

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

**STATE OF MAINE'S MOTION  
FOR LEAVE TO INTERVENE AS  
DEFENDANT AND  
INCORPORATED  
MEMORANDUM OF LAW IN  
SUPPORT THEREOF**

NOW COMES the State of Maine, by and through the Office of the Attorney General, and moves for leave to intervene pursuant to M.R.Civ.P. 24 in this matter for the reasons set forth below. Defendant Town of Kennebunkport does not object to this motion, while counsel for Plaintiffs has stated that they will be objecting.

1. This litigation involves the scope and nature of the public's rights to use Goose Rocks Beach in the Town of Kennebunkport, Maine. Plaintiffs claim that the public is limited to engage in only fishing, fowling and navigating in the intertidal area on Goose Rocks Beach. In particular, Plaintiffs seek to bar the general public from engaging in common recreational activities such as walking, sitting and sunbathing on Goose Rocks Beach.

2. For almost 30 years, the State of Maine, through the Office of the Attorney General has been working to protect the public's recreational rights in the shores of the State. The State, and in particular present counsel and other staff, has participated in every proceeding in which those rights have been at issue. *Eaton v. Town of Wells*, 2000 ME 176, 760 A.2d 232;

*Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989); *Opinion of the Justices*, 437 A.2d 597 (Me. 1981); *Flaherty v. Muther*, Cumb. Cty. Super. Ct. No. RE-08-098 (July 30, 2009) (Crowley, J.).

3. In *Bell v. Town of Wells*, 510 A.2d 509 (Me. 1986), the Court had before it the issue of whether the State was an indispensable party in a dispute over the scope of public rights in Moody Beach in the Town of Wells so that sovereign immunity prevented the case from continuing. The Court found that the State was not an indispensable party, and the case did proceed with the participation of the Attorney General. As explained by the Court:

While the State is not an indispensable party in the instant case, we see no reason to prevent the Attorney General's remaining in the case to represent the public interest in Moody Beach. "We recognize that the Attorney General, as the chief law officer of the State, has the power and duty to institute, conduct and maintain such actions and proceedings as he deems necessary for the protection of public rights and to defend against any action that might invidiously interfere with the same." *In re Estate of Thompson*, 414 A.2d 881, 890 (Me.1980); *see also Lund ex rel. Wilbur v. Pratt*, 308 A.2d 554, 558 (Me.1973). The quieting of title at Moody Beach will affect the rights of the public at that beach and may through the persuasive authority of that decision affect public rights at other Maine beaches. Although neither the Colonial Ordinance nor the allegations of the parties disclose any direct interest of the State in the intertidal zone or the upland at Moody Beach requiring it to be a party to this action, the State acting through the Attorney General may decide that the public rights will be more effectively protected through its continued direct intervention than in its absence. *See* M.R.Civ.P. 20(a), 24(b).

*Id.* at 518 (footnote omitted). The State, through the Office of the Attorney General, fully participated in the trial and appeal in that matter.

4. As rights of the public will be resolved in the present suit, under *Bell* the State, through the Attorney General, can and seeks to participate, therefore, as a party defendant.

5. In *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989), in a 4-3 decision, the Court found that public trust rights in the intertidal area were limited to those related to fishing, fowling and navigation. Then-Associate Justice Wathen wrote a strong dissent.

6. The case of *Eaton v. Town of Wells*, 2000 ME 176, 760 A.2d 232, dealt with the public rights to use Wells Beach, which adjoins Moody Beach, in the Town of Wells. The State participated as a party defendant in that matter, focusing on the public trust doctrine. Then-Superior Court Justice Kravchuk decided the case on prescription, and did not reach the public trust issues. Similarly, the majority of the Law Court did not reach the public trust issues, but then-Associate Justice Saufley wrote a strong concurrence stating that the *Bell* decision should be overturned. *Id.* at ¶¶ 50-55, 760 A.2d at

7. More recently, the State intervened in *Flaherty v. Muther*, Cumb. Cty. Super. Ct. No. RE-08-098 (July 30, 2009) (Crowley, J.), which dealt with recreational rights on Secret Beach in the Town of Cape Elizabeth. Again, the State focused primarily on public trust rights. In the decision (attached hereto), Justice Crowley agreed with the views of Justices Wathen and Saufley in *Bell* and *Eaton*, respectively, but concluded he was bound by the majority decision in *Bell*. *Id.* at 25-26, 30. Justice Crowley went on to make lengthy findings in support of his view. *Id.* at 26-30.

8. In *Flaherty*, the Attorney General Office's experience and understanding of the issues assisted the court in making the trial more efficient and shorter.

9. The notice of appeal in *Flaherty* was filed on December 17, 2009, by the oceanfront property owners. The State has filed a cross-appeal on the public trust issues. Depending upon the preparation of the transcript, the matter will likely be argued sometime in the spring.

10. Needless to say, the State has a strong interest in the present suit involving the public rights to engage in recreation at Goose Rocks Beach, and has expertise that will assist the Court in resolving the present dispute. In addition, as is obvious, the foundation of the majority

decision in *Bell* is much criticized, and the State wishes to present the issue again to the Law Court.

11. Plaintiffs will not be prejudiced by the involvement of the Attorney General's Office. Plaintiffs' counsel represented the successful plaintiffs in *Bell*, and is well-versed on the arguments that the State will present.

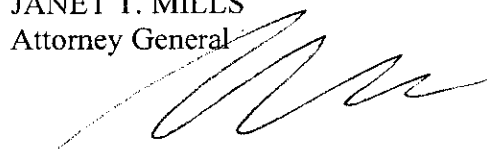
12. In view of the experience of the Attorney General's Office on these issues, assistance to the Town of Kennebunkport will make this matter more efficient and less-costly to both the Town and the Court.

WHEREFORE, this Office respectfully requests that the State of Maine be afforded intervenor status in this matter.

Dated: 12/30/09

Respectfully submitted,

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**NOTICE**

**Pursuant to Rule 7(b)(1), notice is hereby given that any matter in opposition must be filed no later than 21 days after the filing of the enclosed motion unless another time is provided by the Maine Rules of Civil Procedure or set by the Court. Your failure to file a timely opposition will be deemed a waiver of all objections to the motion, which may be granted without further notice or hearing.**

STATE OF MAINE  
CUMBERLAND, ss

STATE OF MAINE  
CUMBERLAND, SS  
CLERK'S OFFICE

SUPERIOR COURT  
CIVIL ACTION  
DOCKET NO. RE-08-098 ✓

ROBERT FLAHERTY, et al.,  
Plaintiffs/Third Party Defendants

2009 JUL 30 P 12:49

v.

JUDGMENT

HELEN MUTHER et al.,  
Defendants/Third Party Plaintiffs

This case arises out of a dispute among various parties living in the Broad Cove neighborhood in Cape Elizabeth, Maine concerning an easement over property owned by Defendants / Third Party Plaintiffs Paul Woods and Helen Muther ("Woods and Muther"). Woods and Muther own the servient estate. The holders of the dominant estate -- a subset of owners of property in the neighborhood -- have sought a declaratory judgment, *inter alia*, with respect to the ownership of property in and around the easement and with respect to the rights and responsibilities of both the dominant and servient estate holders.

As part of what is expected to be a multiple-stage trial process in this case, this Court held an evidentiary hearing from July 14, 2009 through July 23, 2009 at which testimony was taken from Woods and Muther as well as many of the Plaintiffs and Third Party Defendants (collectively called the "J-Lot owners" because of the "J" designator on certain plans specifying the lot they own) and other witnesses including expert witnesses. This Court addresses and makes findings of fact and conclusions of law in this first stage of this case on the issues as they relate to ownership of the property over which the easement lies as well as the immediate, surrounding areas,

including the intertidal zone and the issues as they relate to use of the easement itself and a gate that has been placed at the top of the easement.<sup>1</sup>

## BACKGROUND

### I. Parties

In 2008, Plaintiffs Robert Flaherty, Barbara Cotter, Joseph Cotter, Mary Arnold, Todd Colpitts, Niamh Colpitts, Russell Pierce, Jacqueline Pierce and Paulette York filed suit against Helen Muther, Paul Woods, and the Buffett Coastal Trust. Woods and Muther answered, counterclaimed and filed a third party complaint bringing all of the remaining J-Lot owners into the case. Specifically, the Third Party Defendants are James and Marjorie Moody, Alison Perkins, Paul and Melanie Stewart, Patricia Campbell, Beth and Robert Hess, Jr., Stephen and Elizabeth McGrath, Richard and Kathleen Raubeson, David Sawicki, Diane Beem, Sheryl Flaherty, Peter Connolly, and Nancy and Norman Wulf. Since then, Joseph and Eileen Hetrick were added as Third Party Defendants after they purchased a J-Lot from the Stewarts. All of the original plaintiffs were also renamed as Third Party Defendants. The J-Lot owners who are parties herein are similarly situated, a) because of the provisions in their deeds regarding the same drainage and walkway easement and b) because they have all been sued in the same complaint by the same parties seeking the same remedies.

### II. Pleadings

The following claims, counterclaims and third party claims are addressed in this non-jury stage of the litigation: Plaintiffs' Count I (Declaratory Judgment) and Count II

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<sup>1</sup> Top of the easement refers to the most westerly end of the 20' drainage and walkway easement, which is perpendicular to Running Tide Road.

(Injunctive Relief);<sup>2</sup> Woods and Muther's Counterclaim Count II (Declaratory Judgment), Counterclaim Count III (Overburdening of Easement) and Third Party Plaintiffs' Complaint Count VI (Overburdening of Easement);<sup>3</sup> Third Party Defendants' Counterclaim Count VI (Prescriptive easement to the intertidal zone and above the high-water mark);<sup>4</sup> and finally, the State of Maine's claim for public trust rights in the intertidal zone in front of the Woods and Muther property.

At the next stage in the litigation a jury will decide the following claims, counterclaims, and third party complaints: Plaintiffs' Count III (Damages),<sup>5</sup> Third Party Defendants' Counterclaims Count I (Nuisance), Count II (Harassment), Count III (Invasion of Privacy), Count IV (Tortious Interference with a Prospective Economic Advantage);<sup>6</sup> Raubeson's Counterclaims Count I (Nuisance), Count II (Harassment), Count III (Invasion of Privacy), Count IV (Tortious Interference with a Prospective Economic Advantage); and finally, Woods and Muther's Third Party Complaint Count I (Breach of Indemnification), Count II (Fraud), Count III (Breach of Implied Warranty of Authority), and Count V (Trespass).

### III. Stipulation

The framework of the trial and the Court's decision is based upon the stipulation entered into by the parties on July 2, 2009. The parties have stipulated that the J-Lot

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<sup>2</sup> At closing argument, Plaintiffs' counsel conceded that their claim based on the Public Trust in Intertidal Land Act, 12 M.R.S. §§ 571-573, was not pursued at trial due to the Law Court's prior holding of the statute as unconstitutional in *Bell v. Town of Wells*, 557 A.2d 168, 177 (Me. 1989) (*Bell II*), despite it remaining "on the books."

<sup>3</sup> Woods and Muther's Third Party Complaint Count IV (Declaratory Judgment) regarding the issue of whether the J-Lot owners are bound by the settlement agreement entered into during the prior litigation was resolved in this Court's Summary Judgment Order dated July 8, 2009. In this Order, "Plaintiffs/Third Party Defendants' motion for summary judgment [was] GRANTED insofar as it [sought] a declaration that the J-Lot owners, with the exception of Beth Ellen Hess, were not parties to or bound by the settlement agreement reached in the prior litigation." Order dated July 8, 2009.

<sup>4</sup> At closing argument, Third Party Defendants' counsel conceded that they had not presented evidence to establish Counterclaim Count VII (Dedication). Consequently, the Court does not address this counterclaim herein.

<sup>5</sup> Count IV (Public Trust) is resolved. *See supra* note 2.

<sup>6</sup> Counterclaim Count V (Public Trust) is resolved. *See supra* note 2.

owners "have the right to use the access way to get to the inter tidal zone for uses to which Defendants Helen Muther, Paul Woods and the Buffett Coastal Trust legally cannot object successfully."

#### **IV. Prior Litigation/Settlement Agreement**

The prior litigation and subsequent settlement reached regarding the same drainage and walkway easement at issue in this case is worthy of brief mention. As stated in greater detail in this Court's Summary Judgment Order dated July 8, 2009, Woods and Muther initiated an action against what is now collectively known as the Broad Cove Shore Association (hereinafter "the Association"), docket number RE-05-169 ("the prior litigation"). The Association is comprised of approximately 243 householders located in and around the Broad Cove portion of Cape Elizabeth. Some Association members are also owners of J-Lots. Association members did not have any deeded rights to use the easement. Rather, in the prior litigation the Association asserted rights based on prescriptive use. Ultimately, the parties to the prior litigation entered into a settlement agreement, which granted Association members rights to use the drainage and walkway easement under certain agreed to conditions (e.g., time of day restrictions) and also gave Woods and Muther authority to erect a gate with electronic key card access at the top of the easement. Woods and Muther began construction of the gate after this Court entered its final order in that matter on April 2, 2008. The parties ultimately appealed that order as well as the Court's grant of summary judgment. The Law Court affirmed both decisions. *Muther v. Broad Cove Shore Ass'n*, 2009 ME 37, ¶ 1, 968 A.2d 539, 540.

#### **V. Findings of Fact**

After hearing all of the evidence, the Court makes the following findings of fact:

1. Mary Arnold is the owner of certain real property located on Running Tide Road in Cape Elizabeth, Maine, as the said real property is described in a deed recorded in the Cumberland County Registry of Deeds in Book 13051 Page 185.
2. Todd and Niamh Colpitts are the owners of certain real property located on Masefield Terrace in Cape Elizabeth, Maine, as the said real property is described in a deed recorded in the Cumberland County Registry of Deeds in Book 25728 Page 81.
3. Barbara Cotter is the owner of certain real property located on Running Tide Road in Cape Elizabeth, Maine, as the said real property is described in a deed recorded in the Cumberland County Registry of Deeds in Book 18538 Page 257.
4. Robert and Sheryl Flaherty are the owners of certain real property located on Running Tide Road in Cape Elizabeth, Maine, as the said real property is described in a deed recorded in the Cumberland County Registry of Deeds in Book 15892 Page 245.
5. David and Susan House are the owners of certain real property located on Running Tide Road in Cape Elizabeth, Maine, as the said real property is described in a deed recorded in the Cumberland County Registry of Deeds in Book 12046 Page 273.
6. David and Ellen Meagher are the owners of certain real property located on Running Tide Road in Cape Elizabeth, Maine, as the said real property is described in a deed recorded in the Cumberland County Registry of Deeds in Book 18807 Page 282.
7. Jacqueline and Russell Pierce are the owners of certain real property located on Masefield Terrace in Cape Elizabeth, Maine, as the said real property is described in a deed recorded in the Cumberland County Registry of Deeds in Book 14775 Page 272.
8. Richard and Kathleen Raubeson are the owners of certain real property located on Running Tide Road in Cape Elizabeth, Maine, as the said real property is described in a deed recorded in the Cumberland County Registry of Deeds in Book 13857 Page 267.
9. Paulette York is the owner of certain real property located on Running Tide Road in Cape Elizabeth, Maine, as the said real property is described in a deed recorded in the Cumberland County Registry of Deeds in Book 25386 Page 167.
10. Joseph and Eileen Hetrick are the owners of certain real property located on Running Tide Road in Cape Elizabeth, Maine, as the said real property is described in a deed recorded in the Cumberland County Registry of Deeds in Book 26310 Page 134.

11. Patricia Campbell is the owner of certain real property located on Running Tide Road in Cape Elizabeth, Maine, as the said real property is described in a deed recorded in the Cumberland County Registry of Deeds in Book 24095 Page 240.
12. James and Marjorie Moody are the owners of certain real property located on Running Tide Road in Cape Elizabeth, Maine, as the said real property is described in a deed recorded in the Cumberland County Registry of Deeds in Book 15555 Page 17.
13. Alison Perkins is the owner of certain real property located on Running Tide Road in Cape Elizabeth, Maine, as the said real property is described in a deed recorded in the Cumberland County Registry of Deeds in Book 9906 Page 186.
14. Paul and Melanie Stewart are the owners of certain real property located on Running Tide Road in Cape Elizabeth, Maine, as the said real property is described in a deed recorded in the Cumberland County Registry of Deeds in Book 24158 Page 34.
15. Robert and Beth Ellen Hess were formerly the owners of certain real property located on Masefield Terrace in Cape Elizabeth, Maine, as the said real property is described in a deed recorded in the Cumberland County Registry of Deeds in Book 17759 Page 172.
16. Stephen and Elizabeth McGrath are the owners of certain real property located on Running Tide Road in Cape Elizabeth, Maine, as the said real property is described in a deed recorded in the Cumberland County Registry of Deeds in Book 12882 Page 323.
17. Nancy and Norman Wulf, as Trustees under the Nancy N. Wulf Living Trust, are the owners of certain real property located on Running Tide Road in Cape Elizabeth, Maine, as the said real property is described in a deed recorded in the Cumberland County Registry of Deeds in Book 25766 Page 217.
18. Each of the parties listed in 1 through 17 have deeds that make a reference to subdivision plans specifying the lot they own. Exs. 2 & 3. Throughout the trial, the parties relied primarily on the plan approved by the Cape Elizabeth Planning Board on April 16, 1970, and recorded in the Cumberland County Registry of Deeds in Plan Book 83, Page 6 (hereinafter "the 1970 Plan"). Ex. 3. The Court refers exclusively to the 1970 Plan in this decision.
19. Paul Woods and Helen Muther are Trustees of the Buffett Coastal Trust, and as such are owners of certain real property located on Running Tide Road in Cape Elizabeth, Maine, as the said real property is described in a deed recorded in the Cumberland County Registry of Deeds in Book 21048, Page 85. The Woods and Muther property is a "J-lot," similar to the other J-Lots because it contains a reference to the 1970 Plan. It is Lot J-46.
20. The 1970 Plan contains a layout of the lots in the subdivision, with areas indicated for easements and rights of way.

21. The 1970 Plan designates an area across Lot J-46 (which currently belongs to Woods and Muther) as "20' Drainage and Walkway Easement." The deed to Woods and Muther for Lot J-46 states: "This conveyance is made subject, however, to the drainage and walkway easements shown on said plan."
22. The 1970 Plan does not contain any restrictions on the uses of the drainage and walkway easement, such as numbers of persons or times of day for use. It does not provide for a gate or surveillance equipment. It does not contain any restrictions on the uses and activities in the intertidal zone for people using the easement.
23. The "drainage" portion of the easement was further described and delineated in a deed from I. Alan Balfour and Isabel S. Balfour to the Town of Cape Elizabeth, dated April 23, 1970, and recorded in the Cumberland County Registry of Deeds in Book 8556, Page 751. The deed granted to the Town of Cape Elizabeth the right to use the easement for drainage purposes, and provided "no building or any kind of permanent structure shall be erected on such strip by the Grantors, their heirs and assigns."
24. The intertidal area and some sections of the upland area at the end of the drainage and walkway easement have become popularly known as "Secret Beach."
25. Lot J-46 is bounded on the south by land now or formerly of a Dr. William Holt, who is not a party to this action. Unlike the properties of the parties herein, Dr. Holt's property is not a J-Lot.
26. Mary Arnold has gone through the drainage and walkway easement on Lot J-46 and used Secret Beach regularly between 1985 and 1995.
27. Mary Arnold was not challenged by any person until 2004 for the uses that she made of the beach area.
28. Norman Wulf regularly used the drainage and walkway easement and the beach from the early 1970s through 2008 and ongoing. He was a guest, and a family member of the prior owners of the property. He was not challenged or otherwise prevented from using the beach during his time of use. Both Norman Wulf and his wife, Nancy Wulf, used the intertidal and the upland areas of Secret Beach. He is now a trustee of the trust that owns a J-Lot.
29. Robert Flaherty regularly visited the beach area for many years, at least since 1969. He has used the beach area for general recreational purposes during that time. He acquired a J-Lot in December 1999.
30. Bruce Balfour is the son of the developer I. Alan Balfour. Bruce Balfour used the intertidal zone of Secret Beach from 1969 through the early 1970s, for recreational activities. He was not challenged by the owner of the intertidal zone during that time.

31. Evidence from Robert Flaherty, Bruce Balfour, Nancy Wulf, Norman Wulf, and Mary Arnold shows usage, since 1969, of the intertidal zone of Secret Beach in front of Lot J-46 for recreational uses such as walking, swimming, reading, sitting, and similar activities.
32. Other J-Lot owners have regularly used the easement to access Secret Beach for recreational purposes, without being interfered with or challenged before 2004.
33. Several individuals, including J-Lot owners, went to the beach area and had bonfires and parties. None of the individuals were challenged by any other persons during their period of usage before 2004.
34. J-Lot owners used the beach area during the period between 1969 and 2008 for many purposes, including sunbathing, walking, throwing stones in the water, swimming, picnicking, in addition to fishing and navigating. There was no evidence of fowling on the beach.
35. No signs or restrictions on access were posted at the entrance to the easement until 2005.
36. Signs that were posted in 2005 restricted access to persons who were not J-Lot owners.
37. From 2005 to the present, Mr. Woods has challenged, on different occasions, individual J-Lot owners and their family members who were using their right of access through the drainage and walkway easement.
38. From 2005 to the present, Mr. Woods has confronted individuals, including J-lot owners who wished to use the easement and the beach.
39. Mr. Woods testified that he did not tell J-Lot owners that they could only fish, fowl or navigate in the intertidal zone. This testimony is not credible. Mr. Woods has consistently asserted that the easement is limited to "walking access to the intertidal zone for fishing, fowling and navigation." *See e.g.*, Ex. 36.
40. From the time that he moved into the property in 1999, prior to owning it, Mr. Woods has taken photographs of individuals who were using the easement and the beach area.
41. Mr. Woods and Ms. Muther have been hyper-vigilant about monitoring the use of the easement and of Secret Beach.
42. Most of the disturbances, and all of the criminal activity observed by Woods and Muther at Secret Beach were by unknown teenagers and others, not by J-Lot owners or their families.
43. Mr. Woods intended to change the use of the easement and intertidal zone when he acquired ownership of Lot J-46 in 2004.

44. Some J-Lot owners are frightened by the behavior of Mr. Woods in his confrontation of individuals at the easement area. They have limited their use of the easement and the beach out of aversion to confrontation.
45. In May of 2008, Mr. Woods erected a gate near the top of the easement area; and he erected a fence across the entrance to the easement area.
46. The purpose of erecting the gate was not to exclude J-Lot owners from accessing the easement. The gate was erected after the settlement agreement reached in the prior litigation with the Association and is consistent with that agreement.
47. As a result of some of the confrontations between individuals attempting to assert their rights in the easement and Mr. Woods, Mr. Woods called the Cape Elizabeth Police several times.
48. Mr. Woods did not obtain the consent of the individual J-Lot owners prior to constructing the gate.
49. Mr. Woods has proposed a system for the use of the drainage and walkway easement via an electronic gate and card system, which would be under his control.
50. Woods and Muther would be the sole persons responsible for activating and deactivating the electronic key cards.
51. Several J-lot owners are concerned about whether Mr. Woods would abuse the authority of controlling the gate.
52. The electronic gate system, like any electronic gate system, is subject to failures in operation.
53. Mr. Woods installed an electronic surveillance camera system on the drainage and walkway easement, without the consent of the individual J-Lot owners.
54. Most of the J-Lot owners have expressed concern about the need for the surveillance system and about the past and current use of the photographs obtained through the surveillance system.
55. Mr. Woods installed a system of motion detecting floodlights around the easement area, without the consent of the individual J-Lot owners.
56. Most of the J-Lot owners would prefer not to have the floodlights directed onto the easement.
57. Several of the J-Lot owners would like the ability to use the walkway easement and the beach at any time of the day or night; and they do not wish to have restrictions on the times of day when they can access and use the beach. For example, some J-Lot owners would like to fish at night.

58. There is no evidence that any owner of Lot J-46 prior to Woods and Muther either restricted access to any J-Lot owner through the easement or restricted access or usage on the beach during their time of ownership.
59. Woods and Muther resided in the house on Lot J-46 for several years prior to their acquiring ownership of the real estate. During their period of residence, they had the opportunity to observe the activity of individuals, including J-Lot owners, who were using the beach for recreational purposes. They also observed J-Lot owners using portions of the upland portion of Dr. Holt's land.
60. Woods and Muther have attempted to prevent individuals, including J-Lot owners, from entering onto the upland portion of Dr. Holt's property after they have crossed through the drainage and walkway easement.
61. The eastern boundary of Lot J-46 is the mean high water mark.
62. The owners of Lot J-46 do not own easterly of the mean high water mark.
63. Dr. Holt has owned the real estate to the south of the Woods and Muther property since 1987. About 50% to 60% of Secret Beach is in front of the Holt property.
64. There is a large pile of rocks at the end of the easement, and this pile has made access to the intertidal zone difficult for some individual J-lot owners or members of their families. This pile of rocks was placed in the easement by the Town of Cape Elizabeth for drainage purposes. Neither Mr. Woods nor Ms. Muther had any role in the placement of the rocks by the Town. As a result of the placement of the rocks by the Town, it is much more difficult for the J-Lot owners to get to the intertidal zone without trespassing on Dr. Holt's property.
65. There are various ways to physically access Secret Beach. Secret Beach may be accessed via the drainage and walkway easement, via Dr. Holt's property, via Woods and Muther's property, via the Raubeson's property, from the shoreline either north from Shore Acres or south via Hannaford Cove, as well as by the sea. Some of these avenues of access would involve a trespass.
66. It is very difficult to decipher when one is in the intertidal zone versus above the mean high-water mark when utilizing Secret Beach.
67. It is a very complex, highly technical and expensive undertaking to determine with precision where the mean high-water mark lies.

## VI. Historical Use

### A. Creation of the Drainage and Walkway Easement

The J-Lot owners' rights of access and use of Secret Beach through the drainage and walkway easement are by virtue of references to recorded subdivision plans. Therefore, the J-Lot owners have an "easement by implication based upon estoppel." *Callahan v. Ganneston Park Dev. Corp.*, 245 A.2d 274, 278 (Me. 1968). "When a conveyance expressly refers to a plan, that plan becomes a part of the deed, with the same force and effect as if copied into the deed, and is subject to no other explanation by extraneous evidence than if all the particulars of the description had been actually inserted in the body of the deed." *Bradstreet v. Bradstreet*, 158 Me. 140, 146 (1962).

### B. Boundary of Lot J-46

The next historical issue is the easterly boundary of the Woods and Muther property. The issue is whether Woods and Muther (a) have title to any land below the "top of bank," and/or (b) have title to the area between mean high water and mean low water (i.e. the intertidal zone). "The existence and nature of particular boundaries is a question of law and the location of those boundaries is a question of fact." *Eaton v. Town of Wells*, 2000 ME 176, ¶ 19, 760 A.2d 232, 240. Construction of the language of a deed is a question of law. *Id.*

The 1970 Plan is referenced in Woods and Muther's deed and describes the boundaries of the lot they own, Lot J-46. The deeds and plans in all parties' chains of title make clear that the easterly boundary of Lot J-46 is the mean high water mark of the Atlantic Ocean. This is essentially an undisputed issue as the J-Lot owners' own expert witness, Attorney Robert Danielson, conceded as much. The J-Lot owners' claim that the easterly boundary of Lot J-46 is the top of the bank is rejected.

At the outset, Woods and Muther had color of title<sup>7</sup> to the intertidal zone. This color of title was based on the 1972 Balfour to Cohen deed. However, Woods and Muther's color of title vanished through further chain of title research and expert testimony presented at trial. In Woods and Muther's chain of title, the deed to I. Alan Balfour from Raymond E. Jordan, dated December 12, 1967, and recorded in the Cumberland County Registry of Deeds in Book 3023, Page 188, contains the phrases, "to the Atlantic Ocean," and "by the shore."

As a matter of law, a deed reference 'by the shore' calls for a measurement along the contour of the high-water mark . . . The 'shore' is the ground between the ordinary high and low water mark – the flats – and is a well defined monument. As a monument, the shore limits the grant to the high-water mark. Monuments control inconsistent courses, distances and quantity.

*Hodgdon v. Campbell*, 411 A.2d 667, 672 (Me. 1980) (internal citations and quotations omitted). Thus, Mr. Balfour did not have fee title to the intertidal zone, and he was unable to convey it to the initial owners of Lot J-46, even if he had intended to do so. "[A] person can convey only what is conveyed into them." *Eaton*, 2000 ME 176, ¶ 19, 760 A.2d at 240.

Therefore, as a matter of law, the eastern boundary of Lot J-46 is the approximate mean high water mark. Woods and Muther have not provided credible evidence that they have title to any land below the approximate mean high water mark, which includes the intertidal zone.

For these reasons, Woods and Muther do not hold "title in fee" to the intertidal zone below the mean high water mark. Accordingly, their rights in the intertidal zone are different from the property owners who were plaintiffs in *Bell v. Town of Wells* ("*Bell II*") 557 A.2d 168, 170 (Me. 1989) (stipulation that property owners owned the intertidal

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<sup>7</sup> Color of title is defined as: "A written instrument or other evidence that appears to establish title but does not in fact do so." Black's Law Dictionary 283 (8th ed. 2004).

zone), and from those in *Eaton*, 2000 ME 176, ¶ 6, 760 A.2d at 236 (plaintiffs proved their title). However, as discussed below, Woods and Muther have standing to object to activities that occur in the intertidal zone insofar as those persons use the drainage and walkway easement to access that area and that usage results in an overburdenment of the easement. *See infra* section IX.

## VII. Declaratory Judgments

As the day is long, so is the list of questions regarding the scope of the drainage and walkway easement over Lot J-46. The findings and conclusions within this declaratory judgment regarding the scope of the easement provide guidance to the parties, but do not attempt to resolve every imaginable scenario that may arise on the easement or at Secret Beach. Going forward, all parties as neighbors whose lives are quite literally connected, if only through the right of way in dispute in this case, should act with mutual respect and tolerance for each other in implementing this Order.

Woods and Muther's complaint for a declaratory judgment and the J-Lot owners' complaint for a declaratory judgment ask the Court to decide the rights of the J-Lot owners to use the drainage and walkway easement which burdens Woods and Muther's property. The 1970 Plan indicates that the easement is a "20' Drainage and Walkway" easement. "A court construing the language of a deed . . . must first attempt to construe the language . . . by looking only within the 'four corners' of the instrument." *Pette v. Young*, 2001 ME 156, ¶ 8, 783 A.2d 637, 640. "If the deed is unambiguous, the court must construe the deed without considering extrinsic evidence; if the deed is ambiguous, however, the court may admit extrinsic evidence of the parties' intent." *North Sebago Shores v. Mazzaglia*, 2007 ME 81, ¶13, 926 A.2d 728, 733. "To determine the objectively manifested intent of the parties, a court may consider the practical construction which the parties placed upon [the deed] by their conduct, by acts

done by one party and acquiesced in by the other, especially when such conduct is proven to have continued for a long time." *Guild v. Hinman*, 1997 ME 120, ¶ 9, 695 A.2d 1190, 1193. Although "[s]ubsequent use by the parties may also be relevant," *id.*, its probative value diminishes the farther away it is from the original conveyance. To hold otherwise, would allow subsequent parties to re-write history through their ongoing use. Rather, the focus is, and must be, on determining the original intent of the grantor *at the time of the conveyance*.

**A. Intertidal Zone and Secret Beach**

It is clear from the 1970 Plan that the drainage and walkway easement is for ingress and egress to Secret Beach. It is also clear that the drainage and walkway easement is twenty (20) feet wide. Beyond that, the 1970 Plan is silent. As the Court indicated during the trial, the Court finds that there is an ambiguity in the phrase "Walkway Easement." Therefore, the Court considers extrinsic evidence to determine the intent of the parties' to the original conveyance. *See Badger v. Hill*, 404 A.2d 222 (Me. 1979) (holding where a reference to "pedestrian right of way or foot path" in the easement was ambiguous, review of why it was necessary to reach the water was required). "Generally access to a body of water is sought for particular purposes beyond merely reaching the water, and where such purposes are not plainly indicated, a court may resort to extrinsic evidence to assist the court in ascertaining what they may have been." *Id.* at 226. When the purpose of an easement is not provided, the purpose is determined by reference to the actual or presumed intent of the parties at the time the grant was made. *Chase v. Eastman*, 563 A.2d 1099, 1102 n. 3 (Me. 1989).

The circumstances surrounding Mr. Balfour's creation of the easement demonstrate his intention to create a passageway to the intertidal zone for general recreational purposes. First, the delineation on the 1970 Plan of the drainage and

walkway easement ending at the intertidal zone shows that access to the intertidal zone was intended. Second, and more importantly, the use of the intertidal zone prior to, during, and immediately after the conveyance demonstrates at least the original grantor's acquiescence to this type of activity and at most his actual or presumed intent in creating the easement to give easement holders access to Secret Beach for recreational purposes. For example, evidence from Robert Flaherty, Bruce Balfour, Nancy Wulf, Norman Wulf, and Mary Arnold shows a consistent pattern, since 1969, of usage of the intertidal zone of Secret Beach in front of Lot J-46 for recreational uses such as walking, swimming, reading, sitting, and similar activities. Before Woods and Muther purchased Lot J-46 in 2004, no one objected to this use.

In sum, around the time of the original conveyance most of the activity occurring in the intertidal area was not simply fishing, fowling, and navigation but were rather the recreational activities generally associated with the beach. These activities reflect the general perception of permissible activities on the beach. For these reasons, the Court concludes that it was the intent of I. Alan Balfour, in creating the drainage and walkway easement on the 1970 Plan, to provide access to Secret Beach to J-Lot owners for general recreational purposes.

#### **B. Use of the Easement**

There are several remaining issues with respect to scope that must be addressed. The first issue is what types of use can be made of the drainage and walkway easement. Woods and Muther, not surprisingly, take a strict view of the term "walkway" and argue that only pedestrian foot traffic is permitted. Certainly, foot traffic is permissible on the "walkway easement," whereas motorized vehicles are certainly prohibited. However, Woods and Muther's interpretation of "walkway" is too narrow considering Balfour's intent to provide access to Secret Beach for recreational purposes for the J-Lot

owners in Broad Cove. Thus, wheeled apparatuses incidental to foot traffic, such as baby strollers, wagons and wheelchairs fall within the scope of the easement. Other modes of non-motorized travel, such as bicycles, are likewise within the scope of the easement. Wheeled apparatuses incidental to J-Lot owners exercising their public trust rights to fish, fowl, and navigate in the intertidal zone, such as bringing kayaks on wheels, are also within the scope of the easement.

The second issue is when the J-Lot owners can use the easement. Woods and Muther propose a 9 a.m. to sunset time restriction on the use of the easement as reasonable. There are no restrictions on the 1970 Plan regarding use of the intertidal zone at any time of day or night. The Court rejects Woods and Muther's proposal as an unreasonable burden on the J-Lot owners as owners of the dominant estate in this easement relationship. It stands then, as it has for decades, that J-Lot owners may use the easement, without time restrictions. Any use of the easement must be reasonable and not interfere with Woods and Muther's quiet enjoyment of their property.

The third and final issue is who may use the easement. The description of the easement as a "20' Drainage and Walkway" easement provides no detail concerning *who* may use the easement. As such, in determining the scope of the easement as it relates to who is entitled to use the easement this Court must again determine what the parties intended when the property was originally conveyed to determine what the appropriate scope of the easement is. Certainly, J-lot owners, occupants, and guests are permitted to use the easement. The Court finds it absurd to suggest that the record owner of the J-Lot accompany the other occupants or guests to use the easement, as suggested by Woods and Muther. Such a holding would require a husband and wife (such as Joseph Cotter-non-owner and Barbara Cotter-owner) to always make use of the easement together. This certainly was not the intent of the grantor. Rather, the Court

finds that it was the intent of the grantor to allow the holders of the easement, and a reasonable number of guests (acting with the owners' permission), to use the easement to access Secret Beach. It is conceivable that at some point a J-Lot owner could abuse such access by, for example, inviting large groups of individuals to use the easement over a period of time. This type of use, would be inconsistent with the historic pattern and use of the beach, and would in all likelihood be deemed an overburdenment of the easement. This is true not because the J-Lot owner allowed guests to use the easement but because the J-Lot owner would have allowed a number of guests to use the easement that is inconsistent with the scope of the easement as it was defined at the time of the conveyance. See Paul G. Creteau, *Maine Real Estate Law* 116 (1969) (stating that a "use in excess of the 'normal development' of the dominant estate results in a surcharge of the easement.") (emphasis in original)<sup>8</sup>; *But see Gutcheon v. Becton*, 585 A.2d 818, 822 (Me. 1991) (holding that "[i]t is well settled that a mere increase in the volume of traffic across the access road will not constitute a *per se* overburdening").

As stated above, it is impractical and impossible for this Court to outline every permitted and prohibited activity on the drainage and walkway easement. This Order provides guidelines to the parties, which will allow everyone involved to act reasonably and avoid any further judicial involvement, if they so choose.

### VIII. Injunctive Relief

The next issue is whether the presence of a gate with an electronic access system is reasonable for access to the drainage and walkway easement, if Woods and Muther provide key cards (and replacement cards) to all J-Lot owners at no cost. Other courts

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<sup>8</sup> The accompanying example to this text is illustrative: "A and B are adjacent landowners. A conveys to B an easement to take water from a well located on A's land. At the time of the conveyance B is using his land as a private residence. B changes the residence into a hotel and continues to use the well to supply water to the hotel, thus leaving an inadequate supply for A. This constitutes a surcharge of the easement." Paul G. Creteau, *Maine Real Estate Law* 116 (1969).

have addressed this specific issue with varying outcomes. See *Annotation*, Daniel E. Feld, *Right to Maintain Gate or Fence Across Right of Way*, 52 A.L.R. 3d 9, § 23. Some factors to consider include: the presence of the gate across the easement at the time of the grant; the agricultural use of the servient estate; and evidence that the purpose or effect of the gate was not to obstruct the use of the way. *Id.* § 2[a]. In Maine, the dominant tenement “may properly be subjected to gates and bars not unreasonably established.” *Ames v. Shaw*, 82 Me. 379, 382, 19 A. 856, 856 (1890). The *Ames* court held that the slight burden on the dominant estate in opening a gate was not unreasonable when the easement was for agricultural purposes. *Id.* In contrast, in *Goodale v. Goodale*, the court held that the specific language in the deed prohibited a gate. 107 Me. 301, 303, 78 A. 567, 568 (1910) (quoting the deed language stating that the lane should “be kept open in the same manner as the lane connecting therewith . . .”).

In this case, until May 2008, no gate encumbered the drainage and walkway easement. The gate was erected after Woods and Muther entered into a settlement agreement with the Association in the prior litigation and it is consistent with that agreement. Woods and Muther’s purpose for erecting the gate was not to exclude J-Lot owners from accessing the drainage and walkway easement.

This access system, although widely used by businesses around the State, is not without functional flaws. However, the Court finds the potential for malfunctioning is negligible, but the potential for abuse or manipulation by Woods and Muther is substantial. Woods and Muther would be the sole persons responsible for activating and deactivating the electronic key cards. Woods and Muther’s monitoring of the easement and Secret Beach, via the surveillance cameras or through personal observation has been constant and unrelenting. Confrontations with J-Lot owners and

others have been consistent since Woods and Muther purchased Lot J- 46 in 2004. Needless to say that there is tension between the J-Lot owners and Woods and Muther.

In sum, the J-Lot owners have shown that it is inconvenient and impractical to have a gate with electronic access controlled solely by Woods and Muther. Indeed, it requires J-Lot owners and their guests to be tethered to the electronic key card anytime they wish to use the drainage and walkway easement. Such a gate would be an unreasonable restriction to the access of J-Lot owners, despite the fact that Woods and Muther would provide electronic key cards at no charge. Therefore, the Court holds that Woods and Muther must remove the gate that is situated across the drainage and walkway easement.

Similarly, the presence of surveillance cameras at the gate area creates an impediment to access of the drainage and walkway easement, because it discourages J-Lot owners from exercising their right of passage that they have historically enjoyed. Therefore, the surveillance cameras are an unreasonable burden on the J-Lot owners, as holders of the dominant estate. The surveillance cameras must also be removed.

With respect to the floodlights, the Court holds that the lights, which are located off of the drainage and walkway easement but illuminate the walkway, are reasonable and may remain.

The drainage and walkway easement that burdens Lot J-46 is a private right of way for the benefit of the J-Lot owners. It is not a public easement. That said, Woods and Muther may post signage at the top of the easement depicting the lot numbers in Broad Cove that benefit from the easement in an effort to deter trespassing. Likewise, Woods and Muther have a right to request substantiation from easement users of their right to be there because Woods and Muther have a right to exclude individuals who do not have deeded or contractual rights to use the easement. This right to question

individuals using the easement is not unlimited; rather, the inquiry should be brief and civil. In this way, Woods and Muther can exercise their property right to exclude individuals while not unreasonably interfering with J-Lot owners' rights to use the easement to access Secret Beach.

## **IX. Overburdening**

Having determined the scope of the easement, the court now addresses whether J-Lot owners have overburdened the easement. The Court must first address the threshold question of whether Woods and Muther have standing to object to the activities of the J-Lot owners in the intertidal zone in front of their property. As stated above, any claim of standing based on color of title is without merit given the evidence and this Court's decision that Woods and Muther own to the high-water mark, and do not own the intertidal zone. This conclusion, however, does not speak to the issue of whether the J-Lot owners' use of the drainage and walkway easement to access the intertidal zone for anything other than fishing, fowling, or navigation, or to access the upland properties of Woods and Muther or adjacent owners, is an overburdenment of the easement.

### **A. In General**

In general, Woods and Muther have standing to restrict behavior in the intertidal zone only insofar as it affects, and ultimately changes the scope of the easement beyond the intent of the grantor.<sup>9</sup> For example, if there was evidence to suggest that historically J-Lot owners only used the drainage and walkway easement to access the intertidal zone for fishing, fowling, or navigation and then over time the use expanded to include

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<sup>9</sup> Counsel for Woods and Muther conceded that if the J-Lot owners got to Secret Beach from any of its other access points (e.g., by sea, Holt's property, or Raubeson's property) then Woods and Muther would not have standing to object to any activities occurring in the intertidal zone.

recreational activities the Court would look to see whether this change in use had an effect on the easement. *See discussion supra* section VIIB at 17.

### B. Overburdening Analysis

There are two different analyses for an overburdening claim. The test employed depends on the relationship of the parties involved in the dispute. *Poire v. Manchester*, 506 A.2d 1160, 1162-63 (Me. 1986). The touchstone of both tests is reasonableness of the use. *Id.*; *see also Hermansen & Richards, MSBA Practice Series, Maine Roads and Easements* § 3.5.2.4. The first test, the so-called “Overburdening Analysis” is used where the dispute arises between a dominant and servient tenement, as is the case here.<sup>10</sup> The overburdening analysis evaluates “whether it is reasonable to conclude that a particular use was within the contemplation of the parties to the conveyance and, in that context, whether the contested use made of the servient estate by the dominant estate exceeds the rights granted to the user.” *Poire*, 506 A.2d at 1163.

Most of the activities at Secret Beach, historically and presently, are recreational. The activities were not limited to fishing, fowling, or navigation. Overall, the use of Secret Beach by J-Lot owners and others can be characterized as intermittent and decentralized, with more regular usage during the summer months. This type of use has been consistent since the creation of the easement. Therefore, the Court concludes that J-Lots owners’ recreational use of Secret Beach was within the contemplation of the parties to the original conveyance.

With respect to the rights of the grantor at the time of the conveyance, it is clear that Balfour did not have rights in the intertidal zone at the time of the creation of the easement. However, at that time the public trust rights in the intertidal zone were

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<sup>10</sup> In instances where the dispute is between holders of identical easements the test is the so-called “Reasonable in Comparison” test, which evaluates “whether the actual use made by one is reasonable in comparison with the actual use made by the others.” *Poire*, 506 A.2d at 1163.

unsettled. In fact, even after the 1989 decision in *Bell II* there are still significant questions looming with respect to public trust rights.<sup>11</sup>

Therefore, under the Overburdening Analysis, the J-Lot owners have not overburdened the easement by using the easement to access the intertidal zone on Secret Beach for recreational purposes. However, the use of the drainage and walkway easement to access neighboring lands and Woods and Muther's upland are different matters entirely.

The J-lot owners' use of the drainage and walkway easement to access the upland of either Woods and Muther (outside the 20' drainage and walkway easement) or neighboring landowners, specifically that of Dr. Holt is not permitted. An easement that allows an easement holder to travel to one property is not allowed to use that same easement to travel to a separate property. *Farley v. Bryant*, 32 Me. 474 (1851); see also *Lakeside at Pleasant Mountain Condo. Ass'n v. Town of Bridgton*, 2009 ME 64, ¶ 18, \_\_\_ A.2d \_\_\_, \_\_\_. Dr. Holt's property was not created as part of either plan that grants the J-Lot owners use of the drainage and walkway easement over Woods and Muther's property. Accordingly, this Court determines that a J-Lot owner's use of the easement to cross over to Holt's property would be an impermissible overburdening of the easement. Woods and Muther may restrict the use of the easement to prevent persons from using the easement to access Holt's upland property.<sup>12</sup>

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<sup>11</sup> From 1641 until 1989 the rights of the public in the intertidal zone along Maine's coast was still an open question. In *Bell II*, the Law Court addressed this issue and held that the public trust rights are limited to fishing, fowling and navigation. 557 A.2d at 178. Woods and Muther's anachronistic attempt to overlay the holding in *Bell II* with Balfour's intent is not supported in this case given the testimony of individuals using the beach for recreational purposes around the 1970s, and more generally, given the practices and varying beliefs of the public from the 1600s until 1989.

<sup>12</sup> The J-Lot owners complain that the rocks at the end of the drainage and walkway easement impede their access to the intertidal zone. However, the Court finds that the Town of Cape Elizabeth, not Woods and Muther, placed the rocks at the end of the easement. If the J-Lot owners have a complaint regarding the rocks, or a request for stairs or some other graduated descent that would make the area more passable then that complaint must be brought to the Town of Cape Elizabeth. The Town is not a party in this matter.

## X. Prescription

Some of the J-Lot owners (Moody, Perkins, Stewart, Campbell, Hess, McGrath, Wulf) seek prescriptive rights to both the intertidal zone in front of Woods and Muther's property as well as Woods and Muther's upland. The remaining J-Lot owners assert prescriptive rights only to the intertidal zone.<sup>13</sup> In order to establish a claim for an easement by prescription a party "must prove (1) continuous use (2) for at least 20 years (3) under a claim of right adverse to the owner (4) with his knowledge and acquiescence, or (5) a use so open, notorious, visible and uninterrupted that knowledge and acquiescence will be presumed." *Eaton*, 2000 ME 176, ¶ 32, 760 A.2d at 244. The Court treats the J-Lot owners as a "class of persons" with regard to their prescriptive claims. *See* 14 M.R.S. § 812 (2008) (allowing a "class of persons" to acquire easement rights by adverse possession). Given this characterization, each J-Lot owner need not individually meet all of the elements for a prescriptive claim, but rather their prescription claims succeed or fail based on their use as J-Lot owners, a subset of the public at large.<sup>14</sup>

Nevertheless, the Court does not reach the substantive elements of the J-Lot owners' prescriptive claims for use of the intertidal zone in front of Woods and Muther's property because the true owner of the property is not a party to this case. *Lamson v. Cote*, 2001 ME 109, ¶ 20, 775 A.2d 1134, 1139 (holding that a prescriptive claim was "not ripe for adjudication until an owner of the land in dispute [was] declared."). As stated above, the Court has concluded that Woods and Muther are not the owners of the intertidal zone in front of Lot J-46. That does not, however, answer the question of

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<sup>13</sup> The State withdrew its claim for a *public* prescriptive easement during a trial management conference held on July 2, 2009. The State confirmed this withdrawal in a letter dated July 29, 2009.

<sup>14</sup> The treatment of J-Lot owners as a class of persons with regard to their prescriptive claims is consistent with the position taken by this Court throughout this litigation. *See e.g.*, Summary Judgment Order dated July 8, 2009.

who is the true owner. Having failed to name the true owner of the intertidal zone, whatever prescriptive claim the J-Lot owners have to the intertidal zone in front of Lot J-46 is not ripe for adjudication.

As to the merits of the J-Lot owners' prescriptive claim to the upland of Lot J-46, the J-Lot owners failed to meet their burden of demonstrating continuous use for a period of 20 years, even under the more expansive characterization of J-Lot owners as a "class of persons." The only testimony relevant to these elements is testimony of individuals who were J-lot owners or acting in privity with J-Lot owners *at the time of their use*.

From this Court's review of the evidence, use of the upland area in front of Lot J-46 was limited prior to 1999. No evidence was presented that any J-Lot owner used the area prior to 1985. Mary Arnold testified that she used the upland between 1985 and 1995. Other J-Lot owners who testified to prior use – Norman and Nancy Wulf and Robert Flaherty – were not J-Lot owners until 1995 and 2005, respectively.<sup>15</sup> Additionally, the Secret Beach users did not differentiate between the upland and the intertidal zone.<sup>16</sup> In short, J-Lot owners failed to demonstrate continuous use for at least 20 years.<sup>17</sup> For these reasons, the Court holds that the J-Lot owners have failed to meet their burden to establish a prescriptive easement over Woods and Muther's upland.

Finally, Dr. Holt is not a party to these proceedings and there can be no ruling of this Court affecting his property; thus, any claim of prescriptive rights over the lands of Holt is rejected.

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<sup>15</sup> Additionally, Nancy Wulf testified that she thought she had a right to be on the upland.

<sup>16</sup> Woods and Muther argue that the intertidal zone in front of Lot J-46 is analogous to wild uncultivated lands, and that any use is presumed permissive. *See Town of Manchester v. Augusta Country Club*, 477 A.2d 1124 (Me. 1984). The Court, however, is satisfied that the *Bell I*, *Bell II*, and *Eaton* decisions displace any general rule regarding beaches as wild uncultivated lands and presumptions therein.

<sup>17</sup> To claim a prescriptive easement as a "class of persons" requires more than simply one member of the class (i.e. Mary Arnold) engaging in the activity.

## XI. Public Trust Rights

The only remaining claim for the Court in this non-jury phase of the litigation is the State's claim for expanded public trust rights in the intertidal zone. Having resolved all of the disputes among the private parties, the Court separately addresses the State's claim. The issue presented by the State is whether J-Lot owners have rights to recreate in the intertidal zone under Maine's Public Trust Doctrine.

As a threshold matter, Woods and Muther argue that the Court should not decide the State's public trust doctrine claim because the State failed to join the true owner of the intertidal zone. Having failed to do so, Woods and Muther argue, that the State failed to join an indispensable party and is therefore, not entitled to the relief it seeks. The Court disagrees.

The absence of the true owner of the intertidal zone is immaterial in this Court's decision regarding the public trust rights for several reasons. First, public trust rights impact all landowners along Maine's coast, yet it would be impossible to join them all in one lawsuit. Second, the public trust rights articulated in *Bell II* and requested by the State in this case have great import and wide-ranging impact beyond the individual parties to a case. Third, and finally, public trust rights present a question of law, which is not dependent on individual property rights. For these reasons, the Court reaches the merits of the State's public trust doctrine claim.

While this Court agrees with the discussions and reasoning set forth in then-Associate Justice Wathen's dissenting opinion in *Bell v. Town of Wells*, 557 A.2d 168, 187 (Me. 1989), and set forth in then-Associate Justice Saufley's concurring opinion in *Eaton v. Town of Wells*, 2000 ME 176, ¶ 50, 760 A.2d 232, 248, this Court must follow the majority opinions in these decisions. Only the Law Court can reconsider the decision in *Bell II*. In order to assist that Court, should it choose to do so, this Court makes the following

findings and conclusions, particularly in light of then-Associate Justice Saufley's concurring opinion in *Eaton*:

1. According to the Maine Department of Conservation's Maine Geological Survey, the coast of Maine has 5600 kilometers (3480 miles) of tidally-influenced shoreline and is the third longest in the United States. There are about 3500 islands included in the shoreline length. Mapping has estimated that about 2% of the coast (120 km or 75 miles) has beaches. About half of this distance is made up of sandy beaches and the other half is made up of coarser gravel and boulder beaches. The latter category is commonly called pocket barrier beaches, of which there are over 200 pocket barrier beaches that front coastal wetlands. Most large sandy beaches occur along the southern coast between Kittery and Cape Elizabeth, south of Portland. A few miles of sandy beaches also occur in midcoast Maine near the mouth of the Kennebec River. Maine Department of Conservation, Maine Geological Survey, at <http://www.state.me.us/doc/nrimc/mgs/marine/marine.htm>. *Eaton*, 2000 ME 176, ¶ 52 n.7, 760 A.2d at 249.
2. Maine has the longest coastline on the eastern seaboard of the United States. 1995 Almanac 495 (48<sup>th</sup> ed. 1995). *Eaton*, 2000 ME 176, ¶ 52 n.8, 760 A.2d at 249.
3. There is no dispute that the public may walk, sit, eat or stand in the intertidal zone for recreational or business purposes when the public fishes, fowls, navigates, picks up and lands passengers, travels over frozen waters, moors vessels and discharges and takes on cargo, and digs for worms, clams and shellfish.
4. It is no more burdensome on a private landowner's intertidal zone if the public's walking, standing, eating or sitting in the intertidal zone is unrelated to the activities described in the preceding Finding of Fact. There is no additional burden placed on the intertidal zone or the owner's use and enjoyment of the intertidal zone by a member of the public walking, sitting, eating or standing in the intertidal zone where such activity is not incidental or related to fishing, fowling or navigation.
5. The burden on a private landowner's intertidal zone and the enjoyment of his or her property is no greater if a member of the public is sitting in the intertidal zone simply to enjoy the view as compared to sitting in his beached recreational boat in the intertidal zone to enjoy the view. In fact, the burden is less.
6. The burden on a private landowner's intertidal zone and the enjoyment of his or her property is no greater if a member of the public is sitting in the intertidal zone having a picnic as compared to sitting and having a picnic in his beached recreational boat in the intertidal zone. In fact, the burden is less.
7. The burden on a private landowner's intertidal zone and the enjoyment of his or her property is no greater if a member of the public is sitting in the intertidal

zone reading a book as compared to sitting beside a boat beached in the intertidal zone to enjoy the view. In fact, the burden is less.

8. The burden on a private landowner's intertidal zone and the enjoyment of his or her property is no greater if a member of the public is walking in the intertidal zone for exercise as compared to walking to or from a boat in the intertidal zone.
9. The burden on a private landowner's intertidal zone and the enjoyment of his or her property is no greater if a member of the public is standing in the intertidal zone to enjoy the view as compared to standing in the intertidal zone while fishing with a net or pole.
10. The burden on a private landowner's intertidal zone and the enjoyment of his or her property is no greater if a member of the public is sitting in the intertidal zone to enjoy the sun as compared to digging for worms in the intertidal zone. In fact, the burden is less.
11. The burden on a private landowner's intertidal zone and the enjoyment of his or her property is no greater if a member of the public floating above the intertidal zone at high tide rests upon the intertidal zone when the tide goes out, as compared to a boat floating above the intertidal zone at high tide coming to rest upon the intertidal zone when the tide goes out. In fact, the burden is less.
12. The burden on a private landowner's intertidal zone and the enjoyment of his or her property is no greater if a member of the public is simply eating or picnicking in the intertidal zone as compared to eating when fishing, fowling or navigating in the intertidal zone.
13. The types of uses described by the J-Lot owners and others are recreational activities such as sitting, standing, picnicking, and walking that are generally not incidental or related to fishing, fowling or navigation.
14. This litigation has been a significant financial, emotional and psychological burden on all of the parties, including notably Helen Muther, Nancy Wulf and Patricia Campbell. For Helen Muther, one of the owners of the lot fronting on Secret Beach, the financial and emotional burden was significant. For Nancy Wulf, one of the J-Lot owners, this litigation changed the life of her husband and her financially by requiring him to come out of retirement to take a short-term position to pay for the litigation. Ms. Campbell is a J-Lot owner who can no longer afford an attorney, and is representing herself in the litigation and in the trial, appearing in court every day instead of tending to her businesses. For Ms. Campbell the effect of the litigation on her has been a "huge burden."
15. Secret Beach, including the intertidal area in front of the lot owned by Woods and Muther, has been used since at least 1963 for recreational activities in the intertidal area such as walking, enjoying the water, sitting on chairs, reading, sitting on blankets, skipping stones, and other activities unrelated to fishing, fowling and navigation. In particular, the Court finds the testimony of Nancy Wulf that she extensively used Secret Beach since 1963 credible. Other witnesses

testified to such use since 1969 including Bruce Balfour, who is not a party and is the son of the developer of this area, as well as Robert Flaherty who is now a J-Lot owner. This testimony was uncontroverted and credible. No one objected to the recreational use of the beach until approximately 2004 when Mr. Woods and Ms. Muther purchased Lot J-46.

16. Activities related to fishing, fowling and navigation in the intertidal area at Secret Beach were not common, estimated by some as less than 1 percent.
17. Todd Colpitts – a J-Lot owner – did engage in recreational fishing in the intertidal area in front of the lot owned by Mr. Woods and Ms. Muther, including night fishing and also scouting without a fishing pole in order to determine if there might be good fishing. He testified that he also took his son with him fishing who did not have a fishing pole. Colpitts testified that fishing takes up more space than just sitting.
18. Mr. Woods testified that he is seeking to change the use of the intertidal area in front of his property from that which he had observed from 1999 to 2004.
19. Ms. Muther testified that the burden on the visual enjoyment of her property from someone sitting was no greater than someone fishing in the intertidal zone in front of her lot.
20. Ms. Muther testified that the burden on the physical enjoyment of her property from someone fishing was greater than someone just sitting in the intertidal area in front of her property in view of the safety considerations. In particular, she testified that she would allow her child to be closer to Mr. Colpitts – one of her neighbors – if he was playing with his son as compared to Mr. Colpitts casting his fishing pole in the intertidal zone in front of her property.
21. Ms. Muther testified that a member of the public, assuming he had legal access to the intertidal area in front of her property, can:
  - fish for recreational purposes,
  - fish at night,
  - bring a flashlight when fishing at night,
  - stand when fishing,
  - sit when fishing,
  - walk when fishing,
  - walk to and from the spot from which he chooses to fish,
  - enjoy the view while fishing,
  - enjoy the view even if he knows he is not likely to catch any fish,
  - eat while fishing,
  - eat while sitting down while fishing, and
  - fish with a child who does not have his own fishing pole.
22. Ms. Muther testified that a member of the public, assuming he had legal access to the intertidal area in front of her property, can in that intertidal area:

dig for worms, clams or shellfish for recreational purposes,  
when digging for worms, clams or shellfish have a rake to conduct the  
digging,  
when digging for worms, clams or shellfish have a bucket to store his  
worms, clams or shellfish,  
sit when digging for worms, clams or shellfish,  
stand when digging for worms, clams or shellfish,  
walk around when digging for worms, clams or shellfish, and  
eat when digging for worms, clams or shellfish.

23. Ms. Muther prefers not to go in the intertidal area if there is anyone else there.
24. Ms. Muther did not know 80 percent of the people she saw in the intertidal area in front of her property, since she first rented there in 1999. Essentially, they were members of the public to her.
25. Mr. Woods testified that people from all over the world come down to Secret Beach.
26. Dr. Holt did not object to quiet and peaceful uses of the portion of Secret Beach in front of his property, including such activities as walking without a fishing pole, sitting on a blanket or swimming.
27. Mr. Woods testified that a member of the public, assuming he had legal access to the intertidal area in front of his property, can in that intertidal area:

Fowl there for recreational purposes,  
Sit while fowling,  
Stand while fowling,  
Eat while fowling,  
Eat while sitting down while fowling,  
Have a bird dog while fowling,  
Beach a boat, without limitation on size,  
Beach a boat for recreational purposes,  
Stand in the beached boat,  
Sit in the beached boat,  
Sit beside the beached boat,  
Stand beside the beached boat,  
Walk to and from the beached boat,  
Read a book in the beached boat,  
Eat in or beside the beached boat,  
Have a dog in the beached boat, and  
Have a dog walk with him after getting off the  
beached boat.

28. The State has presented, through the testimony of Mr. Woods and Ms. Muther only, that Woods and Muther have a general view of what they consider to be "fishing, fowling and navigation" but their testimony does not rise to the level of a legal conclusion that this Court must accept. This Court declines to find that

Woods and Muther's opinions apply to any property other than the property in front of their home and to the extent that it applies to the property in front of Woods and Muther's home it has limited relevance as this Court is the arbiter of the correct interpretation of what constitutes activity directly related to "fishing, fowling and navigation."

29. Even though discrete recreational activities, when viewed in isolation, may be less burdensome to the property owner than similar discrete activities permitted under *Bell II*, expanding the public's use of the intertidal zone to include the broad range of recreational activities that the State suggests, would likely result in a substantial increase in the use of the intertidal zone by the public.

The State's request for expanding public trust rights in the intertidal zone does not fall on deaf ears; however, this Court is bound by precedent. Accordingly, the public trust rights in the intertidal zone are limited to fishing, fowling and navigation. *Bell II*, 557 A.2d at 178.

Therefore the entry is:

With respect to Plaintiffs' Count I (Declaratory Judgment), Woods and Muther's Counterclaim Count II (Declaratory Judgment) and Plaintiffs' Count II (Injunctive Relief):

The J-Lot owners have an "easement by implication based upon estoppel."

The eastern boundary of Lot J-46 is the approximate mean high water mark.

The intent of I. Alan Balfour, in creating the drainage and walkway easement on the 1970 Plan was to provide access to Secret Beach to J-Lot owners for general recreational purposes.

The following activities are permitted on the drainage and walkway easement: foot traffic; wheeled apparatuses incidental to foot traffic, such as baby strollers, wagons and wheelchairs; other modes of non-motorized travel, such as bicycles; and wheeled apparatuses incidental to the exercise of public trust rights to fish, fowl, and navigate in the intertidal zone, such as bringing kayaks on wheels.

Motorized vehicles are not permitted on the drainage and walkway easement.

The J-Lot owners may use the easement without time restrictions.

J-Lot owners, and a reasonable number of guests, may use the easement to access Secret Beach.

The electronic access system (i.e. the gate) is an unreasonable obstruction of the Plaintiffs/ Third Party Defendants use and enjoyment of the easement.

The gate shall be removed. The surveillance cameras shall be removed. Woods and Muther may continue to have motion-detecting lights directed on the easement. Woods and Muther may post "No Trespassing" signage at the top of the easement. No other structures may be erected across or along the easement.

The Court granted a Temporary Restraining Order against Mr. Woods and the owners of Lot J-46, based on the inherent interference with the easement rights of J-Lot owners. The TRO included a prohibition against Defendants' interfering with J-Lot owners' access and use of the easement, and one against all parties from behavior, including speech, which unreasonably interferes with the parties' peaceful enjoyment of their property rights. These restrictions are now a Permanent Injunction. These restrictions do not prevent Woods and Muther from making reasonable inquiries of users of the drainage and walkway easement.

With respect to Woods and Muther's Counterclaim Count III (Overburdening of Easement) and Third Party Complaint Count VI (Overburdening of Easement):

The J-Lot owners have not overburdened the easement by using the easement to access the intertidal zone on Secret Beach for recreational purposes.

Use of the easement by J-Lot owners to cross over to Dr. William Holt's property is an impermissible overburdening of the easement and Woods and Muther may restrict the use of the easement to prevent persons from using the easement in this way.

With respect to Third Party Defendants' Counterclaim Count VI (Prescriptive Easement to the intertidal zone and above the high-water mark):

The J-Lot owners' prescriptive claim regarding the intertidal zone in front of Lot J-46 is not ripe for adjudication.

The J-Lot owners failed to establish a prescriptive easement over Woods and Muther's upland.

The J-Lot owners failed to establish a prescriptive easement over the lands of Holt.

With respect to the State of Maine's claim for public trust rights in the intertidal zone in front of the Woods and Muther property:

Members of the public do not have the public trust rights to engage in activities other than "fishing, fowling and navigation" in the intertidal zone.

The clerk shall incorporate this Order into the docket by reference pursuant to M.R. Civ. P. 79(a).

Dated at Portland, Maine this 30<sup>th</sup> day of July, 2009.



Robert E. Crowley  
Justice, Superior Court

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

**ORDER**

IT IS HEREBY ORDERED that the State of Maine's motion for leave to intervene is  
GRANTED.

Dated:

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Justice, Superior Court