

STATE OF MAINE  
YORK, S.S.

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

ROBERT F. ALMEDER et al.,	)	
	)	
	)	
Plaintiffs,	)	
	)	
v.	)	PLAINTIFFS' OPPOSITION TO TMF
	)	INTERVENORS' MOTION FOR
TOWN OF KENNEBUNKPORT et	)	LEAVE TO INTERVENE AS
al.,	)	DEFENDANT
	)	
Defendants.	)	
	)	(Title to Real Estate Involved)
	)	

**I. INTRODUCTION**

Proposed TMF Intervenors fail to satisfy all the criteria necessary under M. R. Civ. P. 24(a) and/or (b) to seek intervention in this case. The fact that the TMF Intervenors all purport to own property in Kennebunkport and use Goose Rocks Beach (“Beach”) is not a sufficient basis for them to ask for either mandatory or permissive intervention. TMF Intervenors’ motion to intervene contains no facts or legal argument to support any claims individualized to the 167 parties listed in their motion, though they declare that their interest in the Beach is not uniformly aligned with those interests of the general public, adequately represented by the Town of Kennebunkport (“Town”) in this case. Additionally, allowing such a vast number of individuals to appear in this action will unnecessarily complicate and clutter this litigation, without concomitantly affording any additional relief to the TMF Intervenors beyond that which the general public may be entitled to by virtue of its representation by the Town. For these and the reasons set forth more fully below, the motion for intervention should be denied.

## II. LEGAL ANALYSIS

### A. TMF Intervenorors are not entitled to intervention under Rule 24(a).

Maine Rules of Civil Procedure Rule 24(a) provides as follows:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Maine Rule 24(a)(2) is identical to Rule 24(a)(2) of the Federal Rules of Civil Procedure. In construing Rule 24(a)(2) of the Federal Rules of Civil Procedure, the First Circuit has identified four requirements the proposed intervenor must meet before intervention will be permitted:

(1) a timely application for intervention; (2) a demonstrated interest relating to the property or transaction that forms the basis of the ongoing action; (3) a satisfactory showing that the disposition of the action threatens to create a practical impairment or impediment to its ability to protect that interest; and (4) a satisfactory showing that existing parties inadequately represent its interest.

Public Serv. Co. of N.H. v. Patch, 136 F.3d 197, 204 (1st Cir. 1998). Intervention is proper only if all four requirements are satisfied. Id. TMF Intevenors' conclusory statements that it satisfies the four required elements of Rule 24 are not sufficient legal argument to sustain their motion. See M. R. Civ. P. 7(b)(C)(3) (“[a]ny party filing a motion...shall file with the motion or incorporate with said motion (1) a memorandum of law which shall include citations of supporting authorities...”). As TMF Intervenorors' motion to intervene is delinquent as to both form and substance, it should be denied.

(i) **Interest of Prospective Intervenor.**

The First Circuit has said that there is “no precise and authoritative definition of the interest required to sustain a right to intervene.” Conservation Law Found., Inc. v. Mosbacher, 966 F.2d 39, 42 (1st Cir. 1992). However, “the intervenor’s claims must bear a ‘sufficiently close relationship’ to the dispute between the original litigants” and “the interest must be direct, not contingent.” Id. (citing Traveler’s Indemnity Co. v. Dingwell, 884 F.2d 629, 638 (1st Cir. 1989)).

All 167 of the TMF Intervenor assert ownership interests in property in Kennebunkport, Maine and assert “an interest” in the Beach as “frequent users” of it. See Motion to Intervene Under Provisions of Rule 24, Maine Rules of Civil Procedure at ¶¶ 168, 173 (“Motion”). The TMF Intervenor fail to acknowledge the fact that the plaintiffs do not seek to bar anyone from use of their respective Beach properties if such a person or entity possess a deeded interest. Complaint ¶ 29. Nor do plaintiffs deny the general public’s right to fish, fowl, and navigate in the intertidal zone pursuant to the Colonial Ordinance of 1647. The TMF Intervenor, beyond listing the addresses of their properties in Kennebunkport, do not make any references to deeded rights to plaintiffs’ Beach properties that indicate that the TMF Intervenor have any property rights, either in fee or by easement, that entitle them, as individuals, to ownership or use of plaintiffs’ Beach properties beyond that which the general public, represented by the Town, might enjoy. They do not allege any interest in the plaintiffs’ Beach properties that is superior to plaintiffs’ ownership.

In their Motion, the TMF Intervenor fail to assert and allege any individualized ownership in plaintiffs’ Beach properties beyond a vague reference to the TMF

Intervenor's having "an interest" in the Beach. The fact that the TMF Intervenor's live near the Beach and use the Beach does not, without specific reference to plaintiffs' Beach properties, automatically grant the TMF Intervenor's the requisite "interest" in plaintiffs' Beach properties to satisfy the first prong of the intervention criteria.

- (ii) **The disposition of this action does not threaten to create a practical impairment or impediment to the TMF Intervenor's ability to protect their generalized interest.**

Twenty years ago the Law Court held that under the Colonial Ordinance which was incorporated into Maine's common law in 1821, with respect to the privately owned intertidal zone, the public does not have the right, short of a taking with compensation, to use plaintiffs' Beach property for recreational activities. Bell v. Town of Wells, 557 A.2d 168, 179 (Me. 1989) (hereinafter, Bell II). The public, together with all of the TMF Intervenor's, continues to enjoy the unfettered right to fish, fowl, and navigate in the intertidal zone.

The TMF Intervenor's have not asserted any claims, either as a group or individually, that indicate that their claims are different in any way from those of the Town, and therefore, the general public. Unlike individual defendants Driver and Lachiatto, already parties to this case and who have pled individual claims (though those claims are also largely duplicative of the Town's claims put forth on behalf of the general public), the TMF Intervenor's make the conclusory statement that not all of their claims are in common with the Town (Motion ¶ 175), but do not describe what those distinct claims are.

The reality is that the claims of the TMF Intervenor's are similar to the Town's claims and they do not state separate, individual claims. In the Superior Court case of

Bell v. Town of Wells, YORSC-CV-84-125 (Me. Super. Ct., Yor. Cty., Sep. 14, 1987) (Brodrick, J.) (true and accurate copies of relevant excerpts of docket entries at Docket Sheet Nos. 3,5, and 7 attached hereto as Exhibit A), in granting plaintiffs' motion to strike certain answers filed in that case, Justice Brodrick noted:

Insofar as the persons sending in the personal statements [regarding their concerns about the use of Moody Beach] are concerned about the general public's interest in the use of Moody Beach, they will be represented by the Attorney General for the State of Maine. Professor David A. Jones' answer to plaintiffs' motion to strike dated May 28, 1985, does meet the requirements of M.R.Civ.P 8(b). However, he has failed to allege any particularized injury that would separate him from the general public. Thus he has no standing under Maine law.

Exhibit A, Docket Entry, June 27, 1985. Professor Jones from the Bell II Superior Court case is similarly situated to the TMF Intervenors in this case, namely unable to articulate any particularized claims. While Justice Brodrick did allow a group of parties to remain in the case, they were required to "assert their independent, particularized rights to Moody Beach." Exhibit A, Docket Entry, June 16, 1986. The TMF Intervenors simply do not do so. Upon information and belief, plaintiffs understand the TMF Intervenors to be a diverse group of owners, some of whom live over 10 miles away from the Beach, renters who are occasional users of the Beach, and others whose actual, particularized claims do not exist.

Without more than a vague assertion that the TMF Intervenors have claims that need to be resolved independently from those asserted by the Town and other parties in this case, TMF Intervenors can point to no impairment of or impediment to their interests in the Beach were they not granted intervenor status.

**(iii) Adequacy of Representation.**

The TMF Intervenor cannot show that the Town will inadequately represent their interests. As the First Circuit observed, where the goals of the applicants are the same as those as the plaintiff or defendant, there is a presumption of adequate representation that must be rebutted by the prospective intervenor. Daggett v. Comm'n on Governmental Ethics and Election Practices, 172 F.3d 104, 111 (1st Cir. 1999).

The TMF Intervenor have not demonstrated any difference from their goals and the Town's goals. The Town has raised in its counterclaim the claim that the public has the right to use the privately held beach for recreational uses. There is no suggestion that there is any difference between the TMF Intervenor's desire to use the Beach for recreational purposes and the Town's goal to see members of the public use private property for recreational uses.

The Town's legal team is from one of Maine's largest and most well respected firms and there is therefore no suggestion that the Town cannot present whatever arguments the TMF Intervenor wish to present. See <http://www.dwmlaw.com/about.php> (last visited June 21, 2010); see also Maine v. Dir., U. S. Fish & Wildlife Serv., 262 F.3d 13, 18 (1st Cir. 2001) (indicating that "some burden of showing inadequacy is imposed on the intervenor" in a case where a conservation group wanted to intervene in a suit about declaring salmon an endangered species in Maine, but was denied status as an intervenor due to adequate representation by the National Marine Fisheries Service and the U.S. Fish and Wildlife Service). In short, the TMF Intervenor have not and cannot rebut the presumption of adequate representation by the Town of the TMF Intervenor interests and therefore cannot satisfy the fourth prong of the Rule 24(a)(2) test.

**B. The TMF Intervenors are not entitled to intervention under Rule 24(b).**

Maine Rules of Civil Procedure Rule 24(b) provides as follows:

Upon timely application anyone may be permitted to intervene in an action when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The first and third sentences of the Rule are in substance identical to Rule 24(b) of the Federal Rules of Civil Procedure.<sup>1</sup> In construing the federal rule, the First Circuit has stated:

Absent intervention of right under Rule 24(a), permissive intervention is allowable under Fed. R. Civ. P. 24(b) if it is determined that (1) the applicant's claim or defense and the main action have a question of law or fact in common, (2) the applicant's interests are not adequately represented by an existing party, and (3) intervention would not result in undue delay or prejudice to the original parties.

Thompson v. Malkemus, 965 F.2d 1136, 1142 n.10 (1st Cir. 1992)(quotations and citations omitted); Ruthhardt v. Ashcroft, 164 F. Supp. 2d 232, 247 (D. Mass. 2001).

Federal courts have held that when a party seeks permissive intervention only to raise issues that have already been litigated and decided, intervention should be denied. See, e.g., Adarand Constructors, Inc. v. Romer, 174 F.R.D. 100, 104 (D. Colo. 1997); Resolution Trust Corp. v. City of Boston, 150 F.R.D.R. 449, 454-55 (D. Mass. 1993).

The issue the TMF Intervenor

s wish to litigate has already been litigated and decided in Bell II. With respect to the second prong, and as explained above, the TMF Intervenor

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<sup>1</sup> The TMF Intervenor

s make no claim that the second sentence of Rule 24(b) is applicable.

have not and cannot show that their interests are not adequately represented by the Town's able counsel.

Third, there is no doubt that the participation of all 167 of the proposed TMF Intervenor, as individual parties, will severely delay and prejudice the existing parties to this case. All individual TMF Intervenor would be subject to discovery from the plaintiffs, who at the outset would request that each of the 167 TMF Intervenor substantiate their claims with regard to their fee interest in plaintiffs' Beach properties and any and all actions the TMF Intervenor have taken over the past 20 years that would ripen their use of the Beach to a prescriptive easement. For example, which proposed TMF Intervenor spent time on which of plaintiffs' Beach property? On how many occasions? Would this information be gleaned through deposition of the 167 proposed TMF Intervenor? Through individual interrogatories propounded upon them? Document production requests? One can imagine a matrix that would cross-reference 167 new parties' use of the Beach with the 22 plaintiffs in this case describing all the individualized claims, with this case becoming quite delayed indeed; and all for no legitimate purpose, as any relief granted to the general public in this case would necessarily inure to the benefit of the TMF Intervenor.

Finally, courts have routinely denied permissive intervention under Rule 24(b) when the proposed intervenor shows there is little that the applicant would contribute to the case that it cannot otherwise contribute through *amicus curiae* status. See, e.g., Massachusetts Food Assoc. v. Sullivan, 184 F.R.D. 217, 225 (D. Mass. 1999); Resolution Trust Corp. v. City of Boston, 150 F.R.D. at 455 (denying the Commonwealth permissive intervention and allowing instead the opportunity to file amicus briefs on the legal issue

of concern to the proposed intervenor); Brewer v. Republic Steel Corp., 513 F.2d 1222, 1224-25 (6th Cir. 1975).

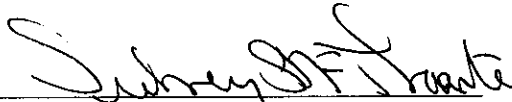
To that end, plaintiffs would not object to granting the TMF Intervenors *amicus curiae* status, as one group, in this case. Nor would plaintiffs object to granting the TMF Intervenors some status in the case that would permit them to participate, as one voice. A similar mechanism was employed in the Superior Court case in Bell II, where Justice Brodrick created a “Tier II” for a class of defendants. Of note, Justice Brodrick in denying the Natural Resources Council of Maine’s petition to intervene in that case stated, “The N.R.C.’s interest is identical to the Attorney General’s interest in this particular case and that interest will be adequately represented by the Attorney General.” See Exhibit A, Docket Entry, Nov. 19, 1984.

Justice Brodrick allowed the so-called “Tier II” group of defendants to participate in the Superior Court Bell II case in order that they might assert particularized claims. Of the 934 parties who originally sought to participate in that case as defendants, only 40 remained in the case and were able to actually assert particularized claims. Indeed, as can be seen from Justice Brodrick’s decision in that case, the Tier II defendants were unable to prove any particularized claims to plaintiffs’ properties. See Bell v. Town of Wells, YORSC-CV-84-125 (Me. Super. Ct., Yor. Cty., Sep. 14, 1987) (Brodrick, J.) (copy of decision attached hereto as Exhibit B). Given the Law Court’s ruling in Lyons v. Baptist School of Christian Training, 2002 ME 137, 804 A.2d 364, the TMF Intervenors’ burden of proof is far greater today than it was when the Bell II case was tried. Therefore, these vague assertions regarding the TMF Intervenors’ claims to plaintiffs’ properties in this case should not establish their right to intervene.

### III. CONCLUSION

The 167 TMF Intervenor who are seeking to participate in this case as parties are no different from the 934 who sought to intervene in Bell II at the Superior Court level. The claims of the TMF Intervenor are the same as those that the Town raises; indeed some claims are merely copied from the Town's counterclaim. Ultimately, this case will come down to a legal challenge to the Bell I (510 A.2d 509 (Me. 1986)) and Bell II decisions<sup>2</sup> and claims of prescriptive easement that must be adjudicated according to Lyons. Prior to this litigation, the Town, with an honest assessment from its attorney, acknowledged that its only claim to the Beach was for a prescriptive easement. See Letter from Amy K. Tchao to Nathan A. Poore, Oct. 27, 2005 (a true and accurate copy attached hereto as Exhibit C). Therefore, the TMF Intervenor, if they have particularized claims related to any of the plaintiffs' Beach properties, will have to define what their claims are and to which of plaintiffs' properties they apply. For now, however, because their claims cannot be differentiated from those of the general public, and for all of the additional reasons stated *supra*, the TMF Intervenor's motion to intervene should be denied.

Dated: June 24, 2010

  
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<sup>2</sup> There are already two cases before the Law Court challenging the supremacy of Bell I and Bell II, asking that those cases be overturned. Undersigned counsel has, in McGarvey v. Whittredge, WAS-10-83, and will, in Flaherty v. Muther, CUM-09-63, file briefs as *amicus curiae* opposing those efforts.

	County	SPECIAL ASSIGNMENT Hon. William S. Brodrick
Action	Intervening Defendants	GUARDIAN AD LITEM APPOINTED 3/1/85 - Ralph Austin, Esq.
LAW DOCKET NO. YOR-85-373	CLF-NRC	
402-87-430		
01		
INH. OF & SELECTMEN TOWN OF WELLS & vs. STATE OF MAINE-BUR. OF PUBLIC LANDS et		
EDWARD B. BELL, et als		
Plaintiff's Attorney Kermit V. Lipez, Esq. Sidney St. F. Thaxter CURTIS THAXTER LIPEZ STEVENS BRODER & MICOLEAU One Canal Plaza Portland, Maine 04112 David Strater, Esq. SEPRATE, HANCOCK & ERWIN 43 Woodbridge Road - Box 69 York, Maine 03909 For: Edward B. Bell	Defendant's Attorney Michael T. Healy, Esq. Verrill & Dana 2 Canal Plaza - Box 586 Portland, Maine 04112 For: Town of Wells Paul Stern, Esq. - Philip Ahrens, Esq. Assistant Attorney General State House Station 6 Augusta, Maine 04333 For: State of Maine, B.P.L.	
Date of Entry		
1984 Nov. 19	Conference had in chambers. Order filed on Natural Resources Council of Maine's Petition to Intervene - "Petition Denied. The N.R.C.'s interest is identical to the Attorney General's interest in this particular case and that interest will be adequately represented by the Attorney General. (Brodrick, J.) Order filed on Plaintiffs' Motion to Join Party Defendants "Motion granted." (Brodrick, J.) Order to be submitted on Defendants' Motion for Appointment of Guardian Ad Litem. (Brodrick, J.) Copy of Orders mailed to K. Lipez, Esq., M. Healy, Esq., P. Ahrens, Esq., W. C. Knowles, Esq., E. B. Carson, Esq. and G. H. S. Scott, Esq.	
1985 Mar. 11	Attorney Austin given leave to remove from Court two volumes of individual form answers totalling approximately 934. Copy of Order mailed to K. Lipez, Esq., M. T. Healy, Esq., P. Stern, Esq., and R. Austin, Esq.	
June 27	Order filed by the Court. "Plaintiffs' motion to strike dated April 22, 1985 is granted as it applies to all persons who filed a personal statement regarding their concerns about the use of Moody Beach. These personal statements do not meet the requirements of M.R.Civ.P. 8(b). Insofar as the persons pending in the personal statements are concerned about the general public's interest in the use of Moody Beach, they will be represented by the Attorney General for the State of Maine. Professor David A. Jones' answer to plaintiffs' motion to strike dated May 28, 1985, does meet the requirements of M.R.Civ.P. 8(b). However, he has failed to allege any particularized injury that would separate him from the general public. Thus he has no standing under Maine law. Ricci v. Bureau of Banking, 485 A.2d 645 (Me. 1984). He, too, will be represented by the Attorney General. Plaintiffs' motion to strike as it applies to Professor Jones is granted." (Brodrick, J.)	
06/16/86	Decision and Orders filed by the Court. ORDERED: "Although the Law Court ruled in Bell v. The Town of Wells, (Dec. No. 1430, May 23, 1986) that the State of Maine is not an indispensable party to this case, the Attorney General will, at my request, continue to represent the general public's interest in Moody Beach. The Town of Wells will continue to have its own counsel and the "E" Team will continue their role as party defendant. By virtue of my granting Tier II Group's July 30, 1985 motion to file late answer, the Moody Beach Tier II property owners will join the lawsuit today as parties defendant with their own counsel to assert their independent, particularized rights to Moody Beach.	



Beach has been public for many years and has long been crowded with public beach lovers. Until fairly recently, Moody Beach was serene by comparison. The fact that Moody Beach is no longer as serene as it once was is the reason for this lawsuit.

There are 30 plaintiffs in this case. They own a number of the approximately 125 individual lots on Moody Beach, including the fee in the beach in front of them to the low water mark. Plaintiffs are proceeding through individual quiet title and declaratory judgment actions. Plaintiffs seek to have the court declare that the public does not have general recreational rights on Moody Beach, either above or below the high water mark. Plaintiffs maintain that the public is limited to the rights to fish, fowl and navigate in the intertidal zone as granted to the public in the Colonial Ordinance of 1641-48. Plaintiffs also seek to have the recently passed Intertidal Lands Act, 12 M.R.S.A. § 571 et seq. declared unconstitutional.

The Attorney General<sup>1</sup> has vigorously disputed plaintiffs' interpretation of the Colonial Ordinance, arguing that it grants

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<sup>1</sup> In a laudable effort to avoid unnecessary duplication, the Attorney General acted as lead counsel on those parts of the case involving the Colonial Ordinance and the Intertidal Lands Act while the Town of Wells took the lead on the issues of local custom, public easement by prescription and implied dedication. Tier II, meaning the back lot owners at Moody Beach, concentrated on its own issue of private easement by prescription. The remaining defendants, meaning the conservation law organizations who were allowed to join this case to help represent the public interest, participated up until the time of trial but did not appear at trial. Obviously, they thought the public interest was well represented by the other defense counsel. They were right.

the public general recreational rights in the intertidal zones of all beaches in the State of Maine, including Moody Beach.

In addition, the Town of Wells has raised the affirmative defenses of local custom, easement by prescription and dedication. The Town argues that the particular factual history of Moody Beach has earned the Inhabitants of Wells the right to use Moody Beach, including both the intertidal zone and the upland area for general recreational purposes.

Finally, Tier Two, a group of approximately 40 parties who own property behind Moody Beach, claim they have earned a private and personal easement by prescription on Moody Beach by their unique personal history of use of the beach.

All parties recently completed a four week trial.

#### Plaintiffs' Case in Chief

Plaintiffs proved most of their case in chief prior to the first witness taking the stand. The parties stipulated that the individual plaintiffs own the fee in their respective lots as described in their deeds. These deeds establish ownership to the ocean and it is not disputed that by deed or by deed in conjunction with the Colonial Ordinance's grant of the foreshore to adjacent landholders, the plaintiffs all own the upland and the intertidal zone on their respective properties. The parties further stipulated that plaintiffs had been in uninterrupted possession of their properties for four years or more and that their respective properties are identified by description in their deeds.

The plaintiffs' initial witnesses made clear--and the defendants did not dispute--that defendants claimed some right or interest in both the dry sand and wet sand areas of plaintiffs' property on Moody Beach. It was not disputed that the Town of Wells has refused as a matter of police policy to enforce plaintiffs' private property rights on grounds that the public has a right to use the beach. Private campground owners have also promoted Moody Beach as a public beach and have encouraged their customers to use Moody Beach as a public beach.

Finally the Legislature's passage of the Intertidal Lands Act, 12 M.R.S.A. §§ 571-573 (Supp. 1986) created an obvious cloud on plaintiffs' title that was bound to affect the fair market value of at least some of plaintiffs' properties.

Plaintiffs are entitled, as pointed out by the Law Court in its examination of this case a year ago on the issue of sovereign immunity, to have a trial to determine "the public right, if any, to use the upland and the scope of the public right to use the intertidal zone." Bell v. Town of Wells, 510 A.2d 509, 518 (Me. 1986). Because the Tier II defendants claim a private easement by prescription in Moody Beach, plaintiffs became entitled to have Tier II's claims settled as well.

With the plaintiffs' case-in-chief not in dispute, let me turn to the various claims made by defendants on Moody Beach, beginning with the Colonial Ordinance.

I. THE COLONIAL ORDINANCE<sup>2</sup>

One major issue to be addressed in this case is whether the Colonial Ordinance of 1648, which is the principal source of Maine's common law of the intertidal zone, granted the public a right to use the intertidal zone for general recreational purposes, even though the fee in the intertidal zone was to be privately owned by the adjacent landowner. It is a matter of historical fact that the general public received an easement for free fishing, fowling and navigation in all privately owned intertidal zones

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<sup>2</sup> The provision of the Colonial Ordinance of 1648 that is in dispute in this case reads as follows:

Everie Inhabitant who is an hous-holder shall have free fishing and fowling, in any great Ponds, Bayes, Coves and Rivers so far as the Sea ebbs and flows, within the precincts of the town where they dwell, unless the Free-men of the same town, or the General Court have otherwise appropriated them. Provided that no town shall appropriate to any particular person or persons, any great Pond containing more than ten acres of land: and that no man shall come upon anothers proprietie without their leave otherwise then as hereafter expressed; the which clearly to determine, it is declared that in all creeks, coves and other places, about and upon salt water where the Sea ebs and flows, the Proprietor of the law adjoining shall have proprietie to the low water mark where the Sea doth not ebb above a hundred rods, and not more wherefoever it ebs farther. Provided that such Proprietor shall not by this libertie have power to stop or hinder the passage of boats or other vessels in, or through any sea creeks, or coves to other mens houses or lands. And for great Ponds lying in common though within the bounds of some town, it shall be free for any man to fish and fowl there, and may passe and repasse on foot through any mans proprietie for that end, so they trespass not upon any mans corn or meadow.

under the express terms of the Colonial Ordinance. The first question, then, is the meaning of fishing, fowling and navigation.

#### HISTORICAL FINDINGS OF FACT

As factfinder, I had the benefit at trial of four historians with expertise in the 17th Century. They were excellent witnesses. Although I did not accept all of their conclusions, which is to be expected, I found all of them to be credible witnesses. Their testimony, in large part, corroborated previous historical discussions by our Law Court or its predecessor Massachusetts court in regard to the Colonial Ordinance. Bell v. Town of Wells, 510 A.2d 509 (Me. 1986); Storer v. Freeman, 6 Mass. 435, 437 (1810); Conant v. Jordan, 107 Me. 227, 77 A.938 (1910). I see no point in repeating many of the historical details concerning the origin of the Colonial Ordinance. I will confine myself to making findings on new facts that have not been clearly stated in previous Law Court discussions of this matter and that are relevant to the issues generated by this case.

1. The 1648 Laws and Liberties, of which the Colonial Ordinance is an important part, was intended to be a broad skeletal outline of the then existing law in the Massachusetts Bay Colony. The principles and laws expressly discussed in the Laws and Liberties were the more important principles and laws. The Laws and Liberties did not discuss all existing laws. Nor did it pretend to serve as a framework for solving future, unknown governmental problems.

2. The framers of the Colonial Ordinance granted ownership of the intertidal zone to adjacent shorefront owners to encourage the growth and protection of local commerce.

3. The framers of the Colonial Ordinance did not intend fishing, fowling and navigation to mean anything other than fishing, fowling and navigation. In other words, fishing, fowling and navigation was not some kind of code phrase that, by implication, included other rights as well. In particular, fishing, fowling and navigation did not mean general recreation.

4. The framers did not intend fishing, fowling and navigation to exclude other public rights in the intertidal zone that might have existed prior to 1648. For example, the poor roads in 17th Century Colonial America and the dangers that existed in trying to travel inland, both before and after passage of the Colonial Ordinance, made travel along the intertidal zone a public right on both public and private intertidal zones. Testimony of Professors Konig and Barnes and Defendants' Exhibits 35, 44 and 86. The Laws and Liberties expressly discussed the right of drovers to rest cattle in open areas. Barnes, The Laws and Liberties of Massachusetts (1982) at p. 18. Other historical documentary evidence makes it clear that the public could use the beaches for their own travel and for driving cattle. This right by necessity and usage apparently did not survive long enough to be formally approved by the courts as a common law right but there can be no doubt that it was a public right in 1648 and for many years thereafter. The framers also expected that public

rights by custom could develop and be part of the law subsequent to passage of the 1648 Laws and Liberties, so long as they were not immoral. Barnes at p. 45.

5. The Puritans, who dominated political life in 17th Century Massachusetts, even though they did not constitute a majority of the population, looked upon recreation as a necessity for physical and spiritual well-being. Recreation, like all other aspects of puritan life, had to serve a godly purpose. Excessive recreation, like excessive anything else, was anathema to the Puritan.

6. The Puritans did not believe in exposing themselves to the sun. Neither the Puritans nor anyone else in 17th Century Massachusetts, Maine or England believed in regular bathing as we know it today. Cleanliness was not next to godliness in the 17th Century.

7. There is some scanty documentary evidence (scanty in modern legal terms, apparently significant in modern historical research terms) of occasional recreation by the public on the beach in 17th Century Massachusetts. See defendants' exhibits 32, 59, 60, 63, 93 and 94. There is insufficient evidence to justify a finding that there was any public custom of regular general recreation on the beaches in 17th Century Massachusetts or Maine with the possible exception of recreational fishing and fowling. There is no evidence whatsoever to justify a finding of regular general recreation on privately owned beaches.

8. In the 16th and 17th centuries in England, the privileged few were forming large private parks for their own, exclusive enjoyment, usually hunting. This worked a hardship on the common people and on at least one occasion led to serious riots. The Puritans strongly opposed these parks, partly out of compassion for the poor and partly because they were opposed to any type of conspicuous consumption. The drafters of the Colonial Ordinance did not intend to encourage the development of private recreational parks when they granted ownership of the intertidal zone to adjacent property owners. However, there is no evidence that the drafters of the Colonial Ordinance were even thinking of large, private recreational parks when they drafted the Colonial Ordinance.

9. The Puritans in 17th Century Massachusetts granted small lots of land to each free man to encourage improvement of the land. The town governments held much of the land in common for common use and held much of the land in reserve. Property owners were expected to get along with their neighbors. The Puritans did not view the crossing of someone else's land as a trespass unless some actual damage to the land resulted. When the Colonial Ordinance speaks of "coming upon" the land, it means inflicting damage or removing assets. It does not mean a simple crossing of the land.

10. Although the Puritans had a keen sense of community and communal effort, they also had a keen appreciation of private ownership. Almost all land users in England were tenants of some sort because of feudal law and tradition. The Puritans and other

free men in Massachusetts appreciated the fact that they owned their respective lots and this was a sharp break from the past.

#### DISCUSSION

The experts were unanimous in their opinions that fishing, fowling and navigation meant just that and nothing more. There is no evidence of any type to rebut that view. The Attorney General conceded at oral argument that the original grant of "fishing, fowling and navigation" rights to the public in the Colonial Ordinance did not include the right of general recreation in the intertidal zone. Instead, the Attorney General argued that the Colonial Ordinance did not preclude additional rights in the intertidal zone that can be identified by the courts through traditional jurisprudential methodology.

Additional public rights in the intertidal zone can be identified by the court when it defines the scope of the public easement in the intertidal zone. Alternatively, the court can recognize a general recreational right in the intertidal zone through its traditional role of recognizing broad common law rights that have been so largely accepted and acted on by the community that it would be "fraught with mischief to set [them] aside." Barrows v. McDermott, 73 Me. 441, 448-49 (1882). Conant v. Jordan, *supra*. It was through this latter process, of course, that the Law Court recognized that the Colonial Ordinance had transformed itself from a statute applicable to the Massachusetts Bay Colony into a broad common law doctrine applicable to the State of Maine. Common law recognition of public recreational

rights in the intertidal zone would use the Colonial Ordinance as one important source but would draw on other sources as well.

The Attorney General correctly points out that the Maine Law Court has taken a more expansive view of fishing, fowling and navigation than has the Massachusetts Supreme Judicial Court. The Law Court has used its definitional power to make fishing, fowling and navigation include recreational fishing and boating, mooring boats in the intertidal zone, landing boats in the zone and walking on the flats when bare, riding or skating on tidal flats when they are covered by ice, unloading cargo on the flats, digging shellfish in the flats and procuring sea manure.<sup>3</sup> The Attorney General also correctly points out that although the Law Court has never ruled that general recreation is part of the public easement in the intertidal zone, it has also never expressly ruled that it isn't. I think it is fair to say that the Attorney General believes that identifying general recreation as part of the fishing, fowling and navigation easement would be a consistent and logical extension of the Law Court's previous efforts to define fishing, fowling and navigation.

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<sup>3</sup> The procuring of sea manure may have developed as a right growing out of necessity, like driving cattle on the beach, and may have been later identified, carelessly, as one of the rights incidental to fishing, fowling and navigation. Riding and skating on ice may have originated as a public right on great ponds and later identified, carelessly, with the public easement in the intertidal zone. The Law Court has never held that the public's easement in the intertidal zone contains rights that are equal to the public's rights on great ponds, which are owned by the State and held in trust for the public.

I have several problems with this argument. Although not controlling, it is of interest that the Massachusetts Supreme Judicial Court has addressed this very question and ruled that general recreational rights are not included in the fishing, fowling and navigation easement. Butler v. Attorney General, 195 Mass. 79, 80 N.E. 688 (1907).<sup>4</sup> The Attorney General has argued that the Butler court did not have the benefit of expert historical testimony and did not analyze the issue carefully, as evidenced by the brevity of Butler. As I read Butler, the court did not conduct an extended analysis because they did not think the issue was a close question. Id. at pp. 83-84.

Secondly, the type of intense beach usage sought by the Attorney General for the public in this case (including beach towels, umbrellas, coolers and the slathering of bodies with various oils in search of the perfect suntan) would have been repugnant to the Puritans who drafted the original easement. This modern type of beach usage is no longer repugnant to most modern persons but when the issue is definition of an easement, the intent of the original drafters must be considered.

Thirdly, most of the additional public uses identified by the Law Court in defining the public easement in the intertidal zone are or were incidental to fishing, fowling and navigation. Swimming and sunbathing are simply not incidental to fishing,

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<sup>4</sup> This holding was reaffirmed by the Massachusetts Supreme Judicial Court in Opinion of the Justices 313 N.E.2d 561 (Mass. 1974). However, because it was an opinion only, I do not assign it any weight.

fowling and navigation, unless one is willing to distort the everyday meaning of incidental.

Finally, all of the additional uses identified by the Law Court in the past have been transitory in nature. Yet what the Attorney General seeks in this case is a kind of public right to camp by day on privately owned land. The evidence in this case shows that fishing, fowling and navigation as currently defined by the Law Court imposed only a minimal impact on Moody Beach. It was not until the public began to treat Moody Beach like Ogunquit Beach in recent years that the nature of Moody Beach began to change and it began to lose its serene atmosphere. Extending fishing, fowling and navigation to include sunbathing and swimming and all of the ritual that goes with modern beach usage would cause a dramatic change in the degree and the nature of the burden placed on privately owned beaches.

It is important to remember that the public owns only an easement in privately owned intertidal zones. As clarified in Bell, supra, the State has no interest in the fee in privately owned beaches and there is no public trust doctrine at work here. The easement was spelled out in express terms by the drafters of the Colonial Ordinance. Although this particular easement, like all easements, is subject to continuing judicial interpretation, the basic thrust of the easement must be respected. I am satisfied, on balance, that the easement in the Colonial Ordinance does not include general recreational rights for the public.

As for the argument that a public common law right to use the beaches has evolved from the Colonial Ordinance and other sources, I am similarly unpersuaded.

There was some evidence at trial of swimming in colonial Massachusetts. There was no evidence as to whether swimming was tolerated on privately owned beaches. As for sunbathing, there was no positive evidence at all. Given the Puritans' disapproval of tanned skin (or at least their admiration of white skin) and given the infrequent bathing habits of the English, it seems highly unlikely that there was any consistent usage of public beaches, let alone private beaches, for sunbathing and swimming.

In Blundell v. Catterall, 5 B and ALD.268 (1815) an English court ruled that no public right to utilize private beaches for swimming existed in 1815 or had ever existed, partly because there was no history of usage that would support such a common law customary right. The Attorney General argues correctly that this decision, which was on a three to one vote, has been criticized. However, the majority holding was unanimously affirmed in Brinckman v. Matley, 2 Ch. 313 (1904). Thus in English common law, at least, there was no right to swim and sunbathe on private beaches that grew out of necessity and public usage.

Of course the colonists firmly believed that they were not bound by English common law but were free to develop their own laws as dictated by their own needs and circumstances. Conant v. Jordan, supra. at p. 236. Therefore, one has to ask whether the colonists and their descendants developed through need, customs

Maine. It should be emphasized that the issue here is not whether the public has developed the type of recreational usages that the state seeks to establish in this case. These recreational usages have developed and are obviously important to the public. See, e.g., the findings by our Legislature in 12 M.R.S.A. §§ 571-573. The issue here is whether the public has developed its recreational customs on private beaches. The evidence to support such a conclusion simply does not exist.

The Attorney General argues that the rule of construction in cases involving the granting of public lands favors the public. He points out correctly that "in all grants from the government to the subject, the terms of the grant are to be taken most strongly against the grantee, and in favor of the grantor . . ." Commonwealth v. City of Roxbury, 75 Mass. 451, 492, (1857). This rule certainly doesn't hurt the public's case but I don't see how it helps, either. This rule of construction cannot be used to preserve a public right that did not exist at the time of the grant. The fact that the Puritans did not approve of large, private amusement parks does not mean that the ocean front lot owners in 1648 would be governed by a unique form of private property law. Under the Colonial Ordinance the owner of the upland received normal private property rights in the intertidal zone except for the rights reserved for the public under the fishing, fowling and navigation clauses or by some other custom or law. Commonwealth v. Alger, 61 Mass. 53, 68 (1851).

and usage any consistent enjoyment of recreational rights on private beaches. The record does not favor the Attorney General.

As discussed above, the type of public recreational rights sought by the Attorney General would have been repugnant to the Puritans so we can be sure that the Laws and Liberties of 1648 would not include, by unwritten custom, the type of extensive beach usage sought in this case. The question then becomes whether this type of recreational right--even if it did not exist in England and did not exist in the Massachusetts Bay Colony in 1648--developed subsequent to the drafting of the Colonial Ordinance. If it did, then the fact that the Puritans would not have approved of sunbathing becomes of less significance. In determining the development of general common law doctrine over a long period of time, the focus is on needs, custom and usages over that period of time and not on the intent of the drafters of an easement prior to that period of time.

The evidence is clear that the types of recreational usages sought by the Attorney General for the public have in fact developed over a long period of time, mostly in the last century. However, there is no evidence that would justify a conclusion that these usages were practiced on private beaches as well as public beaches. The lack of evidence on this point is understandable in part. The expert witnesses made it clear how difficult it is to find evidence on recreational customs in ancient times. But even in the last century there is only the skimpiest evidence of the public's use of private beaches for recreational purposes in

The Attorney General further argues that three other state courts have recognized the right of the public to use beach property for general recreational purposes. Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47 (N.J. 1972); White v. Hughes, 190 So. 446 (Fla. 1939); State ex rel. Thornton v. Hay, 462 P.2d 671 (Ore. 1969).

The problem with these cases is that in all three states, the state owns the fee in the intertidal zone. That particular property law doctrine is, of course, in direct contrast with property law in Maine and Massachusetts. Furthermore the facts of these cases are substantially different from Moody Beach. In the Oregon case, the public not only had a long standing right to use the intertidal zone for recreational purposes but the shorefront owners conceded that at the time they purchased their land, they knew the public had traditionally used the dry sand area of the beach as well as the intertidal zone for recreational purposes. Thornton at p. 674. In the Florida case the public's right to use all beaches below the high water mark for recreational purposes was such a given that it was not in dispute. White at p. 448-449.

The New Jersey case is most helpful to the Attorney General because in that case the Supreme Court of New Jersey rather easily extends the public's traditional English common law public rights of navigation and fishing to include general recreation. Neptune City at p. 54. However, the New Jersey Court takes pains to explain that it is not deciding whether public rights would

exist in intertidal zones bordered by privately owned lands. Id. at p. 54. Neptune City does not deal with a privately owned beach.

It is the private ownership of the intertidal zone and the lack of evidence of any significant public use of privately owned beaches for general recreational purposes that distinguish Maine from other states. The public's need for recreation is important but private property rights are also important. Private property rights should be predictable and not subject to dramatic transformation by the courts when there is an absence of the traditional types of evidence that would normally justify the evolution of a common law doctrine.

For the reasons stated, I conclude that the Colonial Ordinance reserved for the public the right to fish, fowl and navigate in intertidal zones on Maine's beaches. I have been persuaded that the Colonial Ordinance was not exclusive. It did not eliminate other pre-existing common law property rights or preclude the development of new common law property rights. However, I also conclude that a public common law right to use privately owned beach property for general recreational purposes did not exist when the 1648 Colonial Ordinance was drafted and has not developed since.

## II. AFFIRMATIVE DEFENSES

The Town of Wells does not rely exclusively on the Colonial Ordinance and general common law development for the establishment of public recreational rights on Moody Beach. The Town also

relies on the law of local custom as it applies to Moody Beach in particular, on the law of easement by prescription and on the law of dedication. These are affirmative defenses raised by the Town and as a result, the burden of persuasion is on the Town. These arguments do not apply to any beaches in the state other than Moody Beach. With regard to these affirmative defenses, I make the following findings of fact.

1. Public attitudes towards private property and trespass were similar in colonial Maine and Massachusetts.

2. The beaches, both private and public, were used by everybody for travel in colonial Maine because of poor roads and the danger from wolves and Indians.

3. Until the mid-nineteenth century there is insufficient documentary evidence to draw any inferences about the use of the beaches in Wells for recreational purposes. However, common sense dictates that the beaches in Wells were occasionally used for swimming and other recreation.

4. The latter half of the nineteenth century saw the beginnings of the "tourist" industry in Wells. Visitors who came to Wells enjoyed the sea air and swimming.

5. By 1856 the principal road to the beaches in Wells traveled from Route 1 to Moody Point, directly between the north end of Moody Beach and the south end of Wells Beach.

6. By 1872 the only beach road in existence in Wells paralleled the beach that is now known as Wells Beach. There was no road running parallel to Moody Beach until Moody Beach was

developed at the turn of the 20th Century. There is no documentary evidence from which one can conclude that local residents and visitors to Wells in the late 19th Century used Moody Beach as opposed to Wells Beach or Ogunquit Beach. Because the only beach road paralleled Wells Beach, it seems more likely that most locals and visitors used Wells Beach. The presence of a lodging house at Moody Point and common sense, once again, dictate that there was occasional public use of Moody Beach for recreational purposes in the second half of the 19th Century.

7. Moody Beach was originally owned by the Town of Wells. At some point that was not made clear during the trial, Moody Beach became privately owned. Moody Beach started to be developed privately by Charles Tibbets and Oscar Hubbard at the turn of the 20th Century.

8. Tibbets and Hubbard, when laying out their 50' lots, left three 35' access ways from Ocean Avenue to the beach at various locations. These access ways have been assumed by everyone to be public access ways, either designed for public recreational use of that portion of the beach in front of the access ways or for emergency vehicles or both.

9. Tibbets and Hubbard did not deed use of the beach to the public or to any back lot owners.

10. A portion of the Tibbets plan shows the easterly boundary of each 50' lot at the seawall above the beach. However, the individual deeds, which control, grant each ocean front lot owner land to the ocean.

11. The Town claims now that it has never taxed the area below the seawall on Moody Beach. I found the Town's property tax system for beach front lots to be incomprehensible. The Town did, however, tax ocean front property at Moody Beach at fair market value in compliance with state law. No ocean front owners were ever told that their property below the seawall was not being taxed.

12. The Town has expended minimal funds on Moody Beach for clean up and police patrol. The Town has expended over \$100,000 on Wells Beach for seawall construction and practically nothing on Moody Beach for seawall construction.

13. The Town has posted a lifeguard at the Moody Beach parking lot since the 1950's. The lifeguard's primary function was to cover the public beach in front of the Moody Beach parking lot although he would occasionally move northward on to Moody Beach as well. The Town thought for years that this public beach belonged to Wells. Sometime in the 1970's a court determined that the Moody Beach parking lot and the beach in front of it belonged to Ogunquit. It was and remains a public beach, regardless of ownership. The Town did not post a lifeguard at the Bourne Avenue public access point until approximately 1978. The Town's lifeguards have patrolled outside the Bourne public access area on occasion and have been told to stay in the public access areas by beach front owners on occasion.

14. The Town built restrooms at the Moody Beach parking lot in 1966.

15. The Town's efforts to clean Moody Beach have been few and fitful and have been opposed by some of the beach front owners.

16. As factfinder, I found most of the lay witnesses on both sides to be sincere people who believed they were telling the truth. I found some of these sincere people to be more credible than others. I found Dr. Warren Jones, in particular, to be an intelligent, observant witness with a good memory. Although, like most of the witnesses, he has an interest in the outcome of this case, I found him to be a highly credible witness. This is not meant to disparage the other lay witnesses. Many of them were intelligent, articulate witnesses. I simply point out that I found Dr. Jones to be particularly credible.

17. Until sometime in the late 1950's or early 1960's, there was minimal use by the public of Moody Beach for sunbathing and swimming on an organized basis. From the turn of the century until the 1960's, members of the public would walk the beach on a regular basis and they would use the beach on occasion for a bonfire or for a ballgame or some other recreational activity. But in terms of taking the family to the beach for a day or a half day and spreading out a blanket and using the beach as the Town seeks to use it now, such public recreational activity was minimal and was confined to the access zones until the 1950's. Until the 1960's, Moody Beach was so large and use of Moody Beach by the public was so minimal that those members of the public who did use Moody Beach outside the access ways for sunbathing and swimming were so few as to not be identifiable as members of the

public. Until the 1960's, Moody Beach had the appearance of a private beach populated by the people who lived in the cottages on the ocean front.

18. In the late 1960's, public usage of the access ways increased to the point where on a good beach day, upwards of 15 members of the public would be spread out from one to four cottages on either side of the access ways and this became a concern of some beach front owners.

19. In the late 1960's, Dr. Jones started telling all strangers who sat on dry sand in front of his cottage (the fourth cottage north of the Bourne Avenue access way) to leave because they were on private property. They would leave, although sometimes reluctantly. Dr. Jones had never heard of Moody Beach being considered a public beach and he posted his land in 1968 as private land as did other beach front owners in the late 1960's and 1970's. Dr. Jones' signs were posted 25' from the seawall in dry sand. Other private property signs were posted at the junction between Ogunquit Beach and Moody Beach in the soft sand in the early 1970's.

20. Dr. Jones never ordered anyone to leave the intertidal zone in front of this cottage except once for a lifeguard. With the possible exception of George Pope and his predecessor in title, no other beach front owners ordered the public off their property in the intertidal zone. Dr. Jones and all of the other beach front owners were willing to let the public walk the beach and remain willing to do so.

21. In 1968 Dr. Jones got in an argument with a police officer over Dr. Jones' right to post his private property sign in the soft sand. The police officer told him to take the sign down. Dr. Jones complied but the next day complained to the Wells town manager, Mr. Littlefield. Mr. Littlefield told Dr. Jones that the police officer was wrong and Dr. Jones could repost the signs. Dr. Jones put out the signs every year until 1984.

22. In the mid 1970's the public usage of Moody Beach began increasing noticeably. It was not until the 1970's that the public began using Moody Beach outside the access zones in significant numbers.

23. A number of plaintiffs other than Dr. Jones have told members of the public using the dry sand in front of their cottages to move because it was private property. Generally the public has moved when told.

24. Plaintiff Edward Bell built a symbolic fence on his dry sand in the late 1960's to provide notice that his property was private. He testified that he got the idea from Harvard College, which apparently has a policy of erecting gates at strategic locations once a year to preserve the privacy of certain routes. Mr. Bell did not build his symbolic fence because the public was using his land in significant numbers. He built his fence and posted notice in the Registry of Deeds because he feared what might happen in the future.

25. Randall Cooper is trustee of the property adjoining the Bourne Avenue public access and has been living there off and on

since the 1950's. Unlike many other plaintiffs, he has never told any members of the public to leave his property, even though the public occasionally used the dry sand area of his property in the 1950's and 60's and with increasing frequency since the 1970's. Mr. Cooper, who is a lawyer, has taken the position that the public uses his property with his permission even though he has never given anyone express permission. Mr. Cooper also took the position that if no one abuses your beach property, you give them permission to share it with you.

26. None of the beach front owners who testified had ever been told that Moody Beach was a public beach. They all were either assured or assumed at the time of purchase that Moody Beach was private. The belief that it was private figured significantly in their decisions to purchase.

27. The non-beach front owners who testified, with one exception, all believed that the public had a right to use Moody Beach for recreational purposes. They did not believe the town had any deeded interest in the beach. They testified that they simply assumed it was public because that's the way it had always been.

28. Real Frechette was a rebuttal witness for the plaintiffs who volunteered to testify after the trial began when he heard or read about the case in the newspaper. He may have been the only totally disinterested witness in the entire trial and I have assigned his testimony some weight. Mr. Frechette worked as a ticket agent at the Wells railroad station from Memorial Day

to Fall in 1943, at a time when almost everyone traveled by train because of the war. Mr. Frechette was told by Mr. Knox, the Wells station master, that Ogunquit Beach and Wells Beach were public but Moody Beach was private and that he should stay away. I interpreted Mr. Frechette's testimony to mean that he was given this information as part of his general instructions so that he could pass this information along to those arriving visitors who asked. However, I am not sure on this last point and it may be Mr. Frechette meant that he was told personally not to use Moody Beach.

29. David Strater, a 66 year old attorney who has lived in the York-Ogunquit area all of his life and who has practiced in the area, has always advised his clients that Moody Beach is private subject only to the Colonial Ordinance. He informed the Town of Wells' officials of this position on behalf of Plaintiff Edward Bell in 1966. He also informed the Town in 1966 that Mr. Bell had posted his land in compliance with the posting statute, 14 M.R.S.A. § 814, at the York County Registry of Deeds.

30. I find the Town's official position on its right to use Moody Beach to be vague. It is clear from defendant's exhibit 103, a letter from Town counsel Barnett Shur to Attorney Strater, that the Town was claiming that the public had the right to use Moody Beach by 1966. However, Attorney Shur was vague about where the Town acquired its rights. When read in its totality, the letter from Attorney Shur seems to be stating that the public's right to use the beaches in Maine was based on the Colonial

Ordinance and thus would not be changed by the statutory position by Mr. Bell. There is no mention of custom or prescription or dedication. There is only mention of a general public right to use all beaches in the State of Maine. This could refer only to the Colonial Ordinance. Attorney Shur acknowledges in this letter that those rights are in dispute and will have to be decided by the Maine Law Court.

Another example of official vagueness is a road sign posted by the Town of Wells in 1953 on Route 1 reading "Moody Beach, Public Beaches and Free Parking." Plaintiffs exhibit no. 61b. This can be read to be a claim that Moody Beach is a public beach. However it can also be read as a directional sign that, if followed, will lead someone to Moody Beach, to some public beaches and to free parking. At the time the sign was first erected, the sign, if followed, would have brought a tourist to a parking lot. Standing on that parking lot and facing the ocean, a visitor would have found Ogunquit's two mile public beach on his right, Wells' public portion of Moody Beach directly in front of the parking lot and the remainder of Moody Beach with the public accesses on his left. Later, as stated earlier, this situation would change because it was determined in a lawsuit that the public beach directly in front of the parking lot was part of Ogunquit's public beach and did not belong to Wells.

31. The rights of way leading from Ocean Avenue to Moody Beach are the Bourne access, the Furbish Road access and the Charles Street access. The Town of Wells took the Bourne access

in 1892 when it laid out Bourne Road. Defendants' Exhibit No. 14. The public started using the Furbish access and the Charles Street access sometime in the 1920's or 1930's, although the evidence on this point was less than clear. In 1938 the Town voted not to abandon the Bourne Avenue right of way, partly because it was used by teams (presumably to gather sea fertilizer). Plaintiffs' Exhibits 58c and d. The three rights of way were never conveyed by the developers of Moody Beach. In March of 1983, the Town took 19 rights of way to Wells Beach and Moody Beach, including the three access ways mentioned above. The town took these rights of way to the low water mark.

32. In 1925 the Ogunquit Beach district, with the cooperation of the Town of Wells, took Ogunquit Beach by eminent domain from Charles Tibbets. Ogunquit Beach is two miles long and lies immediately south of Moody Beach. It was taken to be used as a public beach. This left Mr. Tibbets as private owner of the one mile stretch of Ogunquit Beach now known as Moody Beach. Ogunquit Beach remains a popular, heavily used public beach to this day.

#### CUSTOM

The first issue to settle in deciding the issue of local custom as an affirmative defense is to determine whether it exists as a defense in the State of Maine. Plaintiffs have argued vigorously that it does not exist in Maine. Although our Law Court has never formally approved the doctrine, Piper v. Vorhees, 130 Me. 305 (1931), I am satisfied that it does exist as part of Maine's common law. The law of custom was part of English common

law and was recognized in the Laws and Liberties of 1648, which, of course, contain the Colonial Ordinance. It was also recognized in the 1801 History of Land Titles by James Sullivan, attorney general of Massachusetts. It has also been implicitly recognized by the Maine Legislature in its posting statute 14 M.R.S.A. § 812, 812-A. It has also been recognized in other jurisdictions. Puffen v. Beverly, 187 N.E.2d 840, 345 Mass. 396 (1963); Knowles v. Dow, 22 N.H. 386 (1851). Our Law Court has recognized the role of custom in shaping our State's general common law. Conant v. Jordan, supra., and the Colonial Ordinance has become part of our common law. If an ancient common law doctrine like local custom is to be abrogated, it should be done by the Legislature or the Law Court, not by the Superior Court.

To prove a local custom, defendant Town of Wells must prove by a preponderance each of seven facts.

1. The custom must have been in effect "so long as the memory of man runneth not to the contrary";
  2. The right must have been exercised without interruption;
  3. The use must be peaceable and free from dispute;
  4. The use must be reasonable;
  5. The land impressed with the custom must have boundaries;
  6. The custom must be obligatory; and
  7. The custom must not be repugnant to other customs or law.
- State ex. rel. Thornton v. Hay, 462 P.2d 677 (Ore. 1969).

Defendant Town of Wells did not satisfy me factually at trial by a preponderance of the evidence of the first and third

criteria and therefore their affirmative defense of custom must fail.

There was insufficient evidence presented at trial to draw any inferences at all as to any kind of consistent use of Moody Beach for recreational purposes by the public from colonial days until the mid-nineteenth century. From the late 1800's until Ogunquit Beach was taken by eminent domain in 1925, there is evidence indicating that Wells' beaches were used for general recreational purposes. However, on the question of which beach was used, what little evidence exists (the road structure on Wells Beach and postcards such as defendants exhibits 5, 6A, B, C and D) suggests that the beach currently known as Wells Beach was the primary public recreational center in Wells. Wells Beach continued to be used as a public beach subsequent to 1925. As for Ogunquit-Moody Beach, the simple fact that Ogunquit Beach was taken for public use while Moody Beach was developed privately, when combined with the eyewitness testimony, proved to me that from 1925 until the 1970's, Ogunquit Beach and the disputed portion of public beach in front of the Moody Beach parking lot served as the public beach for the vast majority of beach users in Wells and Ogunquit. The defendants produced evidence that in the late 1950's and 1960's a few members of the public used the Bourne and Furbish Avenue extensions and spilled over a short distance on either side of those extensions. Defendants also proved that in the 1950's and 1960's there was some spillover northward into Moody Beach for a short distance from the public beach in front of the Moody Beach

parking lot. Defendants also proved that as far back as eyewitness testimony can take us, members of the public consistently strolled up and down the intertidal zone of Moody Beach at low tide and even on the dry sand at high tide. Defendants failed, however, to prove that any significant number of the public started to spread out across Moody Beach with blankets and accompanying paraphenalia until the late 1970's. Even defendant's witnesses testified that on a good beach day in the 50's and 60's, there would be "hundreds" of people on Moody Beach. (See testimony of John Holder and Esther Pisaruk). Hundreds of people on a beach one mile long and 500 to 600' wide at low tide is very few people. They could be accounted for almost in their entirety by the occupants of the then existing ocean front cottages of Moody Beach and the few back cottages then in existence.

Defendants also failed to prove to me as factfinder that the public's right to use Moody Beach was free from dispute. Many witnesses from Wells and from the Tier II group testified that they never knew anyone to suggest that Moody Beach was private. All of the beach front owners testified to the opposite. The only disinterested witness (the assistant ticket agent in 1943) corroborated the beach front owners. The ambivalent position of the Town's officials, specifically Mr. Littlefield and Mr. Shur, the distorted expenditure of public money on Wells Beach as opposed to Moody Beach and the isolating of the lifeguards at the parking lot south of Moody Beach until the 1970's also suggest to me that

the Town of Wells itself was not totally convinced that Moody Beach was a public beach.

In addition, shortly after the public began spilling over the access routes in the 1960's, certain beach front owners began disputing the public's right to use the beach and at least seven of those owners continued to protest visibly until the current suit was filed.

Having failed to meet its burden on two key factual issues, Wells has failed to meet its burden on the common law defense of local custom.

#### PRESCRIPTION

The party asserting a public easement by prescription must prove continuous use for at least 20 years under a claim of right adverse to the owner, with his knowledge and acquiescence, or a use so open, notorious, visible, and uninterrupted that knowledge and acquiescence will be presumed. Town of Manchester v. August County Club, 477 A.2d 1124, 1128 (Me. 1984). Unlike the majority of jurisdictions our law holds that with regard to creation of public recreation easements by prescription in wild and uncultivated land, open and continuous use raises a rebuttable presumption that the use was permissive. Manchester, supra, at 1130. This rule is predicated on the notion that such use by the general public is consistent with, and in no way diminishes, the right of the owner in his land.

The only open and continuous public use that defendant proved to exist in this case for the 20 years preceding the

filing of this lawsuit in 1983 was the public's (and the plaintiffs' for that matter) consistent habit of strolling up and down the length of Moody Beach. All of the plaintiffs testified that they were perfectly willing to permit this, never complained about it and would continue to permit this activity in the future. This public activity is consistent with and does not diminish the rights of the plaintiffs on their land. It is not adverse use. Inhabitants of Kennebunkport v. Forrester, 791 A.2d 83 (1978). This activity is presumed permissive and will not establish an easement by prescription. The occasional spillover by members of the public from the three access ways prior to 1983 was objected to by almost all of those plaintiffs who testified and who were affected by the spillover during the 20 year period. The one exception among the plaintiffs was Mr. Cooper. Even in Mr. Cooper's case, I don't think the spillover was adverse enough or frequent enough prior to 1970's to justify the creation of an easement by prescription. Mr. Cooper and his family have taken the position that the public has permission to share their beach so long as the public does not abuse the privilege. This generosity of spirit should be encouraged and will be protected by Maine's presumption of permission on privately owned beaches until it becomes factually clear that the public is making an adverse claim. The adverse claim in Mr. Cooper's case did not become clear until the late 1970's.

### DEDICATION

To prove dedication, defendants must prove that Moody Beach was dedicated by Mr. Tibbets to the Town or the public and that the public accepted the dedication by some affirmative act. Dedication is an appropriation of land to some public use and there must be evidence of a clear intent to dedicate. Manchester, supra. at p. 1129. This issue does not merit lengthy discussion. There is no clear evidence of Mr. Tibbets' intent to dedicate either expressly or by implication. The evidence on that point (the existence of the access ways, the boundary lines on the portion of the plan still in existence (defendants' exhibit 18) and Mr. Tibbets' alleged failure to protest when he saw someone on Moody Beach back when it was being developed) does not begin to form a clear intent to dedicate.

### II. THE INTERTIDAL LANDS ACT

While the Law Court's decision on sovereign immunity was pending in this case, the Legislature enacted "The Public Trust in Intertidal Land Act," Chapter 782 of the 1985 Public Laws. 12 M.R.S.A. § 571-573 (the Intertidal Act).<sup>5</sup> In the Intertidal Act,

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<sup>5</sup> The pertinent portion of Sections 571-573 is as follows:

#### **§ 571. Legislative findings and purpose**

The Legislature finds and declares that the intertidal lands of the State are impressed with a public trust and that the State is responsible for protection of the public's interest in this land.

the Legislature found and declared that all of the intertidal land in Maine are impressed with a public trust. The Legislature declared that this public trust was part of Maine's common law. The Legislature then found that the public trust in the intertidal zones included the rights of fishing, fowling, navigation and recreation.

Plaintiffs claim that the Intertidal Act violates the Maine Constitution's separation of powers, I agree.

The Maine Constitution states that no persons belonging to the legislative, executive and judicial departments "shall exercise any of the powers properly belonging to either of the others, except in case herein expressly directed on or permitted." Art.

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The Legislature further finds and declares that this public trust is part of the common law of Maine and generally derived from the practices, conditions and needs in Maine, from English Common Law and from the Massachusetts Colonial Ordinance of 1641-47. The public trust is an evolving doctrine reflective of the customs, traditions, heritage and habits of the Maine People. In Maine, the doctrine has diverged from the laws of England and Massachusetts. The public trust encompasses those uses of intertidal land essential to the health and welfare of the Maine people, which uses include, but are not limited to, fishing, fowling, navigation, use as a footway between points along the shore and use for recreational purposes. These recreational uses are among the most important to the Maine people today who use intertidal land for relaxation from the pressures of modern society and for enjoyment of nature's beauty.

The Legislature further finds and declares that the protection of the public uses referred to in this chapter is of great public interest and grave concern to the State.

1985, c.782.

III, Section 2. The separation of powers mandated by the Maine Constitution is much more rigorous than the same principle as applied to the United States Constitution, where the separation of powers is only inferred. State v. Hunter, 447 A.2d 797, 799 (Me. 1982).

The Legislature is free to codify, alter or abrogate a longstanding rule of common law. Atlantic Oceanic Kampgrounds v. Camden Nat., 473 A.2d 884, 886 (Me. 1984). However, the Legislature must do so by making new law, not by interpreting existing law. Interpreting existing law is the function of the judiciary. Atlantic at p. 887.

Section 571 of the Intertidal Act states that the public trust doctrine found by the Legislature is a presently existing part of Maine's common law that grew out of Maine's conditions, need and practices, the English Common Law and the Colonial Ordinance of 1641-1647. The Legislature found that the public trust is an evolving doctrine that (at the time of passage of the Intertidal Act) included fishing, fowling, navigation and recreation. As the attorney general argues in his brief, "The Legislative history of the Act demonstrates that its purpose was to confirm and legislatively recognize existing public rights." Note the words "confirm", "recognize" and "existing". In other words, the Legislature was not making law, it was recognizing existing law. This interpretation of the Intertidal Act is supported by the Statement of Facts contained in Legislative Document 2380 and by the statement of co-sponsor Senator Trafton, who stated: "The

bill does not create new rights. Rather this bill confirms or recognizes the traditional rights of the people of Maine . . ." Legislative Record, p. 734 (1986).

The problem here is that in writing the Intertidal Act, the Legislature was making common law interpretations that have never been made by the Law Court. The Law Court in Bell, supra., subsequent to enactment of the Intertidal Act, reaffirmed that whatever rights the public enjoys in the intertidal zone under the Colonial Ordinance exist as an easement, not a trust (or at least not yet a trust). Bell also clarified that the State is not responsible to the public as trustee of the public easement in the intertidal zone. Nor has the Law Court ever held that the public easement in intertidal zone includes the right of general recreation. That issue has been presented for the first time in this case and I have concluded in Part I of this decision that the public does not enjoy any general recreational right on privately owned intertidal zones in Maine. Only the judicial branch of government can make that kind of interpretation of existing common law.

It is possible, of course, that the Law Court may eventually redefine or clarify the public easement in the intertidal zone. One of the great strengths of the common law is that it can be subjected to reexamination and reinterpretation to meet society's changing demands. In fact, the Law Court has remarked that the extent of the public rights under the Colonial Ordinance is not entirely clear. Blaney v. Rittall, 312 A.2d 522, 528 n.7 (Me.

1973). However, any such reinterpretation of existing case law can be carried out only by the courts.

For the reasons stated, I conclude that 12 M.R.S.A. § 571-573, the Public Trust in Intertidal Land Act, violates Art. III Sec. 2 of the Maine Constitution. Because of this ruling, there is no need for me to determine whether the Intertidal Act, if it had been written to create new public rights, would be an unconstitutional taking of private property in violation of the United States and Maine Constitutions.

In the event the Law Court disagrees with my conclusion regarding the separation of powers, I make the following findings of fact concerning the takings argument.

1. It is very difficult at this stage to determine the impact of the Intertidal Act on the fair market value of plaintiffs' property. Depending on the location of plaintiffs' various cottages--in particular, their proximity to the public access ways to Moody Beach--the impact of the Intertidal Act will diminish plaintiffs' fair market value from minimal to no more than 25%.

2. Plaintiffs--at least those who testified--purchased their respective properties with the reasonable expectation that they were purchasing a private beach. Some of them knew of the Colonial Ordinance but none expected any significant public use of the beach outside of the public strolling up and down the beach.

#### IV. TIER II

Approximately 40 parties to this case own property on North and South Tibbets Streets and other locations on the westerly

side of Ocean Avenue across from Moody Beach. They claim personal easements by prescription in Moody Beach because of their unique circumstances. In other words, they claim private easements independent of any rights the public may have in Moody Beach.

In addressing these claims, I make the following findings of fact for each Tier II defendant.

Robert and Madelyn Beauregard

Robert came to Moody Beach for the first time in 1948 as a visitor. He rented in Wells and walked Moody Beach on occasion. He missed some years but came back in 1965 and stayed with the Fortunados. In 1968 he bought a house on South Tibbets Street and moved to an ocean front cottage in 1985 and then moved back to South Tibbets. He has used the beach permanently on a seasonal basis since 1965. He uses the Furbish public access. He usually turns right after entering the beach from Furbish and sits in different locations depending on circumstances (number of people on beach, location of friends, etc.). Madelyn has used Moody on and off since 1938. Like her husband she did not start using Moody on a continuous basis until 1965. She sits at various locations on the beach, utilizing both the intertidal zone and the dry sand. The Beauregards (one or the other) have fished on the beach, played frisbie and ball games and walked the beach.

Frederick and Mildred Beauregard

Frederick and Mildred came to Moody Beach in 1959 with a friend and bought a house on North Tibbets Street that same year. They have used the beach with their ten children continuously

ever since 1959 from March to November for such activities as frisbie, ball playing, kite flying and walking on both the wet and dry sand. They have used three different access points and sit at various locations on the beach. Attorney Hatch, who did considerable real estate work in the Wells area while he was alive, indicated to the Beauregards at the time of purchase of their cottage that they could use the entire beach. Either Mr. or Mrs. Beauregard or both participated in the sit-in in front of plaintiff Kenary's cottage after Mr. Kenary had ordered some Tier II children off his beach.

John and Joanne Anderson

The Andersons first came to Moody Beach in 1963 and rented an ocean front cottage for three years. During that period they would sit in front of their cottage. They bought property on North Tibbets Street in 1965 and built on that property in 1966. Since 1966 they have used the Furbish access. They normally turn right after entering the access, move down three or four cottages and sit down. They use the wet and dry sand. They sunbathe, surf, swim, play frisbie and walk up and down the beach as far as Ogunquit at both low and high tide.

Harold Anderson

Mr. Anderson first came to Moody Beach in 1963 but until 1972, he would visit only on occasional weekends with his brother. In 1972 he bought a duplex on South Tibbets Street. Since then he has continuously used the Furbish access although he moved to the westerly side of Ocean Avenue in 1981 or 82. He turns right and

normally sits with his brother John. He uses the beach for surfcasting, walking and practicing his golf swing.

George and Louise Bertini

George first came to Moody Beach with his parents and grandparents in 1933. He stayed in rentals until 1959 when he purchased a place on South Tibbets Street. Since 1962 he has been living on South Tibbets Street all summer long. Louise first came to Moody Beach in 1958 and has been coming back continuously since 1962. The Bertinis have used the Furbish access since 1962. They turn in both directions and sit in various locations wherever it pleases them from Ogunquit to Furbish.

Raymond and Judith Maureen Morin

The Morins first came to Moody Beach in 1966 to rent. They purchased two properties the same year. They were told by Jim Frazier, who was an heir of the Tibbets estate and who sold Tibbets estate property to a number of Tier II owners, that the public had access to Moody Beach and that the public could use the beach for recreational activities. The Morins use the Furbish access and turn both ways to sit but more often to the left. They swim, walk and have played ball with their children.

Charles Grover

Mr. Grover first came to Moody Beach in 1947. He rented an ocean front cottage for many years for two weeks each summer and while doing so, generally stayed in front of his rental. He bought land in 1965 and built a cottage in 1980. Since 1980 he has used the Furbish access and will sit to the right from four

to six cottages, in both dry and wet sand. The crowd on any given day determines where he sits. Mr. Grover's chief beach activity is walking. He has seen private property signs on the seawall. He has been a member of the Moody Beach Association for 25 to 30 years.

Robert and Ruth Tabor

Mr. and Mrs. Tabor first came to Moody Beach to visit friends in 1947. They have been back every year since and have walked all parts of the beach every year. In 1971 they purchased a property mid-way between the Bourne and Furbish accesses and also a deeded right of way across the Day property to the beach, which they still use. They built on the property in 1981. They sit on the beach in front of their right of way. They saw some private property signs in the early 1980's and Mr. Tabor saw Mr. Bell's symbolic fence. In addition to walking, they swim and play bocci ball.

William F. Savage, Jr.

Mr. Savage first came to Moody Beach in 1959. He bought property in 1959. He uses his cottage from April to October. He has used the beach continuously for such activities as swimming, fishing and walking on both wet and dry sand. He was told by an attorney at the time he purchased his property that he could use the beach by the right of way. He never saw any private property signs on the beach but he remembers Mr. Bell's symbolic fence. He generally sits on the beach as close to the access as

he can. He has used the Furbish access and he has also used Margie's store as an access.

Agnes and Kevin Garthwaite

Mrs. Garthwaite first came to Moody Beach in 1947 and has been staying there continuously as a property owner since 1965. Prior to 1965, her beach excursions were on the public beach in front of the Moody Beach parking lot. She purchased a second cottage in 1972 with a deeded right of way and has used that right of way since. She is a real estate agent who has sold properties on Moody Beach and she has never told anyone the beach is private.

Her son Kevin, also a Tier II party, has used the beach since the 1950's. He purchased a property on the westerly side of Ocean Avenue in 1977 or 1978 and has used the beach continuously since then.

Raymond and Margaret Angelucci

Mr. and Mrs. Angelucci first came to Moody Beach in 1934. They rented a series of cottages on the ocean until 1970 when they started renting on North Tibbets Street. They bought a cottage in 1978. They have used the Furbish access since moving to North Tibbets Street and they do not concentrate on any one spot on the beach. They swim, play games and walk. They saw private property signs approximately five years ago.

William C. and Evelyn Penney

Mr. Penney first came to Moody Beach in 1948 and spent two week vacations in rented cottages until 1963 when he built a

cottage on South Tibbets Street. He has used the Furbish access since building. Mr. Penney was president of the Moody Beach Association for three years and has organized summer games for the children. (The Moody Beach Association held a Fourth of July celebration for children each year, alternating the festivities at the Bourne and Furbish accesses. This was attended by children of both back lot and ocean front owners.) Mr. Penney sits three or four houses to either side of Furbish access now. He has in the past used the beach for horseshoes, softball and volleyball. Until he built his house, he used the Furbish access, access through Margie's store and one other access north of Furbish (Charles Street?). Mr. Penney does not recall the demonstration at the Kenary property although Mr. Ravioli remembers that Mr. Penney was part of it.

Elmer J. Flynn

Mr. Flynn first came to Moody Beach in 1960 but did not start staying there continuously until 1972. He, too, was told by Mr. Frazier of the Tibbets estate that he had a right to use the beach. He has played games on the beach and walked it.

Oscar C. and Yvonne Demuth

Mr. and Mrs. Demuth first came to Moody Beach 35 years ago and stayed at a rental close to Ogunquit Beach. In 1965 they bought a home on South Tibbets Street. They have used the Moody Beach and the Furbish access continuously since 1965 and they vary their beach sitting spot depending on circumstances. Mr. and Mrs. Demuth remember the Kenary sit-in and they remember Mr.

Bell's symbolic fence. They have played ball and flown kites on the beach and Mr. Demuth organized the golf ball driving event as part of the Association's July 4th celebration.

James Fortunato

Mr. Fortunato first visited Moody Beach in 1964 when he visited friends in Wells but he did not start staying at the beach until 1965 when he purchased a lot on South Tibbets Street. He has used the beach continuously since then. He uses the Furbish access, turns right and customarily looks for a comfortable spot one to four cottages down. He was told by Mr. Frazier of his right to use the beach. He has had cookouts on the beach with his children.

Ed and Martha Weagle

Mr. and Mrs. Weagle visited their relatives at Moody Beach on occasional weekends from 1955 to 1965. They did not start continuous use of the beach until 1965 when they purchased a cottage on Bell's Drive. They use the Furbish access and sit at various locations. They walk the beach to Ogunquit and back using both the dry and wet sand. They have 20 days vacation each year and spend it at Moody Beach.

Jane Weagle

Mrs. Weagle's late husband bought a home on Moody Beach in 1963. Mrs. Weagle first came to Moody Beach in 1966. She uses the Furbish access and generally stays in the Furbish area. She has used the beach for games and flying kites and walks the beach.

James and Mary Cassidy

Mr. Cassidy first came to the beach in 1951 as a boy. Mrs. Cassidy first came to the beach in 1965. Mr. Cassidy has used the beach for many activities including swimming, digging, biking, drinking, boating, baseball, softball, volleyball, flying kites and picnics. He has used all the accesses and all the beach, although most of his activity has been on the northern part of the beach near his home. Now he and his wife mostly walk the beach. Mr. Cassidy and his wife have been buying property at Moody Point and South Tibbets Street since 1981 and they rent these properties. Mrs. Cassidy, like some of the other defendants, refers to the Moody Parking Lot Beach as "the public beach."

Richard Merrifield

Mr. Merrifield visited Moody Beach on day visits as a child but didn't start continuous use of the beach until 1967 when he started living in a house he built on North Tibbets Street. He uses two public accesses to the beach. He owns and rents four units somewhere at the beach. He walks the beach regularly on both the dry and wet sand.

Helene and Wayne Larkin

Mr. and Mrs. Larkin have been walking Moody Beach since 1965 but they did not start continuous use of the beach until 1977 when they bought property on the westerly side of Ocean Avenue. They swim on the beach and walk the beach.

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Robert Roche

Mr. Roche has been using the beach continuously since 1963, first as a renter and since 1970 as a property owner. He is a member of the Moody Beach Association and has played badminton, football and bocci on the beach. He swims every day for an hour at the beach. Where he sits on the beach is determined by how many people are on the beach.

John and Mary Iritano

Mrs. Iritano has been using the beach continuously for 61 years and Mr. Iritano since 1944. At first Mrs. Iritano would cut across an empty lot to the ocean. She has been using the Furbish access since her parents bought a property in 1957. She bought in 1962 on South Tibbets Street. They swim, sunbathe, and walk the beach and sit in various locations although they favor the left. They use both the wet and dry sand areas.

George Bushee

Mr. Bushee first came to Moody Beach to visit friends in 1962 but he did not start continuous use until 1975 when he bought a house at Moody Beach. He uses the Furbish access. He walks the beach to Ogunquit every day on both the wet and dry sand. He sits on the beach in various locations.

R. Stanley Jacobson

Mr. Jacobson first came to Moody Beach 58 years ago and has been using the beach continuously since after World War II. He built his own house in 1965. He uses the Furbish access and turns both ways. He walks the entire beach on both wet and dry sand.

John J. Sullivan, Jr.

Mr. Sullivan first came to Moody Beach in 1962 and rented cottages. He has occupied his own place off South Tibbets Street since 1966. He uses the Furbish access and turns left or right to sit, depending on who is on the beach. In the last few years he has been going four, five or six houses away from the access before sitting.

Dr. Paul Sharkey

Dr. Sharkey first came to Moody Beach in the 1950's to visit friends who had an ocean side cottage. In 1963 he purchased his own place on the westerly side of Ocean Avenue and has used the beach continuously since then. He used the Furbish access mostly until 10 years ago when he purchased his own right of way. He sits in different areas on the beach and has always walked the beach on both wet and dry sand.

Donald Peterson

Mr. Peterson visited friends and a brother and uncle and walked the beach when he visited. In 1976 he began continuous use of the beach when he purchased his property on Furbish Road. He sits in various locations on the beach, depending on where his friends are. He swims and walks the beach in both the wet and dry sand area. He has also driven golf balls on the beach.

Kenneth C. Ravioli

Mr. Ravioli first visited Moody Beach in 1950. He has visited the beach every year since then except for 1968 and part of 1969 when he was in Vietnam. From 1957 to the present Mr. Ravioli has

used the Furbish access. After entering the beach access he turns to the right and sits in front of the first or second house. Mr. Ravioli testified that when the number of people using the access way increased five years ago, he might have to go up to five houses to the right. Mr. Ravioli participated in the Kenary demonstration approximately ten years ago. He remembers Mr. Kenary claiming that his beach was private and then a half dozen back-lotters sat in front of Mr. Kenary's cottage to demonstrate their right to use the beach. Mr. Kenary came out and argued with them. A police officer arrived and stated that he didn't know what to do. Mr. Kenary asked the officer to evict the demonstrators. The officer asked the demonstrators to leave to avoid a confrontation. The demonstration lasted approximately thirty minutes and there was no more trouble.

Mr. Ravioli has swum and walked the beach for years. He uses the wet and dry sand.

#### John and Marie Walsh

Mr. and Mrs. Walsh have been coming to Moody Beach since 1957. Until 1974 they came to Moody Beach on occasion to visit a friend. Their continuous use of the beach began in 1974 when they purchased a cottage on the westerly side of Ocean Avenue. Since 1974 they have used a variety of accesses and have sat in a variety of locations on the beach.

#### Common Findings of Fact

Except for the confrontation that several of the Tier II members had with Mr. Kenary, none of them ever had any problems

on the beach with any plaintiffs or anyone else. No Tier II members ever asked permission to use the beach and none ever received permission. They all just assumed they had a right to use the beach.

#### DISCUSSION

To establish a personal easement by prescription, the Tier II members must prove what the Town had to prove on its public easement by prescription. They must prove continuous use for twenty years under a claim of right adverse to the owner, with his knowledge and acquiescence, or a use so open, notorious, visible, and uninterrupted that knowledge and acquiescence will be presumed.

Many of the Tier II members had not established twenty years of continuous use of Moody Beach prior to the filing of this lawsuit. Those who did prove twenty years of continuous use take nothing against these particular plaintiffs. The Tier II owners, for the most part, used the Furbish access, not the Bourne access. The only plaintiff located in the vicinity of the Furbish access is Mr. Kenary. He objected to the public's use of dry sand beach approximately ten years ago and called the police to have the public ejected. Although the police refused to order anyone to move, it was clear that Mr. Kenary was not acquiescing in the public's use of his dry sand area. Mr. Kenary's objection was well known among the Tier II group, perhaps because he was the only ocean front owner who objected to the public's use of his land in the Furbish area. It meets the requirements for an

effective denial and remonstrance as discussed in Dartnell v. Bidwell, 115 Me. 227, 231 (1916).

Even if Mr. Kenary had not objected, it is difficult to see how Tier II members could establish an individual easement by prescription against individual plaintiffs on a beach that is divided into 120 or so individual lots. The testimony was unanimous that none of the Tier II members sat in front of the same cottage on a regular basis. Some sat in the same general area on a fairly regular basis but not in front of the same cottage. How could an individual plaintiff be put on notice that a particular person is attempting to establish a private easement on a particular lot when the private person keeps sitting in different locations? It would not seem fair to allow a person to establish a private easement by prescription on a particular ocean front lot when the person seeking to establish the private easement may well not have ever sat on that particular lot at all and at least not on a consistent basis. That is the state of the record for all the Tier II members. It will not support the creation of a private easement by prescription independent of the general public's rights.

#### CONCLUSION

For the reasons stated above, I am satisfied that plaintiffs own their respective lots at Moody Beach subject only to the public's easement to fish, fowl and navigate in the intertidal zone and subject to those uses incidental to fishing, fowling and navigation that have been previously recognized by the Law Court

to exist in the intertidal zone along Maine's shorefront. These rights do not include general recreation. This decision does not necessarily mark the final chapter in the development of Moody Beach. This decision in no way diminishes the power of the Town of Wells or the State to transform Moody Beach into a public beach or a combination public-private beach by eminent domain, if they choose to do so.

The entry by the clerk will be:

On plaintiffs' first, second, eighth, ninth, twelfth and thirteenth claims, judgment is to the plaintiffs. The individual plaintiffs are requested to prepare individual proposed judicial declarations that they are vested with title to their property free and clear of all encumbrances except those of record and further subject only to the public's right to fish, fowl and navigate--as those terms have been defined by the Law Court--in the intertidal zones of this State. Plaintiffs are not to include in their proposed declarations or proposed judgment any form of equitable relief ordering the Town of Wells to obey the law. The Town of Wells has never indicated that it will not obey the law once the law has been clarified. On the competing motions for summary judgment on plaintiffs' claim 14 regarding the Intertidal Lands Act, summary judgment is granted to plaintiffs and 12 M.R.S.A. §§ 571-573 is declared to be unconstitutional as a violation of the separation of powers clause of the Maine Constitution, Article III, Section 2.

DATED: September 14, 1987

William S. Brodrick  
William S. Brodrick  
Justice, Superior Court

**DRUMMOND  
WOODSUM &  
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Attorneys at Law

October 27, 2005

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Nathan A. Poore  
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Dear Nathan:

You have asked me to address the question of what public rights may exist in Goose Rocks Beach, and what enforcement measures, if any, should be taken by the Town's Police Department or Code Enforcement Officer when private beachfront landowners claim that they own the portion of the beach in front of their homes and complain to the Town that beachgoers are "trespassing" on their land.

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I believe this issue arose this past summer when a private landowner who owns property fronting Goose Rocks Beach complained to the Kennebunkport Police Department (KPD) that individual(s) using the beach in front of her property were trespassing on her land. This landowner has asked KPD to arrest individuals for trespass upon her land.

When Police Chief Bruni and I first discussed this issue, I recall that I told him that I wanted to research the cases addressing the public trust doctrine before giving a definitive response but that I believed that a private oceanfront landowner owned the fee in the portion of the beach above the high water mark, and that the public had rights under the public trust doctrine in the intertidal zone, the scope of which I wanted to further research.

At the time of my conversation with Chief Bruni, it was my understanding that the Town did not possess an express fee or easement interest in Goose Rocks Beach by way of any conveyance document. That is still my understanding. Based on my further research on the scope of public rights in the intertidal zone (between the high and low water marks),

I would like to clarify my understanding of the law on this subject. First, under the Moody Beach cases from the Town of Wells<sup>1</sup> and what is commonly referred to as the public trust doctrine, an oceanfront property owner is presumed to hold title in fee to intertidal land subject only to the public's right to fish, fowl and navigate. *Bell II*, 557 A.2d at 171. Thus, the public retains a reservation of rights in the nature of a public easement to use the intertidal zone for fishing, fowling and navigation, as those terms are broadly and liberally construed. *Id.* at 173. As liberally as those terms have been interpreted, however, the Law Court, stated in *Bell II* that the scope of the public easement in the intertidal zone did not include a general right of beach recreation or sunbathing unassociated with fishing, fowling and navigation.

Completely independent of the *Bell* cases and the public trust doctrine, however, is the legal principle that the public can acquire a prescriptive easement for certain uses if certain requirements are met: continuous use (for a specific purpose or purposes) for at least 20 years under a claim of right adverse to the owner(s), with the owners' knowledge and acquiescence or a use so open, notorious, visible and uninterrupted that knowledge and acquiescence can be presumed. *See S.D. Warren Co. v. Vernon*, 1997 ME 161, ¶ 5, 697 A.2d at 1284. In *Eaton v. Town of Wells*, 760 A.2d 232 (Me. 2000), the Town of Wells established through litigation that the public had acquired a prescriptive easement in Wells Beach for general recreational purposes based on a history of continuous use of the beach by the public as a public beach for a 20-year prescriptive period. The scope and geographical extent of the public prescriptive beach easement included not only the intertidal zone, but also the area above the high water mark on the high, dry sand portion of the beach.

It is unclear whether the Town could prove facts similar to those that were proven in the *Eaton* case for Goose Rocks Beach, and litigating this issue is likely to be a lengthy and costly endeavor. However, it is my understanding that at least a number of Kennebunkport citizens believe that Goose Rocks Beach has been used as a public beach for many years. It is also my understanding that the Selectmen do not want the Town to take any action at this point in time that would tend to defeat or diminish a claim for a public prescriptive easement right in Goose Rocks Beach if the Town were to undertake litigation to establish one in the future.

Under these circumstances then, and because the exact scope and extent of the public rights in Goose Rocks Beach remain unresolved, I do not believe it would be in the Town's best interest for KPD to arrest beachgoers using the beach peaceably for "trespassing" on a private beachfront landowner's land.

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<sup>1</sup> *Bell v. Town of Wells*, 510 A.2d 509 (Me. 1986) ("*Bell I*"); *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989) ("*Bell II*").

Nathan A. Poore  
October 27, 2005  
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I trust that the above discussion is helpful to you and the Police Department on the issues we have discussed regarding Goose Rocks Beach. Please don't hesitate to call me if you have any further questions.

Sincerely,

A handwritten signature in black ink, appearing to read "A. Tchao", with a stylized flourish at the end.

Amy K. Tchao

AKT/sdr