

Maine Beaches Conference 12 July 2013 Plenary II Notes: Private Property, Public Rights: Ownership and Public Use of the Maine Coast

John Duff

Mr. Duff provided background on the public trust doctrine and origins of the colonial law of 1641. Elements of colonial law have since been integrated into common law. He noted that in ME and MA upland owners own to low tide – public rights in the intertidal are fishing, fowling and navigation. Duff reviewed the court’s decision of Bell v. Town of Wells, 1989 (Moody Beach case) – the decision clarified fishing, fowling and navigation as public’s rights in the intertidal and said that the state cannot expand those rights. A minority opinion in the Bell case by three justices said that the above are not the only public interests intertidal. The minority opinion sent a signal. Eaton vs. Wells (2000), the court decided that the town/public had rights to use beach via prescriptive easement. Court did not address broader question of public rights in intertidal.

In McGarvey v. Whittredge, the question was whether public can cross intertidal land to engage in scuba diving. Court decided 6-0 in the affirmative, but arrived at the decision differently. Three opined that scuba diving is considered “navigation.” Three remaining judges said that scuba diving is one among other modern day “ocean uses” that should be considered as public rights.

Almeder v. Kennebunkport (currently on appeal to Law Court) covered two issues: whether and how the public has the right to use Goose Rocks Beach and whether the public has greater interests in intertidal area. Court found that a prescriptive easement exists (proved 25 years of blatant use without objection of property owner). Court also said that an “easement by custom” was met as well (but it is unclear if “easement by custom” is recognized in ME). Public has use of intertidal for ocean-based activities but those activities were highly caveated. List of allowable uses might be used by Law Court in reaching its decision on the appeal.

Amy Tchao

An aerial map and “zones” of Goose Rocks Beach Sand Point, Dinghy Point, Timber Point. In places, there is ¼ mile of wet sand at low tide. This was multi-party litigation 110 beachfront lots, 180 back lots, Town and Selectmen, 29 plaintiffs and the State of Maine as intervener.

The Court found longstanding, historic use had been documented. The Town regulated the use of beach and provided services such as parking, patrols, lifeguards, etc. The public has used wet and dry sand from end to end for more than 100 years; the Court looked at this case using the lens of a prescriptive easement checklist created in the Eaton case.

A beach use ordinance adopted by the Town was an agreement reached apart from the legal proceedings and signed by some members of the community, but not the plaintiffs in the case. The beach use agreement allows for public use under certain circumstances in front of beachfront lots. Town has an obligation to enforce the agreement. There are agreed upon limits to the number of parking spaces and a 25-foot “reserve area” from sea wall to the sand that is reserved for beachfront owner use at their request. A beach advisory committee exists and oversees implementation of the agreement.

The Law Court may address intertidal public use issues on appeal.

### Ben Leoni

The enforceability of the Beach Agreement is questionable. It is complex, hard to understand especially by tourists and renters. There is a “patchwork quilt” of landowners who agreed and not full consensus, as the plaintiffs did not participate in the agreement. It applies to only 60% of the beach. “Objectionable use” of the beach (one basis for being asked to leave) was not defined in the agreement and is open to interpretation.

The public use of the area was unclear. There is a town-owned public beach and an area owned by the Kennebunkport Conservation Trust that is open to the public. Town documents such as the comprehensive plan make reference to the public and private beach.

The case has potentially wide reaching effects (Leoni has fielded calls from northern Maine woodland property owners). If the decision is upheld, will others around state be forced to not allow public use?