

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)

**DEFENDANT TOWN OF
KENNEBUNKPORT'S OPPOSITION
TO MOTION TO DISMISS COUNTS
VI AND IX, MOTION TO STRIKE
DEFENSES AND REQUEST FOR
SANCTIONS UNDER RULE 11**

INTRODUCTION

Contrary to the assertions made by Plaintiffs in their Motion to Dismiss Counts VI and IX of the Counterclaim of Defendant Town of Kennebunkport (the "Town"), Motion to Strike Defense Nos. 9, 12 and 16 and Request for Sanctions pursuant to Rule 11, the counterclaims and defenses asserted by the Town are not barred by Maine law. In fact, many of the cases and statutes on which Plaintiffs rely in their Motion actually demonstrate that the Town's counterclaims and defenses are sustainable, which calls into question whether Plaintiffs primary purpose in filing their Motion is as outlined therein, or whether it is to paper this case to such an extent that it drives the costs too high so that the Town and taxpayers of Kennebunkport might not be able to afford to continue their efforts to preserve Goose Rocks Beach for public recreational use for the generations to come. Regardless, it is the aforesaid Motion of the Plaintiffs, not the counterclaims and

defenses asserted by the Town, that is egregious and should be stricken.

DISCUSSION

I. Standard of Review

The burden on a party seeking dismissal is demanding. A court must “treat the material allegations of the [counterclaims] as admitted” and examine the counterclaims “in the light most favorable to the [counterclaim] plaintiff to determine whether it alleges the elements of a cause of action against the defendant or alleges facts that could entitle the [counterclaim] plaintiff to relief under some legal theory.” *Plimpton v. Gerard*, 668 A.2d 882, 885 (Me. 1995) (quoting *Choroszy v. Tso*, 647 A.2d 803, 805 (Me. 1994) and *Larrabee v. Penobscot Frozen Foods, Inc.*, 486 A.2d 97, 99 (Me. 1984)). “A dismissal for failure to state a cause of action is proper only when it appears beyond doubt that a [counterclaim] plaintiff is entitled to no relief under any set of facts that might be proven in support of the claim.” *Id.* In this case, the Town has adequately alleged counterclaims and defenses asserting that the Town, or the public, has acquired certain rights in Goose Rocks Beach based on local custom and has also properly asserted counterclaims and defenses seeking offset taxes. Plaintiffs’ Motion should therefore be denied.

II. Counterclaims/Defenses

A. Quiet Title Counterclaims

Amongst all of Plaintiffs’ arguments contained in Plaintiffs’ Motion to Dismiss, Motion to Strike and Request for Rule 11 Sanctions, the one that is probably most lacking in merit is that the Town has failed to state a quiet title claim in its Answer, Defenses and

Counterclaim. Specifically, Plaintiffs cite to 14 M.R.S.A. §§ 6651 *et seq.* in arguing that the Town has failed to state “an uninterrupted possessory interest in the Beach for at least four years or claim an estate freehold therein or unexpired term of not less than 10 years.” Plaintiffs’ Motion at 14. A very cursory review of the Town’s Counterclaim, however, clearly shows that the Town has asserted such a possessory interest.

Paragraph 11 of the Counterclaim specifically states that “Defendant, and/or the public, has possessed Goose Rocks Beach openly, notoriously, adversely and exclusively under claim of right for over 100 years and a period in excess of 20 years.” Town’s Answer, Defenses and Counterclaim at 13. In addition, the Town also asserts such a possessory interest in paragraphs 12, 15, 17, 20, 31-32 and 36 of the Counterclaim, and so Plaintiffs’ Motion to Dismiss the quiet title claims asserted by the Town must be denied. It is simply inconceivable why Plaintiffs would file a Motion to Dismiss/Strike claiming that the Town had failed alleged such a possessory interest when the Town obviously did so. To the extent that the Town’s aforementioned assertions, in conjunction with its prayer for relief under 14 M.R.S.A. §§ 6651 *et seq.*, are somehow insufficient for purposes of pleading a possessory interest, or to maintain a quiet title action, the Town hereby requests that it now be permitted to amend its Counterclaim to assert such a possessory interest and quiet title counterclaim(s). *See infra* note 6.

Plaintiffs also assert that the Town has failed to adequately serve known claimants under 14 M.R.S.A. § 6653. Such an argument, however, appears to be nothing more than Plaintiffs’ way of countering the Town’s Opposition to Plaintiffs’ proposed Notice of

Publication in this case rather than a legitimate basis for dismissing/striking the Town's quiet title counterclaim(s).

Plaintiffs are well aware that the Town has objected to their proposed Notice of Publication in this case on the grounds that they have failed to comply with 14 M.R.S.A. §§ 6653-54 and Rule 4(g) of the Maine Rules of Civil Procedure, and the proposed Notice of Publication is inadequate for purposes of service on persons who have an interest in Goose Rocks Beach and are clearly ascertainable. Plaintiffs are also well aware that the Town has requested an expedited hearing with the Court on its Objection for the express purpose of making sure all "known claimants" are notified of Plaintiffs' present legal action seeking to exclude the general public, and others, from using Goose Rocks Beach for recreational purposes.

Under such circumstances, Plaintiffs' Motion to Dismiss/Strike the Town's quiet title counterclaim(s) rings hollow, especially where it is clear that the Town is going out of its way to make sure that all "known claimants" and any persons who may have an interest in Goose Rocks Beach, and are clearly ascertainable, receive notice of this legal action, which would necessarily include notice of Plaintiffs' Complaint and the Town's Answer, Defenses and Counterclaim. Plaintiffs' Motion to Dismiss/Strike the Town's quiet title counterclaim(s) must, therefore, be denied.

B. Count VI and Defense No. 9 (Local Custom)

Plaintiffs' argument that the Town's counterclaim and defenses based on local custom are unsustainable under Maine law is also erroneous and completely misinterprets

the Law Court's decision in *Bell v. Town of Wells*, 557 A.2d 168. In fact, in Count VI of its Counterclaim, the Town specifically relied on the Law Court's decision in *Bell v.*

Town of Wells in asserting the following:

31. Defendant, and/or the public, has acquired rights in Goose Rocks Beach by custom by virtue of the use of the beach by the Town of Kennebunkport, and/or the public, for so long as the memory of man runneth not to the contrary.

32. The use of the beach by the Town of Kennebunkport, and/or the public, has been peaceable and free from dispute.

33. The public rights include the right to fish, fowl, navigate, and to use Goose Rocks Beach in an unfettered manner for recreational and amusement purposes including, but not limited to, swimming, sunbathing, walking, running, playing, kite flying, sandcastle building, sailing, windsurfing, kayaking, canoeing and other recreational activities, or otherwise generally using the beach in an unfettered manner for recreational and amusement purposes, in a manner consistent with the private rights of others.

Town's Answer, Defenses and Counterclaim at 18.

Plaintiffs acknowledge in their Motion to Dismiss, Motion to Strike and Request for Rule 11 Sanctions that, in *Bell v. Town of Wells*, the Law Court did not reach the issue of whether a claim supporting the public's right to use the beach based on local custom

should be recognized in Maine. Specifically, the Law Court stated that “we do not find it necessary to decide whether the court was correct in holding that under the common law of Maine the public may acquire by local custom an easement over privately owned land.” *Bell v. Town of Wells*, 557 A.2d at 179.

Although it did not reach the issue, the Law Court recognized in *Bell* that such a claim might be sustainable, noting that any claim supporting the public’s right to use the beach based on local custom should be predicted on “public usage” that “must have occurred ‘so long as the memory of man runneth not to the contrary’ and it must have been peaceable and free of dispute.” *Id.*; see also 14 M.R.S.A. §§ 812 *et seq.* (“If a person apprehends that a right-of-way or other easement in or over his land may be acquired by custom, use or otherwise by any person, class of persons or the public, he may give public notice of his intention to prevent the acquisition of such easement...”); *infra* note 1. The Town has asserted all of the prerequisites as outlined in *Bell* in Count VI of its Counterclaim, and so there is no merit to Plaintiffs’ Motion to Dismiss Count VI, or their Motion to Strike the Town’s Defense No. 9.

Plaintiffs also mysteriously look to the case of *Lyons v. Baptist School of Christian Training*, 2002 ME 137, 804 A.2d 364. The decision reached by the Law Court in *Lyons*, however, was based on a prescriptive easement claim, not a claim of local custom, and it was reached after trial, not on a motion to dismiss. Thus, *Lyons* is inapposite, and Plaintiffs’ Motion to Dismiss Count VI must be denied. Likewise, there is no basis for the Motion to Strike the Town’s Defense No. 9.

C. Count IX (Offset Taxes) and Defense Nos. 12 (Abandonment) and 16 (Offset Taxes)

In the case of *Eaton v. Town of Wells*, 2000 ME 176, 760 A.2d 232, the Town of Wells asserted a claim alleging an alternative theory (in the event that the Court failed to find a public right of recreational use in Wells Beach) based on the failure of the beachfront owners in question to pay taxes. *Eaton v. Town of Wells*, 2000 ME 176, ¶ 3, 760 A.2d at 236. The Town of Wells sought declaratory relief, as well as damages, to the extent that the Court determined that title to the beach rested in the beachfront property owners, and not the Town or the public. A true copy of the Amended Answer and Counterclaim of the Town of Wells, including Count VIII (Offset Taxes) in the case of *Eaton v. Town of Wells* is attached hereto as Exhibit A.¹

Although the Law Court's subsequent decision in *Eaton* was not based on the offset taxes issue, the Court did not state, or even suggest, in its decision that a counterclaim for offset taxes lacked any "good ground" or merited the imposition of sanctions pursuant to Rule 11, as Plaintiffs now suggest. Likewise, the Superior Court in *Eaton* did not find that such a counterclaim lacked any "good ground" or merited the imposition of sanctions. Thus, where such claims and defenses were asserted as recently as 2000 in *Eaton* (the "Wells Beach case"), and it was not determined by either the Law

¹ In the *Eaton* case, the Town of Wells also asserted a counterclaim based on the theory of local custom. Exh. A., Count IV. Although the Superior Court's ultimate decision in favor of the Town of Wells in *Eaton* was based on the prescriptive use of the beach by the Town of Wells and the public for generations, it did not reject the doctrine of custom as Plaintiffs would have the Court do here. To the contrary, the Superior Court expressly found that, "[i]f the doctrine [of local custom] were a viable one in the State of Maine, this case presents the facts appropriate to its adoption." A true copy of the Superior Court's decision in *Eaton* is attached hereto as Exhibit B.

Court or the Superior Court that such claims and defenses merited sanctions. Thus, there is absolutely no basis for Plaintiffs' request for Rule 11 sanctions based on Count IX and Defense No. 12 for offset taxes in this case.²

There is also no basis for the dismissal of Count IX, and no basis to strike the Town's Defense No. 12. First, contrary to the Plaintiffs' assertions that property cannot be abandoned, the Law Court expressly found in *Canadian Nat'l Railway v. Sprague*, 609 A.2d 1175, that "[t]o prove abandonment a party must show 1) a history of nonuse coupled with an act or omission evincing a clear intent to abandon, or 2) adverse possession by the servient estate." *Id.* at 1179. Furthermore, even in the case of *Town of Sedgewick v. Butler*, 1998 ME 280, 722 A.2d 357, on which Plaintiffs now rely, the Court found that the Town of Sedgewick had established, after trial, that it owned the property in question in fee simple absolute such that it could not be abandoned. *Id.* at 1998 ME 280, ¶¶ 5-6, 722 A.2d at 358.

Here, although Plaintiffs have alleged title to all of Goose Rocks Beach by fee simple absolute in their Complaint, they have not yet proven it, and so the Town must be permitted to allege abandonment in Count IX. Any presumptions favoring Plaintiffs (as the upland property owners) in this case are, of course, rebuttable presumptions, and the Town must be permitted to allege abandonment while the status of the title remains in

² To the extent that Plaintiffs were somehow unaware that the Town of Wells asserted a claim of offset taxes in the *Eaton* case, it is unfortunate that they did not contact the Town's undersigned counsel before filing a request for Rule 11 sanctions with the Court. The Town could have then provided a copy of the Amended Complaint (Exh. A) and the decision of the Superior Court (Exh. B) demonstrating that similar counterclaims and defenses for offset taxes had been asserted by the Town of Wells in the *Eaton* case and no sanctions imposed by the Court, nor were they even requested.

dispute in this case.³ For the same reason, the Town's defense of abandonment (Defense No. 12) is also sustainable to the extent that Plaintiffs fail to establish fee simple title.

Second, Plaintiffs are also off base in asserting that the Town's counterclaim (and defenses) for offset taxes should be dismissed/stricken for failure to bring a tax lien foreclosure action pursuant to 36 M.R.S.A. §§ 942 *et seq.* The Town acknowledges that it has not assessed property taxes on the beach against Plaintiffs because it does not believe that Plaintiffs own the beach as they claim.⁴ In the event that Plaintiffs are able to establish that they own the beach despite the Town's arguments to the contrary, the Town asserts that it would be within the inherent authority of the Court to require that Plaintiffs pay back taxes to the extent permitted by Maine law.⁵

As noted by Plaintiffs, Maine law, including 36 M.R.S.A. § 713, permits the

³ After some preliminary title research, the Town believes that it has already uncovered evidence demonstrating that some of the Plaintiffs in this action have no basis for asserting fee simple title to the beach down to the low water mark at Goose Rocks Beach as alleged in Plaintiffs' Complaint. Of course, such arguments are more appropriately left for a motion for summary judgment brought pursuant to Rule 56 or at trial, but the Town felt it should be noted in light of Plaintiffs' assertions in their Motion to Dismiss, Motion to Strike and Request for Sanctions.

⁴ It is noteworthy that Plaintiffs do not claim that they have been paying property taxes in the event that they own to the low water mark of Goose Rocks Beach, as they claim. Rather, they are apparently seeking to avoid the payment of property taxes on the beach while spending considerable sums seeking court confirmation that they own it.

⁵ Plaintiffs essentially argue that the Court lacks jurisdiction over Count IX of the Town's counterclaims because the Court lacks the authority to assess taxes under Title 36. The Town is not requesting, however, that the Court assess taxes. Rather, the Town is requesting – solely in the event that the Court rules in favor of the Plaintiffs on their claim that they own all of Goose Rocks Beach to the low water mark – that the Court declare that Plaintiffs owe taxes and assess damages for the failure of Plaintiffs to pay taxes on the property that they now claim they own. The Town's claim is similar to a claim for unjust enrichment, and the Town believes that the Court has the authority to declare whether taxes are owed and assess damages in favor of the Town relating to the failure of Plaintiffs to pay taxes.

assessment of taxes up to at least 3 years back, and so the Court could require the payment of back taxes by the Plaintiffs in this case to the extent that they are able to establish ownership of Goose Rocks Beach to the low water mark as they claim.⁶ Regardless, there is no basis for the dismissal of Count IX or for the Town's offset taxes defense (Defense No. 16) to be stricken, and obviously no basis for Rule 11 sanctions.

III. Prayer for Relief

Plaintiffs last argue that the Town's prayer for relief in its Answer, Defenses and Counterclaim should be stricken to the extent that it seeks costs and attorney's fees. Of course, the Town does not dispute that the so-called "American Rule" limits the Court's inherent authority to award costs and attorney's fees. As Plaintiffs acknowledge in their own Motion, however, the Court has the authority to award costs and attorney's fees under certain circumstances, including to the extent the Court finds that there has been egregious conduct in the course of judicial proceedings. *See Baker v. Manter*, 2001 ME 26, ¶ 17, 765 A.2d 583, 586. These proceedings have just begun, and so there is no basis

⁶To the extent that the Court determines that it lacks the inherent authority to order the payment of back taxes by the Plaintiffs, the Town requests that it be permitted to amend its Counterclaim to assert a claim under Title 36. Maine law permits a party to seek leave of the court to amend a pleading and provides that "leave shall be freely given when justice so requires." Me.R.Civ.P. 15(a). "When amendment as a matter of course may no longer be made, leave to amend should be freely granted by the court absent undue prejudice to opponent." *See, Kasu Corp. v. Blake, Hall & Sprague, Inc.*, 540 A.2d 1112, 113 (Me. 1988). The passage of time alone is not a ground to deny a motion to amend. *Mutual Fire Ins. Co. v. Richardson*, 640 A.2d 205, 207 (Me. 1994). Generally, in the absence of undue delay, bad faith, dilatory tactics, or unfair prejudice, courts should freely allow an amendment to a pleading. *See Smith v. School Administrative Dist. No. 58*, 582 A.2d 247, 249 (Me. 1990) (citing 1 Field, McKusick & Wroth, *Maine Civil Practice* § 15.3, at 302-03 (2d ed. 1981)).

In this case, the Town has asserted Count IX as an alternative theory because it maintains that Plaintiffs do not own all of Goose Rocks Beach to the low water mark, and so the Town has not acted in bad faith. Moreover, this case was recently filed, the deadline to amend pleadings is months away, and Plaintiffs will

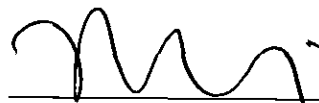
for striking the Town's prayer for relief where it is not clear whether circumstances will arise justifying the award of costs and attorney's fees.

In its Answer, Defenses and Counterclaim, the Town is simply trying to comply with the notice pleading requirements outlined in Rule 8. The Town recognizes that any award of costs and attorney's fees in this case must be in accordance with the "American Rule" as outlined in *Baker v. Manter*, and so Plaintiffs' effort to strike the prayer for relief is totally unnecessary and appears to be a veiled attempt to circumscribe the Court's inherent discretion to award costs and attorney's fees in appropriate circumstances and also gives rise to appearance that Plaintiffs' primary interest in filing their Motion is to drive up the Town's costs in this case.

CONCLUSION

WHEREFORE, Defendant Town of Kennebunkport respectfully request that the Motion to Dismiss Counts VI and IX of the Counterclaim of Defendant Town of Kennebunkport (the "Town"), Motion to Strike Defense Nos. 9, 12 and 16 and Request for Sanctions pursuant to Rule 11 be denied.

Dated: January 15, 2010



Amy K. Tchao, Bar No. 7768
Melissa A. Hewey, Bar No. 3587
Brian D. Willing, Bar No. 9112

Drummond Woodsum & MacMahon
84 Marginal Way, Suite 600
Portland, ME 04101-2480
207-772-1941

suffer no unfair prejudice in the event of such amendment of the Town's Counterclaim.

STATE OF MAINE
YORK, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. RE-97-203

LISLE A. EATON, ET AL,

Plaintiffs

v.

INHABITANTS OF THE
TOWN OF WELLS, ET ALS.,

Defendants

)
)
)
) **AMENDED ANSWER OF**
) **DEFENDANTS AND**
) **COUNTERCLAIM AGAINST**
) **PLAINTIFFS**
)
)
)



NOW COME Defendants, by and through counsel, and hereby restate in their entirety the answer and affirmative defenses set forth in their Answer dated January 21, 1998 and submitted to the Court thereafter. Moreover, Defendants now come before this Court to supplement their said Answer by stating the following Counterclaim against Plaintiffs and additional affirmative defenses:

1. Jurisdiction is granted and statutory authority exists for the following described counterclaims as set forth in 14 M.R.S.A. §801, 812, 813, 815, 816; 14 M.R.S.A. §5951 et seq.; and 4 M.R.S.A. §105.

COUNT I (DECLARATORY JUDGMENT - FEE SIMPLE)

2. On information and belief, Plaintiffs claim to hold fee simple title in a certain portion of Wells Beach as more particularly described in Paragraph 1 of Plaintiffs' Complaint (hereinafter referred to as "Wells Beach").

3. Fee simple title to Wells Beach has resided in Defendant Town of Wells continuously since colonial times.

4. Fee simple title in Wells Beach rests in Defendant Town of Wells by virtue of a deed from Epps dated October 4, 1720, and recorded thereafter, which fee interest derives from a Native American grant of land in approximately 1649.

5. As an alternative source of title, fee simple title to Wells Beach rests in the Town of Wells by virtue of royal grants of certain English monarchs confirmed in 1663 by the decree of King Charles II and later re-confirmed by William III and Mary II as joint sovereigns by virtue of the issuance of a new charter in favor of the Town of Wells.

6. No evidence exists suggesting that the Town of Wells at any time conveyed any portion of its interest to Wells Beach to Plaintiffs or to any other party.

7. Plaintiffs' source of title originates only in 1891 and has no basis in the original land grants to the Town of Wells.

8. Plaintiffs' source of title is invalid relative to the Town of Wells' source of title.

9. Plaintiffs have no current interest in Wells Beach.

10. Defendants have acquired title to Wells Beach either by deed, by adverse possession, or by acquiescence.

WHEREFORE, Defendants respectfully request this Honorable Court to find and declare that fee simple title in Wells Beach rests in the Town of Wells and further order the following:

a. That Plaintiffs refrain from taking any action which would prohibit the unfettered use and possession of Wells Beach by the Town or the public for any and all purposes consistent with title by adverse possession;

b. That Defendants record an attested copy of the Order declaring title in the Town of Wells and the public in the York County Registry of Deeds; and

c. Such and other further relief as this Court deems reasonable and just.

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COUNT II (ADVERSE POSSESSION)

11. Defendants restate the assertions set forth in Paragraphs 1 through 10 as if restated herein in their entirety.

12. Defendants and the public have acquired title to Wells Beach by adverse possession.

13. Defendant Town of Wells and the public have possessed Wells Beach openly, notoriously, adversely and exclusively under claim of right for over 20 years.

14. Neither Plaintiffs nor their predecessors in interest have stated any claim of title against Wells Beach prior to the Complaint despite the Town's and the public's open and notorious possession of Wells Beach for over a century.

15. Plaintiffs have failed to pay real property taxes on Wells Beach at any time.

WHEREFORE, Defendants respectfully request this Honorable Court to find, pursuant to 14 M.R.S.A. §801, 14 M.R.S.A. §816, and Maine common law that the Town of Wells and the public have acquired title to Wells Beach by adverse possession and order the following:

a. That Plaintiffs refrain from taking any action which would prohibit the unfettered use and possession of Wells Beach by the Town or the public for any and all purposes consistent with title by adverse possession;

b. That Defendants record an attested copy of the Order declaring title in the Town of Wells and the public in the York County Registry of Deeds; and

c. Such and other further relief as this Court deems reasonable and just.

COUNT III (TITLE BY ACQUIESCENCE)

16. Defendants restate the assertions set forth in Paragraphs 1 through 15 as if restated herein in their entirety.

17. The Town of Wells and the public established possession to Wells Beach to a clearly marked visible line.

18. The Town of Wells and the public gave actual or constructive notice to Plaintiffs.

19. Plaintiffs' actions and inactions imply their recognition and acquiescence in the possession of Wells Beach by the Town of Wells and the public.

20. Plaintiffs' acquiescence has existed for a sufficiently long period of time to permit establishment of title by acquiescence.

WHEREFORE, Defendants respectfully request this Honorable Court find that title to Wells Beach rests in the Town of Wells by virtue of Plaintiffs' acquiescence pursuant to Maine common law and further order the following:

a. That Plaintiffs refrain from taking any action which would prohibit the Town of Wells or the public from the unfettered use and possession of Wells Beach in accordance with title by acquiescence;

b. That Defendants record an attested copy of this Order in the York County Registry of Deeds; and

c. Such other and further relief as this Court may deem reasonable and just.

COUNT IV (DECLARATORY JUDGMENT - EASEMENT)

21. Defendants restate the assertions set forth in Paragraphs 1 through 20 as if restated herein in their entirety.

22. Defendants, for themselves and the public, assert the existence of an easement over Wells Beach for purposes of unfettered public recreation and amusement as well as for fishing, fowling, and navigation subject only to the equivalent rights of others on the same premises.

23. Defendants and the public have acquired an easement on and over Wells Beach by virtue of more than 20 years continuous, open, and notorious use.

24. Defendants and the public have acquired an easement on and over Wells Beach by the customary use of Wells Beach for the purposes within the scope of easement.

25. Defendants and the public have acquired an easement on and over Wells Beach by virtue of Plaintiffs' express and implied dedication of the Beach to public use by and through the recording of a plan for the sale of lots near Wells Beach and by the actions and inactions of Plaintiffs and their predecessors.

26. Defendants and the public have acquired an easement on and over Wells Beach by virtue of an implied easement created by recording of a subdivision plan for the sale of lots along said Beach and by the sale of lots with reference to the plan.

WHEREFORE, Defendants respectfully request this Honorable Court find and declare that Defendants and the public have an easement on and over Wells Beach for unfettered public recreation and amusement and for fishing, fowling, and navigation subject only to the equivalent rights of others on the same premises. Defendants further request that this Court order the following:

- a. That Plaintiffs refrain from taking any action which would prohibit the Town of Wells or the public from the unfettered use of Wells Beach in accordance with their implied easement rights;
- b. That Defendants record an attested copy of this Order in the York County Registry of Deeds; and
- c. Such other and further relief as this Court may deem reasonable and just.

COUNT V (EASEMENT BY PRESCRIPTION)

27. Defendants restate the assertions set forth in Paragraphs 1 through 26 as if restated herein in their entirety.

28. The Town of Wells and the public has acquired prescriptive rights in Wells Beach by virtue of 20 years of continuous, open and notorious use, of Wells Beach with Plaintiffs' knowledge and acquiescence, for fishing, fowling, navigation and for unfettered general recreational and amusement purposes subject only to the equivalent rights of others in the same premises.

29. Neither Plaintiffs nor Plaintiffs' predecessors in interest has ever stated any claim to Wells Beach which would stop the running of the Town's and the public's continuous adverse use of the premises.

30. The scope of the prescriptive easement obtained by the public and by Defendants includes the right of the general public to use the beach for any general recreational purposes including swimming, sunbathing, walking, running, playing, or otherwise generally using the beach for in an unfettered manner for recreational and amusement purposes subject only to the equivalent rights of other members of the public in the same premises.

WHEREFORE, Defendants respectfully request this Honorable Court to find that Defendants and the public have continuously for 20 years openly and notoriously used Wells Beach for fishing, fowling, navigation and general recreational and amusement purposes and further declare that Defendants and the public hold an easement by prescription on and over Wells Beach for said purposes. Defendants further request this Court to order the following:

a. That Plaintiffs refrain from taking any action which would prohibit the Town of Wells or the public from the unfettered use of Wells Beach in accordance with their implied easement rights;

b. That Defendants record an attested copy of this Order in the York County Registry of Deeds; and

c. Such other and further relief as this Court may deem reasonable and just.

COUNT VI (DEDICATION AND ACCEPTANCE)

31. Defendants restate the assertions set forth in Paragraphs 1 through 30 as if restated herein in their entirety.

32. Plaintiffs and their predecessors have dedicated Wells Beach to exclusive public use by virtue of their actions dating back to 1894 as shown on a subdivision plan of that date, which plan was subsequently recorded in the York County Registry of Deeds in 1932 in Plan Book 11, Page 85 ("Plan").

33. The Town of Wells and the public accepted the dedication of Wells Beach by virtue of their actions since the time of dedication, including maintenance of the beach, and use of the beach for fishing, fowling, navigation, an unfettered array of recreational and amusement purposes.

34. Neither Plaintiffs nor their predecessors took any action inconsistent with the dedication to public use between the creation of the Plan and the time of filing the Complaint.

35. The sale of lots with respect to the Plan and the subsequent recording of the Plan created certain public and private rights which continue to exist today.

36. The private rights so created give owners of lots in the vicinity of Wells Beach which were sold with reference to the Plan the unfettered right to use Wells Beach for any and all purposes consistent with the rights of others to use Wells Beach.

37. The public rights include the right to fish, fowl, navigate, and to use Wells Beach in an unfettered manner for recreational and amusement purposes in a manner consistent with the private rights of others.

WHEREFORE, Defendants respectfully request this Honorable Court to find that Wells Beach has been dedicated to public use and has been accepted for such use by the Town of Wells and the public and pursuant to Maine law, further to order the following:

a. That Plaintiffs refrain from taking any action which would prohibit the Town of Wells or the public from the unfettered use of Wells Beach in accordance with their rights acquired by dedication and acceptance;

b. That Defendants record an attested copy of this Order in the York County Registry of Deeds; and

c. Such other and further relief as this Court may deem reasonable and just.

COUNT VII (IMPLIED EASEMENT)

38. Defendants restate the assertions set forth in Paragraphs 1 through 37 as if restated herein in their entirety.

39. Plaintiffs' predecessors in interest are the common grantors of lots in the vicinity of Wells Beach and Wells Beach itself.

40. The circumstances at the time of the conveyance of lots in the vicinity of Wells Beach imply the intent of Plaintiffs' predecessors to subject the remaining land including Wells Beach to an easement.

41. The use of Wells Beach prior to the conveyance of lots constitutes a quasi-easement.

42. By virtue of their actions taken in connection with marketing the lots in the vicinity of Wells Beach, Plaintiffs' predecessors manifested an intent to continue the quasi-easement.

43. The purchasers of the lots in the vicinity of Wells Beach continued to use the quasi-easement.

44. The scope of the quasi-easement includes the unfettered use of the Beach for all purposes including fishing, fowling, navigation, and all recreational and amusement purposes subject only to the equivalent rights of others on the same premises.

WHEREFORE, Defendants respectfully request this Honorable Court to find that Wells Beach is subject to a quasi-easement permitting the unfettered use of the Beach by the owners of the lots in the vicinity of Wells Beach and by the public and pursuant to Maine law, order the following:

a. That Plaintiffs refrain from taking any action which would prohibit the Town of Wells or the public from the unfettered use of Wells Beach in accordance with their implied easement rights;

b. That Defendants record an attested copy of this Order in the York County Registry of Deeds; and

c. Such other and further relief as this Court may deem reasonable and just.

COUNT VIII (OFFSET TAXES)

45. Defendants restate the assertions set forth in Paragraphs 1 through 44 as if restated herein in their entirety.

46. Neither Plaintiffs nor Plaintiffs' predecessors in interest have paid real property taxes to the Town on Wells Beach at any time since purportedly acquiring ownership thereof.

47. Plaintiffs' failure to pay property taxes constitutes an intent to abandon the property to the Town of Wells and the public.

WHEREFORE, Defendants respectfully request this Honorable Court to declare title to Wells Beach to reside in the Town of Wells and the public and, alternatively, in the event title is determined to reside in Plaintiffs, to order Plaintiffs to pay property taxes on Wells Beach dating back to 1894 and to order such other and further relief as this Court deems reasonable and just.

ADDITIONAL AFFIRMATIVE DEFENSES

Defendants hereby assert the following affirmative defenses in addition to those stated in their original answer:

1. Plaintiffs abandoned any and all interests in Wells Beach by virtue of their actions and inactions since 1894.
2. Plaintiffs are estopped from claiming title to Wells Beach by virtue of their actions and inactions since 1894.
3. Plaintiffs have failed to pay property taxes on all or any portion of Wells Beach at any time since 1894.
4. Plaintiffs' Complaint is barred under the doctrine of laches.

Dated at Kennebunk, Maine this 24th day of February, 1998.

BERGEN & PARKINSON, LLC

By:


Durward W. Parkinson

By: Michael W. Macleod-Ball
Michael W. Macleod-Ball,
Attorneys for the Town of Wells
62 Portland Road, Post Road Center
Kennebunk, ME 04043
207-985-7000

**MONAGHAN, LEAHY, HOCHADEL
& LIBBY, LLP**
By: Thomas F. Monaghan
Thomas F. Monaghan

By: John J. Wall, III
John J. Wall, III
Attorneys for the Town of Wells
95 Exchange Street
P.O. Box 7046
Portland, ME 04112-7046

COUNTERCLAIM AND CROSSCLAIM SUMMARY SHEET

Date Filed

[Empty box for Date Filed]

This summary sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by the Maine Rules of Court or by law. This form is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet and attaching the appropriate party to the appropriate count or counts. By doing this the courts will be better able to ensure that all counts in a case are tracked and disposed of.

(SEE INSTRUCTIONS ON REVERSE)

DOCKET NUMBER RE97-203

I. TITLE TO REAL ESTATE IS INVOLVED IV-D CASE

II. FILING DOCUMENT
 COUNTERCLAIM CROSSCLAIM

III. (a) COUNTERCLAIM PLAINTIFF(s) (an original defendant)
or CROSS-CLAIM PLAINTIFF(s) (an original defendant)

Town of Wells Anthony Cilluffo,
P.O. Box 398 Gerard J. Fletcher, George Finch,
Wells, ME 04090 Richard Clark, Reginald Chase,
207-646-5187 Selectmen of the Town of Wells
c/o Town of Wells

(b) Attorneys (Name, Bar number, Firm name, Address, Telephone Number)
(If Pro se Counterclaim or Cross-Claim plaintiff, leave blank)
Thomas F. Monaghan, Esq. Durward W. Parkinson, Esq.
John J. Wall, III Michael W. Macleod-Ball
Attorneys for the Town of Wells Co-counsel for the Town of Wells
95 Exchange Street, P.O. Box 7046 Bergen & Parkinson
Portland, ME 04112-7046 62 Portland Road 207-985-7000
207-774-3906 Kennebunk, ME 04043

IV. (a) COUNTERCLAIM DEFENDANT(s) (an original plaintiff)
or CROSS-CLAIM DEFENDANT(s) (an original defendant)

Lisle A. Eaton, et al.
Donald H. Eaton, Jr. and
Priscilla Jane Eldridge
c/o Robert M.A. Nadeau, Esq.
Four Oaks Professional Park
1332 Post Road, Suite 4A
Wells, ME 04090
(b) Attorneys (Name, Bar number, Firm name, Address, Telephone Number)
(If known)
Robert M.A. Nadeau, Esq.
Nadeau & Penney, P.A.
Four Oaks Professional Park
1332 Post Road, Suite 4-A
Wells, ME 04090 207-646-4000

Date: 2/25/98

Durward W. Parkinson
Name of Lead Attorney of Record or Pro se Counterclaim or Cross-Claim Plaintiff
Durward W. Parkinson

cc: Michael W. Macleod-Ball
Signature of Attorney or Pro se Counterclaim or Cross-Claim Plaintiff
Michael W. Macleod-Ball

STATE OF MAINE
YORK, SS.

SUPERIOR COURT
Docket No. RE-97-203

OCT 26 10 43 AM '99

Lisle A. Eaton, et al.,)
Plaintiff,)
)
)
v.)
)
)
The Inhabitants of the)
Town of Wells,)
Defendant.)



DECISION AND JUDGMENT

TITLE TO REAL ESTATE INVOLVED

Procedural Background

This action began in December, 1997, when Lisle Eaton and his two siblings filed an action to quiet title to certain real estate located in the Town of Wells. The defendants consisted of the Town itself and "Unnamed Defendants identified as all users of Plaintiffs' property other than persons claiming any right title or interest." The unnamed defendants were served by publication, never appeared, and were defaulted. The Town appeared and asserted by way of answer and counterclaim that it held title to the property in question or, in the alternative, that the Town and the general public had acquired the right to use the subject parcel pursuant to various legal theories.

The parcel in question, located within the Town of Wells, consists of 2200 linear feet of dry sand and the associated intertidal zone to the low water mark. The issues were tried before this Court on September 22-30, 1999. With the consent of all parties, those issues remaining on the complaint and counterclaim after this Court's order on the Motion for Summary

Judgment were addressed in a bifurcated fashion. Therefore, reference is made to this Court's order on the Motion for Summary Judgment filed September 20, 1999, and this Court's prior Findings of Fact and Conclusions of Law, filed September 26, 1999, in order to review the full procedural background.

The State of Maine, through the Office of the Attorney General, had previously been granted limited intervenor's status in this matter. At their request, and with the consent of the Court and all other parties, the attorney for the State participated in only that portion of the testimonial hearing conducted following the Court's decision on the issue of record title.

Factual Findings

According to the 1990 census, the Town of Wells has a year round population of 7,726 people, but during the summer months the population swells to approximately 40,000. The Town itself is 62 square miles, but the high valuation area consists of the 7 square miles located within the so-called "resort area," which runs from Route 1 to the Atlantic Ocean. At one point in time, when the Town of Ogunquit was part of Wells, the Town of Wells advertised itself as a recreational destination with 10 miles of sandy beach. Those beaches stretched from present day Ogunquit Beach in the south to Laudholm Beach in the north and encompassed areas presently known as Moody Beach, Fisherman's Cove, Crescent Beach, "Wells Beach", and Drakes Island Beach. At various times during testimony in this case and throughout history these beaches have

been referred to collectively as "Wells Beach" or the beaches of Wells. However, for the purposes of this opinion "Wells Beach" is defined as the stretch of sand beach above the high water mark and the associated intertidal zone which runs from the Mile Road to the jetty at the Webhannet River.

The area from the Mile Road to the Webhannet River is over one mile in length. [See Ex. 55F, a government map which suggests that the distance from Mile Road to the jetty is 8000 feet and that the subject parcel commences approximately 3000 feet from Mile Road]. The dispute in this case pertains to approximately 2,200 linear feet of beachfront property beginning toward the middle of Wells Beach and running northerly. This parcel of real estate is claimed by the Eatons pursuant to their claim of record title. The upland portion of the property consists solely of dry sand, and that skirt of sand runs between the high water mark and the boundary lines of the oceanfront cottages. The width of the dry sand area varies as one travels northerly on the beach; the entire area is prone to shifting sands and beach erosion/accretion.

The northernmost portion of Wells Beach, adjacent to the jetty, is owned by the Town. Between the Town's property and the Eaton parcel there are one or more other parcels of unknown ownership. Likewise, to the south of the Eaton land running to the Mile Road, there are one or more lots whose ownership and use were not the subject of this litigation. At the point where the Mile Road intersects with the beach, there is a public parking lot

owned by the Town of Wells. That area has historically been known as the Casino Area or the Forbes Area.

The plaintiffs in this action are Lisle Eaton and his siblings. The Eaton siblings came to own the beachfront parcel in question through a series of land transactions dating back to 1892 when their great-grandfather William Eaton was an owner and developer of the Wells Beach Improvement Company. None of the Eaton siblings has ever lived on the subject parcel or in close proximity thereto. The Company bought the 40 acre parcel, comprised of the northern end of the entire peninsula, which runs from Mile Road to Wells Harbor (now the location of the jetty). Originally some 300 lots were laid out on that parcel for sale as cottage and hotel sites. Through the years, the Eaton share of the Company's entire parcel was reduced to the area depicted on the final property plan [Ex. 55A-D], consisting of Lots 1-44 on the easterly side of Atlantic Avenue and also other lots on the westerly side of Atlantic Avenue.

In addition to lots that were sold to individuals, William Eaton also was involved in laying out and dedicating Atlantic Avenue and four "outlets" running from Atlantic Avenue to the sea beach. These "outlets" are twenty foot wide passageways running between lots No. 32 & 33, 42 & 43, 53 & 54, and 63 & 64. Atlantic Avenue runs parallel to the beach and provides access to Lots 1-44, which were owned by Eaton in 1892, and various others lots, owned by Eaton's partners and others, on its easterly and westerly side. In 1893, when Atlantic Avenue was laid out and accepted by

the Town, documents, including Town records and subdivision plans filed in the Registry, reference the four "outlets" as well as Atlantic Avenue. [See Ex. 39].

When Eaton developed the lots on the easterly side of Atlantic Avenue, he conveyed most of them subject to a description based upon the size of the lot measured from Atlantic Avenue, rather than conveying land all the way to the Atlantic Ocean. Thus, most of the Eaton lots have a clearly marked boundary well above the high water mark on the sand beach, leaving a strip of dry sand between the lots' boundaries and the high water mark. Neither Eaton nor anyone else has ever transferred that strip of dry sand, and it is that strip of land which the plaintiffs claim. Exhibit 55(A-D) clearly sets forth the dimension of the upland and intertidal zone, which is the subject of this dispute. It is residual land, currently consisting of approximately seven acres according to plaintiffs' surveyor, which has been owned by William Eaton and his successors in title since 1892.

Prior to 1892, there is scant historical evidence as to the specific recreational uses of Wells Beach in particular. However, there is significant historical evidence of sea bathing, "idling", walking and picnicking on the southern Maine Coast. A review of the Exhibits in the 217 series, particularly #217(94)(65)(70)(63)(93)(95)(66)(16)(61) demonstrates that recreational activities on the seacoast can be traced back to the 1690's. As early as the 1830's, people viewed the general area around Wells Beach as a place of formal recreational activities. Based upon the notion of

historical modeling¹, it is fair to infer that these sorts of activities went on in some measure on the area of beach that is the subject of the present dispute.

However, the pre-1892 use, while suggestive of local custom and usage, is not determinative of the issues in this particular case. There is insufficient historical evidence to establish that either the general public or the Town obtained prescriptive rights to the recreational use of this particular 2,200 linear feet during the period prior to 1892. No one is able to provide direct evidence of those uses and "historical modeling" lacks the specificity required to support the establishment of prescriptive rights.

Turning, however, to the post-1892 evidence, there is ample evidence which supports the finding first suggested in Bell v. Inhabitants of the Town of Wells, York County Superior Court, Docket No. CV-84-125, at p. 30, [hereinafter referred to as "the Moody Beach case"] that "the beach currently known as Wells Beach

¹"Historical modeling" is an accepted practice among historians wherein social history is reconstructed based upon recurring documentation about various subjects in different locations. For instance, there is abundant historical evidence of the colonists' problems with swine roaming the beaches of Massachusetts and Maine. Although no direct evidence exists of such a problem on Wells Beach, the problem is documented as so widespread that it would be fair to infer that it existed on Wells Beach. This concept was discussed at the trial of this matter by Edwin Churchill, the state historian.

was the primary recreational center in Wells."² The aim of the Wells Beach Improvement Co. was "to promote. . . whatever may be helpful to the rest and comfort of our purchasers." Based upon the evidence presented, this Court finds that William Eaton acquiesced in the use of the retained sand beach by all members of the general public, including those who owned lots along both sides of Atlantic Avenue and any other members of the general public.

*Acquiesced
back
to
1892*

The Court heard the testimony of Alberta Wentworth, who is a lifelong resident of Wells and is currently 93 years of age. For as long as she can remember, the public has always been allowed to use Wells Beach for recreational purposes from the sea walls in front of the cottages to the low water mark. The recreational uses always stretched the entire length of the beach, from the Casino to the jetty. Her testimony, and the testimony of Hope Shelley, Robert Littlefield, Irene Brown and Edgar Moore, establishes that the specific area in question was subject to regular use for general recreational purposes from the turn of the century forward to the 1960's. There is absolutely no evidence

²Bell v. Inhabitants of the Town of Wells, York County Superior Court Docket No. CV-84-125, was never appealed on the issues of local custom, easement by prescription and implied dedication. [See Bell v. Town of Wells, 557 A.2d 168, footnote #5 (Me. 1989).] The Superior Court in that case found as a fact that the defendant Town had failed to prevail on those issues as they pertained to Moody Beach. Neither those factual findings pertaining to Moody Beach nor the above-noted gratuitous reference to Wells Beach has any precedential value in this matter, and this Court in no way considers itself bound by those factual findings. However, portions of the Superior Court decision in Bell are instructive and helpful to this Court's analysis and when reference is made to that decision it is for those purposes only.

that William Eaton or any of his successors in title objected to this use or granted permission for the use. During that time period the public primarily accessed the beach from the parking area at the Mile Road lot and from the accessways running alongside the cottages on Atlantic Avenue.

In the 1960's the Town, in conjunction with the U.S. Government, built the jetty that today extends out into the Webhannet River in front of Wells Harbor. In connection with the jetty construction, some public land was purchased at the northern end of the peninsula, and public parking was installed. The jetty changed the character of the area in two specific regards. First, a great deal of sand accreted on the northern end of the peninsula once the jetty was built and the natural sand dunes and hillocks had been leveled. Furthermore, the additional public parking meant that the public could freely enter Wells Beach from both the Mile Road and the jetty sides. Between the early 1960's and 1996 the public and the Town's use of the disputed parcel greatly intensified. During this same time period, the plaintiffs made virtually no use of the beachfront property, and they did not even know exactly which portion of the beachfront was theirs by way of record title.

Unlike Moody Beach [See pp. 30-32 of the Moody Beach case], the disputed portion of Wells Beach was used by significant numbers of the general public well before the late 1970's. Furthermore, every person who used the 2200 feet of beach, whether a resident of a nearby cottage or elsewhere, was a member of the

general public. Unlike the situation on Moody Beach, the use of the sand beach in front of Lots 1-44 by cottage owners was not pursuant to their rights as fee owners of the land to the low water mark. During the period prior to 1996, the record title holders, plaintiffs in this action, never asserted any claim to the beach nor granted anyone permission to use the beach. Increased use by the general public led eventually to increased maintenance and monitoring activities by the Town itself. During the 1950's and even more into the '60's and beyond, the Town of Wells has maintained the subject parcel by raking the sand, installing litter receptacles, and placing lifeguards along the beach.

In 1983 and again in 1989, the Town of Wells itself acknowledged that the Eatons did hold a record interest in the subject parcel. In 1983, the Town purchased from the Eatons nine accessways to the low water mark over certain narrow strips of land that had been retained by William Eaton pursuant to the original plan for development. Consistent with an appraisal initiated by the Town, the Eatons transferred all of their interests in those nine (9) accessways to the Town of Wells. In 1989, the Town initiated condemnation proceedings against the Eaton beachfront land to obtain an easement across the 2200 feet of sand beach to install drainage pipe for a harbor dredging project. That easement existed for a five-year period and expired in 1994.

Recently, the Town has continued its policy of beach

maintenance and protection through involvement in a program to preserve piping plover habitation on the beach, including the disputed parcel. The Town, by way of this lawsuit, seeks not only to establish the public's right to use the upland skirt of sand and the intertidal zone for recreational purposes, such as swimming and sunbathing, but it also seeks to establish its own rights in the beach for purposes of maintenance, life guard stations, and other uses the Town deems appropriate, including the installation of drainage pipe to assist with an anticipated harbor dredging project.

DISCUSSION

The Public's Right to Use "Wells Beach" for Recreational Purposes

As a preliminary matter, it should be noted that the Town of Wells is an appropriate party to assert the public's right to an easement over the property in question. [Bell v. Town of Wells, 510 A.2d 509, 517 (Me. 1986) (citing Town of Manchester v. Augusta Country Club, 477 A.2d 1124 (Me. 1984)).] Furthermore, the public at large is capable of acquiring a non-possessory interest in land. Augusta Country Club, 477 A.2d at 1128; see also 14 M.R.S.A. § 812 (1980) ("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").

The question of whether or not such a public non-possessory interest in land has been established is a factual question

determined from the evidence. The Town has put forth three viable legal theories in support of its argument that such a non-possessory interest has been established; (1) prescriptive easement; (2) custom and usage; and (3) dedication and/or implied easement. This Court will examine each of them in turn.

1.) A Public Use Easement Through Prescription

As a general rule, the party asserting an easement by prescription must prove continuous use for at least 20 years under a claim of right adverse to the owner, with his knowledge and acquiescence, or a use so open, notorious, visible, and uninterrupted that knowledge and acquiescence will be presumed. Augusta Country Club, supra. at 1130 (citing Comber v. Inhabitants of the Plantation of Denniston, 398 A.2d 378 (Me. 1979); Forrester v. Inhabitants of the Town of Kennebunkport, 391 A.2d 831, 833 (Me. 1978); MacKenna v. Inhabitants of the Town of Searsport, 349 A.2d 760, 762 n.3 (Me. 1976)). The Town has proven each of the elements of an easement by prescription.

Acquiescence is defined as "consent by silence." Dartnell v. Bidwell, 115 Me. 227, 230, 98 A. 521, 525 (1916). Acquiescence is not the same as giving permission to someone to use one's property. The facts in this case, beginning with William Eaton's conduct in 1892 and continuing through to the plaintiffs' conduct in 1983 and 1989 indicate nothing but acquiescence to the public's right to use Wells Beach for a broad range of recreational purposes, ranging from strolling to sun bathing, picnicking, and swimming and all other recreational beachfront activities both on

the dry sand and in the intertidal zone.

This Court is mindful that the law in Maine with regard to creation of public recreation easements by prescription in wild and uncultivated land applies the rule that open and continuous use for the requisite length of time raises a rebuttable presumption that the use was permissive. Augusta Country Club, 477 A.2d at 1130. In this case the Town has effectively rebutted that presumption based upon the evidence presented. The character of the plaintiffs' conduct and the conduct of their predecessors in title has never been permissive in nature. There is absolutely no evidence of any member of the general public or any cottage owner on either side of Atlantic Avenue ever seeking or obtaining permission to use this stretch of Wells Beach. Since 1892, the owners of the residual portion of the Wells Beach Improvement Co. have completely and totally acquiesced in the public's recreational use of this land, and the public, including the cottage owners along Atlantic Avenue, have treated the beach as their own for recreational purposes.

Furthermore, this Court questions whether application of the rebuttable presumption is even appropriate on these facts. The presumption was developed to protect owners of large tracts of unfenced, undeveloped lands, while allowing use by the general public of such lands, which would be consistent with and in no way diminish, the rights of the owner in his land. Augusta Country Club, 477 A.2d at 1130. The parcel in this case is not wild and uncultivated land for which this presumption was created. On the

contrary, this stretch of sand beach is located on one of the most developed sections of the Maine Coast.

Even if the presumption does apply, the Town of Wells has effectively rebutted it and has established that the public has a prescriptive easement over the dry sand beach and the associated intertidal zone for all reasonable recreational purposes. The only conceivable use to be made of this beach, at least for the last one hundred years, has been for recreational purposes. The public's use here, which has been under a claim of right adverse to the owners, and is also open, notorious, visible and uninterrupted, stretches for far longer than twenty years. Clearly this use which was not permissive in nature.

2.) Local custom and usage

The Maine Law Court has never formally adopted the doctrine that the public can acquire an easement over property of another by local custom and usage. Piper v. Voorhees, 130 Me. 305, 311 (1931); Bell v. Town of Wells, 557 A.2d 168, 179 (Me. 1989). In the Moody Beach Case (pp. 28-30), Justice Brodrick suggested that the doctrine was a viable one in the State of Maine but that the plaintiffs had failed to establish local custom and usage on those facts. Specifically, in order to establish local custom and usage, the following seven facts must be proven.

1. The custom must have been in effect "so long as the memory of man runneth not to the contrary";
2. The right must have been exercised without interruption;
3. The use must be peaceable and free from dispute;

4. The use must be reasonable;
5. The land impressed with the custom must have boundaries;
6. The custom must be obligatory; and
7. The custom must not be repugnant to other customs or law.

State ex. rel. Thornton. v. Hay, 462 P.2d 677 (Ore. 1969).

This Court does not rely upon that doctrine in determining the public's prescriptive rights in connection with this beach, but does note that the evidence presented in this case appears to be contrary to that considered by Justice Brodrick as to items #1 and #3. Clearly in this case, unlike the Moody Beach Case, no one has ever disputed the public's right to recreate on Wells Beach. Furthermore, this Court heard evidence that recreational uses of beaches were not unknown in Colonial times and that the Puritans themselves felt compelled to legislate to prohibit beach recreation on the Sabbath, thereby inferring that it did occur on other days. [See Ex. 217(93) laws passed in 1692-93 to "restrain all persons from swimming in the water" on the Sabbath]. If the doctrine were a viable one in the State of Maine, this case presents the facts appropriate to its adoption.

3.) Dedication and implied easement

The doctrine of dedication provides an independent basis for the establishment of public rights in this particular dry sand beach and intertidal zone. To prove dedication, two conditions must be shown: that the land in question was "dedicated" by the grantor for a public purpose; and that the public "accepted" the dedication by some affirmative act. Augusta Country Club, 477

A.2d at 1129. The requisite affirmative act has never been defined, but the Law Court has intimated that "actual enjoyment by the public of the use for such a length of time that the public accommodation and private rights would be materially affected by a denial or interruption of the enjoyment" may be sufficient.

Vachon v. Inhabitants of the Town of Lisbon, 295 A.2d 255, 260 (Me. 1972) (quoting Northport Wesleyan Grove Campmeeting Ass'n. v. Andrews, 104 Me. 342, 347, 71 A. 1027, 1029 (1908)).

Most often, the historical cases dealing with dedication have concerned themselves with roads and highways, but the same principles apply to the skirt of dry sand and the intertidal zone not conveyed to lot owners by William Eaton when he developed the cottage lots on this peninsula. Dedication in this context is defined as follows:

And it is not necessary that the dedication be made specially, to a corporate body, capable of taking by grant; it may be to the general public, and limited only by the wants of the community. If accepted and used by the public in the manner intended, it works an estoppel in pais, precluding the owner, and all claiming in his right, from asserting an ownership inconsistent with such use.

State v. Wilson, 42 Me. 9, 23 (1856)

In the present case the evidence demonstrates that it was William Eaton's intent to allow the public, including the lot owners along both sides of Atlantic Avenue, to use the beach for all recreational purposes.

The most telling testimony on this issue was Lisle Eaton's testimony to the effect that he had never heard his grandfather or

any other member of his family speak to the issue of the residual ownership of the dry sand beach. This Court believes this lack of discussion is entirely consistent with William Eaton's scheme of development to dedicate that sand beach to public recreational purposes.

The Town's Right to Maintain and Preserve Wells Beach

Separate and distinct from the public's right to use Wells Beach for recreational purposes are certain claims by the Town of Wells itself pertaining to this beach. First, the Town claims title to the beach based upon adverse possession. A party claiming title by adverse possession bears the burden of proving each element of adverse possession by a "fair preponderance of the evidence." Stowell v. Swift, 576 A.2d 204, 205 (Me. 1990). The Town has failed to prove by a preponderance of the evidence that it has been in possession of this land "under a claim of right". In order to claim land adversely, the plaintiff must establish that it has been in possession for the requisite number of years, "as owner, with intent to claim as [its] own, and not in recognition of or subordination to [the] record title owner." Striefel v. Charles-Keyt-Leaman Partnership, 1999 ME 111 ¶14, (quoting Black's Law Dictionary 248 (6th ed. 1990)).

The Town's action in 1983 and 1989, when it explicitly acknowledged the Eaton's record interest in this parcel, negates any claim to the fee in the parcel by adverse possession. While the Town now argues that the actions taken in the 1980's were simply expediciencies designed to avoid expensive litigation, the

fact remains that the record title owners were the Eatons and the Town then acknowledged that fact.

The Town has shown, however, by this evidence that it holds a prescriptive easement in the subject parcel for purposes associated with routine beach maintenance, such as raking the beach, installing litter receptacles, and placing life guard stands. These activities, like the public recreational activities discussed earlier, have continued by acquiescence since at least the 1960's. Furthermore, if one accepts the theory of dedication as applied to these facts, the Town's routine and longstanding activities with regard to beach preservation and maintenance are akin to the Town maintaining a roadway over which the public has acquired a right of passage.

The Town has requested, additionally, that this Court consider and recognize that it has a right to install pipe over the subject parcel to aid in its harbor dredging project. In 1989 when the same project was anticipated, the Town employed condemnation proceedings to claim an easement for the purpose of laying temporary pipelines. This Court can see no basis upon which to base a prescriptive right to lay pipe over the subject parcel. The proposed use is different in kind from routine beach maintenance or even preservation of piping plover habitat, activities which involve absolutely no adverse infringement on the beach and are either totally natural or temporary in nature. While the temporary infringement of laying pipeline over the subject parcel may be a relatively small infringement, it is

qualitatively different from the types of recreational uses and associated maintenance which are the subject of prescriptive rights. The Eatons, as the record owners of the parcel, have a right to expect some compensation for that type of infringement.³

The distinction which this Court makes between a prescriptive easement for recreational purposes and a broader easement for any purpose of the Town's choice, including laying pipe to assist with a dredging operation, has been previously recognized. In his dissent in Bell v. Town of Wells, 557 A.2d at 189, now Chief Justice Wathen makes the point that in his view, at least, the rights of the public under the Colonial Ordinance of 1641 "are, at a minimum, broad enough to include such recreational activities as bathing, sunbathing and walking. *As ordinarily practiced, such activities involve no additional burden on the shoreowners and nothing is taken from or deposited on the intertidal lands.*" [emphasis added]. Likewise, the prescriptive easement which this Court recognizes on these particular facts to apply to the 2200 linear feet of sand beach and intertidal zone is recreational in nature and neither takes nor deposits anything of even semi-permanence on the land. Although the Law Court's majority opinion disagreed as to the extent of the public's easement under the 1641 Colonial Ordinance, Justice Wathen's observation regarding the

³In 1989, the Town of Wells paid the Eatons \$50.00 per lot for the right to lay the pipe for a five year period. That easement expired in 1994. The value assigned to the infringement then does not, in this Court's view, appear unreasonable, since ultimately the project is intended to benefit all the owners of the sand beach along the length of Wells Beach.

nature of a public recreational easement is a viable distinction when discussing a prescriptive easement such as the one which applies to this 2200 linear feet of sand beach. An easement to install dredging pipe, even for a relatively limited period of time, is tantamount to placing an additional burden on the established recreational easement and it should be done only with the Eatons' consent or pursuant to condemnation proceedings as undertaken in 1989.

**Attorney Fees in Connection with the Prior Injunction
Motion**

Finally, during the summer of 1999, the Town of Wells filed with this Court a request for injunctive relief, seeking an order requiring the Eatons to allow pipes to be laid across their property in anticipation of the aforementioned dredging project. Through a series of circumstances beyond anyone's control, that project did not become funded as anticipated and the Town withdrew its request as prematurely filed. Both the Court and the parties spent a great deal of time wrestling with these issues during the period when the parties should have been investing their efforts on completion of discovery in anticipation of the September trial. When the Town withdrew its request prior to the scheduled hearing on the motion, the Eatons made a request for attorney fees in connection with that matter. The Court indicated it would take the attorney fee request under advisement pending resolution of the underlying dispute.

In light of the fact that the Town always had available to it

the remedy of condemnation in order to obtain the dredging pipe easement and the fact that the Eatons have prevailed on this issue in the case in chief, it is reasonable that the Town should pay the Eatons' costs, if any, in connection with that motion.

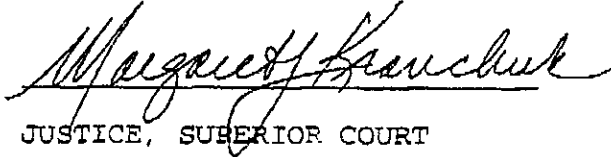
However, this Court does not find that the Town's motion was made in bad faith or with malice and is satisfied that the American Rule regarding attorney fees should prevail.

Based upon the foregoing, and the Court's prior findings of fact dated September 26, 1999, the entry shall be:

Judgment is entered for the plaintiffs on their complaint finding that record title to the disputed parcel is held by the plaintiffs. Judgment is entered for the Town of Wells on so much of its counterclaim as seeks to establish on behalf of the general public and the Town of Wells a right to use the subject premises, both the dry sand and the intertidal zone, for general recreational purposes, including but not limited to bathing, sunbathing, picnicking and walking, and beach maintenance and preservation including raking, litter control, maintaining wildlife habitats, and seasonal lifeguard stands. All other claims and counts raised by way of the counterclaim, including the Town's claim of title by adverse possession, are denied. Each party is responsible for its own costs, with the exception that the Eatons are entitled to their costs in connection with the Preliminary Injunction proceedings. Within 10 days of the date of this decision, counsel for the Town shall prepare a final judgment, containing an appropriate legal description of the

subject premises, including the scope of the aforementioned easements on behalf of the public and the Town, and complying with any requirement for filing in the registry of deeds.

Dated: October 20, 1999


JUSTICE, SUPERIOR COURT