

“private beach,” “notice: private beach to lowest tide,” and “no trespassing” on the ocean-facing portions of Judy’s Moody’s seawall, and has occasionally used pieces of wood, orange cones, or raked seaweed to delineate where the property’s northerly boundary abuts the public way.

b. OA 2012 Trust

Defendant OA 2012 Trust owns property on Moody Beach at 3 Ocean Avenue in Wells, Maine and claims ownership of the seaward intertidal land. The property’s seawall bears a sign that reads “Moody Beach (to your left) is a private beach to the low water mark. No loitering. No dogs allowed.” James Howe, Defendant OA 2012 Trust’s sole beneficiary, has never tried to remove the sign and consents to its message, but no one associated with the trust has ever approached members of the public to ask them to relocate from its property.

c. Ocean 503, LLC

Defendant Ocean 503, LLC owns property on Moody Beach at 503 Ocean Avenue in Wells, Maine and claims ownership of the seaward intertidal land. Mark Montesi, a representative of Defendant Ocean 503, installed signs on the property’s seawall reading “private beach” and “Moody Beach is a private beach to the low water mark. No loitering.” No one from Defendant Ocean 503 has ever asked the public to leave its property.

d. Margaret and Jeffrey Parent

Defendants Margaret and Jeffrey Parent own waterfront property on Moody Beach in Waldoboro, Maine by deed, which describes the property’s boundary as running “to the waters of Back River Cove.” Defendants Parent claim ownership of the intertidal land seaward of their upland property and the seaweed affixed to the rocks therein. No plaintiff has ever been present or conducted any activity, including rockweed harvesting, on Defendants Parent’s intertidal land.

II. Plaintiff Information

a. Marine Industry Plaintiffs¹

Fourteen of the named plaintiffs derive income from a profession intrinsically tied to ocean resources—oyster farming, clam and seaweed harvesting, marine biology, and seaweed product manufacturing—and generally allege that upland beachfront owners' claims of title to the intertidal portion of Maine's coast threaten their livelihood. None of these plaintiffs have ever been on Defendants' intertidal land, seen signage related to its use, or been denied access to it.

b. Crow's Nest Proprietors

Plaintiffs William Griffiths and Sheila Jones, owners of the Crow's Nest Resort in Old Orchard Beach, Maine, allege that their livelihood is threatened by Defendants' intertidal ownership claims. Plaintiff Griffiths avers that in his eight years of owning the resort, six patrons have said they visited Moody Beach and only two or three have asked about the signs posted on it. Plaintiff Jones states that only five or six of the resort's thousands of guests have told her they visited Moody Beach. There is no indication that any of these guests were on Defendants' intertidal portions of Moody Beach, and no guest has ever informed Plaintiffs Griffiths or Jones that they were asked to leave the beach or would no longer stay at the resort as a result of the signage. Plaintiff Griffiths visited Moody Beach around fifty years ago, but he is uncertain whether he was on Defendants' intertidal land, and he was never asked to leave. Plaintiff Jones has never been on Moody Beach, much less seen the signage on or been denied access to Defendants' intertidal land.

c. Remaining Plaintiffs

Plaintiff William Connerney is a trustee of Connerney Nominee Trust, which owns property behind Moody Beach located at 130 South Tibbetts Road in Wells, Maine. While Plaintiff

¹ This group of plaintiffs includes Brian Beal, Robert Morse, George Seaver, Greg Tobey, Hale Miller, Leroy Hilbert, John Grotton, Jake Wilson, Dan Harrington, Susan Domizi, Amanda Moeser, Lori and Tom Howell, and Chad Coffin.

Connerney has never been on the intertidal portions of Moody Beach owned by Defendants Parent, he has engaged in various recreational activities on the intertidal land owned by Defendants Ocean 503, Judy's Moody, and OA 2012 Trust. Since these defendants installed private property signs on Moody Beach, Plaintiff Connerney has become concerned that they will unlawfully challenge his use of their intertidal land and ask him to leave. Plaintiff Connerney continues to use the intertidal portions of Moody Beach despite the signage, but he now attempts to limit his activity to when these defendants are not around or otherwise avoids using their intertidal land to eliminate the possibility of such a confrontation. To date, Plaintiff Connerney has never been approached by anyone associated with any of the named defendants or denied access to their intertidal land.

Plaintiffs Judith and Orlando Delogu are residents of Portland, Maine who allege that their enjoyment of Maine's coast has been curtailed by the intimidating private property signs Defendants posted on their portions of Moody Beach. Mr. Delogu has never been on the intertidal areas of Moody Beach owned by Defendants Parent, but he has walked the length of the intertidal land owned by Defendants Ocean 503, Judy's Moody, and OA 2012 Trust to better understand the character of their signs. Although Mr. Delogu feels these signs act as a barrier to his right of public access to Maine's intertidal land, he has never been approached about his activity on or asked to leave any part of Moody Beach. Mrs. Delogu has never been present on Moody Beach, seen the signage, or been denied access to Defendants' intertidal land.

Plaintiffs Kathy and Peter Masucci are co-trustees of the Masucci Trust, which owns the property they reside in year round located behind Moody Beach at 484 Ocean Avenue in Wells, Maine. Plaintiffs Masucci allege that their access to and enjoyment of the intertidal portions of Moody Beach have been unlawfully diminished by Defendants' installation of private property signs and other boundary demarcations. While Plaintiffs Masucci have never been on the intertidal

portions of Moody Beach owned by Defendants Parent, they have historically engaged in various recreational and sedentary activities on the intertidal land owned by Defendants Ocean 503, Judy's Moody, and OA 2012 Trust. Both Plaintiffs Masucci still regularly walk across these defendants' respective intertidal zones, but they no longer stop to enjoy those areas of Moody Beach for fear of being confronted and asked to leave. Defendants have neither approached Plaintiffs Masucci about the activities permissible within their intertidal zones nor denied them access to that property.

III. Procedural History

On April 22, 2021, Plaintiffs filed a five-count complaint. Count I notice pleaded declaratory judgment, Plaintiffs' requested form of equitable relief. Counts II, III, and V generally aimed to establish the State's fee ownership of Defendants' intertidal land and asserted that any pre-statehood alienation or transfer of such property occurred in violation of various constitutional provisions. In Count IV, Plaintiffs sought to expand the scope of the public's permissible activities within Maine's intertidal zone beyond fishing, fowling, and navigation, the rights of use the Law Court reserved for the public in *Bell v. Town of Wells (Bell II)*, 557 A.2d 168, 169 (Me. 1989).

On May 26, 2021, Defendant Ocean 503 individually, and Defendants Judy's Moody and OA 2012 Trust together, each filed M.R. Civ. P. 12(b)(6) motions to dismiss the complaint on largely similar grounds. On April 15, 2022, the Court granted these motions with respect to Counts I–III and V and denied them with respect to Count IV. The Court explained that Count IV survived because the Law Court, which customarily takes a flexible approach to defining intertidal usage rights, had not yet addressed whether any movement or research-based activity is permissible.

On April 28, 2022, Defendants Parent also filed a M.R. Civ. P. 12(b)(6) motion to dismiss all counts. On August 1, 2022, the Court granted the motion with respect to Counts I–III and V and denied it with respect to Count IV. Again the Court clarified that Count IV subsisted because,

given the Law Court’s historically generous approach to defining intertidal usage rights, there was “some legal theory” that would allow Plaintiffs to obtain a declaratory judgment permitting certain recreational or non-rockweed specific commercial activity in the intertidal zone.

On May 1, 2023, Defendant Ocean 503 filed a motion for summary judgment on Count IV, and on May 2, 2023, Defendants OA 2012, Parent, and Judy’s Moody followed suit. Each motion generally argues that Count IV is nonjusticiable for lack of standing or genuine controversy.²

DISCUSSION

I. Legal Standard

A complaint seeking declaratory judgment must present a justiciable controversy, or “an active dispute of real interests between the litigants.” *Hathaway v. City of Portland*, 2004 ME 47, ¶ 11, 845 A.2d 1168 (quoting *Randlett v. Randlett*, 401 A.2d 1008, 1011 (Me. 1979)). “A justiciable case or controversy involves ‘a claim of present and fixed rights, as opposed to hypothetical or future rights, asserted by one party against another who has an interest in contesting the claim.’” *Id.* (quoting *Connors v. Int’l Harvester Credit Corp.*, 447 A.2d 822, 824 (Me. 1982)); *see also* *Berry v. Daigle*, 322 A.2d 320, 325 (Me. 1974) (“Although the Declaratory Judgments Act expands the range of available relief, it does not relax the requirements of justiciability.”) “A decision issued on a non-justiciable controversy is an advisory opinion, which [the court has] no authority to render except on solemn occasions, as provided by the Maine Constitution.” *Flaherty v. Muther*, 2011 ME 32, ¶ 87, 17 A.3d 640 (citing *Connors*, 447 A.2d at 824).

“Standing is a condition of justiciability that a plaintiff must satisfy in order to invoke the court’s subject matter jurisdiction in the first place.” *Dubois v. Town of Arundel*, 2019 ME 21,

² To the extent that some defendants do not specifically argue standing, the Court considers it sua sponte. *See Homeward Residential, Inc. v. Gregor*, 2015 ME 108, ¶ 20, 122 A.3d 947 (explaining that a court may “notice and act on issues relating to its authority at any time, on its own motion or on the motion of a party”).

¶ 6, 202 A.3d 524 (quoting *Bank of Am., N.A. v. Greenleaf*, 2015 ME 127, ¶ 7, 124 A.3d 1122). To establish standing to seek declaratory relief, a plaintiff must show that their opponent’s “action constitutes ‘an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.’” *Madore v. Maine Land Use Regulation Comm’n*, 1998 ME 178, ¶ 13, 715 A.2d 157 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). “In Maine, standing is prudential, not constitutional,” necessitating a context-specific analysis, and “[t]he plaintiffs bear the burden of establishing standing, which is determined based on the circumstances that existed when the complaint was filed.” *Black v. Bureau of Parks and Lands*, 2022 ME 58, ¶¶ 26-27, 288 A.2d 346 (citations omitted).

II. Analysis

a. Marine Industry Plaintiffs

The Marine Industry Plaintiffs’ Count IV claim against Defendants is nonjusticiable for lack of standing because their alleged injury—economic harm—is not particularized. Rather, these plaintiffs broadly allege that upland owners’ claims to own the intertidal portion of the beach seaward of their properties, including the rockweed attached to rocks located therein, threaten their livelihoods. There is no record evidence that Defendants’ asserted ownership of their adjacent intertidal land in particular has injured the Marine Industry Plaintiffs’ ability to earn a living.³

It is not lost on this Court that the *Ross* decision significantly impacts those whose livelihoods depend on the commercial availability of rockweed. See *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, ¶ 33, 206 A.3d 283 (“[R]ockweed attached to and growing in the intertidal zone

³ On October 30, 2019, Defendants Parent approached a non-party seaweed harvester cutting and removing rockweed attached within their intertidal land and informed him that he needed their permission to do so. Plaintiffs contend that this interaction generates a justiciable controversy because it presumably caused the harvester never to return, thereby injuring Plaintiffs Morse and Grotton’s economic right to purchase seaweed harvested from the rocks within Defendants Parent’s intertidal land and subject to the public trust. The record does not support this tenuous inference.

is the private property of the adjacent upland landowner. Harvesting rockweed from the intertidal land is therefore not within the collection of rights held in trust by the State.”). Nonetheless, these plaintiffs’ claims are nonjusticiable against Defendants and must be dismissed. It is at the Law Court’s discretion whether these plaintiffs should participate as amici curiae on this critical issue.

b. Crow’s Nest Proprietors

Plaintiffs Griffiths and Jones’s Count IV claims are also nonjusticiable for want of standing because their allegation that Defendants’ intertidal ownership threatens their livelihood lacks particularity. There is no record evidence, and the Court declines to speculate, that (1) the six Crow’s Nest Resort customers who visited Moody Beach were present on Defendants’ intertidal land, (2) the three customers who asked about the signs on Moody Beach were referring to those posted on Defendants’ properties, or that (3) the resort lost any patronage as a result of Defendants’ actions. Accordingly, Plaintiffs Griffiths and Jones’s claims against Defendants must be dismissed.

c. Remaining Plaintiffs

The remaining plaintiffs generally allege, in contravention of *Bell II*, that Defendants’ use of private property signs and other boundary-delineating materials to assert intertidal ownership has chilled their lawful recreational use and enjoyment of a resource held in public trust. *See Bell II*, 557 A.2d at 169 (holding that “plaintiff oceanfront owners at Moody Beach hold title in fee to the intertidal land subject to an easement, to be broadly construed, permitting public use only for fishing, fowling, and navigation . . . and any other uses reasonably incidental or related thereto.”).

Plaintiff Judith Delogu lacks standing to pursue Count IV against Defendants for her failure to establish a particularized injury. Mrs. Delogu has never been present or seen the signage on any part of Moody Beach, much less on Defendants’ intertidal land. Indeed, the only facts related to Mrs. Delogu’s intertidal activities concern her use and enjoyment of Maine’s coast in general.

Therefore, Mrs. Delogu's claim against Defendants is nonjusticiable and must be dismissed.

Plaintiffs Kathy and Peter Masucci, William Connerney, and Orlando Delogu lack standing to maintain an action against Defendants Margaret and Jeffrey Parent on the same ground. These parties stipulated that none of the named plaintiffs have ever stepped foot or engaged in any activity on Defendants Parent's intertidal land or been prevented from doing so. There are also no record facts indicating that Defendants Parent posted private property signs or otherwise demarcated the boundaries of their property. Therefore, Plaintiffs Masucci, Connerney, and Orlando Delogu's claims against Defendants Parent are nonjusticiable and must be dismissed.

In contrast, Plaintiffs Masucci, Connerney, and Orlando Delogu have established the requisite standing to pursue Count IV against Defendants Judy's Moody, Ocean 503, and OA 2012 Trust. Each of these plaintiffs evidenced their historical use of these defendants' intertidal land and specified the ways in which the private property signs and boundary markers located thereon have chilled their recreational use and enjoyment of that land. This conclusion comports with existing Law Court jurisprudence. *See Black*, 2022 ME 58, ¶ 28, 288 A.3d 346 (holding that plaintiffs who alleged no specific harm beyond a power transmission line's visibility had standing based on their history of use of the public reserved lands on which the power line was installed); *Fitzgerald v. Baxter State Park Auth.*, 385 A.2d 189, 197 (Me. 1978) (holding that plaintiffs had standing because their diminished "use and enjoyment of Baxter State Park and its resources" qualified as "a direct and personal injury" to their interest in the park). Consequently, the Court will address the merits of Plaintiffs Masucci, Connerney, and Orlando Delogu's Count IV claim against Defendants Judy's Moody, Ocean 503, and OA 2012 Trust in a separate order.


CONCLUSION

In accordance with the above, this lawsuit is now limited to Plaintiffs Kathy and Peter Masucci, Orlando Delogu, and William Connerney's Count IV claim against Defendants Judy's Moody, LLC, OA 2012 Trust, and Ocean 503, LLC. Plaintiffs Judith Delogu, William Griffiths, Sheila Jones, Brian Beal, Robert Morse, George Seaver, Greg Tobey, Hale Miller, Leroy Hilbert, John Grotton, Jake Wilson, Dan Harrington, Susan Domizi, Amanda Moeser, Lori and Tom Howell, and Chad Coffin lack standing to bring this suit against any of the named defendants.

Further, all plaintiffs lack standing to bring this suit against Defendants Margaret and Jeffrey Parent; thus, Defendants Parent's motion for summary judgment is **MOOT**. The clerk is directed to incorporate this Order into the docket by reference. M.R. Civ. P. 79(a).

Dated:

1/26/24



John O'Neil, Jr.
Justice, Maine Superior Court

Entered on the Docket: 2/9/2024