

STATE OF MAINE
YORK, ss.

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

ROBERT F. ALMEDER and)
VIRGINIA S. ALMEDER, ET AL.,)
)
Plaintiffs,)
)
v.)
)
TOWN OF KENNEBUNKPORT and)
ALL PERSONS WHO ARE)
UNASCERTAINED,)
)
Defendants.)
)

PLAINTIFFS' ANSWER AND
AFFIRMATIVE DEFENSES
TO TOWN OF KENNEBUNKPORT'S
COUNTERCLAIM

(Title to Real Estate Involved)

Plaintiffs Robert F. Almeder, et al., each plaintiff is more fully identified in the complaint and all plaintiffs are referred to collectively as "plaintiffs" herein, by and through counsel, state as their answer and affirmative defenses to defendant Town of Kennebunkport's ("Town") counterclaim, Counts I-V and VII-VIII, as follows¹:

COUNT I (Fee Simple)

1. Plaintiffs admit paragraph 1 of Count I of the Town's counterclaim.
2. Plaintiffs deny paragraph 2 of Count I of the Town's counterclaim.
3. Plaintiffs deny paragraph 3 of Count I of the Town's counterclaim.
4. Plaintiffs are without sufficient information or knowledge to form a belief as to the truth of the allegations set forth in paragraph 4 of Count I of the Town's counterclaim and therefore deny the same.

¹ In response to Count VI (Custom), paragraphs 30 through 33, and Count IX (Offset Taxes), paragraphs 46 through 48, to the Town's counterclaim, plaintiffs are concurrently serving herewith a motion to dismiss said counts pursuant to Rule 12(b)(6) of the Maine Rules of Civil Procedure.

5. Plaintiffs deny paragraph 5 of Count I of the Town's counterclaim.
6. Plaintiffs deny paragraph 6 of Count I of the Town's counterclaim.
7. Plaintiffs deny paragraph 7 of Count I of the Town's counterclaim.
8. Plaintiffs deny paragraph 8 of Count I of the Town's counterclaim.

WHEREFORE, plaintiffs demand judgment in their favor against the Town on Count I of the Town's counterclaim, together with costs, and such other relief, including equitable relief, as is appropriate.

COUNT II (Adverse Possession)

9. Plaintiffs repeat and reassert each answer to paragraphs 1 through 8 to Count I as if more fully set forth herein.

10. Plaintiffs deny paragraph 10 of Count II of the Town's counterclaim.
11. Plaintiffs deny paragraph 11 of Count II of the Town's counterclaim.
12. Plaintiffs deny paragraph 12 of Count II of the Town's counterclaim.
13. Plaintiffs deny paragraph 13 of Count II of the Town's counterclaim.

WHEREFORE, plaintiffs demand judgment in their favor against the Town on Count II of the Town's counterclaim, together with costs, and such other relief, including equitable relief, as is appropriate.

COUNT III (Acquiescence)

14. Plaintiffs repeat and reassert each answer to paragraphs 1 through 8 to Count I and paragraphs 9 through 13 to Count II as if more fully set forth herein.

15. Plaintiffs deny paragraph 15 of Count III of the Town's counterclaim.
16. Plaintiffs deny paragraph 16 of Count III of the Town's counterclaim.
17. Plaintiffs deny paragraph 17 of Count III of the Town's counterclaim.

18. Plaintiffs deny paragraph 18 of Count III of the Town's counterclaim.

WHEREFORE, plaintiffs demand judgment in their favor against the Town on Count III of the Town's counterclaim, together with costs, and such other relief, including equitable relief, as is appropriate.

COUNT IV (Prescription)

19. Plaintiffs repeat and reassert each answer to paragraphs 1 through 8 to Count I, paragraphs 9 through 13 to Count II, and paragraphs 14 through 18 to Count III as if more fully set forth herein.

20. Plaintiffs deny paragraph 20 of Count IV of the Town's counterclaim.

21. Plaintiffs deny paragraph 21 of Count IV of the Town's counterclaim.

22. Plaintiffs deny paragraph 22 of Count IV of the Town's counterclaim.

WHEREFORE, plaintiffs demand judgment in their favor against the Town on Count IV of the Town's counterclaim, together with costs, and such other relief, including equitable relief, as is appropriate.

COUNT V (Dedication and Acceptance)

23. Plaintiffs repeat and reassert each answer to paragraphs 1 through 8 to Count I, paragraphs 9 through 13 to Count II, paragraphs 14 through 18 to Count III, and paragraphs 19 through 22 to Count IV as if more fully set forth herein.

24. Plaintiffs deny paragraph 24 of Count V of the Town's counterclaim.

25. Plaintiffs deny paragraph 25 of Count V of the Town's counterclaim.

26. Plaintiffs deny paragraph 26 of Count V of the Town's counterclaim.

27. Plaintiffs deny paragraph 27 of Count V of the Town's counterclaim.

28. Plaintiffs deny paragraph 28 of Count V of the Town's counterclaim.

29. Plaintiffs deny paragraph 29 of Count V of the Town's counterclaim.

WHEREFORE, plaintiffs demand judgment in their favor against the Town on Count V of the Town's counterclaim, together with costs, and such other relief, including equitable relief, as is appropriate.

COUNT VII (Easement)

30. Responding to paragraph 34 of the Town's counterclaim, plaintiffs repeat and reassert each answer to paragraphs 1 through 8 to Count I, paragraphs 9 through 13 to Count II, paragraphs 14 through 18 to Count III, paragraphs 19 through 22 to Count IV, paragraphs 23 through 29 to Count V.

31. Plaintiffs admit that in paragraph 35 of the Town's counterclaim, the Town has stated as an assertion that "[d]efendant, for themselves and the public, assert the existence of an easement over Goose Rocks Beach for purposes of unfettered public recreation and amusement including, but not limited to, swimming, sunbathing, walking, running, playing, kite flying, sandcastle building, sailing, windsurfing, kayaking, canoeing and other recreational activities, or otherwise generally using the beach in an unfettered manner for recreational and amusement purposes, as well as for fishing, fowling and navigation, subject only to the equivalent rights of others on the same premises." Plaintiffs otherwise deny the allegations stated in paragraph 35 of the Town's counterclaim.

32. Plaintiffs deny paragraph 36 of Count VII of the Town's counterclaim.

33. Plaintiffs deny paragraph 37 of Count VII of the Town's counterclaim.

34. Plaintiffs deny paragraph 38 of Count VII of the Town's counterclaim.

35. Plaintiffs deny paragraph 39 of Count VII of the Town's counterclaim.

WHEREFORE, plaintiffs demand judgment in their favor against the Town on Count VII of the Town's counterclaim, together with costs, and such other relief, including equitable relief, as is appropriate.

COUNT VIII (Implied/Quasi Easement)

36. Responding to paragraph 40 of the Town's counterclaim, plaintiffs repeat and reassert each answer to paragraphs 1 through 8 to Count I, paragraphs 9 through 13 to Count II, paragraphs 14 through 18 to Count III, paragraphs 19 through 22 to Count IV, paragraphs 23 through 29 to Count V, and paragraphs 34 through 39 to Count VII as if more fully set forth herein.

37. Plaintiffs deny paragraph 41 of Count VIII of the Town's counterclaim.

38. Plaintiffs deny paragraph 42 of Count VIII of the Town's counterclaim.

39. Plaintiffs deny paragraph 43 of Count VIII of the Town's counterclaim.

40. Plaintiffs deny paragraph 44 of Count VIII of the Town's counterclaim.

41. Plaintiffs deny paragraph 45 of Count VIII of the Town's counterclaim.

WHEREFORE, plaintiffs demand judgment in their favor against the Town on Count VIII of the Town's counterclaim, together with costs, and such other relief, including equitable relief, as is appropriate.

AFFIRMATIVE DEFENSES

1. The Town's counterclaim, in whole or in part, fails to state a claim upon which relief may be granted.

2. The Town has no right, title or interest in fee simple to any of the respective plaintiffs' properties affected by the tides between the mean high watermark and either 100 rods

seaward from the high watermark or the mean low watermark, whichever is closer to the mean high watermark and, therefore, lacks standing.

3. Custom is not a recognized claim in Maine.

4. The Town's counterclaims are barred, in whole or in part, by the public trust doctrine.

5. The Town's counterclaims are barred by lack of permission and/or acquiescence for the public to traverse and use plaintiffs' properties situated upland from the high water mark and to the seawall or landscaped portion of plaintiffs' properties.

6. The Town does not possess plaintiffs' properties under any claim of right.

7. Plaintiffs paid taxes assessed by the Town on their respective properties.

8. Neither plaintiffs, nor their predecessors, have dedicated their properties, or any portion thereof, to the Town.

9. The Town has failed to comply with requirements of 14 M.R.S. §§ 6651 *et seq.*

10. The Town's counterclaims are barred, in whole or in part, by laches.

11. The Town's counterclaims are barred, in whole or in part, by waiver.

12. The Town's counterclaims are barred, in whole or in part, by estoppel.

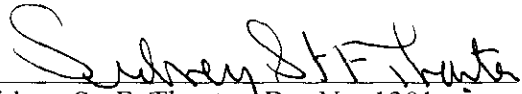
13. The Town's counterclaims are barred, in whole or in part, by the applicable statutes of limitations.

14. The Town's counterclaims are barred, in whole or in part, by the provisions of 36 M.R.S.A. § 713.

15. Plaintiffs reserve the right to raise other defenses to the Town's counterclaims as such defenses become known during discovery or as is otherwise appropriate.

WHEREFORE, plaintiffs request that the court grant judgment for plaintiffs on the Town's counterclaim and plaintiffs be awarded their costs and such further relief including equitable relief, as the court deems just and proper.

Dated: December 11, 2009


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