

STATE OF MAINE  
CUMBERLAND, SS.

SUPREME JUDICIAL COURT  
SITTING AS THE LAW COURT  
Docket No. YOR-12-599

ROBERT F. ALMEDER, et al.,            )  
  )  
  Plaintiffs-Appellants,    )  
v.    )  
TOWN OF KENNEBUNKPORT, et al.,    )  
  )  
  Defendants-Appellees.        )

PLAINTIFFS' OPPOSITION TO STATE OF  
MAINE'S MOTION FOR RECONSIDERATION

Given that Intervenor the State of Maine never asserted any claim against Plaintiffs Robert F. Almeder, et al. ("Plaintiffs") and the absence of any judiciable controversy on the public's use of the intertidal area of Plaintiffs' properties, the State of Maine's motion for reconsideration ("Motion") should be denied.

**STANDARD OF REVIEW**

A motion for reconsideration "shall state with particularity the points of law or fact that the moving party asserts the Court has overlooked or misapprehended and shall contain such argument in support of the motion . . ." M.R. App. P. 14(b)(1). "The motion is not an occasion to reargue the appeal." 3A Harvey, *Maine Civil Practice* § 14:2 (2013-2014 ed.). This Court "will grant a motion for reconsideration 'only in the extraordinary case where a clear and substantial error has occurred.'" *Id.* (citing to the Advisory Committee's Note to former Rule 76A, which was the predecessor to Appellate Rule 14(b)). It is the Town's burden as the moving party to show that this Court committed a "clear and substantial error." *Id.*

## ARGUMENT

### **I. THE STATE CANNOT RELY ON THE TOWN'S COUNTERCLAIMS WHEN THE TOWN FAILED TO PRESERVE AND/OR ABANDONED ITS COUNTERCLAIMS.**

Plaintiffs hereby incorporate by reference the arguments concerning the Town's waiver of its counterclaims and all other issues presented in their opposition to the Town's motion for reconsideration filed simultaneously with this opposition.

The State asserts that although it did not assert any counterclaims below, procedurally it may be deemed to have advanced a claim on which relief can be granted based on the fact that the Town asserted "public trust" counterclaims. In order to obtain relief, Rule 8(a) of the Maine Rules of Civil Procedure requires a pleading which sets forth a claim through either a complaint, counter-claim, cross-claim or third party claim, a claim showing the pleader is entitled to relief. The State never filed any pleading setting forth a claim against the Plaintiffs. As a matter of procedure, the State has no claims against the Plaintiffs in this case.

Assuming Rule 8(a) can be ignored and somehow the State can be deemed to have a claim derivative of the Town's counterclaim, the State cannot advance any claim given that the Town has waived its counterclaims by failing to ever argue or join in the State's "public trust" argument before the Superior Court. Further, even if not waived, as the Superior Court's partial judgment did not address the Town's counterclaims there is missing a partial final judgment that would permit this Court to review the issues the State presents. If the Town's public trust counterclaims are not properly before this Court, the State cannot rely on those counterclaims to raise the "public trust" issue before this Court. Even assuming the State can be deemed to have pled a claim through the Town's assertion of its

counterclaims, the State cannot hitch a ride on Town claims because those claims have been waived/abandoned, or are not ripe. Thus, the State cannot show that this Court committed clear and substantial error when it declined to address in its decision the State's own "public trust" arguments.

**II. THE STATE SHOULD NOT HAVE BEEN PERMITTED TO PRESENT THE PUBLIC TRUST ISSUES TO THIS COURT BECAUSE IT SHOULD NOT HAVE BEEN GRANTED INTERVENOR STATUS PURSUANT TO RULE 24.**

Even if the Town's counterclaims were properly preserved for this appeal, the only party that forwarded the "public trust" argument at trial was the State, a party who should never have been granted intervenor status in the first place. While the issue of whether the trial court erred by permitting the State to intervene was briefed and presented to this Court, the court did not address the issue. For all the reasons stated in Plaintiffs' brief (June 18, 2013),<sup>1</sup> this Court should address the issue and hold that the Superior Court erred in permitting the State to intervene under Rule 24.<sup>2</sup> Thus, this Court need not entertain the State's Motion and the State's arguments concerning the "public trust" doctrine because the State should never have been permitted to intervene in this lawsuit in the first place.

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<sup>1</sup> Plaintiffs raised this issue and explained in greater detail that the trial court improperly allowed the State to intervene under Rule 24 because the State failed to show how its interest in the litigation was not "adequately represented by existing parties." M.R. Civ. P. 24(a). See Section VII of Plaintiffs' Brief, citing among other cases, *Public Serv. Co. of N.H. v. Patch*, 136 F.3d 197, 204 (1st Cir. 1998); *Int'l Paper Co. v. Town of Jay*, 887 F.2d 338, 345 (1st Cir. 1989); *Moosehead Sanitary Dist. v. S.G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir. 1979).

<sup>2</sup> Plaintiffs' arguments that the Superior Court erred in permitting the State to intervene in this case mirror this Court's reasons for vacating the Superior Court's decision permitting the TMF Group to intervene.

**III. THE STATE'S AND TOWN'S MOTIONS FOR RECONSIDERATION SHOULD BE DENIED BECAUSE THERE IS NO ACTUAL CASE OR CONTROVERSY WITH RESPECT TO PUBLIC USES IN THE INTERTIDAL ZONE.**

Neither the Town nor State has asserted that any individual has been denied the ability to use the intertidal zone at Goose Rocks Beach for any recreational or “ocean-based” activity or has otherwise suffered a “cognizable injury” similar to that in *McGarvey*.<sup>3</sup> Absent a “cognizable injury” there is not justiciable controversy. Absent a justiciable controversy this Court lacks jurisdiction to rule on the scope of the public rights in the intertidal zone.<sup>4</sup> The Court must decline the Town and State’s invitation for this Court to render an advisory opinion. This Court lacks the authority to do so. *See Reville v. Reville*, 289 A.2d 695, 698 (Me. 1972) (“A court, created to exercise judicial power . . . is unauthorized to offer advisory opinions.”).

In order to reach the issue of public rights in the intertidal zone, the State and Town were required to show that a member of the public engaged in a specific use of the intertidal zone “was injured.” *Collins v. State*, 2000 ME 85, ¶ 7, 750 A.2d 1257, 1260. An injury occurs when a party has “been harmed in a ‘concrete way’ necessary to create a case or controversy for decision on the merits of an appeal.” *Rockland Plaza Realty Corp. v. City of Rockland*, 2001 ME 81, ¶ 28, 772 A.2d 256, 264 (citations omitted).

It is the State and Town’s burden to point to facts in the record that show members of the public have suffered a cognizable injury and are entitled to “specific relief through a judgment of conclusive character as distinguished from a judgment merely advising what the law would be if, for example, [Plaintiffs] should someday decide to assert a right to

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<sup>3</sup> *McGarvey v. Whittredge*, 2011 ME 97, 28 A.3d 620.

<sup>4</sup> Plaintiffs fully briefed this issue in Section VII(B) of their Reply Brief in response to the State’s Cross-Appeal and incorporate those arguments by reference herein.

[stop the public from engaging in recreational or “ocean-based” activities in the intertidal zone].” *Conners v. Int’l Harvester Credit Corp.*, 447 A.2d 822, 824 (Me. 1982). The only alleged “cognizable injury” related to the use of the intertidal zone that the State references is the use of jet skis. State’s Motion at 3. Yet, the Superior Court’s findings of fact do not include a single instance where an individual was denied the ability to cross or use the intertidal zone for a particular use.

Thus, besides leaving jet skis in the intertidal zone<sup>5</sup> neither the State nor Town has even alleged that any member of the public was injured or “harmed in a concrete way necessary to create a case or controversy.” *Rockland Plaza Realty Corporation*, 2001 ME 81, ¶ 28, 722 A.2d at 264; *see also McGarvey*, 2011 ME 97, ¶ 11, 28 A.3d at 624–25 (declining to address arguments that the public has the right to cross the intertidal zone for “surfing” and instead answering “only the question before” it regarding scuba diving.).

Finally, Plaintiffs point out that the only true claim implicating the scope of the public rights to the intertidal zone is the Town’s counterclaim. The claim has long since been abandoned by the Town. Plaintiffs’ quiet title and declaratory judgment action does not seek any declaration as to the scope of the public rights in the intertidal zone for the simple reason that Plaintiffs have not sought to bar the public from reasonably recreating on the intertidal zone. Instead, Plaintiffs have permitted such use pursuant to the

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<sup>5</sup> Plaintiffs also note that the State’s citation to the appendix regarding jet skis clearly shows that the property owner only objected to “leaving” the jet ski in the intertidal zone, rather than crossing the intertidal zone for the purposes of jet skiing. A. 762–63. The court can take judicial notice that jet skis are operated on water, and not on dirt or sand.

presumption of permission.<sup>6</sup> The State has sought to expand the scope of public rights in the intertidal zone despite a lack of cognizable injury or case or controversy.

The State's argument would lead to the absurd result that anytime a property owner initiated a quiet title action that included the intertidal zone, the State should be allowed to intervene and without pleading any a claim for relief, argue for a limitless number of public rights to use the intertidal zone regardless of a lack of evidence that any person was ever denied the ability to use the intertidal zone for a particular purpose. For all the reasons expressed above, this is not the law. Therefore, the State's motion should be denied.

**IV. EVEN IF THIS COURT COULD REACH THE ISSUE AS TO THE PUBLIC RIGHTS IN THE INTERTIDAL ZONE, PLAINTIFFS PRESERVED FOR THE PURPOSES OF THIS OPPOSITION ALL THE ARGUMENTS CONTAINED IN THEIR BRIEF AND REPLY BRIEF WITH RESPECT TO THE INTERTIDAL ZONE.**

Plaintiffs thoroughly set forth their position regarding the public's easement rights in the intertidal zone and incorporate by reference all those arguments herein. Thus, should this Court fully consider the scope of the public's rights in the intertidal zone, Plaintiffs reassert those same arguments with respect to the Town's and State's motions for reconsideration. Additionally, Plaintiffs reiterate that there is no "public trust" in the intertidal zone but rather a public "easement" for limited uses. *Bell v. Town of Wells*, 510 A.2d 509, 516-17 (Me. 1986) (unanimously concluding that "the public right under the Colonial Ordinance to use the intertidal zone for navigation and fishing [is] an easement."); *see also Cushing Nature and Preservation Center v. Town of Cushing*, 2001 ME 149, ¶ 12, 785 A.2d 342, 346 (characterizing the public rights in the intertidal zone as "an easement").

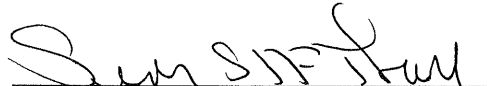
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<sup>6</sup> A. 390-93 (Compl. ¶¶ 45-55 and Prayer for Relief)(seeking declaratory judgment and quiet title "subject to" the public's rights under the Colonial Ordinance). The Plaintiffs' quiet title action was clearly initiated to defend against the Town's recent declarations that the entire beach is public, not to defend against any assertion of rights to use *only* the intertidal zone for all purposes.


**CONCLUSION**

For all the reasons expressed in this memorandum in opposition to the State's Motion, Plaintiffs respectfully request this Court deny the State's motion.

Dated: March 14, 2014

  
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CERTIFICATE OF SERVICE

I, Benjamin M. Leoni, hereby certify that I have this 14<sup>th</sup> day of March 2014, caused a copy of the foregoing Plaintiffs' Opposition to State of Maine's Motion for Reconsideration 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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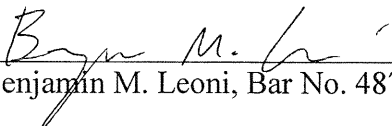
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