF Defendants own property in a demographic area that is separate and distinct from that of the general public. TMF Defendants have purchased their property with the understanding and belief that they acquired individualized rights to Goose Rocks Beach, which run with their land and are transferrable. Many of the TMF Defendants' deeds make reference to Goose Rocks Beach, unlike the deeds of members of the general public. See e.g. App. 2277-2282. Appellants have even testified that they would not have rented back-lot property at Goose Rocks Beach without having access and the ability to recreate on Goose Rocks Beach. See e.g. Testimony Transcript of Janice Fleming at p. 213, lines 6-10.[7] TMF Defendants' property taxes are assessed as a higher rate than the general public based on their proximity and access to Goose Rocks Beach. Unlike the general public, TMF Defendants do not need to acquire a parking permit from the Town of Kennebunkport or stay at a local inn in order to access Goose Rocks Beach. These are all rights TMF Defendants acquired when they purchased their property, these are the rights that the TMF Defendants sought to protect in answering the Appellants' Complaint, and these are property rights separate and distinct from the public's claim to use the beach.

[7] Attached hereto is a copy of Transcript Testimony of Janice Fleming, which appears to have been altered in the page submitted in the electronic Appendix at 857.

While it is true that in Maine, the "interpretation of the prescriptive servitude focuses on the reasonable expectations of the landowner," as Appellants argue, it is also true that "the relevant inquiry is what a landowner in the position of the owner of the servient estate should reasonably have expected to lose by failing to interrupt the adverse use before the prescriptive period had run." Flaherty v. Muther, 2011 ME 32, ¶ 83, 17 A.3d 640, 661 (citing Restatement (Third) of Prop.: Servitudes § 4.1 cmt. (h)). "This approach is consistent with the idea that the 'open, notorious, [and] visible' element of establishing a prescriptive easement is required 'to give notice to the owner of the servient estate that the user is asserting an easement.'" Id. at 661-662 (quoting Great N. Paper Co. v. Eldredge, 686 A.2d 1075, 1077 (Me. 1996). Based on the long standing use of back-lot owners and the fact that their use was consistent at all areas of Goose Rocks Beach, from the Batson River to the Little River, dating back to the 1920s, it is not reasonable for the Appellants to argue that the TMF Defendants' use, as a class, is indistinguishable from the public. To be sure, Appellants testified to their own use of the beach at times when they were a member of that very class. See e.g. App. 809 (Appellant William Forrest's parents were back-lot owners at Goose Rocks Beach and Mr. Forrest recreated on the beach as a child).

B. TMF Defendants are properly a class as provided under 14 M.R.S.A. § 812.

14 M.R.S.A. § 812 specifically states that a class of persons may acquire an easement upon or over the land of another. While "class" is not specifically defined in the statute, this Court in Flaherty provided guidance on this issue. This Court in Flaherty found that a group of people who owned property in a subdivision, referenced in their deeds as J-Lot owners[8], were

[8] This is similar to the language in the TMF Defendants' deeds, which were all submitted and admitted as exhibits in this case, which make reference to "Goose Rocks Beach" or similar language of that import.

considered a class of persons as provided under 14 M.R.S.A. § 812. 2011 ME 32, ¶ 84, 17 A.3d at 661. Furthermore, Blacks Law Dictionary defines a "class" as "[a] group of people…that have common characteristics or attributes." Bryan A. Garner ed., 7th ed., 242, West 1999. Appellants argue that the Superior Court was wrong in holding that the TMF Defendants were a class of persons by virtue of their ownership of property in the Goose Rocks Zone, but the holding in Flaherty dictates otherwise. Whereas Flaherty did not hold that a prescriptive easement was proven for a class of person because the use by the class of persons was "quite limited," in this instance the use by the TMF Defendants was (and continues to be) extensive. 2011 ME 32, ¶ 84, 17 A.3d at 661. Therefore, the holding in Flaherty is on point and supports TMF Defendants. In addition, the Superior Court in this case did not simply find the TMF Defendants were a class by virtue of their ownership of property in the Goose Rocks Zone, the Superior Court also cited to other distinguishing factors that separated TMF Defendants from the public at large. These factors included, but were not limited to, TMF Defendants' ability to access the beach via private rights of ways, TMF Defendants' involvement in Goose Rocks Beach community and community functions (often times alongside Appellants), TMF Defendants' ability to rent their properties based on their proximity to Goose Rocks Beach, and TMF Defendants' constant, sometimes year-round use of Goose Rocks Beach.

II. THE TRIAL COURT'S FINDINGS AND CONCLUSIONS CONCERNING THE TMF DEFENDANTS' PRESCRIPTIVE EASEMENT SHOULD BE AFFIRMED.

A. **The Appellants were on notice of the TMF Defendants' use.**

This Court held in Flaherty v. Muther that the Maine statute regarding adverse possession allows that a class of persons may acquire an easement through prescriptive use. 2011 ME 32, 17 A.3d 640;14 M.R.S.A § 812 (2011). In Flaherty, this Court noted that it had "decided numerous cases regarding acquisition of prescriptive easements by individuals and the public."

Id. at ¶ 81 (citing Lyons v. Baptist Sch. of Christian Training, 2002 ME 137, 804 A.2d 364 (discussing public prescriptive easements); Blackmer v. Williams, 437 A.2d 858 (Me. 1981) (affirming an individual's easement by prescription); Town of Kennebunkport v. Forrester, 391 A.2d 831, 833 n.2 (Me. 1978). However, this Court, until that point, had never discussed how a class of persons that is separate from the public can establish the prescriptive element of continuity. In providing guidance, the Law Court stated that "[i]n the absence of relevant prior decisions, [the Court] seeks guidance from the Restatement, which provides: 'A servitude should be interpreted to give effect to the intention of the parties ascertained from . . . circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created.'" Id. at ¶83 (citing Restatement (Third) of Prop.: Servitudes § 4.1(1)). "When the circumstances surrounding the creation of an easement are prescriptive in nature, 'the adverse use that leads to creation of the servitude provides the basis for determining its terms.'" Id. (citing Restatement (Third) of Prop.: Servitudes § 4.1 cmt. a.).

> Since the servitude created by adverse use arises from the failure of the landowner to take steps to halt the adverse use, interpretation of the prescriptive servitude focuses on the reasonable expectations of the landowner. The relevant inquiry is what a landowner in the position of the owner of the servient estate should reasonably have expected to lose by failing to interrupt the adverse use before the prescriptive period had run.

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

"This approach is consistent with the idea that the 'open, notorious, [and] visible' element of establishing a prescriptive easement is required 'to give notice to the owner of the servient estate that the user is asserting an easement.'" Id. (citing Great N. Paper Co. v. Eldredge, 686 A.2d 1075, 1077 (Me. 1996)). Backlot owners are not required by law to send a letter to each plaintiff expressing an intention to acquire rights to the beach by prescription.

Adopting this view, the objective expectations of the Appellants *and not the type of use* (i.e. recreational use) becomes central to determining whether, as a matter of law, the conduct by the TMF Defendants established a prescriptive easement as a class of persons in Goose Rocks Beach. "Those expectations rest on the actual use of [Goose Rocks Beach] during the prescriptive period." Id. at ¶ 89. The objective expectations of the Appellants should rest on the twenty-plus years of continuous, uninterrupted, recreational use of Goose Rocks Beach as testified to by the TMF Defendants, which was clearly observed by the Appellants as owners of beachfront property and clearly understood by Appellants when they purchased their homes. See e.g. App. 810 (Appellant William Forrest testified to use of Goose Rocks Beach with his wife without permission prior to owning beachfront property).

The argument that the Appellants were not on notice of the TMF Defendants claims because the TMF Defendants are not distinguishable from the public does not hold. Many TMF Defendants had private rights of ways leading to the beach, many of which bordered along or were very close to Appellants' property. See e.g. App. 790; App. 767; App. 551 (Appellant Robert Scribner testifying that Exhibit 123 was "a quitclaim deed that describes a right of way, pedestrian right of way, I believe, that was given to a series of back-lot owners that are in the neighborhood of our property"). There is a Goose Rocks Beach Association which is attended by both beachfront owners, including Appellants, and back-lot owners. There was ample testimony in which Appellants recognized back-lot owners and their families. Furthermore, unlike other cases of a similar ilk, Goose Rocks Beach is a well-defined zone with natural barriers to excessive use by non-owners in the Goose Rocks Beach zone. This leads to a familiarity that is not evident elsewhere. Based on the ample testimony at trial of recreational use of the Appellants' property by TMF Defendants, the Superior Court was within its discretion

to observe the testimony and the credibility of the witnesses and draw certain inferences from that testimony. See e.g. Carolan v. Bell, 2007 ME 39, ¶ 24, 916 A.2d 945, 951. "Without question, substantial numbers of the TMF Group [have] been using the Beach without interruption in a continuous, open and visible manner for eighty or more years." App. 364.

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

B. The type of use (recreational use) and the nature of the land (beach) does not diminish the rights acquired by the TMF Defendants.

The Appellants mischaracterize the argument that the lower court committed an error of law by failing to conclude that the TMF Group had rebutted the presumption of permission or had demonstrated hostile use by focusing on the type of use, the nature of the land, and the "neighborly" feel of Goose Rocks Beach. As demonstrated below, the test for determining whether or not the TMF Defendants have demonstrated the hostile use or whether the presumption of permission applies is by looking at what the Appellants should reasonably have expected to lose by failing to interrupt the use of Goose Rocks Beach by the TMF Defendants before the prescriptive period had run.

In none of the cases cited by the Appellants does the court distinguish the "use of a way" from recreational use. Rather, these cases focused on the type of land and the frequency of use. See e.g. Weeks v. Krysa, 2008 ME 120, ¶ 2, 955 A.2d 234, 235 ("casual, seasonal, use of an undeveloped waterfront lot…"); Weinstein v. Hurlbert, 2012 ME 84, ¶ 12, 45 A.3d 743, 746 ("The 'notorious' and 'hostile' elements of adverse possession require more" than seasonal lawn mowing). That is certainly not the case here. In addition, both Weeks and Weinstein involve the acquisition of land by adverse possession, as opposed to a prescriptive easement. See Weeks, 2008 ME 120, 955 A.2d 324 and Weinstein, 2012 ME 84, 45 A.3d 743.

This Court should look at all factors to determine if the elements of a prescriptive easement are established, including, but not limited to, "the nature of the land, the uses to which it can be put, its surroundings, and various other circumstances." See Falvo v. Pejepscot Indus. Park, Inc., 1997 ME 66, ¶ 8, 691 A.2d 1240, 1243. The Appellants are using strained readings of those cases to support attenuated arguments, to no avail. Unlike Weinstein, the instant case involves more than "limited seasonal lawn mowing, the planting and pruning of several bushes, minimal gardening [and] a single instance in which building supplies were stored on the property…". 2012 ME 84, ¶ 11, 45 A.3d 743, 746. Finally, unlike Lyons, which is another case the Appellants use to focus on the type of use and the nature of the land, the TMF Defendants are not asserting a public prescriptive easement. 2002 ME 137, 804 A.2d 364.

As previously discussed, TMF Defendants are distinguishable from the public at large. "In cases involving claims of private, prescriptive easements, [the Court has] stated that where there has been unmolested, open and continuous use of a way for twenty years or more, with the knowledge and acquiescence of the owner of the servient estate, the use will be presumed to have been adverse and under a claim of right." Id. at ¶ 18. This Court's decision in Weeks did

not overrule this standard. Furthermore, the Court stated in Lyons that the application of the presumption would not be applied *only* when it involves a public, prescriptive easement claim for recreational uses when that claim applies to *open fields or woodlands*. Id. (emphasis added); see also Eaton v. Town of Wells, 2000 ME 176, 760 A.2d 232 (finding that the presumption applied to recreational use of a beach). The facts of this case, including the nature of Goose Rocks, the use of the beach, and the fact that Appellants and Parties-in-interest acquiesced to its use by TMF Defendants, is what gives rise to the presumption.

C. The presumption that the prescriptive use by the TMF Defendants is under a claim of right adverse to the owner applies in this case.

"[A] party asserting an easement by prescription must prove (1) continuous use (2) for at least 20 years (3) under a claim of right adverse to the owner, (4) with his knowledge and acquiescence, or (5) a use so open, notorious, visible and uninterrupted that knowledge and acquiescence will be presumed." Eaton v. Town of Wells, 2000 ME 176, ¶32, 760 A.2d 232, 244. "[T]he permissible uses of an easement acquired by prescription are necessarily defined by the use of the servient land during the prescriptive period." Id. at ¶ 41 (quoting Gutcheon v. Becton, 585 A.2d 818, 822 (Me. 1991)). There can be no doubt, given the ample and credible record, that Goose Rocks Beach has been used for recreational purposes for well over 100 years.

In Lyons, this Court stated that "[i]n cases involving claims of private, prescriptive easements, [the Court has] stated that where there has been unmolested, open and continuous use of a way for twenty years or more, with the knowledge and acquiescence of the owner of the servient estate, the use will be presumed to have been adverse and under a claim of right." Lyons v. Baptist Sch. Of Christian Training, 2002 ME 137, ¶ 18, 804 A.2d 364, 370. The Lyons Court did not state, as the Appellants would lead this Court to believe, that there is a presumption

that the property owners have given implied permission for the recreational use and it is the TMF Defendants' burden to overcome this presumption. The Appellants' use of the Lyons case in support of this proposition is inappropriate. The Appellants cite to Lyons as an example of Maine case law recognizing that recreational use of open, unenclosed land is presumed to be permitted by property owners. Id. at ¶¶ 18-24. However, the Court in Lyons was clear to point out that the application of this permissive use only applies to "a *public*, prescriptive claim…to open fields or woodlands." Id. at ¶ 18 (emphasis added). Lyons is not a departure from past Maine precedent that applied to *private*, prescriptive claims. See e.g. S.D. Warren v. Vernon, 1997 ME 161, ¶¶ 15-17, 697 A.2d 1280, 1283-84 (affirming a finding of a private prescriptive easement, but vacating a finding of a public prescriptive easement based on evidence of use of a way for hunting or *recreational*, woods work and access by abutting *landowners*) (emphasis added).

The Appellants also cite to Weeks v. Krysa for the proposition that the ruling in Lyons now applies to private prescriptive claims, but this application of the Weeks holding is unsupported by the language of the holding itself. 2008 ME 120, 955 A.2d 234. Weeks only established what has been generally regarded in the law of servitudes; namely, that if the use of an easement has been unexplained for twenty years, it is presumed that the use is adverse and is sufficient to establish title by prescription unless controlled or explained. Id. at ¶¶ 2, 13 (use of an undeveloped waterfront lot approximately twice a year which was *never witnessed by the landowner* was not "sufficient to put a person of ordinary prudence, and particularly the true owner, on notice that the land in question is actually, visibly, and exclusively held by a claimant"). The responsibility rests on the record owner to show that the use of the easement was somehow explained by some unique circumstance or was a result of a "license, indulgence,

or special contract inconsistent with a claim of right by the other party." See e.g. White v. Chapin, 94 Mass. 516, 518 (1866).

While permission by the owner will prevent a claim for a prescriptive easement, acquiescence is not sufficient to prevent acquisition of prescriptive rights. Id. Permission is more than acquiescence. "Acquiescence… means passive assent such as consent by silence and does not encompass acquiescence in the active sense such as…by means of the positive grant of a license or permission." See Jacobs v. Boomer, 267 A.2d 376, 378 (Me. 1970). The ample testimony in the case by TMF Defendants and Appellants alike point to passive assent on the part of Appellants with respect to the TMF Defendants' recreational use of Goose Rocks Beach. In those instances where a positive grant of a license or permission was given on Goose Rocks Beach, it was with respect to some unique circumstance such as storage of a boat or kayak, use of the beach access stairs on the beachfront owner's upland property, or to hold a wedding. App. 811 and 852. Permission was never asked and never given with respect to general recreational activities on the beach.[9]

Furthermore, Weeks is distinguishable in that it involved a claim for adverse possession, not a prescriptive easement. Id. at ¶ 2. The other example in Maine where this Court has looked to whether the use was controlled or explained was in the case of Androkites v. White. 2010 ME 133, ¶ 16, 10 A.3d 677, 682 (holding that the prescriptive use was not adverse to the owner due to the fact that at one point the servient estate was owned by a *family member* and thus, the use was deemed permissive) (emphasis added)). However, Appellants can only point to two separate

[9] Appellants also try to argue that they objected to the use of the beach by the TMF Defendants, but their only proof of objections came well after the prescriptive period had already run, and their objections related to non-recreational use. For example, objecting to people climbing on the rocks (App. 665) or objecting to storage of boats on the beach (App. 671). As such, the prescriptive claim for recreational use was not defeated by an objection to the prescriptive use as Appellants contend.

family members as between the Appellants and TMF Defendants out of over 178 TMF Defendants and over 27 Appellants. This is not enough (under any objective analysis) to overcome the presumption, especially in light of the fact that more than just these family members used the Appellants' property in question. Permissive use by one individual does not in and of itself prevent any other user from establishing an independent claim of right. Blackmer v. Williams, 437 A.2d 858, 862 (Me. 1981). The fact that certain Appellants and TMF Defendants were friends does not rise to the level that the use was controlled or explained. A perfect example of this was when TMF Defendant Maria Junker testified that while she would never enter into the Appellants' Celi or Scribner home uninvited, she would certainly access the beach in front of their home without invitation and without permission. App. 1921.

An analogous case, looking at whether the presumption of permission applies to a class of persons, which might give the Court further guidance is Cordrey v. Dorey, which involved the use of a pier and grove regarded and used by the owners of the surrounding lots as a common area. 1996 De. Ch. LEXIS at *6. Cordrey is particularly on point in that the Court of Chancery of Delaware applied the presumption that the use was under a claim of right to a class of persons when that use was open, notorious visible and uninterrupted. Like the facts in this case, both the plaintiffs and defendants in Cordrey used the prescriptive area in a like manner, without objection by anyone and the state of affairs giving rise to the prescriptive claim existed from 1923 until 1988, when the plaintiffs executed (through straw parties) quitclaim deeds to themselves, and thereafter claimed the right to exclusive possession of the pier and the grove. Id.

Similar to the case before this Court, the defendants, together with the plaintiffs, in Cordrey constitute a majority (though not all) of the lots surrounding the grove. In addition, the prescriptive rights defendants sought to vindicate in Cordrey were broader than their own

individual rights of access to the disputed property. Because the Cordrey defendants presented their claim largely in terms of their own personal use, the evidence was sufficient to support a finding that easement rights exist in a broader *class of persons*. Id. at *7 (emphasis added).

In Cordrey, the Court of Chancery of Delaware found that the use of the pier and the grove was open and notorious. Id. at *8. The facts laid out various uses such as sunbathing, crabbing and parking cars on the grove consistently over time. Id. The only contrary evidence was testimony by one of the plaintiffs that no cars were ever parked on the grove, which testimony was contradicted by photographs which showed that the grove was used to park cars. Id. This is not dissimilar to the Appellants' claims in this case that no one used the beach, claims buttressed by showing sample photographs in support of this claim. These claims were contradicted by testimony and photos of several back lot owners using the beach dating back to the 1940s. See e.g. App. 2283-2416.

Where the use of the disputed property is open and visible, as was the case in Cordrey, and where "there is no semblance of proof that the use was permissive," the adverse character of the user may be presumed. Id. at *10. In Cordrey, the Chancery Court found that the use of the pier and the grove was open and visible, and there was no evidence of permission was given or asked. Id. The little testimony of permission that was offered was given no weight because it was unspecific, conclusory, undocumented and self-serving. Id. at *11. The facts in Cordrey are very similar to the facts here, and the Court in Cordrey found that the presumption applied with respect to a prescriptive easement asserted by a class of persons. Based on the facts of the case at hand, this Court can and should reach the same conclusion.

D. TMF Defendants met their burden of demonstrating that the Appellants were on notice of their use giving rise to a prescriptive easement claim.

When determining whether or not the Appellants had knowledge and acquiesced to the recreational use of the beach in front of their property, the test is not whether Appellants subjectively knew their rights were at jeopardy, or that they were friendly with some of the TMF Defendants, as they contend in this case, but rather the test is objectively when would the property owner be on notice. When the use is so open, notorious, visible and uninterrupted, *knowledge* and acquiescence will be presumed. Eaton v. Town of Wells, 2000 ME 176, ¶32, 760 A.2d 232, 244 (emphasis added). The Goose Rocks Beach property owners and their predecessors in title were on notice dating back to the 1920s and likely earlier. To sit idle for over ninety (90) years and claim that such use was permissive despite any credible testimony that permission was given (before this lawsuit was filed) or objection was made as to recreational use is by its very nature acquiescence, which is one of the prescriptive elements to be satisfied by the TMF Defendants.

The Appellants cite to Flaherty as proof of lack of notice: however, Flaherty is quite different to the overwhelming facts at hand in the instant case. In Flaherty, only 3 out of the 19 witnesses were able to establish a prescriptive claim. 2011 ME 32, 17 A.3d 640. In Flaherty, the use of the easement in question only dated back to the 1970s, and out of the 19 lot owners, only 3 had potentially met the prescriptive period and one of the three that testified to over 20 years of use was not a part of the class. Id. The property owner in Flaherty did not have "notice" because the elements of a prescriptive claim by the class could not be met. In the instant case, 30 people testified to over 20 years of continuous use, under a claim of right adverse to the owner, with the owner's knowledge and acquiescence, or a use so open, notorious, visible and uninterrupted that knowledge and acquiescence will be presumed. If the TMF Defendants did not heed the

Superior Court's admonitions and exhortations regarding trial time and judicial economy, over 140 other witnesses would have testified similarly.

The testimony presented at trial established that back lot owners and beachfront owners that were part of the class live at all areas of the beach, and back-lot property owners' use encompassed the entirety of Goose Rocks Beach. It is a hollow argument to state that TMF Defendants only access the beach via certain rights of way and stray only a few houses over in either direction when there are over 27 rights of ways providing access to the beach, and at its largest point only 15 lots separate these rights of ways. No Appellant testified to not seeing back lot and beachfront owners using the beach in front of their property, as was the case in Weeks. Appellants testified to back-lot owners and beachfront owners using the beach for recreational purposes without permission and without interruption. The Appellants even testified as to their own recreational use without permission in front of other beachfront owner's homes.

The Appellants are essentially sticking their heads in the sand (pun intended) and ignoring the fact that the beach in front of their property was used by Goose Rocks residents for a period well exceeding twenty (20) years. A few isolated instances of objection to non-recreational use or permission, many of which occurred after the case was filed, cannot defeat the valid prescriptive claim brought by the TMF Defendants. Indeed, some of the Appellants did not even rebut the testimony of the prescriptive use on their property. These Appellants cannot now claim that the TMF Defendants did not meet their burden of proof.

Appellants in one breath state in defense of the Town of Kennebunkport's claim for a public prescriptive easement that "everyone knew it was private property," but in the next breath say that with respect to the TMF Defendant's claim, the use was not adverse because the Appellants did not have knowledge of the use by backlot and beachfront owners. If the beach

was indeed private as the Appellants contend, and everyone did in fact know it, but still used it without objection or permission, the use by its very nature is adverse and the Appellants had knowledge of the use.

Finally, the TMF Defendants did present testimony as to use on each of the Plaintiffs' property for the prescriptive period. While this use was not every day, this use was continuous for the prescriptive period and the use does not have to be made by each member in the class. Rather, as stated in Flaherty v. Muther, 'the adverse use that leads to creation of the servitude provides the basis for determining its terms.'" 2001 ME 32 at ¶ 83 (citing Restatement (Third) of Prop.: Servitudes § 4.1 cmt. a.).

> Since the servitude created by adverse use arises from the failure of the landowner to take steps to halt the adverse use, interpretation of the prescriptive servitude focuses on the reasonable expectations of the landowner. The relevant inquiry is what a landowner in the position of the owner of the servient estate should reasonably have expected to lose by failing to interrupt the adverse use before the prescriptive period had run.

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

The recreational use by the TMF Defendants at Goose Rocks Beach was open, notorious and visible such that notice was provided to the Appellants that the TMF Defendants were asserting a right to use the beach for recreational purposes.

In sum, there was competent evidence presented at trial that the TMF Class has established a prescriptive easement to the entirety of Goose Rocks Beach for recreational purposes, and such finding was not in clear error, and should be affirmed.

III. THE ENTRY OF FINAL JUDGMENT WAS PROPER

This Court reviews the entry of final judgment certification for an abuse of discretion. Wells Fargo Home Mortgage, Inc. v. Spaulding, 2007 ME 116, ¶ 13, 930 A.2d 1025, 1028.

"Because of the restricted function of [M.R. Civ. P. 54(b)(1) this Court has] required 'specific findings and reasoned statement by the…court explaining the certification' to enable [this Court] to review 'whether the facts of this case constitute such an unusual circumstance that the merits of an interlocutory appeal should be considered before all pending claims are resolved.'" Chase Home Finance LLC v. Higgins, 2008 ME 96, ¶10, 953 A.2d 1131, 1143 (quoting Wells Fargo, 2007 ME 116, ¶ 12, 930 A.2d at 1028). Chase Home Finance LLC listed several factors which are deemed relevant in determining whether the facts of this case merit the certification of final judgment under M.R.Civ.P. 54 (b)(1). Those factors are:

- The relationship of the adjudicated and unadjudicated claims;
- The possibility that the need for review may be mooted by future developments in the trial court;
- The chance that the same issues will be presented to the court more than once;
- The extent to which an immediate appeal might expedite or delay the trial court's work;
- The nature of the legal questions presented as close or clear;
- The economic effects of both the appeal and any delays on all of the parties, including the parties to appeal and other parties awaiting adjudication of unresolved claims; and
- Miscellaneous factors such as solvency considerations, the res judicata or collateral estoppels effect of a final judgment and the like.

Id. (citing Wells Fargo, at ¶ 13 n.1, A.2d at 1028).

Applying the factors in Chase Home Finance LLC the trial court appropriately found that:

a. The adjudicated prescriptive easement claims and the unadjudicated easement by estoppel, easement by implication and the title claims rested on very different factual underpinnings;

b. No future decision by the trial court could moot the need for review. In fact, the TMF Defendants' claim for prescriptive easement would not be impacted with a finding that the Plaintiffs have title to the low water mark;

c. In light of TMF Defendants' Conditional Stipulation, there is no likelihood that this Court will face the same issues more than once;

d. An immediate appeal would expedite the trial court's work because TMF Defendants' Conditional Stipulation to dismiss with prejudice their remaining claims obviated the need for a trial on all remaining issues;

e. The legal questions on appeal with respect to a class prescriptive claim are not close with respect to the TMF Defendants' claims for easement by estoppel and easement by implication;

f. All parties would be better off economically by avoiding the need for a costly and time-consuming trial on the remaining Counterclaims by TMF Defendants and the pending title claims between the Town of Kennebunkport and the Plaintiffs; and

g. Judicial economy weighs in favor of entering final judgment, and all parties would benefit from an expedited resolution.

App. 376-77.

"Finally, in addition to promoting judicial efficiency and economy, no party was prejudiced by the entry of final judgment. The [Appellants] lose nothing because the Conditional Stipulations puts the [Appellants] in the same position on appeal that they would be if they tried – and won- all of the remaining claims by TMF Defendants and the remaining title claims." App. 377.

The Appellants argue that further developments in the lower court could render portions of this Court's decision moot, but that simply is not the case. For example, the Appellants propose a scenario that an instance could arise in which the lower court could find that neither the Town or the Appellants have title to the beach and as such this Court's decision in this appeal would become an advisory opinion; however, unlike Flaherty, 2011 ME 32, ¶ 85 n.16, 17 A.3d 640 (stating that an easement claims regarding property owned by a non-party presents a non-justiciable issue), this case did not involve non-party owners. The only possible owners are either the Appellants, which has no impact on the TMF Defendants prescriptive claims, the Town, or some predecessor in title who were effectively put on notice in this case. If it is ultimately determined that the Town owns the beach, then this would have little impact on the TMF Defendants as well, as they would continue to enjoy the benefits of recreating on the beach. The economic benefits of having a final judgment far outweigh the potential impact that the TMF Defendants' prescriptive claims are rendered moot if it is determined that the Town owns the beach. Accordingly, it was entirely appropriate and in the best interest of all involved that the Partial Judgment was certified.

CONCLUSION

Goose Rocks Beach is one of Maine's most bucolic sites. The beauty and the community are what drove people, in some cases over one hundred years ago, to purchase property there.

The beach served, and continues to serve, as the focal point of activities in the Goose Rocks Beach area, and this natural resource is a treasure for all. For some, however, this treasure is one that is now sought to be held exclusively, a stark contrast from the inclusive nature that was once part of the draw to vacation and purchase at Goose Rocks Beach. It is almost as if, having gone from renter to backlot owner to beachfront owner, Appellants are the last ones in pulling up the drawbridge. Not only is this conduct reprehensible in and of itself, it is without support in the law.

The TMF Defendants, through exhaustive testimony (and with a bullpen of scores of other members of the class poised to testify), demonstrated decades upon decades of use of Goose Rocks Beach, from the Batson River to the Little River. This use included recreational activities common to all beaches, on the dry sand and in the intertidal zone, in full view of beachfront owners. Permission was never sought (except for uses beyond the traditional activities) nor granted. Recall TMF Defendant Carl Schmulz responding incredulously to a question regarding whether he sought permission to use the beach – "I might as well ask for permission to breathe." Recall TMF Defendant Robert Pearce's emotional and tearful response to the question as to whether he ever thought, in the 80 plus years he had been coming to Goose Rocks Beach, that he would be called to a courtroom to detail his years of use in order to preserve his right to use Goose Rocks Beach. Recall TMF Defendant Joan Junker describing the beach in the 1940s and today in remarkably consistent terms, and the hold it has had on generations of her family. These are the stories of Goose Rocks Beach.

Appellants have been quick to brush aside concerns about their attempt at privatization of the beach, asserting that backlot owners have always used the beach and will likely always be allowed to use the beach. Unfortunately, that is not what Appellants requested when they

commenced this litigation, and the reliance on their future largesse is insufficient security for such a treasure.

For generations, backlot owners and beachfront owners have recreated on Goose Rocks Beach. They've been members of the Goose Rocks Beach Association. They've watched their grandparents and parents, and then their children and grandchildren, frolic in the surf, build sand castles, play beach volleyball, or read a book. They've watched as babies have grown to teenagers who went away in their post-college years, only to be drawn back to the haven of Goose Rocks Beach. They've watched back-lot owners remodel homes, or perhaps purchase a beachfront home, and the use of the beach was as consistent and reliable as the tides that shape the beach itself.

And, unfortunately, back-lot owners and beachfront owners have watched as a self-selected few initiated this litigation to put effectively an end to this way of life, a way of life that is the only way of life each of them has known at Goose Rocks Beach for decades. That attempt is misguided, as it is both anathema to the culture and ethos of the special place, and it is without support in our jurisprudence. The law, tradition, and common sense dictate that Goose Rocks Beach should be as Goose Rocks Beach is and was.

For all the reasons set forth above, the Superior Court's Order granting summary judgment should be affirmed. The Partial Judgment and Findings of the trial court regarding TMF Defendants' prescriptive rights to recreate on Goose Rocks Beach should be affirmed, and the entry of Final Judgment should be affirmed. Appellees should be granted their costs, including attorney's fees for this appeal.

DATED: August 6, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2013, I caused to be served by placing a copy of the forgoing **Brief of Appellee TMF Defendants** in the U.S. Mail, postage prepaid, and addressed to the following:

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A. Generally we were right there, we didn't move a lot.
Q. Right where?
A. In front of the property that the Kraeuters rented out.
Q. Okay. And was it important for you to you -- when you were renting to be able to access the beach so that your four and six-year old daughters could play on the beach?
A. Yes.
Q. Okay. From 1973, the summer of '73 to the summer of '74, did your use -- did your activities on the beach change at all?
A. Yes, because in '74 we rented a house, it had three bedrooms, we got a baby-sitter and my husband bought a boat. So that summer we did a lot of sailing together, the baby-sitter stayed with the children. And that changed, so I --
Q. Were the kids engaging in the same activities that they had done the summer before on the beach?
A. Yes, they were staying on the beach.
Q. Okay. Great. So you knew in 19 -- did you see other people in 1973 using the beach when you were down there?

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A. Yes.
Q. Okay. So you knew in 1973 that other people, back lot owners and beach front owners, were using the beach at Goose Rocks Beach, correct?
A. In '73 when we were at the Kraeuters, the Kraeuters were the back lot and there was no one behind them and so I had no idea who people were. We went to the beach, I paid -- minded my own business and I didn't really talk to anybody else. So I didn't know where they came from.
Q. But you were renting a back lot and you were using the beach?
A. That's right.
Q. Did you ever see people -- beach front owners come out of their house, do you recall, and use the beach as well?
A. I don't remember to tell you yes. In 1974 when we -- '75 when we rented the Pick/Young cottage, there were people that lived next door and they used their beach in front of their property.
Q. Great. And the -- the house on Bel Air, that you rent now, I believe Jack testified in his deposition that you see evidence of the renters using the beach, sand all over the place and things like that; is that accurate?

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A. Right.
Q. Great. Do you have any idea where those -- do you have any idea where those renters go on the beach?
A. Idea or knowledge?
Q. Knowledge or --
A. No knowledge.
Q. Great. I want to get at just a little more -- I think this is my final question, but the concept of -- the objection and the permission. You said -- I believe you said that if you don't object to something, they have your permission, correct?
A. When did I say that?
Q. Maybe you didn't.
A. I didn't say that.
Q. Okay. How does someone know that they have your permission to use the beach in front of your house?
A. If I kick them off, they don't have my permission.
Q. Okay. So in the absence of any affirmative act, they have your permission?
A. Right.
Q. Okay. What about -- when your husband testified

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in his deposition that he's objected before but not said anything to someone, is that an objection or is that permission in your mind?
A. In my mind it's a discussion that we had with one another and sometimes he's harder than I am and sometimes I'm harder than he is, so we discuss it, is this reasonable. And I do not want to be bad neighbors with our back lot people, so I would rather be reasonable. Sometimes he gets aggravated with the noise and the castles being built and -- and it's just kind of like it's only going to be for another day and then they're going to leave.
Q. But do you know -- you used the term those back lot -- or back lot people, do you know everyone behind you?
A. I know the people that he's objecting to because they own the house across the street and they have five adult children and they have a million grandchildren.
THE COURT: I'm hoping that's not a fire alarm.
THE JUDICIAL MARSHAL: It is a fire alarm.
THE COURT: It is a fire alarm.