



TAYLOR
McCORMACK &
FRAME 

ATTORNEYS AT LAW

André G. Duchette, Esq.
ADuchette@TMFAttorneys.com
Direct Dial: (207) 347-4528

July 1, 2010

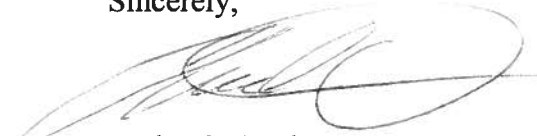
Dianne Hill, Clerk
York County Superior Court
45 Kennebunk Road
P.O. Box 160
Alfred, Maine 04002

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

Dear Ms. Hill:

Enclosed for filing please find a Reply Memorandum to Plaintiffs' Opposition to TMF Intervenor's Motion to Intervene as Defendants. Please feel free to call should you have any questions.

Sincerely,



André G. Duchette, Esq.

AGD:rl

cc: Sidney St. F. Thaxter, Esq.
Amy K. Tchao, Esq.
Neal L. Weinstein, Esq.
Paul Stern, Esq.
Christopher E. Pazar, Esq.
Alexander and Judith Lachiatto
Richard and Margarete Driver
Kendall and Linda Burford
Jean French and David Green
Roger and Nancy Allen

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,)
)
) Defendants)

**REPLY MEMORANDUM TO PLAINTIFFS’
OPPOSITION TO TMF INTERVENORS’
MOTION TO INTERVENE AS DEFENDANTS**

Introduction

In determining a motion to intervene pursuant to M.R.Civ.P. 24, it is well settled that a non-party has a right to intervene in an action if, on timely application: “(1) [the party] claims an interest in the property or transaction that is the subject of the action, and (2) [the party] is so situated that the disposition of the action may impair or impede [the party’s] ability to protect [its] interest, and (3) [the party’s] interest is not adequately represented by the existing parties to the action.” John Doe v. Richard Roe et al., 495 A.2d 1235, 1237 (Me. 1985). This is the lens through which the Court must review TMF Intervenors’ Motion.

As an initial matter, the Court’s attention must be directed to the irony of Plaintiffs’ stance in this matter and their Motion in Opposition in particular. Plaintiffs brought an action, on their own accord, against the “Town of Kennebunkport and All Persons who are Unascertained, not in being, unknown or out of the State, heirs or legal representatives of such unascertained persons, or such persons who shall become heirs, devisees or appointees of such unascertained

persons who claim the right to use or title in Plaintiffs' Property other than persons claiming ownership or easement by, through or under an instrument recorded in the York County Registry of Deeds.”

The crux of Plaintiffs' Complaint is to declare the beach area in front of Plaintiffs' homes to be private property, to the exclusion of all others. As such, Plaintiffs have cast a very wide net in their pleading.¹ However, Plaintiffs seek to exclude from the proceedings individuals who have appropriately claimed a right of use over the property in question. As such, Plaintiffs cast a blind eye to the obvious contradiction inherent in their opposition. Were Plaintiffs to be successful on their underlying claim, and a Declaratory Judgment were to issue in their favor, Plaintiffs would vociferously oppose any action by a TMF Intervenor to enforce TMF Intervenor rights, asserting collateral estoppel and *res judicata*. Yet, TMF Intervenors, by being excluded from these proceedings, would have no opportunity to litigate this matter once and for all, sapping the Court's resources. Plaintiffs argue that because the TMF Intervenor group is so large, that should serve as a bar to enforcement and adjudication of their rights. However, the logistics of litigation should not control the level of participation, but rather the converse is true.

1. TMF Intervenors fall squarely within M.R.Civ.P. 24(a) and (b).

Rule 24 makes clear the parameters for Intervenors. While Plaintiffs make conclusory statements that TMF Intervenors don't satisfy the requirements, those statements belie the truth. Specifically:

1. *TMF Intervenors have made a timely application for intervention.* Indeed, TMF Intervenors sought the Court's guidance on this very issue, despite little resistance from the existing parties. Of particular note, there was some question as to whether

¹ Whether or not Plaintiffs have complied with the provisions of 14 M.R.S.A. § 6653 is not covered in this Reply Memorandum.

any Intervenor motion was needed, or whether TMF Intervenors should simply file an Answer, Counterclaim, and Affirmative Defenses, given how clearly the TMF Intervenors fit into the description of Defendants as laid out in the caption of Plaintiffs' Complaint. In an abundance of caution, a Motion to Intervene was filed. As further indication that the TMF Intervenors' motion was timely, (as a result of Plaintiffs' notice being deficient) there are still a number of interested parties who are either just becoming aware of this case as they make their way back to Goose Rocks Beach for the summer or are not yet aware of this case.

2. *TMF Intervenors have a demonstrated interest relating to the property or transaction that forms the basis of the ongoing action.* TMF Intervenors, in their Motion and in their Answer, clearly lay out their interest in use of the property in question in this matter. Indeed, for some TMF Intervenors, that demonstrated interest extends back well over half a century. Simply because Plaintiffs don't want TMF Intervenors involved or that their involvement may pose logistical challenges for Plaintiffs does not mean that TMF Intervenors have no interest in the property. If the intervenors "will either gain or lose by the direct legal operation and effect of the judgment [citation omitted]," then the right to intervene is warranted. John Doe, 495 A.2d at 1237.
3. *TMF Intervenors have satisfactorily shown that the disposition of the action threatens to create a practical impairment or impediment to its ability to protect its interests.* If this matter were litigated without TMF Intervenors' involvement, it would result in 167 property owners having their clear interest in a property determined without their involvement. In that case, the Court can be assured of a throng of independent,

separate actions against the Plaintiffs in this action in order to seek a Declaratory Judgment bedrocked on determining the rights of the denied TMF Intervenors. Plaintiffs at that time would likely assert the affirmative defenses of collateral estoppel and *res judicata*, but those defenses would necessarily fail as the TMF Intervenors were not a party to the prior litigation, despite timely and adequate motions to do so, and therefore did not have the opportunity to participate in a full and final litigation of the issues and claims on their merits. See e.g. Flaherty v. Muther, 2009 Me. Super. LEXIS 100 (certain property owners, with rights to an easement and beach, were not bound by the prior litigation because they were not named parties to the suit and were not in privity with a community association asserting certain rights separate and distinct from the property owners).

4. *TMF Intervenors have satisfactorily shown that existing parties inadequately represent their interests.* Plaintiffs take great steps to show that the Town is represented by one of Maine's pre-eminent law firms. TMF Intervenors do not deny that to be so. However, Drummond Woodsum represents the Town in enforcing the public's right to use Goose Rocks Beach. The Town's interest and the TMF Intervenors' interests are not aligned. The TMF Intervenor claims are not "largely duplicative" of the Town's. Indeed, while the TMF Intervenors' claims and the Town claims emanate from a similar factual backdrop (the use of Goose Rocks Beach over an extended period of time), one need only look at the Town's Answer and Counterclaims and the TMF Intervenors' Answer and Counterclaims to see that there are markedly different components.

The interest of TMF Intervenor and the Town of Kennebunkport can best be described using the analogy of two concentric circles. While there is certainly a fair amount of overlap where the circles meet (symbolizing commonly aligned interests), there is also a great deal of interest in the litigation that TMF Intervenor derive independent of the Town's interest. By way of example, the TMF Intervenor's interest in the use of the beach is separate from and independent of the Town of Kennebunkport's interest in that access and use of the beach for both the property owners and their tenants provide great value, and the Town of Kennebunkport, due to various outside pressures, may be more inclined to agree to terms that the TMF Intervenor's may not necessarily agree with (e.g. time-of-day restrictions, restrictions on activities, etc.). See e.g. Flaherty v. Muther, 2009 Me. Super. LEXIS 100 (property owners with certain rights to an easement and beach were not in agreement with the settlement negotiated by a community association, which agreed to certain restrictions such as number of people who may use the beach at one time, time restrictions, noise restrictions, etc.).

Some of the TMF Intervenor have deeded rights of way to the Beach. Some possess something other than a deeded interest. In addition, there are claims for prescriptive or adverse possession interest, as well as easement rights derived by implication or by estoppel. TMF Intervenor's basis for intervening is not simply that they own property and use the beach, which is a mischaracterization of the argument. Their basis is the claim of interest in Goose Rocks Beach. TMF Intervenor's Motion and Answer clearly demonstrates these interests. TMF Intervenor have more than a "generalized interest" to fish, fowl and navigate. They have a very specific interest to recreate and utilize the dry sand portion, as they have for numerous years.

There is no reason to suppose that the Town of Kennebunkport would feel any compulsion or inclination to raise the arguments which would be raised by the TMF Intervenors'. See e.g. Wyman v. Diamond, 1992 Me. Super. LEXIS 10, *4.

In many ways, Plaintiffs' opposition to intervention can be summed up by the homonyms of "so" and "sow". As noted, Plaintiffs have made innumerable conclusory statements to underscore their reasons for opposing TMF Intervenor status. Essentially, their stance is "it is so because we say it is so". However, the real focus is on reaping what you sow. Specifically, Plaintiffs have forced the hands of TMF Intervenors by their initial filing, and must now reap what they sow. Having deemed it necessary to commence litigation to declare their rights to the exclusion of others, Plaintiffs must be prepared to defend their claims against others who have a claim of right adverse to Plaintiffs' interest.

2. TMF Intervenors Would be Unduly Prejudiced by Not Being Permitted Intervenor Status

M.R.Civ.P. 24(b) states that the Court, in "exercising its discretion" under a Rule 24 motion, "shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." In this matter, there is not even a scheduling order in place. No depositions have been held. Other motions to intervene have already been granted. There is no undue delay as a result of granting TMF Intervenor status. There would be, however, an unduly prejudiced group if the Motion were not granted, as TMF Intervenors would certainly be unduly prejudiced by a denial of the Motion, and would likely be compelled to file separate Declaratory Judgment actions.

Plaintiffs use the guise of judicial economy to limit TMF Intervenors' rights. Plaintiffs seek to exclude TMF Intervenors, arguing that they would "request that each of the 167 TMF Intervenor substantiate their claims with regard to their fee interest in Plaintiffs' beach properties

and any and all actions the TMF Intervenors have taken over the past 20 years that would ripen their use of the Beach to a prescriptive easement”. This is exactly why TMF Intervenors need to be a party. In the absence of this inquiry, this Court will face innumerable litigations, all as a result of Plaintiffs’ actions. The arrogance of Plaintiffs’ stance is stunning. Essentially, they are saying:

- 1) We have initiated the litigation
- 2) We want the Court to exclude TMF Intervenors from a parcel of land they have enjoyed for years; and
- 3) We want the Court to rule that TMF Intervenors have no interest or say in the exclusion of TMF Intervenors and others from this parcel of land.

Plaintiffs want a limit of fishing, fowling and navigating in the intertidal zone. The Town’s generalized interest here is quite different from TMF Intervenors; Plaintiffs themselves have recognized that. The Town wants the greatest use it can get for the greatest number. TMF Intervenors want those rights that, as Plaintiffs themselves admit, have ripened over 20 years, as well as other rights beyond the prescriptive easement claim, all of which was outlined in their Motion and Answer. Judicial economy demands TMF Intervenor involvement to fully and finally determine rights.

3. The Litigation of this Case is a Direct Threat to TMF Intervenors

Plaintiffs cite to several cases that hold that the Intervenors’ interest must be direct, and not contingent. Public Services of NH v. Patch, 136 F.3d 197 (1st Cir. 1998) and Conservation Law Fund, Inc. v. Mosbacher, 966 F.2d 39 (1st Cir. 1998). As factual support for its Opposition, Plaintiffs note that they do not seek to bar anyone from use of the beach if such a person has a

deeded interest. Plaintiffs further state that they do not deny the general public's right to fish, fowl and navigate in the intertidal zone.

Plaintiffs misapprehend TMF Intervenors claims. TMF Intervenors are claiming use to the dry sand and wet sand - indeed, the entire beach- and for those with deeded access rights and for those without deeded access rights.

Furthermore, and perhaps most importantly, the TMF Intervenors interest in this matter is direct, and not contingent. As opposed to Public Service, which was "not a case in which ongoing litigation directly threatens our economic right or benefit presently enjoyed by any would-be intervenor" (136 F3d at 205), the present litigation clearly and directly threatens a benefit presently enjoyed by TMF Intervenors. TMF Intervenors have used Goose Rocks Beach for decades. It is a right that has spanned generations. It is a right that has been instrumental to the decision to purchase property. It has been a right that is vital to the continual rental of TMF Intervenor properties. Plaintiffs' Complaint and Request for Declaratory Judgment unmistakably and unequivocally directly threatens those benefits.

4. Amicus Status is Completely Inappropriate

Plaintiffs note that they would not object to TMF Intervenors providing amicus curiae briefs to the Court. The inequality of such a situation is telling. TMF Intervenors would be able to provide assistance and guidance to the Court on the rights of Plaintiffs vis-à-vis the rights of all others (including TMF Intervenors), rights that would ultimately have a direct impact on TMF Intervenors and pose a direct threat to benefit previously enjoyed by TMF Intervenors.

5. Plaintiff's Reliance on Bell II's Tiered System is Ill-Timed

While it is possible that the Court could at some point create tiers of TMF Intervenors, or pare down the list of TMF Intervenors, the Court cannot and should not make that decision at this early stage in the litigation. TMF Intervenors have satisfied the requirements of Rule 24 preliminarily, and it would be inappropriate to parse out various levels of involvement at this stage.

Further, while Plaintiffs argue that Lyons requires a greater burden of proof than Bell II for some of the claims of TMF Intervenors, Plaintiffs cannot and do not cite to anything in Lyons that requires or authorizes the Court to summarily exclude Intervenors who have put forth valid arguments and facts that properly include them in a litigation over those claims.

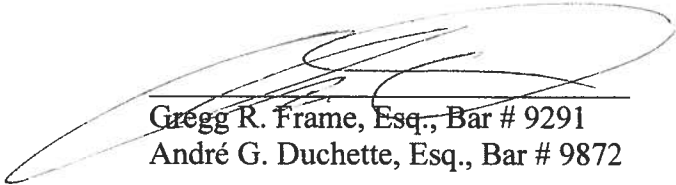
Conclusion

In sum, TMF Intervenors have a clear interest in the subject matter of this litigation that is directly threatened by Plaintiffs' Complaint. Plaintiffs are seeking a Declaratory Judgment that would exclude TMF Intervenors from the use of a parcel of land that Plaintiffs may or may not have title to, and to which TMF Intervenors have a claim of use, title, and/or interest. While Plaintiffs state that they would like their rights to be declared without undue delay, they really want those rights declared without undue opposition. However, opposition by way of TMF Intervenors' Motion to Intervene is entirely appropriate for reasons of equity, procedure, and judicial economy.

For these reasons, the TMF Intervenors' Motion to Intervene should be granted.

DATED:

7/1/10



Gregg R. Frame, Esq., Bar # 9291
André G. Duchette, Esq., Bar # 9872

Attorneys for TMF Intervenors
TAYLOR, McCORMACK & FRAME,
LLC
4 Milk Street, Suite 103
Portland, ME 04101
207-828-2005