STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET NO. YOR-12-599

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

Appellants-Plaintiffs

v.

TOWN OF KENNEBUNKPORT, et al.,

Appellees-Cross-Appellants-Defendants

STATE OF MAINE'S MOTION FOR RECONSIDERATION

Now comes Appellee-Cross-Appellant State of Maine, pursuant to Maine Rule of Appellate Procedure 14(b), and joins the Town in requesting reconsideration of the Court's decision not to address the public trust doctrine issues on the merits. The State of Maine adopts the well-made arguments of the Town, and makes the following additional observations:

1. The Court's decision did not address the public trust issues, reasoning:

> [N]otwithstanding the [Superior C]ourt's application of a public prescriptive easement to the intertidal zone (which we herein vacate) the court went on to declare separately the public's rights in the intertidal zone stemming from the public trust doctrine. That determination is premature. The court's determination of the scope of the public's right to use the intertidal zone pursuant to the public trust doctrine must be vacated because *only the Beachfront Owners' declaratory judgment claim even implicates the public trust, and the parties have not yet litigated that portion of the case. In addition, as noted earlier, the State did not file a claim for a declaratory judgment or any other cause of action raising the public trust doctrine.* We note also

> that the presumption of permission applies to the intertidal zone as well as to the dry sand for all general recreational activities.

Decision, ¶ 35 (emphasis added; footnote omitted).

2. The public trust issue is in the same procedural posture as prescription and custom.

3. As explained by the Town in its motion for reconsideration, the Town's counterclaims do include the same public trust doctrine claims as those in the State's affirmative defenses. It is true that the State did not file a separate counterclaim but the Town's counterclaims more than suffice.

4. The public trust issue was fully litigated by the parties before the Superior Court, just as custom and prescription were. Just as the State relied upon the Town and others to primarily "litigate" the custom and prescription issues, the Town relied upon the State to primarily "litigate" the public trust issues. This division of work-load does not change the fact that the Town did file a counterclaim on the public trust issues.

5. Following the use-by-use approach of the *McGarvey Opinions*, the Town and the State claim that there are public trust rights in the intertidal zone at Goose Rocks Beach, and those rights include, *inter alia*, "jet-skiing; water-skiing, knee-boarding or tubing; surfing; windsurfing; boogie boarding; rafting; tubing, paddleboarding; and snorkeling" as found by the Superior Court.

6. Additionally, the Court should address the public trust issues for the same reasons the Chief Justice explained in *Eaton v. Town of Wells.* 2000 ME 176, ¶52, 760 A.2d 232, 249 (Saufley, J., concurring) ("The potential for

multiple disputes, for continuing uncertainty, and for extensive litigation is obvious.")

7. The apparent *dicta* that "the presumption of permission applies to the intertidal zone as well as to the dry sand for all general recreational activities," *Decision,* ¶ 35, should not forestall consideration of the public trust rights in the present appeal.

8. This statement could be viewed as a legal conclusion that "permission" is a complete defense to the consideration of or recognition of any modern public trust use—that is, any evolution of "navigation" to include, for example, scuba diving.

9. First, that would represent a complete abandonment of the *McGarvey* opinions. The *McGarvey* opinions established "compare and contrast" approaches on a use-by-use basis, without *permission* playing a role. The modern evolution of fishing, fowling and in particular navigation has been reinforced by the general acceptance of particular uses, but *permission* is not a determinative component.

10. Second, the suggestion of permission is not supported by the record. The record reflects that Plaintiffs objected to public members, for example, beaching jetskis in the intertidal zone. *State Brief,* 27. Plaintiffs did not simply "permit" these uses; the record is clear that Plaintiffs recognized the "right" of the public to engage in them. *E.g., State Brief,* 44 n.84 (Plaintiff Scribner (A.547 at 32, A.550 at 45, A.555 at 66-67) (public has *right* to stroll in intertidal zone)).

11. Finally, permission is irrelevant because the Town and the State claim that the public trust uses exist *regardless* of permission.

12. Here, the Town and the State seek to have a declaration on the Town's counterclaim that the public trust uses include those recognized by the Superior Court as well as other uses. Plaintiffs certainly do not agree that the public trust uses include those recognized by the Superior Court. Instead, each Plaintiff seeks to obtain a declaration that the public trust doctrine do not include those uses, and to have the unfettered discretion to revoke permission at any time for any and all of those uses.

13. There is a continuing controversy here, which cannot be avoided by Plaintiffs suggesting that at this moment in time, for strategic litigation purposes, they "permit" the trust uses the public exercises but seek the legal right to end that permission at any time. This dispute is over the *rights* of the public, not the whims of the Plaintiffs.

14. The State further suggests that the Court may wish to consider, if it would be helpful, to have oral argument on the merits of the public trust issues. The earlier argument on this case did not focus on the actual public trust uses applying the *McGarvey Opinions.*

Wherefore, the State respectfully requests that the Court reconsider its decision, and address the public trust issues on the merits in the present appeal.

DATED: February 18, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Paul Stern, Deputy Attorney General, hereby certify that I have caused one copy of the State's Motion for Reconsideration to be served upon counsel of record by depositing said copies in the United States mail, postage prepaid, addressed as follows:

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Dated at Portland, Maine this 18th day of February, 2014.

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