

STATE OF MAINE

YORK, ss.

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

ROBERT F. ALMEDER, et al.,

Plaintiffs

v.

ORDER

TOWN OF KENNEBUNKPORT and
ALL PERSONS WHO ARE
UNASCERTAINED,

Defendants

DECISION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Pending are seven motions for summary judgment. Oral argument was held on November 18, 2011. The Town of Kennebunkport, the plaintiffs, the State, and the TMF Group were all represented by counsel. The Lachiatto and Driver defendants represented themselves. Also, there are two outstanding motions regarding the summary judgment filings.

BACKGROUND

On October 26, 2009, the plaintiffs, a group of beach-front land owners in Kennebunkport ("Plaintiffs"), brought a quiet title and declaratory judgment action against the Town of Kennebunkport and all persons unascertained who may have a claim to the high dry sand and intertidal zone of Goose Rocks Beach that is claimed by the Plaintiffs.

The procedural history of this case is extensive and complicated. Therefore, only a brief outline of that history related to the motions for summary judgment is provided here.

Turning first to the motions for summary judgment seeking judgment for fee title to the beach, the procedural history is as follows. The Defendant Town of Kennebunkport ("Town") filed its Motion for Summary Judgment ("Town MSJ") along with supporting documents on March 21, 2011. This motion seeks summary judgment against the relief requested in Counts I and II of the Plaintiffs' Complaint (declaratory judgment and quiet title to Goose Rocks Beach) and granting the relief requested in Count I of the Town's Counterclaim (fee simple ownership of Goose Rocks Beach).

On April 6, 2011, Paul and Sharon Hayes filed a memorandum opposing the Town's motion and joining the Plaintiffs reasoning.¹ On April 29, 2011, the Plaintiffs filed a "Joint Memorandum of Law in Opposition to Defendant Town of Kennebunkport's Motion for Summary Judgment" ("Joint Opp.") and a "Joint Opposition to Defendant Town of Kennebunkport's Statement of Undisputed Material Facts" ("Joint OSMF"). In support of this Joint Opposition, the Plaintiffs also submitted "Plaintiffs' Joint Statement of Material Facts" with exhibits tabbed as 1-6 ("Joint SMF"). The Plaintiffs also filed the "Plaintiffs' Motion for Partial Summary Judgment" ("Pls. MPSJ") seeking the relief requested in Counts I and II of their Complaint (only as to fee simple title) against the Town and any other defendant to be ascertained and "Plaintiffs' Motion for Summary Judgment" ("O'Connor/Leahey/Fleming MSJ") seeking judgment in their favor on Count I of the Town's Counterclaim. These motions are also

¹ Paul and Sharon Hayes refer to themselves as third party defendants. However, the Town has treated them as plaintiffs because they have adopted the allegations of the Plaintiffs' complaint. See Town MSJ 2, n.1.

supported by the "Plaintiffs' Joint Statement of Material Facts" with exhibits tabbed as 1-6.

On June 10, 2011, the group of intervenors *de benne esse*, known as the TMF Group, filed a "Reply to Plaintiffs' Motion for Partial Summary Judgment with Incorporated Memorandum of Law" ("TMF Group MSJ") and "TMF Defendant's Opposition to Plaintiffs' Statements of Material Fact" ("TMF SMF"). The Plaintiffs subsequently filed a Motion to Strike the TMF Group's Reply ("Pls. Mot. Strike") and also filed a response to the TMF Group's "Statements of Additional Fact" ("Pls. TMF OSMF"). The TMF Group then filed a reply to the motion to strike ("TMF Group Reply").

On June 14, 2011, the Town filed a "Consolidated Memorandum of Law" ("Consol. Mem.") in opposition to the Plaintiffs' motions for summary judgment and in reply to the Plaintiffs' Opposition to the Town's Motion for Summary Judgment, accompanied by a reply to the Plaintiffs' Joint Statement of Undisputed Material Fact ("Town OSMF"). On June 14, 2011, the State of Maine opposed the Plaintiffs' Motion for Partial Summary Judgment by adopting the position of the Town. The Plaintiffs filed a reply to the Town's opposition on June 30, 2011 ("Pls. Reply").

Turning next to the claims of the TMF Group and other individual back-lot owners, the procedural history is as follows. On June 10, 2011, the Plaintiffs filed "Plaintiffs' Motion for Partial Summary Judgment Against Lachiatto, Driver, Harris, and TMF Group" on all remaining counts in each of these parties' counterclaims. The Plaintiffs also filed Statements of Material Fact ("Pls. TMF SMF") and a Memorandum of Law ("Pls. TMF MSJ"). The TMF Group responded with an Opposing Statement of Material Facts on July 11, 2011 ("TMF Group SMF") and a Memorandum of law ("TMF Group Mem.") on July 18, 2011. Also, on July 11, 2011, the Lachiatto and Driver

Defendants filed a Response and Cross-Motion for Summary Judgment and Memorandum of Law in support (“L/D MSJ”), and Statement of Material Facts. The Plaintiffs filed an opposition to the Lachiatto/Driver Statement of Material Facts and Memorandum in Opposition on July 19, 2011. On July 29, 2011, the Plaintiffs responded to the TMF Group’s opposition (“Pls. TMF Reply”). And finally, on August 9, 2011, the Lachiatto/Driver Defendants submitted a Supplemental Statement of Material Facts with record citations (“L/D Supp. SMF”) along with a Motion for Enlargement of Time for filing these statements of fact.

The State of Maine, as intervenor, filed a Motion for Summary Judgment and Memorandum of Law on May 4, 2011, requesting a ruling that general recreational activity in the intertidal zone, not incidental or related to fishing, fowling, or navigation, is permitted under the Maine public trust doctrine, the decision in *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989), notwithstanding. The Plaintiffs filed an opposing Memorandum of Law on May 13, 2011. On May 16, 2011, the Surfrider Foundation filed a Motion for Summary Judgment joining the arguments of the State of Maine which was opposed by the Plaintiffs on May 19, 2011. The State filed a Reply on May 25, 2011. The State has since filed a supplement to its Memorandum and the Plaintiffs have replied.

DISCUSSION

I. Summary Judgment Standard

Granting summary judgment is proper if there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. M.R. Civ. P. 56(c). “A material fact is one that could potentially affect the outcome of the suit.” *Farrington’s Owners’ Ass’n v. Conway Lake Resorts, Inc.*, 2005 ME 93, ¶ 9, 878 A.2d 504. “A genuine issue exists when sufficient evidence supports a factual contest to

require a factfinder to choose between competing versions of the truth at trial.” *Baillargeon v. Estate of Dolores A. Daigle*, 2010 ME 127, ¶ 12, 8 A.3d 709. The court should consider the facts in the light most favorable to the non-moving party and the court is required to consider only the portions of the record referred to and the material facts set forth in the parties’ Rule 56(h) statements. *See e.g., Johnson v. McNeil*, 2002 ME 99, ¶ 8, 800 A.2d 702.

II. Town of Kennebunkport’s Motion for Summary Judgment on Count I of its Counterclaim.

The Town’s Motion for Summary Judgment seeks judgment that the Town is the fee simple owner of the high dry sand and intertidal zone of Goose Rocks Beach. The argument is based on the legal significance of a document executed in 1684 by Thomas Danforth, then governor of the Province of Maine. (Town SMF ¶ 2.) The Town argues that this document conveyed from Massachusetts to the Town all of the common and undivided land within the boundaries of the Town. This land had been acquired by Massachusetts through its purchase of the previously un-granted lands within Maine from Ferdinando Gorges, and included the claimed areas of Goose Rocks Beach. (Town SMF ¶ 2.) The Town argues that after acquiring Goose Rocks Beach through this conveyance, it never subsequently conveyed any part of the beach into private hands. (Town SMF ¶¶ 36-98.)

The interpretation of a deed is a question of law. *Bennett v. Tracy*, 1999 ME 165, ¶ 7, 740 A.2d 571. When construing a deed the courts “are to give effect, if possible, to the intention of the parties, so far as it can be ascertained in accordance with legal canons of interpretation... [and] are to consider all the words of the grant in the light of the circumstances and conditions attending the transaction.” *McLellan v. McFadden*, 95 A. 1025, 1028 (Me. 1915). The court must first attempt to construe the language of the deed by looking only within the “four corners” of the document and give the words in a deed

their “general and ordinary” meaning to determine if they create any ambiguity. *Pettee v. Young*, 2001 ME 156, ¶ 8, 783 A.2d 637. An ambiguity exists if the language in the deed is reasonably susceptible to different interpretations. *Labonte v. Thurlow*, 2008 ME 60, ¶ 9, 945 A.2d 1237. “If the language of the deed is unambiguous, then the court must construe the deed without considering extrinsic evidence of the intent of the parties.” *Id.* However, the deed may be read in light of the surrounding circumstances in order to better understand the intent of the parties. *Emery v. Webster*, 42 Me. 204, 206 (1856).

Because the court may consider the circumstances attendant to the execution of a deed in order to provide context for the plain language without having to make a finding of ambiguity, the court may consider the historical context as explained by the parties. In short, by 1684, the year in which this document was executed, the land within what is now the State of Maine had been under the control of several different and competing political entities. (Joint SMF ¶ 10; Town OSMF ¶ 10.) The status of private titles in this area was in doubt because of the nullification of the grants of some proprietors and the continual need for each successive political entity to confirm any prior grants of title. (Town SMF ¶ 113; Joint SMF ¶¶ 10, 47-51; Town OSMF ¶ 49.) The Town of Cape Porpoise was incorporated as a political entity in 1653 under the Massachusetts Bay Colony Charter. (Joint SMF ¶ 8.) In 1678, Massachusetts Bay Colony purchased all of the previously ungranted land within the Province of Maine from the successors to the Gorges Patent, originally granted by King James I in 1622 and confirmed by successive monarchs. (Joint SMF ¶¶ 50-51.)

On its face, this document has the appearance of a deed, but it is a deed that only acted to confirm legal title to lands previously conveyed to the Town’s earliest settlers. First, the deed sets out the parties and the date on which it was executed. Next, it sets

out the authority under which Danforth could convey property. The Massachusetts Colony, the then “proprietor” of Maine, in May 1681 granted to Danforth the power to “make legal confirmation” to the inhabitants of the Province of Maine “all their Lands or proprieties to them justly appertaining or belonging within the Limitts or Bounds of the said Province.” This language gives Danforth authority to confirm the titles that had been previously granted (“all their lands to them justly appertaining”). Following the authority clause, the deed recites the granting clause through which Danforth does “clearly and absolutely give, grant, and confirm” the property described in the deed. The granting clause must be interpreted in the context of the document itself.

The deed also clearly describes the property conveyed. It states:

All that Tract or parcell of Land within the Township of Cape Porpus in said Province according to the Bounds & Limitts of the s^d Township to them formerly granted by S^r Ferdinando Gorges Knight or by any of his Agents or by the General assembly of the Massachusetts with all Priviledges and Appurces to the same appertaining or in any Wise Belonging...

This description first limits the grant to only that land within the boundaries of Cape Porpoise. It then limits the grant to that land that had been previously granted by Sir Ferdinando Gorges, by his agents, or by the General Assembly of Massachusetts to any of the inhabitants of the Town.

Despite the use of the terms “give” and “grant” in the granting clause, the property description in this document clearly limits the “grant” to those lands that had been previously granted. The Law Court, in *Banton v. Crosby*, 50 A. 86 (Me. 1901), held that when a deed, by its own terms suggests a prior grant of title, the granting clause “give, grant, convey and confirm” does nothing more than evidence the grant or act as an identification or confirmation of title. *Id.* at 86-87. The property description in this deed clearly and unambiguously references the prior grants of title made by Gorges, his agents, or the General Assembly of Massachusetts. Furthermore, under the terms of the

grant from Gorges to the Massachusetts Bay Colony, Massachusetts only acquired those lands that had not yet been previously granted into private hands. Using the parties' oft-quoted axiom that you can only convey that which you own, Massachusetts could not have "conveyed" to the Trustees the lands described. At the same time, given the lack of land records and the confused state of title, Massachusetts could not be sure exactly what lands were acquired through its purchase. Hence, there was a need for Massachusetts to acknowledge these previous titles and promise to not interfere with those interests.

Because the court concludes that the 1684 document does not convey any grant of new title, specifically the common and undivided lands within the Town boundaries, to the Town, the court does not need to address remainder of the Town's argument as to why fee simple title remains vested in the Town.

III. Plaintiffs' Motion for Summary Judgment on Count I of Town's Counterclaim

While the Plaintiffs have successfully opposed the Town's motion for a ruling that the fee simple title to the beach is vested in the Town, nevertheless the Plaintiffs' own motion on the same issue must be considered independently to determine if the Plaintiffs are entitled to judgment. The Plaintiffs base their argument on conveyances made in the 1640s and 1650s to the Plaintiffs' predecessors in title by Alexander Rigby, through his agent George Cleeves. They argue that the 1684 deed did not convey new title in undivided lands to the Town but, to the extent that it did, the Beach was not part of the undivided lands. (O'Connor/Leahey/Fleming MSJ 4-6.) If, instead, the 1684 deed only confirmed prior title, the Town would have to prove a grant of the beach existing prior to the 1640s and 1650s, in order to obtain title via the 1684 deed. (Id.)

The Colonial Ordinance of 1641-47 declared that the owner of land adjoining places "about and upon salt water where the sea ebbs and flows" shall also own the

property to the low-water mark. *Snow v. Mt. Desert Island Real Estate Co.*, 24 A. 429, 430 (Me. 1891). After the enactment of the ordinance, conveyance of the upland presumably also conveyed the flats. *Id.* However, the intertidal zone can always be conveyed separately from the upland so there must be a call to the tidal water in order for the presumption to apply. *Storer v. Freeman*, 6 Mass. 435, 439 (1810). The terms “ocean,” “sea,” “cove,” or “river” (when referring to a river affected by the tides) are treated as calls to the tidal water raising the presumption of the Colonial Ordinance. *Ogunquit Beach Dist. v. Perkins*, 21 A.2d 660 (Me. 1941); *Britton v. Dept. of Conservation*, 2009 ME 60, ¶ 6, 974 A.2d 303. The terms “beach,” “shore,” and “sea-shore” refer to the intertidal zone bordered on one side by the high-water mark and on the other by the low-water mark. *Storer*, 6 Mass. at 439. The context of the description must be evaluated in order to determine which side of the “shore” was intended to be the boundary. *Dunton v. Parker*, 54 A. 1115, 1118 (Me. 1903). In addition to the terms used in the description, the court must also look for any evidence within the deed suggesting that there was a motive or reason for separation, such as a natural separation, value of the beach apart from the upland, separate occupation, or quasi-cultivation. *Snow*, 24 A. at 430.

The Plaintiffs claim title through Alexander Rigby who obtained title to Goose Rocks Beach through his 1643 purchase of the “Lygonia Patent,” a subdivision of Ferdinando Gorges’ grant received from the Plymouth Council of New England in 1622. (Joint SMF ¶ 10.) The Plaintiffs offer evidence of deeds from George Cleeves, acting as agent for Alexander Rigby, to original settlers Howell, Jeffrey, Bush, and Moore. (Joint SMF ¶¶ 15-46.) They argue that these deeds exemplify an intention by Rigby to convey the whole of Goose Rocks Beach. (O’Connor/Leahey/Fleming MSJ 17-24.) Based on later deeds that reference other conveyances, the Plaintiffs argue that additional deeds

to John Bush, Roger Willine, and Joseph Bowles can be presumed to have been made by Rigby and to exemplify that same intent. (O'Connor/Leahey/Fleming MSJ 9-10.)

Cleeves made a deed to Richard Moore and to John Bush, both on December 19, 1648 and both describing the same parcel. The Moore deed is recorded at Book I Folio 41, York County Registry of Deeds. (Joint SMF ¶ 40; Ross Aff. ¶ 53, Ex. 13.) The Bush deed is recorded at Book I, Folio 36/37, York County Registry of Deeds. (Joint SMF ¶ 40, Ross. Aff. ¶ 52, Ex. 14.) These deeds describe 400 acres of land “to begine at the south west side of the little River betwixt Cape Porpus & Saco...at the point of the grove of pine trees neare unto ye sea & adjoining unto the said River, & from thence to runne upon a straight line to the sea banke southwest....” The Plaintiffs argue that the pine trees are used, not as a boundary, but as a physical monument to fix a direction and bring you to the “sea banke.” See *Erskine v. Moulton*, 66 Me. 276 (1877) (when a deed uses a monument on the bank of a stream and then describes the seaward boundary as “thence by the stream” the monument is meant to give the direction of the line from the upland but not meant to restrict the boundary to the upland). The grove of pine trees in this description is not located at the sea bank. The grove marks the marsh side boundary and, therefore, cannot serve as a directional marker as contemplated in *Erskine*. Furthermore, the use of “to the sea banke” means that the sea bank is excluded from the conveyance. See *Snyder v. Haagen*, 679 A.2d 510, 514 (1996). However, nothing within the deed description gives the court context for determining the meaning of “sea bank” other than the fact that the deed also separately uses the word “sea,” suggesting that the terms have different meanings.

The deed to Gregory Jeffrey was made by George Cleeves on November 1, 1651 and is recorded at Book I Folio 36, York County Registry of Deeds. (Joint SMF ¶ 40; Ross Aff. ¶ 52, Ex. 11.) That deed describes 200 acres by first describing the marsh-side

boundary and then the sea-side boundary as follows: "beginning at the south west side of the Lott of land granted to Joseph Bush...to run four score poole bredth Southwesterly towards Cape Porpus, & from the sea banke is to run Northwesterly four hundred pooles...." The remainder of the description states: "all the marsh ground in the said four hundred pooles in breadth between the sea and the wood side, to be contained in this grant...." The Plaintiffs argue that the use of the word "sea" in this last phrase suggests that the terms "sea" and "sea banke" are equivalent. This interpretation would trigger the presumption of the Colonial Ordinance to the effect that the deed conveyed the intertidal zone. The parallel structure of the sentence suggests that this phrase could be read "between the sea side and the wood side," thus excluding the flats by establishing the boundary on the natural separation that is the "sea bank."

The court finds that the use of the term "sea bank" in these two deeds creates an ambiguity. In other cases, the term "bank" has been interpreted as "not the sea" and "not the shore" but the "land adjacent to the shore": that is, extending "to the margin of the shore, as in case of a fresh water river the bank extends to the margin of the water." *Proctor v. Me. Central Railroad Co.*, 52 A. 933, 937 (Me. 1902). Although the term "shore" can mean either the water-side or upland-side, the phrase "to the margin of the shore" suggests that the upland-side was the intended boundary. Given this case law, the fact that each deed used both the terms "sea" and "sea bank" suggesting that each carries a different meaning, and the implication of the plain language (that a "sea bank" is an embankment of land by the sea and not the sea itself) the court cannot conclude as a matter of law that the deeds convey the flats.

The only other existing recorded conveyance from this period was made by Cleeves to Morgan Howell on April 17, 1648 and is recorded at Book I, Folio 136/137 in the York County Registry of Deeds. (Joint SMF ¶ 16; Ross Aff. ¶ 14, Ex. 3.) This deed describes 100 acres, 10 of which are marsh, 30 acres are upland, and the remaining 60 acres appear not to be adjacent to these other parts. As this deed, along with the other deeds, was copied and put into typeface, there are words missing from the description making it difficult to determine the actual description. The only reference to the “sea side” appears to be describing the 60 acres which are not located at Goose Rocks Beach (“and soe to take the other sixty Acres vp the Easter River, next to Cape Porpus on the East side along by the River to runne Thyrtty poole East by the sea side...”). Regardless, none of the Plaintiffs claim that this grant is within their chain of title. The Plaintiffs only include it to suggest that Rigby had a common plan of conveying all of the land up to the sea. However, the ambiguity in the language of the above noted deeds belies this argument.

The Plaintiffs have not conclusively proven that Goose Rocks Beach was conveyed into private hands before the Town was incorporated or before the 1684 deed was executed. Although the court finds that the Town has not proven that the 1684 deed granted title to the undivided lands to the Town, the Plaintiffs have not proven that the Beach was not part of this common and undivided land. Evidence presented to the court, suggesting that the Town of Cape Porpoise made conveyances of common lands within the boundaries of the Town, implies that title to the common and undivided lands was vested in the Town at some point. (Town OSMF ¶ 56.)² Thus, the Plaintiffs have not conclusively proven that they are entitled to judgment as a matter of

² The Town also stated at oral argument that the Plaintiffs have not shown Massachusetts to have made any subsequent grants of the common and undivided land after the 1684 deed and that the records show that only the Town made such grants.

law on the question of whether the Town has a claim for fee simple title to Goose Rocks Beach.

IV. Plaintiffs' Motion for Summary Judgment on Counts I and II of their Complaint

The Plaintiffs rest their motion for summary judgment on their declaratory judgment and quiet title actions on the argument that ancient conveyances dated in the 1640s and 1650s acted to convey into private hands all of the land area of Goose Rocks Beach down to the low-water mark and that their current deeds also include the beach. (Pls. MPSJ ¶ 12.) The Plaintiffs also argue that, whatever title the Town may have had in the beach, a grant into the Plaintiffs' chain of title can be presumed based upon possession of the beach for a prolonged period of time. (Id. 7-9.)

To the extent that the Plaintiffs rely on three recorded conveyances from George Cleeves as agent for Alexander Rigby to their predecessors in title of some of the area of Goose Rocks Beach to prove that they currently have title to the high dry sand and the intertidal zone, the court finds that these conveyances are not conclusive. The parties agree that the chain of title for each of the Plaintiffs cannot be completely traced back to the 1640s and 1650s. Therefore, even if these ancient grants did convey the high dry sand and intertidal zone, the Plaintiffs have not proven that the beach was not severed from the upland at some later point.

The Plaintiffs' remaining argument is that, under the doctrine of "presumption of a lost grant," the court should quiet title to the low-water line by virtue of their modern title. This argument is based on the Maine Title Standard Number 201 and on *Crooker v. Pendleton*, 23 Me. 339 (1843). (Pls. MPSJ 3.) Title Standard Number 201 states that a party has good title if a title examiner can trace the chain of title back 40 years for a warranty deed and 60 years for a quitclaim deed. In *Crooker v. Pendleton*, the Law Court was asked to determine which party had title to an island in Penobscot Bay because

both had deeds describing the property. The plaintiff claimed title by virtue of an 1829 grant from Massachusetts and Maine. The defendant claimed title by virtue of deeds from family members who had been in possession of the island since 1776, supposedly under a grant from the colonial government of Massachusetts which had been lost over time. The Law Court held that lost grants can be presumed against individuals and against the State, although a longer period of time may be required to use the doctrine against the State. *Id.* at 341-42. It stated that the purpose of the doctrine is similar to that of a statute of limitations and is designed to provide repose and quiet ancient possessions. *Id.* at 342. This doctrine, therefore, is analogous to the doctrine of adverse possession, except it may be used against the sovereign. *Note: The Doctrine of the Presumption of a Lost Grant as Applied Against the State*, 29 Harv. L. Rev. 88, 89-90 (1915).

In order to rely on the doctrine of presumptive grant, the Plaintiffs must, first, show that their current deeds actually describe the high dry sand and the intertidal zone and, second, show that their chain of title describing that land and the actual possession of the land goes back for a number of years. The *Crooker* case does not stand for the proposition that the court may presume a lost grant from the Town when the current owners do not have record title, even if they have been in possession for a long period of time.³

The court notes that some of the Plaintiffs' current deeds either do not unambiguously describe the high dry sand and intertidal zone as part of the property, or convey the property solely by reference to a recorded subdivision plan.⁴ For those Plaintiffs whose current deeds do describe the beach, the Plaintiffs have not put before the court the preceding chain of title to prove that those Plaintiffs and their

³ That argument sounds in adverse possession and may not be raised against the Town. *Portland Water Dist. v. Town of Standish*, 2006 ME 104, ¶ 15, 905 A.2d 829.

⁴ See e.g. Sherman (Scannell Aff. Ex. B); Coughlin (Scannell Aff. Ex. D); Gray (Scannell Aff. Ex. L) Hastings (Scannell Aff. Ex. Q). See also TMF Group MSJ 2-7, 7.

predecessors in interest have been in possession under the presumed lost grant for a sufficient number of years.

The court is unaware of any established time frame that the Plaintiffs must use to prove their title. The Plaintiffs suggest that the Maine Title Standard 201 provides a guide. Although the Town is correct to note that the Maine Title Standards are not law, the forty to sixty-year timeframe described by the title standards provides a reasonable guide for the court to begin examination. As noted in *Crooker*, however, the time frame for presuming a lost grant against a sovereign may be longer than against an individual.

Based on the Plaintiffs' motion for summary judgment on their quiet title and declaratory judgment claims, the Plaintiffs have not conclusively proven that they are entitled to judgment as a matter of law.

V. Plaintiffs' Motion for Summary Judgment Against the TMF Group/Harris/Driver/ Lachiatto

This group of motions for summary judgment involves the claims of the Lachiatto, Driver, and Harris defendants and the TMF Group ("Defendants") to certain rights in the beach as asserted in the parties' various counterclaims. If the Plaintiffs are successful in disposing of the remaining counterclaims to title in the beach through this motion for summary judgment, the Lachiattos, Drivers, Harris, and TMF Group will no longer have standing to challenge the Plaintiff's title in the beach.⁵

⁵ The TMF Group sought to intervene in this case and was denied status as an intervenor but was granted standing *de bene esse* during discovery in this court's August 17, 2010 order. In this court's August 30, 2010 order, the court required the Plaintiffs make additional service by publication on all those unascertained persons, including persons owning non-beachfront property in the so-called Goose Rocks Zone. The TMF Group argues that this order eliminated the need for them to file individual motions to intervene. (TMF Reply to Mot. Strike 2-3.) The TMF Group filed an Answer and (Second) Counterclaim within the 41 days required by the publication notice, to which the Plaintiffs responded by filing a Motion to Strike. The court held argument on the Motion to Strike and declined to rule, instructing the Plaintiffs to file a Motion for Summary Judgment on the Counterclaims. Because the court did not strike the Answer and Counterclaims and ordered the Plaintiffs to file a Motion for Summary Judgment on the Counterclaims, the court intended to entertain the arguments made by the TMF Group.

A. Prescriptive Easement

The Lachiatto/Driver/Harris Defendants and the TMF Group all claim an interest in the beach through prescriptive easement. The Plaintiffs argue that no prescriptive easement can be obtained because the defendants' use is not distinct from that of the general public; because one cannot obtain a prescriptive easement when the use has not been exclusive of the public; and because the individual defendants are unable to prove each element of a prescriptive easement claim against every one of the Plaintiffs. (Pls. TMF MSJ 12-24.)

1. Standing

As a threshold requirement to bringing any claim, a party must demonstrate that it has standing to bring the claim. In Maine, standing is prudential rather than constitutional, meaning that the courts may limit access to those who are best suited to bring a particular claim. *Lindermann v. Comm'n on Governmental Ethics & Election Practices*, 2008 ME 187, ¶ 8, 961 A.2d 538. For a party to prove that they are best suited to bring a claim, it must, at a minimum, at the commencement of litigation demonstrate a sufficient personal stake in the controversy. *Mortgage Electronic Registration Systems, Inc. v. Saunders*, 2010 ME 79, ¶ 7, 2 A.3d 289. This requirement has also been articulated as requiring a particularized injury, that being an effect on a party's property, pecuniary, or personal rights. *Nergarrd v. Town of Westport Island*, 2009 ME 56, ¶ 18, 973 A.2d 735. "A person suffers a particularized injury only when that person suffers injury or harm that is 'in fact distinct from the harm experienced by the public at large.'" *Id.* (quoting *Ricci v. Superintendent, Bureau of Banking*, 485 A.2d 645, 647 (Me. 1984)).

The Plaintiffs argue that the Defendants do not have standing because their injury is the same as that of the general public and the Town is the better-suited party to

bring that claim. The TMF Group argues that it is both factually and legally⁶ distinct from the public in a way that establishes their standing. The TMF Group asserts that as property owners in the area of Kennebunkport known as the “Goose Rocks Zone” or “Goose Rocks Area,” they are distinguishable from the general public because of

their location to the beach, their treatment of the beach as if it were their own, their ability to access the beach without permits (parking), their ability to rent their homes based on their proximity to the beach, their inflated tax assessed values based on their location...and their ability to access the beach through various public and private rights of way....

(TMF Group Mem. 11.) The Defendants have submitted sufficient evidence to support the claim that there is a distinct area called “Goose Rocks Beach.” (See TMF Group SMF ¶¶ 22, 38, 40.)

The Defendants have demonstrated a particularized injury both individually and as a class of people known as Goose Rocks Beach residents. If the claimants are not permitted to bring this claim, they will be deprived of their individual and/or collective interest in the beach, which is distinct from the public’s interest in the beach. Their injury would be a loss of a property right, whereas the consequence to the public would be a loss of use of the beach. Therefore, they have standing to assert these rights.

2. Use Along with the General Public

The Plaintiffs claim that Maine law prohibits “a private prescriptive easement [from arising] where the use has been exercised with the public.” (Pls. TMF MSJ 16-17 (citing Hermansen & Richards, *Roads and Easements* § 4.5.2 (2003).) However, the case law does not clearly support this conclusion. Rather, the cases simply state that when a public prescriptive easement is established, no private easement in the same property

⁶ The TMF Group asserts that they are legally distinct from the public because of the different elements required to prove a private and a public easement. (TMF Group Mem. 12.) That difference being that there is no presumption of adversity when there has been continuous use with knowledge and acquiescence when claiming a public prescriptive easement. *Lyons v. Baptist School of Christian Training*, 2002 ME 137, ¶¶ 18-19, 804 A.2d 364.

for the same purpose can be established. See *Hill v. Lord*, 48 Me. 83 (1861) (claimant was claiming a prescriptive easement as a member of the public, not in his individual capacity); *Wadsworth Realty Co. v. Sundberg*, 338 A.2d 470, 474 (Ct. 1973); *Garmond v. Kinney*, 579 P.2d 178, 179 (N.M. 1956).

The holdings of these cases are essentially a re-articulation of the standing requirement: the Defendants have to prove that they used the beach in a way that is distinct from the public in order to obtain a private prescriptive easement. The Defendants are not precluded from establishing a private prescriptive easement simply because the general public also used the location in question.

3. Elements of the Claim

To obtain a prescriptive easement, a claimant must prove (1) continuous use, (2) for at least 20 years (3) under a claim of right adverse to the owner, (4) with the owner's knowledge and acquiescence, or (5) a use so open, notorious, visible, and uninterrupted that knowledge and acquiescence will be presumed. *Eaton v. Town of Wells*, 2000 ME 176, ¶ 32, 760 A.2d 232. This is a mixed question of law and fact. *Striefel v. Charles-Keyt-Leaman P'shp*, 1999 ME 111, ¶ 7, 733 A.2d 984 (citations omitted).

In the abstract what acts of dominion will result in creating title by adverse possession is a question of law. In this field the powers of the court are primary and plenary. Whether those acts were really done, and the circumstances under which they were done, raise questions of fact. In this field the powers of the jury, in the first instance, are primary and plenary.
Webber v. Barker Lumber Co., 116 A. 586, 587 (Me. 1922).

"Continuous use means occurring without interruption" and only requires the kind and degree of possession that an average owner would make of the property. *Stickney v. City of Saco*, 2001 ME 69, ¶ 18, 770 A.2d 592.

The term "under claim of right" means that the claimant is in possession as an owner intending to claim the land as their own and without recognition or

subordination to the true owner. *Androkites v. White*, 2010 ME 133, ¶ 16, 10 A.3d 677. There is a presumption that use is under a claim of right when the claimant has proven continuous possession for 20 years with the owner's knowledge and acquiescence. *Id.* at 17. This presumption does not arise when there is an explanation of the use that contradicts the rationale of the presumption. *Id.*

"Acquiescence...means passive assent such as consent by silence and does not encompass acquiescence in the active sense such as when a use is acquiesced in by means of the positive grant of a license or permission." *Jacobs v. Boomer*, 267 A.2d 376, 378 (Me. 1970). "[T]he 'open, notorious, [and] visible' element of establishing a prescriptive easement is required 'to give notice to the owner of the servient estate that the user is asserting an easement.'" *Flaherty v. Muther*, 2011 ME 32, ¶ 83, 17 A.3d 640 (citing *Great N. Paper Co. v. Eldredge*, 686 A.2d 1075, 1077 (Me. 1996)).

a. Individualized Claims

The Plaintiffs argue that the Defendants' responses to interrogatories and assertions in their counterclaims are insufficient to prove the elements of prescriptive easement for the 205 individually claimed prescriptive easements against each of the Plaintiffs. First, the Plaintiffs assert that proving an easement between each Defendant and each Plaintiff is a monumental task and that the claimants' answers to interrogatories, alleging generalized use of the entire length of the beach, are clearly insufficient to meeting this burden. (Pls. TMF MSJ 20.) Second, the Plaintiffs specifically claim that the Defendants have not used any specific portion of the beach in a manner hostile and in such a way as to put the Plaintiffs on notice that there were 205 individual claims being made. (Pls. TMF MSJ 20.) And, third, the Plaintiffs argue that the Defendants' responses to interrogatories are too broad to satisfy the requisite proof of a prescriptive easement. (Pls. TMF MSJ 20-21; Pls. TMF SMF ¶ 1.)

The use that the TMF Group members allege to have made of the beach is not sufficient to establish an individual prescriptive easement against all or any of the individual Plaintiffs. The generalized allegations of use that do not target each Plaintiff's lot are insufficient to have put any one Plaintiff on notice of an individual claim against their property such that the owner can be deemed to have had knowledge and acquiesced to that use. See *Bell v. Inhabitants of the Town of Wells*, 1987 Me. Super. LEXIS 256 * 63-64 (Sept. 14, 1987) (the back-lot owners made similarly general claim and the court noted that even where some had claimed to use the same general area each time, it was not fair to allow a person to establish a prescriptive easement on a particular lot when they never have used that lot or at least not on a consistent basis).

b. Class Claim

The TMF Group claimants also claim a prescriptive easement as a class of persons. The statute of limitations makes clear that a class of persons can obtain a prescriptive easement. 14 M.R.S. § 812 (2010). The only Maine case to consider whether a class of person acquired a prescriptive easement is *Flaherty v. Muther*, 2011 ME 32, 17 A.3d 640. In that case, the court considered whether use by three households was sufficient to establish a prescriptive easement for a class of nineteen lot owners. Quoting the Restatement (Third) of Property: Servitudes, section 4.1, the court states, "The relevant inquiry is what a landowner in the position of the owner of the servient estate should reasonably have expected to lose by failing to interrupt the adverse use...." *Id.* at ¶ 83. The court found that the actual use of the claimed area was "quite limited" and was insufficient to provide notice to the owner that the entire neighborhood was asserting an easement because only a few people were using her property. *Id.* at ¶ 84.

As distinguished from *Flaherty*, this case requires the court to determine if the beachfront owners should have been on notice of a class easement as opposed to a public prescriptive easement. The evidence that the TMF Group has put forth suggests that these residents of the Goose Rocks Beach Area can be distinguished from the general public in that many used access-ways within the neighborhood to reach the beach rather than coming from the public access; that the Plaintiffs acknowledged the Goose Rocks Area as a specific area; and the presumably more intense use of the beach by residents of the Goose Rocks Beach Area as compared to the general public. (TMF Group SMF ¶¶ 37-38.)

Acting as a class does not absolve the TMF Group from having to prove a claim against each individual Plaintiff. Where the individual claims seem deficient on the “continuous use” element, the class claim, at least potentially, could satisfy this element. The TMF Group can rely on the whole class’s use of each lot to establish “continuous use.” Also, the TMF Group has put forth evidence that their use of the beach was not interrupted or objected to by the Plaintiffs. (TMF Group SMF ¶¶ 21, 23, 25-27, 39.) A fact finder could find that the Plaintiffs had notice of this class of people using the beach and that they acquiesced to that use. The fact finder could also find that the Plaintiffs should reasonably have expected to at least be subjecting their ownership to an easement in favor of the back lot owners.

iii. Lachiatto/Driver

The Lachiattos and Drivers are not part of the TMF Group. They have asserted claims to individual prescriptive easements. The Lachiatto/Driver claimants state that they have proven the elements for obtaining a prescriptive easement because they have (1) used the whole of Goose Rocks Beach (L/D Supp. SMF ¶¶ 3a, 3b, 5; Driver Aff. ¶¶ 4,7; Lachiatto Aff. ¶¶ 4, 6) for activities such as walking, jogging, sunbathing, and

swimming (Id.), (2) for 40 years (L/D Supp. SMF ¶ 4), (3) that the Plaintiffs have admitted in their Complaint that this was under a claim of right (Pls. Compl. ¶¶ 29, 51), (4 or 5) and that by the very nature of the beach, their use was open and notorious (L/D Mem. 7).⁷ This claim fails for the same reasons as stated above regarding the individual claims of the TMF Group. However, to the extent that the Lachiatto and Driver defendants are part of the class defined as those owning property in the Goose Rocks Zone, they may continue to pursue the claim of prescriptive easement as members of a class of people.

B. Estoppel

An easement by estoppel arises when (1) acts, words, or silence amounting to fraud induces one party, (2) the reliance on the misleading action or statement was reasonable and foreseeable, and (3) the inducement provides a benefit to the misled party that is unfair to deny. *Martin v. Me. C.R. Co.*, 21 A. 740, 742 (Me. 1890). This may arise when a lot owner takes title by reference to a recorded plan that shows subdivision amenities. *See Arnold v. Boulay*, 147 Me. 116, 121 (1951).

Herbert and Judith Cohen, who purchased their home from the Almeders, have asserted that when they rented the same house from the Almeders nothing was said about limited use of the beach. And later when they purchased the home, nothing was said about limited use of the beach. (TMF Group SMF ¶ 23.) This allegation demonstrates silence that potentially induced the Cohen's into renting and subsequently purchasing a house from the Almeders. If they can prove that the Almeders knew that the Cohens used the beach while they were renters, then sold without indicating that there are no beach rights, estoppel may be appropriate. The

⁷ The Statements of Material Facts on which the Lachiatto and Driver defendants rely were not timely and do not appear to have been served on the Plaintiffs. There is a pending motion for extension of time to file statements of material fact. The court grants that motion and the supplemental statements of material fact are considered by the court.

Plaintiffs deny the statements. (Pls. TMF Reply OSMF ¶ 23.) This is an issue of material fact. However, the Cohens are the only members of the TMF Group that have alleged such conduct.

An easement by estoppel can also arise when lots are conveyed by reference to a subdivision plan that depicts some areas within the subdivision as common areas or amenities for the use of those owning land within the subdivision. *Arnold v. Boulay*, 83 A.2d 574, 577 (Me. 1951). The Law Court has stated

From this doctrine it, of course, follows that such distinct and independent private rights in other lands of the grantor than those granted may be acquired, by implied covenant, as appurtenant to the premises granted, although they are not of such a nature as to give rise to public rights by dedication. The object of the principle is, not to create public rights, but to secure to persons purchasing lots under such circumstances those benefits, the promise of which, it is reasonable to infer, has induced them to buy portions of a tract laid out on the plan indicated.

Id.

Several of the TMF Group defendants have asserted that they acquired title by reference to a recorded subdivision plan. There is a factual dispute about the subdivision plan drafting conventions in the early 1900s. (See *Buisman Aff.* ¶ 9; *Town SMF* ¶¶ 55-57, 61.) Although interpretation of a subdivision plan, like the interpretation of a deed, is a question of law, the drafting conventions are questions of fact that must be resolved before the court can interpret the plans.

C. Other Claims

The counterclaims for fee simple ownership, adverse possession, custom, nuisance, and quasi-easement all fail as a matter of law because the defendants who assert them fail to establish at least one element of each claim. In fact, the Lachiatto and Driver defendants do not even appear to pursue their claim to fee-simple ownership and the Harris defendants do not appear to pursue their nuisance claim. No evidence has been put before the court to support either claim. Adverse possession requires that

the claimant be in possession of the disputed property to the exclusion of the true owner. *Striefel v. Chaarles-Kent-Leaman P'ship*, 1999 ME 11, ¶ 17, 773 A.2d 984. This element is clearly not present in this case. Custom is not a recognized cause of action for a private easement in Maine. *Piper v. Voorhees*, 155 A. 556 (Me. 1931). Lastly, quasi-easement requires the claimant to provide evidence that the claimant's land was in common ownership with the servient land and that before land was divided the owner used the "servient" estate in the manner equating an easement. *Connolly v. Me. Cent. R.R. Co.*, 2009 ME 43, ¶ 8, 969 A.2d 919. The defendants have not properly controverted the Plaintiffs' statements of material facts asserting that none of the properties were in common ownership or asserting that there is no proof of conduct by former owners suggesting an easement.

VI. The Lachiatto/Driver Cross-Motion for Summary Judgment on their Counterclaim for Prescriptive Easement

As noted above, the Plaintiffs brought a motion for summary judgment in their favor on this claim and the Lachiatto and Driver defendants have cross-claimed on the same issue. For the reasons stated above, the Lachiatto and Driver defendants have failed to prove their claim for individual prescriptive easements against the Plaintiffs, however, they may continue to present their case for a class prescriptive easement.

VII. The State of Maine and Surfrider Foundation's Motion for Summary Judgment

The State of Maine answered the Plaintiffs' Complaint and asserts as a defense that the public, as a whole and as individual members, has public trust rights over the intertidal zone for general recreational purposes, thus barring the Plaintiffs' claims. The Plaintiffs' Complaint recognizes that the title that it seeks to quiet in this action is subject to the public rights to fishing, fowling, and navigating as limited by Colonial Ordinance of 1647. The State's original motion seeks to preserve for future review the argument that *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989), was wrongly decided. In

its supplemental motion, the State asks the court to hold that the public trust doctrine includes “the rights to stroll, swim and surf in the intertidal zone, and when doing so to engage in incidental activities such as sitting and standing.” (State Supp. Mot. 14.)

The Plaintiffs have not disputed that their ownership of the beach is subject to the rights of the public under the public trust doctrine as limited by the Colonial Ordinance of 1641-1647. The State is asking the court to expand the scope of the public’s use rights as described in *Bell* and most recently in *McGarvey, Jr., et al. v. Whittredge*, 2011 ME 97. This issue cannot be resolved on summary judgment.

The entries are:

The Plaintiffs’ Motion to Strike the TMF Group Reply to Plaintiffs’ Motion for Summary Judgment is DENIED. The members of the TMF Group are defendants in this case.

The Lachiatto/Driver Motion for Enlargement of Time to file its response to the Plaintiffs’ Statements of Material Fact is GRANTED.

The Town of Kennebunkport’s Motion for Summary Judgment on Count I of its Counterclaim and Counts I and II of the Complaint is DENIED.

The Plaintiffs’ Motion for Summary Judgment on Count I of the Town of Kennebunkport’s Counterclaim is DENIED.


The Plaintiffs’ Motion for Partial Summary Judgment on Counts I and II of its Complaint is DENIED.

The Plaintiffs’ Motion for Partial Summary Judgment Against Lachiatto, Driver, Harris and TMF Group is GRANTED as for all counterclaims raised by these parties except that of a prescriptive easement by a class and easement by estoppel which remain.

The Lachiatto/Driver Cross-motion for Summary Judgment on their claims is DENIED.

The State of Maine and Surfrider Foundation Motions for Summary Judgment are DENIED.

DATE: 12/22/11



G. Arthur Brennan
Justice, Superior Court, Active Retired