

STATE OF MAINE
YORK, ss.

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

ROBERT F. ALMEDER et al.,)	
)	
Plaintiffs,)	PLAINTIFFS' CONSOLIDATED
)	REPLY MEMORANDUM
v.)	TO OPPOSITIONS OF TMF GROUP AND
)	LACHIATTO AND DRIVER TO
TOWN OF KENNEBUNKPORT,)	PLAINTIFFS' MOTION FOR
)	PARTIAL SUMMARY JUDGMENT
Defendants.)	(Title to Real Estate Involved)

Plaintiffs Robert F. Almeder, et al. and the Parties In Interest¹ represented by Sidney St. F. Thaxter and Curtis Thaxter LLC (collectively "Plaintiffs"), pursuant to Rule 7(e) of the Maine Rules of Civil Procedure, submit this consolidated reply to the opposing memoranda of law filed on July 11, 2011 by the TMF Group² and the joint opposition of Alexander M. Lachiatto, Judith A. Lachiatto, Richard J. Driver and Margarete K.M. Driver in response to the Plaintiffs' Motion for Partial Summary Judgment Against Lachiatto, Driver, Harris and TMF Group (June 9, 2011).

INTRODUCTION

The TMF Group now claims to represent some 178 parties who want to be part of this suit. TMF Opp'n at fn. 2.³ Of those 178, none of them answered the interrogatories within the

¹ David and Jennifer Eaton, Susan Lewis as Trustee of the Amended and Restate Susan K. Lewis Residence Trust, Paley Family Homes, LLC, and Heather Vicenzi as Trustee of the George A. Vicenzi Trust.

² The TMF Group's opposing memoranda does not respond on behalf of Sharon Ann Eon-Harris and John Michie Harris ("Harris") to Plaintiffs' specific requests for summary judgment against Harris on their counterclaims. As a result, Harris has failed to file a timely opposing memorandum to the Plaintiffs' motion and, as such, Plaintiffs' respectfully request the court deem that Harris has waived all objections to the motion and enter summary judgment in favor of Plaintiffs on Harris' counterclaims. M.R. Civ. P. 45(h)(4).

³ This number appears to be a moving target. The TMF Group on October 27, 2011 included some 309 persons representing 205+ real properties. See Answer, Defenses and Counterclaims of TMF Defendants dated October 27, 2010. Presumably this number has dropped after service of interrogatories upon the TMF Group by Plaintiffs.

extended deadline.⁴ As a whole they all claim in a universal chorus that they have used the entire beach, including every single one of Plaintiffs' properties. Now, in order to shoe horn in the 178, TMF Group members representing only 13 properties appear to claim that they took their property by reference to a plan such as the Emmons plans that allegedly gave them rights to the beach⁵. TMF Group members representing 26 properties are claiming deeded rights of way to access the beach (but no deeded rights to use the beach). TMF Group members representing only one out of 205+ properties (see Answer, Defenses and Counterclaims of TMF Defendants (October 27, 2010)) have made any factual allegations that could have any possible relevance to a claim for an easement by estoppel.⁶ Finally, only two of the members of the TMF Group have made any allegations that relate specifically to any of Plaintiffs' individual properties; the rest make the blanket assertion that they have "used" the entire two-mile beach.⁷

First, it should be emphasized that the complaint filed in this case excepts out any persons who claim a right based on a recorded instrument. See Compl. ¶ 29. Therefore, any rights based on a recorded deed that contains a right of way to access or right to use the beach and any rights based on any recorded instrument (e.g. deed or deed which references a recorded plan) that

⁴ Answers from TMF Group members owning 9 properties answered three days after the deadline, answers from TMF Group members owning 116 properties answered before the Motion for Summary Judgment was filed and TMF Group members owning 52 properties have filed answers after the filing of Plaintiffs' Motion for Summary Judgment.

⁵ It should be noted that the TMF Group makes a patently false allegation in their brief with no record citation that "all TMF Defendants have property referenced to a plan which depicts access ways to the beach and have acquired rights in the beach." TMF Opp'n, at 20. As a factual matter, only 17 members of the TMF Group (owning 13 properties) have deeds that reference a recorded plan that actual covers a portion of Goose Rocks Beach owned by the Plaintiffs. These members and the plans referenced in their deeds are Cooper, Gregory (Plan 15/Book 30); Detchon, C. Faith (Plan 8/Book 73); Fitzpatrick, Jan (Plan 33/Book 18); Garvey, Robert and Jane (Plan 14/Book 37); Jose-Roddy, Judy (Plan 8/Book 73); Junker, William III and Maria (Plan 8/Book 73); Koffs, Richard and Kathleen (Plan 15/Book 30); Mazeika, David and Barbara (Plan 14/Book 37) and (Plan 10/Book 36); Nichols, Ray and Ellen (Plan 10/Book 59); Nixon, Howard, Trustees Howard J. Nixon Family Irrev. Trust (Plan 8/Book 73); Skeirik, Patricia (Plan 8/Book 73); Whittemore, Charles, Ttee Whittemore Living Trust (Plan 8/Book 73).

⁶ TMF Group members Herbert A. and Judith D. Cohen claim they purchased their property from the Plaintiffs Almeders and that the Almeders said nothing to them about whether the conveyance included rights to the beach or not. See Cohen Answers to Interogatorries 3 and 6. This allegation is the subject of a separate claim to be made by Cohen in a separate action, if they wish to proceed. See Compl. ¶ 29.

⁷ Robert Pearce and Kathleen A. DeMarre-Pappas have answered that they have used two of the Plaintiffs' properties, Plaintiffs Julian and Lewis.

conveys rights to use the beach are not intended to be part of this lawsuit. Those persons who hold any such rights under the said recorded instruments will not be precluded from bringing their claims separately and litigating their claims in the future. Second, this Court offered those individuals, like the Junkers, who claim rights to use the beach under the Emmons plan the right to intervene if they made specific factual allegations. The TMF Group has chosen to try this case as a group. They have not moved this Court to be and are not certified as a class. The Plaintiffs asked each TMF Group member for the details of each member's use of the beach on or over each of the Plaintiffs' properties. With 2 miles of beach, it is clearly not possible for all these 309 members of the TMF Group to have used each of Plaintiffs' properties in a manner that would give each of them prescriptive rights to each property. Some of Plaintiffs' properties have been owned for generations. Some Plaintiffs can attest that their land has been posted against activities other than walking in the intertidal zone and that there has been no use by any member of the TMF Group of their properties. If the individual members of the TMF Group choose in their answers not to give the requested specifics, then they clearly and consciously have failed to put forth facts sufficient to survive a summary judgment.

The genius of this Court's August 17, 2010 order is that those individuals who had a particular claim were invited to intervene and make their claims as to the particular property they were claiming against. For example, had the Junkers followed the court order they would have had to make a specific claim against Plaintiffs Coughlin and Almeders whose beachfront properties the Junkers claim the right to use. Factually that claim is not sustainable. First, because the Junkers have asked for and received permission to use the Coughlin property; and second, because when the Emmons plans are reviewed, as our experts did, it is clear that the

beach portion of the Emmons plan is not a subdivision amenity depicted on the plan that would give rise to rights in those who took their property by reference to that plan.

We point this out, not to begin a factual debate which is inappropriate to a request for summary judgment but to point out that the TMF Group is avoiding addressing these claims on a property by property basis or individual by individual basis because they are not sustainable. The terms of a prescriptive easement are based on what the landowner's reasonable expectations are based on the actual use of the property by the claimants. The Plaintiffs are entitled to know which individual members of the TMF Group are claiming property rights in which of Plaintiffs' property or properties or those reasonable expectations cannot be evaluated. To illustrate this point, the property of Plaintiffs Temerlins is approximately two miles from Plaintiffs Almeders and any evidence and proof regarding which TMF Group members were using those two properties will be markedly different. A blanket statement that every single one of the TMF Group members used every single property along that two-mile stretch is not enough. As a group they cannot claim private prescriptive rights over each Plaintiff's property spanning over two miles of beach.

Those members of the TMF Group that have claims against certain properties should have come forward and made their case by answering completely Plaintiffs' interrogatories. Those in the TMF Group that claim they took their property by reference to a recorded instrument (e.g. a deed or a deed referencing a recorded plan that actually depicts the beach or the ocean at Goose Rocks Beach), should if they wish litigate their case in a separate lawsuit against the individual beachfront owners. The fact is they haven't. Instead, Plaintiffs, through counsel and experts, have been required to incur additional expense and comb through hundreds of pages of canned answers to interrogatories to discover who claims rights to their property by

reference to a plan that depicts the beach, to identify the only two members of the TMF Group who make specific allegations regarding specific beach front parcels and to identify the one member who purchased their lot from one of the Plaintiffs. The TMF Group is trying to shoehorn the skinny facts of less than 17 members of a 309 member group in order to argue that those 309 members have a case for private rights. If there are members of the group that have individualized claims, this Court has ordered long ago that those persons come forward pursuant to the Maine Rules of Civil Procedure and state so. They haven't.

Defendants Lachiatto and Driver filed a Joint Opposition to Plaintiffs' Motion for Summary Judgment; however, their Opposition raises no new issues. Despite their attempt to create an issue of fact and individualize their claims, the fact remains that Lachiatto and Driver have not articulated any claims that differ from the claims being made by the general public.

LEGAL ARGUMENT

I. Standing

The TMF Group seems to be arguing in its Opposition that Plaintiffs are doing an end run on justice for the TMF Group because the members of the group will be barred from litigating in the future their private rights. This is a clear misstatement of the reality of this case. Apart from the 13 members of the TMF Group which allege a right under a recorded plan referenced in their deeds, the remaining TMF Group has not asserted any private rights that they have a right to litigate. The TMF Group doesn't have standing as individuals because the use of the beach by members of the group is indistinguishable from the use alleged general public. The Town has shown itself more than capable of litigating the issue of public rights to the beach. Therefore, the TMF Group is adequately represented in this case already.

The TMF Group also alleges that it is distinct from the general public because the members of the group all reside in a municipal land use zone known as the “Goose Rocks Beach Zone.” This may be true but a land use zone can have no applicability to private prescriptive easements. The more relevant question, as we will argue below, is whether the alleged use by the members of the TMF Group was in any way different from the alleged use by the general public and whether the Plaintiffs reasonably should have known that the individual members of the TMF Group were somehow different from the general public and were, through their use over time, acquiring rights for as a defined group.

When the circumstances surrounding the creation of an easement are prescriptive in nature, ‘the adverse use that leads to creation of the servitude provides the basis for determining its terms.’ Since the servitude created by adverse use arises from the failure of the landowner to take steps to halt the adverse use, interpretation of the prescriptive servitude focuses on the reasonable expectations of the landowner. 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 before the prescriptive period had run.

Flaherty v. Muther, 2011 ME 32, ¶ 83; 17 A.3d 640, 661 (quoting Restatement (Third) of Prop.: Servitudes § 4.1 cmt. a, h). If we take the TMF Group’s allegations as true that the owners, tenants and guests of 205 properties were all using the beach for general recreational purposes along with, as the Town and the TMF Group alleges, other residents of the Town, as well as people from out of town, could the Plaintiffs in this case have reasonably expected that the people associated with the 205 TMF properties were doing anything different from the general public or that each and every one of them was acquiring a private prescriptive easement? Would the fact that the TMF Group owned property all within the same land use zone have any impact on the Plaintiffs’ reasonable expectations? We think this Court must answer these questions in the negative.

II. The Individual Members of the TMF Group Have Failed to Provide Specific Facts About What Activities They Allegedly Conducted on Which Beach Front Properties; Therefore Their Claims for Private Prescriptive Easements Must Fail.

The TMF Group, presumably because it simply does not have the facts to support a claim that each member of its group really did all of the activities that they allege on every single parcel of beach front properties, now makes clear that they are simply making a blanket allegation that each member of the TMF Group has used every single beach front parcel. They say their use clearly indicates all of Plaintiffs' properties because they say they have used the whole entire beach and therefore they do not have to make any allegations with respect to individual Plaintiffs' properties.

The TMF Group has refused to specifically set forth any evidence in their answers to Plaintiffs' interrogatories that they may have as to specific properties. None of the TMF Group members allege which activities were conducted on which of Plaintiffs' properties. This is important, and if the TMF Group was able to allege which properties they say they used and for what activities, then their claim might perhaps receive some credibility. By way of example, we will use the case of TMF Group member Barbara Barwise. She alleges that she has walked dogs, watched wildlife, collected clams and shells, flown kites, played Bocce, windsurfed, built campfires and picnicked. See Statement of Additional Material Facts ("TMF-SAMF") ¶ 21. The TMF Group never actually makes the specific claim that Ms. Barwise did all of these activities on every single beach front parcel but rather makes a blanket statement that each and every TMF Group member has conducted its activities on each and every parcel of beachfront properties. However, they have failed to provide the specifics. This is because it simply cannot be true. Clearly Barbara Barwise has not built a campfire on every single beach front lot with enough regularity that her alleged private prescriptive easement would give her a right to build a

campfire on every single lot. Such a conclusion is not warranted and this is why the TMF Group has failed to make the required specific factual allegations. The members of the TMF Group have totally failed to identify on which lots their activities took place. A blanket assertion by them that they have “used” every single piece of the beach cannot allow them to establish as a group, a private prescriptive easement over every piece of the beach especially when they were asked under oath to give the specifics as to the use of each particular property.⁸

If there is a member of the TMF Group that has claimed, for example, as Peter and Cynthia Guttermann have, that he or she has moored a boat and left a dinghy on the beach, then that member must come forward and tell Plaintiffs which of the Plaintiffs’ properties they are claiming that they left a dinghy on.⁹ That is the only way that the Plaintiff in question may defend against such a claim. It may well be that a Plaintiff, such as Coughlin, has given permission for such use but it is impossible for Plaintiffs to defend against such vague and broad allegations. It is manifestly unfair and unsustainable as matter of the evidentiary burden of proof to allow the TMF Group to be parties in this lawsuit when (1) their claims are no different from those of the general public, and (2) they cannot provide factual allegations against the Plaintiffs’ properties to even allow the Plaintiffs to defend against the alleged claims.

The generalized assertions being made by the TMF Group that each and every of the 309 TMF Group members have used the entire stretch of beach simply cannot make out a claim for

⁸ It should be noted that there are two members of the TMF Group (Kathleen A. De Marre-Pappas and Robert Pearce) who have stated that the lots they have primarily used included Plaintiff Julian’s and Plaintiff Lewis’ parcels and a parcel adjacent to Plaintiff Lencki’s parcel. See Pappas answer to Interrogatory No. 2 and Pearce answer to Interrogatory No.2 attached to the TMF Group’s Statement of Additional Material Facts. These are the only two members of the TMF Group that have identified specific parcels that they allegedly used. Unfortunately, even these two group members are vague with regard to which activities were conducted on the particular parcels and how often the alleged use occurred. They simply state that the activities occurred “regularly.” Julian and Lewis would happily litigate these claims because they can focus on the facts these particular TMF Group members claim and not on amorphous allegations.

⁹ The Guttermanns claim that they “stored dinghy on beach” but they did not specify on which property they allegedly stored a dinghy. See Guttermann answer to Interrogatory No. 20.

309 private prescriptive easements over each of the Plaintiffs' properties. The TMF Group states in its Opposition at page 13 that there is no notice requirement for a prescriptive easement. This is simply false. In order to make out a case for a private prescriptive easement, the claimant has to show the requisite adversity property by property and the open and notorious nature of the use and the purpose of this requirement is to ensure that the owners of alleged servient estates have notice of the assertion of a right over their property. Flaherty v. Muther, 2011 ME 32, ¶ 83, 17 A.3d 640, 661-62 ("the '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.'" (quoting Great N. Paper Co. v. Eldredge, 686 A.2d 1075, 1077 (Me. 1996))).

This notice is required so that the persons defending against such an easement have sufficient notice that the claimant is actually using their property in such a way that they could acquire property rights. Clearly, because Barbara Barwise claims she had campfires on the beach, when she does not specify *where* on the beach she had those campfires, does not establish the adversity or openness required to put Plaintiffs' on notice that she was attempting to acquire a prescriptive right over each of their individual properties.

This Court, on August 17, 2010, ordered that if individual members of the TMF Group have private, specific claims to portions of the beach, they should come forward with their claims. Order on Pending Motions (August 17, 2010) (Brennan, J.) at 6, 19. We don't want to tell the TMF Group how to litigate their case, but clearly, if they were serious about pursuing these alleged claims, they would then move to intervene, giving specific facts about each of the intervenor's use of specific properties. By way of example, if there is a person who says they have been having bonfires on one of Plaintiffs' properties every year for the last 40 years, we are not arguing that they should not be able to come forward and make such an allegation. Or if

there is a person who says that they have been setting up a badminton net in front of one of the Plaintiffs' houses for the last 40 years, similarly they should be able to come forward and say so. The fact is, is that the claims are just generalized claims of parties who are indistinguishable from the general public and, as such, they are not able to make these specific claims.

III. The members of the TMF Group cannot turn their claim into a "private" claim simply because it would afford them a more favorable presumption of law.

The TMF Group raise as a reason why each of the members of their group should be allowed to put forward a claim for a private prescriptive easement, is the fact that the burden of proof is different for public easement claimants than it is for private easement claimants with regard to open and unenclosed land. Plaintiffs have already addressed this argument in a prior brief but we will repeat the basics here. The TMF Group cites to Lyons v. Baptist Sch. of Christian Training, in which the Law Court stated "[u]nder our precedents, public recreational uses of unposted open fields or woodlands and the ways through them are presumed permissive." 2002 ME 137, ¶ 19, 804 A.2d 364, 370. Prescriptive easements are not favored by the courts and the Law Court in Lyons and Androkites v. White, 2010 ME 133 ¶ 20, 10 A3d 677, 683 has made clear that there is a heavy burden on those wishing to establish claims by prescription.

If the TMF Group's argument with respect to the burdens in prescriptive easement cases were accepted, then there would *never* be a case where a court could deny standing to a party whose claims are indistinct from the general public, at least in the context of a prescriptive easement. It is ludicrous to suggest that a party's claim should be transformed simply because that party does not like a presumption of law that applies to them. The bottom line is that if the members of the TMF Group have been using the beach, as they allege they have, they have been using it in a manner that is indistinguishable from the use alleged to have been made by the general public. Further, if anything, the TMF Group's point about the presumption of law

applicable to public easement cases underscores the importance of recognizing that the TMF Group's claim is simply that of the general public. The Lyons court stated that "our rule that public recreational uses are presumed to be permissive 'is predicated on the notion that such use by the general public is consistent with, and in no way diminishes, the rights of the owner in his land.' This observation is consistent with the testimony about traditions underlying recreational uses of land that was offered by several of the plaintiffs' witnesses in this case." Lyons, 2002 ME 137, ¶ 19, 804 A.2d 364, 370 (quoting Town of Manchester v. Augusta Country Club, 477 A.2d 1124, 1130 (Me. 1984)). This presumption is based on Maine's open land tradition and encourages landowners to allow public access to their lands in order to continue this tradition. See Baron, Marya, Case Note: Weeks v. Krysa: Cultivating the Garden of Adverse Possession, 62 Me. L. Rev. 289, 292 (2010). The TMF Group should not be allowed to negate an important presumption of law predicated on important policy concerns for the State of Maine simply because they allege their claims are "private."

IV. The TMF Group Is Comprised of Members of the General Public and IS NOT a "Class" of Persons.

There is only one Maine case regarding an assertion of a prescriptive easement by a class of persons as referred to in 14 M.R.S.A. § 812 (statute of limitations). Furthermore, the Law Court has stated that there is a dearth of cases on this issue even nationwide. Flaherty v. Muther, 2011 ME 32, ¶ 81, 17 A.3d 640, 661. The TMF Group points only to Flaherty v. Muther in which a class was not found and asserts simply that "the facts of this case are much different" and makes no attempt to distinguish that case from the case at bar. TMF Opp'n. at 15. In fact, Flaherty supports the Plaintiffs' position. The Law Court in Flaherty explains that determining the nature of a prescriptive easement is determined by reference to the actual conduct that was acquiesced to by the landowners. Apparently there has to be some conduct on the part of the

prescriptive claimants that would alert the landowners to the fact that the claimants were asserting rights “as a class of persons.” Id. ¶ 84; 17 A.3d at 662 (“the objective expectations of the owner of Lot J-46 become central to determining whether, as a matter of law, the conduct by the J-Lot owners established a prescriptive easement for the J-Lot owners, as a class of persons, in the upland of Lot J-46. Those expectations rest on the actual use of the upland during the prescriptive period.”). The J-Lot owners were all in the same subdivision that had a specific deeded right of way that led to the beach. Here, we have members of the TMF Group that live as far away from the beach as one mile and a beach that spans two miles. The facts here are even less likely to lead to a finding of a class than those in Flaherty, where a class was not found.

There is no possible way, based on the allegations made by the TMF Group, that the Plaintiffs could possibly have been alerted to the fact that the individual members of the TMF Group were asserting a private prescriptive easement on behalf of all of the households in the entire so-called “Goose Rocks Zone.” Plaintiffs would have no way of knowing whether a person on the beach even lived in the Town of Kennebunkport. Arguing for a class of persons in the context of this case, which concerns over two miles of beach and over 100 beachfront lots, simply makes no sense. Flaherty v. Muther involved only one beach front property and a class was not even found in that case. Frankly, it is the TMF Group that is attempting to do an end run on the law that applies to public prescriptive easements. This is law as articulated in Lyons that encourages landowners to make their land available to public use without fear of the acquisition of vested rights and is an important policy consideration in this State. (See infra Section III).

V. There Is No Genuine Issue of Material Fact as to Whether or Not the TMF Group Has Acquired an Implied Easement Based on a Recorded Plan.

The TMF Group claims that there is a genuine issue of material fact as to whether the TMF Group has acquired an implied easement based on receiving property by reference to a

recorded plan. They state in their Opposition that “all TMF Defendants have property referenced to a plan which depicts access ways to the beach and have acquired rights in the beach” and that this could give them an implied easement to use the beach. TMF Opp’n, at 20. The TMF Group provides no record citation that could support such a broad allegation. The Plaintiffs will assume that this statement was made in error because it is simply not true and the TMF Group has not alleged such a proposition as a factual matter. In fact, although they have never made this specific allegation, the Plaintiffs have been able to determine that the TMF Group has, in their responses to discovery, alleged that there are members of the TMF Group owning only 13 properties that took their property by reference to a plan that actually depicts the beach. Filed with the Plaintiffs Opposition to the Town’s MSJ on the fee title issue, is a plan prepared by M. Johann Buisman, PLS, that depicts the areas of the beach that are covered by recorded plans. See Affidavit of M. Johan Buisman, ¶¶ 7(a)-7(j) and Exhibits 3-12 attached at Tab 2 to Plaintiffs Joint Statement of Material Facts (April 29, 2011). There are only 17 members of the TMF Group that have alleged that they took 13 properties with reference to one of the plans depicted on Buisman’s plan that affect Plaintiffs’ properties. See fn. 4 infra at 2. There are other TMF Group members that took their property by reference to a plan but those plans do not depict the beach; rather, they depict subdivisions that are removed from the beach area or cover other areas of the beach that are not owned by the Plaintiffs. The TMF Group cites Callahan v. Ganneston Park Development Corp., 245 A.2d 274 (Me. 1968), for the proposition that parties who take their property by reference to a recorded plan receive the benefits depicted on the plan which can be reasonably inferred to have induced the parties to buy their property. TMF Opp’n, at 19. There is no question that a plan that does not even depict the beach or depict a right of way to the beach, cannot support a claim for an implied easement to the beach under this theory. Therefore,

there are only 17 members of the TMF Group that arguably have a claim under this theory. The TMF Group's attempt to shoehorn 292 other parties into the arguable claims of 17 is very disingenuous and misleading.

There are three ways in which this Court can address the 17 members of the TMF Group that claim to have taken their property with reference to a plan that depicts the beach. First, the court could hold that because the TMF Group attempts to shoehorn the remaining parties into a claim for an implied easement without even giving notice pleading to all beach front homeowners of the members of TMF Group that could even have claims means, that, as a group, the TMF Group cannot be allowed in to pursue these claims. Second, because the Plaintiffs excepted out of this lawsuit those who claim rights on the basis of a recorded instrument, this Court could rule that those 17 members are not part of this lawsuit due to that exclusion but are free to bring their claims in a separate lawsuit. Third, this Court could allow only the 17 parties into the lawsuit to pursue their individual claims for an implied easement based on their deeds that reference recorded beach-front plans.

VI. There Is Not a Genuine Issue of Material Fact as to Whether the TMF Group Has Acquired a Quasi-Easement to Use Goose Rocks Beach.

As was laid out in Plaintiffs' Motion for Summary Judgment, "[a] quasi-easement is created 'when a common grantor severs real estate, conveying part of it and retaining the balance . . . , and the circumstances at the time of the conveyance denote the grantor's intent to subject the [conveyed] land (the servient estate) to an easement benefiting the [retained] land (the dominant estate).'" Connolly v. Me. Cent. R.R. Co., 2009 ME 43, ¶ 8, 969 A.2d 919, 921 (quoting Frederick v. Consol. Waste Servs., Inc., 573 A.2d 387, 389 (Me. 1990)). Motion at 29.

The TMF Group has admitted that no members of the group share a common boundary with any of the Plaintiffs. In their responses to the Plaintiffs' statements of material facts they

qualify the Plaintiffs' statements to that effect by stating that they are not aware whether or not any of the rights of ways that some of the TMF Group members claim to have to the beach abut any of Plaintiffs' properties. TMF Opp. SMF 2. It is their burden given the interrogatories to answer in sufficient detail to survive a motion for summary judgment. Clearly, a right of way abutting one of Plaintiffs' properties would have no relevance to the question of whether a quasi-easement has arisen with respect to the beach. Furthermore, the TMF Group has failed to allege any facts whatsoever that would lead to a conclusion that, even if any of the properties were in common ownership with the Plaintiffs' properties, that there were circumstances that would indicate that when the land was severed the grantor intended to have the granted parcel receive a quasi-easement to use the beach for recreational purposes. The TMF Group members were all asked what facts they had that would support a claim for quasi-easement, specifically, they were asked to "[d]escribe each and every act of the common grantor that manifested intent to use any portion or party of any of Plaintiffs Property." See TMF Defendants answers to Plaintiffs' First Set of Interrogatories, Interrogatory No. 7b, attached to TMF Opposition to Plaintiffs Statement of Material Facts. The TMF Group all responded with the canned answer that "[w]e believe the history and development of Goose Rocks Beach will show that all back-lot owners acquired a right to use all of Goose Rocks Beach for general recreational purposes and the various plans reflecting the development of the Goose Rocks Beach community support this." See e.g., Herbert A. and Judith D. Cohen's answers to Interrogatory No. 7b attached to TMF Opposition to Plaintiffs' Statement of Material Facts. The purpose of allowing the attorneys for the TMF Group in this case for the purposes of discovery was to allow them to put forward their clients' facts in support of their claims. This is all the TMF Group was able to come up with in their answers under oath and, with the possible exception of 13, there simply is no claim here.

Because there are no facts that have even been alleged, let alone a factual dispute, this count must be dismissed.

VII. There Is No Genuine Issue of Material Fact as to Whether the TMF Group Has Acquired an Easement by Estoppel.

As was established in Plaintiffs' Motion for Summary Judgment, to prove a claim for an easement by estoppel, the claimant must show the following,

(1) an inducement by one party who misleads another party through acts, wording, or silence amounting to fraud or impermissible to take some action or refrain from taking some action; (2) the reliance on the misleading inducement must be both reasonable on the part of the misled party and foreseeable by the inducing party; (3) the inducement must provide some benefit to the misled party which would be unfair to deny.

Martin v. Maine C. R. Co., 83 Me. 100, 21 A. 740, 742 (1890); Woods v. Libby, 635 A.2d 960 (Me. 1993). Motion at 32.

The TMF Group brings forward only one fact with relation to only two single TMF Group members who own one parcel of property in the "Goose Rocks Zone" and the members' use of only one single parcel of beach front property that could possibly lead to a finding of an easement by estoppel. The TMF Group alleges that the Almeders sold property to TMF Group members Herbert and Judith Cohen ("Cohens") and they allege that Plaintiffs Almeder was silent as to whether or not the members had the right to use Goose Rocks Beach. It should be noted that if the Cohens could prove their claim, it would give them the right to use only that portion of the beach that is owned by the Almeders. Clearly, this is not what the TMF Group wants. The group wants to shoehorn this one allegation into a right for the owners, tenants and invitees of the entire TMF Group that have had no dealings whatsoever with the Almeder's property. This claim is completely without merit and should be dismissed.

The court has two choices with respect to the TMF Group's claim for an easement by estoppel. First, the court could hold that because the TMF Group attempts to shoehorn 309 parties into a claim for an easement by estoppel that only two members of one property arguably has, that, as a group, the TMF Group cannot be allowed in to pursue these claims. Second, this Court could allow the 2 member, husband and wife party, referenced by the TMF Group into the lawsuit to pursue their individual claims for an easement by estoppel.

VIII. The TMF prescriptive easement is not appurtenant.

The TMF Group cites LeMay v. Anderson for the proposition that “[i]f an easement is in its nature an appropriate and useful adjunct of the land conveyed...it should be held to be an easement appurtenant and not an easement in gross.” 397 A2d 984, 987 (Me. 1979). And of course, the nature of an easement is determined according to the intent of the parties. 397 A2d 984, 987 (Me. 1979). TMF Opp'n. at 18. The TMF Group jumps from this citation of the law to a conclusion that, because, as they allege, the TMF Group members are in the “neighborhood” of the beach (although they are as far away as a mile) that an easement to use the beach is an appropriate and useful adjunct to their lots. TMF Opp'n. at 19. Well, certainly the ability to use a nice beach that is located in the same town as one's house would always be an appropriate and useful adjunct to a person's property, but to state that just because that beach is in the same town or even the same neighborhood cannot meet the test. This would mean that easement would always be appurtenant if the easement is located in the same town as the dominant estate. Surely this cannot be the proper application of the law in this area. The TMF Group cites Anchors v. Manter for the proposition that in Maine an easement appurtenant does not have to be over property that abuts the dominant estate. Anchors v. Manter, 1998 ME 152, ¶ 12, 714 A.2d 134, 138. This may be true, but it should be emphasized that that case did not concern a case where

the alleged dominant estate was located up to a mile away from the alleged servient estate. Anchors concerned a right of way over land that abutted a pond. The alleged dominant estate was an island located within the pond. The right of way provided the owners of the island with access to their island. Clearly, that easement was meant to be appurtenant to the island. The court in Anchors cited another Maine case in which the dominant and the servient tenements were separated only by a road and the easement in question was a view easement over the servient property – clearly an easement that was meant to be appurtenant. Id. ¶12 (citing Day v. McEwen, 385 A.2d 790, 791 (Me. 1978)). These cases cannot be used as authority to claim that a lot that is located as far as a mile away from a beach can acquire a prescriptive appurtenant easement over the beach.

Finally, it should be emphasized that “[a] servitude should be interpreted to give effect to the intention of the parties ascertained from . . . circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created.” Flaherty v. Muther, 2011 ME 32, ¶ 83, 17 A.3d 640, 661 (quoting Restatement (Third) of Prop.: Servitudes § 4.1(1)).

“When the circumstances surrounding the creation of an easement are prescriptive in nature, ‘the adverse use that leads to creation of the servitude provides the basis for determining its terms.’ Id. Since the servitude created by adverse use arises from the failure of the landowner to take steps to halt the adverse use, interpretation of the prescriptive servitude focuses on the reasonable expectations of the landowner. 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 before the prescriptive period had run. This approach is consistent with the idea that the “open, notorious, 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.”

Id. (citing Great N. Paper Co. v. Eldredge, 686 A.2d 1075, 1077 (Me. 1996)).

Clearly even if Plaintiffs did see members of the TMF Group using their property and acquiesced in the use (which Plaintiffs deny), there would have been no way for Plaintiffs to

distinguish the members of the TMF Group, some of whose lots are as far away as a mile from the beach, from the general public that was allegedly using the property alongside them.

Because the scope and terms of a prescriptive easement are based on the reasonable expectations of the landowner and the landowners in this case would have no way of knowing that the TMF Group were using the beach (if they were) in connection with ownership of some lot in the town, any easement acquired by the TMF Group would necessarily be an easement in gross. Flaherty v. Muther, 2011 ME 32, ¶ 84, 17 A.3d 640, 662.

IX. Whether or Not the Plaintiffs Own to the Low Water Mark Is Irrelevant to the Issue Before the Court on This Motion.

The TMF Group appears to be intent on arguing that the Plaintiffs do not own their properties to the low water mark. They have made clear that they are in support of the Town's claim for fee simple title to the beach. In the first place, as the Plaintiffs have argued in their Motion for Partial Summary Judgment with respect to the Town's fee title claim, because the TMF Group does not make any claim to fee title interest in the beach, it does not have standing to challenge the Plaintiffs' fee title interest. Furthermore, who owns the dry sand beach or the intertidal zone is irrelevant to the question of whether the TMF Group has acquired easement rights in those areas. In addition, the Plaintiffs would point out that they have introduced competent evidence by way of a recognized expert on real estate law that they do own their properties to the low water mark and neither the Town nor the TMF Group have introduced any competent evidence that challenges that ownership.

It is a circular argument to claim that because Plaintiffs don't own to the low water mark, they can't complain about the TMF Group's use of the beach. For purposes of this motion, the ownership by the Plaintiffs can be presumed. Even if some other private party owned the beach (and no one in or out of the case has put forward such a proposition), the TMF Group would still

have to prove its private prescriptive easement that it cannot. The court will have to make a determination of who owns the beach and there are only two parties that have asserted that ownership – the Plaintiffs and the Town. If the Plaintiffs own to the low water mark, then Plaintiffs obviously can complain about the TMF Group’s use of their property. Alternatively, if the court finds that the Town owns the beach than the TMF Group’s entire case fails because it is quite clear under Maine law that prescriptive rights cannot be obtained against a municipality.

Loavenbruck v. Rohrbach, 2002 ME 73, ¶ 11, 795 A.2d 93.

X. Conclusion

In conclusion, it is abundantly clear that the TMF Group as a group has raised no new issues that are dispositive of the Plaintiffs’ Motion for Summary Judgment on the TMF Group’s private claims for prescriptive easements, easements by implication, quasi-easements or easements by estoppel. Therefore, the court should grant judgment to the Plaintiffs on those claims. If there were individuals that had specific claims that were particularized, then those individuals should have come forward long ago and made their claims. If the court feels it is appropriate to let in those individual that may have claims such as the 17 that have deeds that reference a recorded plan, then the court may certainly do so.¹⁰ The purpose of the August 17, 2010 Order was to separate those who had claims from those of the general public.

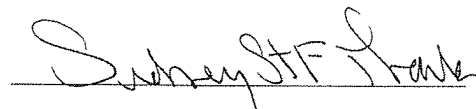
Because Lachiatto and Driver have failed to raise any new issues in their Joint Opposition and have not properly controverted each statement of material fact set forth in Plaintiffs’ Statement of Undisputed Materials Facts and pursuant to Rule 56(h)(4) each statement is deemed admitted as against Lachiatto and Driver, and for the reasons set forth in the Plaintiffs’ Motion

¹⁰The Plaintiffs would note, however, that under notice pleading rules, the members of the TMF Group that do have a deed reference to a relevant recorded plan should be required to set forth those facts with specificity rather than forcing Plaintiffs and the court to glean information that has not been plainly stated and look beyond broad unsubstantiated allegations to locate the few claims that may have any merit at all. In other words, their answer to interrogatories doesn’t even make a colorable claim that the plan grants them rights to the beach.

for Partial Summary Judgment which is incorporated fully by reference herein, the undersigned respectfully suggests that the court must grant judgment in favor of the Plaintiffs on Lachiatto's claims for fee simple, adverse possession, prescription and implied/quasi-easement, and on Driver's claim for a prescriptive easement.

As to Plaintiffs' motion seeking summary judgment in their favor and against the Harris defendants, Harris nor his counsel has filed a timely memorandum in opposition to the motion for summary judgment against Harris pursuant to Rule 7(c)(2) of the Maine Rules of Civil Procedure. Counsel for TMF Group in footnote 3 of its opposition referenced that Harris "have joined in the TMF Defendants' Answer filed on October 17, 2010 and therefore, join in this Reply [opposition]." TMF Opp'n, at 2. Plaintiffs moved to strike the TMF Defendants' Answer dated October 17, 2010. See Motion to Strike (filed November 22, 2010). That motion is currently pending before this Court. Counsel for the TMF Group in his opposition dated July 11, 2011 did not oppose the Plaintiffs' motion seeking summary judgment against Harris' claims. Therefore, pursuant to Rule 7(c)(3), Harris has waived all objections to the motion and Plaintiffs respectfully request the court to enter summary judgment in favor of Plaintiffs on Harris' counterclaims.

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