STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Docket No. YOR-12-599

ROBERT F. ALMEDER, *et al.*

Plaintiffs-Appellants

v.

TOWN OF KENNEBUNKPORT, *et al.*

Defendants-Appellees

APPEAL
From The York County Superior Court

APPELLEE TOWN OF KENNEBUNKPORT MOTION FOR RECONSIDERATION AND INCORPORATED MEMORANDUM OF LAW

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SUPREME JUDICIAL COURT
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ROBERT F. ALMEDER, et al.,

Plaintiffs

v.

LAW COURT
DOCKET NO. YOR-12-599

TOWN OF KENNEBUNKPORT, et al.,

Defendants

APPELLEE TOWN OF KENNEBUNKPORT'S MOTION FOR RECONSIDERATION AND INCORPORATED MEMORANDUM OF LAW

Appellee Town of Kennebunkport (the "Town"), pursuant to M.R. App. P. 14(b), hereby moves this Court for reconsideration of the February 4, 2014 Decision, with the support of Appellees TMF Defendants, State of Maine and Margarete and Richard Driver and Judith and Alexander Lachiatto, and the Town likewise supports the Motions for Reconsideration filed by Appellees State of Maine and Margarete and Richard Driver and Judith and Alexander Lachiatto, and further states as follows:

MEMORANDUM OF LAW

I. REVIEW OF THE TOWN'S PUBLIC TRUST DOCTRINE COUNTERCLAIM IS NOT PREMATURE.

In its February 4, 2014 Decision, it appears that the Court misunderstood that the Town has asserted a counterclaim based on the public trust doctrine. The Court held that the Superior Court's determination

concerning the scope of the public trust doctrine was premature "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," Decision at 24, but the Superior Court's entry of final judgment and determination of the scope of the public trust doctrine was clearly in response to the Town's public trust doctrine counterclaim and the State's affirmative defenses.

The Town specifically asserted a counterclaim on the public trust issue, in Paragraph 39 of Count VII of the Town's November 19, 2009 Answer, Defenses and Counterclaims, claiming rights on behalf of itself and the public "on and over Goose Rocks Beach for purposes of unfettered public recreation and amusement, as well as for fishing, fowling, and navigation, by virtue of the public trust doctrine." A. at 435. The Town then requested in its prayer for relief that the Superior Court declare the scope of the public trust doctrine and find that the public "has an easement on and over Goose Rocks Beach for unfettered public recreation and amusement as aforesaid and for fishing, fowling, and navigation."[1] A. at 435.

On November 29, 2013, the Superior Court ordered that "final judgment be entered on the public trust claims," including the Town's public trust doctrine counterclaims – and not just the public trust doctrine defenses asserted by the State of Maine to the Appellant's title claims. A. at 378

[1] Appellants specifically acknowledged in their Brief on appeal that the Town had asserted a counterclaim pursuant to the public trust doctrine that "mirrored" the State's affirmative defenses based on the public trust doctrine. Appellants' Brief at 69. Furthermore, the parties and Superior Court all understood that the trial below included the "prescriptive, custom and public trust claims," as exemplified by the July 12, 2012 correspondence from Attorney Thaxter to Dianne Hill, Clerk of the York County Superior Court, a true copy of which is attached hereto for the Court's convenience as Exhibit A.

(emphasis added). The Town, in its Brief on appeal, expressly "adopt[ed] by reference the State's arguments on public rights in the intertidal zone." Town's Brief at 17, n. 1. Thus, final judgment has been entered on the Town's public trust doctrine counterclaim, it is clearly part of this appeal, and a review of the Superior Court's determination of the scope of the public trust doctrine, including but not limited to its determination that the public trust doctrine includes "ocean-based activities," is not premature here.

II. THE CASE SHOULD BE REMANDED TO THE SUPERIOR COURT FOR SPECIFIC FINDINGS AS TO EACH PARCEL.

It is unclear from the Court's February 4, 2014 Decision whether the case of *Eaton v. Town of Wells*, 2000 ME 176, 760 A.2d 232, on which the Town and Superior Court both relied in this case, has now been overturned, and whether it is even still possible to acquire a public prescriptive easement for recreational purposes under Maine law. *See, e.g.,* Decision at 18, n. 16. The Court relies in large part on the case of *Lyons v. Baptist Sch. Of Christian Training*, 2002 ME 137, 804 A.2d 364 in finding that the Superior Court erred by failing to apply the presumption of permission. Yet the *Lyons* Court did not hold that the presumption of permission was irrebuttable; instead, the *Lyons* Court acknowledged that the presumption of permission merely "leaves with the [claimant] the burden of proving adversity through a claim of right hostile to the owner's interest, without the benefit of any presumption of adversity arising from long term public recreational uses of the land." *Lyons*, 2002 ME 137, ¶ 25, 804 A.2d at 372.

The Court in *Lyons* went on to find insufficient evidence of adverse use of the woods road in question that could have put the Baptist School on notice that its property rights were in jeopardy. In doing so, however, the *Lyons* Court distinguished *Eaton*, specifically recognizing that the evidence of public use and Town maintenance on Wells Beach met the test for adversity in that case, effectively rebutting the presumption of permission as follows:

> [T]he evidence [in *Lyons*] is very different from the evidence that supported finding a public easement in *Eaton v. Town of Wells,* 2000 ME 176, 760 A.2d 232. In *Eaton,* the Town of Wells was a party and was asserting a public easement. There was a century-long history of the Town maintaining, patrolling, and enforcing laws on the contested beach. There was also an extensive history of large public gatherings planned and conducted by the town and other groups unrelated to the landowners, and there was some indication of landowner dissatisfaction with some of the public uses. This evidence was sufficient in *Eaton* to give the owners notice that a public easement was being acquired and that their rights were in jeopardy....

Lyons, 2002 ME 137, ¶¶28-29, 804 A.2d 364 (emphasis added) (*citing Eaton,* 2000 ME 176, ¶¶ 34-39, 760 A.2d 232).

If the *Eaton* case remains good law and has not now been overturned by this Court,[2] the presumption of permission with respect to a public prescriptive

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[2] The Court's February 4, 2014 Decision states that "[i]n *Eaton*, we affirmed the trial court's grant of a public prescriptive easement over Wells Beach . . . [and i]n our decision, we referred to the presumption of permission, but it is not at all clear that we applied it." Decision at 18, n 16. A review of the decision of the trial court in *Eaton* demonstrates, however, that it recognized the application of a rebuttable presumption of permission and found that "the Town has effectively rebutted that presumption based on the evidence presented." *Eaton v. Town of* Wells, RE-97-203, at *11-12 (Me. Sup. Ct., York Cty, Oct. 20, 1999). On appeal, this Court in *Eaton* then specifically found that "the [trial] court did not err in finding that the Town proved every element of a prescriptive easement" by a preponderance of the evidence, including that public recreational beach use had been under a claim of right adverse to the owner. *Eaton*, 2000 ME 176, ¶ 40, 760 A.2d at 246. Likewise, the Town here is not asserting that the presumption of permission does not apply to beaches; to the contrary, the Town

easement for recreational purposes remains rebuttable,[3] and the case should be remanded to the Superior Court for specific findings as to the beachfront parcel of each of the Appellants to determine whether the presumption has been rebutted by the Town on a parcel by parcel basis.

If the case is remanded, the Superior Court could find evidence of adverse use on a parcel by parcel basis. By way of example, there was extensive testimony at trial, including the testimony of several Appellants,[4] concerning the so-called "public area" or "open section" of Goose Rocks Beach in the center of the beach where there are no houses from "Dinghy Point" to Broadway Avenue, where, according to the Superior Court, "the beach-front lots in that area are vacant; on-street parking is available and the Tides Inn, a hotel, is across the street."[5] A. at 356 and 1986. Most of the vacant lots in the "public area" were purchased by the Kennebunkport Conservation Trust or the

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acknowledges that the presumption applies and asserts that it has overcome the rebuttable presumption of permission by affirmatively proving adversity, just as the Town of Wells did in *Eaton*, as this Court recognized in *Lyons*.

[3] Appellants recognized in their pleadings below that the presumption of permission was applied in *Eaton* and was rebutted by the evidence of longstanding public use and Town maintenance of Wells Beach: "The Law Court specifically distinguished [the *Lyons* case] from the facts in *Eaton v. Town of Wells*, 2000 ME 176, 760 A.2d 232, where the evidence of use was sufficient to overcome the presumption of permission." Plaintiffs' Post Trial Brief at 12, dated September 21, 2012.

[4] Numerous Appellants testified at trial that the area of the beach where there are no houses starting at Dinghy Point (or Gardner's Point) and extending eastward to Broadway Avenue was open to the public and considered the "public beach," including specifically the beach parcels owned by Henriksen, Lencki and Emmons. *See, e.g.,* A. at 546, 551 (Scribner); A. at 563-564 (Hastings); A. at 587 (Davis); A. at 717, 719 (Gallant); A. at 732 (Sandifer); A. at 738, 745 (Zagoren); A. at 766 (Vandervoorn).

[5] Appellants admitted in their pleadings below that "[t]he public beach was always identified as the center or open part of the beach where there are no houses." Plaintiffs' Proposed Findings of Fact and Conclusions of Law at 1.

Town in the 1970s, A. at 1986 and 2007, but several of these parcels are now owned by Appellants, specifically Marie B. Henriksen, Donna K. Lencki and Mary Lou Emmons, and are scattered amongst the parcels owned by the Town and Kennebunkport Conservation Trust. A. at 816-17, 869-875, 918 and 1986. The Court should, therefore, remand the case to the Superior Court for specific findings on a parcel-by-parcel basis as to adverse public use of the beach areas in front of each of the Appellants including, for example, the three parcels located within the universally acknowledged "public area" of the beach.

The Superior Court expressly found in its October 16, 2012 Partial Judgment that "there was more intense use of the Beach in the 'public' area'" and, beginning in the 1950's, "[t]here was a lifeguard stand at or near the 'public' area of the Beach." A. at 356. The testimony at trial established that the lifeguard stand was not located in one specific place over the years, but was placed throughout the "public area" of Goose Rocks Beach, including on the beach in front of parcels currently owned by Appellants, A. at 587, 606, 737, 746-47, 780-81, 785, 787, 818-19, 997-1000, 1044, 1256-57, 1457, 1588, 1756-57, 1842, 1893, 1963 and 2016, and the lifeguard stand was there for many years before the Kennebunkport Conservation Trust or the Town acquired any of the vacant lots in the 1970s. A. at 354, 997-1009, 1960.

The evidence at trial also established that there was a century-long history of the Town maintaining, patrolling, and enforcing laws on the contested beach, particularly in the "public area" of the beach. A. at 353-54 and 2141-54; *see also* Town Trial Ex. at 59a-rrr, 61c-i, 62, 64, 65b-c and 130.

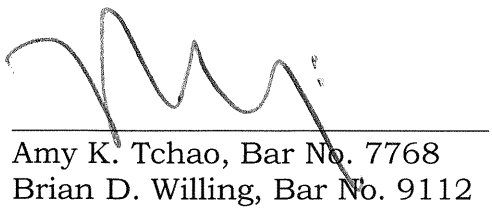
If the case is remanded to the Superior Court for further findings, and the Superior Court finds such evidence on a parcel by parcel basis, the presumption of permission could be rebutted in this case in accordance with the Court's decisions in *Eaton* and *Lyons*.

Swimming and sailing lessons were given to the public in the so-called "public area" of the beach, A. at 543-46, 553, 587, 606, 737, 740, 750, 780-81, 836, 1075-77, 1257-58, 1345, 1409, 1426, 1452-56, 1752-53, 1892-99, 1963, 2275, and there have also been large public gatherings, including but not limited to bonfires, weddings and softball games, A. at 653, 742, 744, 1024-25, 1107, 1120-24, 1249-50, 1633, 1757 and 1839; *see also* Town Trial Ex. 59w, just as the Court found in *Eaton*, and which the Court found in *Lyons* rebutted the presumption of permission. *Lyons*, 2002 ME 137, ¶¶28-29, 804 A.2d 364. The evidence also established that members of the public used the area around Dinghy Point (aka Gardiner's Point) to store boats and dinghies, A. at 713-14, 731-32, 1070, 1257, 1415-16, 1577-78, 1853 and 2198, and that the Town has repaired the seawall that runs along Kings Highway on the vacant beachfront lots. A. at 670 and 2150-54. And, there was extensive testimony at trial concerning Appellants' dissatisfaction, including the testimony of Marie B. Henriksen, Donna K. Lencki and Mary Lou Emmons. These facts, if found by the Superior Court on a parcel by parcel basis, could rebut the presumption of permission under the standard articulated by the Court in *Eaton* and *Lyons*.

WHEREFORE, Appellee Town of Kennebunkport respectfully requests that the Court reconsider its February 4, 2014 Decision and address the public

trust doctrine counterclaim asserted by Appellee Town of Kennebunkport and/or remand the case to the Superior Court for further findings in accordance with *Eaton v. Town of Wells*, 2000 ME 176, 760 A.2d 232 and *Lyons v. Baptist Sch. Of Christian Training*, 2002 ME 137, 804 A.2d 364.

Dated: February 18, 2013



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CERTIFICATE OF SERVICE

I, Brian D. Willing, hereby certify that I have this 18th day of February, 2014, caused two copies of the foregoing Appellee Town of Kennebunkport's Motion for Reconsideration and Incorporated Memorandum of Law to be served on counsel for the parties listed below, by depositing the same in the United States mail, first-class postage prepaid, addressed as follows:

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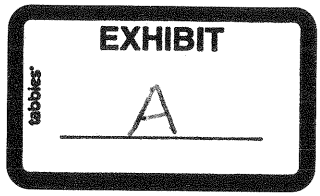
(Counsel to Surfrider Foundation Maine Chapter)

Dated: February 18, 2014

Brian D. Willing, Bar No. 9112



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July 12, 2012

Dianne Hill, Clerk
York County Courthouse
45 Kennebunk Road
PO Box 160
Alfred, ME 04002-0160

RE: Robert Almeder, et al. Town of Kennebunkport, et al.

Dear Ms. Hill:

I am writing to respond to André Duchette's letter dated July 9, 2012, which we received today. If his letter is forwarded to Judge Brennan, please also forward this letter.

The TMF claims of easement by implication are clearly claims that, by their own experts' testimony, involve examination of the titles of both the claimant's property and the particular parcel on which they claim the easement, as well as the interpretation of plans and evidence regarding common ownership. The easement by implication claims will take extensive time to try and will involve the testimony of all three of Plaintiffs' title experts. They are therefore claims that should be heard in conjunction with and following the trial on the title claims, not during the trial of prescriptive easements and custom.

Chris Pazar and I therefore oppose the easement by implication claims being tried with the prescriptive, custom, and public trust claims and agree that Judge Brennan's Procedural Order makes clear that any easement by implication claims would be tried later with title claims.

Sincerely,

Sidney St. F. Thaxter

SST/rar
Copy to:
Amy K. Tchao, Esq./Brian Willing, Esq.
Paul Stern, Deputy Attorney General

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

ROBERT F. ALMEDER, et al.,

Plaintiffs

v.

LAW COURT
DOCKET NO. YOR-12-599

TOWN OF KENNEBUNKPORT, et al.,

Defendants

ORDER

Upon the Motion for Reconsideration of Appellee Town of Kennebunkport, the Court hereby GRANTS the Motion and ORDERS that the case be remanded to the Superior Court for specific findings on a parcel by parcel basis in accordance with *Eaton v. Town of Wells*, 2000 ME 176, 760 A.2d 232 and *Lyons v. Baptist Sch. Of Christian Training*, 2002 ME 137, 804 A.2d 364.

Dated:

_____
Justice, Supreme Judicial Court