STATE OF MAINE
YORK, ss.

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

ROBERT F. ALMEDER and VIRGINIA S. ALMEDER, et al.,	)	
Plaintiff,	)	**DEFENDANT TOWN OF KENNEBUNKPORT'S OPPOSITION TO MOTION *IN LIMINE* REGARDING TMF GROUPS' BURDEN OF PROOF**
v.	)	
TOWN OF KENNEBUNKPORT, et al.,	)	
Defendant	)	

Plaintiffs have twice sought to remove/dismiss TMF Defendants as defendants in this case, but TMF Defendants were permitted to intervene over Plaintiffs' objection, and the Court subsequently refused to enter summary judgment against TMF Defendants. Plaintiffs' Motion *in Limine* Regarding TMF Groups' Burden of Proof is essentially their third bite at the same apple, and it should be denied by the Court just as the first two motions were denied. Of course, TMF Defendants can explain for themselves why Plaintiffs' latest attempt should be denied, and the Town is simply responding to address Plaintiffs' misleading interpretation of the case of *Lyons v. Baptist School*, 2002 ME 137, 804 A.2d 365, and whether the so-called presumption of permission, which applies to "wild and uncultivated lands" in Maine, applies to the public's longstanding use of Goose Rocks Beach for well over a hundred years.

As an initial matter, Plaintiffs must themselves demonstrate that Goose Rocks Beach is "wild and uncultivated land" to which the presumption of permission applies.

In the case of *Flaherty v. Muther*, the Cumberland County Superior Court (Crowley, J.) specifically determined that the presumption of permission did not apply to Secret Beach in Cape Elizabeth, Maine – just as it had not applied to Wells Beach or Moody Beach in the earlier beach rights cases. *See Flaherty v. Muther*, Me. Super. Ct. No. RE-08-098, at *24 n.16 (July 30, 2009), aff'd *Flaherty v. Muther*, 2011 Me 32, ¶ 5, 17 A.3d 640. Thus, it is far from clear that the presumption of permission applies here.

Even if the presumption somehow applies to Goose Rocks Beach, the Court in *Lyons* did not overturn *Eaton v. Town of Wells*, 2000 ME 176, 760 A.2d 232, in which the Law Court specifically recognized that the Town and public had acquired a prescriptive easement for general recreational use of Wells Beach. Rather, the *Lyons* Court distinguished the long-standing use, control and maintenance of the beach by the Town and public in the *Eaton* case from the absence of evidence of such public use, control or maintenance of the road in Lyons. *See Lyons* at ¶ 30-31, 804 A.2d at 373 (emphasis added). The Court further reasoned:

> 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 v. Baptist School, 2002 ME 137, ¶ 28, 804 A.2d 365, 373.

The evidence at trial in this case, like the evidence in *Eaton*, will demonstrate that Plaintiffs were well aware of the longstanding use of Goose Rocks Beach by the Town

and the public sufficient "to give the owners notice that a public easement was being acquired." Thus, whether the Cumberland County Superior Court (Crowley J.) correctly concluded in *Flaherty v. Muther* that the presumption of permission does not apply to recreational use of a beach, or even if the presumption does apply here, the underlying issue is notice to Plaintiffs and their predecessors in title of the longstanding use, control and maintenance of Goose Rocks Beach by the Town and public. The evidence at trial will demonstrate that the Town and public have been using, controlling and maintaining the beach for well over a hundred years, and such use, maintenance and control is more than sufficient to put Plaintiffs, and their predecessors in title, on notice that "a public easement was being acquired and their rights were in jeopardy." *Id.*

Dated: August 16, 2012

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