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' OPPOSITION TO TMF DEFENDANTS' AND TOWN OF KENNEBUNKPORT'S MOTION *IN LIMINE* CONCERNING STANDING ARGUMENT**

The TMF Defendants and the Town of Kennebunkport (the "Town") confuse the doctrine of standing with the doctrine of ripeness. In their motion, which the Town joined,[1] TMF Defendants argued that since this Court has not yet ruled whether Plaintiffs have title to the beach, they do not have standing to "object to the prescriptive easement." TMF Motion at 1 (citing *Flaherty v. Muther*, CUM-RE-08-098 (Me. Sup. Ct., Cum Cty., July 30, 2009)). This argument reveals a fundamental misunderstanding of both the Superior Court's decision and the Law Court's decision in *Muther*, which addressed the issue of *ripeness*, not standing.

In *Muther*, the Law Court upheld the Superior Court's determination that the *back lot owner's* prescriptive claims to the intertidal zone "were not *ripe* for adjudication" because the true owners of the intertidal zone were not present. *Flaherty v. Muther*, 2011 ME 32, ¶ 85, fn. 16 (emphasis added). At no point did either court declare that the true or "claimed" property owners did not have standing to challenge the prescriptive claims. Rather, the courts declared that the *prescriptive claimants* could not bring a prescriptive claim at all because the issue was

[1] This very issue was discussed at a pretrial conference at which the Town's own attorneys agreed to hold the prescriptive easement trial first.

not ripe. *Id.* Thus, there is no "standing" argument for the TMF Defendants or the Town to preserve at all.

Based on the Plaintiffs' understanding of the procedure in this case, such a "preservation" of either a ripeness or standing claim is not necessary because this Court has indicated that the prescription trial and any decision rendered therefrom would be *de bene esse*. Black's Law Dictionary defines *de bene esse*: "[a]s conditionally allowed for the present; in anticipation of future need." Black's Law Dictionary 180 (Pocket 3d ed. 2006). Maine law allows court hearings and testimony to be held *de bene esse*. *E.g. Henriksen v. Cameron*, 622 A. 2d 1135, 1147, fn. 4 (Me. 1993) ("Black's Law Dictionary, 5th ed. 1979, defines *de bene esse* as 'proceedings which are taken provisionally and are allowed to stand ... for the present, but which may be subject to future exception or challenge, and must then stand or fall according to their intrinsic merit and regularity'") (dissenting opinion).

This Court has already declared that, in order to ensure witness participation at this trial, the prescriptive easement trial will occur first, followed by a trial on title. Therefore, any decision on prescriptive easement made by this Court will be *de bene esse* and will stand subject to this Court's decision on title later this year.[2]

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[2] To the extent a decision is not made *de bene esse*, Plaintiffs seek to preserve argument regarding ripeness but do not see this to be a potential issue.