

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)

TMF DEFENDANTS' REPLY TO PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT AGAINST
LACHIATTO DEFENDANTS, DRIVER
DEFENDANTS, HARRIS DEFENDANTS AND
TMF DEFENDANTS WITH INCORPORATED
MEMORANDUM OF LAW

TMF Defendants, by and through their undersigned counsel, hereby Reply to Plaintiffs' June 9, 2011 Motion for Summary Judgment as follows:

INTRODUCTION/PROCEDURAL HISTORY

This is the Plaintiffs third attempt to remove TMF Defendants from this case, without allowing the very same TMF Defendants they joined to present defenses and claims relative to their use of Goose Rocks Beach, which use has spanned in some instances for more than sixty years and for many families over multiple generations.¹ While the very essence of the Plaintiffs' Complaint seeks to preclude the rights of TMF Defendants with respect to their historic use of Goose Rocks Beach, the Plaintiffs argue, for a third time, that TMF Defendants have no right to defend these rights. Interestingly enough, Maine's Proceedings to Quiet Title specifically

¹ On June 29, 2011, Plaintiffs also filed a Motion to Strike TMF Defendants' Reply to Plaintiffs' Motion for Partial Summary Judgment (April 29, 2011) claiming that TMF Defendants are not a Party to this suit and therefore cannot file a response to Plaintiffs' motions for partial summary judgment. This is a very convenient, albeit procedurally inappropriate, position for the Plaintiffs to take. They can move for summary judgment claiming others do not have rights to the beach, but seek to preclude TMF Defendants from responding.

provide that the TMF Defendants are the very people that *must* be made a party to this action. See 14 M.R.S.A. §§ 6651 *et seq.* (emphasis added).

TMF Defendants originally filed a Motion to Intervene and corresponding Answer on June 4, 2010 on behalf of 171 land owners in the “Goose Rocks Beach Zone” asserting rights to use Plaintiffs’ property.² On August 17, 2010, this Court issued an Order indicating that a party must have an “interest in a controversy ‘that is in fact distinct from the interest of the public at large.’” (*quoting Nergaard v. Town of Westport Island*, 2009 ME 56, ¶ 18, 973 A.2d 735, 740). This Court stated that the original TMF Defendants did not assert any individualized interest in the beach area separate and distinct from those claims being asserted by the general public. However, this Court did allow TMF Defendants to re-file, provided they asserted a factual basis showing an individualized claim.

On August 30, 2010, this Court issued another Order with respect to Service by Publication, recognizing that there are many other individuals, corporations and trusts who are also seeking to intervene in these proceedings.³ In its Order, this Court stated that to “serve, notify, and bind [unascertained persons], including person owning non-beachfront property in the so-called “Goose Rocks Zone” of the Town of Kennebunkport, the court orders service to be made by publication.” This Court provided that if these persons “wish to oppose the claims of the plaintiffs, you or your attorney must prepare and deliver a written answer to the complaint ... within 41 days from the date of first publication.” Based on this Court’s August 30, 2010 Order, the TMF Defendants filed an Answer on October 27, 2010.⁴

² TMF Defendants are currently comprised of 178 lot owners.

³ This Court has already allowed Sharon A. Eon-Harris and John Michie Harris (represented by TMF) and *other pro se* litigants to enter as Defendants in this matter. Sharon A. Eon Harris and John Michie Harris have joined in the TMF Defendants’ Answer filed on October 27, 2010 and therefore, join in this Reply.

⁴ Plaintiffs have not filed an Answer to TMF Defendants’ Counterclaims and are in default. Therefore, Plaintiffs should not be allowed to bring this Motion for Summary Judgment.

TMF Defendants have joined this suit because they, their heirs, devisees, legal representatives or predecessors in title claim a right to use Goose Rocks Beach that is separate and distinct from the Public's claim being asserted by either the Town of Kennebunkport or the State of Maine. All TMF Defendants purchased or acquired their property with the understanding that they had access to, and the right to use, Goose Rocks Beach, in both the intertidal zone and dry-sand area, for general recreational purposes. TMF Defendants own property in a demographically defined area that is generally known as the "Goose Rocks Zone." This area is reflected in the Town of Kennebunkport Tax Maps Numbers 32, 33, 34, 35, 36, 37 and 41 and lies generally south of Mills Road (Route 9) and is accessed by New Biddeford Road, Winter Harbor Road or Dyke Road. A map of the Goose Rocks Zone is attached hereto and marked as Exhibit A. Goose Rocks Beach has its own fire station and is separately zoned by the Town of Kennebunkport. A Kennebunkport Zoning Map is attached hereto and marked as Exhibit B. Virtually all of TMF Defendants' deeds state language similar to the following: "A certain lot or parcel of land situated in that part of the Town of Kennebunkport known as 'Goose Rocks Beach', in the County of York and State of Maine."⁵ Therefore it is abundantly clear that all parties consider Goose Rocks Beach to be a unique and separate enclave easily distinguishable from other parts of Kennebunkport.

If TMF Defendants are not allowed to assert their individual claims and the Town of Kennebunkport's or the State of Maine's claim for public access to Goose Rocks Beach is denied, the preclusive effect of this would severely limit TMF Defendants' ability to ever adjudicate their private rights, however they were acquired. This is a convenient corner that

⁵ Other TMF Defendants' deeds make reference to "Beachwood," which is what Goose Rocks Beach was referred to for a period of time.

Plaintiffs are seeking to paint TMF Defendants into, a procedural ruse that should be denied by this Court.

Despite the Plaintiffs' standing arguments related to the TMF Defendants, the Goose Rocks Beach residents are distinguishable from the public generally. Their rights are separate and distinct from the public because they have been acquired either by individual use and/or as a "class of persons." See 14 M.R.S.A. § 812 (stating "[n]o person, *class of persons* or the public shall acquire a right-of-way or other easement through, in, upon or over the land of another by the adverse use and enjoyment thereof, unless it is continued uninterruptedly for 20 years"). TMF Defendants attached to their October 27, 2010 Answer an exhibit which provided details on each TMF Defendants' deeds, location of use of Goose Rocks Beach, years of use of Goose Rocks Beach, years of prior owner's use of Goose Rocks Beach, activities conducted on Goose Rocks Beach and right of way access. As such, this exhibit clearly provided for an individualized and particularized claim for each TMF Defendant as requested by this Court.

Plaintiffs and Parties-In-Interest own property in the Goose Rocks Zone, just as TMF Defendants do.⁶ Despite their contention to the contrary, it is not clear whether or not the Plaintiffs and Parties-In-Interest hold title to their properties on Goose Rocks Beach down to the low water mark under the Maine Title Standards. The Plaintiffs, in a very convenient argument, argue that TMF Defendants do not have the right to contest the Plaintiffs' title. However, this position is not supported by Maine law. See *e.g.* Flaherty v. Muther, 2009 Me. Super. LEXIS 100 (holding that back lot owners had standing to question the title of the beachfront owners to the intertidal zone, and ultimately ruling that the beachfront owner did not hold title to the low

⁶ The Parties-In-Interest referred in this Reply are those who have joined in the Plaintiffs' Motion for Summary Judgment; however, it is unclear what their position is with respect to the TMF Defendants, as they have not joined in the Plaintiffs' Complaint and make no claim for Declaratory Judgment or Quiet Title to the beach in front of their property.

water mark). This is no different than where TMF Defendants stand today, and based on TMF Defendants' claim of right to the beach, they have standing to raise a question of material fact as to the title of Plaintiffs property.⁷ While the beach may be privately owned, it is not necessarily owned by the Plaintiffs, and to the extent that it is not, they do not have the right to prohibit the use by TMF Defendants, who have confirmed their individualized claims.

STATEMENT OF FACTS

For purposes of this litigation, "Goose Rocks Beach" or the "Goose Rocks Zone" is a neighborhood community bordered to the Northwest by Route 9 / Mills Road in Kennebunkport and to the Southeast by the Atlantic Ocean. There are two access roads leading into Goose Rocks: Dyke Road and New Biddeford Road. *See* Exhibits A and B attached hereto. There is a Goose Rocks Beach Association. TMF Defendants' Opposition to Plaintiffs Statement of Material Facts (hereafter "TMF SMF") at ¶ 22. A review of the deeds for those owning property in this area supports the depiction of a separate and distinct area, as a majority of these deeds make reference to a "parcel of land ...situated at Goose Rocks Beach." TMF SMF at ¶ 40. Plaintiffs and parties in interest own properties along a two mile stretch of beach in the Goose Rocks Zone. The walk to the beach by those living in the Goose Rocks Zone is significantly shorter than walking the length of the beach itself.

While the general public may have used Goose Rocks Beach along with TMF Defendants and the Plaintiffs, TMF Defendants do not assert that their rights are derived by the fact that Goose Rocks Beach is a public beach, but rather that they have acquired rights to use Goose Rocks Beach for general recreational purposes. TMF SMF at ¶ 14. This use is evidenced in the

⁷ In an interesting twist of fate, it would appear that it is the Plaintiffs who do not have standing to bring a Motion for Summary Judgment. Despite their contention to the contrary, many of the Plaintiffs' title does not provide them with ownership to the low water mark, and in some instances, does not provide the Plaintiffs' with any title to Goose Rocks Beach at all.

various pleadings filed with this Court and TMF Defendants' responses to Plaintiffs' request for Interrogatories. TMF Defendants have clearly indicated what their use is on Goose Rocks Beach and where they have conducted their use on Goose Rocks Beach. By way of example:

1. Barbara Barwise acquired her property at Goose Rocks Beach in 1970. In the forty-plus years that she and her family have used the beach, she has received no objection and no permission from any of the Plaintiffs. Her use of Goose Rocks Beach has included, but is not limited to, walking her dogs, watching wildlife, collecting shells and clams, flying kites, playing Bocce, windsurfing, building campfires and picnicking, on both the wet and dry sand. TMF SMF ¶ 21.
2. Solomon Cohen and Dorcas Cofer have been members of the Goose Rocks Beach Association since 1958 and have participated in numerous beach activities through their involvement in the Association. They have owned their property at Goose Rocks Beach since 1986. They have a right of way in their deed which provides them access to Goose Rocks Beach. TMF SMF ¶ 22.
3. Herbert and Judith Cohen acquired their property from the Plaintiffs' Robert and Virginia Almeder in 2000. Prior to their ownership they rented the Almeder's home for five years. During the time that they rented their home, the Almeders never made any indication that their use of the beach was limited. When the Cohens purchased their current home from the Almeders, again, the Almeders never made any indication that their use of the beach was limited. The Cohens have not received any objections to their use of Goose Rocks Beach. The Cohens have a right of way in their deed which provides them access to Goose Rocks Beach. TMF SMF ¶ 23.

4. Judith Colby has been coming to Goose Rocks Beach with her family since 1948. Her mother originally owned property on the beach, but transferred it to own a back-lot property because she was nervous about the potential for flooding. There was never any concern that her rights to use Goose Rocks Beach would change as a result of her ownership of a back-lot parcel versus a beachfront parcel. TMF SMF ¶ 24.
5. Thomas Corello has owned his property since 1976. He has used Goose Rocks Beach for activities such as walking, sitting, reading, and playing games. His use has never been objected to or interrupted. He has a right of way in his deed which provides access to Goose Rocks Beach. TMF SMF ¶ 25.
6. John V. and Sonia M. Dalton have owned their property since 1983 and have been coming to Goose Rocks Beach since 1977. They have access to the beach by reference to a plan. In the forty-plus years that they have been using Goose Rocks Beach for recreational purposes, they have not seen any signs indicating private property. TMF SMF ¶ 26.
7. Robert Dolbeare has been coming to Goose Rocks Beach since 1935 and his family has owned property at Goose Rocks Beach since 1939. In the seventy-plus years that Mr. Dolbeare has been using Goose Rocks Beach for recreational purposes, he has not received any objection to his use by any of the Plaintiffs or parties in interest. TMF SMF ¶ 27.
8. Kathleen A. DeMarre-Pappas' family has been coming to Goose Rocks Beach since 1930 and have used the beach without objection. They have used the beach for recreational activities such as making sand castles, sunbathing, swimming, fishing, picnicking, having barbecues, flying kites, and playing Frisbee. While Ms. DeMarre-Pappas makes

reference to using all of Goose Rocks Beach, she also clearly indicates the map and lot numbers (including those of certain Plaintiffs) which she has used more regularly than others. TMF SMF ¶ 28.

Similar use is clearly depicted in all of TMF Defendant responses to Plaintiffs' Interrogatories, some of which were provided to the Court as Exhibits to the Plaintiffs' Motion for Summary Judgment. TMF Defendants' use, both individually and as a class of persons, clearly identifies particular use of the Plaintiffs' properties because their use encompasses the entirety of Goose Rocks Beach. Plaintiffs have attempted to make the nonsensical argument that TMF Defendants did not identify beach use in front of specific Plaintiff properties. To the extent that TMF Defendants assert that they have used the entirety of the beach, it would stand to reason that the beach area in front of each of the Plaintiffs' properties are implicated.

In addition, and as already pointed out to this Court in other filings, it is unclear as to whether or not Plaintiffs even own the beach and therefore can object to its use. Of particular note, there are several Plaintiffs where it is abundantly clear that they do not own any portion of Goose Rocks Beach or at the very least do not own to the low water mark as they claim. TMF SMF at ¶ 29-36.

What is even more interesting is that the Plaintiffs have decided for all beachfront owners and back lot owners what recreational use is permitted on Goose Rocks Beach. Indeed, Plaintiff John T. Coughlin testified that walking is permitted for Plaintiffs on Goose Rocks Beach and that he had never asked any of the beachfront owners' permission to walk on the beach in front of their properties. TMF SMF at ¶ 39. Notwithstanding Mr. Coughlin's extrajudicial determination, it is solely for this Court to decide what uses are permissible on Goose Rocks Beach and for whom those uses apply.

Finally, while TMF Defendants' counsel certainly appreciated Attorney Thaxter's extension of time to respond to the Plaintiffs' discovery request, Thaxter's portrayal of any discovery disputes is misguided and out of context and should not be given consideration at this juncture. TMF Defendants have provided responses for all but eight of its clients.⁸ A Paralegal for Plaintiffs' counsel even requested that the Answers be provided in "batches" once a week given the number of clients that TMF represents. In the meantime, despite efforts since March 2011 to schedule depositions with Plaintiffs' counsel, Plaintiffs' counsel has only provided two of the nine requested depositions, giving various excuses for why they are not available to testify in person and failing to respond to inquiries as to when his clients will be available. In addition, some of the Plaintiffs' own responses to TMF discovery requests have been late, but given the size of this case and intimations from counsel about staying or extending discovery deadlines,⁹ we did not see any need to bring these matters to the Court's attention as in most cases these types of discovery disputes are resolved without taxing the Court's resources. Were Attorney Thaxter serious about resolving discovery disputes, he should have used the procedural mechanism under Rule 26(g), and requested a discussion with counsel, as opposed to inappropriately using it as a leverage point in conjunction with his Motion for Summary Judgment.

DISCUSSION OF LAW

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Panasonic Communications & Sys. Co. v. State*, 1997 ME 43, ¶ 10, 691 A.2d 190 (citing *Gonzales v. Comm'r, Dep't of Pub. Safety*,

⁸ Given the size of this litigation, the number of clients, the fact that many parties live out of the State of Maine, this is not out of the question that there are responses still waiting to be filed and counsel for TMF Defendants is more than willing to have a discussion with Attorney Thaxter about resolving any discovery disputes that might remain.

⁹ Indeed, Attorney Thaxter filed a Motion to Stay Discovery with his Motion for Summary Judgment.

665 A.2d 681, 682-83 (Me. 1995). If there is a serious dispute as to what those facts are, consideration of a summary judgment is not proper. *North East Ins. Co. v. Soucy*, 1997 ME 106, & 8, 693 A.2d 1141. “A fact is material if it has the potential to affect the outcome of the case under governing law.” *Levine v. RBK Caley Corp.*, 2001 ME 77, ¶ 4, n.3, 770 A.2d 653, 655, n.3 (citing *Burdzel v. Sobus*, 2000 ME 84, ¶ 6, 750 a.2d 573, 575). “To avoid judgment as a matter of law in the defendant’s favor, the plaintiff must establish a *prima facie* case for each element of the cause of action.” *Beaulieu v. The Aube Corp.*, 2002 ME 79, ¶ 14, 796 A.2d 683, 687. Findings for the plaintiff “may not be based upon conjecture or speculation,” *Id.*, or upon “conclusory allegations or unsubstantiated denials.” *Polk v. Town of Lubec*, 2000 ME 152, ¶ 11, 756 A.2d 510, 513.

A. TMF Defendants Have Standing.

Plaintiffs have already brought a similar Motion against TMF Defendants in which they assert that TMF Defendants claims are not separate and distinct from the Public and therefore do not have standing. As stated in TMF Defendants’ Reply to Plaintiffs’ Motion to Strike (November 24, 2010), there can be no doubt that TMF Defendants have an interest in this matter. The Plaintiffs own property at or near Goose Rocks Beach and have brought this action to obtain a declaration that they own fee title in the beach to the low-water mark, and to exclude all others from the beach. Indeed, the Plaintiffs’ Complaint specifically names as Defendants “[a]ll persons who are unascertained...who claim a right to use...Plaintiffs’ property...and who have trespassed...and have used or claim the right to use Plaintiffs’ property for unlawful uses, including, but not limited to bathing, sunbathing, picnicking and other recreational activities.” Plaintiffs’ Complaint at ¶ 29.

Despite the fact that the Plaintiffs have specifically identified the class of Defendants, they now seek to prevent TMF Defendants, who fit squarely into that class of Defendants description, from defending against the very rights that Plaintiffs have asserted. In that regard, Plaintiffs are endeavoring to engage the Court and TMF Defendants in a shell game. They wish to broadly name all TMF Defendants and others as a party, thereby guaranteeing the preclusive effect of any final judgment against those same TMF Defendants, but want the Court to affirmatively deny TMF Defendants a seat at the litigation table, where those very rights will be adjudicated. This is a miscarriage of justice in its basest form.

While Plaintiffs are quick to claim TMF Defendants and the public at large are one and the same, it is clear that TMF Defendants differ from the public at large, both in fact and in law. Factually, TMF Defendants are distinguishable from the general public because of their location to the beach, their residency in what is universally known as the Goose Rocks Beach area, their consistent use of the beach, their treatment of the beach as if it were their own, their ability to access the beach without permits (parking), their ability to rent their homes based on their proximity to the beach, their inflated tax assessed values based on their location in the “Goose Rocks Zone,” and their ability to access the beach through various public and private rights of way, to name a few. Indeed, Plaintiffs’ own deponent, Mary Davis, who has been coming to Goose Rocks Beach since the 1920s, in a deposition on December 8, 2010, made the sweeping and important distinction between those in the Goose Rocks Beach area and the public at large. When asked who she considered to be “outsiders” versus “insiders,” she testified that “insiders” were those that “owned property there or rent, they are owners of beach property, they are owners of Goose Rocks Beach property.” TMF SMF at ¶ 38. When asked to clarify this statement even more and whether or not “Goose Rocks Beach people” included people on the

opposite side of King's Highway (back-lot owners), she testified "yes." TMF SMF at ¶ 38. And when asked if she considered Goose Rocks Beach to be its own little community, she testified "yes." TMF SMF at ¶ 38. Even Plaintiffs own deponents understand what Plaintiffs' counsel does not; namely, that Goose Rocks Beach is distinct from the larger Town of Kennebunkport, as are its residents.

Legally, there is an important distinction as well between TMF Defendants and the general public; this is found in the differing burdens of proof for establishing an easement by the public at large and TMF Defendants. It is well-settled that under a prescriptive easement claim, a municipality has a higher burden than a private individual to assert a prescriptive claim. In *Lyons v. Baptist School of Christian Training*, 2002 ME 137, ¶¶ 18-19, 804 A.2d 364, 370, the Court held that in cases involving claims of *private* prescriptive easement, where there has been unmolested, open and continuous use of a way for twenty years or more, with the knowledge and acquiescence of the owner, the use will be presumed to have been adverse and under a claim of right. *Id.* However, the Court has refused to apply this presumption to a *public* prescriptive easement claim for recreational uses when that claim applies to open fields or woodlands and the ways traversing them. *Id.* As such, Plaintiffs are cleverly trying to use the guise of judicial economy, and an unsupported and inappropriately strict view of notice pleading, to keep TMF Defendants out of the case. Then, Plaintiffs will most certainly seek to preclude TMF Defendants, through *res judicata*, from asserting any individual rights should the Town of Kennebunkport or the State of Maine lose or otherwise drop out of this case.

In short, Plaintiffs' goals are to remove TMF Defendants from the case, but to do so in such a way that *res judicata* serves as a bar against further litigation by TMF Defendants. Then, having eliminated their claims, ostensibly on the basis of TMF Defendants and the Town having

indistinguishable interests, Plaintiffs will seek to hold the Town to a higher burden than TMF Defendants would have been held to.

Simply because Plaintiffs claim that the TMF Defendants do not use the beach in front of their property does not make it true. Plaintiffs' lone argument seems to be that by TMF Defendants identifying the whole of the beach for its individual use, TMF Defendants have not identified individual property for its use. Of course, it is axiomatic that the whole necessarily encompasses the individual parts. Plaintiffs offer no support, no facts, and no affidavits, which support the Plaintiffs' argument that TMF Defendants have not acquired a prescriptive easement to Goose Rocks Beach for general recreation. The reason for this lack of support is that for the Plaintiffs to do so would be to ignore over 100 years of use by the Goose Rocks Beach community. Thus, the Plaintiffs have inappropriately attempted to make a Motion for Summary Judgment where the facts are very much in dispute.

B. There is a genuine issue of material fact as to whether or not the TMF Defendants have acquired a prescriptive easement individually or as a class of persons.

To meet the burden of proving an easement by prescription, "the party asserting the easement 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 v. Town of Wells*, 2000 ME 176, ¶ 32, 760 A.2d 232, 244. There is no notice requirement for an easement by prescription. "[T]he permissible uses of an easement acquired by prescription are necessarily defined by the use of the servient land during the prescriptive period." *Id.* at ¶ 41 (quoting *Gutchen v. Becton*, 585 A.2d 818, 822 (Me. 1991)). Based upon the facts, TMF Defendants have clearly established an easement for general recreational use of Goose Rocks Beach.

“For a use to be continuous it is not necessary that it be constant or be made every day; a use may be continuous even though the specific acts of use are periodical or only occasional.” Paul G. Creteau, *Principles of Real Estate Law*, Ch. 7, 141 (Castle Publishing Company, 1980). As such, those TMF Defendants who only use their property seasonally satisfy this requirement. “In computing time it is not necessary that the same individual be the adverse user throughout the statutory period. Successive periods of adverse use by different persons may be added (tacked) together, provided there is “privity” between them.” *Id.* at 143. TMF Defendants have asserted uses that span twenty (20) years, either individually or through successive ownership.

It is clear from the record that TMF Defendants have been using Goose Rocks Beach continuously, for over twenty years, under a claim of right adverse to the owner, with the owner’s knowledge or acquiescence, or their use has been so open, notorious, visible and uninterrupted that knowledge and acquiescence is presumed. TMF Defendants’ use of Goose Rocks Beach has never been challenged by the Plaintiffs and they have never been given permission to use the beach. The Plaintiffs have done nothing to stop TMF Defendants use until the filing of this law suit. There is nothing in the Plaintiffs’ facts to indicate otherwise.

TMF Defendants’ claims are not “canned assertions,” but are rather specific to each Plaintiff by virtue of the Plaintiffs’ Complaint and TMF Defendants’ Answer, Defenses and Counterclaims. While the use of the beach by the TMF Defendants is general recreational use, including, but not limited to, swimming, picnicking, exercising, reading, this use has been done as a private right.

To the extent that the TMF Defendants’ individual private prescriptive claims fail, TMF Defendants have acquired a prescriptive right as a class of persons. The statute of limitations for adverse possession makes clear that a class of persons may acquire an easement through

prescriptive use: “No person, *class of persons* or the public shall acquire a right-of-way or other easement through, in upon or over the land of another by the adverse use and enjoyment thereof, unless it is continued uninterruptedly for 20 years.” *Flaherty v. Muther*, 2011 ME 32, ¶ 80, 17 A.3d 640, 660-661 (*citing* 14 M.R.S.A. § 812 (2010) (emphasis added)). While the Court in *Flaherty* found that an easement by prescription for the three households (one for twenty years, one for ten years, and one for one year) was insufficient to establish a prescriptive easement for a class of nineteen households, the facts in this case are much different. As further stated in *Flaherty*, “[a] servitude should be interpreted to give effect to the intention of the parties ascertained from...circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created.” *Id.* at ¶ 83 (*citing Restatement (Third) of Prop.: Servitudes* § 4.1(1)). “When the circumstances surrounding the creation of an easement are prescriptive in nature, ‘the adverse use that leads to creation of the servitude provides the basis for determining its terms.’” *Id.* (*citing Restatement (Third) of Prop.: Servitudes* § 4.1 cmt. a.).

Since the servitude created by adverse use arises from the failure of the landowner to take steps to halt the adverse use, interpretation of the prescriptive servitude focuses on the reasonable expectations of the landowner. The relevant inquiry is what a landowner in the position of the owner of the servient estate should reasonably have expected to lose by failing to interrupt the adverse use before the prescriptive period had run.

Id. (*citing Restatement (Third) of Prop.: Servitudes* § 4.1 cmt. h.). The conduct of TMF Defendants, a majority of which spanned over a period of greater than twenty years, and the failure of the Plaintiffs to interrupt this use, has clearly established a prescriptive easement for TMF Defendants in Goose Rocks Beach as a class of persons.

C. Use of the beach along with the general public does not preclude TMF Defendants from asserting a private prescriptive right or a prescriptive right as a class of persons.

If the Plaintiffs are stipulating that the Town either owns Goose Rocks Beach or that the Town has acquired an easement in Goose Rocks Beach, TMF Defendants would agree that they cannot assert a prescriptive claim. However, this hasn't been stipulated to as yet and this strikes at the core of why TMF Defendants and other *pro se* litigants have joined this suit.¹⁰ TMF Defendants do not deny that the public has been using Goose Rocks Beach, and it appears from their filings that the Plaintiffs are not denying this either. However, TMF Defendants' use is separate and distinct from the public based on their proximity, access, and use of the beach. Plaintiffs cite two out-of-state cases to support their theory that a private prescriptive easement, never mind a class of persons, cannot be obtained by a party who uses land of another in common with the general public. *See e.g. Wadsworth Realty Co. v. Sundberg*, 338 A.2d 470 (Ct. 1973) and *Garmond v. Kinney*, 579 P.2d 178 (N.M. 1978).

These cases are clearly inapplicable. First and foremost, the Plaintiffs need look no further than Maine law to answer the question as to whether or not a private prescriptive easement can be obtained when the use is in common with the general public. While the Plaintiffs cite to *Hill v. Lord* to support its position, when viewed more closely, *Hill v. Lord* stated that the prescriptive right must first be *established* in the public. 48 Me. 83, 96 (1861) (emphasis added). *Hill v. Lord* is inapposite for the following reasons: 1) The Defendant in *Hill* argued that the Town owned the property and as a resident had permission from the Town. *Id.* at 95-96. TMF Defendants do not allege that the Town owns Goose Rocks Beach, and if it is found that they do, TMF Defendants recognize that they will not be able to acquire rights by virtue of the Town's interest. 2) The Defendant in *Hill* didn't argue that he has acquired a private prescriptive right, but rather asserted that for more than seventy years, the people of

¹⁰ Not all of the *pro se* litigants who have objected to the Plaintiffs' claims have been joined in this Motion for Summary Judgment.

Kennebunkport and elsewhere, farmed the seaweed from the shore, until forbidden by the present plaintiff. *Id.* at 96. In-other-words, he was making a public prescriptive claim on behalf of the Town of Kennebunkport. TMF Defendants are not making such a claim. TMF Defendants' claims are personal and are based on TMF Defendants' long continued enjoyment of Goose Rocks Beach, by themselves and their ancestors and their grantors. *Id.*

Even if the Court were to consider the cases cited in Plaintiffs' Motion, this case is distinct in that TMF Defendants are not claiming their right to use Goose Rocks Beach because it is a public beach. *See e.g. Wadsworth*, 338 A.2d at 472 (in which the prescriptive period is less than Maine's prescriptive period and the Court stated that, "[a]t the present time, [the defendant] uses this dirt driveway because he still feels that the public and he, as one of the public, have a right to use this road."). TMF Defendants do not assert that their rights are derived from the use of Goose Rocks Beach by the general public, but rather TMF Defendants assert that these rights have been vested in them by nature of their own private use or use as a class of persons to Goose Rocks Beach. The right of the individual TMF Defendants to use Goose Rocks Beach is not dependent upon a similar right in others. *See e.g. 17 Am. Jur. 976 § 64.* Therefore, *Garmond* is even less on point as the defendant in that case did not meet the elements of a prescription because there was substantial evidence that the use was permissive. 579 P.2d at 179.

Plaintiffs also rely heavily on the Superior Court decision in *Bell v. Inhabitants of Wells*. 1987 Me. Super. LEXIS 256 (Me. Super. Ct. Sept. 14, 1987). While the TMF Defendants' assert that the *Bell* decision was wrongly decided with respect to the Tier II Defendants (back-lot owners), there are also several distinctions worth noting. First, the Plaintiffs in *Bell* owned fee title to the beach in front of them to the low water mark. That is not the case in this instance. In addition, the Tier II Defendants, as referenced, were only a group of approximately 40 back-lot

owners. The TMF Defendants, along with several *pro se* Defendants, comprise close to 200 back-lot and beachfront owners who use Goose Rocks Beach for general recreational purposes. This is a close-knit community with an Association that grew based on the use of Goose Rocks Beach by all of those living in the community. Unlike Moody Beach, Goose Rocks Beach is a unique and well-defined area. Finally, the *Bell* decision made no reference to or analysis of the fact that those living in the area acquired a prescriptive right as a class of persons.

D. The TMF Defendants' prescriptive easement is appurtenant.

Whether the TMF Defendants can acquire a prescriptive easement as a class of persons or maintain a claim for a private prescriptive easement, both would be an appurtenant easement based on the facts of this case, and for those TMF Defendants who do not meet the twenty-year prescriptive period, they can tack their predecessors' use. "Easements that are intended to be personal rights and do not profess to create a benefit in favor of any land are easements "in gross," terminable at the death of the individual for whom created, and not assignable." *Anchors v. Manter*, 1998 ME 152, ¶ 10, 714 A.2d 134, 138. "Easements appurtenant, by contrast, are 'created to benefit the dominant tenement and therefore run with the land.'" *Id.* (quoting *O'Neill v. Williams*, 527 A.2d 322, 323 (Me. 1987)). "The traditional rules of construction for grants or reservations of easements require that whenever possible an easement be fairly construed to be appurtenant to the land of the person for whose use the easement is created.'" *Id.* (quoting *LeMay v. Anderson*, 397 A.2d 984, 987 (Me. 1979)). "If an easement is in its nature an appropriate and useful adjunct of the land conveyed...it should be held to be an easement appurtenant and not an easement in gross. If doubt exists as to its real nature, an easement is presumed to be appurtenant and not in gross." *Id.* It is also understood, under Maine law, that

the dominant and the servient estate do not need to be contiguous in order for it to be found that the easement is appurtenant. *Id.* at ¶ 12. This is the majority rule. *Id.*

TMF Defendants' easement is appurtenant because of the nature of the Goose Rocks community, the development of Goose Rocks Beach and the use of the beach by TMF Defendants dating well before the Plaintiffs acquired their property. TMF Defendants are reliant on the use of Goose Rocks Beach for general recreational purposes. The use of Goose Rocks Beach by those living in Goose Rocks is an "appropriate and useful adjunct to the land conveyed." These factors, along with the other factors discussed above and presented in TMF Defendants' interrogatories, stand for the presumption that the easement be appurtenant or at the very least, create a dispute of material fact. Furthermore, the TMF Defendants can establish that their predecessors in title, where applicable, used Goose Rocks Beach in a similar fashion, satisfying the prescriptive period.

E. There is a genuine issue of material fact as to whether or not the TMF Defendants have acquired an implied quasi-easement or an easement by estoppel.

Maine courts have consistently held that "a grantee who acquires property by reference to a plan acquires a private right-of-way in proposed streets delineated in the plan." *Callahan v. Ganneston Park Development Corp.*, 245 A.2d 274, 278 (Me. 1968). *See also, Murch v. Nash*, 2004 ME 13, ¶12, 861 A.2d 646, 650.

The Law Court in *Callahan* provided an equitable rationale for this principle:

[The] deed referring to the plan of the plotted lots and streets...carried with it to the grantee a right of way in the street which neither (the grantor) nor his successors in title could afterwards destroy or interfere with ...The right of way in the proposed streets acquired by a grantee under such circumstances is an 'easement by implication based upon estoppel,' [*citing*] *Arnold v. Boulay*, 147 Me. 116, 120 (1951).

Arnold continues, 'Such an easement is not based upon a dedication to the public. It is a private right in no way dependent upon a prospective public use.' And

quoting from *Lenning v. Ocean City Association*, 41 NJ Eq. (14 Stew.) 606 A. 491, 'The object of the principle is, not to create public rights, but to secure to persons purchasing lots under such circumstances those benefits, the promise of which, it is reasonable to infer, has induced them to buy portions of a tract laid out on the plan indicated.'

Callahan, 245 A.2d at 278.¹¹

The rights acquired by reference are "private" and individual to each lot owner. They are protected against acts by the grantor or his successor in interest to "destroy or interfere" with the rights, by any means. TMF Defendants' Answer and Interrogatories establish a genuine issue of material fact with respect to TMF Defendants' easement rights by implication. By way of example, all TMF Defendants have property referenced to a plan which depicts access ways to the beach and have acquired rights in the beach. These plans are referenced in TMF Defendants' Interrogatory responses. For example, TMF Defendants Jan Fitzpatrick, Robert J. Garvey and Maria M. Junker all derive their property at Goose Rocks by reference to a plan which provides them with access to the beach. TMF SMF at ¶ 2-3. There are many more subdivision plans that have created access ways to Goose Rocks Beach. TMF SMF at ¶ 37.

The use of Goose Rocks Beach by beachfront owners and back-lot owners for general recreational purposes is supported and evidenced by the historic use of Goose Rocks Beach. Such evidence includes, but is not limited to, the creation of the various subdivision plans which provide access to the beach, the 27 different rights of ways which provide access for back-lot owners to the beach and show the original intent of the developers (common grantors) for the beach to be used by all residence living in Goose Rocks, and the reliance of the TMF Defendants on this historic use. The Plaintiffs cannot rewrite history, and their decades of silence has created a reliance by those who have purchased property in Goose Rocks Beach that they would

¹¹ The rights of certain back-lot owners are described as being "deeded," but they are more properly described as a result of references in their deeds that create easements "by implication based upon estoppel."

be entitled to use Goose Rocks Beach for general recreational purposes. “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.” *Anchors v. Manter*, 1998 ME 152 at ¶ 11 . *See also, Englishmans Bay v. Jackson*, 340 A.2d 198 (1975). In that case, the court looked to circumstances in existence prior to creation of easement. The Court should do the same here and look to the historic use of Goose Rocks Beach by both beachfront owners and back lot owners. Further, other Maine cases state the obvious principle that, “Inland owners [are] entitled to use waterfront for purposes reasonably related to the enjoyment of the waterfront.” *Chase v. Eastman*, 563 A.2d 1099 (Me. 1989). *See also, Ware v. Public Service Co.*, 412 A.2d 84 (Me. 1980).

Discovery is still ongoing and the historic facts are still being developed, but there is already evidence, as is the case with those parties who have derived their ownership from lots depicted on a plan, that the parties are in privity of estate with the original grantors. Even with the facts presented thus far, it is clear from the development of Goose Rocks Beach that the original intent of the developers was to allow the beach to be used by back-lot owners. It is interesting that the Plaintiffs are stating what is and is not a necessity and that back lot owners were not induced with respect to their reliance regarding the use of Goose Rocks Beach, when there is evidence that one of them purchased their property from the Almeder Plaintiffs. Based upon this one set of facts alone, a dispute of material fact is raised with respect to what misrepresentations were made by the Plaintiffs. In addition, the Plaintiffs made misrepresentations through their silence and their own recreational use of the beach. The beach provides significant value (tax, rental, etc.) to both back-lot and beachfront owners. The

Plaintiffs are barred from denying TMF Defendants use of Goose Rocks Beach for general recreational purposes.

F. There is a genuine issue of material fact of whether or not the Plaintiffs own certain portions of Goose Rocks Beach.

There is nothing in Maine law which prohibits recreational activities on the shore of Maine except the prohibition or objection of the owner. See Eaton v. Town of Wells, 2000 ME 176, 760 A.2d 232. Because Plaintiffs do not own certain portions of Goose Rocks Beach, they cannot object to its use by TMF Defendants. See TMF SMF at ¶ 29-36.

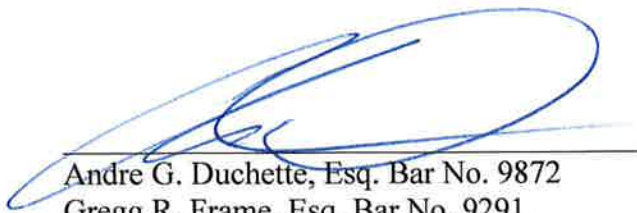
G. Plaintiffs' Counsel has not complied with the provisions of Rule 26(g).

Plaintiffs' argument with respect to discovery disputes should be dismissed outright. Plaintiffs are trying to circumvent discovery rules, which apparently don't apply to them, and dismiss TMF Defendants without a 26(g) conference and the procedures associated with it. As discussed above, there have been discovery issues on both sides. M.R.Civ.P. 26(g) is clear that "[n]o written motions...shall be filed without the prior approval of a justice or judge of the court in which the action is pending." M.R.Civ.P. 26(g)(1). "The moving party shall first confer with the opposing party in a good faith effort to resolve by agreement the issues in dispute." *Id.* "If the dispute is not resolved by agreement, the moving party shall request a hearing from the clerk by letter." *Id.* None of the procedures of Rule 26(g) have been followed by Plaintiffs' counsel. Using discovery disputes as a leverage point in a Motion for Summary Judgment is inappropriate and cuts the heart out of Maine's longstanding ethos of comity amongst opposing counsel.

CONCLUSION

For the reasons stated in this Reply and because there is a genuine issue of material fact as to the defenses and claims asserted by the TMF Defendants, the Plaintiffs' Motion for Summary Judgment should be denied.

DATED: July 11, 2011

A handwritten signature in blue ink, consisting of several overlapping loops and strokes, positioned above a horizontal line.

Andre G. Duchette, Esq. Bar No. 9872

Gregg R. Frame, Esq. Bar No. 9291

Attorneys for TMF Defendants

Taylor, McCormack & Frame, LLC

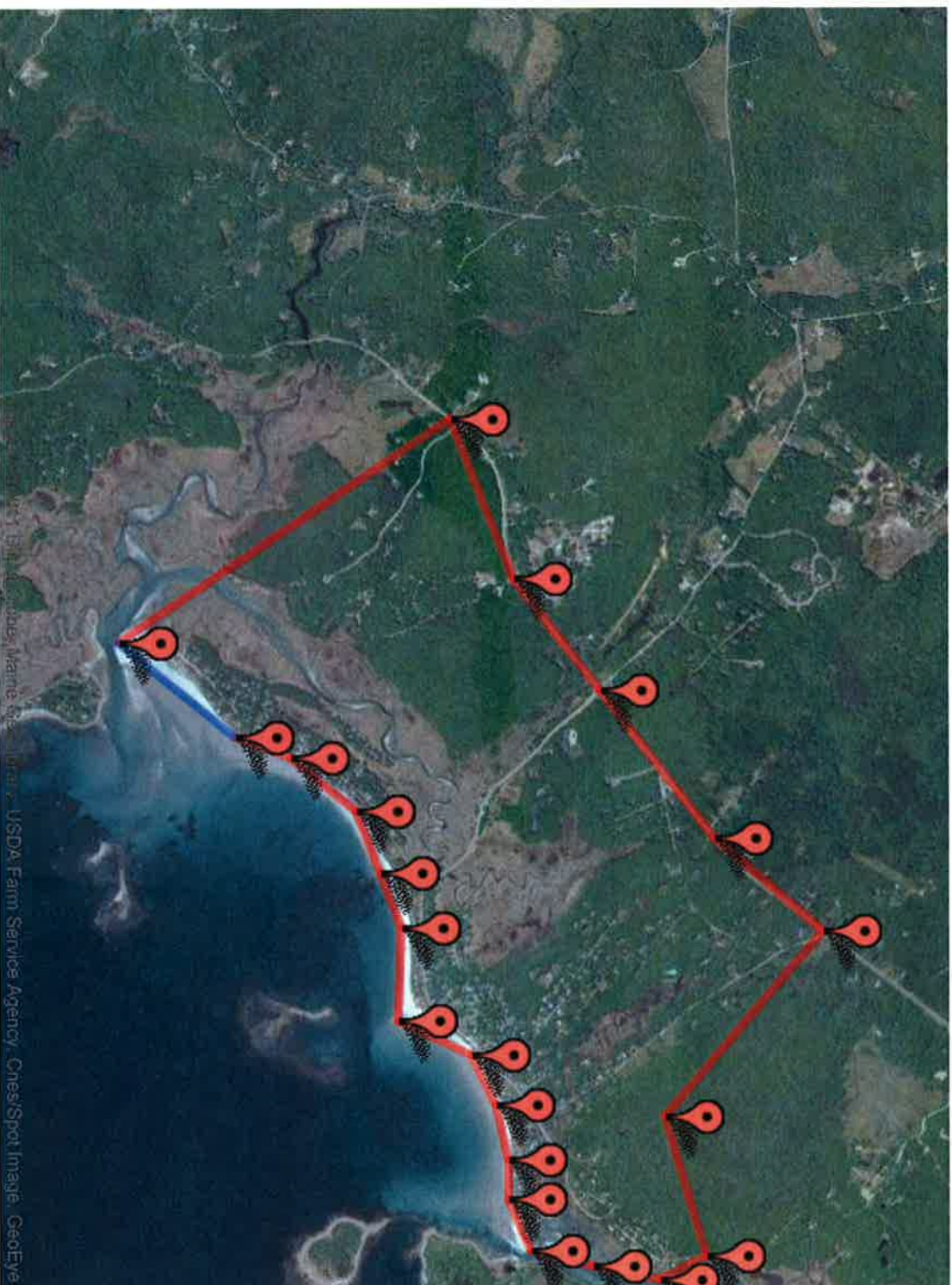
30 Milk Street, 5th Floor

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Google Planimeter

Measure areas using Google Maps!



3.920e+6 m² / 392.0 hectares / 3.920 km² / 4.219e+7 ft² / 968.6 acres / 1.513 miles

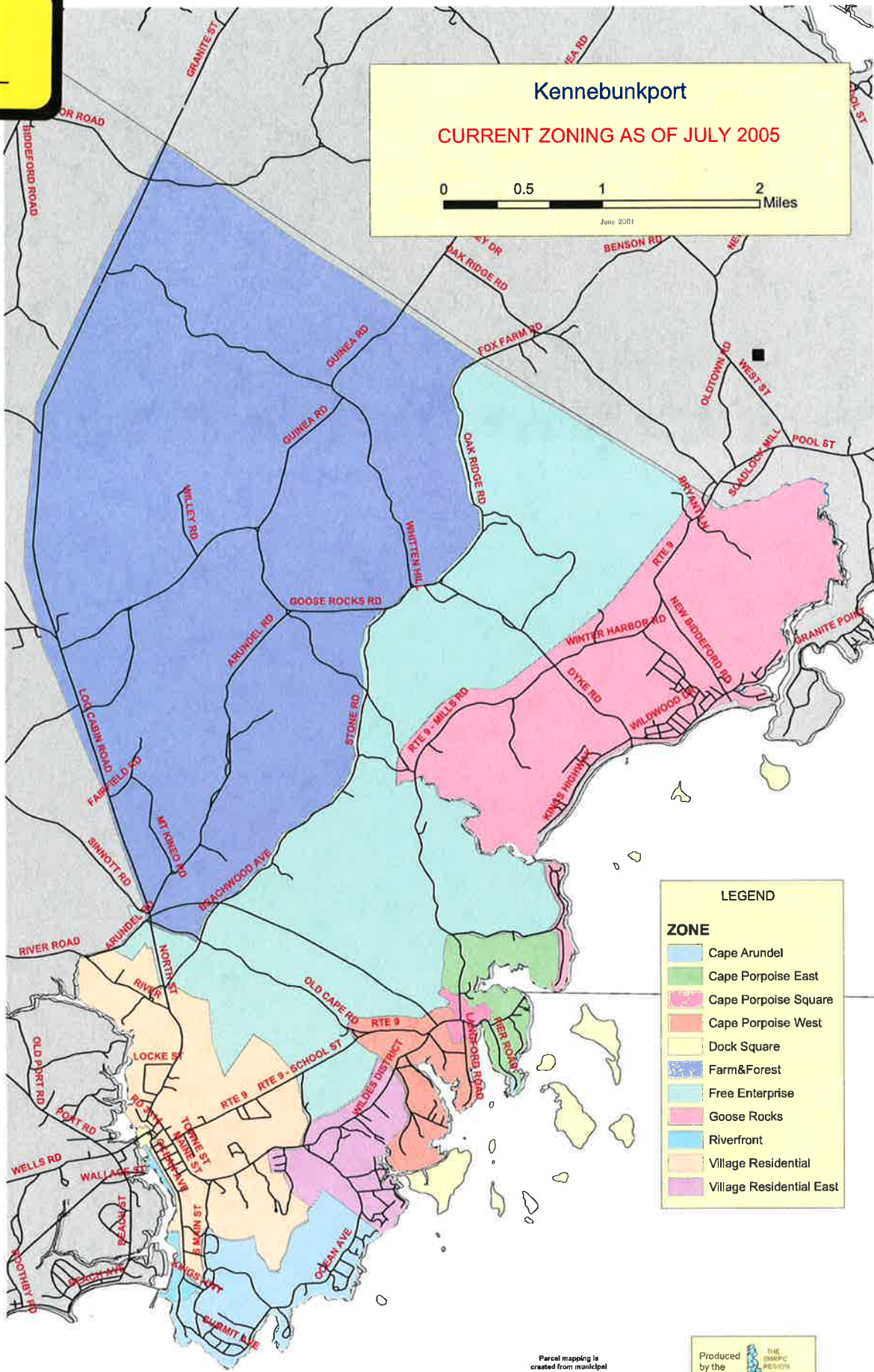
Drag the map with your mouse, or double-click to center.

Click on the map to place points.

The enclosed area is shown below.

Delete Last Point

Clear All Points



Kennebunkport
CURRENT ZONING AS OF JULY 2005

0 0.5 1 2
 Miles

June 2001

LEGEND

ZONE

	Cape Arundel
	Cape Porpoise East
	Cape Porpoise Square
	Cape Porpoise West
	Dock Square
	Farm & Forest
	Free Enterprise
	Goose Rocks
	Riverfront
	Village Residential
	Village Residential East

Parcel mapping is created from municipal tax mapping and contains any inaccuracies inherent in that mapping.

NOTE:
 When overlaying parcel maps with USGS topographic maps (7.5 min. quadrangles) discrepancies are likely.



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