COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-11885

MARIA KITRAS, TRUSTEE, ET AL
Plaintiffs/Appellants

v.

TOWN OF AQUINNAH, ET AL
Defendants/Appellees

On Appeal From A Judgment Of The Land Court

BRIEF OF APPELLEES MARTHA'S VINEYARD LAND BANK COMMISSION AND THE TOWN OF AQUINNAH

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I. STATEMENT OF THE ISSUES

1. Whether there is any basis in Massachusetts law for creating a property right establishing easements benefitting landlocked parcels based on Native American tribal custom allowing free access on foot over lands occupied or held by the tribe.

2. Whether the 1878 conveyances by court-appointed Commissioners dividing common lands of a Native American tribe pursuant to an act of the Massachusetts Legislature give rise to implied access easements over lands of other grantees where no necessity for such easements existed at the time of the conveyances.

3. Whether this Court should depart from prior law and recognize a public policy favoring development of landlocked land and establishing an easement by necessity as a property right appurtenant to landlocked parcels.

II. STATEMENT OF THE CASE

This action was filed in May 1997 in the Land Court by the owners of several parcels of landlocked property in Aquinnah, Massachusetts, seeking access to their properties over the land of the defendants to the east, south or west. Twenty-five owners of adjacent parcels

were named as original defendants. Appendix at 10-13. (hereinafter "A. ____").

Motions to dismiss the action were filed by several of the original defendants based on plaintiffs' failure to name other parties over whose property an easement might be sited to the north. A. 13-15. Plaintiffs amended their complaint several times and ultimately named the "United States of America as Trustee for the Wampanoag Tribe of Gay Head (Aquinnah)" ("United States") as a defendant. A. 16-17.

The United States removed the action to federal court in January 1999, where it successfully moved to be dismissed from the action on sovereign immunity grounds. A. 17-18. The action was then remanded back to the Land Court in July 1999. A. 18 (Docket #156).

The parties proceeded with discovery through August 31, 2000. Thereafter, certain defendants filed motions for summary judgment or, alternatively, to dismiss the action on the grounds that (1) on the undisputed facts, no easement by necessity was intended, (2) in any event, any such easement was extinguished by a subsequent eminent domain taking, and (3) should the court find that an easement by necessity did exist and had not been

extinguished, this matter could not proceed in the absence of the United States as an indispensable party. The plaintiffs cross-moved for summary judgment arguing that, on the undisputed facts, an easement by necessity did exist over land of the defendants for the benefit of their lots. In June 2001, the Land Court granted summary judgment for the defendants and dismissed the case for lack of an indispensable party, the United States. Kitras v. Town of Aquinnah, 9 LCR 103 (2001) (Green, J.). A. 56. Judgment pursuant to Mass. R. Civ. P. 54(b) was eventually entered on August 21, 2003. A. 25.

The plaintiffs appealed, as did defendants Vineyard Conservation Society, Inc. ("VCS"), Caroline Kennedy and Benjamin L. Hall, Jr. as Trustee of Gossamer Wing Realty Trust. A. 27. In 2005, the Appeals Court issued a decision, Kitras v. Town of Aquinnah, 64 Mass. App. Ct. 285 ("Kitras I"), rev. denied, 445 Mass. 1109 (2005), holding (1) that easements by necessity could theoretically be implied for certain, but not all, of plaintiffs' lots and specifically that no such easement could be implied for Lots 1 through 188 or 189 because the unity of title required to imply an easement by necessity failed for those lots, (2) that since the

Wampanoag Tribe of Aquinnah ("the Tribe") could be sued in its own right, the United States was not an indispensable party, and (3) that on remand the Land Court should consider certain factors in determining whether easements by necessity existed for Lots 189 or 190 above. Requests for Further Appellate Review filed in this Court by the parties were denied; plaintiffs had sought review in this Court of the Appeals Court's determination concerning Lots 1-188 or 189. A. 115.

On remand, in August 2006, the Land Court allowed VCS' motion, joined by most of the defendants, to bifurcate the case, recognizing that the question of whether easements were intended at all should be decided before "defendants are put to additional effort and expense in preparing documentation and retaining counsel, surveyors, engineers and historians" to address the issue of locating the easements. A. 119. In issuing the bifurcation order, the Land Court judge advised that "the parties must be mindful of the well-established standard articulated by [Kitras I] [that] '[i]t is the proponents' burden to prove the existence of an implied easement.'" A. 120, citing Kitras I, 64 Mass. App. Ct. at 300. Observing that because the question of state of mind involved events that occurred over 150 years ago, there

would be no witness "competent to provide direct testimony as to the intent of the parties to the setoff lots in 1878," the court asked the parties to consider whether the case could be resolved on summary judgment. A. 120.

Following the bifurcation, there were numerous motions to dismiss, add or substitute parties and suggestions of death filed reflecting changes of ownership or status for many of the parcels involved in the then almost decade-long litigation. A. 32-35. In March 2007, plaintiffs filed a Third Amended Verified Complaint naming the defendants and "[p]ersons unknown or ascertained who may have an interest in any land heretofore or hereinafter mentioned or described" and seeking declaratory and injunctive relief. A. 35, 121-135.

Attempts by the parties to submit the matter on a "case stated" basis were unsuccessful and the parties instead, recognizing that there could be no live testimony on the issue of intent, submitted proposed documentary evidence, objections, motions to strike and rebuttal evidence and a document detailing the exhibits and bases for objections and motions. A. 251-265. After hearing argument, the court issued an Order on the

parties' objections and motions to strike, effectively establishing the record in the case. A. 267-271.

Among the evidentiary issues in dispute were exhibits concerning Lot 178 – a lot concerning which the Appeals Court in Kitras I had conclusively ruled no easement by necessity could be implied. The Land Court rejected plaintiffs' multiple attempts to submit evidence on this issue and although plaintiffs sought review of this issue in the Appeals Court below, the opinion of the court did not address the issue. A. 267-299; Appellants' Brief at 44-48; Kitras v. Town of Aquinnah, 87 Mass. App. Ct. 10 (2015) ("Kitras II"). The dissent in Kitras II, however, noted that under the doctrine of law of the case, the question was not open for reconsideration by the Land Court and should not be reopened on appeal. 87 Mass. App. Ct. at 19, n.2 (Agnes, J., dissenting). Given the Land Court judge's exclusion of this evidence, defendants neither offered rebuttal evidence nor presented argument on this issue before the Land Court.

Based on the documentary evidence admitted consistent with the factors outlined in Kitras I, the Land Court judge ruled that no easements by necessity were intended, finding that the existence of express easements in the grants negated any intent to create

other easements, as did the then-poor condition of the land and tribal customs regarding access. A. 415-425. Addendum 9-10 (hereinafter "ADD___"). The plaintiffs appealed and the case was argued in January 2013. Two years later, the Appeals Court issued a divided opinion in Kitras II, reversing the Land Court and remanding to that court "to draw the necessary easement lines," 87 Mass. App. Ct. at 11, based on a different interpretation of the relevant law than that set forth in Kitras I. Defendants Martha's Vineyard Land Bank Commission ("the Land Bank"), the Town of Aquinnah ("the Town") and VCS filed Requests for Further Appellate Review on February 3, 2015, and the Commonwealth of Massachusetts filed a Request for Further Appellate Review on February 20, 2015, all of which were all allowed by this Court on June 8, 2015.

III. FACTS RELEVANT TO APPEAL

The long history of land ownership in Aquinnah (formerly Gay Head) and the legislative acts and reports leading up to the land division in 1878 is described in the Appeals Court decisions in Kitras I, Kitras II and in the brief filed by defendant/appellee Vineyard Conservation Society, Inc. (hereinafter "VCS Brief"). This brief will not detail again that

history but will highlight a few facts of particular significance to the arguments made herein.

First, the entirety of the town now known as Aquinnah, including the lots at issue here, was divided pursuant to legislative enactment in the 1860's and 1870's. Accordingly, whatever this Court decides relative to the easements created in connection with those enactments will have Town-wide impacts.

Second, Appellees direct the Court's attention to the division of the Chappaquiddick lands in 1849 pursuant to earlier, but similar, legislative enactments. Chappaquiddick is located at the opposite end of the island of Martha's Vineyard from Aquinnah and in the Chappaquiddick setoff as noted in the report of Division of Indian Lands at Chappaquiddick, Exhibit Appendix at 749, specific rights were reserved in roads or cartways in specific locations within that division. The Commissioners provided for access rights by "road or cartway, by gates or bars, for the accommodation of all concerned . . . from Cohag Point, so called, on the Southeast side of said Neck; and also, on the Southwest side of said Neck from the Pond to the Harbor." Exhibit Appendix at 773. The

Commissioners also reserved a road leading from the Swimming Place Road to Sampson's Hill and a right of passage to the peat swamp. Exhibit Appendix at 773. These express reservations reflect an intent by the Commissioners to create access rights when they were needed, confounding the Appeals Court's suggestion in Kitras II that "intent was beyond the pale of the Commissioners." 87 Mass. App. Ct. at 14.

Next, Moshup Trail, the road to which plaintiffs now seek access, did not exist at the time of the partition in 1878. A. 419. The road did not come into existence until the mid 1950's and, defendants' lots were landlocked until the taking that established that road. Exhibit Appendix 194-196. Accordingly, to the extent that an implied access easement by necessity is dependent on the intent of the parties at the time of the partition, any intent to create an access to Moshup Trail could not have been contemplated or intended in 1878.[1]

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[1] Although the Appeals Court in Kitras II relied on tribal custom and usage in its decision, the Tribe, which supported Further Appellate Review in Kitras I, was not a party to the Third Amended Complaint, precluding any access route to the north as suggested in Kitras I and leaving the route to Moshup Trail as the only possible access.

Finally, as the docket entries in the case establish, the complaint in this action has been amended numerous times between its filing and the time of the most recent Land Court decision after remand. Owners of lots have continued to sell and convey their lots without notice or knowledge of any easements that either burden or benefit their land. If the Appeals Court decision is upheld it will be years and perhaps decades before the location of these implied easements is determined. Such uncertainty in land titles is contrary to settled policy of this Court as embodied in specific legislative enactments discussed below.

IV. SUMMARY OF ARGUMENT

Neither established Massachusetts precedent nor logic support the imposition of easements by necessity on the facts of this case. The presumption that a grantor would not knowingly convey land in such a way as to deprive the grantee of access has no applicability on the facts of this case as such a presumption is based on the shared understanding of the parties to the conveyance based on access actually in use and necessary to the enjoyment of the land of the grantee at the time of the conveyance. In this case, because Indian custom and usage provided free

and unimpeded access by foot, there was no necessity at the time of the partition conveyances; moreover, because the land of the defendants was also landlocked the access that plaintiffs now seek would not have been within the contemplation of any of the parties at the time of the 1878 partition. Pp. 13-19.

Moreover, comment c to section 2.15 of the Restatement (Third) of Servitudes, which requires that the necessity exist at the time of the conveyance giving rise to the implied easements, would also preclude such easements despite the Restatement's public policy favoring easements for landlocked parcels. The particular facts of this case, moreover, do not support adoption of section 2.15 of the Restatement here. Pp. 19-21.

The Appeals Court's majority decision in Kitras II is based on a fictional "chain of title" that has no basis in either the actual partition deeds or any other deeds in the chain of title and there is nothing in the record to suggest the existence of such easements. The Massachusetts recording system was created to protect purchasers from interests not recorded and to which they had no notice. Although exceptions may exist when usage on the ground is

established and accordingly provides actual notice, there is nothing in this record to support such a finding and accordingly the private and public parties who have purchased land and built homes or acquired property interests for conservation or open space purposes would be burdened by rights concerning which they had no record, actual, or constructive notice. Pp. 21-25.

If the Appeals Court opinion is grounded not on Massachusetts property law but on aboriginal or Indian title, the Appeals Court ignored the import of the settlement of Indian claims in Gay Head as implemented by both an Act of Congress (25 U.S.C. §1771) and Massachusetts law (St. 1985, c. 277). Pp. 25-31.

The analysis embodied in the opinion of the Land Court judge which determined that the defendants had met their burden of rebutting the presumption that an implied easement exists under the circumstances of this case was largely ignored by the Appeals Court. The trial judge assumed that the presumption existed but that the evidence submitted by the defendants had rebutted that presumption. The opinion of the Appeals Court shifted the burden of proof from the plaintiffs, the proponents of the easements here, to the

defendants and ignored this Court's mandate that easements by necessity based on the presumed intention of the parties should be construed with strictness. Pp. 31-37.

Massachusetts courts have not recognized a public policy favoring development of landlocked land and the facts of this case do not support such a policy. Adoption of such a policy in this case would conflict with other well-recognized public policies including a policy favoring certainty of title and the reliability of the recording system. Moreover, if the Appeals Court decision in Kitras II is left undisturbed, litigation involving the location of these easements will continue for at least a decade leaving titles to all land in the Town of Aquinnah unsettled and potentially subjecting land abutting landlocked parcels throughout the Commonwealth to similar claims. Pp. 37-41.

V. ARGUMENT

A. The Conveyances to Plaintiffs' Predecessor in Title in this Case Do Not Give Rise to an Easement by Necessity Under Massachusetts Law

The Land Court judge assumed without discussion that the presumption in favor of an easement by

necessity, as articulated by this Court in Davis v. Sikes, 254 Mass. 540, 545 (1926) applied in this case and he focused his analysis on whether the defendants below had produced sufficient evidence to rebut the presumption. ADD008. While the Land Bank and the Town agree that there is more than ample evidence in the record to rebut any presumption of an implied easement, the presumption should not be applied on the facts of this case.

1. The Facts in this Case Do Not Support Application of a Presumption that Easements Were Intended

This Court has defined easements by necessity as arising "when land is conveyed which is inaccessible without trespass, except by passing over the land of the grantor." Schmidt v. Quinn, 136 Mass. 575, 576 (1884). An easement by necessity has also been imposed in circumstances where a grantor conveyed land in such a way that would deprive him of access to his remaining land. Dale v. Bedal, 305 Mass. 102, 104 (1940); Davis, 254 Mass. at 545. In either circumstance, the dominant and servient estates, i.e. the land of the grantor and grantee, are defined at the time of the conveyance and, accordingly, applying an evidentiary presumption based on the presumed

intent of the parties to the conveyance is both logical and reasonable.

In this case, plaintiffs seek the imposition of easements not over land of a common grantor but land of other grantees of the 1878 partition. Case law based on presumed intention of the parties to a single conveyance, where the dominant and servient estates are defined and the use of an access easement clearly understood by the parties to the transaction, has no application to a partition made of an entire town at the direction of the General Court where plaintiffs are demanding the creation of easements over the land of fellow grantees, whose lots were likewise landlocked in 1878, the critical date for examining whether an easement was intended or created and where neither grantor nor grantee intended or contemplated such an easement. Plaintiffs can point to no single case where the circumstances are even remotely similar to the case at bar.

In addition, as discussed in detail in the brief submitted by VCS, the concept of avoiding "trespass on land" implicit in the necessity for an implied easement was foreign to Indian culture and customs. VCS Brief at 10-17. Whether lands had been enclosed

or not, members of the Tribe, all of whom became grantees in the 1878 partition, passed freely among lands so set off with either express or implied permission. There was accordingly no necessity for the easements now claimed at the time of the 1878 partition and no basis for applying a presumption that such easements were intended.

2. In Order to Give Rise to an Easement by Necessity, the Necessity Must Exist at the Time of the Conveyance

As noted by Judge Agnes in his dissenting opinion in Kitras II, citing the Appeals Court opinion in Kitras I, in order to give rise to an implied easement by necessity, the necessity must arise at the time of the conveyance. This requirement exists whether the grantor is a government or a private entity. Kitras II, 87 Mass. App. Ct. at 30 (Agnes, J., dissenting), citing Kitras I, 64 Mass. App. Ct. at 292, n.5. See Darman v. Dunderdale, 362 Mass. 633, 639-640 (1972) (eminent domain taking cutting off access years after original conveyance did not give rise to easement by necessity when necessity did not exist at the time of the original conveyance); New England Continental Media, Inc. v. Milton, 32 Mass. App. Ct. 374, 378 (1992) (subsequent eminent domain taking does not give

rise to easement by necessity); Swartz v. Sinnot, 6 Mass. App. Ct. 838, 839 (1978) (no easement by necessity where railroad layout cutting off access to public way gave rise to necessity after the time of the conveyance).

The cases cited above, while distinguishable on their facts, provide helpful precedent to the case at bar. In Darman, Swartz and New England Continental Media, the necessity was created after the fact by either an eminent domain taking or a railroad layout which cut off a previously accessible lot. Here, not only did the necessity arise more than a century after the original conveyance (and presumably only when the present plaintiffs recognized the value of being able to improve their lots),[2] in addition, the *opportunity* for access to these lots, which did not exist in 1878, was created only when Moshup Trial was laid out in

[2] This factor alone distinguishes this case from any other Massachusetts appellate decision where an easement by necessity has been implied. In those cases the time of severance was considerably closer to the time such an easement was claimed. See, e.g., Joyce v. Devaney, 322 Mass. 544, 547-48 (1948) (title to adjacent lots severed in 1931, claim of easement arose fifteen years later); Mt. Holyoke Realty Corp. v. Holyoke Realty Corp., 284 Mass. 100, 104 (1933) (ten years between severance and claim).

1955 by a taking of the Commonwealth.[3] A. 419. At the time of the original conveyances in 1878, there was no necessity for an easement to any of the lots so set off because members of the Tribe owning lots permitted other members free access by foot. This permissive access was most certainly recognized by the Commissioners who laid out the lots; otherwise, the creation of scores of landlocked parcels made no sense. Implying a property right in the form of an easement when this permission no longer exists is akin to allowing permissive use to establish an easement in an adverse possession or prescriptive rights case. Permission to utilize an easement or pathway in the absence of a deeded right to do so may be withdrawn at any time, only adverse use may establish prescriptive

[3] Otherwise, the only access is to the north, over land taken by eminent domain by the United States for the benefit of the Wampanoag Tribe of Aquinnah - a result that would lead to a bar of any such access route. See Kitras I, 64 Mass. App. Ct. at 294 (at the time of the partition, "the most logical routing choice" would have been north through the Settlement Lands to what is now State Road). Kitras I later observes that if the route is through the Settlement Lands, the Tribe could be joined directly. 64 Mass. App. Ct. at 296-297. As noted above, however, the Tribe was not named in the Third Amended Complaint.

rights.[4] Labounty v. Vickers, 352 Mass. 337 (1959); Spencer v. Rabidow, 340 Mass. 91, 92-93 (1959); see Hall v. Stevens, 50 Mass. (9 Met.) 418 (1845) (where party's first entry on land is permissive, legal presumption is that subsequent entry also permissive). Similarly, in the case at bar, former permissive use in accordance with Indian custom cannot serve as the basis for establishing a property right based on such use.

3. The Rule Set Forth in Restatement (Third) of Servitudes Would Not Result in Easements by Necessity in this Case

The Appeals Court in Kitras II, in urging the adoption by this Court of section 2.15 of the Restatement (Third) of Servitudes, fails to reconcile comment c to that section in its analysis. The Appeals Court, as urged by plaintiffs, advocate the adoption of section 2.15 because that section embodies a public policy in favor of implied access rights to connect properties with a public road. Kitras II at 16-17. Although the Appeals Court cited both comment b and comment e to that Restatement section, the majority opinion does not cite or acknowledge the

[4] Plaintiffs' Third Amended Complaint included a count for an easement by prescription which plaintiffs later abandoned. A. 134-135.

requirement of comment c that the necessity exist at the time of the original conveyance. Comment c to section 2.15 states as follows:

> c. *Severance of rights arising out of common ownership is required.* The rule stated in this section applies only when a conveyance would otherwise deprive property of rights necessary to its reasonable enjoyment. This means that, prior to the conveyance, the property did enjoy such rights and that, absent the implied servitude, the conveyance would deprive it of such rights. . . Servitudes will be implied only in conveyances that cause the necessity to arise. If the property did not enjoy the rights prior to the conveyance, there is no basis for implying a servitude to continue the enjoyment of the rights after the severance. *Servitudes are not implied to enjoy rights later acquired by the owners of property once held in common ownership.*

Restatement (Third) of Property (Servitudes) §2.15 (2000), comment c. (emphasis supplied). Here, the defendants' access to a public road was acquired only after Moshup Trail was laid out in 1955, establishing such access as a right "later acquired" under comment c.

The illustrations under comment c make it clear that unless the conveyance at issue -- here the 1878 partition -- operates to deprive the grantee of a previously enjoyed easement right, the conveyance does

not give rise to an implied servitude. There is nothing in the record to suggest that the 1878 partition deprived the grantees of the original partition deeds of their previously enjoyed permissive rights and Indian custom to walk freely upon any land not fenced off. Under the circumstances, the requirement of the Restatement that the necessity arise at the time of and because of the conveyance cannot be met in this case.

Whatever its possible application to cases in the future, the Court should not use the case at bar to adopt section 2.15 of the Restatement as the law of the Commonwealth.

B. The Appeals Court Decision in *Kitras II* is Based Neither on Sound Principles of Existing Massachusetts Property Law Nor on a Reasonable Application of the Restatement (Third) But on a Fictional "Chain of Title"

The majority in Kitras II concluded that "the ancient origins" of Indian common, free and permissive access "established the equivalent of a chain of title, with access rights that would not yield landlocked parcels." 87 Mass. App. Ct. at 11. There is no basis in the record for a finding that these permissive access rights establish the equivalent of a chain of title; more particularly, there is nothing in

the record that traces that chain of title to the present day plaintiffs, particularly given that an Act of Congress in 1987 eliminated all aboriginal rights of title. 25 U.S.C. §1771; see Brief of Amicus Curiae Aquinnah/Gay Head Community Association pp. 15-19 (hereinafter "AGHCA Brief").[5]

The suggestion that a chain of title establishing rights to an access roadway that did not exist at the time of the original conveyance could be arbitrarily superimposed over multiple lots to benefit modern day plaintiffs looking to develop their landlocked lots has no grounding in the record of this case or in Massachusetts law. As noted by the dissent, "curiously absent" from the record are any of the actual partition deeds and subsequent deeds from the original Gay Head tribe grantees. 87 Mass. App. Ct. at 26, n.9 (Agnes, J, dissenting).

1. Establishing a Chain of Title Is Dependent on Documents of Record Available to the Public

The current Massachusetts recording system as set out in G.L. c. 183, §4 had its origins in 1640 with

[5] In Kitras I, the Appeals Court expressed no opinion on the effect of the Tribe's Settlement Agreement and the federal and state legislation implementing it "on any claimed easements burdening the Settlement Lands." 64 Mass. App. Ct. at 296, n8.

the passage of the statute requiring sales of real property and mortgages to be "recorded." 1 Mass. Colonial Records 306 (1640), quoted in K.M. Mitchell and P. Wittenborg, Real Estate Title Practice in Massachusetts, § 1.4.2 (2010). The recording statute was enacted to avoid fraudulent conveyances and "for the prevention of all clandestine and uncertain sales and titles." Id., quoting 3 Mass. Colonial Records 280 (1652). Since the earliest registration act, courts have required that instruments conveying title or interest in real estate be acknowledged and recorded in order to be effective. Morse v. Curtis, 140 Mass. 112 (1885).

The purpose of the recording statute is to show the condition of the title to a parcel of real estate and to protect purchasers from interests that are not recorded and to which they have no notice. HRPT Advisors, Inc. v. MacDonald, Levine, Jenkins & Co., P.C., 33 Mass. App. Ct. 613 (1997). Although an easement may be created absent a recorded document creating that right if the servient estate owner is on actual notice of the interest, the notice must be accompanied by use by the dominant estate owners to be

valid. In Campbell v. Nickerson, for example, the Appeals Court found an easement in favor of certain landowners who had used a proprietors' road with "a very long and undisturbed existence in its present configuration." 73 Mass. App. Ct. 20, rev. denied, 453 Mass. 1101 (2008). Here, there is nothing of record or on the ground suggesting that an easement over certain of defendants' lots may exist. See Kitras I, 64 Mass. App. Ct. at 294, n.6 (nothing in the record showing any way in use of the ground at the time of Commissioners' 1878 report). The record of consistent and established use that can provide an exception to the recording statutes is also not present.

Conveyances of land in the Town have proceeded on the assumption that no implied easement rights have existed for more than a century; homes have been built; parcels have been acquired by public entities for conservation, recreation and open space; and land has been registered without reference to any easement rights. At the time that they purchased their interests in the lots that are the subject of this litigation, neither the plaintiffs nor the defendants were aware of the potential existence of the easements

based on "the equivalent of a chain of title." Nor could any of the parties to the litigation have discovered these purported property interests by either a fuller search in the Registry of Deeds or a thorough investigation of the facts on the ground. The recognition that such a property interest may exist is contrary to the public policy that has formed the underpinning of the Massachusetts recording statutes in effect for centuries and would be blatantly unfair to numerous private parties who have purchased land and built houses, believing that the property was free from easements, and on public entities, such as the Town, the Commonwealth, VCS and the Land Bank, who have acquired property or interests in land for conservation, open space or public use, all of which could be threatened by being burdened by subdivision roads in the event that the Appeals Court decision is not vacated.

2. To the Extent the Appeals Court Opinion Suggests the Creation of Property Rights Based on Aboriginal Custom and Usage, Those Rights Have Been Abolished by the Actions of Congress and the Massachusetts Legislature

Without citation to any authority, the majority in Kitras II concluded that the historical custom and

practice of common access by members of the Wampanoag Tribe "establish the equivalent of a chain of title" and that the subsequent partition of the land in Aquinnah, then Gay Head, in the 1870s, "did not, we determine, break these preexisting access rights." Kitras II, 87 Mass. App. Ct. at p. 11. According to the majority, "[t]he deeds in severalty to the Tribe members/real parties in interest in the partitioning process, in our opinion, resulted in a 'carry-through' of the preexisting right of common access of the Tribe members to their lands now held in severalty." Id. at 13.

As noted in the dissenting opinion, "American courts recognize two distinct levels of ownership of Indian lands: fee title and Indian title." Kitras II, 87 Mass. App. Ct. at 21 n. 3, (Agnes, J., dissenting), quoting James v. Watt, 716 F.2d 71, 74 (1st Cir. 1983), cert. denied, 467 U.S. 1209 (1984). After the American Revolution, fee title to Indian lands in the thirteen original states devolved to the states. Id. Indian title, which gave the Indians a "right of occupancy," coexisted with fee title and after the United States Constitution was adopted, rights to Indian lands became

the exclusive province of federal law. Oneida Indian Nation of New York v. County of Oneida, New York, 414 U.S. 661, 667 (1974).

By Chapter 213 of the Acts of 1870, Gay Head was incorporated as a town and the common lands owned by the District of Gay Head were transferred to the Town, id. at § 2, with the proviso that, upon application of the selectmen or petition of 10 resident landowners, the local probate judge could order partition of the common lands. Id. at § 6. The conveyances at issue here occurred as a result of the 1878 partition ordered as a result of the 1870 Act.

In litigation one hundred years later regarding the validity of these transfers, the United States Court of Appeals for the First Circuit interpreted these statutes as "giving Indians fee title and the power to alienate land." James, 716 F. 2d at 75. Moreover, where the lawsuit concerned lands allocated to individual Indians, not tribal rights to lands, the United States Supreme Court has determined that "the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts." Oneida, 414 U.S. at 676.

The proposition that access based on tribal custom and usage under aboriginal law is the equivalent of a chain of title and can be "carried through" when fee title is granted to individual tribe members has no support in local property law. As noted by the dissent in Kitras II, it is an "extraordinary alteration of traditional principles of Massachusetts law." Kitras II, 87 Mass. App. Ct. at 20 (Agnes, J., dissenting).

As discussed in section A supra, the easements sought by plaintiffs here do not meet the legal requirements for establishing easements by necessity. The only alternative is that the right of access envisioned by the Appeals Court majority is a function of Indian title. However, if that is the case, then the Kitras II majority failed to consider the effect of the Massachusetts Indian Land Claim Settlement Act of 1987 ("Settlement Act of 1987") on that right.

A hundred years after the 1878 setoffs, the authority of the Commonwealth to transfer the land, including the parcels at issue here, was challenged in Federal District Court in Massachusetts in 1974 by the then recently incorporated Wampanoag Tribal Council.

Wampanoag Tribal Council of Gay Head v. Town of Gay Head, Civil Action No. 74-5826-MC (D. Mass.). Detailed discussion of the claims raised in this case and others and the settlement that followed is contained in the AGHCA Brief. The settlement made provision for transferring title to certain common lands to the Tribal Council and the parties agreed to seek federal legislation that "eliminates all Indian claims of any kind, whether possessory, monetary, or otherwise, whether aboriginal or under recognized title involving lands and waters in the Town of Gay Head . . .whether asserted in the past, present or future." Joint Memorandum of Understanding Concerning Settlement of Gay Head, Massachusetts Indian Claims dated September 28, 1983, section 8(d), submitted as an addendum to the AGHCA Brief.

To effectuate the settlement, the United States Congress enacted the Settlement Act of 1987. Of particular note are the congressional findings concerning the impact of the litigation on land titles in the Town:

> (1) there is pending before the United States District Court for the District Of Massachusetts a lawsuit that involves Indian claims to certain public lands within the town of Gay Head, Massachusetts;

(2) the pendency of this lawsuit has resulted in severe economic hardship for the residents of the town of Gay Head by clouding the titles to much of the land in the town, including land not involved in the lawsuit;

(3) the Congress shares with the Commonwealth of Massachusetts and the parties to the lawsuit a desire to remove all clouds on titles resulting from such Indian land claim ...

25 U.S.C. §1771 (emphasis added).

The Settlement Act of 1987 also ratified and approved all transfers in the Town of Gay Head, including transfers made pursuant to state statute. 25 U.S.C. §1771b. Finally, and of critical import to this case, the Act extinguished aboriginal title and claims based on that title:

> Any aboriginal title held by the Wampanoag Tribal Council of Gay Head, Inc. or any other entity presently or at any time in the past known as the Gay Head Indians, to any land or natural resources the transfer of which is consented to and approved in subsection (a) of this section is considered extinguished as of the date of such transfer. . . .
>
> Any claim (including any claim for damages for use and occupancy) by the Wampanoag Tribal Council Of Gay Head, Inc., the Gay Head Indians, or any other Indian, Indian nation, or tribe or band of Indians against the United States, any State or political subdivision of a State, or any other person which is based on -
>
> (1) any transfer of land or natural resources which is consented to and approved in subsection (a) of this section, or
>
> (2) any aboriginal title to land or natural resources the transfer of which is consented to

and approved in subsection (b) of this section, is extinguished as of the date of such transfer.

25 U.S.C. §1771b(b), (c). Aboriginal title and claims based on that title were extinguished retroactive to the date of the transfer; accordingly, assuming the majority's right of access was rooted in Indian law, it was extinguished in 1987, retroactive to the date of partition.[6]

C. To the Extent the Facts in This Case Support a Presumption That an Easement Was Implied to Benefit Landlocked Lands, Defendants Submitted Sufficient Evidence to Rebut This Presumption

The legal presumption that a grantor of a landlocked parcel intended an easement over land retained by the grantor in order to provide access is based on the presumed intent of the parties to the conveyance and the assumption that a party would not knowingly convey land previously benefitted by an access in such a way as to cut off such access. Davis, 254 Mass. at 545-546. Both the Land Court judge and the parties in their Appeals Court briefs analyzed the case in light of whether the defendants had offered sufficient evidence to rebut this

[6] The Massachusetts Legislature also enacted a law implementing the settlement. St. 1985, c. 277 ("An Act to Implement the Settlement of Gay Head Indian Land Claims").

presumption. The Appeals Court opinion in Kitras II, however, completely sidesteps this analysis, noting that "intent was beyond the pale of the Commissioners" and creating instead a fictional "chain of title" springing from aboriginal usage and custom. The Land Bank and the Town respectfully urge this court to return to the analysis of the Land Court judge who found more than sufficient evidence in the record to rebut any presumption that an easement was intended if such a presumption can be said to arise in this case.

1. The Land Court Judge Correctly Ruled that the Presumption Had Been Rebutted by the Defendants

The trial judge assumed *arguendo* that the presumption articulated by this Court in Davis, 254 Mass. at 545-546 operated to benefit plaintiffs but determined that if the presumption applied it had been rebutted by evidence produced by the defendants. In particular, the trial judge found that the explicit language in several of the parcel descriptions in the Commissioners' setoff creating specific easement rights including, for example, rights to access a stream or take peat from certain lots, negated any intention to create an easement by implication or necessity to access common ways or roadways over lands

of others, citing the principle "*expressio unius est exclusio alterius.*" Joyce v. Devaney, 322 Mass. 544, 549 (1948).

The Appeals Court's statement that the Commissioners were not "real parties in interest" and accordingly "one would not expect to see" expressions of intent regarding easements in those setoff instruments ignores the Legislative mandate to the Commissioners to ascertain the will and intent of the members of the Tribe.[7] Thus, while the Commissioners' intent is not reflected in the setoff descriptions, the intent of the numerous grantees to those setoff lots is so manifested.[8] For example, Lot 240 while being setoff to Marisa Devine, specifically reserves to William A. Vanderhoop and others "all their peat rights."

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[7] While the plaintiffs argue that the reservation of peat rights did not mean that access was granted to the lot itself, the fact that rights were reserved by the Commissioners, whether the right to remove peat or to access a strip of land one rod wider along the Herring Fishery (see Addendum 21-22 to Plaintiffs' Brief) demonstrates that the Commissioners certainly knew how to reserve access rights and considered such rights, and had they intended to reserve full rights of access, they would have done so, as was done in the setoff in the neighboring Island of Chappaquiddick.

[8] The notion that the Commissioners did not concern themselves with the creation of access easements as part of their undertaking is also contradicted by the 1850 setoff of lands in Chappaquiddick where access easements to certain roadways are expressly set forth. Exhibit Appendix at 749-778.

Exhibit Appendix at 525-526. This explicit reservation evidenced communication between the Commissioners and the grantees and reflected a concern of paramount importance to those grantees. These reservations could not be clearer examples of the type of "*expressio unius*" that negates any suggestion that other easements were intended or implied and is sufficient to rebut any presumption that additional easements were intended as part of the 1878 partition.[9]

2. In Contravention of Established Precedent, the Appeals Court Removed the Burden of Proof From the Proponent of the Easement

In describing the presumption that attaches to claimed easements by necessity, the majority in Kitras II stated that, where a conveyance would otherwise leave property landlocked, "there is a presumed access by an easement by necessity, *absent contrary evidence rebutting the presumption and proving* that the *conveying parties did not intend access, but rather intended to cut off access and convey land that is*

[9] As discussed in section A, supra, the Appeals Court opinion misses the critical element that the intent required is the presumed intent at the time of the original severance, not the intent of a twentieth century developer. See, e.g., Richards v. Attleborough Branch R.R. Co., 153 Mass. 120, 122 (1891) (necessity and intent must exist and the time of the severance).

landlocked." Kitras II, 87 Mass. App. Ct. at 17 (emphasis in original). The above is a misstatement of law regarding presumptions and the burden of proof, and it shifted the burden of proof from the plaintiffs, as the proponents of the easement by necessity, to the defendants.

Established Massachusetts precedent places the burden of proof on the party claiming the benefit of an easement by necessity.[10] An easement by necessity can be recognized only if it can be found in the presumed intention of the parties, "a presumption of law which 'ought to be and is *construed with strictness.*'" Joyce, 322 Mass. at 549 (citation omitted) (emphasis added).[11]

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[10] See Mt. Holyoke Realty Corp. v. Holyoke Realty Corp., 284 Mass. 100, 105 (1933) ("The burden of proving the intent of the parties to create an easement which is unexpressed in terms in a deed is upon the party asserting it."); Boudreau v. Coleman, 29 Mass. App. Ct. 621, 629 (1990) ("The parties asserting the easement, here the defendants, have the burden of proving its existence.").

[11] Accord, Orpin v. Morrison, 230 Mass. 529, 533 (1918)("It is a strong thing to raise a presumption of a grant in addition to the premises described in the absence of anything to that effect in the express words of the deed. Such a presumption ought to be and is construed with strictness. There is no reason in law or ethics why parties may not convey land without direct means of access, if they desire to do so."); Home Investment Co. v. Iovieno, 243 Mass. 121, 124 (1922) ("It is a strong exercise of the power of the law to raise a presumption of a grant of a valuable right in addition to the premises described without

Section 301(d) of the Massachusetts Guide to Evidence provides the following statement regarding presumptions:

> A presumption imposes on the party against whom it is directed the burden of production to rebut or meet that presumption. The extent of that burden may be defined by statue, regulation, or the common law. If that party fails to come forward with evidence to rebut or meet that presumption, the fact is to be taken by the fact finder as established. If the party comes forward with evidence to rebut or meet the presumption, the presumption shall have no further force or effect. A presumption does not shift the burden of persuasion, which remains throughout the trial on the party on whom it was originally cast.

Mass. G. Evid., §301(d) (2013) See Standerwick v. Zoning Board of Appeals of Andover, 447 Mass. 20, 34 (2006)(a presumption does not shift the burden of proof; it is a rule of evidence that aids the party bearing the burden of proof in sustaining that burden).

Here, the defendants produced substantial evidence, in accordance with the criteria laid down in Kitras I, to rebut the presumption. As noted by the dissent in Kitras II, there was evidence of tribal custom and practice, the grant of other express easements in the partition of Gay Head ("expressio unius est exclusion alterius"), the creation of a

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any words indicative of such an intent in the deed. Such a presumption is construed with strictness even in the few instances where recognized.").

roadway system in the partition of other tribal land on Martha's Vineyard, and the condition of the land, all of which suggested that no easement by necessity was intended at the time of partition of Gay Head's common lands. 87 Mass. App. Ct. at 28-31 (Agnes, J., dissenting).

The presumption having thus been rebutted, it was of no further force and effect, and the burden of proof remained on the plaintiffs to prove that easements to their lots were intended. Standerwick, 447 Mass. at 34-35. But, even if one were to somehow conclude that the presumption was not rebutted (and that it is even applicable in circumstances such as these), at no point was the burden on the defendants to prove that the partition was "intended to cut off access and convey land that is landlocked" as suggested by the Kitras II majority. The burden of proof remained with the plaintiffs and was not met.

D. Neither the Equities of This Case Nor Sound Public Policy Support the Result Sought by Plaintiffs Below

The opinion of the Appeals Court suggests that easements by necessity "spring forth" from a public policy against the ownership of landlocked land and in favor of the development of such land rather than as a

result of the intention of the parties. 87 Mass. App. Ct. at 31 (Agnes, J., dissenting). As Kitras I recognized, such a policy has never been acknowledged by the appellate courts in Massachusetts. 64 Mass. App. Ct. at 298, citing Richards v. Attleborough Branch R.R. Co., 153 Mass. 120, 122 (1891), see Orpin, 230 Mass. at 533 (1918) ("there is no reason in law or ethics why parties may not convey land without direct means of access").

It has been the law of Massachusetts for over a century that an implied easement by necessity must be based on the presumed intention of the parties to the original conveyance and there is no public policy reason to change that law now, particularly on the facts of the case at bar. In this case, it is not the presumed intention of parties to the partition deeds but the increasing popularity of Martha's Vineyard as a tourist destination that gave rise to the "necessity" claimed by plaintiff.[12] Many of the defendants in this case, notably the Land Bank, the

[12] That same popularity and the accompanying "unchecked development" on the island spawned the Legislature's 1974 creation of the Martha's Vineyard Commission as a regional planning agency to monitor development. St. 1974, ch. 637; see Island Properties, Inc. v. Martha's Vineyard Commission, 372 Mass. 216, 229 (1977).

Town, the Commonwealth and VCS, have acquired fee ownership, easement rights, and conservation restrictions involving hundreds of acres of open space held in trust for the public in order to preserve for generations to come the very open spaces over which plaintiffs' Native American predecessors in title walked and over which these easements by necessity might be located after remand.

The decision will also impact owners of all frontage lots in the Town and elsewhere as the entire town is comprised of parcels set off pursuant to legislative action and there are numerous landlocked parcels that have remained undeveloped as a result of their landlocked status. The Appeals Court's determination that tribal custom is tantamount to a chain of title providing easement rights will cloud the titles of all lots -- improved and unimproved -- in the Town as no standards for locating the easements were suggested, effectively rendering any frontage lot in the vicinity of these landlocked parcels unmarketable in contravention of the explicit language and legislative intent behind the Federal and State legislation implementing the settlement of Gay Head Indian Land claims.

If the Appeals Court decision is left undisturbed, numerous additional proceedings will ensue. The remand of this eighteen year litigation requires the Land Court to create out of whole cloth easements over roads that never existed and were never used in unspecified locations with no guidance whatsoever. Such an enterprise will invariably require the court to choose among potential routes over defendants' properties with the likelihood that cross-claims will be filed among existing defendants and additional unnamed parties. While the Land Court might be inclined to prefer locating access routes over undeveloped land, there is no legal basis for doing so and such preference would discriminate against those who have elected not to build as well as those such as the Town and the Land Bank who hold land for open space purposes. In addition, the decision will likely inspire other owners of landlocked parcels in Aquinnah and elsewhere to commence proceedings to claim such easements.

Remarkably, moreover, the Appeals Court failed to define or attempt to define the scope of the easements in question. Certain of the plaintiffs are developers who will seek to construct subdivision roads across

the properties of the defendants in order to build substantial homes on their parcels and pave and lay utilities in those roads.[13] Such use is far from the intent or contemplation of the Native Americans whose custom of walking freely across the land was recognized by the Appeals Court as the basis for its decision in this case. The greatest irony resulting from Kitras II is the decision's impact on the Land Bank's legislative mandate (carried out with the assistance of the Town) to create a network of pathways open to the public in furtherance of the "freedom to roam" by all, an objective far more consistent with the tribal custom of free access than the development goals of the plaintiffs. The scope of the easements as well as their location will accordingly require years of additional litigation for existing and as yet unidentified parties.

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[13] The laying out of such roadways would also conflict with other legislative mandates. For example, St. 1985, c. 736 created the Martha's Vineyard Land Bank Commission for the purpose of preserving land in its "natural, scenic or open condition" and prohibits the construction of roadways on land held by the Land Bank without Town Advisory Board approval.

VI. CONCLUSION

For all the above reasons, as well as the reasons detailed in the Briefs of Amicus Curiae Aquinnah/Gay Head Community Association and the Real Estate Bar Association and Abstract Club, as well as those contained in the briefs of the Commonwealth of Massachusetts and Vineyard Conservation Society, Inc., the Town of Aquinnah and the Martha's Vineyard Land Bank Commission urge this court to affirm the judgment of the Land Court.

Respectfully Submitted,

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Dated: October 20, 2015

CERTIFICATE OF COMPLIANCE WITH MASS. R. APP. P. 16(k)

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure, the undersigned counsel hereby certifies that the foregoing brief complies with all applicable appellate rules.

Diane C. Tillotson

ADDENDUM TABLE OF CONTENTS

(SEAL)

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

DUKES COUNTY, ss

MISCELLANEOUS
CASE NO. 238738 (CWT)

MARIA A. KITRAS, as Trustee of BEAR REALTY TRUST, *et al.*,

Plaintiffs

v.

TOWN OF AQUINNAH, *et al.*,

Defendants

DECISION

Plaintiffs filed this action in May 1997 seeking to determine their access rights in the portion of Aquinnah, Dukes County, sometimes referred to as the "Zack's Cliffs" region. The question of access arises from the set-offs, completed in 1871 and 1878, of separate lots of land for ownership by individual members of the Wampanoag tribe. Neither of the set-off reports created express provisions regarding access rights across or for the benefit of the various set-off lots. Plaintiffs are the successors in title to certain of the set-off lots who claim rights of access, under various legal theories, over other of the set-off lots now owned by Defendants.

By order dated June 4, 2001, this court (Green, J.) dismissed Plaintiffs' complaint for failure to join an indispensable party. This court (Lombardi, J.) later issued a judgment dismissing Plaintiffs' claims and Plaintiffs appealed from that judgment. The Appeals Court reversed the judgment and this action was returned to this court for further proceedings consistent with the Appeals Court opinion. See Kitras v. Town of Aquinnah, 64 Mass. App. Ct. 285 (2005). On August 14, 2006, this court (Lombardi, J.) issued an order bifurcating the case,

stating "[b]efore Defendants are put to the additional effort and expense of preparing documentation and retaining counsel, surveyors, engineers and historians to address the issue of where the unestablished easement or easements might be located, the Court should address the issue of whether or not there is any easement at all."

On March 29, 2007, this court (Lombardi, J.) granted Plaintiffs leave to amend their complaint. Plaintiffs Third Amended Verified Complaint contains two counts: one asserting an easement by necessity and one asserting an easement by prescription.[1] The parties agreed to submit this action to the court on a case stated basis, without calling witnesses.[2] The parties submitted proposed exhibit lists and this court ruled on three motions to strike, after which eighty-six exhibits were entered into evidence. Based on all the evidence and reasonable inferences drawn therefrom this court finds the following material facts:[3]

1. Plaintiff Maria Kitras, as trustee of Bear Realty Trust and of Bear II Realty Trust (Kitras), holds record interests in lots 178, 711 and 713 (Kitras lots) as shown on a plan of land entitled "Plan of Gay Head Showing the Partition of the Common Lands As Made by Joseph T. Pease and Richard L. Pease, Commissioners Appointed by the Judge of Probate Under Section 6, Chapter 213 of the Acts of 1870 By John H. Mullin Civil Engineer" on file with the Dukes County registry of probate (set-off plan). The Kitras lots are contiguous.

2. Plaintiff Paul D. Pettegrove, as trustee of Gorda Realty Trust (Pettegrove), owns lots 232 and 243 on the set-off plan (Pettegrove lots). Lot 232 enjoys an appurtenant easement for access under an agreement recorded with the Dukes County registry of deeds in book 640, page 895.

3. Plaintiffs Gardner Brown and Victoria Brown (Browns) own lot 238 on the set-off plan (Brown lot). The Brown lot is adjacent to Kitras lots 178 and 713.

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[1] Plaintiffs have submitted no evidence supporting their claim of an easement by prescription. Therefore, this court finds that Plaintiffs have not carried their burden on this count.

[2] Subsequent to this agreement, Benjamin Hall submitted a request for a trial. To the extent not clear herein, that request hereby is denied. The facts relevant to a final determination of the issues raised by Plaintiffs' complaint are contained in reports and documents dating back the late 1800s. Consequently, witness testimony is likely irrelevant and unable to shed light on Plaintiffs' claims of easement by implication.

[3] These facts are taken in large part from this court's (Green, J.) Decision on Cross-Motions for Summary Judgment and Motions to Dismiss, dated June 4, 2001. Additional facts not included in the June 4th Decision, but relevant to this court's determination of the issues have been added where appropriate. Further, facts included in the June 4th Decision, but not relevant to this court's determination of the issues herein at issue have been omitted.

4. Plaintiffs Eleanor Harding, as trustee of Eleanor P. Harding Trust, and Mark Harding (Hardings) own lots 554 and 555 on the set-off plan (Harding lots). The Harding lots are contiguous to Kitras lot 711.

5. Plaintiff Benjamin L. Hall, Jr., as trustee of Gossamer Wing Realty Trust (Gossamer Wing), owns lots 707, 710 and 302 on the set-off plan (Gossamer Wing lots). Lot 710 is contiguous to Kitras lot 711; the other Gossamer Wing lots are not contiguous to any of the Kitras lots.

7. By St. 1862, c. 184, § 4, the General Court established the district of Gay Head. Section 5 of the same chapter directed the clerk of the district of Gay Head to make and maintain a register of the existing members of the Gay Head tribe, and to make and maintain "a register of the lands of each Plantation, as at present held, whether in common or severalty, and if in severalty, by whom held."

8. By chapter 42 of the Resolves of 1863, the General Court appointed a commissioner, Charles Marston "to examine, and fully and finally to determine, all boundary lines between the individual owners of land located in the Indian district of Gay Head, in the county of Dukes County, and also to determine the boundary line between the common lands of said district and the individual owners adjoining said common lands; and he, the said commissioner, is hereby authorized to adjust, and fully and finally to settle, equitably, and as the interest of the petitioners and all other parties may require, all the matters, claims and controversies, now existing and growing out of or in connection with the boundaries of the aforesaid lands." The resolution further provided for hearing, following notice by publication, of all claims by interested parties, directed the commissioner to "make a report of his doings to the governor and council," and appropriated a sum not exceeding one hundred dollars as compensation for his services.

9. Marston submitted a report in 1866 and reported that he had not been able to complete his work due to illness. However, Marston did create book of records setting forth descriptions of a large portion of the lots of land, which was recorded at the Dukes County Registry of Deeds in Book 49, at Page 1.

10. Marston died before completing the assigned task, and the General Court appointed a new commissioner, Richard L. Pease, in 1866. Commissioner Pease submitted his report on the lands held in severalty to the Governor in 1871, establishing set-off lots 1 through 173. As of the time of the commissioner's 1871 report, a significant portion of the land in Gay Head appears to have remained common land.

11. A short time before the commissioner's 1871 report, the General Court abolished the district of Gay Head, and in its place incorporated the town of Gay Head. Section 6 of that chapter established a new procedure for the determination of property rights in the town, in apparent substitution for the procedure prescribed under the 1863 resolution. The 1870 statute authorized the "judge of probate of the county of Dukes-county [sic], upon the application of the selectmen of Gay Head, or of any ten resident owners of land

therein, after such notice as the judge may direct to all parties interested and a hearing on the same, if he shall adjudge that it is for the interest of said parties that any or all of the common lands of said town be divided, shall appoint two discreet, disinterested persons commissioners to make partition of the same, and their award, being confirmed by said court, shall be final in the premises . . . and the said judge of probate shall direct the said commissioners to examine and define the boundaries of the lands rightfully held by individual owners, and to properly describe and set forth the same in writing, and the title and boundaries thus set forth and described, being approved by the court, shall be final in the premises." Pursuant to that authority, and on the petition of certain individual claimants (but contrary to the request of the Gay Head selectmen and others) the probate court appointed Joseph L. Pease and Richard L. Pease as commissioners to carry out the partition of common lands and the determination of claims to other lands held in severalty.

12. Commissioners Joseph Pease and Robert Pease submitted their final report to the probate court, which approved the report on December 21, 1878. The commissioners' 1878 report advises that

> [the Commissioners] have made and completed a division of the common and undivided lands of Gay Head, among all the inhabitants of that town adjudged to be entitled thereto; and have made careful and correct descriptions of the boundaries and assignment of each lot in the division; and have also examined and defined the boundaries of those lots held or claimed by individuals of which no satisfactory record evidence of ownership existed.
>
> In accordance with the almost unanimous desire of the inhabitants, the Commissioners determined to leave the cranberry lands near the sea shore, and the clay in the cliffs, undivided; it being, in their judgment, impracticable to make a division that would be, and continue to be, an equitable division of these cranberry lands, and of the clays in the cliffs, owing to the changes continually being made by the action of the elements.
>
> The numbers refer to a map - made under the direction of the Commissioners - accompanying this Report.[10]

13. The commissioners' 1878 report further explains that "[t]he lots of common lands drawn or assigned by the Commissioners . . .are numbered from no. 189 and upwards, in regular order. Lots no. 1 to no. 173, inclusive, were run out and bounded under previous provisions of the statutes. The record of these lots will be found in Land Records Book 49, pages 89 to 198, inclusive. Lots no. 174 to no. 189 were run out and bounded afterwards by the Commissioners who made partition of the Indian common lands."

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[10]The set-off plan is the map which accompanied the commissioners' 1878 report.

14. In 1869, a special joint committee of the Senate and House was designated to visit the Indians of the District of Gay Head and inquire as to their condition. A report of that visit noted that the legislators found the common lands to be "uneven, rough, and not remarkably fertile." The legislators further opined that the lots would "lie untilled and comparatively unused" following the division of the common land.

15. The commissioners explicitly granted to certain individuals, some identified and some not, the right to take peat from various lots.

16. The commissioners also expressly reserved an easement for fishing and clearing creeks over Lots 382, 384, and 395.

17. In 1955 a taking was made by the Commonwealth for the purpose of laying out the Moshup Trail, which gave access to some of the lots conveyed in 1878, which are now owned by Defendants.

18. Leading up to the 1878 division of the subject property the land existed under two different systems of ownership. The Commonwealth abided by traditional common law rules of real property, while the tribe abided by Indian traditional law. Indian title gave each tribe member the right of occupancy, which could only be destroyed by the sovereign. Indian title also granted each tribe member the right of access over all common lands.[4]

* * * * *

Plaintiffs argue that they have acquired easements to access an existing public way by virtue of the 1871 and 1878 divisions. Plaintiffs claim that the divisions created an easement by necessity by landlocking certain parcels and providing no alternative access to a public way. Defendants do not dispute that certain parcels were landlocked by the divisions, but argue that there was no intent to create an easement. Defendants further argue that because Indian title granted every tribe member access over lands held in common, no strict necessity existed at the time of the 1871 and 1878 divisions. For the reasons set forth herein, this court finds that Plaintiffs have failed to meet their burden and finds that no easement was created.

[4] The federal government did eventually extinguish Indian title by passing 25 U.S.C. § 1771, et seq. in 1987. Congress retroactively approved prior transfers of land in Gay Head by the tribe or any individual Indian and extinguished Indian title in the land "as of the date of such transfer."

Easements by necessity are created "when land is conveyed which is inaccessible without trespass, except by passing over the land of the grantor, a right of way of necessity is presumed to be granted; otherwise, the grant would be practically useless." Schmidt v. Quinn, 136 Mass. 575, 576 (1884). This rule is not borne out of any public policy interest, Kitras v. Town of Aquinnah, 64 Mass. App. Ct. 285, 298 (2005), rather "the rule is founded on the presumed intention of the parties to the deed, construed, as it must be, with reference to the circumstances under which it was made." Richards v. Attleborough Branch Railroad Co., 153 Mass. 120, 122 (1891). However, "[i]t is the law of the Commonwealth that easements of necessity can only be granted in very limited circumstances of reasonable or absolute necessity." Goulding v. Cook, 422 Mass. 276, 280 (1996).[5]

In addressing Plaintiffs' claims, this court must "remain[] mindful that it is the proponents' burden to prove the existence of an implied easement." Kitras v. Town of Aquinnah, 64 Mass. App. Ct. 285, 300 (2005) (citing Cheever v. Graves, 32 Mass. App. Ct. 601, 607, 609 (1992). Additionally this court must consider that an easement by necessity should only be recognized where it can be found in the presumed intention of the parties, "a presumption of law which ought to be and is construed with strictness." Joyce v. Devaney, 322 Mass. 544 (1948) (internal quotation and citation omitted); see also Orpin v. Morrison, 230 Mass. 529, 533 (1918) ("It is a strong thing to raise a presumption of a grant in addition to the premises described in the absence of anything to that effect in the express words of the deed. Such a presumption ought to be and is construed with strictness. There is no reason in law or ethics why parties may not convey land without direct means of access, if they desire to do so.");

[5] Although Plaintiffs' brief refers to an "implied easement" this court notes that there is no evidence of the use prior to the division that would be necessary to prove an easement by implication. Additionally, Plaintiffs' brief argues that the easement has been proved through necessity. Consequently, this court understands Plaintiffs' argument to be one for an easement by necessity.

Home Inv. v. Iovieno, 243 Mass. 121, 124 (1922) ("It is a strong exercise of the power of the law to raise a presumption of a grant of a valuable right in addition to the premises described without any words indicative of such an intent in the deed. Such a presumption is construed with strictness even in the few instances where recognized.").

Therefore, the intent of the parties must be the touchstone of this court's analysis. Whether an easement by necessity has been created

> must be found in a presumed intention of the parties, to be gathered from the language of the instruments when read in the light of the circumstances attending their execution, the physical condition of the premises, and the knowledge which the parties had or with which they are chargeable.

Sorel v. Boisjolie, 330 Mass. 513, 517 (1953). Furthermore, because the issue is one of intent, the benefitted and burdened parcels must have come from previous common ownership. Nylander v. Potter, 423 Mass. 158, 162 (1996) ("Without previous common ownership, Potter cannot claim an easement by necessity."). Finally, the court must consider whether there is strict necessity. Necessity is an indicator of the parties' intent and consequently if there is alternative access, the parties will not be presumed to have intended an easement. See Uliasz v. Gillette, 357 Mass. 96, 102 (1970). Additionally, the necessity must have existed at the time of the division and when the necessity ceases any intended easement also ceases. See Viall v. Carpenter, 80 Mass. 126 (1859). It is important to note, as did the Appeals Court, that "[i]t is well established that in this Commonwealth necessity alone does not an easement create." Kitras v. Town of Aquinnah, 64 Mass. App. Ct. 285, 298 (2005).

Plaintiffs' contend that the easement by necessity is presumed by the case law and point to Davis v. Sikes, 254 Mass. 536, 545-46 (1926). Defendants argue that the presumption should be not be applied to the unique circumstances presented by the instant case and further argue that

even if the presumption were applied they have produced sufficient evidence to rebut the presumption.

> A presumption imposes on the party against whom it is directed the burden of production to rebut or meet that presumption. . . If that party fails to come forward with evidence to rebut or meet the presumption, the fact is to be taken by the fact finder as established.

Massachusetts Guide to Evidence Rule 301(d). Assuming *arguendo* that the presumption articulated in Davis is applicable to this case, this court finds that Defendants have produced sufficient evidence to rebut the presumption.

Furthermore, this court has determined that, despite the fact that the 1871 and 1878 divisions landlocked certain parcels, no easements, other than those there were expressly granted, were intended. Defendants point to Joyce v. Devaney, 322 Mass. 544 (1948) and this court finds its analysis persuasive. "The deeds at the time of severance created the specific easements. . . . Those easements are unambiguous and definite. The creation of such express easements in the deed negatives, we think any intention to create easements by implication. Expressio unuius est exlusion alterius." Joyce, 322 Mass. at 549; see also Krinsky v. Hoffman, 326 Mass. 683, 688 (1951) ("[The trial judge] could have attached considerable weight to the fact that, while the deed expressly created an easement in favor of the grantee on the six foot strip owned by the grantor, it contained nothing about a similar right being reserved to the grantor over the grantee's strip. The subject of rights in the passageway was in the minds of the parties and the fact that nothing was inserted in the deed reserving to the plaintiffs rights similar to those granted to the defendant is significant."). As noted by the Appeals Court in Kitras,

> Particularly noteworthy in our estimation is the commissioners' silence on this issue, as is the fact that even the most cursory glance at a contemporaneous plot map shows that the vast majority of set-off lots had no frontage or obvious access to or from any

> public amenity. Also problematic is the difficulty of routing easements from common lands to public roads. . .without traversing those lands already held in severalty, that is, lots 1 through 188 or 189. With those problems evident, and in light of the careful and lengthy consideration given the partitioning process, the commissioners' failure explicitly to provide for easements might well be interpreted as a deliberate choice.

Kitras, 64 Mass. App. Ct. at 299. In light of the express easements granted by the commissioners, the failure to provide any easements for access appears intentional and serves to negate any presumed intent to create an easement.

Moreover, as noted in Kitras, this court should "consider relevant the historical sources of information on tribal use and common custom applicable at the time." Kitras, 64 Mass. App. Ct. at 300. The record here establishes that prior to the 1878 division of the common land, the lots were held by the Commonwealth under English common law rules of property and by the tribe under Indian traditional law. English title conveyed fee title while Indian title gave tribe members the right of occupancy. Therefore, the fee title carried no immediate right of possession. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823) ("While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy."). The prevailing custom among the tribe at the time of the division allowed for access for each member of the tribe as necessary over lands held in common and in severalty. The commissioners were familiar with this system and likely assumed easements for access were

unnecessary given the tribal culture at the time. This fact also negates any presumed intent to create an easement.[6]

Finally, the perceived condition of the land negates any presumed intent to create an easement. See Dale v. Bedal, 305 Mass. 102, 103 (1940). It is clear on this record that the common land was believed to be "uneven, rough, and not remarkably fertile" and that the legislators believed that the land would "lie untilled and comparatively unused" following the division of the common land.[7] As the Appeals Court stated in Kitras,

> The record reveals other circumstances that may render doubtful the parties' presumed intent to reserve easements, for example, the nature and then-perceived poor quality of the land so divided. See Dale v. Bedal, 305 Mass. 102, 103 (1940) (circumstances to be considered include 'the physical condition of the premises'). Without belaboring the point, it seems a legitimate question whether anyone at the time, objectively considered, would have troubled to provide for these 'uneven, rough, and not remarkably fertile' unclaimed and untenanted lots a beneficial conveyance by reserving for them easements to a road then in 'deplorable condition' and blocked to free travel by a stone wall and bars.

It is clear from the record before this court that the land was believed to be unfertile and unusable.

As acknowledged by the Appeals Court in Joyce, this "case is a hard one but if we should hold otherwise it would be another instance of a hard case making bad law." Joyce v. Devaney, 322 Mass. 544, 549 (1948). This court finds that the perceived condition of the land, in conjunction with the commissioners understanding of the Indian title system and tribal culture, and the express easements granted by the commissioners, is sufficient to negate any presumed

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[6] This observation also calls into question how strictly necessary access easements were at the time of division. As noted above, the necessity must have existed at the time of the division. See Viall v. Carpenter, 80 Mass. 126 (1859). If an easement was not necessary *at the time of division* it cannot be manufactured at a later point.

[7] It is worth noting that the current record supports the legislators' prediction that the land would "lie untilled and comparatively unused" following the division. As this court (Green, J.) noted in its 2001 decision "the plaintiffs (and their predecessors in title) waited to present their claims for more than one hundred years after the commissioners' 1878 report. . . ."

intent of the grantors to create an easement by necessity for any of Plaintiffs' lots. Further, this court finds that Plaintiffs have failed to introduce evidence sufficient to carry their substantial burden of proving easements by necessity.[7]

Judgment to issue accordingly.

Charles W. Trombly, Jr.
Justice

Dated: August 12, 2010

[7] Because I find that no easement by necessity was intended, I do not now reach the issues of merger and alternative access also raised by the pleadings.

(SEAL)

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

DUKES COUNTY, ss

MISCELLANEOUS
CASE NO. 238738 (CWT)

MARIA A. KITRAS, as Trustee of BEAR REALTY TRUST, *et al.*, Plaintiffs v. TOWN OF AQUINNAH, *et al.*, Defendants	**JUDGMENT**

Plaintiffs filed this action in May 1997 seeking to determine their access rights in the portion of Aquinnah, Dukes County, sometimes referred to as the "Zack's Cliffs" region. The question of access arises from the set-offs, completed in 1871 and 1878, of separate lots of land for ownership by individual members of the Wampanoag tribe. Neither of the set-off reports created express provisions regarding access rights across or for the benefit of the various set-off lots. Plaintiffs are the successors in title to certain of the set-off lots who claim rights of access, under various legal theories, over other of the set-off lots now owned by Defendants.

By order dated June 4, 2001, this court (Green, J.) dismissed Plaintiffs' complaint for failure to join an indispensable party. This court (Lombardi, J.) later issued a judgment dismissing Plaintiffs' claims and Plaintiffs appealed from that judgment. The Appeals Court reversed the judgment and this action was returned to this court for further proceedings consistent with the Appeals Court opinion. See Kitras v. Town of Aquinnah, 64 Mass. App. Ct. 285 (2005). On August 14, 2006, this court (Lombardi, J.) issued an order bifurcating the case.

On March 29, 2007, this court (Lombardi, J.) granted Plaintiffs leave to amend their complaint. Plaintiffs Third Amended Verified Complaint contains two counts: one asserting an easement by necessity and one asserting an easement by prescription. The parties agreed to submit this action to the court on a case stated basis, without calling witnesses. The parties submitted proposed exhibit lists and this court ruled on three motions to strike, after which eighty-six exhibits were entered into evidence.

After careful consideration of all of the evidence, the court has issued a decision of today's date, ruling that there was no intent to create easements by necessity providing access to Plaintiffs' lots.

In accordance with that decision, it is hereby

ADJUDGED and **DECLARED** that lots 178, 711, 713, 232, 243, 238, 554, 555, 707, 710, and 302 as shown on a plan of land entitled "Plan of Gay Head Showing the Partition of the Common Lands As Made by Joseph T. Pease and Richard L. Pease, Commissioners Appointed by the Judge of Probate Under Section 6, Chapter 213 of the Acts of 1870 By John H. Mullin Civil Engineer," are not benefited by any easements by necessity for access over any of the lots owned by Defendants to this action.

By the Court (Trombly, J.)

Attest:

Deborah J. Patterson
Recorder

Dated: August 12, 2010

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER

(SEAL)

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

DUKES COUNTY, ss. CASE NO. 97 MISC 238738 (CWT)

MARIA A. KITRAS, as Trustee of BEAR REALTY TRUST, *et al.*,

Plaintiffs

v.

TOWN OF AQUINNAH, *et al.*,

Defendants

AMENDED AND FINAL JUDGMENT

This action was filed by Plaintiffs in May 1997 seeking to determine their access rights in the portion of Aquinnah, Dukes County, known as the "Zack's Cliffs" region. The question of access arose out of set-offs, completed in the middle to late nineteenth century, of separate lots of land for ownership by individual members of the Wampanoag Tribe. Neither of the set-off reports created express provisions regarding access rights across or for the benefit of the various set-off lots. Plaintiffs are the successors in title to certain of the set-off parcels who claim rights of access, under various legal theories, over other of the set-off lots now owned by the Defendants.

On August 12, 2010, this court ruled that Plaintiffs had failed to introduce evidence sufficient to carry their substantial burden of proving easements by necessity and finding for Defendants with respect to Count I of Plaintiffs' Third Amended Verified Complaint. On February 16, 2011, Defendant Vineyard Conservation Society, Inc. filed a motion for summary judgment on Count II of the Third Amended Verified Complaint, to which Defendants Joann Fruchtman, Jack Fruchtman, Jr., Martha's Vineyard Land Bank Commission, David H. Wice, Betsy W. Wice, and the Town of Aquinnah have joined. The Commonwealth filed its own motion for summary judgment on Count II, while Plaintiffs and Defendants Gossamer Wing Realty Trust & Barons Land Trust filed written opposition thereto on March 21, 2011.

The Court has entered an order today entitled Order on Motion for Summary Judgment of Defendant Vineyard Conservation Society, Inc. On Count II of the Complaint. In that Order, after fully setting forth the reasons therefor, the Court GRANTED summary judgment in favor of the Defendants on Count II of the Third Amended Verified Complaint. The Court also dismissed Count III of the Third Amended Verified Complaint, finding and ruling that the issue raised in Count III, a claim for nuisance stemming from the construction of the Moshup Trail, is not within either the exclusive or concurrent jurisdiction of the Land Court as set forth in G. L. c. 185, § 1. In accordance with the above, it is

ORDERED and **ADJUDGED**, as set forth in the Judgment entered by this Court on August 12, 2010, that Lots 178, 711, 713, 232, 243, 238, 554, 555, 707, 710, and 302 as shown on a plan of land entitled "Plan of Gay Head Showing the Partition of the Common Lands As Made by Joseph T. Pease and Richard L. Pease, Commissioners Appointed by the Judge of Probate Under Section 6, Chapter 213 of the Acts of 1870 By John H. Mullen Civil Engineer," are not benefitted by any easements by necessity for access over any of the lots owned by Defendants to this action; and it is further

ORDERED and **ADJUDGED** that summary judgment is hereby granted to the Defendants on Count II of the Third Amended Verified Complaint, Plaintiffs and Defendants Gossamer Wing Realty Trust and Barons Land Trust not having proven they have rights of access to and/or over Defendants' property; and it is further

ORDERED and **ADJUDGED** that Count III of the Third Amended Verified Complaint is hereby dismissed without prejudice, the claim of nuisance raised therein not being within either the exclusive or concurrent jurisdiction of the Land Court.

DWT

By the Court. (Trombly, J.)

Attest:

Deborah J. Patterson
Recorder

Dated: April 4, 2011

ATTEST:
Deborah J. Patterson
RECORDER

Restatement (Third) of Property (Servitudes) § 2.15 (2000)

Restatement of the Law - Property

Database updated June 2015
Restatement (Third) of Property: Servitudes

Chapter 2. Creation of Servitudes

§ 2.15 Servitudes Created by Necessity

A conveyance that would otherwise deprive the land conveyed to the grantee, or land retained by the grantor, of rights necessary to reasonable enjoyment of the land implies the creation of a servitude granting or reserving such rights, unless the language or circumstances of the conveyance clearly indicate that the parties intended to deprive the property of those rights.

Cross-References:

Section 4.3, Duration of a Servitude; § 4.8, Location, Relocation, and Dimensions of a Servitude; § 7.14, Extinguishment of Servitude Benefits Under Recording Act; § 7.15, Servitudes Not Terminable by Marketable Title Acts.

Comment:

a. History and rationale. The rule that conveyances include those rights necessary to make use of the property conveyed can be traced back in the common law at least as far as the 13th century. A maxim dating from the time of Edward I (1239-1307) states that one who grants a thing must be understood to have granted that without which the thing could not be or exist. From this maxim and its extended applications, developed what came to be known as the easement by necessity. The implied right of access to the thing granted was extended, first, to include access to property expressly excepted from a grant, and, then, to other property of the grantor not mentioned in the conveyance. Although the primary right covered by this servitude is a right of access, it has been stated broadly enough to include other rights necessary to the enjoyment of property conveyed or retained.

The rationale for implying the conveyance or retention of rights necessary to permit enjoyment of the subject of a conveyance has changed over the centuries. In the 13th- and 14th-century cases, judges said that without a way of access, a man could get no profit from his land. In the 17th century, Chief Justice Glyn added a public policy justification: "... it is not only a private inconvenience, but it is also to the prejudice of the public weal, that land should lie fresh and unoccupied...."

Public policy favoring use and occupation of land remained the stated basis for the servitude until the 19th century, when the focus shifted back to private needs. Reflecting their tendency to explain transactions in private contract terms, 19th century judges concluded that ways by necessity arose because of the presumed intent of the parties. The 20th century has brought renewed recognition of the public-policy basis of servitudes by necessity, although the presumed intent of the parties is still the prevailing rationale expressed in the cases.

Both justifications for the rule have force. The presumed intent of the parties justifies finding that the conveyance included rights necessary to avoid rendering the property useless. Parties to a conveyance would very rarely intend deliberately to render useless either property conveyed or retained by the grantor. Public policy also justifies the rule because it avoids the costs involved if the property is deprived of rights necessary to make it useable, whether the result is that it remains unused, or that the owner incurs the costs of acquiring rights from landowners who are in a position to demand an extortionate price because of their monopolistic position.

Although the public policy favoring utilization of land and avoidance of the costs involved in forcing the landlocked owner to acquire access rights from the neighboring landowners might have justified it, the common law never developed a general method for providing access to landlocked property. Only if the cause of the landlocking can be traced back to a particular conveyance does the common law provide a solution. The common-law solution is limited to providing access over or through property held by the grantor at the time of the conveyance. Statutes in a number of states provide a broader solution by permitting the owners of landlocked property to purchase necessary access rights regardless of the manner in which the landlocking occurred. This section states the common-law rules by which servitudes by necessity are acquired in land once held in a common ownership without payment of additional compensation.

b. Rights necessary to reasonable enjoyment of property. Access rights are almost always necessary to the enjoyment of property. In a conveyance that would otherwise deprive the owner of access to property, access rights will always be implied, unless the parties clearly indicate they intended a contrary result. The most commonly implied access rights are those to connect property with a public road, but there are others. A conveyance dividing property into horizontal estates will include implied servitudes for access from the surface estate to the estates above and below the ground. A conveyance of a profit will include a right of access to the subject of the profit. A conveyance of an easement will include a right of access to the easement. The implied rights necessary to enjoy profits and easements are often called secondary easements.

Rights necessary to the enjoyment of property may include rights in addition to access, particularly when the property is severed into horizontal estates, or when nonpossessory interests are created. Support rights are necessary to the enjoyment of all horizontal estates that lie above other horizontal estates. To enjoy a profit, the owner must ordinarily be able to extract and remove the subject of the profit; to enjoy an easement, the owner must often be able to improve and maintain the easement way. Although customary usage has often collapsed the rights necessary to enjoyment of a profit into the concept of the profit itself, the implied secondary rights necessary to enjoyment of profits share a common origin with the implied easements by necessity that provide access to surface possessory estates. For analytical purposes, implied rights necessary to reasonable enjoyment of profits are treated as implied servitudes covered by the rule stated in this section.

Under the rule stated in this section, a servitude will be implied to do whatever is reasonably necessary for the enjoyment of property, if the conveyance would otherwise eliminate the property owner's right to do those things.

Illustrations:

The following Illustrations are based on the assumption that there is no indication in the language or circumstances of the conveyance that the parties intended to deprive the land of rights necessary to its enjoyment.

1. O, the owner of two contiguous parcels, conveyed Blackacre to A, retaining Whiteacre. Blackacre would be landlocked by the conveyance if no servitude to cross Whiteacre were implied. The conveyance grants an implied servitude for rights of access to Blackacre across Whiteacre.

2. Same facts as Illustration 1, except that O conveys Whiteacre and retains Blackacre. The same result follows. The conveyance reserves an implied servitude for rights of access to Blackacre across Whiteacre.

3. O, the owner of Blackacre and Whiteacre, leased Whiteacre to A. Whiteacre does not abut a public highway, but adjoins Blackacre, which does. The lease does not include an express easement for ingress and egress over Blackacre. A servitude for access rights across Blackacre to Whiteacre will be implied.

4. O, the owner of Blackacre, conveys subsurface coal rights to A. Without access through the surface of Blackacre, A has no right to gain access to the coal. There is an implied servitude granting all rights necessary to mine the coal through O's retained surface estate.

5. Same facts as Illustration 4, except that the coal completely underlies Blackacre, so that without access through the coal, O has no right to reach water and oil that underlie the coal. There is an implied servitude reserving rights of access to underlying strata for the benefit of the surface owner.

6. O, the owner of Blackacre, conveyed the standing timber on Blackacre to A. The conveyance did not include express rights to enter Blackacre or to cut and remove the timber. Conveyance of the timber includes an implied servitude for all rights necessary to cut and remove the timber.

7. O, the owner of Blackacre, conveyed an easement for a pipeline to A. The conveyance did not include express rights to enter Blackacre to install or maintain the pipeline. Conveyance of the pipeline easement includes an implied servitude for all rights necessary to enjoy the pipeline easement, including rights to install and maintain the pipeline.

c. Severance of rights arising out of common ownership is required. The rule stated in this section applies only when a conveyance would otherwise deprive property of rights necessary to its reasonable enjoyment. This means that, prior to the conveyance, the property did enjoy such rights and that, absent the implied servitude, the conveyance would deprive it of such rights. This set of circumstances arises only when the conveyance severs interests held in a single ownership, and when the owned interests include the claimed rights.

Servitudes by necessity arise only on severance of rights held in a unity of ownership. This severance can take place when a grantor, who owns several parcels, conveys one or more to others. It can also take place when a grantor divides a single parcel into two or more parcels, and it can take place when a grantor conveys less than full ownership in a single parcel. Implied servitudes can arise when the grantor simultaneously conveys all the grantor's interests to two or more grantees, as well as when the grantor retains some interest. Servitudes by necessity arise on conveyances by governmental bodies as well as by other grantors. Whether servitudes by necessity arise on severance of parcels held by concurrent owners whose interests overlap, but are not identical, in the two parcels is determined under the principles governing creation of servitudes by less than all owners of the servient estate under § 2.3.

Servitudes will be implied only in conveyances that cause the necessity to arise. If the property did not enjoy the rights prior to the conveyance, there is no basis for implying a servitude to continue the enjoyment of the rights after the severance. Servitudes are not implied to enjoy rights later acquired by the owners of property once held in common ownership.

Illustrations:
Illustrations:

8. O, the owner of two contiguous parcels, conveyed Blackacre to A. At the time of the conveyance, Blackacre abutted a public road. O's retained parcel, Whiteacre, abutted a different public road. When the access rights from Blackacre to the public road were later condemned, the owner of Blackacre had no right to cross Whiteacre to reach the public road. Since the conveyance from O to A did not deprive Blackacre of access to a public way, there was no implied servitude for access.

9. O, the owner of two contiguous parcels, conveyed Blackacre to A. At the time of the conveyance, there was an easement appurtenant to Blackacre for access to a public highway across the land of X, a stranger. O's remaining parcel, Whiteacre, abutted on a public highway. When X later extinguished Blackacre's easement by adverse user, the owner of Blackacre had no right to cross Whiteacre to reach the public road. Since the conveyance from O to A did not deprive Blackacre of access to a public way, there was no implied servitude for access.

10. O, the owner of two contiguous parcels, conveyed Blackacre to A, together with an express easement for ingress and egress across Whiteacre, O's retained parcel. A failed to record the deed to Blackacre. O later conveyed Whiteacre to X, a bona fide purchaser without notice of the easement conveyed to A. Under the jurisdiction's recording act, the express easement was destroyed. Even though Blackacre has become completely landlocked, the owner of Blackacre has no right to cross Whiteacre. Since the conveyance from O to A did not deprive Blackacre of access, a servitude will not be implied on the basis of that conveyance.

d. Degree of necessity required. Servitudes are implied under the rule stated in this section on the basis of necessity alone, without proof of a prior use of the properties consistent with the claimed servitude. To support implication of a servitude under this section, the rights claimed must be necessary to the reasonable enjoyment of the property. "Necessary" rights are not limited to those essential to enjoyment of the property, but include those which are reasonably required to make effective use of the property. If the property cannot otherwise be used without disproportionate effort or expense, the rights are necessary within the meaning of this section. Reasonable enjoyment of the property means use of all the normally useable parts of the property for uses that would normally be made of that type of property.

What is necessary depends on the nature and location of the property, and may change over time. Access by water, while adequate at one time, is generally not sufficient to make reasonably effective use of property today. Land access will almost always be necessary, even though water access is available. Even in the case of remote recreational properties, where access has traditionally been by water, implication of servitudes for land access is justified, unless the parties clearly intended to deprive the property of land access rights.

Until recently, access for foot and vehicular traffic tended to be the only rights regarded as necessary for the enjoyment of surface possessory estates. However, the increasing dependence in recent years on electricity and telephone service, delivered through overland cables, justify the conclusion that implied servitudes by necessity will be recognized for those purposes. Whether access for other utilities and services has also become necessary to reasonable enjoyment of property depends on the nature and location of the property and normal land uses in the community.

Illustrations:
Illustrations:

11. O, the owner of two contiguous parcels of land, conveyed Blackacre to A. Blackacre was divided by a deep ravine that could only be bridged at a cost greater than the value of the land. The half of Blackacre contiguous to O's retained parcel, Whiteacre, had no access to a public road except across Whiteacre, or the land of strangers. The other half of Blackacre abutted a public road, Since O's conveyance of Blackacre would otherwise deprive half of it of access, without the expenditure of a disproportionate sum, the conveyance includes an implied servitude for access across Whiteacre.

12. O, the owner of Blackacre and Whiteacre, conveyed Whiteacre to A. Whiteacre is landlocked, but Blackacre abuts a public street. The property is located in a rural residential area and it is suitable for residential use. A servitude for necessity will be implied for access for surface travel and for utility services normal in the area.

13. O, the owner of two contiguous parcels, conveyed Blackacre to A. Blackacre fronts on a navigable river. O's retained parcel, Whiteacre, abuts a public highway. Blackacre has no access to a public highway, other than the river.

In the absence of language or circumstances indicating that O and A intended to deprive Blackacre of land-access rights, a servitude for access across Whiteacre will be implied.

e. Contrary intent. Because of the strong public policy favoring avoidance of the costs incurred on account of unusable property, and the strong likelihood that the parties to the conveyance do not intend to deprive it of its utility, servitudes by necessity will be implied unless it is clear that the parties intend to deprive the property of rights necessary to its enjoyment. Thus, servitudes for rights necessary to enjoyment of the property will be implied unless it affirmatively appears from the language or circumstances of the conveyance that the parties did intend that result. Mere proof that they failed to consider access rights, or incorrectly believed other means to be available, is not sufficient to justify exclusion of implied servitudes for rights necessary to its enjoyment.

In an occasional case, a court has denied an easement by necessity to a party who voluntarily created the access problem. Such results are rare, and should only be reached in cases where the conduct of the landlocked party is such that an estoppel against claiming the easement is justified.

Illustrations:
Illustrations:

14. Railroad Corporation owned a large parcel of land that had no access to a public highway. The parcel abutted Railroad Corporation's railroad right of way, which it owned in fee simple. Railroad Corporation conveyed the parcel to A by a conveyance which stated: "This conveyance does not include any rights of ingress or egress over other property of grantor, including grantor's adjacent right of way." There is no implied servitude for access over the grantor's retained land to the conveyed parcel because the intent not to create a servitude for access is clearly stated.

15. O, the owner of two contiguous parcels, conveyed Blackacre to A by warranty deed. O's retained parcel, Whiteacre, had no access to a public road except across Blackacre, or the land of strangers. Inclusion of a warranty against encumbrances does not clearly indicate an intent not to retain a servitude for access to Whiteacre across Blackacre.

16. D, the developer of a large tract of land, subdivided the land in such a way as to leave one small parcel landlocked. After D had conveyed all of the other parcels at a price reflecting their value without an encumbrance for an access easement to the landlocked parcel, D asserted a claim of easement by necessity against the grantees of the parcels abutting the landlocked parcel. Because D controlled the subdivision process and the pricing of the lots sold, the conclusion would be justified that D is estopped to claim an easement by necessity.

Reporter's Note

This section is consistent with the rule stated in § 476, Comment *g,* of the first Restatement.

History and rationale, Comment a. The historical material is drawn from Simonton, Ways By Necessity, 25 Colum. L. Rev. 571 (1925). Section 476, Comment *g,* of the first Restatement took the position that the inference as to the intention of the parties not to render property useless was influenced largely by considerations of public policy favoring land utilization.

Thompson v. Whinnery, 895 P.2d 537 (Colo.1995) (easement by necessity is implied because the law assumes that no person intends to render property conveyed inaccessible for the purpose for which it was granted or retained; assumed intent has its roots in considerations of public policy that militate against rendering a tract of land useless for lack of access).

