

STATE OF MAINE
YORK, ss.

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

ROBERT F. ALMEDER and VIRGINIA S.
ALMEDER, et al.,

Plaintiff,

v.

TOWN OF KENNEBUNKPORT, et al.,

Defendant.

**DEFENDANT TOWN OF
KENNEBUNKPORT'S OPPOSITION
TO PLAINTIFFS' MOTION *IN*
LIMINE TO EXCLUDE TESTIMONY
OF EDWIN A. CHURCHILL**

The expert testimony of historian Edwin A. Churchill is relevant to the issues of easement by prescription and easement by custom,¹ which claims are before the court in this first phase of trial and is therefore admissible. M.R.Evid.402. "Relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." M.R.Evid.401. "All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute or by these rules or by other rules applicable in the courts of this state." M.R.Evid.402.

Presently before this Court during this first phase of trial are three legal issues: whether the general public has acquired a right to use the Beach by either prescriptive easement or the doctrine of custom, and whether TMF Defendants have acquired private prescriptive rights to the Beach. In Maine, a prescriptive easement is created when there is continuous use of property for at least twenty years under a claim of right adverse to the owner, and with his knowledge and

¹ Plaintiffs' Motion in Limine inexplicably ignores the fact that the claim of easement by custom is also being tried in this first phase of trial.

acquiescence, or by a use that is open, notorious, visible, and uninterrupted, such that acquiescence can be presumed. *E.g.*, *Jost v. Resta*, 536 A.2d 1113, 1114 (Me. 1988).

A claim of custom is premised typically on seven criteria, including several factors that look to the use of land in the past: the custom must be ancient and in place as long as anyone can remember, the use must have been exercised without interruption, the use must be peaceable and free from dispute, and the use must be reasonable. *E.g.*, *Bell v. Town of Wells*, 1987 Me. Super. LEXIS 256 ** 37-38 (Sept. 14, 1987)(citing *State ex. rel. Thornton v. Hay*, 462 P.2d 671 (Ore. 1969)). Both of these legal issues require this Court to evaluate factual issues of what occurred in the past: specifically, how and when the Beach was used, who used it, what beachfront owners knew of that use, whether the use was in dispute, and whether the use was reasonable. Under the doctrine of easement by prescription, the Town need only prove use that extends “at least twenty years,” but the Town is not limited to presenting evidence for any single twenty year period. Likewise, in order to evaluate a claim under the doctrine of custom, the Court must expressly consider evidence regarding use of the beach that has been “ancient and in place as long as anyone can remember.”

On July 29, 2011, the Town designated historian Edwin A. Churchill, and stated in relevant part as follows:

Mr. Churchill will testify concerning Maine’s colonial history, and specifically as it relates to the use of Goose Rocks Beach, and the use of Goose Rocks Beach and other coastal beaches in Maine as a road. Mr. Churchill will analyze historic documents and will also testify concerning the historical development of Goose Rocks Beach.

This designation is clear that Mr. Churchill will be testifying both to “the use of Goose Rocks Beach and the use of Goose Rocks Beach and other coastal beaches as a road.” *Id.* (emphasis added). During his deposition, on June 1, 2012, Mr. Churchill indicated that with regard to

certain aspects of his testimony (most of which will not be introduced until the title phase of this trial), he would be “more or less” focused on the period from 1620 to 1720, Churchill Deposition at 9:4-16, but that other portions of his testimony regarding use of the beach, including its use as a road, “does go beyond the colonial and revolutionary period up until what I would call the prerecreation, the prehotel period, so there could be some items going up a little further there.” Churchill Deposition at 14. Mr. Churchill specifically stated that he would be offering opinions on “the use of the beach, as I say, in the pretourist² period in terms of how it was used and who was in control, et cetera,” Churchill Deposition at 16:8-14, 71:6-18.

Such testimony will include the use of the beach as a road and for travel during that time period, including evidence of such roads depicted on maps and charts as late as the 1867 Navigational Maps produced by Plaintiffs. It will also include use and control of the beach by the Town for the purpose of controlling and regulating the movement of horses, sheep, cattle and other livestock. The Law Court, in upholding an easement by prescription in *Eaton v. Town of Wells*, specifically cited to evidence that the Town “regulated beach activity” including regulations regarding animals on the beach. *Id.* 2000 ME 176, ¶ 37, 760 A. 2d 232, 245. So, for example, during Mr. Churchill’s deposition he explicitly testified regarding two Acts and Resolves of Massachusetts in 1789 and 1795, which expressly granted the Town authority over the beach “lying between the rivers called Batson River and Little River in the easterly part of said town,” which in Mr. Churchill’s opinion “basically says the town is in control and can tell people who can come and go and when. In other words, the town has been given authority to

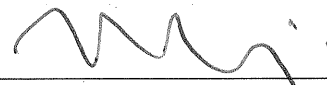
² Evidence at trial, presented primarily through witnesses other than Mr. Churchill, will show that Goose Rocks Beach (historically also known as “Beachwood”) was heavily advertised as a tourist destination and beach resort community starting as early as the late nineteenth century, and that for several decades thereafter it contained many hotels, motels, campgrounds, resorts and even a casino, some of which still exist today. Mr. Churchill’s reference to the “prehotel” or “pretourist” period was an indication that he will be testifying regarding use of the beach starting in the early seventeenth century up to the start of this period in the late nineteenth century.

control the beach.” Churchill Deposition at 102:2-24. Mr. Churchill’s testimony may also include an analysis of the limited historical primary documentation regarding recreational use of the beaches in Kennebunkport during the prehotel or pretourist period, such as the Andrew Walker diaries recording such recreational use of Kennebunkport beaches during the early to mid nineteenth century.

All of this evidence, including the evidence regarding the use of the beach as a road, is relevant both to the Town’s claim for an easement by prescription as well as an easement by custom. As Plaintiffs concede in their motion *in limine*, the scope of the easement claimed by the Town includes the right to walk from one end of the beach to the other. The historic public use of the beach “as long as anyone can remember” and for “a period in excess of twenty years” to walk, ride, and otherwise travel from one end of the beach to the other is an element of the Town’s claims, and Mr. Churchill’s testimony regarding this use is directly relevant and admissible. Plaintiffs’ argument that such testimony (or a portion thereof) is irrelevant because the Town’s claims of the right to walk the beach from end to end are somehow limited to “the right to *stay* on beach property for the purpose of ... walking” (as distinct from the right to walk across the beach for the purpose of travel) strains comprehension. *See* Plaintiffs’ Motion in Limine at 2 (emphasis original).

The Town claims an easement by prescription and an easement by custom, the scope of which includes all types of recreational activities (including walking and other forms of travel). Mr. Churchill’s testimony regarding the “prehotel” and “pretourist” use of the beach for recreation, travel as a road, and the Town’s authority, use and regulation of livestock on the beach are all relevant and admissible to the Town’s claims. Therefore, Plaintiffs’ Motion in Limine to exclude the testimony of Edwin A. Churchill should be denied.

Dated: August 14, 2012



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STATE OF MAINE
YORK, ss.

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

ROBERT F. ALMEDER and VIRGINIA S.)
ALMEDER, et al.,)

Plaintiffs)

v.)

TOWN OF KENNEBUNKPORT, et al.,)

Defendants)

**TOWN OF KENNEBUNKPORT'S
EXPERT WITNESS DESIGNATION**

Defendant Town of Kennebunkport (the "Town"), by and through its undersigned counsel, and hereby designate its expert as follows:

1. Robert A. Yarumian II, P.L.S., 8 River Road, Route 112, P.O. Box 67, Buxton, ME 04093-0067

Mr. Yarumian has been a licensed surveyor in the State of Maine since 1984 and has over twenty-five years of experience as a professional land surveyor. Mr. Yarumian has been the owner of Maine Boundary Consultants since 1988 and is a 1979 graduate of Paul Smith College and has been a member of the Maine Society of Land Surveyors since 1984 and served on its executive committee from 1990-1994. Mr. Yarumian has also been a member of the Maine Land Title Association. A copy of Mr. Yarumian's Curriculum Vitae is attached to the Expert Designation of TMF Defendants and was also included as an Exhibit to Mr. Yarumian's affidavit filed in support of the Town's Motion for Summary Judgment.

Mr. Yarumian will testify consistently with the opinions set forth in his affidavit filed in support of the Town's Motion for Summary Judgment, including but not limited to the modern and ancient title history and the historical location of Plaintiffs' properties and the properties of their predecessors in title, including the physical boundaries of the properties

and geographical features referenced in the modern and ancient title. Mr. Yarumian will analyze the modern and ancient title history, as well as historic documents, and will also testify concerning the historical development of Goose Rocks Beach. Mr. Yarumian will provide expert analysis relative to the effect of the title and historical documents and the historic development of Goose Rocks Beach on the Town's interests in Goose Rocks Beach.

Mr. Yarumian may further testify in response to any of the opinions expressed by the testimony of Plaintiffs' expert witnesses.

In support of his opinions, Mr. Yarumian will rely upon his education, training and professional experience. He may also rely on his inspection of documents produced by the Plaintiffs, the pleadings, transcripts of depositions, and other material produced in this matter.

Mr. Yarumian will be paid at the rate of \$125 per hour. The Town reserves the right to supplement this disclosure upon receipt of: a) deposition transcripts; b) documents produced in response, to discovery requests; and c) any information produced by Plaintiffs expert witnesses. The Town further reserves the right to supplement their disclosure in this matter upon the completion of discovery in this matter.

2. Edwin A. Churchill, 62 School Street, Augusta, ME 04330

Edwin Churchill was the Chief Curator at the Maine State Museum in Augusta. He received his Ph.D. from the University of Maine in 1979, has taught American and European history at several institutions in Maine, and is the author of numerous books and articles on Maine history. His areas of expertise include Maine and northeastern American history, with emphasis on the colonial period, and Maine material culture. He is a two-time recipient of the Maine Historical Society's James P. Baxter Award for best journal articles published and received the Neil Allen Award from the Society for outstanding contributions in the fields of

Maine history and genealogy. The Town will provide a copy of Mr. Churchill's Curriculum Vitae shortly – specifically as soon as it receives a copy from Mr. Churchill.

Mr. Churchill will testify concerning Maine's colonial history, and specifically as it relates to the use of Goose Rocks Beach, and the use of Goose Rocks Beach and other coastal beaches in Maine as a road. Mr. Churchill will analyze historic documents and will also testify concerning the historical development of Goose Rocks Beach. Mr. Churchill will further testify in response to any of the opinions expressed by the testimony of Plaintiffs' expert witnesses.

In support of his opinions, Mr. Churchill will rely upon his education, training and professional experience, including his experience as a consultant in the case of Bell v. Town of Wells, Eaton v. Town of Wells and State of New Hampshire v. State of Maine. Mr. Churchill will also rely on his inspection of documents produced by the Plaintiffs, the pleadings, transcripts of depositions, and other material produced in this matter.

Mr. Churchill will be paid at the rate of \$85 per hour. The Town reserves the right to supplement this disclosure upon receipt of: a) deposition transcripts; b) documents produced in response, to discovery requests; and c) any information produced by Plaintiffs expert witnesses. The Town further reserves the right to supplement their disclosure in this matter upon the completion of discovery in this matter.

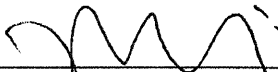
The Town also hereby designates Wayne Fessenden, Bill Fullerton, Barbara Barwise and Sharon Cummins based on their extensive knowledge of the history of Goose Rocks Beach, including the use of Goose Rocks Beach by the public over time.

The Town may supplement its expert designation to include a title attorney to testify concerning the ancient and modern title history at Goose Rocks Beach. The Town has been consulting with a title attorney, who is one of the leading beach rights experts in Maine, for over a year in this matter, but recently learned that the consultant does not wish to be

designated as an expert in this case out of a concern that the scheduling of the trial and depositions would interfere with the consultant's teaching schedule. The Town is considering an application to the Court under Rule 32(a)(3)(E) of the Maine Rules of Civil Procedure, which provides for the introduction of deposition testimony at trial in lieu of live testimony "upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice..."

Finally, the Town reserves the right to supplement this designation of experts based on the disclosure of new or additional information made available during discovery and which may give rise to additional opinions to be rendered by experts in this case.

Dated: July 29, 2011



Amy K. Tchao, Bar No. 7768
Brian D. Willing, Bar No. 9112
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STATE OF MAINE
YORK, ss

SUPERIOR COURT
CIVIL ACTION
Docket No. RE-09-11

ROBERT F. ALMEDER, et al,]
 Plaintiffs]
vs.]
TOWN OF KENNEBUNKPORT and ALL]
PERSONS WHO ARE UNASCERTAINED,]
 Defendants]

DEPOSITION OF: EDWIN A. CHURCHILL

Taken before Melinda Gay Simon, Notary Public,
in and for the State of Maine, on June 1, 2012, at
the offices of Drummond & Drummond, One Monument
Square, Portland, Maine, commencing at 10:00 a.m.,
pursuant to notice given.

Job No. CS396528

1 Q. So do I understand that the population of -- we're
2 talking about Kennebunkport now?

3 A. Yes.

4 Q. And the population of that town back the 1700s was
5 wiped out?

6 A. Yeah, they were wiped out completely at least three
7 times.

8 Q. Okay. And your testimony here today relates to what
9 historic time period?

10 A. I would say essentially from the time of founding up
11 through the next, oh, 90 to 100 years and the
12 founding date we will say is around 1720 --

13 Q. So --

14 A. 1620.

15 Q. So 1720 to 1620, more or less?

16 A. More or less, generally, yes.

17 Q. And have you ever read Kinvin Wroth's chapter of the
18 Legal History of Maine up to 1820?

19 A. No, I can't say that I have.

20 Q. Okay. And you're not a legal historian, right?

21 MR. WILLING: Objection.

22 A. I would say that I did not take courses in legal
23 history, but I have dealt with legal documents in
24 seriously journaled publications for the last
25 40 years.

1 A. It's probably a little more specific than general,
2 but yes, I think that would be passable.

3 Q. And what other opinions are you expected to give
4 here today in this case?

5 A. I will be looking or have been looking very much at
6 the use of the beach, as I say, in the pretourist
7 period in terms of how it was used and who was in
8 control, et cetera.

9 Q. And what are you relying on for your testimony
10 regarding that?

11 A. Primary documents, almost completely. In other
12 words, primary documents being documents created at
13 the time or very near thereto.

14 Q. And which document -- do you have any record or
15 reference as to which these primary documents would
16 be?

17 A. Yes, the biggest source were called the Province and
18 Court Records of Maine. That was the major one.
19 There are some -- there's one history, Sullivan's
20 History of Maine, and the reason that can fall into
21 that category is Sullivan's family moved into
22 Berwick in 1723, and actually he was born in '40 and
23 they were chased out of Berwick by the Indians in
24 1744, came back and ultimately became governor of
25 Massachusetts, but he wrote the first history of

1 Q. Okay.

2 MR. THAXTER: Chris, I think I will turn it
3 over to you.

4 EXAMINATION

5 BY MR. PAZAR:

6 Q. Mr. Churchill, my name is Chris Pazar, I represent a
7 couple of the plaintiffs in the action. You
8 testified earlier that the scope of your analysis
9 was between 1620 to 1720?

10 MR. WILLING: Objection.

11 BY MR. PAZAR:

12 Q. Is that correct?

13 A. I would say -- I would not lock it down to that but
14 I say basically most of it will be within that time
15 period with the exception of roads, which will
16 probably go later.

17 Q. What is the scope --

18 A. I mean beach, not roads.

19 Q. What is the scope of your research, what time
20 period?

21 A. Well, I think I just told you I am looking at what's
22 going on, how the communities -- a community of Cape
23 Porpoise and its sister communities how they evolved
24 through this time period, how they dealt with like
25 resettlement and of how this all ties into the use

1 A. It makes it a year-long thing.

2 Q. Let's look at number two. Can you point me to any
3 language in that document where the town claims
4 ownership of the beach?

5 A. It basically -- my argument that I made there when I
6 put that in is it's not as explicit at that but what
7 it says is it basically says the town is in control
8 and can tell people who can come and go and when.
9 In other words, the town has been given authority to
10 control the beach.

11 Q. To regulate animals on other people's property?

12 MR. WILLING: Objection.

13 A. I would just say to regulate the beach.

14 BY MR. PAZAR:

15 Q. And the beach that they are talking about is pretty
16 defined, and I'm going to read the section I want
17 you to just either agree or not. It says "on the
18 neck of land and beach adjoining the same known by
19 the name of the pines lying between the rivers
20 called Batson River and Little River in the easterly
21 part of said town".

22 A. Yeah, that is Cape Porpoise Beach, I do believe.

23 Q. That would be Goose Rocks?

24 A. I mean Goose Rocks.

25 Q. Goose Rocks Beach. So at the time in -- I'm trying

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CERTIFICATE

I, Melinda Gay Simon, Notary Public in and for the State of Maine, hereby certify that on June 1, 2012, personally appeared before me the within-named deponent who was sworn to testify the truth, the whole truth and nothing but the truth in the aforementioned cause of action; and the foregoing, as reduced to computer type, is a true and accurate record of the evidence as taken by me by means of stenotype.

I further certify that I am a disinterested person in the event or outcome of the aforementioned cause.

IN WITNESS WHEREOF, I subscribe my hand at West Gardiner, Maine, June 8, 2012.

Melinda Gay Simon
Notary Public
My Commission Expires September 28, 2013