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 and ALL PERSONS WHO ARE UNASCERTAINED, et al.,

Defendants

OPPOSITION OF DEFENDANT TOWN OF KENNEBUNKPORT TO PLAINTIFFS' MOTION TO AMEND SCHEDULING ORDER

Defendant Town of Kennebunkport (the "Town") hereby opposes Plaintiffs' Motion to Amend Scheduling Order, which is essentially a Motion for Reconsideration filed in violation of Rule 7(b) (5) of the Maine Rules of Civil Procedure,[1] for all of the reasons previously stated in the Town's January 24, 2011 and January 28, 2011 correspondence to the Court, copies of which are attached hereto as Exhibits A and B, and in response to Plaintiffs' January 27, 2011 correspondence to the Court, a copy of which is attached hereto as Exhibit C. In addition, the Town states as follows:

Plaintiffs first argue that this case should not be subject to the ADR requirements under Rule 16B as provided in the January 31, 2011 Scheduling Order. Although

[1] Rule 7(b) (5) specifically prohibits Motions for Reconsideration "unless required to bring to the court's attention an error, omission or new material that could not have previously been presented." Here, the Court issued a scheduling order on January 31, 2011 after counsel for Plaintiffs and the Town had both written to the Court with proposed orders and arguments in support thereof. See Exhibits A-C, attached hereto. The arguments now made by Plaintiffs in the Motion to Amend Scheduling Order mirror the arguments previously made in Plaintiffs' January 27, 2011 correspondence, and so the Motion to Amend is essentially a Motion for Reconsideration.

Plaintiffs are correct that the parties previously participated in a judicial settlement conference with Justice Fritzsche in February 2010, a year has passed since then, and the Town believes that a mediation, or another settlement conference with Justice Fritzsche, would be a worthwhile exercise. Many of the current parties to the case, including TMF Intervenors and a majority of the current plaintiffs, did not attend the original settlement conference,[2] and so the Town believes that a mediation or judicial settlement conference held during the summer months when all, or most, of the parties are residing in the area, and could attend such a mediation or conference, would be beneficial.

Next, Plaintiffs repeat the argument made in the January 27, 2011 correspondence to the Court, attached hereto as Exhibit C, that the Town and other parties should be required to designate experts before Plaintiffs based on their assumption that the Town and others bear the burden of proof in this case. Plaintiffs argue that the Court should deviate from the standard scheduling order under Maine Rules of Civil Procedure based on the Federal Rules, but a review of Rules 16 and 26 of the Federal Rules of Civil Procedure shows that standard scheduling orders in Federal court are not based on which party has the burden of proof. The Federal Rules state in relevant part as follows:

> Absent a stipulation or a court order, [expert] disclosures must be made:
>
> > (i) at least 90 days before the date set for trial or for the case to be ready for trial; or

[2] At the time of judicial settlement conference with Justice Fritzsche in February 2010, TMF Intervenors had not yet intervened in the case, and so they did not participate in the settlement conference. Likewise, many others who have since joined the case did not have an opportunity to participate in the settlement conference with Justice Fritzsche, and only a handful of the Plaintiffs personally attended. (This was likely due to the fact that the settlement conference was held in February 2010, when many Goose Rocks Beach residents are residing out of state.)

> (ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

F. R. Civ. P. 26(a)(2)(C). The timing of expert disclosures under the Federal Rules is based on the timing of the trial, not who has the burden of proof on a particular issue. Regardless, it is not at all clear which party has the burden of proof on each issue in this case, and Plaintiffs' suggestion that the Court base the expert designation deadlines for each issue on whichever party has the burden of proof is a recipe for countless discovery disputes and Motions *in Limine* down the road.

In its correspondence on January 28, 2011, counsel for the Town noted that there is currently considerable disagreement in this case about the burdens of proof. Indeed on many issues, if not most issues, the burden of proof could shift depending on particular factual issues that may not become clear until trial. Consider, for example, the issue of "wild and uncultivated lands" in adverse possession and prescriptive easement claims. If the disputed land is found by the court, as a matter of fact, to be wild and uncultivated, the party claiming an easement has the burden of proving that the use was not permissive, whereas if the court makes a finding that the land is not wild and uncultivated, the party defending against the easement has the burden of proving that it was permissive. *See, e.g., Lyons v. Baptist School of Christian Training*, 2002 ME 137, 804 A.2d 364.

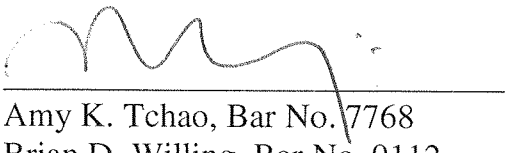
Plaintiffs alternatively request that they be allowed rebuttal experts in this case. There is no basis, however, in the Maine Rules of Civil Procedure for allowing rebuttal witnesses as the Plaintiffs propose, or having a rebuttal expert deadline. Plaintiffs are in

essence requesting a "pass" on their initial expert deadline because they claim they do not need to present affirmative expert testimony in this case. In other words, it appears that Plaintiffs plan to do nothing at the time of their original expert deadline, then review the expert testimony of the remaining parties in this case and respond to it at the rebuttal deadline. Thus, there is little difference between Plaintiffs' proposal for rebuttal experts and its original proposal that the other parties in this case designate experts first.

For all of the reasons previously discussed by the Town in its correspondence to the Court in January, attached hereto as Exhibits A and B, the Town objects to any schedule that turns standard Maine civil practice completely on its head by mandating that defendants—or any other party—designate their expert witnesses before plaintiffs, thereby giving plaintiffs a legal advantage and, not insignificantly, the benefit of reviewing all of defendants' expert research before they themselves have to designate experts, which is clearly plaintiffs' real agenda here. Plaintiffs' Motion may be moot in any case because the Town has now provided Plaintiffs with a 36 page affidavit by Robert A. Yarumian II, PLS of Maine Boundary Consultants, along with 83 exhibits, in Support of its Motion for Summary Judgment on Counts I and II of Plaintiffs' Complaint and Count I of the Town's Counterclaims.

WHEREFORE, Defendant Town of Kennebunkport respectfully requests that Plaintiffs' Motion to Amend Scheduling Order be denied and that the Court enter such other and further relief as justice may require.

Dated: March 22, 2011



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Brian D. Willing, Bar No. 9112
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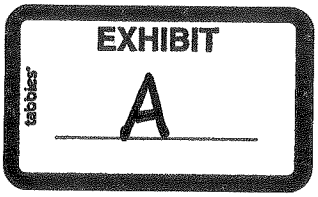

January 24, 2011

Dianne Hill, Clerk
York County Superior Court
45 Kennebunk Road
P.O. Box 160
Alfred, ME 04002-0160

RE: Almeder, et al. v. Town to Kennebunkport, et al.
Docket No. RE-09-111

Dear Ms. Hill:

I write as requested by Justice Brennan at the December 29, 2010 conference regarding the scheduling order in the above-referenced matter.

I have conferred with counsel for Plaintiffs, TMF Intervenors, State of Maine and others regarding an appropriate scheduling order in light of Justice Brennan's expectation that the trial in the above-referenced matter would take place in the fall of 2011. All of parties and attorneys with whom I have conferred agree (with the exception of Plaintiffs' counsel from whom I have not received a response) that the Court should simply enter a new standard scheduling order.

A newly issued standard scheduling order would allow for a discovery period of eight months (with most of the other deadlines, including expert witness deadlines, etc... occurring during the discovery period). Thus, if the Court issues a new scheduling order this week, discovery would be completed by the end of August 2011, and the case would be ready for trial in the fall of 2011 in accordance with Justice Brennan's anticipated trial schedule.

I greatly appreciate your attention to this matter.

Sincerely,

Brian D. Willing

BDW/al

cc: Sidney St. F. Thaxter, Esq.
Christopher E. Pazar, Esq.
Gregg R. Frame, Esq.
André G. Duchette, Esq.
Alan Shepard, Esq.
Paul Stern, Esq.
Nicholas S. Strater, Esq.
Neal L. Weinstein, Esq.
Alexander & Judith Lachiatto (pro se)
Richard & Margarete K.M. Driver (pro se)
Paul & Sharon Hayes (pro se)
Michael & Donna Kelly (pro se)
Thomas Ramsey (pro se)
Barbara Young (pro se)
Alan Clark (pro se)
William Lee Joel, II (pro se)
Kristin Mulvihill (pro se)
Mary Jane & Jason Mulvihill (pro se)
Robert & Lois Baylis (pro se)
Allison W. Phinney, Jr. (pro se)
Larry Mead, Town Manager

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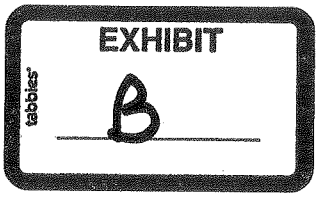

January 28, 2011

By Hand

Dianne Hill, Clerk
York County Superior Court
45 Kennebunk Road
P.O. Box 160
Alfred, ME 04002-0160

RE: Almeder, et al. v. Town to Kennebunkport, et al.
Docket No. RE-09-111

Dear Ms. Hill:

I write in response to the correspondence of Sidney St. F. Thaxter, Esq. dated January 27, 2011 regarding the scheduling order in the above-referenced matter.

At the court hearing on July 21, 2010, the Court requested that the parties agree upon a scheduling order in this case. Following the hearing, the Town of Kennebunkport proposed to all parties and counsel who were then involved that the Court should simply enter a new standard scheduling order. Plaintiffs never responded and also did not respond after counsel for the Town wrote to plaintiffs' counsel on October 28, 2010 and again proposed that the Court enter a new standard scheduling order.

After the Court again requested at the hearing on December 29, 2010 that the parties agree to a new scheduling order, counsel for the Town conferred with counsel for plaintiffs, TMF Intervenors, State of Maine, and some pro se parties who have been actively involved in the case regarding an appropriate scheduling order in light of the Court's expectation that trial would take place in the fall of 2011. All of these parties and attorneys with the exception of plaintiffs' counsel agreed that the Court should simply enter a new standard scheduling order.

Plaintiffs' counsel now proposes (without any legal authority in support) that, contrary to standard civil procedure in Maine, the Town and other defendants must designate experts before plaintiffs. In this manner, plaintiffs will, of course, get the benefit of reviewing the defendants' expert designations and any supporting materials, including their title research, deeds, plans, etc..., before they have to designate experts themselves, and it is probably not lost on plaintiffs or their counsel that such a schedule would provide them significant savings in time and expenditures in preparing their own designations – in addition, of course, to the obvious legal advantages.

There is no reason to deviate from normal civil practice in this case, and plaintiffs' counsel offers no justification except to simply declare based on his own personal experience that "it is common when there are both claims and counterclaims to have the initial expert disclosure be made with respect to any issue [by] a party [who] bears the burden of proof..." The fact that many of the defendants in this case have asserted counterclaims, however, does not distinguish this case from many other civil actions, particularly real estate disputes where there are almost always counterclaims. In such cases, the Court nevertheless uses the standard civil scheduling order, in which plaintiffs disclose their expert witnesses after three months and defendants disclosing their witnesses after five months.

By way of example, in the case of *Eaton v. the Town of Wells* which involved claims and counterclaims very similar to those in this case, the Court entered an expedited pretrial order, but still followed the standard practice of having plaintiffs designate first (within sixty days), and having all other parties (including on their counterclaims) designate after the plaintiffs. Nowhere in the rules—or in standard Maine practice—is there any consideration given to who has the burden of proof on a particular issue.

The scheduling order proposed by plaintiffs not only turns the standard civil scheduling order on its head, but it also makes it less clear when parties are required to designate experts in this case. Under plaintiffs' proposed order, all of the parties, including pro se parties, would be required to dissect the various legal issues and try to ascertain who has the burden of proof to determine their expert designation deadlines. Indeed on many issues, the burden of proof shifts depending on particular factual issues that will not become clear until trial.[1] Thus, plaintiffs' proposed order will almost certainly lead to disputes in this case over which party or parties has/have the burden of proof, and whether various expert designations were timely under the schedule proposed by plaintiffs, in which case there will be many more hearings and conference calls with the Court concerning deadlines and discovery matters in this case.

The Town objects to any schedule that turns standard Maine civil practice completely on its head by mandating that defendants—or any other party—designate their expert witnesses before plaintiffs, thereby giving plaintiffs a legal advantage and, not insignificantly, the benefit of reviewing all of defendants' expert research before they themselves have to designate expert, which is clearly plaintiffs' real agenda here.

In addition, the Town notes that, particularly for any parties who have been joined since the hearing on July 21, 2010, an expert deadline of March 1, 2010 is a bit unreasonable. TMF Intervenors and other defendants and parties who are actively involved in this case should be given adequate opportunity to designate expert witnesses. Counsel for TMF Intervenors and the various pro se parties with whom the Town's undersigned counsel has conferred believe that the timeframe under the standard scheduling order is adequate.

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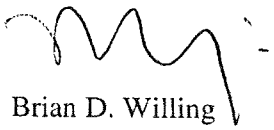
[1] Consider for example the issue of wild and uncultivated lands in adverse possession claims. If the disputed land is found by the court, as a matter of fact, to be wild and uncultivated, the party claiming an easement has the burden of proving that the use was not permissive, whereas if the court makes a finding that the land is not wild and uncultivated, the party defending against the easement has the burden of proving that it was permissive.

Finally, the Town notes that Plaintiffs' proposed order deviates from the standard order in a third respect, not identified in the Plaintiffs' letter to the court: In the section entitled "Estimate of Time Required for Trial," Plaintiffs remove the text that would ordinarily require them to confer with other parties not later than 15 days after the discovery deadline to determine a good faith estimate of trial length. Instead, plaintiffs' counsel replaces this standard language with a unilateral attempt to limit the time available to all defendants to a single week at trial.

Nothing in this case differentiates it from any other case in which claims and counterclaims are filed—including a very similar case such as *Eaton v. Town of Wells*—that would justify the court replacing the standard language that plaintiffs should designate experts first. The court should decline to adopt plaintiffs' counsel's proposed scheduling order, which adopts an amorphous and confusing standard that requires parties to determine who has the standard of proof on a particular issue, and should instead enter a standard scheduling order in this case

I greatly appreciate your attention to this matter.

Sincerely,



Brian D. Willing

BDW/al

cc: Sidney St. F. Thaxter, Esq.
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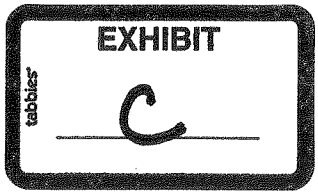
Mary Jane & Jason Mulvihill (pro se)
Robert & Lois Baylis (pro se)
Allison W. Phinney, Jr. (pro se)
Larry Mead, Town Manager



CURTIS THAXTER
ATTORNEYS AT LAW

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January 27, 2011

Dianne Hill, Clerk
York County Courthouse
45 Kennebunk Road
P. O. Box 160
Alfred, Maine 04002-0160

RE: Robert F. Almeder, et al. v. Town of Kennebunkport, et al.
Docket No. RE-09-111

Dear Ms. Hill:

Plaintiffs and other parties that this firm represents object to the proposal for a standard scheduling order as submitted by the Town's counsel, Brian Willing. This case has been pending since October, 2009 and a standard order does not fit the present circumstances.

The proposed scheduling order submitted herewith is different from that submitted by the Town in two respects. First, the deadlines are based on the case being ready for trial by October 2011, the date the parties discussed with Justice Brennan at the hearing on December 29, 2010.

Second, given the existing claims and counterclaim and counterclaims, the expert disclosure deadlines differ from that found in the standard order. The standard order has the plaintiff designating first and then later the defendants. It is common when there are both claims and counterclaims to have the initial expert disclosure be made with respect to any issue a party bears the burden of proof. Otherwise, the standard order will need to be amended to permit after the defendants' disclosure for the plaintiffs to designate additional experts with respect to issues on which defendants have the burden of proof. This later process will only add another 60 days to the discovery schedule and will mean the case will not be ready for trial until 2012.

Please submit the enclosed proposed scheduling order to the court and note our objection to the proposed order submitted by Brian Willing. If the court believes a telephonic hearing would be helpful, let me know and we can arrange for one on a date and time convenient for the court. However, personally I don't think that a hearing or phone conference will add much so we are comfortable with this Court's decision or an appropriate order without any conference.

As always, thank you for your assistance.

Sincerely,

Sidney St. F. Thaxter

SST/rar
Enclosure

Copy to (w/enc.): Service List

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2011, I caused to be served by (1) placing a copy of the foregoing document in the U.S. Mail, postage-prepaid, and addressed to the following:

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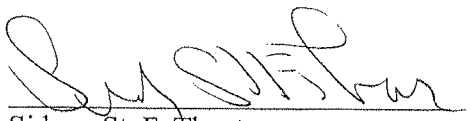
South Natick, MA 01760-5643

Dated: January 27, 2011



Sidney St. F. Thaxter
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Portland, Maine 04112-7320
Telephone: (207) 774-9000

Attorney for plaintiffs

STATE OF MAINE
YORK, ss.

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

Robert F. Almeder and Virginia S. Almeder, et al.,	)	
Plaintiffs,	)	
	)	**SCHEDULING ORDER**
v.	)	
TOWN OF KENNEBUNKPORT and ALL PERSONS WHO ARE UNASCERTAINED,	)	**(Title to Real Estate Involved)**
Defendants.	)	

1. **Joinder of Parties and Amendment of Pleadings.** Unless otherwise ordered by the court, new parties may not be joined and third party complaints and motions to amend the pleadings may not be filed later than April 1, 2011. If new parties are added, all deadlines remain the same unless otherwise ordered by the court.

2. **Expert Witness Designations.** Unless the court orders otherwise for good cause shown, each party may designate no more than one expert per issue. For purposes of expert witness designation, parties with common interests shall be considered one party. Unless the court orders otherwise for good cause shown, the expert witness designation shall include a complete statement of the information and reports required by M.R. Civ. P. 26(b)(4)(A)(i). The party having the burden of proof on an issue shall disclose all expert witnesses on that issue on or before March 1, 2011. The party not having the burden of proof on an issue shall disclose all expert witnesses on that issue on or before April 15, 2011. No extensions of the designation deadlines will be granted except on motion demonstrating good cause and that discovery was timely and diligently conducted in good faith. Counsel shall not assume that agreements to designate experts beyond these deadlines will be accepted by the court. Such extensions shall not delay trial.

3. **Discovery Deadline.** Unless the court orders otherwise for good cause shown, discovery shall be completed by September 2, 2011. Discovery shall be initiated so as to enable the opposing party to serve a response within the period allowed by the rules but in advance of this deadline. No extensions of the discovery period will be granted except on motion demonstrating good cause and that discovery was timely and diligently conducted in good faith. Counsel shall not assume that agreements to conduct discovery beyond this deadline will be accepted by the court. Such agreements shall not delay trial.

4. **Alternative Dispute Resolution Conference (ADR).** This case is subject to the requirements of M.R. Civ. P. 16B. The parties have engaged in ADR. Unless any party wishes to engage in ADR again and upon motion demonstrating good cause or the agreement of the parties to participate, no further ADR is required.

5. **Estimate of Time Required for Trial.** Two weeks is the estimated time for trial. One week for the plaintiffs and one week for defendants.

6. **Exchange of Witness and Exhibit Lists.** No later than 15 days after the discovery deadline, each party shall serve on all other parties a list of the name and place of residence or business address of each witness expected to be called at trial and a list of exhibits, including demonstrative aides to be offered or used at trial.

7. **Deadline for Filing Motions.** All motions, except motions in limine and those affecting the conduct of the trial, shall be filed pursuant to M.R. Civ. P. 7 not later than August 4, 2011. Motions filed after the close of discovery or August 4, 2011 will not prevent a case from being placed on the trial list.

8. **Sanctions.** Failure to comply with deadlines as ordered may result in the imposition of sanctions pursuant to M.R. Civ. P. 16(d).

9. **Modification of Scheduling Order**. This order shall not be modified, amended or supplemented, except as allowed by M.R. Civ. P. 16(a)(1).

10. **Trial.** The clerk is directed to set this matter for trial on the court's October 2011 trial list.

The entry will be "Scheduling Order filed. (Motion deadline is August 4, 2011)(Discovery deadline is September 1, 2011)(Trial: October 2011)."

Dated: _____

_____
Justice, Superior Court

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