STATE OF MAINE **YORK, ss.**	**SUPERIOR COURT** **CIVIL ACTION** **DOCKET NO. RE-09-111**
ROBERT F. ALMEDER et al., **Plaintiffs,** **v.** **TOWN OF KENNEBUNKPORT and ALL PERSONS WHO ARE UNASCERTAINED,** **Defendants.**	**PLAINTIFFS' MOTION *IN LIMINE* REGARDING TMF GROUP'S BURDEN OF PROOF**

NOW COMES Plaintiffs, by and through their undersigned counsel, and hereby files the following Motion *in limine* Regarding TMF Group's (the backlot "Class") Burden of Proof.

THE BACKLOT CLASS'S PRESCRIPTIVE EASEMENT CLAIM MUST OVERCOME A PRESUMPTION OF PERMISSIVE USE

It is undisputed that the Class claims a prescriptive easement for recreational uses over Plaintiffs' claimed beachfront property. In Maine, recreational uses of another's property are presumed permissive. Since the Class is claiming a prescriptive easement for recreational purposes, the Class must overcome the presumption that such use is with the owner's permission.[1] This presumption also applies to the Town's claim of a prescriptive easement for public recreation.

Maine case law has historically recognized that recreational use of open, unenclosed land is presumed to be permitted by property owners. *See Lyons v. Baptist School*, 2002 ME 137, ¶¶

[1] If the Class was not claiming a recreational easement but was instead claiming a private prescriptive easement for a "use of a way" by each member of the Class *individually*, the Class would be entitled to a presumption that its use is adverse and under a claim of right so long as it could prove that [1] the "use of the way" was continuous for 20 years and [2] was with the knowledge and acquiescence of the owner for 20 years. *Lyons*, 2002 ME 137, ¶18. However, since the Class is not claiming a prescriptive easement for each private individual member of the Class and because the Class is claiming a recreational easement, not a right of way, the presumption of adversity does not apply.

18–24, 804 A.2d 365, 37–72. In *Lyons*, the Law Court examined whether this presumption arose from "the public, recreational use itself, or by the nature of the land on which the use occurs" and concluded that "it is the public recreational uses of the land, not the nature of the land alone, that triggers application of the rebuttable presumption of permissive use in public prescriptive easement cases." *Id.* ¶¶ 20, 24. The Law Court stated that "our rule that public recreational uses are presumed to be permissive is predicated on the notion that such use by the general public is consistent with, and in no way diminishes, the rights of the owner of the land." *Id.* ¶ 19 (citing *Town of Manchester v. Augusta Country Club*, 477 A.2d 1124, 1130 (Me. 1984)) (internal quotation omitted). Although *Lyons* explicitly dealt with a public recreational prescriptive easement, if recreational use by the general public does not diminish the rights of the owners, clearly recreational use by only a subset of the public or a few private individuals could not diminish the rights of the owner of land.

However, it was not until the Law Court's decision in *Weeks v. Krysa* that Maine common law explicitly recognized that this presumption applies equally to public *and private* recreational prescriptive easements.[2] 2008 ME 120, ¶¶ 16–17, 955 A.2d 234, 238–39. In *Weeks*, claimants consisted of a private family that used the defendant's vacant shorefront lot for a variety of recreational uses. In overturning the Superior Court's decision granting the claimants title through adverse possession, the Law Court noted that evidence of private recreational use could not overcome the presumption of permission. *Id.* ¶¶ 15–16. The Court cited prescriptive easement cases to hold that:

> Maine has a tradition of acquiescence in access to nonposted fields and woodlands by abutters and by the public. *Lyons v. Baptist Sch. of Christian Training*, 2002 ME 137, ¶¶ 14, 19, 804 A.2d 364, 369, 370. Pursuant to our open lands tradition, recreational use of unposted open fields or woodlands and any

[2] The presumption applies equally to the "claim of right" or "hostility" element of a prescriptive easement or adverse possession claim. *Lyons*, 2002 ME 137, ¶ 26.

> ways through them are presumed permissive and do not diminish the rights of the owner in the land. *Id.* ¶ 19, 804 A.2d at 370; *Town of Manchester v. Augusta Country Club*, 477 A.2d 1124, 1130 (Me.1984).
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> Thus, an abutter's children playing on land, or persons crossing a lot to access the shorefront, other lots, or a local store, are not acts that demonstrate an intent to displace or limit the true owners of the land, and such acts do not provide an absent owner adequate notice that the owner's property rights are in jeopardy. *Lyons*, 2002 ME 137, ¶¶ 26-30, 804 A.2d at 372-73 (discussing what actions demonstrate intent to displace or limit the true owners and provide adequate notice). "To demonstrate adverse use, a claimant must show disregard of the owner's claim entirely and use of the land as though the claimant owned the property." *Id.*

Id. (emphasis added). Although Maine cases have not dealt with whether beaches are part of Maine's open lands tradition, Massachusetts has recognized that "tidal action makes any attempt to fence off or enclose [owner's] beachfront futile . . . [owner's] beachfront is open and unenclosed." *Houghton v. Johnson*, 71 Mass. App. Ct. 825, 838 (2008) (holding that backlot owners had not established all elements of a prescriptive easement because they did not overcome the presumption that their use of owner's beach property was with implied permission). However, such a distinction no longer carries much relevance in Maine because *Lyons* made clear that it is not the nature of the land as "open and unenclosed . . . but the use of the land" for recreation that raises the presumption. *Lyons*, 2002 ME 137, ¶ 21, 804 A.2d 364, 371.

To prove that the use was "under a claim of right" and "hostile" enough to overcome a presumption of permission for recreation, a claimant in either a prescriptive easement case or adverse possession case must prove that the use was: "(1) without the express or implied permission of the owners; (2) with the intent to displace or limit the owner's rights to the land; and (3) undertaken in a manner that provided the owners with adequate notice . . . that the

owner's property rights are in jeopardy." *Id.* ¶ 26 (internal citations and quotations omitted) (emphasis added).

In this case, the Class claims to hold a recreational prescriptive easement over Plaintiffs' properties and therefore must overcome a presumption that the use is permissive. Therefore, Plaintiffs request that this Court decide that the Class must satisfy all elements of a recreational easement—as well as all presumptions— as applied to public claims in *Lyons* and subsequently applied to private claimants in *Weeks v. Krysa*.

Dated: August 10, 2012

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NOTICE

Pursuant to Rule 7 of the Maine Rules of Civil Procedures and the Court's oral order issued August 2, 2012, opposition to this Motion must be filed not later than Friday, August 17, 2012. Failure to file a timely objection will be deemed a waiver of all objections to this Motion which may be granted without further notice or hearing.

STATE OF MAINE
YORK, ss.

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

ROBERT F. ALMEDER et al.,	)	
	)	
	)	
Plaintiffs,	)	**ORDER**
	)	
v.	)	
	)	
TOWN OF KENNEBUNKPORT and ALL PERSONS WHO ARE UNASCERTAINED,	)	
	)	
	)	
	)	
Defendants.	)	

UPON CONSIDERATION of Plaintiffs' Motion in Limine Regarding TMF Group's (the backlot "Class") Burden of Proof, with/without opposition, and with/without hearing, the motion is GRANTED. The Court finds that the Class' claim is a claim for a recreational prescriptive easement over Plaintiffs' properties.

IT IS SO ORDERED that the Class must satisfy all elements of a public recreational easement, as well as all presumptions that the use is permissive, as stated in *Lyons v. Baptist School*, 2002 ME 137, 804 A.2d 365, and subsequently applied to private claimants in *Weeks v. Krysa*, 2008 ME 120, 955 A.2d 234. The clerk is directed to incorporate this Order into the docket by reference. M.R. Civ. P. 79(a).

Dated: August _____, 2012

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Justice, Superior Court