COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 2012-P-0260

MARIA KITRAS, TRUSTEE, et al.,
Plaintiffs-Appellants,

v.

TOWN OF AQUINNAH, et al.,
Defendants-Appellees

ON APPEAL FROM A JUDGMENT
OF THE LAND COURT

APPELLANTS' BRIEF AND APPENDIX

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Explanation of Abbreviations

Add. refers to the Addendum reproduced in this volume.

A. refers to the Appendix of docket entries reproduced immediately after the Addendum.

E. refers to the two-volume set of Exhibits.

T. refers to the volume of nonevidentiary hearings, bound sequentially as T. 4/25/06, 9/12/06, 12/4/06, 1/16/07, 7/10/07, 6/13/08, 9/9/08, 9/30/08, 2/4/09, 6/21/10, and 9/8/10.

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ISSUES PRESENTED FOR REVIEW

1. Whether, on the 19th century documentary record, the plaintiffs' lots have access easements by necessity over lots partitioned out of common Gay Head Indian land by a common grantor acting on behalf of the General Court, where the lots were otherwise landlocked under the common law and the General Court indisputably intended these lots, conveyed to individual members of the tribe, to be both usable and salable.

2. Whether the Land Court erred in reading this Court's decision in Kitras I as foreclosing, on remand, consideration of Lot 178 as among those benefitted by an easement by necessity where

   a) this Court's determination about Lot 178 in Kitras I had no bearing on the outcome of the appeal and thus did not preclude further litigation of this issue; and

   b) on remand, the plaintiffs proffered additional evidence that Lot 178 was part of the common land partitioned in 1878.

STATEMENT OF THE CASE

Nature of the Case.

The plaintiffs--Maria Kitras and James J. Decoulos, trustees[1] ("Kitras"), Sheila H. Besse and Charles D. Harding, trustees, and Mark D. Harding[2] ("Harding")--appeal from a Land Court judgment

[1]Maria Kitras is the trustee of Bear Realty Trust, (lots 178, 241, and 711); and Maria Kitras and James J. Decoulos are the trustees of Bear II Realty Trust (lot 713) and Gorda Realty Trust (lots 232 and 243). A. 122-123. The Land Court inadvertently omitted their ownership of lots 232, 241, and 243. Add. 2.

[2]Mark D. Harding owns lot 554. Sheila H. Besse and Charles D. Harding are the trustees of the Eleanor P. Harding Realty Trust which owns lot 555. A. 123.

declaring that their lots have no easements by necessity over the defendants' land. The locus is in the Town of Aquinnah on Martha's Vineyard.[3] All lots in issue were conveyed to members of the Gay Head Indian tribe in 1878. A chalk of the locus (Add. 20) shows the Kitras lots (numbers 178, 232, 241, 243, 711 and 713); the Harding lots, (numbers 554 and 555); the defendants' lots; and the Moshup Trail, a public way laid out in 1955 which gave the defendants express access to their lots. Add. 5, ¶ 18.

As will be explained later in greater detail, the Gay Head Indians' land fell into two rough categories: land held "in common," meaning land used communally by the tribe, and land held "in severalty," meaning lots claimed by individual Indians by enclosing an area of the common land, usually with a stone wall. E. 29, 195. With one exception--Kitras's lot 178, see pp. 44-50, *infra*--it is undisputed that all of the plaintiffs' lots were partitioned in 1878 from the common land.

Prior Proceedings and Disposition in the Court Below.

In 1997, the plaintiffs sought a judgment in the Land Court declaring that the 19th century partition of

[3]In 1998, the legislature changed the Town's name from Gay Head to Aquinnah. St. 1998, c. 110.

lots from this common land to their predecessors in title included access easements by necessity over other partitioned lots. They relied, and still rely, on the legal presumption that an easement by necessity "is said to arise (or is implied) ... when a common grantor carves out what would otherwise be a landlocked parcel." Kitras v. Town of Aquinnah, 64 Mass. App. Ct. 285, 291 (2005) (Kitras I, Add. 23) (quoting cases).

In 2003, the Land Court dismissed their complaint for failure to join a necessary party, and in 2005, this Court reversed and remanded the case to decide their easement by necessity claims. Kitras I at 301.

On remand, the Land Court ruled that it would first decide whether easements existed; if so, it would then locate the easements on the ground. A. 116. For several years the parties worked toward submitting the first question to the court on an agreed documentary record, i.e., as a "case stated." Middlesex Ret. Sys. LLC v. Bd. of Assessors, 453 Mass. 495, 498-499 (2009); T. 9/12/06, 84, 105, 2/4/09, 67-72. In late 2008 and early 2009, they submitted proposed exhibits and a document noting their respective objections. A. 251.

Beginning in April, 2009, it became obvious that the "case stated" approach would not work because the

parties could not agree on the evidence. T. 6/21/09, 168. The second issue in the appeal concerns the Land Court's decision to strike Kitras's exhibits concerning lot 178, ruling that in Kitras I this Court "determined that Lots 1-188 or 189 do not hold any easement rights" because not partitioned from common land. Add. 14, 17. Kitras, who had urged that this language in Kitras I was not preclusive, made an offer of proof that Lot 178 was in fact carved from the common land. A. 300.

The case went to the Land Court on documents alone, and on August 12, 2010, it ruled as follows:

> Assuming *arguendo* that the presumption [of an intended easement] articulated in Davis v. Sikes, [254 Mass. 536, 545-546 (1926)] is applicable to this case, this court finds that Defendants have produced sufficient evidence to rebut the presumption. Add. 8.

The lower court was persuaded by three of the defendants' arguments. First, it relied on the maxim, *expressio unius est exclusio alterius,* ruling that the Commissioners' reservation of peat and fishing rights in some of the partition deeds "negatives . . . any intention to create easements by implication." Second, the court relied on the tribal custom which allowed "for access for each member of the tribe as necessary over [Indian] lands held in common and in severalty;" for this reason, the court ruled, the commissioners

who partitioned the Indian land "likely assumed easements for access were unnecessary." Third, the court ruled that the land was so "unfertile and unusable" that the commissioners did not take the trouble to give the grantees access to it. Add. 8-11.

On May 3, 2011, a Final Amended Judgment entered, and the plaintiffs claimed timely appeals.[4] A. 426, 457-460.

Facts Relevant to the Appeal.

Factual overview of the case.

At the heart of this case is one factual question: whether Massachusetts officials, when dividing about 1900 acres of Indian common land in 1878 and conveying the resulting lots to individual members of the tribe, intended mutual easements by which every land owner had the common law right to get to and from his or her lot.

As the Land Court recognized, Add. 6-9, a rebuttable presumption helps to answer this question:

> The law presumes that one will not [convey] land to another without an understanding that the grantee shall have a legal right of access to it, if it is in the power of the grantor to give it .... This presumption prevails over the ordinary covenants of a warranty deed. Davis v. Sikes, 254 Mass. 540, 545-546 (1926).

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[4]The plaintiffs do not appeal the summary judgment against them on their prescriptive easement claims over Zack's Cliff Road and the Radio Tower Road. A. 54.

This rule of law was firmly in place and presumably known by the state officials who made these conveyances in 1878. Brigham v. Smith, 70 Mass. 297, 298 (1855); Nichols v. Luce, 41 Mass. 102, 103-104 (1834).

These officials were appointed as part of a broad legislative initiative to improve the status and wellbeing of the native peoples of Massachusetts. This initiative effected momentous changes for the Gay Head Indians in particular. Between 1869 and 1878, they became citizens of the Commonwealth; their ancestral lands became a Town, entitling them to representation in the General Court; and they became fee owners of real property, with the power to alienate their land.

Until then, Massachusetts owned the fee to the land in Gay Head. Under the common law, the tribe members' "Indian title" was a mere "right of occupancy" which the state had the exclusive power to extinguish and which, if conveyed to anyone outside the tribe, the courts would not enforce. Kitras I, 292-293; James v. Watt, 716 F.2d 71, 74-75 (1st Cir. 1983).

Historical Background to the 1878 Partition.

In 1817, *The North American Review* reported:

> The west end of Martha's Vineyard containing 3000 acres of the best land in the island, and including Gay Head, is reserved for the Indians established at this place and their descendants.

> ... The land is undivided; but each man cultivates as much as he pleases, and no one intrudes on the spot, which another has appropriated by his labor. They have not the power of alienating their lands, being considered as perpetual children, and their property committed to the care of guardians appointed by the government of Massachusetts.

E. 231.

In 1828, for reasons unnecessary to relate, the Gay Head Indians began living as the direct wards of the state, without a guardian. E. 34-35. For the present purposes, little changed for them until 1859.

> *April, 1859-March, 1862*: Commissioner Earle recommended that the General Court extend "the sanction of the law" to lots held by individual tribe members in severalty but recommended against dividing the common land, which he described as "the largest, best and most valuable portion of the property of the tribe."

By the middle of the nineteenth century the General Court, which had been a national leader in targeting discrimination against African-Americans, Jones v. Afred F. Mayer Co., 392 Mass. 409, 474 (1968), was feeling the pinch of conscience about the Indians. Among other indignities, they could not vote, hold or transfer the fee title to their land, make contracts, sue or be sued. E. 34, 127.

By St. 1859, c. 266, the General Court appointed John Milton Earle to investigate and report on the Indians' social, political, and economic condition.

The big question was whether they should "be placed immediately and completely, or only gradually and partially, on the same legal footing as the other inhabitants of the Commonwealth." Among Commissioner Earle's tasks was to identify "all property of [the Indians] in lands, and whether the same is held in severalty or in common ...." E. 14-15.

In his 1861 report he documented his observations of a dignified, civil people as well as the "fearful work" done to them by "the prejudice of caste, social exclusion, and civil disfranchisement." For practical and ethical reasons, he reported, "[t]he condition of the several tribes presents a broad field for the exercise of a wise benevolence." E. 20-23.

He specifically found the Gay Head Indians, living on a peninsula and "almost isolated from the rest of the world," to be "a frugal, industrious, temperate and moral people," who had made more progress than "any other tribe in the state." They had also "suffered so much from outside interference in their affairs that they have become very fearful of it...." E. 31-33. For example, as of 1861 they were opposed to becoming citizens, and Earle thus recommended against it because of "[t]he prejudices of color and caste, and the fears

of the burdens it might impose ...." E. 39.

For purposes of this case, Earle's most significant findings and recommendations concerned the Gay Head Indians' relationship to land. About 450 of the 2,400 acres on the Gay Head peninsula, he found, "is held in severalty, and is fenced and occupied by the several owners, and the remainder is held by the tribe in common." E. 26.[5] By tradition, these common lands were reserved for communal use and communal benefit. Earle described the land as follows:

> The surface of Gay Head is uneven and somewhat hilly, with a great variety of soil, some of it of excellent quality, affording fine pasturage for cattle, and this constitutes almost the sole resource of the tribe for revenue to support their poor. Cattle are brought hither from other parts of the Vineyard, and from the main, for pasturage, and the income therefrom is paid into the public treasury. It amounts to about $225 a year, and is wholly applied to the relief of the poor. The only other sources of income, are, from their cranberry bogs and their clay. These are both public property. . . .
>
> The land is generally rough, affording abundance of stone for fencing, and a considerable amount of what is not taken up and enclosed, or is not used for pasturage, is grown up to bushes, which afford convenient summer fuel for common culinary purposes. E. 28-29.

Also by tradition, any member of the tribe could

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[5]Surveys later showed that the total acreage was "nearer 3,400, of which a little less than one-half [was] held in severalty." E. 71 (footnote).

fence or wall off any part of the common land for private use and then hold this lot in severalty:

> Any member of the tribe may take up, fence in, and improve as much of the [common] land as he pleases, and, when enclosed, it becomes his own . . . . The benefit to the plantation of having more land subdued and brought into cultivation, is considered a fair equivalent for its value in the natural state, and the title to land, so taken up and enclosed, is never called into question.

E. 29, 38.

For the most part, Earle observed, this "unwritten Indian traditional law" respecting land worked well, and the people "are fearful of any innovations upon it." E. 29. He recommended against dividing up the common land, in part because the people opposed it and in part because they used income from this land to support the poor. The common land, he reported, was "the largest, best and most valuable portion of the property of the tribe" E. 37.

By contrast, Earle recommended that the General Court take action concerning the severalty lots enclosed and held by individuals. Their rights, he noted, were insecure, having been "acquired under [the Indian traditional law], from generation to generation" but without legal protection from acts of "disaffected or unprincipled individuals." With respect to these lots, Earle concluded, "[t]he sanction of the law ought

... to be, at once, extended to the rights thus obtained in good faith." E. 39-40.

1862-1866: The General Court charged Charles Marston, and then Richard Pease, with establishing titles to the severalty lots and with fixing the boundaries of the severalty lots and the common lands.

After receiving Earle's report, the General Court acted swiftly. In April, 1862, it passed a law "plac[ing all Indians] on the same legal footing as the other inhabitants of the Commonwealth." While this part of the law excluded the Gay Head tribe, it moved them toward equality by turning the Gay Head Plantation into a district. Excepting the right of legislative representation, Gay Head now had all the powers of a town, including the right to hold property.[6] Its clerk was thus ordered to make and maintain "a register of the lands of [the Gay Head district], as at present held, whether in common or severalty, and if in severalty, by whom held." St. 1862, c. 184 §§ 4,5.

The General Court also adopted Earle's recommendation to give the Gay Head severalty lots the protection of the common law. In 1863 it passed a "Resolve Relating to the Establishment of Boundary

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[6]G.S. 1860, ch. 18, § 9; Hill v. Easthampton, 140 Mass. 381, 384 (1886), citing Opinion of the Justices, 3 Mass. 568, 572 (1807).

Lines of Indian Lands at Gay Head," Add. 33, appointing a commissioner

> to determine the boundary lines between the individual owners of land located in the Indian district of Gay Head, ... and also to determine the boundary line between the common lands of said district and the individual owners adjoining said common lands ... E. 55.

Over the next three years, the first commissioner, Charles Marston, met with members of the tribe who claimed enclosed lots as their own and trod the land with a surveyor. After three years, however, he had to withdraw because of illness. In March, 1866, he reported that he had identified the boundaries and adjusted the claims to "very large proportion of the lots." He provided a record book of the titles he had recorded. E. 60-62, 342-381.

In April, 1866, the General Court authorized Richard Pease to complete Marston's work. Resolves, 1866, c. 67; E. 64-65, 70-71.

1869-1870: the General Court enfranchised the Gay Head Indians as citizens, made Gay Head a Town, transferred the common land to the Town, and authorized its partition.

After the Civil War ended in 1865, the next five years of Reconstruction--during which time Congress took extreme action to try to secure Negro suffrage in

the resistant states[7]--saw momentous changes in the legal status of the Gay Head Indians.

In 1869, the General Court enfranchised all Indians of Massachusetts, making the people of Gay Head "the recipients of the glorious privileges of Massachusetts citizenship in full." Because they did not live in a town and thus had no right to legislative representation, however, their citizenship created a "political anomaly:" these new privileges "could neither be exercised nor enjoyed." E. 69, Add. 35.

A legislative committee sent to investigate the people's readiness strongly recommended that Gay Head be made a town, E. 69-78, and also weighed in on the ongoing issue of land. With respect to the ownership of individual lots, it noted Pease's progress and characterized this work as "absolutely essential," given the Indians' new legal status as citizens.

With respect to the common lands, it recommended that, if the Indians themselves wished to divide them, this should be done:

> This land is uneven, rough, and not remarkably fertile. A good deal of it, however, is, or might be made, reasonably productive with a slight expenditure, and, doubtless, would be if the

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[7]United States v. Price, 383 U.S. 787, 801-805 (1966).

> owners had the means; but, deficient as they are in "worldly gear," it is, perhaps, better that these lands should continue to lie in common for the benefit of the whole community as pasturage and berry lands, than to be divided up into small lots to lie untilled and comparatively unused. This, however, is a question of "property," which every "citizen" should have the privilege of determining for himself, and the people of Gay Head have certainly the right to claim, as among the first proofs of their recognition to full citizenship, the disposition of their landed property, in accordance with their own wishes.

E. 71.

In April, 1870, two months after the committee filed its report, the legislature passed Chapter 213 of the Acts of 1870, incorporating the Town of Gay Head, conveying all common lands to the new Town, and authorizing partition of these lands.

This statute, which kept the power to convey Gay Head land in the state, changed the process by which the General Court had been addressing the question of land ownership. Under the new procedures, a Dukes County Probate Court judge had administrative oversight over all changes in ownership. With respect to the severalty lots, the court was to appoint

> two discreet, disinterested 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 ....

As for the common land, if the court, the Gay Head selectmen, or "ten resident owners" petitioned for partition--and if the court found that partition was in the parties' interest--it was to entrust this task to the same two commissioners. E. 84-86.

Within four months, seventeen Gay Head citizens petitioned the Probate Court "to appoint two proper persons to divide and set off our parts in severalty to us of all the common land in Gay Head." E. 87-88.

The court granted the petition. In late 1870, it appointed Richard Pease (Marston's replacement in the 1863 severalty lot work) and Joseph Pease

> [1] to make division of all the Common and Undivided Lands of the people in the Town of Gay Head, among those inhabitants of said Town entitled to any portion of the same, defining the part thereof assigned to each one by suitable metes and bounds; [and]
>
> [2] 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, as required by Chapter 213, Section 6, of the Statutes of the year 1870. E. 101.

May, 1871: Pease completed Marston's work, identifying lots 1-173 as severalty land and mapping the boundaries of these lots and the common lands.

On May 22, 1871, Richard Pease filed "a Report of the Commissioner Appointed to Complete the Examination And Determination of All Questions of Title to Land and

of all Boundary Lines Between the Individual Owners at Gay Head," informing the legislature that he had "concluded his labors." E. 109. His report included indices of the new titles to lots numbered from 1 to 173 and of each new owner by name and lot number. E. 152-160. He also included a map showing the "lands of individual owners and the general fields or commons" at Gay Head, E. 66, 779, and twenty-one sectional plans, showing the same information on a larger scale. E. 130, 161-183.

Pease described the land this way:

> 'The territory embraces about every variety of soil, a portion of the land is of the very best quality, and capable, under good culture, of producing most abundant harvests.' The surface is irregular, abounding in hills and valleys, ponds and swamps, fine pasture-land and barren beach, with occasional patches of trees and tilled land.
>
> Increasing attention is paid to agriculture, but there is room for great improvement. As an abundance of that most excellent dressing, rockweed, can be procured, additional labor, energy and skill would bring a sure reward. A very large portion of the lands now enclosed, was, a generation since, wild, rough land, unfenced, and seldom tilled, and of course unproductive and of little value. As it has been cleared up, fenced and tilled, its value has largely increased. . . . While yet, as a community, poor and without and men of wealth, their circumstances are improving. E. 109-110.

An earlier visitor, he said, described the soil as "good, wanting nothing but industry and proper

management to render it capable of producing every kind of vegetable in perfection." E. 114.

Pease further noted that his finished census of the Gay Head inhabitants "will be of great service in the work, yet to be performed, of dividing the common lands, under the provisions of the Act by which Gay Head was made a township." E. 131.

His comprehensive report included Massachusetts' somewhat murky claim to the Gay Head land and the history of the Indians' lack of "absolute control over their land." On their inability to sell their land freely and other legal disabilities, Pease opined:

> It is hardly to be wondered at, then, that the Indians were "thriftless and improvident," for some of the most powerful incentives to elevate a man were wanting. E. 128.

Like others of his generation, Pease placed property ownership high on the list of social values. See, e.g., Bartemeyer v. Iowa, 85 U.S. 129, 136 (1873) ("it has now become the fundamental law of this country that life, liberty, and property [which include 'the pursuit of happiness'] are sacred rights, which the Constitution of the United States guarantees to its humblest citizen..."); Paul v. Virginia, 75 U.S. 168, 180 (1868) (the Privileges and Immunities Clause guarantees freedom to acquire and enjoy property).

These were the values of the legislators who, when the Indians asked to partition their common lands, gave them this power. This, the legislators believed, was "a question of 'property,' which every 'citizen' should have the privilege of determining himself...." E. 71.

The 1878 Partition of the Gay Head Common Lands and Conveyance of Individual Titles to Lots 174-736.

In 1878, the Peases filed their final report to the Probate Court. They asserted that they had

> . . . made and completed a division of the common land and undivided lands of Gay Head, among all the inhabitants of that town, adjudged to be entitled thereto; and have made careful and correct description 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. E. 188.

With this report they submitted a map entitled "Plan of Gay Head Showing the Partition of the Common Lands." E. 188-189, 196. Plaintiffs prepared a map showing the lands conveyed in 1871--lots 1-173--and the new lots listed in the 1878 report--lots 174-736. E.

194. All the plaintiffs' lots are in the 1878 group. A. 122-123.

The Peases categorized the lots as follows:

> The lots of common lands drawn or assigned by the Commissioners Joseph T. Pease and Richard L. Pease duly appointed by Hon. Theodore G. Mayhew, Judge of Probate for Dukes County, are numbered from No. 189 and upwards in regular order. Lots No. 1 to No. 173 inclusive were run out and bounded under previous provision of the statutes. The record of these lots will be found in Land Records 49 Book pages 116-187 inclusive.
>
> Lots No. 174 to No. 189 were run out and bounded afterwards, by the Commissioners who made partition of the Indian Common lands. The description of these lots, their boundaries and ownership are here given. E. 190, 193.

Thirty-seven of the 562 individual deeds included a reservation of the "rights to peat on the premises": twenty-six deeds reserved peat rights for named owners of other lots,[8] and ten reserved peat rights "that may justly belong to any person or persons to them their heirs and assigns." In addition, three deeds reserved

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[8]The grantees of peat rights--a source of heating fuel--in others' lots and the number of each grantee's homestead lot were William Jeffers (Lot 156), Thomas Jeffers (Lot 167), William Vanderhoop (lot 131), Deacon Simon Johnson (Lot 165, Patrick and John Divine (Lot 159), Jonathan Francis (Lot 104), Elizabeth Howwasswee (Lot 79), Isaac Rose (Lot 153), George Belain (Lot 56), Tristram Weeks and Louisa David (Lots 72 and 79), Simon Tristram Weeks (Lot 72), Abram Rodman (Lot 152), Aaron Cooper (Lot 110), heirs of Lewis Cook (Lot 395). One person--Horatio Pease, not a member of the tribe, E. 137-147--owned no separate lot yet was granted peat rights. Add. 21.

to the proprietors of the Herring Fishery a strip on either side of the creek "for the purpose of fishing and clearing the creeks." Add. 21.

All lots burdened with peat and fishing profits, like all lots of the plaintiffs' predecessors, were landlocked. None of the partition deeds--whether reserving profits or conveying title--included explicit access easements. The profit grantees had no legal way to get to their products or remove them from the land, just as the title grantees had no legal way to get to and from their land.

For simplicity, throughout this brief the grantor of the 1878 lots is identified as the General Court, which authorized the Commissioners and the Probate Court to act on its behalf. Add. 36.

SUMMARY OF ARGUMENT

Because the case concerns land development on Martha's Vineyard, it may arouse strong feelings. This lengthy litigation continues to be hard fought. But the law is plain. On the documentary record, to be reviewed *de novo*, the plaintiffs proved that their lots have appurtenant access easements by necessity.

They indisputably proved their entitlement to the legal presumption that the parties to these 1878

conveyances intended to include access easements. As this Court found in Kitras I, all three elements needed for the presumption are rock solid. At the time of partition, a common grantor held title to the common land, Br. (Brief) 26-27; that unity of title was severed by the act of partition into multiple lots, Br. 27; and those lots lost access to a public way as a result of the partition, Br. 27-28.

The historical record of these conveyances adds rock solid support to the parties' presumed intent to include common law access with each lot. In allowing the Indians to choose to partition their common land, the General Court expressly focused on the people's constitutional right to *sell property*--a right denied them during their long history as wards of the state. Without transferable, common law access rights, these lots were useless and unsalable, and the Commissioners, who acted for the General Court--could hardly have intended this cruel outcome. For their part, the Indians would hardly have intended to trade a vast tract of accessible common land for single, unsalable lots. Br. 28-31

The reasons proffered by the defendants to rebut the plaintiffs' presumptive access rights neither make

sense nor comport with the record.

The first reason is the untenable notion that the common land was so "unusable"--i.e., worthless--that the General Court did not bother to include access rights. The record is clear that the General Court knew that the land had a variety of uses: as pasturage for animals, as a source of bushes for fuel, and--with fertilizer and labor--as a future source of productive agricultural land. Br. 33-36.

The second reason is the untenable notion that, because Indian law gave the grantees access over each other's land, the General Court did not consider common law access rights necessary. The General Court is presumed to have known that all Indian rights were extinguished before partition, when it transferred the common lands to the new Town of Gay Head. Br. 36-38. Further, the record is clear that the General Court intended to convey *salable* lots; and it is presumed to have known that the Indian grantees could not legally convey any Indian law access rights. Br. 38-41.

The third reason is the untenable notion that, because the General Court conveyed other rights--profits à prendre for peat and fish--it did not intend to convey access rights in the lots. The record is

clear that it included no access rights with the profits, either. Without access, both the lots and the profits were equally useless and unsalable. The parties cannot have intended either result. Br. 41-43.

Also discussed is the Land Court's erroneous refusal to consider Kitras's Lot 178 among those severed from the common land in 1878. Br. 44-50.

I. BECAUSE THE GENERAL COURT IS PRESUMED TO HAVE INTENDED THE INDIAN GRANTEES TO HAVE LEGAL ACCESS TO THEIR PARTITIONED LOTS, AND BECAUSE THERE IS NO EVIDENCE OF ANY CONTRARY INTENT, THE PLAINTIFFS' LOTS HAVE ACCESS EASEMENTS BY NECESSITY.

A. Applicable Principles of Law.

Standard of Review. The Land Court decided the case solely on documentary evidence, so "this court is in the same position as was the trial judge to decide the issues." Guempel v. Great American Ins. Co., 11 Mass. App. Ct. 845, 848 (1981). Review of all factual and legal issues is *de novo*. Board of Registration in Medicine v. Doe, 457 Mass. 738, 742 (2010).

Easement by necessity: substantive law.

"[W]hen land is conveyed which is inaccessible without trespass, except by passing over the land of the grantor, a right of way by necessity is presumed to be granted; otherwise, the grant would be practically useless.... [A]ll that is required is that a way over

the grantor's land be reasonably necessary for the enjoyment of the granted premises." Schmidt v. Quinn, 136 Mass. 575, 576 (1884). This "settled rule of property law," Leo Sheep Co. v. United States, 440 U.S. 668, 679 (1979), "can be traced back in the common law at least as far as the 13th century." RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.15 comment (a) at 203 (2000). Its rationale is common sense: the parties' presumed intent to include "rights necessary to avoid rendering the property useless." Id.

Most typically, the rule applies to access rights. "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." Id., comment (b), at 204.

There are three basic elements of an easement by necessity; "necessity alone does not an easement create." Kitras I at 298. These elements are (a) unity of title, i.e., the grantor having owned both dominant and servient estates; (b) a conveyance which severs this unity of title; and (c) necessity arising from that conveyance. Kitras I at 291; RESTATEMENT, supra, at 206. Necessity "is not limited to absolute physical necessity. It means that the [access rights]

must be reasonably necessary." Davis v. Sikes, 254 Mass. 540, 546 (1926), citing Pettingill v. Porter, 90 Mass. 1, 6-7 (1864); RESTATEMENT, supra, at 207.

These elements establish a legal presumption that the parties intended the grantees to have "a legal right of access" to their land. Davis v. Sikes, 254 Mass. 540, 545-546 (1926), quoting New York & New Eng. Railroad v. Railroad Comm'rs., 162 Mass. 81, 83 (1894). "This presumption prevails over the ordinary covenants of a warranty deed." Id..

Because of the "strong likelihood" that the parties did not intend to make the property useless,

> 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.

RESTATEMENT, supra, at 208. Once established, this easement runs with the land. Id., § 1.1 at 8-9.

Easement by necessity: burdens of proof and persuasion.

The burden of establishing an easement by necessity is on the parties asserting it, i.e., Kitras

and Harding. Krinsky v. Hoffman, 326 Mass. 683, 688 (1951). As the 1878 grantees' successors, they are aided by "the principle that a deed is to be construed most strongly against the grantor and that the law will imply an easement in favor of the grantee more readily than it will in favor of the grantor." Id..

They are also aided by the law of presumptions:

> 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 statute, 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. ... A presumption does not shift the burden of persuasion, which remains throughout the trial on the party on whom it was originally cast.

MASSACHUSETTS GUIDE TO EVIDENCE, § 301(d) (2011).

B. On Its Face, The Record Establishes a Legal Presumption That the Commissioners Intended the Indian Grantees to Have a "Legal Right of Access" to The Lots Partitioned From the Common Lands.

The undisputed circumstances of the 1878 partition establish the parties' presumed intent to include a legal right of access. Every Land Court judge to consider this question has acknowledged as much. A. 69 (Green J.); Add. 8 (Trombly, J.); Add. 42-43 (Randall, J.); Add. 54-56 (Cauchon, J.).

1. *Unity of title.*

At the time of the 1878 partition, the common land

was owned by the Town of Gay Head, with the state retaining the power to convey it. Chapter 213 of the Acts of 1870 provided: "All common lands ... held by the district of Gay Head are hereby transferred to the town of Gay Head, and shall be owned and enjoyed as like property and rights of other towns are owned and enjoyed." Add. 36. Assuming *arguendo* that any "Indian title" remained in the common land once it was conveyed to the town,[9] that title was held in common by all members of the tribe. Accordingly, whether held solely by the Town or jointly by the Town and the tribe, there was unity of title in the common lands.

2. *Severance of unity of title.*

That unity of title was severed by the 1878 partition of the common lands into separately-owned lots, as authorized by the General Court in 1870.

3. *Necessity resulting from the 1878 conveyances.*

As a result of the 1878 partition, the plaintiffs' lots became landlocked. Kitras I at 293-294. Implied easements were thus reasonably necessary to give the new owners "a legal right of access" to their lots. Davis v. Sikes, 254 Mass. 540, 545-546 (1926), quoting New York & New England Railroad v. Railroad Comm'rs.,

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[9]For the contrary position, see pp. 36-38, *infra*.

162 Mass. 81, 83 (1894).

As a matter of law, the parties to the 1878 conveyances are thus presumed to have intended a "legal right of access." Davis, supra; Mt. Holyoke Realty Corp. v. Holyoke Realty Corp., 284 Mass. 100, 106 (1933); Viall v. Carpenter, 80 Mass. 126, 127 (1859).

C. The Historical Purpose of These Conveyances, to Ensure the Gay Head Indians' New Constitutional Right to Alienate Their Property, Cements the Commissioners' Presumed Intent That Their Lots Would Have Legally Enforceable Access.

A central purpose of the General Court's 1870 decision to authorize voluntary partition--one year after it enfranchised all Massachusetts Indians, 1869 Mass. Acts c. 463, § 1, and three years after it ratified the Fourteenth Amendment, James v. Watt, 716 F.2d 71, 75 (1st Cir. 1983)--was to allow individual Gay Head Indians to own and convey property like every other citizen. The Land Court's ruling that the General Court did not intend these new property owners to have legally-enforceable rights to access their lots disregards the compelling historical record of the 1870 Act and its constitutional underpinnings.

The General Court could not have made clearer its overarching intent in 1870 to give meaningful content to the Indians' new citizenship, just gained in 1869.

In explicit language, the General Court stated its intention to fix two glaring anomalies incompatible with "all the rights, privileges and immunities" of citizens. St. 1869, c. 463, § 1, Add. 35; U.S. Const., am. 14, § 1.

First, because Gay Head was not a town, its citizens had no right to representation in the General Court and thus could "neither exercise[] nor enjoy[] their new privileges. E. 69; Hill v. Easthampton, 140 Mass. 381, 384 (1886). In 1870, the legislative committee sent to investigate this question recommended making Gay Head a town, despite its poverty and high percentage of people of color. Quoting the still-unratified 15th Amendment, the committee urged that

> the time has long gone by when in the Commonwealth of Massachusetts equal political rights and privileges will be refused to any citizen or body of citizens "on account of race, color, or previous condition of servitude." E. 77.

The second "political anomaly" was the new Gay Head citizens' rights in 1,900 acres of common land without the legal power to divide or convey any of it. The same committee recommended that the General Court authorize partition because of the Indians' right to make "disposition of their landed property:"

> This ... is a question of "property," which every "citizen" should have the privilege of determining

> for himself, and the people of Gay Head have certainly the right to claim, as among the first proofs of their recognition to full citizenship, the disposition of their landed property, in accordance with their own wishes.

E. 71. It is noteworthy that the committee quoted section 1 of the Fourteenth Amendment,[10] which the General Court had recently ratified.

The General Court's prompt decision to authorize partition was thus born of the impulse to give the Gay Head Indians the property rights to which they were entitled under the Fourteenth Amendment. These "[l]egislators believed that the only proper course was to wipe out 'all distinctions of race and caste, and [place] all [the state's] people on the broad platform of equality under the law." Ann Marie Plane and Gregory Button, *The Massachusetts Enfranchisement Act: Ethnic Contest in Historical Context, 1949-1869*, 40 ETHNOHISTORY 587, 588 (1993), quoting Joint Special Committee on Indian Affairs, "Report on the Indians of

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[10] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., am. 14, § 1.

the Commonwealth," 1869 House Document 483 (Mass. State Library, Special Collections, State House, Boston): 13.

One of the most disabling aspects of their status as wards of the state--noted in reports to the General Court in 1862 and 1871--was that they "could make no sale of their lands to any except other members of their tribe." E. 34, 127. Only a partition which included legal access rights would allow such sales and thus remove this legal disability.

Behind the legal presumption in issue here--the General Court's intent to give the Gay Head Indians land with lawful access--is this history of white settlers' descendants, inspired by the post-Civil War amendments, seeking to expand the Union's freedoms to its Indian residents. This history compels the conclusion that the General Court intended the property rights conveyed to be rights in *salable* land. Salable land requires access rights that run with the land.

D. Nothing in This Record Rebuts The Parties' Presumed Intent to Convey Access Rights By Showing Their Contrary Intent, i.e., Their Desire to "Convey Land Without Direct Means of Access."

In order to overcome the presumption that the parties intended to convey legal access rights, Massachusetts law and the RESTATEMENT are in harmony.

In Massachusetts, the evidence must show that the

parties affirmatively "[desired to] convey land without direct means of access." Orpin v. Morrison, 230 Mass. 529, 533 (1918). In Orpin, the clear, direct evidence held to rebut the presumption was "a conversation between [grantor and grantee] to the effect that no right of way over other land of the former would attach to the lot conveyed to the latter." Id. at 531.[11]

Similarly, under the RESTATEMENT the evidence must be "clear that the parties intend to deprive the property of rights necessary to its enjoyment." RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.15 comment (e) at 208 (2000). The RESTATEMENT's first illustration is a deed to landlocked property which flatly states, "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 here, the authors assert, "because

[11]Notably, Orpin--based on direct evidence of the parties' subjective intent *not* to include access--was criticized as allowing parole evidence to trump the "elementary principle that the grant of a thing carries with it whatever is reasonably necessary to its enjoyment." Comment, *Evidence of Intention as Rebutting Ways of Necessity,* 29 YALE L.J. 665 (1920). See, e.g., Flax v. Smith, 20 Mass. App. Ct. 149, 153 (1985) ("[w]hat is required...is not an actual subjective intent on the part of the grantor but a presumed objective intent of the grantor and grantee based on the circumstances of the conveyance").

the intent not to create a servitude is clearly stated." Id. at 209.

The record here contains no such evidence. Mindful that review is *de novo*, we show why the Land Court was wrong to rule that "Defendants have produced sufficient evidence to rebut the presumption." Add. 8.

1. The General Court expressly believed that the partitioned lots were a resource which could be developed with fertilizer and labor.

The Land Court ruled:

> [T]he perceived condition of the land negates any presumed intent to create an easement. . . 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. . . . It is clear from the record before this court that the land was believed to be unfertile and unusable." Add. 10.

In short, according to the Land Court, the legislators saw no need to give the Indian grantees any access at all to their "unfertile and unusable" lots.

This selective reading of the record omits the General Court's explicit statement that the common land could easily be brought into productive use. Here is the full passage from its committee's 1870 report:

> This land is uneven, rough, and not remarkably fertile. A good deal of it, however, is, or might be made, reasonably productive with a slight expenditure, and, doubtless, would be if the owners had the means; but, deficient as they are

> in "worldly gear," it is, perhaps, better that these lands should continue to lie in common for the benefit of the whole community as pasturage and berry lands,[12] than to be divided up into small lots to lie untilled and comparatively unused. This, however, is a question of "property," which every "citizen" should have the privilege of determining for himself . . . .

E. 71. In short, the committee believed that if the Indians were slightly less poor they could make the common land "reasonably productive." It also recognized the land's current value as pasturage--echoing Earle's observation that the common land "afford[s] fine pasturage for cattle" and "constitutes almost the sole resource of the tribe for revenue to support their poor." E. 28-29. By definition, land which can be made "reasonably productive" and which already provides "fine pasturage" is not "unusable."

Indeed, the legislators' characterization of the land as "*comparatively* unused" because "untilled"--a notably non-Indian perspective--is a far cry from "unusable" land. Poor people make what use they can of their resources; as Earle noted, these were a "frugal" people who used even the bushes of the common land as "summer fuel for common culinary purposes." E. 28-29.

A year after the committee issued its 1870 report,

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[12]The people decided to keep the cranberry lands in common, i.e., in the Town. E. 188.

Commissioner Pease echoed their view that the common land had potential. He began by quoting Earle's observation that "a portion of the land is of the very best quality, and capable, under good culture, of producing most abundant harvests."[13] He then described how the people had improved the severalty lots earlier claimed from the common land, and how these methods could benefit the still-rough common land to be partitioned. Pease spoke with hope of their progress:

> Increasing attention is paid to agriculture, but there is room for great improvement. As an abundance of that most excellent dressing, rockweed, can be procured, additional labor, energy and skill would bring a sure reward. A very large portion of the lands now enclosed,[14] was, a generation since, wild, rough land, unfenced, and seldom tilled, and of course unproductive and of little value. As it has been cleared up, fenced and tilled, its value has largely increased. . . . While yet, as a community, poor and without and men of wealth, their circumstances are improving. E. 110.

Nowhere in this record does a single legislator or person acting for the General Court suggest the view that the partitioned lots were "unusable." On the

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[13]Pease quoted a different visitor's description of the soil as "good, wanting nothing but industry and proper management to render it capable of producing every kind of vegetable in perfection." E. 114.

[14]As noted, "the lands now enclosed" refer to the severalty lots which individual Indians severed from the common land with a stone wall. E. 29, 195.

contrary, they expressly believed the lots to be a usable resource. All that was needed was rockweed, labor, energy and skill. And, of course, access.

2. The General Court knew that Indian access rights, even if still extant at the time of partition, could not make these lots transferable.

The Land Court also mistakenly found for the defendants for this reason:

> The prevailing custom among the tribe at the time of 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.

Contrary to the Land Court's finding, the record contains no clear evidence that the parties "likely assumed easements for access were unnecessary given the tribal culture at the time." The General Court knew more about the law and tribal rights than the Land Court attributed to them. They knew that tribal rights were, if not extinguished, not transferable.

a) The General Court likely doubted that any traditional rights remained in the Gay Head common land by the time of partition.

It is unlikely that the General Court believed that any vestige of Indian title remained at the time of partition. While it was aware that the Indians shared their common land, E. 38, it is also presumed to

have been "aware of the statutory and common law that governed" this same matter. Globe Newspaper Co., Petitioner, 461 Mass. 113, 117 (2011).

In 1862, the General Court, bestowing citizenship on many Indians but not on the Gay Head tribe, provided that any Indian, upon becoming a citizen of the state, "shall not thenceforward return to the legal condition of being an Indian." St. 1862, c. 184, § 2. In 1869, the General Court made the Gay Head Indians citizens. St. 1869, c. 463. With this act, it likely believed that Indian law was extinguished on Gay Head.

Other legislative acts had the same likely effect. In 1870, when incorporating Gay Head as a town, the General Court transferred all the common lands "to the town of Gay Head," which it empowered to own and enjoy the land as the "property and rights of other towns are owned and enjoyed." St. 1870, c. 213, § 2. Legally, upon this transfer to the Town, which then held the common lands "for the public use of the inhabitants," G.S. 1860, ch. 18, § 9, those inhabitants' "aboriginal rights [were] extinguished." Clark v. Williams, 36 Mass. 499, 500-502 (1837). The General Court

presumably was aware of this holding.[15]

At the latest, the General Court likely viewed any lingering aboriginal rights as extinguished upon partition, when the Indians' new fee title merged with their "right of occupancy" into fee simple absolute. James v. Watt, 716 F.2d 71, 74-75 (1st Cir. 1983); Cf. Farnum v. Peterson, 111 Mass. 148, 151 (1872) (merger of title and possessory interest).

b) The General Court, intending to convey *salable* property, knew that property with only tribal access was not salable.

Assuming *arguendo* that the General Court believed that traditional Indian access rights on Gay Head survived partition, those rights provided no "legal right of access"--i.e., no access enforceable in Massachusetts courts. Davis v. Sikes, 254 Mass. 540,

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[15]In 1878, the General Court is also presumed to have believed that the state had the exclusive control over its Indian residents and title to their lands, without concurrent federal control. Danzell v. Webquish, 108 Mass. 133, 134 (1871).

Congress eventually confirmed that aboriginal land rights were extinguished when the General Court transferred the common land to the newly-incorporated Town of Gay Head. In 1987, Congress retroactively approved transfers of Gay Head land "by, from, or on behalf of any Indian ... or tribe ... of Indians,... including any transfer pursuant to the statute of any State, and the incorporation of the Town of Gay Head," and affirmed that aboriginal title was "extinguished as of the date of such transfer." 25 U.S.C. §1771b(a),(b).

545-546 (1926). Without a common law easement, any Indian who conveyed his partitioned lot to a non-Indian with the claim that his aboriginal access rights ran with the land would have conveyed a useless, landlocked lot. The part of the conveyance which purported to convey traditional Indian rights was *void ab initio*. Pells v. Webquish, 129 Mass. 469, 471-472 (1880); James v. Watt, 716 F.2d 71, 74 (1st Cir. 1983).

A conveyance of landlocked property with access only by Indian tradition was facially incompatible with the lofty goals of the General Court, on whose behalf the Commissioners acted. In 1871, Pease reported to the legislators that authorizing the Gay Head Indians to sell land to non-members of the tribe would provide them with one of the most "powerful incentives to elevate a man." E. 127-128. Given this mission, it is unlikely that the General Court "desired to" convey unsalable lots without transferable access rights. Orpin v. Morrison, 230 Mass. 529, 533 (1918).

The Land Court's attribution of that desire to the General Court--in effect, the desire to perpetrate a cruel ruse on new citizens, under the guise of ensuring their constitutional rights--runs contrary to every enlightened intent recorded in the legislative history.

Pulling back from these separate points of law to the big picture, the General Court's likely view of the Gay Head Indians' rights at partition was simple. These legislators likely believed that the Indians' ownership of real property was now governed by the common law alone, just like every other state citizen. See, e.g., Drew v. Carroll, 154 Mass. 181, 184 (1891).[16] Their intent to equalize the Indians' legal status is printed in black and white on the record of their actions. E. 69-71, 134, Add. 31,[17] 35;[18] A. Plane and G. Button, *The Massachusetts Enfranchisement Act: Ethnic Contest in Historical Context, 1949-1869*, 40 ETHNOHISTORY 587, 588 (1993).

The Land Court took one bare fact--the General Court's knowledge of the Indians' pre-partition

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[16]St. 1869, c. 463, Add. 35, gave each member of the Herring Pond tribe a right to partition his share of the common land. Id. at 183-184. Once the statute took effect, "every Indian belonging to the tribe had precisely the same kind of right in the lands of the tribe that an ordinary tenant in common has in the lands held by himself and his co-tenants." Id. at 184.

[17]Upon becoming a citizen of Massachusetts, a person "shall not thenceforward return to the legal condition of an Indian." St. 1862, c. 184, § 2.

[18]All Indians of Massachusetts are declared citizens and "entitled to all the rights, privileges and immunities, and subject to all the duties and liabilities to which citizens of this Commonwealth are entitled or subject." St. 1869, c. 463, § 1.

"prevailing custom" of sharing the common land, Add. 9-10--far beyond its logical reach. As shown, the General Court is presumed to have known much more than this about the law of Indians and real property. At a minimum, they knew that the post-partition survival of Indian access rights was uncertain enough to make an implied common law easement "reasonably necessary." Davis v. Sikes, 254 Mass. 540, 546 (1926).

3. The General Court's reservation of profits in several lots without legal access supports the presumption that it intended the grantees to have legal access to their own lots and to their profits on others' lots.

The Land Court also mistakenly ruled that the parties did not intend access easements because the Commissioners reserved and conveyed rights to peat and fishing rights in some of the lots but reserved and conveyed no mutual access easements in any of them. Add. 5 ¶¶ 15, 16. The court ruled:

> [D]espite the fact that the 1871 and 1878 divisions landlocked certain parcels, no easements, other than those [that] were specifically 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 (sic) unuius est (sic) exclusion 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.") . . . . 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. Add. 8-9.

This reasoning turns the law of implied easements on its head. Unlike Joyce (express easement for access to garage) and Krinsky (express easement for access to grantees' parcel), the peat and fishing rights conveyed here had nothing to do with access. These "profits" or "profits à prendre" conveyed the right to enter another lot owner's land and to remove peat and fish. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 1.2(b) at 12 (2000). Profits are not "similar" to access rights.

Rather, an owner of profits *needs* access rights, and the partition deeds to profits suffer from the same omission as the partition deeds to land: they gave the grantees no access to the property rights conveyed. Without an implied access easement, the profits were useless. For this reason, the RESTATEMENT provides as follows:

> A conveyance of a profit will include a right of access to the subject of the profit. The implied rights necessary to enjoy profits ... are often called secondary easements.

RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.15 comment b at 204 (2000). The General Court's conveyance of otherwise landlocked profits supports, rather than negates, the plaintiffs' easement by necessity claim.

The canon of construction, "expressio unius est exclusio alterius" thus has no sensible application here. Without access, a profit and a lot are equally useless. The fact that the General Court conveyed ostensibly useless profits hardly shows their *desire* to do so, much less their *desire* to convey hundreds of useless lots. Orpin v. Morrison, 230 Mass. 529, 533 (1918). Nor does their failure to provide legal access to the profits make "clear" that they intended to deprive either the profits or the lots "of rights necessary to [their] enjoyment." RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.15 comment (e) at 208 (2000).

4. The General Court's silence about the obvious lack of access in these deeds is a legally neutral fact common to all cases of easement by necessity.

Finally, we must address this Court's observation, relied upon by the Land Court, that the Commissioners were "silent" about the obvious lack of access for the "vast majority of the set-off" lots. Add. 8-9, citing

Kitras I at 299. Respectfully, this observation applies in every single case of easement by necessity. Without a deed noteworthy for its lack of access, these cases would not exist. The absence of language conveying access to land defines the question; it does not suggest the answer. Schmidt v. Quinn, 136 Mass. 575, 576 (1884) (reversing and finding easement by necessity "even though a right of way might have been expressly included in the [conveyance] but was not"); Viall v. Carpenter, 80 Mass. 126, 128 (1859) ("A reservation, in terms, of 'a way of necessity,' would confer no further right than would be conferred by operation of law, without those words").

As noted at p. 6, *infra*, the General Court is presumed to have known the common law of implied easements of necessity, which was settled law in 1878 and remains settled law today. This Court is asked to uphold that law and rule that the plaintiffs' lots have implied access easements.

II. KITRAS LOT 178, LIKE THE PLAINTIFFS' OTHER LOTS, IS ENTITLED TO AN ACCESS EASEMENT BY NECESSITY.

A. The Land Court's Ruling About Lot 178 on Remand and the Applicable Principles of Law.

The Land Court erroneously excluded Kitras Lot 178 from the remand proceedings, Add. 14, as follows:

> [I]t is clear from the 2005 Appeals Court decision in this case that the court properly considered and foreclosed the issue of which lots were held separately and which lots were held in common ownership; Lot 178 is among the former. This determination ... is explicitly a threshhold determination made by the court in order to reach the question of whether the United States is an indispensable party. The Appeals Court found, affirmatively, that Lots 1 through 188 or 189 do not benefit from an easement implied by necessity but that Lots 189 or 190 and above may be so benefitted, and remanded the case to this Court for further proceedings consistent with that opinion. Therefore, the issue of whether Lot 178 was held in separate ownership has been adjudicated, and this Court has no authority to consider it further. Add. 18.

This ruling is reviewed *de novo*. Casavant v. Norwegian Cruise Line Ltd., 460 Mass. 500, 503 (2011).

B. This Court's Determination About Lots 174-189 Was Not Essential to Its Decision in Kitras I.

The narrow question in Kitras I was whether the plaintiffs' easement claims were properly dismissed for failure to join an indispensable party. Here is the holding on this question:

> [G]iven the possibility that at least some easements by necessity benefitting lots formerly part of the common land properly could be routed on nontribal land, and because any easement claims that do affect the Settlement Lands may be resolved by joining the Tribe directly, we do not think that the United States is an indispensable party within the meaning of Rule 19. Id. at 298.

To reach this question, this Court first needed to decide whether "easements by necessity may be implied for some or all of the lots in question." Id. at 291.

That is, the main question was moot unless at least one lot qualified for this easement. On the summary judgment record, this Court determined that lots 189 and upward all qualified. Based solely on this ruling, it decided the main question. Id. at 293-294.

In this crucial sense, its contrary determination about lots 1-189--that, lacking unity of title, these particular lots did not compel the Court to decide the "indispensable party" question--was a finding with no "bearing on the outcome of the [appeal]" and thus no preclusive effect on remand. Jarosz v. Palmer, 436 Mass. 526, 533 (2002). "If issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded." Id., quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment h (1982).

The Land Court thus erred in holding that this Court made "a threshhold determination [about Lot 178} in order to reach the question of whether the United States is an indispensable party." Add. 18. Even after this Court proceeded to decide that question based on "Lots 189 or 190 and above," it included Kitras Lot 178 as one of the "lots at issue" in considering the possible location of the easements. Id. at 294.

The only "threshhold determination" upon which the Kitras I decision depended was the determination that "easements by necessity may be implied for some . . . of the lots in question." Id. at 291. The decision was not "dependent upon" which lots did or did not qualify for the easement. Jarosz, supra.

C. The Record, Including Kitras's New Documents Improperly Stricken Based on Issue Preclusion, Showed That Lot 178 Was Part of the Common Land Partitioned in 1878.

In 1870, as noted at pp. 26-27, *infra*, when the General Court transferred the common land to the Town of Gay Head, there was unity of title in this land.

In 1871, Commissioner Pease reported to the General Court that he had "concluded his labors," E. 109," i.e., he had completed Marston's work in fixing the boundaries of the severalty lots *and* the common land. E. 55. His report included a surveyed map and sectional plans showing 173 severalty lots and the common land, i.e., "The General Fields or Commons." E. 130, 161-183, 779. Pease noted the "work yet to be performed, of dividing the common lands." E. 131.

On the face of this record, all lots created after Pease's 1871 report--lots 174 and above, including Lot 178--were thus carved out of the common land owned by the Town of Gay Head and shown on Pease's map.

Lot 178 thus qualifies for an easement by necessity: until 1878, there was unity of title in the Town; partition destroyed that unity of title; and, as a result of partition, Lot 178 became landlocked.

Assuredly, Lots 174-189 are in a peculiar category of their own. The 1878 Commissioners divided the Gay Head individual lots into three categories: lots 1-173, conveyed in 1871 as severalty lots, E. 151-160; lots 174-189, described as "run out and bounded afterwards, by the Commissioners who made partition of the Indian common lands;" and lots "189[19] and upwards," described as "the lots of common lands drawn or assigned by the Commissioners...." E. 190.

The Commissioners explained that Lots 174-189 were outliers: "lots held or claimed by individuals of which no satisfactory record evidence of ownership existed." E. 188. So far as the evidence shows, the only "record evidence of ownership" under Indian law was an enclosure, typically a stone wall. E. 29, 195.

On remand, Kitras relied on the following evidence as additional factual support that Lot 178 had never been enclosed and was carved out of the common land.

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[19]Lot 189, irrelevant here, is a conundrum; the Peases placed it in two separate categories. E. 190.

In 1863, an Indian named Zaccheus Howwasswee made a will leaving his wife, Elizabeth, "my homestead and the dwelling house and all other buildings standing thereon, together with all other of my lands however situated or bounded, whether owned in severalty *or in common with others*. . . ." E. 781, emphasis added. In 1870, the General Court conveyed the common land to the Town. E. 84. In 1871, Richard Pease conveyed severalty lots 51, 79, 93, 94 and 96 to Zaccheus, lot 79 being his homestead. E. 153, E. 789-791. In 1873, Zacheus died. In 1878, the Commissioners conveyed Lot 178 to his widow, Elizabeth.

In an affidavit, Kitras's surveyor attested that lot 178 was not adjacent to any of the Howwasswee severalty lots; that he found "no stone walls ... which define any of the boundaries of Lot 178;" and that Lot 178 was "located on the General Fields or Commons, as shown on" Pease's 1871 map and sectional plans. E. 793; A. 300-304.[20]

Had the Land Court properly considered this post-remand evidence, it should have found that this lot was

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[20]See, LAND COURT MANUAL OF INSTRUCTIONS FOR THE SURVEY OF LANDS AND PREPARATION OF PLANS, §§ 2.1.3.5.9 and 3.2.4 (importance of stone walls as evidence of property lines).

part of the common land until bounded and set-off to Elizabeth in 1878. At a minimum, Kitras is entitled to a trial on this issue.

CONCLUSION

The Kitras and Harding plaintiffs ask this Court to reverse the Land Court's decision; to order the entry of a judgment declaring that all their lots have access easements by necessity; and to remand the case to locate those easements on the ground. With respect to Lot 178, the Kitras plaintiffs alternatively ask for a trial to determine whether this lot was part of the common lands until bounded and conveyed in 1878.

Respectfully submitted,

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Certificate of Compliance

I certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. App. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. App. P. 16(e) (references to the record); Mass. R. App. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. App. P. 16(h) (length of briefs); Mass. R. App. P. 18 (appendix to the briefs); and Mass. R. App. P. 20 (form of briefs, appendices, and other papers.

____
Wendy Sibbison, Esq.

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(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.");

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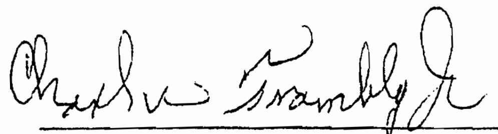
[6] This observation also calls into question how strictly necessary access easements were at the time of division. As noted above, the necessity must have existed at the time of the division. See Viall v. Carpenter, 80 Mass. 126 (1859). If an easement was not necessary *at the time of division* it cannot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

(631) 5607 1089

COMMONWEALTH OF MASSACHUSETTS

(SEAL)

LAND COURT

DEPARTMENT OF THE TRIAL COURT

RECEIVED

APR 29 2009

Nicholas J. Decoulos

DUKES, 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

ORDER ON THE PARTIES' MOTIONS TO STRIKE PROPOSED EXHIBITS

This case comes before the Court on the objections by various parties to proposed exhibits for trial. On January 30, 2009, plaintiffs, Maria A. Kitras, as Trustee of Bear Realty Trust, Maria A. Kitras and James J. Decoulos, as Trustees of Bear II Realty Trust, Maria A. Kitras and James J. Decoulos, as Trustees of Gorda Realty Trust, filed a Motion to Strike certain trial exhibits proposed by defendants, the Town of Aquinnah, Martha's Vineyard Land Bank Commission, Vineyard Conservation Society, Inc., Caroline B. Kennedy, Edwin Schlossberg, David Wice, Betsy Wice, and the Commonwealth of Massachusetts ("Defendants"). On February 2, 2009, defendants filed a Motion to Strike certain trial exhibits proposed by plaintiffs as well as certain trial exhibits proposed by defendants, Gossamer Wing Realty Trust and Barons Land Trust ("Trusts").

The motions were argued on February 4, 2009, and these are the matters presently before the Court. On February 9, 2009, JoAnn Fruchtman and Jack Fruchtman, Jr. Joined in the defendant's motion. The Trusts opposed the defendants' motion on February 10, 2009. On February 23, 2009, the parties submitted a joint statement listing the parties' proposed exhibits and the objections, if any, to each.

I. THE DEFENDANTS' PROPOSED EXHIBITS

a. Proposed Exhibits 69-73

Proposed exhibits 69-73 are documents from a period prior to the 1878 Set-Off Plan and, therefore, not relevant. Accordingly, it is hereby ORDERED that proposed exhibits 69-73 are not admitted.

b. Proposed Exhibit 74

Plaintiffs' only objection to proposed exhibit 74 is that it is duplicative of part of one of their own proposed exhibits. Accordingly, it is hereby ORDERED that proposed exhibit 74 is admitted.

c. Proposed Exhibit 82

Proposed exhibit 82 is a collection of deeds. Plaintiffs object that these deeds may not have much relevance because they lack descriptions of the boundary lines between the common lands and the individual owners adjoining the common lands. However, I do not see how plaintiffs will be prejudiced by the admission of this evidence. Accordingly, it is hereby ORDERED that proposed exhibit 82 is admitted.

d. Proposed Exhibit 85

Proposed Exhibit 85 is an 1850 commissioner set-off of lands in Chappaquiddick. Plaintiffs object to the relevance of this proposed exhibit. However, this evidence could

be relevant to show the practice and intent of the commissioner in the instant case. Accordingly, it is hereby ORDERED that proposed exhibit 85 is admitted.

II. THE PLAINTIFFS' PROPOSED EXHIBITS

a. Proposed Exhibit 1

Plaintiffs have agreed to limit the use of this exhibit to a chalk. Accordingly, it is hereby ORDERED that proposed exhibit 1 is to be identified as a chalk.

b. Proposed Exhibits 23 and 24, and 37-39

Proposed exhibits 23 and 24 concern Lot 178, and proposed exhibits 37-39 concern Lot 79. The Appeals Court has determined that Lots 1-188 or 189 do not hold any easement rights. Accordingly, it is hereby ORDERED that to extent that these proposed exhibits involve Lot 178 or Lot 79, they are not admitted.

c. Proposed Exhibit 42

This proposed exhibit is a publication by the Dukes County Historical Society concerning Old South Road. Plaintiffs propose this exhibit for the purpose of informing the Court of the conditions of the land in this case. This literature is hearsay, and I am not satisfied that it is substantively relevant to the particular facts of this case. Accordingly, it is hereby ORDERED that proposed exhibit 42 is not admitted.

d. Proposed Exhibit 50, 52, and 53

These proposed exhibits are case law, which are not relevant as exhibits in this case, but may be cited by the parties in their briefs. Accordingly, it is hereby ORDERED that proposed exhibits 50, 52, and 53 are not admitted.

e. Proposed Exhibit 60

This proposed exhibit is a plan of Moshup Trail. Defendants object to this proposed exhibit as having no foundation as to the data shown. However, the plan may be limited to use as a chalk. Accordingly, it is hereby ORDERED that proposed exhibit 60 is to be identified as a chalk.

f. Proposed Exhibit 63

This proposed exhibit is a plan of existing wetland resources surrounding Moshup Trial. Defendants object to it on grounds of relevance and hearsay. I see no reason why it should not be admitted. Accordingly, it is hereby ORDERED that proposed exhibit 63 is admitted.

g. Proposed Exhibit 75

Proposed exhibit 75 consists of documents concerning plaintiffs' application for the Self-Help Program concerning Moshup Trial. I see no relevance to this proposed exhibit. Accordingly, it is hereby ORDERED that proposed exhibit 75 is not admitted.

h. Proposed Exhibit 81

Proposed exhibit 81 is a December 1997 letter from the Friends of Moshup Trial. Defendants object to this proposed exhibit on the grounds of relevance and hearsay. I see no relevance to this proposed exhibit. Accordingly, it is hereby ORDERED that proposed exhibit 81 is not admitted.

i. Proposed Exhibits 25-36; 43-49; 51; 54-59; 61; 62; 64-67; and 76-80

The parties have agreed to defer the issue of the admissibility of these proposed exhibits until the second half of this bifurcated case, as they concern the issues of easement by prescription and "ancient way." Accordingly, it is hereby ORDERED that

proposed exhibits 25-36; 43-49; 51; 54-59; 61; 62; 64-67; and 76-80 are not admitted in this half of the bifurcated case.

j. Proposed Exhibit 41

The plaintiffs have agreed that this proposed exhibit will not be admitted. Accordingly, it is hereby ORDERED that proposed exhibit 41 is not admitted.

III. THE TRUSTS PROPOSED EXHIBITS

The Trust's proposed exhibits consist of certain documents concerning lots, which the Appeals Court has previously determined do not hold easement rights. Accordingly, it is hereby ORDERED that the Trust's proposed exhibits are not admitted.

All other proposed exhibits have not been objected to. Accordingly, it is hereby ORDERED that the remaining proposed exhibits are admitted.

So Ordered

By the Court (Trombly, J.).

Attest:

Deborah J. Patterson
Recorder

Dated: April 27, 2009

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER

Add 16

COMMONWEALTH OF MASSACHUSETTS

(SEAL)

LAND COURT

DEPARTMENT OF THE TRIAL COURT

COUNTY OF DUKES, ss

CASE NO. 97 MISC 238738 (CWT)

RECEIVED

JAN 22 2010

Nicholas J. Decoulos

MARIA A. KITRAS, as Trustee of BEAR REALTY TRUST; MARIA A. KITRAS and JAMES J. DECOULOS, as Trustees of BEAR II REALTY TRUST and GORDA REALTY TRUST; and MARK D. HARDING, SHEILA H. BESSE, and CHARLES D. HARDING, JR., as Trustees of the ELEANOR P. HARDING REALTY TRUST,

Plaintiffs

v.

TOWN OF AQUINNAH, COMMONWEALTH OF MASSACHUSETTS, acting through its EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS, GEORGE D. BRUSH, as Trustee of the TOAD ROCK REALTY TRUST; CHARLES E. DERBY; JOANNE FRUCHTMAN; JACK FRUCHTMAN; BENJAMIN L. HALL, as Trustee of GOSSAMER WING REALTY TRUST; BRIAN M. HALL, as Trustee of BARON'S LAND TRUST; CAROLINE KENNEDY, individually, and with EDWIN SCHLOSSBERG, as guardians of their minor children ROSE KENNEDY SCHLOSSBERG, TATIANA CELIA KENNEDY SCHLOSSBERG, and JOHN BOUVIER KENNEDY SCHLOSSBERG; JEFFREY MADISON, as Trustee of TACKNASH REALTY TRUST; THE MARTHA'S VINEYARD LAND BANK; MOSHUP TRAIL II LIMITED PARTNERSHIP; PETER OCHS; PERSONS UNKNOWN OR UNASCERTAINED BEING THE HEIRS OF SAVANNAH COOPER, SUSAN SMITH, AND RUSSELL SMITH; BARBARA VANDERHOOP, as Executrix of the ESTATE OF LEONARD F. VANDERHOOP, JR.; VINEYARD CONSERVATION SOCIETY, INC.; DAVID WICE; BETSY WICE; and PERSONS UNKNOWN OR UNASCERTAINED WHO MAY HAVE AN INTEREST IN ANY LAND HERETOFORE OR HEREINAFTER MENTIONED OR DESCRIBED,

Defendants

ORDER DENYING THE PLAINTIFFS' MOTION FOR RECONSIDERATION OF ORDER DATED APRIL 27, 2009

AND
MOTION TO INCLUDE EXHIBIT 87

This case comes before the Court on motions of the Plaintiffs, Maria A. Kitras, as Trustee of Bear Realty Trust; and Maria A. Kitras and James J. Decoulos, as Trustees of Bear II Realty Trust and Gorda Realty Trust, for reconsideration of a this Court's Order of April 27, 2009, and to admit proposed exhibit 87 into evidence. The action underlying this motion is for declaratory judgment, pursuant to G.L. c. 231A, § 1, to determine the rights of the parties to easements implied by necessity crossing certain parcels of real property, located in the Town of Aquinnah, owned of record by Defendants.

Through this motion, Plaintiffs seek to have the Court admit previously stricken exhibits 24, 30, and 38. In addition, Plaintiffs submit proposed exhibit 87 for admission. Defendants, Martha's Vineyard Land Bank, Town of Aquinnah, Caroline B. Kennedy, Edwin Schlossberg, Commonwealth of Massachusetts, and Vineyard Conservation Society, Inc., opposed the Motion to Include Exhibit 87 on September 2, 2009, and Defendants, David Wice and Betsy Wice, joined in the opposition on September 4, 2009. In support of their motions, Plaintiffs argue that these exhibits contain evidence that Lot 178 was held by the common grantor, not separately and, therefore, is not disqualified from being the beneficiary of an easement by necessity.

However, it is clear from the 2005 Appeals Court decision in this case that the court properly considered and foreclosed the issue of which lots were held separately and which lots were held in common ownership; Lot 178 was among the former. This determination is not dicta, as Plaintiffs suggest, but is explicitly a threshold determination made by the court in order to reach the question of whether the United States is an indispensable party. The Appeals Court found, affirmatively, that Lots 1 through 188 or 189 do not benefit from an easement implied by necessity but that Lots 189 or 190 and above may be so benefited, and remanded the case to this Court for further proceedings consistent with that opinion. Therefore, the issue of whether Lot 178 was held in separate ownership has been adjudicated, and this Court has no authority to consider it further.

Accordingly, it is hereby:

ORDERED that the Plaintiffs' Motion for Reconsideration of Order Dated April 27, 2009 is **DENIED**; and it is further

ORDERED that the Plaintiffs' Motion to Include Exhibit 87 is **DENIED**.

The admissibility of evidence in this case having been settled, this case is ready to be scheduled for briefing. Accordingly, it is further:

ORDERED that Plaintiffs shall file a brief of their case on or before March 8, 2010. Defendants shall file all reply briefs on or before forty-five (45) days after service of Plaintiffs' brief. Plaintiffs shall file a reply brief, if any, on or before fifteen (15) days

after service of Defendants' reply brief. Defendant shall file all surreply briefs, if any, on or before fifteen (15) days after service of Plaintiffs' reply brief.

So Ordered.

By the Court (Trombly, J.).

CWT

Attest:

Deborah J. Patterson
Recorder

Dated: January 21, 2010

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER

ESTATE OF LEONARD F. VANDERHOOP, JR. AND TACKNASH R.T.

(ORIGINAL HOMESTEAD OF HEBRON WAMSLEY LOT HELD IN SEVERALTY - NO SET-OFF #)

77 78 80 79 81 87 88 231 230 176 233 232 706 707

GORDA R.T.

ROAD

GORDA R.T. 243

MILLER 708

ESTATE OF LEONARD F. VANDERHOOP, JR. 709

MV LAND BANK AND BARON LAND TRUST 177

242

KENNEDY 240

BEAR R.T.

FRUCHTMAN 543

710

MV LAND BANK AND GOSSAMER WING R.T.

CLIFFS

BEAR R.T. 178

TOAD

241

VCS 548

FRUCHTMAN 544

239

89 WICE

TOWN 549

BEAR R.T. 711

BEAR II R.T. 713

ROCK

COOPER 547

MOSHUP

HARDING 554

MV LAND BANK 238

237

TOWN 550

EDGE OF PAVEMENT

ELEANOR P. HARDING TRUST 555

TOAD ROCK R.T. 712

561 VCS AND DERBY

VCS 714

TOWN 550

VCS 553

FORMER LORAN RADIO ANTENNA

SUPPORT SHEDS

TOAD ROCK

ROAD

247

CEDAR TREE FOUNDATION 551

SOUTH SHORE BEACH, INC. 552

553

TOWN 556

KENNEDY 560

MV LAND BANK 569

579

KENNEDY 562

VCS 563

RADIO

SMITH 578

TRAIL

TOWN 556

VCS 559

VCS 563

TOWN 570

O'KEEFE 557

BRUTUS RT 557

VCS 559

VCS 564

ZACK'S

VCS 568

TOWER

KENNEDY 577

UTILITY POLE (TYP.)

PUBLIC WAY 60 FT WIDE

VCS 558

VCS 564

567

VCS 571

ROAD

TOWN 576

572

VCS 565

LAST UTILITY POLE ON MOSHUP TRAIL FROM NORTHEAST

BOULDERS PLACED IN DECEMBER, 1997 TO OBSTRUCT RADIO TOWER ROAD ENTRANCE

ATLANTIC OCEAN

KENNEDY

LOCKED GATE PROHIBITING SOUTHERLY ACCESS ON ZACK'S CLIFFS ROAD

REFERENCES

1. 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.
2. AERIAL PHOTOGRAMMETRY PROVIDED BY LOCKWOOD MAPPING ROCHESTER, NY, MARCH, 1979
3. U.S. GEOLOGICAL SURVEY TOPOGRAPHIC QUANDRANGLES SQUIBNOCKET, MA; 1897, 1944, 1951 and 1977
4. TOWN OF AQUINNAH ASSESSOR RECORDS, MARCH, 2008

PLAN OF EXISTING OWNERSHIP
MARIA A. KITRAS, TRUSTEE ET AL. V. TOWN OF AQUINNAH ET AL.
MASSACHUSETTS LAND COURT MISC. CASE NO. 238738

DATE 06/18/2008

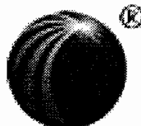
SCALE 1" = 600'

FIGURE NO. 1

CHALK FOR APPEAL--PEAT AND FISHING RIGHTS (FROM EXHIBITS}

Lot 193	"Reserving, however, any and all right or rights to peat on the premises that may justly belong to any person or persons, to them their heirs and assigns."
Lot 218	"Reserving, however, to William Jeffers, his heirs and assigns, all his rights in and to the peat upon said premises."
Lot 221	"Reserving, however, to Thomas Jeffers, his heirs and assigns, all his rights in and to the peat upon said premises."
Lot 225	"Reserving, however, any right or rights to peat on the premises that may justly belong to any person or persons, to them, their heirs and assigns."
Lot 240	"Reserving, however, to William A. Vanderhoop, and any others heretofore rightfully claiming any peat upon said premises to them, their heirs and assigns all their peat rights"
Lot 241	"Reserving however to Horatio N. Pease, as the assign of Emily G. Johnson all of the rights she formerly possessed in and to the peat on said premises, to him, his heirs and assigns."
Lot 244	"Reserving, however, to Deacon Simon Johnson, Patrick Divine and John Divine their heirs and assigns, all their right in and to the peat upon said premises."
Lot 245	"Reserving, however, to Deacon Simon Johnson, Patrick Divine and John Divine and their heirs and assigns, all their right in and to the peat upon said premises."
Lot 246	"Reserving, however, to Deacon Simon Johnson, Patrick Divine and John Divine and their heirs and assigns, all their right in and to the peat upon said premises."
Lot 254	"Reserving, however, to Abram Rodman, his heirs and assigns, all his rights in and to the peat upon said premises."
Lot 277	"Reserving, however, to Jonathan Francis his heirs and assigns, all his rights in and to the peat upon said premises."
Lot 293	"Reserving, however, to Elizabeth Howwasswee her heirs and assigns, all her rights in and to the peat upon said premises."
Lot 294	"Reserving, however, to Deacon Simon Johnson, Patrick Divine and John Divine and their heirs and assigns, all their right, (if any) in and to the peat upon said premises."
Lot 295	"Reserving, however, to Deacon Simon Johnson, Patrick Divine and John Divine and their heirs and assigns, all their rights, (if any) in and to the peat upon said premises."
Lot 296	"Reserving, however, to Isaac D. Rose, and his heirs and assigns, all his rights in and to the peat upon said premises."
Lot 298	"Reserving, however, to Elizabeth Howwasswee, and her heirs and assigns, all her right in and to the peat upon said premises."
Lot 304	"Reserving, however, to Isaac D. Rose, and his heirs and assigns, all his rights in and to the peat upon said premises."
Lot 306	"Reserving, however, to George J. Belain, his heirs and assigns, all his right in and to the peat upon said premises."
Lot 307	"Reserving, however, to Tristram Weeks and Louisa David, and their heirs and assigns, all their rights in and to the peat upon said premises."
Lot 308	"Reserving, however, to Tristram Weeks and Louisa David, and their heirs and assigns, all their rights in and to the peat upon said premises."

Lot 311	"Reserving, however, any and all right to peat on the premises that may justly belong to any person or persons to them their heirs and assigns."
Lot 321	"Reserving, however, to Simon Johnson, and his heirs and assigns, all his right in and to the peat upon said premises."
Lot 329	"Reserving, however, to Tristram Weeks, and his heirs and assigns, all his right in and to the peat upon said premises."
Lot 334	"Reserving, however, to Abram Rodman, his heirs and assigns, all his rights in and to the peat upon said premises."
Lot 340	"Reserving, however, to Abram Rodman, all his rights in and to the peat upon said premises, to him and his heirs and assigns."
Lot 351	"Reserving, however, right or rights to peat on the premises that may justly belong to any person or persons to them their heirs and assigns."
Lot 352	"Reserving, however, any and all right to peat on the premises that may justly belong to any person or persons to them their heirs and assigns."
Lot 353	"Reserving, however, any and all right to peat on the premises that may justly belong to any person or persons to them their heirs and assigns."
Lot 354	"Reserving, however, any and all right to peat on the premises that may justly belong to any person or persons to them their heirs and assigns."
Lot 355	"Reserving, however, any and all right or rights to peat on the premises that may justly belong to any person or persons to them their heirs and assigns."
Lot 356	"Reserving, however, any and all right to peat on the premises that may justly belong to any person or persons to them their heirs and assigns."
Lot 365	"Reserving, however, to Abram Rodman, his heirs and assigns, all his right in and to the peat upon said premises."
Lot 366	"Reserving, however, to Abram Rodman, his heirs and assigns, all his rights in and to the peat upon said premises."
Lot 366½	"Reserving, however, any right or rights to peat on the premises that may justly belong to any person or persons to them their heirs and assigns."
Lot 369	"Reserving, however, to Aaron Cooper, his heirs and assigns, all his rights in and to the peat upon said premises."
Lot 378	"Reserving, however, to the heirs of Lewis Cook, deceased, and his heirs and assigns, all the rights said Lewis Cook had at the time of his death in and to the peat upon said premises."
Lot 382	"Reserving for the use of the proprietors in the Herring Fishery, for the purpose of fishing and clearing the creeks, a strip of land, one rod wide, on each side of the creek, so long as the said reservation may be needed for that purpose."
Lot 384	"Reserving for the use of the proprietors in the Herring Fishery, for the purpose of fishing and clearing the creeks, a strip of land, one rod wide, on each side of the creek, so long as the said reservation may be needed for that purpose."
Lot 393	"Reserving for the use of the proprietors in the Herring Fishery, for the purpose of fishing and clearing the creeks, a strip of land, one rod wide, on each side of the creek, so long as the said reservation may be needed for that purpose."
Lot 419	"Reserving, however, any right or rights to peat on the premises that may justly belong to any person or persons to them their heirs and assigns."



LexisNexis®

MARIA A. KITRAS, trustee, [1] & others [2] vs. TOWN OF AQUINNAH & others. [3]

1 Of Bear Realty Trust, Bear II Realty Trust, and Gorda Realty Trust.
2 James J. Decoulos, as trustee of Bear II Realty Trust and Gorda Realty Trust; Victoria Brown; Gardner Brown, Jr.; Mark D. Harding; and Eleanor P. Harding, as trustee of the Eleanor P. Harding Trust.
3 Vineyard Conservation Society, Inc.; Benjamin L. Hall, Jr., as trustee of Gossamer Wing Realty Trust; David Wice; Betsy Wice; Susan Smith; Russell Smith; John F. Kennedy, Jr.; Caroline Kennedy; George B. Brush, as trustee of Toad Rock Realty Trust; South Shore Beach, Inc.; Leonard F. Vanderhoop, Jr.; Joanne Fruchtman; Jack Fruchtman; Peter Ochs; Hope E. Horgan; Helen S. James; Donald Taylor; Moshup Trail II Limited Partnership; Richard Hoyle; Charles E. Derby; Shirley A. Jardin; heirs of Wallace E. Francis; Jeffrey Madison, as trustee of Tacknash Realty Trust; estate of Edwin D. Vanderhoop; John A. Wiener; Sally D. Wiener; Patrick J. Evans; Scott Harrison; Julie B. Hoyle; Carmella Stephens, as trustee of Deer Meadow Realty Trust; Stella Winifred Hopkins, also known as Winifred S. Hopkins; heirs of Esther Howwasswee; heirs of Savannah F. Cooper; Heidi B. Stutz; Michael W. Stutz; Hamilton Camman; Mary Elizabeth Pratt; heirs of Amos Smalley; June Noble; Richard Sullivan; Sarah Saltonstall; Steven Yaffe; Thomas Seeman; Lawrence B. Evans; Beverly A. Evans; estate of William Vanderhoop; Kevin Craig; Cynthia Craig; Flavia Stutz; Robert Stutz; Selma Greenberg; William Greenberg; Wilma Greenberg; Alexandra Whitcomb; Rolph Lumley; and Aurilla Fabio.

No. 04-P-472

APPEALS COURT OF MASSACHUSETTS

64 Mass. App. Ct. 285; 833 N.E.2d 157; 2005 Mass. App. LEXIS 773

April 11, 2005, Argued
August 18, 2005, Decided

SUBSEQUENT HISTORY: As Corrected October 5, 2005.
Review denied by Kitras v. Town of Aquinnah, 445 Mass. 1109, 840 N.E.2d 56, 2005 Mass. LEXIS 806 (2005)
On remand at, Findings of fact/conclusions of law at, Judgment entered by, in part Kitras v. Town of Aquinnah, 2010 Mass. LCR LEXIS 87 (2010)

PRIOR HISTORY: [***1] Suffolk. Civil action commenced in the Land Court Department on May 20, 1997. Motions to dismiss were heard by Mark V. Green, J.; motions to amend the complaint were heard by Leon J. Lombardi, J., and entry of judgment was ordered by him.
Kitras v. Town of Aquinnah, 2003 Mass. LCR LEXIS 54 (2003)

HEADNOTES

Easement. Real Property, Easement. *Wampanoag Tribal Council. Governmental Immunity.*

COUNSEL: H. Theodore Cohen (Leslie-Ann Morse with him) for the plaintiffs.

Jennifer S.D. Roberts for Vineyard Conservation Society, Inc.

Ronald H. Rappaport for town of Aquinnah.

Benjamin L. Hall, Jr., Pro se.

JUDGES: Present: Grasso, Brown, Trainor, JJ.

OPINION BY: BROWN

OPINION

[*286] [**160] BROWN, J. Before us are the owners of certain landlocked lots lying within the town of Aquinnah (town) on Martha's Vineyard. Desirous of developing their lots but having no road frontage or access to utilities, these owners claim easements by necessity crossing their neighbors' lots. One of those neighbors is the United States, which holds a number of town lots in trust for the Wampanoag Tribal Council of Gay Head, Inc. (Tribe), a Federally recognized Native American Tribe. On cross motions for dismissal or summary judgment, a Land Court judge concluded that any easements by necessity would burden tribal land; that the claims could not fairly be adjudicated in the absence [***2] of that land's trustee, the United States (which had been dismissed from the litigation on sovereign immunity grounds); and that the owners' claims therefore must be dismissed for want of an indispensable party. A different judge denied subsequent attempts to join the Tribe directly and, pursuant to Mass.R.Civ.P. 54(b), 365 Mass. 820 (1974), entered a partial judgment from which these appeals and cross appeals mainly have been taken. We reverse and remand.

I

The area of Martha's Vineyard originally known as Gay Head, now the town of Aquinnah, was "and is still the home of a [*287] remnant of that race, which . . . the white man found here as lords of the soil." Report of the Commissioners, 1856 House Doc. No. 48, at 3. On May 6, 1687, "Joseph Mittark, sachem of Gay Head," an Algonquian and chief's son, purportedly deeded Gay Head to New York Governor Thomas Dongan. *Id.* at 6. Dongan, in turn, on May 10, 1711, transferred his fee to an English religious entity. *Id.* at 4. This entity neglected Gay Head, neither "demanding rents" nor "exercising over it any jurisdiction or control." *Id.* at 5. Although it is not entirely clear how, or under [***3] what authority, sometime after the Revolutionary War the Commonwealth assumed control of Gay Head and its residents became wards of the State.

So matters stood until mid-Nineteenth Century when, apparently as part of the move to grant full citizenship to the Commonwealth's Native American residents, commissioners appointed by the Governor recommended that a boundary marked by a stone fence be established "between the lands of [the Gay Head Indians] and the lands of the white inhabitants of Chilmark." *Id.* at 2. Later, by St. 1862, c. 184, §§ 4 and 5, the Legislature established the district of Gay Head and directed the clerk of the district to make and maintain "a register of the lands of [the district], as at present held, whether in common or severalty, and if in severalty, by whom held." Charles Marston then was appointed as a commissioner to

> "examine, and fully and finally to determine, all boundary lines between the individual owners of land located in the [**161] Indian district of Gay Head . . . and also to determine the boundary line between the common lands of said district and the individual owners adjoining said common lands."

Resolves 1863, c. 42. Marston [***4] died soon thereafter; Richard Pease was appointed in his stead. Resolves 1866, c. 67.

In its 1870 report to the Senate, a legislative committee noted that Gay Head "contains, within its area, about two thousand four hundred acres of land. About four hundred and fifty acres of the land is held in severalty, and is fenced and occupied by the several owners, and the remainder is held by the tribe in common." Report of the Committee, 1869 Senate Doc. No. 14, at 4. The committee observed that this common land was [*288] "uneven, rough, and not remarkably fertile. . . . It is, perhaps, better that these lands should continue to lie in common for the benefit of the whole community as pasturage and berry lands, than to be divided up into small lots to lie untilled and comparatively unused." *Id.* at 5.

Situated on a peninsula and separated from the main island by an isthmus, Gay Head at that time was served by a single main road "much travelled in summer by people from the main land, pleasure-seeking on the Vineyard"; this road nonetheless was described as being "in most deplorable condition of which your Committee had most 'striking' proof," and as blocked by "a substantial stone wall" and "bars" [***5] that "have to be removed whenever a carriage crosses." *Id.* at 9. The committee thus recommended "that provision be made at an early day whereby the road in Gay Head from the light-house to Chilmark shall be put in good travelling order at the expense of the State." *Id.* at 10.

After receiving the committee's 1870 report, the Legislature abolished the district of Gay Head, in its place incorporating the town of Gay Head (later renamed the town of Aquinnah), St. 1870, c. 213, § 1. The act also required the Dukes County "judge of probate . . ., [upon proper application for division of] any or all of the common lands of [the town], [to] appoint two discreet, disinterested persons commissioners to make partition of the same," and charged the judge to "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." St. 1870, c. 213, § 6. The act also directed the county commissioners of Dukes County to lay out and construct a road -- what is [***6] now called State Road -- from Chilmark to the Gay Head lighthouse. St. 1870, c. 213, § 5. See the Appendix to this opinion for a sketch plan depicting the roads and lots at issue.

With the command of St. 1870, c. 213, commissioners Joseph Pease and Richard Pease proceeded to identify and fix the lots. At that time, as noted, the land was already held either in severalty or in common. By reports of 1871 and 1878, the Pease [*289] brothers formalized the boundaries of those lots already held in severalty, numbering them 1 through 188 or 189. With the exception of certain land not relevant here, the common land was partitioned in 1878 into lots numbered 189 or [**162] 190 and above. [4] The vast majority of the lots so set off have no frontage on or other access to what became State Road. None of the reports or original deeds makes mention of easements, either to State Road or to any other location.

4 The lot numbered 189 is an anomaly, described in the record as held prior to these events both in severalty and in common.

The [***7] years since have seen changes, most notably with respect to the perceived value of the town's "uneven, rough, and not remarkably fertile" land. Also relevant here, by at least 1939 an unpaved way now known as Zack's Cliffs Road, leading generally south from State Road (via Old South Road) to and across certain of the lots here at issue, appears to have been in regular use. Nothing in this record establishes that Zack's Cliffs Road was in use significantly before that date. In 1954 a new road, called the Moshup Trail, was laid out and, over the next several years, constructed; this paved road travels generally south and west from State Road through the area generally under consideration here (although none of the persons here claiming easements own lots with road frontage).

Perhaps most important, as part of a comprehensive settlement resolving "Indian claims to certain lands within the town," St. 1985, c. 277, § 1, the Tribe acquired in the mid- to late 1980's several hundred acres of town land (the Settlement Lands); the Settlement Lands are held by a State-chartered corporation, called the Tribal Land Corporation, with the United States acting as trustee. See *Building Inspector & Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp.*, 443 Mass. 1, 3, 8, 818 N.E.2d 1040 (2004). [***8] The Settlement Lands consist of several physically unconnected parcels in and about the town; for our purposes, we focus on the central parcels, consisting of numerous lots generally lying between State Road and the lots here at issue.

Before identifying the lots and interests most directly relevant here, we pause to note that it sometimes is difficult to determine from the pleadings what owners are claiming what easements [*290] for what lots, or even what parties remain interested in the case. In the interest of expediency and because our decision today does not depend upon it, we proceed as if all persons and lots noted below properly are before us and under consideration. On remand it will be for the trial judge and parties to resolve these uncertainties.

That said, as described by the motion judge in his decision, and as presented in the summary judgment materials and the appellate briefs, plaintiffs Maria Kitras (as trustee of Bear Realty Trust, Bear II Realty Trust, and Gorda Realty Trust) and James Decoulos (as trustee of Bear II Realty Trust and Gorda Realty Trust) (collectively, Kitras) claim ownership of five lots, numbered 178, 711, 713, 232 and 243. Plaintiffs Gardner and Victoria [***9] Brown (collectively, Brown) own lot 238. Plaintiffs Eleanor Harding (as trustee of the Eleanor P. Harding Trust) and Mark Harding own two lots, numbered 554 and 555. Defendant Benjamin Hall (as trustee of either Gossamer Wing Realty Trust or Baron Land Realty Trust) (Hall) here claims ownership of lots 707, 710, 302, 177 and 242 (the latter two lots are labeled Howwasswee in the Appendix). The remaining defendants own various other lots in the general vicinity of the plaintiffs' and Hall's lots.

II

Rule 19(a) of the Massachusetts Rules of Civil Procedure generally provides that [**163] the category of "persons to be joined if feasible" includes one whose absence would prevent complete relief from being afforded those already parties. Mass.R.Civ.P. 19(a), 365 Mass. 765 (1974). If it is not feasible to join such a person, "the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." Mass.R.Civ.P. 19(b), 365 Mass. 765 (1974). See G. L. c. 231A, § 8 [***10] .

A person with an interest in land ordinarily should be joined if a judgment could affect that interest. See *Uliasz v. Gillette*, 357 Mass. 96, 105, 256 N.E.2d 290 (1970). Persons in possession of land burdened by an easement have an interest in land such that they ordinarily should be joined in actions that concern that [*291] easement. See *Vance v. Ford*, 187 Or. App. 412, 423-425, 67 P.3d 412 (2003). No party suggests that the United States has waived its sovereign immunity such that it may be joined in this action. See *Alaska v. Babbitt*, 38 F.3d 1068, 1072-1074 (9th Cir. 1994). The question

presented by the judgment before us, then, is whether the United States, as trustee over the Settlement Lands, was an indispensable party in an action seeking a declaration that certain lots in the general vicinity of the Settlement Lands had the benefit of easements by necessity. See and compare *Bay Colony Constr. Co.* v. *Norwell*, 5 Mass. App. Ct. 801, 360 N.E.2d 1278 (1977). Of course, we need not reach that question unless easements by necessity may be implied for some or all of the lots in question.

A. "An easement is by definition a limited, nonpossessory interest in realty. [***11] " *M.P.M. Builders, LLC v. Dwyer*, 442 Mass. 87, 92, 809 N.E.2d 1053 (2004). It may be created either expressly, see, e.g., *id.* at 88, or, in some limited cases, implicitly from circumstance; an easement by necessity is of the latter sort. In general, such an easement is "said to arise (or be implied) . . . when a common grantor carves out what would otherwise be a landlocked parcel." *Bedford v. Cerasuolo*, 62 Mass. App. Ct. 73, 76-77, 818 N.E.2d 561 (2004), quoting from *New England Continental Media, Inc.* v. *Milton*, 32 Mass. App. Ct. 374, 378, 588 N.E.2d 1382 (1992). More specifically, an easement by necessity may be implied if we can fairly conclude that the grantor and grantee, had they considered the matter, would have wanted to create one. To make this deduction, we require that (1) both dominant and servient estates once were owned by the same person or persons, i.e., that there existed a unity of title; (2) a severance of that unity by conveyance; and (3) necessity arising from that severance, all considered "with reference to all the facts within the knowledge of the parties respecting the subject of the grant, to the end that their assumed design may be carried [***12] into effect." *Orpin v. Morrison*, 230 Mass. 529, 533, 120 N.E. 183 (1918). See *Nichols v. Luce*, 41 Mass. 102, 24 Pick. 102, 104 (1834); *Davis v. Sikes*, 254 Mass. 540, 545-546, 151 N.E. 291 (1926); *Joyce v. Devaney*, 322 Mass. 544, 549, 78 N.E.2d 641 (1948); *Nylander v. Potter*, 423 Mass. 158, 162, 667 N.E.2d 244 (1996); Restatement (Third) of Property (Servitudes) § 2.15 (2000).

Of critical importance for the present analysis is the unity of title requirement, which derives from the simple observation [*292] that, whatever the intent, one may not grant what one does not own. See *Boudreau v. Coleman*, 29 Mass. App. Ct. 621, 632, 564 N.E.2d 1 (1990). Thus, easements can be created only "out of other land of the grantor, or reserved to the grantor out of the land granted; never out of the land of a stranger." *Richards v.* [**164] *Attleborough Branch R.R. Co.*, 153 Mass. 120, 122, 26 N.E. 418 (1891). See *Uliasz v. Gillette*, 357 Mass. at 102. Here, with respect to the lots numbered 1 through 188 or 189, the Commonwealth, whom the parties assume to be the grantor, [5] could not grant or reserve an easement because, at [***13] the times at interest here, it did not own the lots: each of those lots already was owned by other persons. There was thus no unity of title and no easements can be implied.

> 5 We do not doubt that the Commonwealth, a governmental entity, can act as a grantor for these purposes, though this is a question of some controversy not previously decided in this Commonwealth. See Bruce & Ely, Easements & Licenses in Land § 4:7, at 4-18 to 4-20 (2001) (collecting authorities). "The rationale for [rejecting governmental ownership of both lots as satisfying the unity-of-title standard] is unclear, but one commentator suggests that it may be based on 'some remnant of the prerogative of the sovereign.'" *Id.* at 4-18 to 4-19 (footnotes omitted), quoting from Simonton, Ways by Necessity, 25 Colum. L. Rev. 571, 579 (1925). The Restatement has, without discussion, taken the position that easements "by necessity arise on conveyances by governmental bodies as well as by other grantors." Restatement (Third) of Property (Servitudes) § 2.15 comment c (2000). There appears no compelling modern reason here to distinguish between governmental and private grantors, and we adopt the Restatement's approach.

[***14] As Hall observes, this "was *not* just a routine subdivision development invoking the application of traditional easement principles" (emphasis original). It will be recalled that the commissioners' process did not operate on virgin, untenanted land. Instead, what eventually became the town was tenanted at the times under discussion by individuals, many of whom claimed ownership of discrete and separated portions of that land. These claims developed out of what the commissioners understood to be the prevailing tribal law or tradition, with the "rule [being] that any native could, at any time, appropriate to his own use such portion of the unimproved common land, as he wished, and, as soon as he enclosed it, with a fence, of however frail structure, it belonged to him and his heirs forever." Report of the Commissioners, 1849 House Doc. No. 46, at 20. As another commissioner noted, "the title to land, so taken up and enclosed, [*293] is never called in question" under "the unwritten Indian traditional law." Report to the Governor and Council Concerning the Indians of the Commonwealth, 1862 House Doc. No. 215, at 34.

The commissioners appointed with the task of "examining and defining" [***15] those who already claimed partitions respected this unwritten Indian traditional law, and a legislative committee described the land so claimed as being in "severalty." Report of the Committee, 1869 Senate Doc. No. 14, at 4. Indeed, far from "partitioning" or "severing" the land so held, the commissioners acted, under charge from the Legislature,

simply to acknowledge "the boundaries of the lands *rightfully held by individual owners*" (emphasis added). St. 1870, c. 213, § 6. Nor can it be said that the Commonwealth had in those already claimed lots a right of present possession or some other title carrying with it the right to grant presently operative easements; instead, at most, the Commonwealth held a "fee title" on those lots, meaning it had only "a contingent future interest which ripened into a fee simple only when the Indians abandoned their possessory interest [Indian title] (or when the sovereign, holding fee title, took that possessory interest)." *James v. Watt*, 716 F.2d 71, 74-75 (1st Cir. 1983), cert. denied, 467 U.S. 1209, 104 S. Ct. 2397, 81 L. Ed. 2d 354 (1984) (internal quotation marks, citation and emphasis omitted).

Thus, considered most favorably from the complainants' [***16] perspective, the titles for [**165] each of the lots numbered 1 through 188 or 189 can best be described as an unusual mixture of the aboriginal or beneficial title and corresponding unlimited right of possession held by an individual, on the one hand, and the Commonwealth's contingent future interest represented by its fee, on the other. But however title is described, each lot was owned by a different individual, and the unity of title required to imply an easement by necessity fails. See *Richards v. Attleborough Branch R.R. Co.*, 153 Mass. at 122; *Uliasz v. Gillette*, 357 Mass. at 102.

Lots 189 or 190 and above, however, are on a very different footing; those lots consisted before division of a single tract of unclaimed and untenanted common land. Though owned in equal measure by numerous persons, each partitioned lot thereby [*294] had, before severance, common owners, and the unity of title requirement is satisfied for those commonly owned lots. We also note that the plaintiffs' and Hall's remaining lots -- those numbered 189 or 190 and above -- were landlocked as a result of that partition. Accordingly, like the motion judge, we assume that easements by necessity [***17] could be implied for those lots.

B. But we part company with the motion judge as to his conclusion that such easements, if implied, must inevitably traverse or otherwise burden the Settlement Lands. [6] To be sure, for most of the affected lots -- with the exception of Hall's lot 302 -- a more or less direct route north through what are now the Settlement Lands would have been at the time of partition the most logical routing choice to access what at some point became State Road. However, we have certain reservations about whether Zack's Cliffs Road could serve as a routing choice for all of the lots, insofar as only three of the lots at issue -- Kitras lots 243 and 178, and Hall lot 242 -- touch upon on Zack's Cliffs Road. The remaining lots -- Kitras lots 232, 711, and 713; Hall lots 302, 707, and 710; and the Brown and Harding lots -- have no direct access to Zack's Cliffs Road. See Appendix. Still, in principle, we grant the general logic of the motion judge's observation.

> 6 The motion judge explicitly ruled that the "record does not indicate the existence of any way in use on the ground at the time of the commissioners' [the Peases'] 1878 report, and the present record is insufficient to establish conclusively the location of a way by necessity."

[***18] But that a thing is probable is not to say it is necessary or inevitable where circumstances revealed in the record suggest different possible results. See *Bedford v. Cerasuolo*, 62 Mass. App. Ct. at 80 (location and precise bounds of easement, when not specified in deed, presented question of fact). On the record before us it requires no great stretch to imagine any number of routes from the various lots to State Road. Many traverse the Settlement Lands; many do not. For example, while we do not presume to specify any particular location, we observe that a public way, the Moshup Trail, opened in the general vicinity of the plaintiffs' and Hall's lots in the early 1960's. Many of the lots at issue are separated from this way, which leads to State Road, by only an intervening lot or two. Locating easements to [*295] this road, therefore, would (i) not affect the Settlement Lands; (ii) minimize the total number of lots burdened; (iii) advantageously exploit the assumed Zack's Cliffs Road routing, which intersects the Moshup Trail running south; (iv) for the most part avoid lots 1 through 188 or 189; and (v) give expression to what we assume was the town's intent in allowing [***19] the Moshup Trail [**166] to be constructed in the first instance (that it be used by local residents to gain access to State Road).

For present purposes we are not troubled that the Moshup Trail did not exist when the common lots were partitioned. The same objection, after all, applies to an easement routed to or over Zack's Cliffs Road, yet no party suggests that this road would be an inappropriate easement location. In any case, we focus here on route and location, not creation (about which we will have additional comments later). At this procedural stage, and given our stated assumptions, we have no difficulty envisioning a multiplicity of intentions implied from the circumstances prevailing at the time of partition, *Orpin v. Morrison*, 230 Mass. at 533, including that the lots were to have access to whatever road was most convenient or might be constructed at some future date. It will be recalled in this regard that State Road in the 1870's was described as being in "deplorable condition" and blocked to free traffic by barriers at the isthmus. Compare *Crotty v. New River & Pocahontas Consol. Coal Co.*, 72 W. Va. 68, 71, 78 S.E. 233 (1913) (upon severance of a common [***20] parcel, the "parties may well be presumed to have contemplated such conditions as the future was likely to bring forth").

In so considering we also remain mindful of the nature of the easement claimed. Whereas a preexisting use might in some cases give rise to an implied easement, see *Bedford v. Cerasuolo*, 62 Mass. App. Ct. at 78, we imply an easement by necessity not from use but from a "severance of rights [once] held in a unity of ownership." Restatement (Third) of Property (Servitudes) § 2.15 comment c (2000). In this sense an easement by necessity, initially having no determined physical location, may be located as circumstances or the parties later dictate. Compare *Bass v. Edwards*, 126 Mass. 445, 449 (1879) (a way by necessity arising, owner of dominant estate retained "the [*296] right to deviate from the usual way and go over other parts of the land, doing no unnecessary damage," when owner of servient estate blocked the usual route); *Crotty v. New River & Pocahontas Consol. Coal Co.*, 72 W. Va. at 71 (easement by necessity could be routed to road not in existence at time of partition). Cf. *M.P.M. Builders, LLC v. Dwyer*, 442 Mass. at 90-91 [***21] (adopting Restatement [Third] of Property [Servitudes] § 4.8[3] [2000]); Restatement (Third) of Property (Servitudes) § 4.8(1) (2000). We see no reason why this flexibility should not, in principle, be applied to establish, in light of the town's changing circumstances, present easement locations. With these differing possibilities thus before us, we are unable to conclude with confidence that any easements implied necessarily burden the Settlement Lands or that the United States inevitably has an interest in whatever judgment may be entered.

C. In any case, should easements by necessity be located on or routed through the Settlement Lands, those claims may be fairly adjudicated by joining the Tribe directly. [7] Because of our remand, the joinder issue is likely to arise again. Accordingly, we discuss this matter here. [8]

> 7 Deciding as we do, we do not reach the question whether the various parties' motions to join were correctly denied.
>
> 8 In doing so we express no opinion as to what effect, if any, the Tribe's settlement agreement, implementing State and Federal legislation, or subsequent conveyances may have had on the continuing status of any claimed easements burdening the Settlement Lands. [**167]

[***22] Title 25 of the United States Code, § 1771e(c)(3)(B) (2000), specifically reserves to the Tribe, not the United States, the right to transfer "any easement for public or private purposes in accordance with the laws of the Commonwealth of Massachusetts or the ordinances of the" town. Any doubt that this provision permits the Tribe to be joined was dispelled by *Building Inspector & Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp.*, 443 Mass. 1, 818 N.E.2d 1040 (2004) (*Shellfish Hatchery Corp.*), decided after the partial judgment before us entered. In *Shellfish Hatchery Corp.*, after reviewing the Tribe's history and the various land disputes, all of which were resolved by a comprehensive settlement agreement implemented at both the State and Federal level by legislation, 443 Mass. at 3-8, the Supreme Judicial Court "concluded that the Tribe [*297] waived its sovereign immunity as to land use on the Cook Lands." *Id.* at 16-17. In so concluding the court found particularly compelling language in the Tribe's settlement agreement specifying that the Tribe agreed to hold its land "in the same manner, and subject to the same laws, as any [***23] other Massachusetts corporation." [9] *Id.* at 13.

> 9 This language, the court held, "is clear and the words 'in the same manner' convey a special, known, and obvious meaning. These words are used by the United States and by the Commonwealth to waive sovereign immunity." *Shellfish Hatchery Corp.*, 443 Mass. at 13.

Although *Shellfish Hatchery Corp.* dealt with the Cook Lands and involved a zoning dispute (rather than the easement rights here at issue) we see little reason to suppose the court's rationale would not control the present proceedings. The central Settlement Lands here at issue are subject to the same settlement agreement and implementing State and Federal legislation as the Cook Lands. Section 3 of the settlement agreement, also cited in *Shellfish Hatchery Corp.*, specifies that the Tribe

> "shall hold the Settlement Lands, and any other land it may acquire [e.g., the Cook Lands], in the same manner, and subject to the same laws, as any other Massachusetts [***24] corporation . . . . Under no circumstances . . . shall the civil . . . jurisdiction of the Commonwealth of Massachusetts, or any of its political subdivisions, over the settlement lands, or any land owned by the [Tribe] in the [town], or the Commonwealth of Massachusetts . . . be impaired or otherwise altered . . . ."

We also note that § 13 of that agreement provides that all "Federal, State and Town laws shall apply to the Settlement Lands" subject only to limited exceptions not relevant here, a provision mirrored in both the State and Federal implementing acts. See St. 1985, c. 277, § 5; 25 U.S.C. § 1771g (2000).

In light of *Shellfish Hatchery Corp.*, and given the explicit right to transfer easements, 25 U.S.C. § 1771e(c)(3)(B) (2000), in accordance with the Commonwealth's laws and subject to the

Commonwealth's jurisdiction, it would be anomalous indeed were we to conclude that the Tribe could not be joined in a suit to resolve easement claims potentially burdening the Settlement Lands. As observed in *Shellfish Hatchery Corp.*, "although [*298] the Tribe may not desire the precise result now occurring, the Tribe's agreement [***25] had a 'real world objective' and 'practical consequence.' . . . By employing the 'in the same manner . . . as' language in paragraph three of the settlement agreement, the parties ensured, in unequivocal wording, that the Tribe would have no special [**168] status in its land holdings different from an ordinary Massachusetts business corporation. That status confers, inter alia, the right to sue and be sued, and thus waives the Tribe's sovereign immunity with respect to its" Settlement Lands. *Shellfish Hatchery Corp.*, 443 Mass. at 15-16 (footnote omitted). The same rationale also eliminates any need to join the United States as trustee. See *id.* at 15 n.14.

In sum, given the possibility that at least some easements by necessity benefitting lots formerly part of the common land properly could be routed on nontribal land, and because any easement claims that do affect the Settlement Lands may be resolved by joining the Tribe directly, we do not think that the United States is an indispensable party within the meaning of rule 19. Compare *Brookline v. County Commrs. of the County of Norfolk*, 367 Mass. 345, 349, 327 N.E.2d 690 (1975) (all towns potentially affected [***26] by judgment need not have been joined because "they [were] not disputants to the immediate controversy"). As we have concluded that the United States is not an indispensable party within the meaning of rule 19, the present claims were not properly dismissed on that basis.

III

We have until now assumed, for lots numbered 189 or 190 and above, the intent to create easements. This assumption seemingly arises naturally from the necessity created by dividing the common land; the assumption may ultimately be found to be factually correct, but this is not inevitable. It is well established in this Commonwealth: necessity alone does not an easement create. *Nichols v. Luce*, 24 Pick. at 104. *Orpin v. Morrison*, 230 Mass. at 533. Neither does there exist a public policy favoring the creation of implied easements when needed to render land either accessible or productive. *Richards v. Attleborough Branch R.R. Co.*, 153 Mass. at 122 ("The law does not give a right of way over the land of other persons to every [*299] owner of land who otherwise would have no means of access to it"). *Orpin v. Morrison*, 230 Mass. at 533-534 (if one purchases [***27] land knowing "he had no access to the back part of it, but over the land of another, it was his own folly; and he should not burden another with a way over his land, for his convenience"), quoting from *Gayetty v. Bethune*, 14 Mass. 49, 56 (1817). As previously noted, our charge, then, is not to look simply at the necessity, but to consider all "the circumstances under which [the severance] was executed and all the material conditions known to the parties at the time." *Orpin v. Morrison*, 230 Mass. at 533. In doing so, in the unique circumstances of this case, the fact that certain lots were landlocked as a result of partition does not persuade us as being the definitive measure of intent.

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 the common lands to public roads (at least those arguably existing at the time) without traversing those lands already held in severalty, [***28] that is, lots 1 through 188 or 189. With these 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.

[**169] 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, 25 N.E.2d 175 (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. The 1869 Legislative committee, at least, expected that these lots would "lie untilled and comparatively unused" following division. Report of the Committee, 1869 Senate Doc. No. 14, at 5.

[*300] We consider relevant the historical [***29] sources of information on tribal use and common custom applicable to the time. Though by itself hardly conclusive, and assuming the material's admissibility, we see no reason why the common practice, understanding and expectations of those persons receiving title could not shed light on the parties' probable, objectively considered intent. See *Flax v. Smith*, 20 Mass. App. Ct. 149, 153, 479 N.E.2d 183 ("what is required . . . is not an actual subjective intent on the part of the grantor but a presumed objective intent of the grantor and grantee based upon the circumstances of the conveyance").

We do not mean to suggest by our discussion that an easement by necessity for any given lot carved out of the

common land either does or does not exist, but rather that the question requires thoughtful consideration and resolution by a fact finder. This question thus is best left for the trial judge, after the parties have had an opportunity to make whatever showing they wish or are able, [10] remaining mindful that it is the proponents' burden to prove the existence of an implied easement. *Cheever v. Graves*, 32 Mass. App. Ct. 601, 607, 609, 592 N.E.2d 758 (1992).

10 The trial judge may consider whether to relieve certain of the plaintiffs of their respective stipulations to the effect that they would offer no evidence (the Hardings) or certain described testimony (Kitras) at the trial of this action. We are aware of no similar stipulation by any defendant.

[***30] Should the requisite intent be found for some or all of the partitioned common lots, this will not end the inquiry: numerous questions remain, including the merger and extinguishment matters noted by the motion judge. In addition, we note that a "right of way by necessity can only be presumed when the necessity existed at the time of the grant; and it continues only so long as the necessity continues." *Schmidt v. Quinn*, 136 Mass. 575, 576-577 (1884). Relatively recently several lots appear to have acquired -- or at least the lot owners have claimed -- the benefit of express or prescriptive easements. Such easements, to the extent they moderated the original necessity, may thereby have extinguished any easements implied from that necessity. Compare *Viall v. Carpenter*, 80 Mass. 126, 14 Gray 126, 128 (1859); *Hart v. Deering*, 222 Mass. 407, 411, 111 N.E. 37 (1916). The recent eminent domain takings may also have extinguished any easements located on the lots so taken. See *Darman v. Dunderdale*, 362 Mass. 633, 641, [*301] 289 N.E.2d 847 (1972); *New England Continental Media, Inc.* v. *Milton*, 32 Mass. App. Ct. at 378. We also leave the [***31] question of scope of any easements to trial.

[**170] IV

The judgment is reversed, the order of December 22, 2003, is vacated, and the case is remanded to the Land Court for further proceedings consistent with this opinion.

So ordered.

[*302] [EDITOR'S NOTE: SEE APPENDIX IN ORIGINAL]

G.S. 1860

CHAPTER 18.

OF THE POWERS OF TOWNS, AND THE ELECTION, QUALIFICATION, AND DUTIES, OF TOWN OFFICERS.

may hold property, make contracts, &c. R. S. 15, § 11. 3 Mass. 360. 12 Mass. 417. 2 Pick. 351, 352.

SECT. 9. They may hold real estate for the public use of the inhabitants, and may convey the same, either by a vote of the inhabitants or by a deed of their committee or agent; may hold personal estate for the public use of the inhabitants, and alienate and dispose of the same by vote or otherwise; may hold real and personal estate in trust for the support of schools and for the promotion of education within the limits of the town; may make contracts necessary and convenient for the exercise of their corporate powers; and may make orders for the disposal or use of their corporate property as they may judge necessary or expedient for the interest of the inhabitants.

St. 1862.—CHAPTER 184.

AN ACT CONCERNING THE INDIANS OF THE COMMONWEALTH. *Chap.* 18

Be it enacted, &c., as follows:

Civil rights declared. Persons excepted.

SECTION 1. All Indians and descendants of Indians are hereby placed on the same legal footing as the other inhabitants of the Commonwealth, except such as are or have been supported in whole or in part by the state, and except also those residing on the Indian Plantations of the Chappequiddick, Christiantown, Gay Head, Marshpee, Herring Pond, Fall River and Dudley tribes, or those whose homes are on some one of said Plantations and who are only temporarily absent therefrom.

Excepted persons may assume rights.

SECTION 2. Any Indian or person of color belonging to any of the Indian tribes specially enumerated in the first section of this act, and to whom the rights of citizenship are not thereby extended, and who desires to possess such rights, may, if residing within the limits of any city or town of this Commonwealth, certify his desire to the clerk of said city or town, who shall make record of the same; and, upon paying a poll-tax, he shall become to all intents and purposes a citizen of the state and shall not thenceforward return to the legal condition of an Indian. Settlement shall be acquired by those who thus become citizens, in the same manner as by other persons; and any such citizen becoming a pauper without having acquired a settlement shall be deemed a state pauper.

...ot to affect ...s, &c., of ...ing tribes, ...t as after...ded.

SECTION 3. The provisions of this act shall not be deemed or taken to change the existing laws affecting the rights of property or person, or the administration of the affairs, of the Indians or descendants of Indians continuing to be members of and to constitute the Chappequiddick, Christiantown, Marshpee, Herring Pond, Fall River and Dudley tribes of Indians; except as is hereinafter provided as to the Gay Head tribe, and as to the registration of the persons or lands of those and of the other Indians.

...ct of Gay ... estab...l.

SECTION 4. The Plantation of Gay Head, together with the Indians and people of color constituting the Gay Head tribe of Indians, are hereby made a body politic and corporate, as a district, by the name of the District of Gay Head, to possess the same powers and privileges and be subject to all the duties and liabilities, which are now provided by law for the District of Marshpee: *provided, however*, that no person shall be authorized to vote in municipal affairs, except natives of the Gay Head tribe, or of other Indian tribes of this state, married or having been married to a Gay Head woman, or such other person resident on the Plantation or only temporarily absent therefrom, and married or having been married to a Gay Head woman, as shall have the right conferred on him by two-thirds of the voters of the district. And the acting clerk of the Plantation of Gay Head shall by proper notice cause the male proprietors thereof to meet at some convenient time and place by him designated to organize the said district.

...rs, duties, ...so.

Add 31

St. 1862 c. 184 cont'd

ry of members of tribes.

SECTION 5. The clerks of the Districts of Marshpee and Gay Head, and the guardians of other Indian tribes, shall make or cause to be made a register of the existing members of said tribes, and shall hereafter keep or cause to be kept a register of all the members thereof, and of all the marriages, births and deaths therein; and they shall also make or cause to be made a register of the lands of each Plantation, as at present held, whether in common or severalty, and if in severalty, by whom held; and shall hereafter keep or cause to be kept a register of all changes in the holding of the land of the Plantation.

SECTION 6. This act shall take effect upon its passage.

Approved April 30, 1862.

Resolves, 1863, c. 42

Chap. 42. RESOLVE RELATING TO THE ESTABLISHMENT OF BOUNDARY LINES OF INDIAN LANDS AT GAY HEAD.

Treasurer of Marshpee a commissioner to establish.

Resolved, That the treasurer of the district of Marshpee be, and he is hereby appointed and commissioned 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; and he may use such means as may be necessary to collect all desired information in relation to the matter, and cause a record to be made of the same, and good and sufficient bounds to be established between the said owners, and recorded in a book for that purpose.

Powers and duties.

Shall publish resolve and notice of hearing.

And said commissioner shall cause this resolve to be published in the "Vineyard Gazette," on two different days, and at least fourteen days prior to a day, duly specified and appointed, upon which all parties interested may have fair and impartial hearing; and with this resolve the said commissioner shall publish a notice of such hearing, designating the time and place appointed therefor. And said boundaries, made and established and recorded by said commissioner, shall ever after be and remain the true and lawful boundary lines between said parties forever.

Award of commissioner to be final.

Shall report to governor and council.

And said commissioner shall make a report of his doings to the governor and council, and receive such compensation for his services as they shall deem reasonable; and the governor is authorized to draw his warrant accordingly; and a sum not exceeding one hundred dollars is hereby appropriated for the same. *Approved March* 30, 1863.

Compensation.

Add 33

Resolves, 1866, c. 67

Chap. 67. RESOLVES IN RELATION TO THE ESTABLISHMENT OF BOUNDARY LINES OF INDIAN LANDS AT GAY HEAD.

Report of commissioner on certain titles confirmed.

Resolved, That the report of Honorable Charles Marston, appointed and commissioned to examine and finally to determine all the boundary lines of certain lands in the Indian district at Gay Head, under chapter forty-two of the resolves of the year eighteen hundred and sixty-three, communicated by message of the governor, dated March twenty-third in the year eighteen hundred and sixty-six, as to certain titles in said report described, is hereby confirmed, and the secretary of the Commonwealth is hereby directed to cause the book of titles prepared by said commissioner to be deposited in the registry of deeds for the county of Dukes county, and to be also recorded in said registry; and the said book and the record of the same shall be held to be conclusive evidence of the title of the persons therein named to the premises therein described, and copies of said record, properly certified, shall be admitted as evidence of such title in any court.

Secretary to cause book of titles deposited and recorded in registry of Dukes County as conclusive evidence.

Resolved, That the governor, with the advice and consent of the council, is hereby authorized and empowered to appoint and commission some suitable person to complete the examination and determination of questions of title under said resolve, not passed upon by said commissioner, and such commissioner so appointed shall have all the powers in said resolve granted to the commissioner in said resolve, and the decision and finding of said commissioner so appointed, and his report thereof, when made to the governor and council, shall have all the force and effect of the decision, finding and report of the commissioner heretofore appointed and commissioned under said resolve; and the report of said commissioner, so made to the governor and council, shall be by the secretary of the Commonwealth deposited in the registry of deeds for the county of Dukes county, and be also recorded in said registry; and copies of said record, properly certified, shall be admitted as evidence of such titles in any court.

Governor may appoint commissioner to complete work under resolve of 1863.

Report to be deposited and recorded as above.

Approved April 30, 1866.

Add 34

St. 1869, c.463

Chap. 463 AN ACT TO ENFRANCHISE THE INDIANS OF THE COMMONWEALTH.

Be it enacted, &c., as follows:

Indians, &c., made citizens.

SECTION 1. All Indians and people of color, heretofore known and called Indians, within this Commonwealth, are hereby made and declared to be citizens of the Commonwealth, and entitled to all the rights, privileges and immunities, and subject to all the duties and liabilities to which citizens of this Commonwealth are entitled or subject.

Indian lands.

SECTION 2. All lands heretofore known as Indian lands, and rightfully held by any Indian in severalty, and all such lands which have been or may be set off to any Indian, shall be and become the property of such person and his heirs in fee simple: *provided*, that such lands shall not be held liable to be taken upon attachment or execution for any debt or liability which existed before the passage of this act; and all Indians shall hereafter have the same rights as other citizens to take, hold, convey and transmit real estate.

Proviso.

Judge of probate to appoint commissioners to divide lands.

SECTION 3. The judge of probate of the county in which any lands held in common belonging to any tribe of Indians may lie, except in the case of the Indians of Marshpee and Gay Head, upon the application of any member of said tribe, after notice to all parties interested and a hearing of the same, if in his opinion it is for the interest of said parties that any or all of said lands 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; but if he shall adjudge that it is for the interest of said parties that the same, or a part of the same, be sold, he shall direct the said commissioners, after they shall have given such bonds as the court may require, to proceed to sell any or all of said lands, and to divide the proceeds of the same among the parties rightfully entitled thereto in proportion to their several interests therein, under the direction of the said court; and the judge of probate of the county in which any lands heretofore and now known as Indian lands, and claimed in severalty by any Indians, may lie, shall direct the said commissioners to examine and define the boundaries of the lands rightfully held by individual owners, and shall properly describe and set forth the same in writing, and such description being approved by the court, shall be final in the premises; and the same, together with all deeds of partition, division or sale made by such commissioners shall be recorded in the registry of deeds in the county, and the expenses of said commissioners, including the cost of recording said deeds, the same being approved by the judge of probate, shall be paid out of the treasury of the Commonwealth, the same being also approved by the governor and council.

Commissioners to collect all funds, &c., and divide same.

Said commissioners are authorized to sue for, collect and receive all funds belonging to, or held in trust for, any tribe of Indians for which said commissioners are appointed; and all such funds shall be divided by said commissioners among the parties rightfully entitled thereto under the direction of the probate court of the county in which such tribe resides; and any property held in trust by any person for any tribe of Indians shall be sold by such person under the direction of the judge of probate, and the proceeds of such sale shall be paid over to the commissioners to be divided as aforesaid. The judge of probate of Plymouth county shall have jurisdiction over all matters relating to the Herring Pond Indians under this section.

Right of appeal.

Any person aggrieved by any order, decree or denial of the judge of probate under this act, shall have the same right of appeal, under the same rules and regulations as provided for in chapter one hundred and seventeen of the General Statutes: *provided*, that the attested copies and notices required to be given by said chapter shall be served upon such parties as the judge of probate shall direct.

Proviso.

Provision for the support of poor Indians in state almshouses.

SECTION 4. Upon the application of the overseers of the poor of any town, to the board of state charities, said board shall make provision in the state almshouses or elsewhere for the support of any persons heretofore known as Indians who may be unable to support themselves, and who have not acquired a settlement in any town; and upon the application of any Indian who has heretofore received aid from the Commonwealth, the said board shall furnish to such person in the state almshouses or elsewhere, such aid as they may deem expedient.

SECTION 5. The general agent of the board of state charities shall take charge of the house, and all property connected therewith, in the town of Webster, belonging to the Commonwealth, and may lease the same to persons heretofore known as members of the Dudley tribe of Indians, upon terms substantially like those upon which they have heretofore occupied it; or he shall, under the direction of the board of state charities, sell the same at public auction, and the proceeds of such leases or sale shall be paid into the treasury of the Commonwealth.

Approved June 23, 1869.

Add 35

Chap. 213 AN ACT TO INCORPORATE THE TOWN OF GAY HEAD.

Be it enacted, &c., as follows:

Town of Gay Head incorporated. District abolished.

SECTION 1. The district of Gay Head is hereby abolished, and the territory comprised therein is hereby incorporated into a town by the name of Gay Head. And said town of Gay Head is hereby invested with all the powers, privileges, rights and immunities, and subject to all the duties and requisitions to which other towns are entitled and subject by the constitution and laws of this Commonwealth.

Common lands, fishing rights, &c., transferred to town.

SECTION 2. All common lands, common funds, and all fishing and other rights held by the district of Gay Head are hereby transferred to the town of Gay Head, and shall be owned and enjoyed as like property and rights of other towns are owned and enjoyed.

Warrant for first meeting for election of town officers.

SECTION 3. Any justice of the peace of the county of Dukes-county, may issue his warrant directed to any principal inhabitant of the town of Gay Head, requiring him to notify and warn the inhabitants thereof qualified to vote in district affairs, to meet at the time and place therein appointed, for the purpose of choosing all such town officers as towns are by law authorized and required to choose at their annual meetings, and said warrant shall be served by publishing a copy of the same in some newspaper printed in the county of Dukes-county and by posting up copies thereof attested by the person to whom the same is directed, in three public places in said town, seven days at least before such time of meeting. Such justice, or in his absence such principal inhabitant, shall preside until the choice of a moderator in said meeting. At such meeting all inhabitants of said town qualified to vote in district affairs may vote, and no check-list shall be required for any purpose.

To form part of same district as Chilmark.

SECTION 4. The said town shall be and form a part of the same representative, senatorial, councillor and congressional district as the town of Chilmark until legally changed.

County commissioners to construct a road.

SECTION 5. The county commissioners of Dukes-county, shall as soon as may be after the passage of this act, proceed to lay out and construct a road from the line of Chilmark and Gay Head to the light-house on Gay Head, and may appropriate such sum from the funds of the county as may be necessary to defray the expense of the same; and the sum actually expended for that purpose shall be reimbursed from the treasury of the Commonwealth: *provided*, the same shall not exceed the sum of five thousand dollars.

Expense not exceeding $5,000, to be reimbursed by the State.

Common lands may be divided by commissioners appointed by the judge of probate.

SECTION 6. The judge of probate of the county of Dukes-county, 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; but if he shall adjudge that it is for the interest of said parties that the same, or a part of the same, be sold, he shall direct the said commissioners, after they shall have given such bonds as the court may require, to proceed to sell any or all of said lands, and to pay the proceeds thereof to the treasurer of said town; 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; and the same, together with all deeds of partition, division or sale made by such commissioners shall be recorded in the registry of deeds in the county, and the expenses of said commissioners, including the cost of recording said deeds, the same being approved by the judge of probate, shall be paid out of the treasury of the Commonwealth, the same being also approved by the governor and council; and the governor is hereby authorized to draw his warrant accordingly. Any person aggrieved by any order, decree or denial of the judge of probate under this act, shall have the same right of appeal, under the same rules and regulations as provided for in chapter one hundred and seventeen of the General Statutes: *provided*, that the attested copies and notices required to be given by said chapter shall be served upon such parties as the judge of probate shall direct.

Commissioners to define boundaries of lands held by individual owners.

Right of appeal from order, &c., of judge of probate.

Support of schools.

SECTION 7. All sums of money payable to the selectmen or treasurer of the district of Gay Head, under chapter thirty-six of the General Statutes, for the support of schools, shall hereafter be paid to the treasurer of the town of Gay Head, to be expended in accordance with section four of said chapter. This section shall continue in force for five years.

SECTION 8. This act shall take effect upon its passage.

Approved April 30, 1870.

St. 1870, c. 213

Add 36

TITLE 25. INDIANS
CHAPTER 19. INDIAN LAND CLAIMS SETTLEMENTS
MASSACHUSETTS INDIAN LAND CLAIMS SETTLEMENT

25 USCS § 1771b

§ 1771b. Approval of prior transfers and extinguishment of aboriginal title and claims of Gay Head Indians

(a) Approval of prior transfers. (1) Any transfer before the date of the enactment of this Act [enacted Aug. 18, 1987] of land or natural resources now located anywhere within the United States from, by, or on behalf of the Wampanoag Tribal Council of Gay Head, Inc., or (2) any transfer before the date of the enactment of this Act by, from, or on behalf of any Indian, Indian nation, or tribe or band of Indians, of any land or natural resources located anywhere within the town of Gay Head, Massachusetts, including any transfer pursuant to any statute of the State, and the incorporation of the town of Gay Head, shall be deemed to have been made in accordance with the Constitution and all laws of the United States that are specifically applicable to transfers of land or natural resources from, by, or on behalf of any Indian, Indian nation, or tribe or band of Indians (including the Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33, sec. 4, 1 Stat. 137) [unclassified], and all amendments thereto and all subsequent versions thereof). Any such transfer and any transfer in implementation of this Act [25 USCS §§ 1771 et seq.], shall be deemed to have been made with the consent and approval of Congress as of the date of such transfer.

(b) Extinguishment of aboriginal 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) is considered extinguished as of the date of such transfer.

(c) Extinguishment of claims arising from prior transfers or extinguishment of aboriginal title. 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), or

(2) any aboriginal title to land or natural resources the transfer of which is consented to and approved in subsection

(b), is extinguished as of the date of any such transfer.

(d) Personal claims not affected. No provision of this section shall be construed to offset or eliminate the personal claim of any individual Indian which is pursued under any law of general applicability that protects non-Indians as well as Indians.

HISTORY:

(Aug. 18, 1987, P.L. 100-95, § 4, 101 Stat. 705.)

COMMONWEALTH OF MASSACHUSETTS

Dukes, ss. LAND COURT

Everel A. Black
John L. Black
Francis F. Cournoyer
Gertrude R. Cournoyer,
Plaintiffs

Miscellaneous
Case No. 69813

vs.

Cape Cod Company
Henry Hornblower, II,
Defendants

DECISION

The Complaint was brought under the provisions of the General Laws, Chapter 185, Section 1(k) and Chapter 240, Section 6, by the plaintiffs[1] who pray that an easement by necessity be established to and from their land "over land of respondents at a point to be designated by order of the Court and to include the right to install and maintain public utility systems" thereon. In additon to other prayers not now applicable, plaintiffs seek to enjoin defendants from blocking the "public way" passing through their property.

The plaintiffs filed a stipulation dismissing the complaint as against Henry Hornblower, II. The Cape Cod Company answered plaintiffs' complaint, denying the claimed right of way by necessity over its land, the right to install and maintain public utility systems thereon, and their unlawful interference with plaintiffs' ingress and

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1. Francis F. Cournoyer was joined as plaintiff by an amendment to the complaint.

egress. Further, defendants claim that plaintiffs were guilty of

egress. Further, defendants claim that plaintiffs were guilty of
laches, but not having been argued this is deemed to have been waived.

The case was heard on June 4, 1974, at the Dukes County Courthouse in Edgartown, Massachusetts. A view of the premises was taken on that day with plaintiffs, defendants, and their attorneys present. Five witnesses were called by the plaintiffs with their testimony being taken by a stenographer who was sworn by the Court. Eight exhibits were introduced into evidence and are incorporated herein for the purpose of any appeal. All references to book and page numbers are to documents recorded at the Dukes County Registry of Deeds unless otherwise noted.

The evidence produced at the trial shows that plaintiffs Cournoyer own the northwesterly half and plaintiffs Black own the southeasterly half of Lot 594 as shown on the plan introduced into evidence as Exhibit No. 5. Defendants own Lot 587 which abuts Lot 594 at the northwesterly corner thereof as shown on said plan.

The land in question was formerly held for the benefit of the Indians located in the Indian district of Gay Head. Until the passage of the St. of 1869 c. 463 the Indians were wards of the Commonwealth and the title to the lands occupied by them was held by the Commonwealth. <u>Coombs, Petitioner</u>, 127 Mass. 278, <u>Danzell v. Webquish</u>, 108 Mass. 133, 134. The Court takes judicial notice of Chapter 42 of the Resolves of 1863 entitled "Resolve Relating To The Establishment of Boundary Lines of Indian Lands at Gay Head." As a result of this resolve, a commissioner was appointed "to examine, and fully and finally to determine, all boundary lines between the individual owners of the land located in the Indian district of Gay Head...and also to determine

the boundary lines between the common lands of said district and the individual owners adjoining said common lands...." By Chapter 67 of the Resolves of 1866 the report of the Honorable Charles M. Marston, the commissioner so appointed under Chapter 42 of the Resolves of 1863, was accepted and a further resolve authorized the appointment of still another commissioner to complete "the examination and determination of questions of title under said resolve, not passed upon by said commissioner." A map of "Gay Head" was prepared [Exhibit No. 8] "under the direction of Richard L. Pease, Eng., Commissioner appointed by Gov. Bullock under Resolve Chap. 67 of 1866," recorded in Book 5, Pages 34 and 35.

By Section 6 of St. 1870, Chapter 213, "An Act to Incorporate the Town of Gay Head" the General Court as part thereof authorized the Probate Court of Dukes County to appoint two commissioners to recommend the division of these lands among the Indians. Richard Pease and Joseph Pease were appointed commissioners in 1878 and submitted their report recommending the parceling of the common land to individual Indians [Exhibit No. 1]. Thereafter, Lot 587 was parceled out to Leander Basset and Lot 594 to Amy Spencer [Exhibits No. 2 and 3] as shown on the plan submitted by the commissioners in connection with the set off. [Exhibit No. 6]. Each lot was described by making reference to abutting lots in accordance with the plan which showed the lots set forth as on a grid. The plan itself [Exhibit No.6] showed that the only road ran from the Chilmark town line westerly to the Gay Head Light House. The deeds to the individual lots made no provision for any rights of way or easements to get to and from any of the lots. There was evidence that showed that at the time of

the set-off the whole area was used in common by the Indians for planting corn, as pasture for their wild ponies and presumably in part for their abodes. The lots were undefined on the ground as there were no fences or any other separation of the lots. The Indians traveled on foot or on horseback without reference to any one person's land or boundaries. None of the trails were more than three feet wide and vehicles were never used.

Plaintiffs' title to Lot 594 comes by mesne conveyance from the title set-off to Amy Spencer [Exhibit No. 2] while defendant's title to Lot 587 comes from the lot set off to Leander Bassett [Exhibit No. 3]. Moshup Trail is a two-lane tar road built according to testimony in 1963-1964 which loops southerly from the state road. There is one new house on the south side of Moshup Trail 1/3 to 1/2 mile east of the turn off sought to be established as a right of way to 594. Utility lines end at this house, coming to it from the east. Except for this house, the area is wild and uninhabited, being sparsely covered with grass growing in loose, sandy soil ever more sparse as one approaches the beach to the south. The terrain itself is made up of small hills that may be passed over in a jeep or four-wheel drive vehicle.

The way over which plaintiffs claim their easement is part of an ancient way which commences at an undetermined point off "Old South Road" (which appears on Exhibit No. 5) and runs thence in a generally southeasterly direction to Moshup Trail. Ink lines on Exhibit No. 5 indicate that the way runs from Moshup Trail across Lots 577, 581 and 582 to Lot 587 where it divides into two ways, one

curving to the north, and the other, with which this case is concerned, to the south across Lot 587 to and through Lot 594. From there, it proceeds across Lot 595, a beach area, and thence westerly across Lots 585, 584, 583, 575 and 572 to Moshup Trail. The portion running from Lot 595 westerly to Moshup Trail is known as "Zack's Cliff Road." Since the Complaint alleges the right claimed by the plaintiffs to lie across Lot 587, the Court is unconcerned with Zack's Cliff Road. Because the necessity of access is to Moshup Trail, the Court is unconcerned with that part of the ancient way running between Old South Road and Moshup Trail. The way from Moshup Trail to Lot 594 was originally a horse trail which was widened by the repeated driving of an automobile over it. There is a gate across the way at the westerly boundary line of Lot 587, built by the defendants and kept locked by them since 1964. There was evidence indicating that the plaintiffs and others would, whenever they found it locked, cut the locks and throw them into the bushes in order to pass through Lot 587 to Lot 594 and beyond.

The partition of 1878 of the land held in common by the Indians was to establish parcels to be owned individually by the Indians, and this partition contained no provision for access to and from land-locked parcels by the designated owners of such parcels. There is no evidence whatsoever that the Commonwealth intended in the partition of 1878 to provide parcels of land to individual Indians without allowing them any means of access. Rights of way of necessity are created by a presumption of law. Where a landowner conveys a portion of his land in such a manner that he is unable to reach the land retained without travelling over the land conveyed, the law

presumes in the absence of contrary evidence that the intent of the parties to the conveyance was to provide access to the former by passage over the latter. Davis v. Sikes, 254 Mass. 540. The necessity of the right of access does not of itself create the right, but it is evidence that the right can be implied from the intent of the parties. Orpin v. Morrison, 230 Mass. 529, Gorton-Pew Fisheries Co. v. Tolman, 210 Mass. 402. This principle is not disrupted by the fact that these parcels were all created at one and the same time in a partition of the land and not as a result of a landowner conveying out or retaining an inaccessible parcel.

That the Commonwealth in 1878 did not provide for specific means of access to the parcels partitioned perhaps indicates its awareness of the Indians' customary travelling on horseback and on foot without regard to the boundaries of individual lots as a means of access. Use of such a means was, perhaps, an exercise of an easement which now may need only specific location because of the changes in the use and occupation of the land involved and because of changes in modes of transportation. One cannot, obviously, drive an automobile to a landlocked parcel in complete disregard of the boundaries of other parcels.

If the Court were to rule that plaintiffs did have, as a result of the necessity of access and the lack of evidence of an intent on the part of the Commonwealth to deny access, an easement of access to Lot 594, it would not compel any conclusion that their easement lies over the way which they have been using to reach their Lot 594. The most direct way to reach Moshup Trail might be across Lots 586,

582, 583, 575, 576 and 572, in addition to Lot 587. The owners of these lots are not before the Court and thus the Court cannot issue in their absence any decree or judgment that would affect their rights. Even if, as plaintiffs allege, their right were to lie across the way over which they claim an easement, perhaps by prescription, that way runs across Lots 582, 581 and 577, in addition to Lot 587. The owners of these lots are likewise not before the Court, and the Court is powerless to issue in their absence any decree or judgment that would affect their rights. Finally, the Court notes that there are other landlocked parcels which may have rights over Lot 594. While this fact does not of itself prevent the Court from determining plaintiffs' claim, it does suggest the crying need for a thorough and comprehensive planning of access to the entire area. One manner of providing access, which might under other circumstances be judicially imposed, would be to plan ways sufficiently wide to allow vehicular use along the boundary lines of each lot (on all four sides if necessary to give access to Moshup Trail to any given lot), burdening each lot with one-half the width of the way and in turn benefiting each lot with a right of way over such of the other remaining lots as is necessary to reach Moshup Trail. This would be imposed in such a manner as would divide the burden of ways as equitably as possible.

The Court reluctantly concludes that the owners of at least Lots 571, 572, 575, 576, 577, 581, 582, 583, and 586 are indispensable parties to this action, and relief cannot without their presence in the action be granted. Rule 1A of the new Rules of Civil Procedure, designed to provide guidance in the transition of procedure

from the old rules to the new rules, provides in Rule 1A(3) and 1A(8) authority for the Court to dispose of this case under the procedure effected by new Rules of Civil Procedure. Under Rule 19(a) of the new rules, the Court can on its own motion order these other owners to be joined in these proceedings. Rule 19(a) (1), Rule 19(a) (2) (i). Alternatively, under Rule 19(b), the Court can dismiss the case without prejudice until such time as the plaintiffs upon proper pleadings and process can join in this action these indispensable parties. It is the Court's view that any judgment that could issue at this point in these proceedings, assuming such a judgment would be favorable to the plaintiffs, would be either unavoidably prejudicial to one or more parties not now before the Court, or completely inadequate to the needs of the plaintiffs. The Court chooses in its discretion to dismiss the case without prejudice under Rule 19(b) because the information necessary to make an order under Rule 19(a) is not now before the Court. More important, a dismissal without prejudice under Rule 19(b) will not only tend to accomplish the same purpose as an order under Rule 19(a), should the plaintiffs desire to file the appropriate motions and pleadings, but also a dismissal will tend to give the present parties ample latitude in their pursuit of this litigation. The Court is a suitable place for determining rights of the parties before it under the law, but legal process is not always the best means for planning access to a large number of lots; the Court has no special expertise in land development. However, the Court is quite prepared to decide whatever legal issues are presented to it provided all the proper parties are before it.

The Court orders that the petition be dismissed without prejudice to the plaintiffs to file appropriate motions and pleadings for further hearings in this matter.

So Ordered.

William J. Randell
JUDGE

Dated: July 14, 1975.

County: **Dukes, ss.**

Case No: **Miscellaneous Case No. 129925**

Date: **July 19, 1989**

Parties: **HUGH C. TAYLOR and JEANNE S. TAYLOR vs. DAVID E. VANDERHOOP and EVELYN VANDERHOOP**

Decision Type: **DECISION**

Hugh C. and Jeanne S. Taylor ("Plaintiffs") commenced this action on October 4, 1988 seeking a declaration, pursuant to GL c. 231A, that David E. and Evelyn Vanderhoop ("Defendants") have no right to enter upon or to pass over a forty (40) foot wide right of way ("Way") depicted on Land Court Plan Nos. 35915A and 35915B as running across a portion of a parcel of registered land owned by the Plaintiffs located on Lobsterville Road in Gayhead, Massachusetts, shown as Lot No. 4 on Land Court Plan No. 35915B ("Locus") (Exhibit No. 1-B), or in the alternative, a declaration that any right of access which the Defendants may possess on or over said Way, does not include the right to use it for vehicular traffic or to install utilities or other services in or over the same. Pending a trial on the merits, the parties filed cross-motions for preliminary injunctive relief. These motions were allowed by Order of this Court dated October 20, 1988, as follows:

> (a) The defendants are enjoined, until further order of this Court, from (i) using for vehicular traffic, (ii) disturbing, or (i-ii) altering the "Way (40.00 wide)" shown on Land Court Plan No. 35915B except that defendants may use the Way, during reasonable working hours, until noon on October 22, 1988, for the purpose of causing one vehicle to pass over said Way in order to reach defendants' land and to excavate a foundation hole on said land; and
> (b) The plaintiffs are ordered, until further order of this Court, to remove from the Way the boat or any other items which may obstruct passage over said Way.

Thereafter, on November 3, 1988, the Order was amended to read as follows:

> A. The plaintiffs are ordered, until further order of this Court, to refrain from obstructing passage over the disputed [Way] . . . or from interfering with the use of the Way by the defendants for passage to and from their land by foot or by ordinary vehicles
> B. The defendants are enjoined, until further order of this Court, from using the Way for construction vehicles of any nature . . . or from altering or causing damage to the Way. . . .

A trial was held in the Land Court, sitting at Edgartown, on January 30, 1988, at which time a stenographer was appointed to record and transcribe the testimony. The matter was submitted on a partial Statement of Agreed Facts (Exhibit No. 1) and oral testimony. Five witnesses testified and five exhibits were introduced into evidence. All exhibits, and certain of the agreed facts, are incorporated herein for the purpose of any appeal. Following trial, the Court viewed the subject premises in the presence of counsel.

On all of the evidence, I find as follows:

1. The Plaintiffs acquired title to Locus by Transfer Certificate of Title No. 3806 (Exhibit No. 1-A) on July 19, 1974. Locus constitutes a portion of the land originally registered to Isaac and Gertrude Taylor ("Taylors") by Final Decree dated August 9, 1971 (See Exhibits No. 1-C-1, 1-C-2 and 1-D). The Taylors' Original Certificate of Title, dated August 9, 1971 (Exhibit No. 1-C-2), contains the following language:

> . . . So much of the land hereby registered as is included within the areas marked "Way-20.00 feet wide; and "Way-40.00 feet wide," approximately shown on [Land Court Plan No. 35915A] (Exhibit No. 1-D), is subject to the rights of all persons lawfully entitled thereto in and over the same. . . .

Although this language is omitted from the Plaintiffs' Transfer Certificate of Title, the aforesaid forty (40) foot wide Way in depicted on the Plaintiffs' Land Court Plan No. 35915B (Exhibit 1. B) and is clearly visible on the ground. In any event, the unexplained omission in a Transfer Certificate of a right in a dominant estate does not extinguish that right absent a release or other appropriate document.

2. By deed from John O. Vanderhoop, Pauline Vanderhoop and Leonard F. Vanderhoop, Sr. dated December 30, 1976, recorded at Book 341, Page 314 in the Dukes County Registry of Deeds (Exhibit No. 1-E), the Defendants acquired title to a certain parcel of unregistered land located to the northwest of Locus and shown in part as a lot marked "Edwin D. Vanderhoop" on Land Court Plan No. 35915A.

3. As shown on said Plan, the Defendants' property lies

between a parcel of registered land located to the north and another parcel of registered land located to the south, both of which parcels are owned by Frances A. Ginnochio ("Ginnochio"). The foregoing parcels appear as Lots No. 1 and 2 on Land Court Plan No. 19215A (Exhibit No. 1-G).

4. At the time of Ginnochio's registration petition, an objection thereto was filed by David F. Vanderhoop, Leonard F. Vanderhoop and Pauline A. Vanderhoop (Exhibit No. 1-H). Thereafter, on November 27, 1946, two Stipulations for Decree (Exhibit Nos. 1- I and 1-J) were entered into by the parties and duly incorporated into Ginnochio's registration decree. The pertinent portion of the Stipulation identified as "Exhibit No. 1-I" reads as follows

> . . . any decree registering the title in [Lot 1] on the Petitioner's plan [19215A], shall subject the fee therein to a right of way over the so-called Coast Guard Station Road as laid out on said plan . . . for the benefit of the present owners of [the Vanderhoop parcel], their heirs or assigns.

5. On November 20, 1953, a Final Decree (Exhibit No. 1~) entered in Ginnochio's registration case incorporating the Stipulation for Decree quoted above in Finding No. 4 as follows:

> So much of said lots 1 and 2 [on Land Court Plan No. 19215A] as is included within the limits of the way forty (40) feet wide, . . . is subject to the rights of all persons lawfully entitled thereto in and over the same (emphasis added), and to the terms of [the] stipulation [referenced above]. . . .
>
> There is appurtenant to said lots 1 and 2 the right to use the way forty (40) feet wide, . . . in common with all other persons lawfully entitled thereto. . (emphasis supplied).

6. The parcels depicted on Land Court Plan No. 35915B as belonging to Taylor, Vanderhoop, Ginnochio and one Broacher were all held at one time as common lands of the District of Gay Head, the same being transferred thereafter to the Town of Gay Head and later partitioned in accordance with Chapter 213 of the Acts and Resolves of 1870.

7. Following the filing of an additional objection to the Ginnochio registration petition by the United States of America ("USA"), an Agreement for Decree (Exhibit No. 1-K) was executed, whereby a perpetual easement for the benefit of the USA was granted in:

> a strip of land twenty (20) feet each side of the center line of existing ways as identified by dotted lines on a plan of land in Gay Head of [Ginnochio] . . . dated April, 1944 ("1944 Plan") (Exhibit No. 1-L) . . . with full right of egress and ingress over said lands by those in the employ of the [USA], on foot or with vehicles of any kind, with boats or any articles used for the purpose of carrying out the intentions of Congress provided for the establishment of life-saving stations; and the right to pass over said lands in any manner in the prosecution of said purposes and to erect such structures upon said land as the [USA] may see fit. . . .

Some time after 1947, the U. S. Coast Guard took over the Life Saving Station ("Station") situated on the parcel marked "1" on the 1944 Plan.

8. The forty (40) foot wide Way appears to have been created some time in the late nineteenth century for purposes of accessing the Station. As it presently appears, the Way runs from Lobsterville Road, a public way, to the site of the Station, crossing over the lands of the Plaintiffs', Defendants',

Ginnochios' and other parcels. The Way constitutes the Defendants' sole means of access from their Land to a public way. The evidence is somewhat vague as to the precise year of the Way's establishment, but I note that the 1887 U.S. Geodetic Survey Map on file with the Land Court shows what now appears to be South Road as the only road then located in Gayhead.

9. From the 1940's through the 1960's, the Vanderhoop family used the Way, or footpaths connecting thereto, to reach the Station for purposes of delivering newspapers and milk, and collecting swill for their pigs. At times, the Vanderhoops crossed over the Way in the course of hunting rabbits or searching for ancient artifacts over the surrounding area. In addition, they occasionally used the Way or connecting footpaths for recreational purposes and/or observing the extent of any erosion of the cliffs of Gayhead. At no time during this period did the Vanderhoops find their use of the Way blocked or obstructed.

10. In 1954, extensive erosion of the surrounding cliffs threatened the Station's structural soundness. Accordingly, the U.S. Coast Guard abandoned the Station and relocated thereafter to Menemsha (See Exhibit No. 3).

The Defendants Vanderhoop assert rights in the subject forty (40) foot wide Way based on the following legal theories: 1) easement by prescription; 2) easement by implication or necessity- and 3) easement in a private way for which the public has acquired rights of use by motor vehicle. For the reasons enunciated below, I find and rule on the evidence that the Defendants have acquired an easement by implication or necessity to pass and repass without

obstruction, by foot or by motor-vehicle, along the entire length of the Way for purposes of access to and egress from their property.

It is familiar law in this Commonwealth that one may acquire a right of way by prescription through twenty years of uninterrupted, open, notorious and adverse use. G.L. c. 187, s 2; Boston Seaman's Friend Society. Inc. v. Rifkin Management. Inc., 19 Mass. App. Ct. 248, 251 (1985); Glenn v. Poole, 12 Mass. App. Ct. 292 (1981); Brown v. Sneider, 9 Mass. App. Ct. 329, 331 (1980); Ryan v. Stavros, 348 Mass. 251, 263 (1964); Garrity v. Sherin, 346 Mass. 180, 182 (1963); Nocera v. DeFeo, 340 Mass. 783 (1959). In the matter herein, the-Vanderhoops' use of the subject Way spans the 1940's through the 1960's. I find such use, however, to be irregular and/or for purposes of reaching the station O Accordingly, the Vanderhoops' use of the Way is of an insufficient nature to establish their acquisition of prescriptive easement rights in and over the Way. See Uliasz v. Gillette, 357 Mass. 96, 101-102 (1970); Akasu v. Power, 325 Mass. 497, 502 (1950). Similarly, I find there to be insufficient evidence in the record before the Court to establish that the Vanderhoops, or the general public, have acquired easement rights in the Way under the theory that it is a private way for which the public has obtained rights.

The Defendant Vanderhoops further assert that they hold an easement by implication or necessity over the Way as it crosses Locus. Implied easements do not arise out of necessity alone. Perodeau v. O'Connor, 336 Mass. 472, 474 (1958). Their origin must

be found in the presumed intention of the parties to be gathered from the language of the relevant instruments read in 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. Labounty v. Vickers, 352 Mass. 337, 347 (1967); Perodeau at 474; Sorel v. Boisjolie, 330 Mass. 513, 517 (1953); Joyce v. Devaney, 322 Mass. 544, 549 (1948); Dale v. Bedal, 305 Mass. 102, 103 (1940). Additionally, where as here the Way in which an easement by implication or necessity is claimed traverses registered land, the proponents thereof bear the burden of proving that such easement rights accrued prior to the date of a Final Decree in such registration case and that they are members of the class referred to in the Decree as having said rights. The imposition of this burden is consistent with the well-settled rule that an easement by implication may not be created against registered land. G.L. c. 185, s. 53; Goldstein v. Beal, 317 Mass. 750, 757 (1945).

One particular set of circumstances which will give rise to an easement by implication, and which I find to be relevant hereto, exists where, during the common ownership of a tract of land, an apparent and obvious use of one part of the parcel is made for the benefit of another part thereof and such use is being actually made up to the time of the severance and is reasonably necessary for the enjoyment of the other part of the tract. Sorel at 516; Jasper v. Worcester Spinning and Finishing Co., 318 Mass. 752, 756-757 (1945); Joyce at 549. Further, where one conveys a portion of his land in such a way as to deprive himself of access to the remainder

thereof unless he crosses the land sold, the law implies from the resulting situation of the parties that such person has a way of necessity over the granted portion of the premises. The law thus presumes that one will not sell land to another without an understanding that the grantee shall have a legal right of access to it, and it equally presumes an understanding of the parties that one selling a portion of his land shall have a legal right of access to the remainder over the part sold if he can reach it in no other way. New York & New England Railroad Company v. Board of Railroad Commissioners, 162 Mass. 81, 83 (1894); Gorton-Pew Fisheries. Co. v. Tolman, 210 Mass. 402, 411 (1912); Orpin v. Morrison, 230 Mass. 529, 533 (1918); Davis v. Sikes, 254 Mass. 540' 545-546 (1926); Restatement of the Law: Property, Section 474.

In the instant matter, the respective properties of the Plaintiffs' and Defendants' originally comprised a portion of the common lands of the District of Gay Head. Following the enactment of Chapter 213 of the Acts and Resolves of 1870, however, the District of Gay Head was abolished and the Town of Gay Head established. Thereafter, the common lands were partitioned and conveyed to individual owners, the parcels owned by the Plaintiffs and Defendants being among those created by such partition. Accordingly, as it is immaterial whether the severance of common ownership results from execution of law, See Viall v. Carpenter, 80 Mass. (Gray XIV) 126 (1859); Flax v. Smith, 20 Mass. App. Ct. 149 (1985), a reasonable implication arises that some means of ingress to and egress from the resulting lots is necessary to the lot owners' enjoyment of their property. While the foregoing facts

do not support an easement by prescription, they do demonstrate that the subject forty (40) foot wide Way has been the accepted means of access to and from the surrounding parcels since its establishment in the late 1800's. While the record is devoid of evidence that the Way existed at the time of the partitioning of the common lands, the easement, nevertheless, came into existence at that time as an undefined easement by necessity. Where a right of way is not precisely located or established, its existence is not affected. Emery v. Crowley, 371 Mass. 489, 495 (1976). In such instances, the Court has the authority to establish the easement or the same may come into being by acquiescence of the parties involved. Here, the establishment of the Way on the ground, its use and the surrounding circumstances, including the Vanderhoops' filing of an objection in the Ginnochio Registration Case No. 19215A (See Finding No. 4), all serve to define the easement created by the partition. Additionally, as the Final Decree in the Ginnochio registration case incorporates a Stipulation for Decree whereby the registration of the Ginnochio land was made subject to the Vanderhoops' right to cross over the same for purposes of accessing their land, the reasonable inference to be drawn therefrom is that at that time the parties deemed the Way to be the access route to their properties.

As noted above in Finding No. 1, the Original Certificate of Title held by the Plaintiffs' predecessors in title also refers to Land Court Plan No. 35915A, which depicts the forty (40) foot wide Way and which expressly acknowledges that such registration is subject to the rights which others may lawfully possess therein.

The Vanderhoop's status as persons so entitled to use the Way accounts for their failure to file an objection in Land Court Registration Case No 35915. Accordingly, when the Final Decrees of the Land Court of November 20, 1953 (Ginnochio) and August 9, 1971 (Taylor) were extended onto Land Court Plan Nos. 19215A and 35915A and said plans and decrees were made a matter of public record, some easement of passage over the Ways depicted thereupon became appurtenant to the lot now owned by the Defendants. See Dubinsky v. Cama, 261 Mass. 47, 53-54 (1927); Walter Kassuba Realty Corp. v. Akeson, 359 Mass. 725, 728 (1971).

The Plaintiffs' Transfer Certificate of Title fails to include any language subjecting the registration of Locus to similar easement rights in and over the subject Way', but Land Court Plan No. 35915B, which is specifically referred to therein, shows said Way. I therefore deem this omission of no consequence since the Certificate's reference to the plan places the Plaintiffs on notice as to the existence of the Way, and accordingly, causes the registration of Locus to be subject to any and all easement rights which other persons may lawfully possess in and over said Way. See Anderson v. DeVries, 326 Mass. 127, 132 (1950); Myers v. Stalin, 13 Mass. App. Ct. 127, 137 (1971); Brooks v. Capitol Truck Leasing. Inc., 13 Mass. App. Ct. 471, 478-479 (1971). The Plaintiffs thus took title to Locus subject to the Vanderhoops' right of way and must be estopped to deny the existence of whatever easement of travel was created in and over the Way under the land registration records. See Dubinsky at 56. I note in addition thereto that such "easement of travel" is not limited to access in and over the Way

up to the Ginnochio parcel, as the Taylors' Original Certificate of Title contains no express language so limiting the Defendants' rights in and over the Way. Had the Taylors intended to restrict the extent of such passage to that portion of the Way running in front of the Ginnochio property, and not to any point beyond, they should have so petitioned the Court, rather than leaving the Way open to the rights of all persons lawfully entitled thereto in and over the semen. I thus find the Certificate's reference to the Way, and to the rights contained therein (See Finding No. 1), to further substantiate an acknowledgment on the part of the Plaintiffs' predecessors in title that the Vanderhoops, and others similarly entitled to use the Way, possess rights to pass and repass over the entire length of the Way for purposes of accessing their land. Further, as it is fundamental that where an easement or other property right is granted or created, every right necessary for its enjoyment is included by implication, Sullivan v. Donohoe, 287 Mass. 265, 267 (1934); Anderson at 134, the Defendants' right to so use the Way carries with it the right to make reasonable repairs and improvements thereto at their own expense. Such right further includes the right to install utilities therein, or thereupon as conditions may dictate, for purposes of servicing their property. G.L. c. 187, s. 5; Nantucket Conservation Foundation. Inc. v. Russell Management -Inc., 380 Mass. 212, 217 (1980).

In consideration of the foregoing, I rule in summary that the Defendant Vanderhoops have acquired a right of way by implication to enter upon and to pass and repass without obstruction, by foot

or by vehicle, over and along the entire length of the forty (40) foot wide Way, such easement encompassing each and every right necessary or incidental to the Defendants' enjoyment thereof, and that the Vanderhoops, their heirs and assigns are members of the class so entitled to use the Way.

Judgment accordingly.

Judge: **/s/**

Robert V. Cauchon

Justice

Dated: July 19, 1989

End Of Decision

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COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
LAND COURT DIVISION
CASE DOCKET

CASE GROUP: Miscellaneous
CASE NO.: 97 MISC 238738
CITY / TOWN: Aquinnah
DESCRIPTION:

CASE STATUS: Closed

DATE FILED: 05/20/1997
CASE TYPE: Miscellaneous
ACTION CODE (S): CDJ - Complaint for Declaratory Judgment, Chapter 231A
OTHER COUNTS:
TRACK:
JUDGE: Trombly, Charles W.

PLAINTIFF(S):	DEFENDANT(S):

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
LAND COURT DIVISION
CASE DOCKET

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COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
LAND COURT DIVISION
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COMMONWEALTH OF MASSACHUSETTS
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02/29/2000 David Wayne Lima, Esq.
Law Offices of David W. Lima
30 Turnpike Road
Suite 4
Southborough, MA 01772
(508)485-0363
appears for Thomas G. Seeman

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11/13/2000 John Montgomery
John H. Montgomery , Jr.
P.O Box 1117
26 Bold Meadow Road
Edgartown, MA 02539
(508)627-4304
appears for South Shore Beach, Inc.

01/21/2000 Thomas N Margulis, Esq.
Thomas N. Margulis, Esq.
106 Gibbs Street
Newton Centre, MA 02459
(617)558-5571
appears for Richard Sullivan

02/24/1999 . Pro Se

appears for Hamilton Cammann Trustee(s) of Nick M. Realty Trust

10/30/2000 Ellen B Kaplan, Esq.
Kaplan & Nichols PC
63 Winter Street
P.O. Box 2198
Edgartown, MA 02539
(508)627-3900
appears for Carol I. Francis

10/30/2000 Ellen B Kaplan, Esq.
Kaplan & Nichols PC
63 Winter Street
P.O. Box 2198
Edgartown, MA 02539
(508)627-3900
appears for Cheryl Arwood Executor of the Estate of Helen James

10/28/2003 Benjamin L Hall, Jr., Esq.
45 Main Street
PO Box 5155
Edgartown, MA 02539-5155
(508)627-5900
appears for Brian M. Hall Trustee of Barons' Land Trust

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04/25/2006 . Pro Se
appears for Sharon Nowell

07/28/2006 Stephen L Saltonstall, Esq.
P.O. Box 1992
5188 Main Street
Manchester Center, VT 05255-1992
(802)362-7077
appears for Sarah Saltonstall

John M Donnelly, Esq.
Office of the Attorney General
One Ashburton Place
18th Floor
Boston, MA 02108
(617)963-2592
appears for Commonwealth of Massachusetts

06/21/2007 Diane C Tillotson, Esq.
Hemenway & Barnes LLP
60 State Street
Boston, MA 02109
(617)227-7940
appears for The Martha's Vineyard Land Bank

06/21/2007 Shana Maldonado, Esq.
Hemenway & Barnes LLP
60 State Street
Boston, MA 02109
(617)227-7940
appears for The Martha's Vineyard Land Bank

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#	Entry	Date	Judge
1	Complaint for Declaratory Judgment, Chap. 231 A, Filed	05/20/1997	
2	Appearance of James Demotses for Maria A. Kitras Trustee(s) of Bear Realty Trust	05/20/1997	
3	Appearance of James Demotses for Janice Feltz Trustee(s) of 466-a Trust	05/20/1997	
4	Appearance of James Demotses for Harold Adler Trustee(s) of Bear Realty Trust	05/20/1997	
5	Appearance of Nicholas Decoulos for Plaintiffs	05/20/1997	
6	Appearence Date: 06/23/1997 Peter Ochs Defendant Jack Fruchtman, Jr.,Prose JoAnn Fruchtman, Pro Se 1807 Kenway Road Baltimore, MD 21209	05/20/1997	
7	Appearence Date: 06/23/1997 Peter Ochs Defendant John H. Montgomery,Jr.Esq 26 Bold Meadow Road P.O. Box 1117 Edgartown, MA. 02539 APPEARS FOR: South Shore Beach, Inc.	05/20/1997	
8	Appearence Date: 06/23/1997 Peter Ochs Defendant William M. Healy, Esq. P.O. Box 1518 Edgartown, MA. 02539 APPEARS FOR: David Wice and Betsy Wice	05/20/1997	
9	Appearence Date: 06/30/1997 Peter Ochs Defendant Brian M. Hurley, Esq. Serge Georges, Jr., Esq. Rackemann, Sawyer & Brewster, P.C. One Financial Center Boston, MA. 02111 APPEARS FOR: John F. Kennedy, Jr. and Caroline Kennedy	05/20/1997	
10	Appearence Date: 07/02/1997 Peter Ochs Defendant Jennifer S.D. Roberts,Esq 886 Main Street P.O. Box 1026 Osterville, MA. 02655 APPEARS FOR: Vineyard Conservation Society, Inc.	05/20/1997	

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11	Appearence Date: 07/11/1997 Peter Ochs Defendant Ronald H. Rappaport, Esq. Reynolds, Rappaport & Kaplan, LLP 106 Cooke Street P.O. Box 2540 Edgartown, MA 02539 APPEARS FOR: Town of Gay Head, The	05/20/1997
12	Appearence Date: 07/15/1997 Peter Ochs Defendant Judith K. Wyman, Esq. Frank M. Capezzera, Esq. Roche, Carens & DeGiacomo P.C. 99 High Street, 20th Floor Boston, MA 02110 APPEARS FOR: Margaret B. Gubser, Trustee	05/20/1997
13	Appearence Date: 07/21/1997 Peter Ochs Defendant Susan Heckler Smith RRI Box 261 A Gay Head, MA 02535 Pro Se	05/20/1997
14	Appearence Date: 07/21/1997 Peter Ochs Defendant Russell H. Smith RRI Box 261 A Gay Head, MA 02535 Pro Se	05/20/1997
15	Appearence Date: 08/08/1997 Peter Ochs Defendant Ira H. Zaleznik Esq. Lawson &Weitzen 425 Summer Street Boston, MA 02210 APPEARS FOR: Vicki and Klaus Broscheit	05/20/1997
16	Appearence Date: 10/30/1998 Peter Ochs Defendant Ronald L. Monterosso, Esq P.O. Box 433 Edgartown, MA 02539 APPEARS FOR: Frank Nuovo	05/20/1997
17	Appearence Date: 02/11/1999 Peter Ochs Defendant Joann Fruchtman And Jack Fruchtman, Jr. 1807 Kenway Road Baltimore, Maryland 21209 Appear Pro	05/20/1997

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18	Appearence Date: 02/18/1999 Peter Ochs Defendant Elizabeth B. Ornstein,Esq Bernard E. Greene, Jr. Roche, Carens & DeGiacomo, P.C. 99 High Street Boston, MA 02110 Appear for Scott Harrison Tel. (617)457-4000	05/20/1997
19	Appearence Date: 02/12/1999 Peter Ochs Defendant Daniel J. Larkosh, Esq. 62 Winter Street P.O. Box 1929 Edgartown, MA 02539 (508) 627-1320 APPEARS FOR: Michael Stutz, Heidi Stutz, Kevin Craig, Cynthia Craig, Flavia Stutz, Robert Stutz, Se lma Greenburg, William Greenburg and Wilma Greenburg	05/20/1997
20	Appearence Date: 02/24/1999 Peter Ochs Defendant Victor H. Polk, Jr., Esq. Monica L. Swanson, Esq. Bingham Dana 150 Federal Street Boston, MA 02110 (617) 951-8000 APPEARS FOR: Lawrence B. Evans	05/20/1997
21	Appearence Date: 02/25/1999 Peter Ochs Defendant Ellen B. Kaplan Kaplan & Nicholas, P.C. 63 Winter Street P.O. Box 2198 Edgartown, MA 02539 Appears for Hope E. Horgan	05/20/1997
22	Appearence Date: 04/09/1999 Peter Ochs Defendant Change of Address For Thomas K. Zebrowski Cook, Zebrowski LLP 264 Wellesley Avenue Wellesley Hills, MA 02481-6809 Appears for David Wice and Betsy Wice	05/20/1997
23	Appearence Date: 02/22/1999 Peter Ochs Defendant Thomas Seeman 4 Maple Hill Drive Aquinnah, MA 02535 APPEARS: Pro Se	05/20/1997

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24	Appearence Date: 02/22/1999 Peter Ochs Defendant Sarah Saltonstall Old South Road Aquinnah, MA 02535 APPEARS: Pro Se	05/20/1997
25	Appearence Date: 02/24/1999 Peter Ochs Defendant Mary Elizabeth Pratt 5 Moshup Trail Aquinnah, MA 02535 APPEARS: Pro Se	05/20/1997
26	Appearence Date: 02/24/1999 Peter Ochs Defendant Richard Sullivan 1 Emmons Place Cambridge, MA 02138 APPEARS: Pro Se	05/20/1997
27	Answer of JoAnn Fruchtman and Jack Fruchtman, Jr.,Filed	06/23/1997
28	Answer of South Shore Beach, Inc., Filed	06/23/1997
29	Motion to Enlarge Time for Response, Filed	06/23/1997
30	Appearance of John Montgomery for South Shore Beach, Inc.,	06/23/1997
31	Motion to Dismiss of John F. Kennedy, Jr. and Caroline Kennedy, Filed	06/30/1997
32	Defendant Vineyard Conservation Society, Inc.'s Motion to Substitute Parties under Rule 25, Filed	07/02/1997
33	Defendant Vineyard Conservation Society, Inc.'s Motion to Dismiss under Rule 12 (b), Filed	07/02/1997
34	Defendant Vineyard Conservation Society, Inc.'s Memorandum of Law in Support of its Motion to Dismiss under Rule 12 (b), Filed	07/02/1997
35	Joint Ex Parte Motion to Make a Defendant a Party Plaintiff, Filed	07/02/1997
36	Summons Returned to Court with Service on Vineyard Conservation Society, Inc., in hand to Brendan O'Neill, Filed	07/10/1997
37	Summons Returned to Court with Service on, Mark Harding, in hand, Filed	07/10/1997
38	Summons Returned to Court with Service on George B. Brush as Trustee of Toad Roack Realty Trust, in hand, Filed	07/10/1997
39	Summons Returned to Court with Service on Peter Ochs of Gay Head, in hand, Filed	07/10/1997
40	Summons Returned to Court with Service on Russell Smith, Last and Usual, Filed	07/10/1997
41	Summons Returned to Court with Service on Susan Smith, Last and Usual, Filed	07/10/1997
42	Summons Returned to Court with Service on Benjamin L. Hall, Jr., Trustee of Gossamer Wing Realty Trust, in hand to a person of suitable age at Last and Usual, Filed	07/10/1997
43	Defendants David Wice and Betsy Wice, Motion to Dismiss, Filed	07/11/1997
44	Motion of the Town of Gay head to Dismiss or in The Alternative to Stay these Proceedings, Filed	07/11/1997

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45	Memorandum of Law in Support of Motion of the Townof Gay Head to Dismiss or in the Alternative to Stay Proceedings, Filed	07/11/1997
46	Stipulation, Filed	07/15/1997
47	Answer of The Defendant, Margaret B. Gubser, as She is Trustee of the Testamentary Trust of Alice	07/15/1997
48	Stone Blackwell and Motions to Dismiss, Filed	07/15/1997
49	Certificate of Service, Filed	07/16/1997
50	Defendants' Answers, Filed	07/21/1997
51	Joint Ex-Parte Motion to Make a Defendant a Party Plaintiff, Allowed (Kilborn, C.J.)	07/23/1997
52	Motion to Enlarge Time for response, Allowed (Kilborn, C.J.)	07/23/1997
53	Order issued, (Kilborn, C.J.)	07/23/1997
54	Answer/Counterclaim & Cross-Claim, Filed	07/28/1997
55	Certificate of Service, Filed	07/28/1997
56	Opposition To Motions to Dismiss & Cross-Motion toHave the Court Appoint a Guardian Ad Litem, Filed	07/28/1997
57	Certificate of Service, Filed	07/28/1997
58	Defendant Vineyard Conservation Society, Inc. 's Motion to Dismiss Crossclaim of Defendant Benjamine L. Hall, Jr.	08/04/1997
59	Motion to Dismiss Cross-Claim of Gossamer Wing Realty Trust By John F. Kennedy and Caroline Kennedy, Filed	08/05/1997
60	Answer of Mark Harding, Filed	08/07/1997
61	Answer of Eleanor P. Harding, Truste of Eleanor P.Harding Trust, Filed	08/07/1997
62	Answer of Mark Harding (Cross-Claim of Benjamin L.Hall, Jr., Trustee), Filed	08/07/1997
63	Answer of Eleanor P. Harding, Trustee of Eleanor P. Harding Trust (Cross-Claim of Benjamin L. Hall, Jr., Trustee. Filed	08/07/1997
64	Answer and Cross-Claims of Defendants Vicki and Klaus Broscheit, Filed	08/08/1997
65	Answer of Town of Gay Head to Cross-Claim of Benjamin L. Hall, Jr., Trustee Filed	08/20/1997
66	Answer of Town of Gay Head to Cross-Claim of Klaus F. Broscheit and Vicki Broscheit, Filed	08/20/1997
67	Answer of John F. Kennedy, Jr. and Caroline Kennedy to Cross-Claim of Vicki and Klaus Broscheit, Filed	08/22/1997
68	Defendant Vineyard Conservation Society, Inc.'s Motion to Dismiss Crossclaim of Klaus F. and Victoria B. Broschet Pursuant to Rules 12 (b) 7 and 19, filed	09/02/1997
69	Defendants' Appearance, filed	11/04/1997
70	Stipulation of Dismissal of The Town of Gay Head, Vineyard Conservation Society, John F. Kennedy, Jr Caroline Kennedy, and Vicki & Klaus Broscheit, as to Answer and Cross-Claims of Vicki & Klaus Broscheit, Pursuant to M.R.C.P. 41(c), filed	11/04/1997
71	Plaintiffs Motion to Amend Complaint To Be Heard On April 16, 1998 at 10:00 a.m., filed	04/03/1998

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72	Motion to Dismiss Defendant Margaret B. Gusber To Be Heard on April 16, 1998 at 10:00 a.m., filed	04/03/1998
73	Hearing held. Plaintiffs' Motion to Amend Complaint allowed. Defendant VCS's Motion to Substitute itself for Gubser ALLOWED. Defendants' Motion to Dismiss under M.R.C.P. (12)(6)(7) and (19) DENIED without prejudice. Plaintiffs to bring further Motio n to Amend Complaint within sixty (60) days to add all parties necessary for just adjudication. (Green, J.)	04/16/1998
74	Amended Verified Complaint filed nunc pro tunc April 3, 1998.	04/16/1998
75	Hearing held. No action taken on Town's Motion to stay proceedings pending appointment of commissioner. (Green, J.)	04/16/1998
76	Hearing held. Defendants' Motions to Dismiss uner M.R.C.P. 12(b)(9) withdrawn because moot. No action taken of Defendants' Motions to Dismiss Count III and Claims under G.L.C. 240. (Green, J.)	04/16/1998
77	Hearing held. Defendants' Kennedy's and VCS Motion to Dismiss Cross-Claim of Defendant Hall DENIED without prejudice. Hall may file, within sixty (60) days, Motion to Amend and Cross-Claim. (Green, J.)	04/16/1998
78	Order, Issued. (Green, J.)	04/21/1998
79	Plaintiffs' Motion to Amend Complaint To Be Heard on July 9, 1998 at 10:00 a.m., Filed	06/19/1998
80	Defendant Vineyard Conservation Society, Inc.'s Motion to Dismiss Plaintiffs' Amended Complaint, Filed	06/22/1998
81	Defendant Vineyard Conservation Society, Inc.'s Memorandum of Law in Support of its Motion to Dismiss Plaintiffs' Amended Complaint, Filed	06/22/1998
82	Defendant Vineyard Conservation Society, Inc.'s Renewed Motion to Dismiss CrossClaim of Defendant Benjamin L. Hall, Jr., Filed	06/22/1998
83	Certificate of Service, Filed	06/22/1998
84	Amended Answer/CounterClaim & Cross-Claims, Filed	06/22/1998
85	Appearance of Benjamin L. Hall Jr Pro Se	06/22/1998
86	Opposition of Defendant Benjamin L. Hall, Jr. to Defendant Vineyard Conservation Society, Inc.'s Renewed Motion to Dismiss Cross-Claim of DefendantBenjamin L. Hall, Jr. and Cross-Motion for Sanctions Pursuant to G.L. c. 231 ¿ 6F, Filed	06/29/1998
87	Motion of Defendant Benjamin L. Hall, Jr. to Amendhis Answer Counter-Claim and Cross-Claim, Filed	06/29/1998
88	Motion to Dismiss Cross-Claim of Gossamer Wing Realty Trust by Joann and Jack Fruchtman, Filed	07/02/1998
89	Letter Rescheduling Motion on for July 9, 1998 at 10:00 a.m. to August 4, 1998 at 10:00 a.m., Filed	07/03/1998
90	Motion to Amend Answer Counterclaim and Cross- Claim Continued to August 6, 1998 by Counsel by Agreement. (Green, J.)	08/04/1998
91	Motion to Dismiss Plaintiffs' Amended Complaint Continued to August 6, 1998 by Counsel by Agreement. (Green, J.)	08/04/1998
92	Renewed Motion to Dismiss Crossclaim of Defendant Continued to August 6, 1998 by Counsel by Agreement. (Green, J.)	08/04/1998
93	Motion to Dismiss Crossclaim Continued to August 6, 1998 by Counsel by Agreement. (Green, J.)	08/04/1998

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94	Plaintiff's Motion to Amend Complaint Continued to August 6, 1998 by Counsel by Agreement. (Green, J.)	08/04/1998
95	Stipulation, Filed	08/06/1998
96	All pending motions continued generally. Case setdown for status conference on October 30, 1998 at 11:00 a.m. notice to be sent by counsel. (Green, J.)	08/06/1998
97	Appearance of Ronald L. Monterosso, Filed	10/30/1998
98	Pre-Trial Conference Held. Motion to Amend Complaint to be Filed by November 13, 1998. Opposition if any, to be Filed by November 19, 1998. Hearing, if Necessary, Set for November 23, 1998 at 10:00 a.m. (Green, J.)	10/30/1998
99	Plaintiffs' Motion to Amend Complaint To Be Heard on November 23, 1998 at 10:00 a.m., Filed	11/16/1998
100	Hearing Held. Oral Motion to Amend the PlaintiffsMotion to Amend Argued. Motion as Modified is Allowed. New Amended Complaint to be Filed by Counsel. (Green, J.)	11/23/1998
101	Withdrawal of Counsel for Defendant Wice's, Filed	11/23/1998
102	Notice of Appearance, Filed	11/23/1998
103	Amended Verified Complaint, Filed	11/30/1998
104	Certificate of Service, Filed	12/21/1998
105	Defendant Vineyard Conservation Society, Inc.'s Answer to Plaintiffs' Amended Verified Complaint, Filed	12/21/1998
106	Defendant Vineyard Conservation Society, Inc.'s Motion to Substitute Parties Under Rule 25, Filed	12/21/1998
107	Answer of John F. Kennedy, Jr. and Caroline Kennedy to Plaintiffs' Amended Verified Complaint, Filed	12/24/1998
108	Answer of Defendants, David and Betsy Wice to Plaintiffs' Amended Verified Complaint, filed	01/19/1999
109	Removal by United States of America to United States District Court, filed	01/29/1999
110	Answer of Patrick J. Evans, filed	02/01/1999
111	Answer of JoAnn Fruchtman and Jack Fruchtman, Jr.,filed	02/11/1999
112	Summons Returned to Court WITHOUT Service on Selma Greenberg (deceased)	02/11/1999
113	Summons Returned to Court WITHOUT Service on Robert Stutz (deceased)	02/11/1999
114	Summons Returned to Court WITHOUT Service on William Greenberg	02/11/1999
115	Summons Returned to Court with Service on Michael W. Stutz (in hand)	02/11/1999
116	Summons Returned to Court with Service on Hamilton Cammann (in hand)	02/11/1999
117	Summons Returned to Court with Service on Thomas Seeman (in hand)	02/11/1999
118	Summons Returned to Court with Service on Steven Yaffe (in hand)	02/11/1999
119	Summons Returned to Court with Service on Sarah Saltonstall (in hand)	02/11/1999
120	Summons Returned to Court with Service on Shirley A. Jardin (in hand)	02/11/1999

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121	Summons Returned to Court with Service on Jeffrey Madison, Trustee of Tacknash Realty Trust (in hand)	02/11/1999
122	Summons Returned to Court with Service on Alexandra Whitcomb (last and usual place of abode also by first class mail)	02/11/1999
123	Summons Returned to Court with Service on Mary Elizabeth Pratt (last and usual place of abode and also by certified mail)	02/11/1999
124	Summons Returned to Court with Service on Flavia Stutz (in hand)	02/11/1999
125	Stipulation To Extend Time For Response To Complaint, filed	02/12/1999
126	Answer of Defendant Scott Harrison, filed	02/18/1999
127	Answer of Alexandra N. Whitcomb to Plaintiffs' Amended Verified Complaint, filed	02/22/1999
128	Answer of Russell and Susan Smith To Plaintiffs' Amended Verified Complaint, filed	02/22/1999
129	Stipulation To Extend Time For Response To Complaint, filed	02/22/1999
130	Answer of Defendant, Thomas Seeman, filed	02/22/1999
131	Answer of Defendant, Sarah Saltonstall, filed	02/22/1999
132	Appearance of Thomas G. Seeman Pro Se	02/22/1999
133	Answer of Town of Aquinnah, filed	02/23/1999
134	Answer of Defendant, Mary Elizabeth Pratt, filed	02/24/1999
135	Answer of Defendant, Richard Sullivan, filed	02/24/1999
136	Answer of Lawrence B. Evans, filed	02/24/1999
137	Answer of Beverley A. Evans, filed	02/24/1999
138	Answer of Hamilton Cammann to Plaintiffs' Amended Complaint, filed	02/24/1999
139	Appearance of Hamilton Cammann Pro Se	02/24/1999
140	Answer of Hope E. Horgan, filed	02/25/1999
141	Motion by United States to Dismiss, filed in U.S. District Court, District of Massachusetts	03/01/1999
142	Motion to Dismiss Complaint for Failure to State Claim Mass. R. Civ. P. 12(b)(6), filed	03/15/1999
143	Certificate of Service, filed	03/15/1999
144	Memorandum of law in Support of Defendants' Motionto Dismiss, filed	03/15/1999
145	Request for Hearing Re: Motion to Dismiss Complaint for Failure to State Claim Mass. R. Civ. P. 12(b)(6), filed	03/15/1999
146	Affidavit of Daniel J. Larkosh in Compliance with Superior Court Rule 9A, filed	03/15/1999
147	Notice of Change of Address, filed	04/09/1999
148	Notice of Removal to United States District Court, filed	04/09/1999
149	Attested Copies of the File Forwarded to the United States District Court, filed	04/21/1999
150	Defendant Aurilla Fabio's Motion to file Motion to Dismiss or for more definate statement late - assented to filed in U.S. District Court, district of Massachusetts and allowed. (Stearns, D.J.)	05/03/1999

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151	Defendant Aurilla Fabio's Motion to Dismiss or for more definite statement, filed in U.S. District Court, District of Massachusetts	05/03/1999
152	Appearance of James Demotses for Janice Feltz Trustee(s) of 4656-a Trust	05/20/1999
153	Appearance of James Demotses for Bear Realty Trust	05/20/1999
154	Order granting Motion to Dismiss from U.S. District Court, District of Massachusetts, Entered. (Stearns, D.J.)	06/30/1999
155	Case Closed in U.S. District Court, District of Massachusetts.	06/30/1999
156	Order of Remand for U.S. District Court, District of Massachusetts, to Land Court, Entered. (Stearns, D.J.)	07/30/1999
157	Amended Order to Remand from Federal Court, filed	09/21/1999
158	Answer of Town of Aquinnah filed	11/12/1999
159	Appearance of Ronald Rappaport for Town Of, Gay Head	11/12/1999
160	Appearance of Jason Redlo Talerman for Town Of, Gay Head	11/12/1999
161	Order of Dismissal. (Green, J.)	11/23/1999
162	Appearance of Leslie-ann Morse for Mark Harding	11/23/1999
163	Appearance of Leslie-ann Morse for Eleanor P. Harding	11/23/1999
164	Appearance of Leslie-ann Morse for Eleanor B. Harding Trust Trustee(s) of	11/23/1999
165	Appearance of Richard Erwin Burke for Richard K. Fabio	11/30/1999
166	Order, Issued. (Green, J.)	11/30/1999
167	Notice of Status Conference to be heard on Friday, January 21, 2000, filed.	01/11/2000
168	Motion of Defendants David Wice and Betsy Wice to Dismiss Plaintiffs' Amended Verified Complaint to be heard on Friday, January 21, 2000, filed.	01/12/2000
169	Memorandum and Request for Summary Judgment in the Matter of Kitras and Aquinnah from Jack and Joann Fruchtman Re: inability to attend January 21, 2000 Conference, filed.	01/18/2000
170	Plaintiffs' Status Conference Memorandum to be heard on Friday, January 21, 2000, filed.	01/19/2000
171	Defendant Vineyard Conservation Society's Status Conference Memorandum, filed.	01/19/2000
172	Letter from Jack and Joann Fruchtmans re: non-delievery of Plaintiffs' Summary and inability to atten January 21, 2000, Conference, filed.	01/20/2000
173	Letter from Sarah Saltonstall Re: inability to attend January 21, 2000 Conference, filed.	01/20/2000
174	Letter from Thomas G. Seeman Re: inability to attend January 21, 2000 Conference, filed.	01/20/2000
175	Appearance of Thomas G. Seeman Pro Se	01/20/2000
176	Letter from Mary Elizabeth Pratt re: Inability to Attend January 21, 2000 Conference, filed	01/20/2000
177	Conference Scheduled for 01/21/2000. at 11:00 a.m. cancelled due to inclient weather. Conference continued to 02/04/2000. at 11:00 a.m. (Green, J.)	01/20/2000
178	Defendant, Richard Sullivan's Conference Memorandum, filed.	01/21/2000
179	Appearance of Thomas Margulis for Richard Sullivan	01/21/2000

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180	Motion of Defendants Russell Smith and Susan Smith to Dismiss Plaintiffs' Amended Verified Complaint,	01/24/2000
181	Rule X Brief of Defendants Russell and Susan Smith in Support of Motion to Dismiss Plaintiffs' Amended Verified Complaint, filed.	01/24/2000
182	Status Conference Continued to February 29, 2000, at 11:00 A.M. (Green, J.)	02/04/2000
183	Case assigned for status conference 02/29/2000 (Green, J.)	02/07/2000
184	Withdrawal of IVO MEISNER, ESQ. as Counsel for PETER OCHS	02/07/2000
185	Letter from Alexandra Whitcomb Re: Inability to attend 02/29/00, Status Conference.	02/22/2000
186	Letter from Mary Elizabeth Pratt Re: Inabliity to Attend 02/29/00, Status Confernce.	02/25/2000
187	Mesage from Sarah Saltonstall Re: Inability to Attend 02/29/00, Status Conference.	02/29/2000
188	Appearance of David Wayne Lima for Thomas G. Seeman	02/29/2000
189	Status Conference held. Discovery is to be complete by August 31,2000. Motion for Summary Judgment and memorandum i n support thereof due by September 29, 2000. Response/opposition to motion for Summary Judgment due October 31, 2000. Reply to opposit on due November 15, 2000. Hearing on Motion for Summary Judgment December 18, 2000 at 2:30 p.m. (Green, J.)	02/29/2000
190	Motion for Summary Judgment assigned for hearing on 12/18/2000 before Justice Green (Green, J.)	02/29/2000
191	Order Issued. (Green, J.)	03/09/2000
192	Notice of Hearing of Motion for Summary Judgment to be heard on December 18, 2000, at 2:30 P.M., before Judge Green. issued.	03/10/2000
193	Order, issued. (Green, J.)	04/12/2000
194	Plaintiffs' Motion for Alternative Methods of Service of Process to be heard on 05/12/2000, filed	05/05/2000
195	Hearing held on Plaintiffs' Motion for Alternative Methods of Service of Process. Proposed Citation to be Submitted to Court Within one week. Counsel to advise Court by June 16, 2000, as to Defendants to be Voluntarily Dismissed. (Green, J.)	05/12/2000
196	Withdrawal of JAMES DEMOTSES as Counsel for MARIA A. KITRAS Trustee (s) of BEAR REALTY TRUST	06/20/2000
197	Withdrawal of JAMES DEMOTSES as Counsel for HAROLD ADLER Trustee (s) of BEAR REALTY TRUST	06/20/2000
198	Withdrawal of JAMES DEMOTSES as Counsel for JANICE FELTZ Trustee(s) of 466-A TRUST	06/20/2000
199	Defendant Vineyard Conservation Society's Motion to Compel Answers to Interrogatories held. Motion allowed. (Green, J.)	08/01/2000
200	Defendant Vineyard Conservation Society's Application under Rule 33(a) for Judgment against Plaintiffs Victoria and Gardner Brown filed.	08/04/2000
201	VINEYARD CONSERVATION SOCIETY's, INC., Motion to Compel Answers to Interrogatories filed	08/04/2000
202	Defendant Vineyard Conservation Society's Memorandum in Support of its Motion to Compel Answers to Interrogatories filed	08/04/2000

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203	VINEYARD CONSERVATION SOCIETY, INC., First Set of Interrogatories to Plaintiff Maria A. Kitras filed	08/04/2000
204	Notice of Motion .	08/04/2000
205	Order. (Green, J.) .	08/08/2000
206	Appearance of H Theodore Cohen for Victoria Brown	08/14/2000
207	Appearance of H Theodore Cohen for Gardner Brown Jr.	08/14/2000
208	Appearance of Cheryl Ann Blaine for Gardner Brown Jr.	08/14/2000
209	Appearance of Cheryl Ann Blaine for Victoria Brown	08/14/2000
210	Notice of Application for Final Judgment/or Dismissal Pursuant to Mass. R. Civ. P. 33(a) sent.	08/25/2000
211	Defendant Vineyard Conservation Society's Motion for Protective Order to be heard on 09/26/2000 , filed	09/11/2000
212	Notice of Motion, filed .	09/11/2000
213	Affidavit of H. Theodore Cohen, filed	09/19/2000
214	Plaintiff Victoria and Gardner Browns' Opposition to Defendant Vineyard Conservation Society's Motion for Protective Order, filed	09/19/2000
215	Service List, filed .	09/19/2000
216	Plaintiffs answers to Defendant First Set of Interrogatories filed	09/20/2000
217	Motion to Make Two Defendants Party Plaintiffs to be heard on 09/29/2000, filed	09/22/2000
218	Service List, filed .	09/22/2000
219	Plaintiffs' Stipulation, filed .	09/26/2000
220	Defendants' Stipulation, filed .	09/26/2000
221	Hearing scheduled on 9/29/00 canceled.	09/28/2000
222	Order of Notice by Publication in the Vineyard Gazette, one time before November 13, 2000, issued	09/29/2000
223	Defendant, Thomas Seeman's Motion to Dismiss or in the Alternative for Summary Judgment, filed	09/29/2000
224	Affidavit of Defendant, Thomas Seeman's Affidavit in Support of his Motion for Summary Judgment, filed	09/29/2000
225	Memorandum of Law in Support of Defendant, Thomas Seeman's Motion to Dismiss or in the Alternative for Summary Judgment, filed	09/29/2000
226	Motion of Defendants Beverly A. Evans, Patrick J. Evans and Lawrence B. Evans' Motion for Summary Judgment filed	10/06/2000
227	Memorandum of Law in support of Defendant, Beverly A. Evans, Patrick J. Evans and Lawrence B. Evans' Motion for Summary Judgment filed	10/06/2000
228	Service List, filed .	10/06/2000
229	Defendant Vineyard Conservation Society, Inc.'s Motion for Summary Judgment or, Alternatively, to Dismiss, filed	10/06/2000
230	Memorandum of Law in Support of Defendant Vineyard Conservation Society, Inc.'s Motion for Summary Judgment or, Alternatively, to Dismiss, filed	10/06/2000
231	Affidavit of Brendan T. O'Neill, filed	10/06/2000

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232	Affidavit of Jennifer S.D. Roberts, filed	10/06/2000
233	Response of Caroline Kennedy to Motions for Summary Judgment filed	10/12/2000
234	Appearance of Brian Michael Hurley for Caroline Kennedy	10/12/2000
235	Statement of Defendants David Wice and Betsy Wice in Response to Motions of Several Defendants for Summary Judgment filed	10/18/2000
236	Appearance of Thomas Zebrowski for David Wice	10/18/2000
237	Appearance of Thomas Zebrowski for Betsy Wice	10/18/2000
238	Response of Jo Ann and Jack Fruchtman Jr., to Motion for Summary Judgment, filed	10/23/2000
239	Return of Service by Publication Per Order of Court, filed	10/25/2000
240	Answer of Carol I. Francis filed	10/30/2000
241	Answer of Carol I. Francis filed	10/30/2000
242	Appearance of Ellen Kaplan for Carol I. Francis	10/30/2000
243	Answer of Cheryl Arwood Executor of the Estate of Helen James filed	10/30/2000
244	Appearance of Ellen Kaplan for Cheryl Arwood Executor(s) of the Estate of Helen James	10/30/2000
245	Summons returned to court with service on Carol I. Francis filed	11/02/2000
246	Response of Sarah Saltonstall to Motions for Summary Judgment, filed	11/06/2000
247	Motion of Plaintiffs, Gardner and Victoria Brown's Cross-Motion for Summary Judgment and Opposition to Defendants' Motion for Summary Judgment, filed	11/07/2000
248	Affidavit of Gardner Brown filed	11/07/2000
249	Cross-Motion for Summary Judgment of Plaintiffs', Maria A. Kitras as Trustee of Bear Realty Trust and Bear II Realty Trust, Et als, filed	11/07/2000
250	Statement of Facts and Statement of Legal Elements of Plaintiffs, Maria A. Kitras, Trustee, Et als., in Support of Cross-Motion for Summary Judgment and in Opposition to Motions for Summary Judgment of Defendants, Vineyard Conservation Society, Inc., Eta l., filed	11/07/2000
251	Memorandum of Plaintiffs' Maria A. Kitras as Trustee of Bear Realty Trust and Bear II Realty Trust, Et als, to Support Cross-Motion for Summary Judgment filed	11/07/2000
252	Affidavit of James J. Decoulos to Support Plaintiffs' Cross Motion for Summary Judgment, filed	11/07/2000
253	Response of Mary Elizabeth Pratt to Motions for Summary Judgment, filed	11/09/2000
254	Response of South Shore Beach, Inc. To Motion for Summary Judgment filed .	11/13/2000
255	Appearance of John Montgomery for South Shore Beach, Inc.	11/13/2000
256	Motion to Strike, filed	11/29/2000
257	Defendant Vineyard Conservation Society, Inc.'s Memorandum in Reply, filed	11/29/2000
258	Affidavit of Jennifer S.D. Roberts filed	11/29/2000
259	Defendant (Estate of) Aurilla Fabio's Answer to Plaintiffs' Amended Verified Complaint, filed	12/04/2000

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260	Defendant's Motion to Strike the Following Paragraphs of the Affidavit of James Decoulos granted as to 11, 12,15, 27-33, 39, 12 and 43. Denied as to 3-9, 20 and 38. (Green, J.)	12/18/2000
261	Hearing held upon Stipulation, Parties Patrick Evans and Thomas Seeman dismissed. Parties Cross-Motions for Summary Judgment Taken under advisement. (Green, J.)	12/18/2000
262	Defendant Vineyard Conservation Society, Inc.'s Motion to Supplement the Record, filed	12/22/2000
263	Defendant Vineyard Conservation Society, Inc., Motion to Supplement the Record to be heard on 02/14/2001, filed	01/31/2001
264	Assent of Plaintiffs, Victoria Brown and Gardner Brown to the Defendant Vineyard Conservation Society, Inc.'s Motion to Supplement the Record, filed	02/09/2001
265	Defendant Vineyard Conservation Society, Inc.'s Motion to Supplement the Record, allowed. (Green, J.)	02/14/2001
266	Decision On Cross-Motions for Summary Judgment and Motions to Dismiss Entered. (Green, J.) Copies sent to Nicholas Decoulas, James Demotses and Others.	06/04/2001
267	Notice of Appeal of Plaintiffs' Maria A. Kitras as Trustee of Bear Realty Trust and Bear II Realty Trust, and Paul D. Pettegrove as Trustee of Gorda Realty Trust, to the Appeals Court , filed	06/19/2001
268	Notice of Appeal by Plaintiffs to the Appeals Court , filed	07/02/2001
269	Notice of Appeal by Defendant, Gossamer Wing Realty Trust, Benjamin L. Hall, Jr., Trustee to the Appeals Court , filed	07/03/2001
270	Defendant Vineyard Conservation Society's First Set of Interrogatories to Plaintiff Benjamin L. Hall, Jr., Trustee filed	09/19/2001
271	Appearance of Jennifer S D Roberts for Vineyard Conservation Society, Inc.,	09/19/2001
272	Response of Defendant Benjamin L. Hall, Jr, As he is Trustee of Gossamer Wing Realty Trust, To the Interrogatories Propounded By the Defendants, Vineyard Conservation Society, filed.	11/05/2001
273	Interrogatories Propounded by the Defendant Benjamin L. Hall as he is Trustee of Gossamer Wing Realty Trust, To Be Answered by the Defendant, Vineyard Conservation Society, filed.	11/09/2001
274	Call of the List Hearing scheduled for 03/13/2002 at 10:00 A.M. (Lombardi, J.)	02/22/2002
275	Notice of Assignment of Hearing Date Sent.	02/25/2002
276	Hearing scheduled on 3/13/02 rescheduled for 5/13/02	03/11/2002
277	Notice of Call of List sent.	03/15/2002
278	Status conference held. (Lombardi, J.) .	05/13/2002
279	Appearance of CARA DANIELS for Caroline Kennedy	05/13/2002
280	Appearance of JENNIFER E. PARKER for Maria A. Kitras Trustee(s) of Bear Realty Trust	06/02/2002
281	Appearance of H THEODORE COHEN for Maria A. Kitras Trustee(s) of Bear Realty Trust	06/03/2002
282	Plaintiffs' Motion for Leave to Amend Complaint and, to the Extent Necessary, Motion for Relief under Mass. R. Civ. P. 60(b), filed .	06/03/2002

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283	Motion of Defendant Gossamer Wing Realty Trust to Correct, Amend or Modify the Order of Judge Green Docketed June 4, 2001 to be heard on 07/10/2002, filed	06/03/2002
284	Suggestion of Death of Defendant, leonard F. Vanderhoop, Jr., filed	06/03/2002
285	Hearing on Motion of Defendant Gossamer Wing Realty Trust to Correct, Amend or Modify the Order of Judge Green docketed June 4, 2001 taken off the list at request of moving party. (Lombardi, J.)	06/28/2002
286	Plaintiffs' Motion for Leave to Amend Complaint and, to the Extent Necessary, Motion for Relief under Mass. R. Civ. P. 60(b), and Motion of Defendant Gossamer Wing Realty Trust to Correct, Amend or Modify the Order of Judge Green docketed on June 4, 2001 to be heard on 09/05/2002, filed	07/08/2002
287	Defendant Vineyard Conservation Society, Inc.'s Opposition to Plaintiffs' Motion to Amend Complaint and to the Extent Necessary, Motion for Relief under Mass. R. Civ. P. 60(b), filed	07/09/2002
288	Defendant Vineyard Conservation Society, Inc.'s Opposition to the Motion of Defendant Gossamer Wing Realty Trust to Correct, Amend of Modify the Order of Judge Green, filed	07/09/2002
289	Jack Fruchtman Jr., and Jo Ann Fruchtman, Defendants, Opposing, Pro Se the Plaintiffs' Motion to Amend Complaint and to the Extent Necessary Motion for Relief under Mass. R. Civ. P. 60(b), filed	07/19/2002
290	Jack Fruchtman Jr., and Jo Ann Fruchtman, Defendants, Opposing, Pro Se the the Motion of Defendant, Gossamer Wing Realty Trust to Correct, Amend, or Modify the Order of Judge Green, Docketed June 4, 2001, filed	07/19/2002
291	Plaintiffs' Memorandum in Support of Motion for Leave to Amend Complaint and, to the Extent Necessary, Motion for Relief under Mass. R. Civ. P. 60(b), filed	08/14/2002
292	Affidavit of H. Theodore Cohen, filed	08/14/2002
293	Defendant Vineyard Conservation Society, Inc.'s Supplemental Opposition to Plaintiffs' Motion to Amend Complaint and, to the Extent necessary, Motion for Relief under Mass. R. Civ. P. 60(b), filed	09/03/2002
294	Defendant Memorandum in Support of Defendant Gossamer Wing Realty Trust's Motion to Correct, Amend or Modify the Order of Judge Green docketed June 4, 2001 and Additional Request for Relief, filed	09/05/2002
295	Motion of Defendant Gossamer Wing Realty Trust to Correct, Amend, or Modify the Order of Judge Green docketed June 4, 2001 Argued and Taken under advisement. (Lombardi, J.)	09/05/2002
296	Plaintiffs' Motion for Leave to Amend Complaint and, to the Extent Necessary. Motion for Relief under M.R.C.P. 60(b) Argued and Taken under advisement. (Lombardi, J.)	09/05/2002
297	Order Denying Motion to Amend And Order Allowing in Part and Denying in Part Motion to Correct, Modify, or Amend. (Lombardi, J.) Copies sent to Cohen, Wyman, Rappaport, Zebrowski, Lima, Margulis, Smith, Hall, Polk, Montgomery, Fruchtman, Morse, Cammon, Hurely, Decoulos, Burke, Kaplan, Roberts, Saltonstall, Sullivan and Pratt.	09/17/2002
298	Withdrawal of THOMAS ZEBROWSKI as Counsel for DAVID WICE	10/28/2002
299	Appearance of DAVID WICE PRO SE	10/28/2002
300	Withdrawal of THOMAS ZEBROWSKI as Counsel for BETSY WICE	10/28/2002
301	Appearance of BETSY WICE PRO SE	10/28/2002

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302	Withdrawal of JENNIFER E. PARKER as Counsel for MARIA A. KITRAS Trustee(s) of BEAR REALTY TRUST	03/31/2003
303	Plaintiffs' Motion for Entry of Final Judgment Pursuant to Rule 54(b) to be heard on 05/29/2003	05/06/2003
304	Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Entry of Final Judgment Pursuant to Rule 54(b), filed	05/06/2003
305	Motion to Dismiss on Mark Harding and Eleanor Harding, Trustee of the Eleanor P. Trust to be heard on 05/29/2003	05/19/2003
306	Hearing scheduled on 05/28/2003 rescheduled for 05/29/2003	05/22/2003
307	Memorandum in Opposition of Defendant Gossamer Wing Realty Trust to Plaintiff's Motion for Seperate Judgment and the Harding Motion to Dismiss, filed	05/29/2003
308	Combined Motion of Defendant Gossamer Wing Realty Trust for the Following Relief: (1) To Clarify, Correct, Amend or Modify the Order of Judge Lombardi Dated 9/17/02, (2) Gossamer Wing Realty Trust should be Allowed to File an Amendment to its Answer, f iled	05/29/2003
309	Motion to Dismiss Allowed. (Lombardi, J.) .	05/29/2003
310	Hearing Held on Plaintiffs' Motion for Entry of Final Judgment Pursuant to Rule 54(b) and Motion Taken Under Advisement. Attorney Cohen to file Supplemental Pleading by June 16, 2003. (Lombardi, J.)	05/29/2003
311	Plaintiffs' Further Motion for Leave to Amend Complaint to be heard on 07/30/2003, filed	06/16/2003
312	Plaintiffs' Response to Defendant, Grossamer Wing Realty Trust's Combined Motion and Opposition and Plaintiffs' Request for Deferral of Action with Regard to Plaintiffs' Rule 54(b) Motion, filed	06/16/2003
313	Plaintiffs' Memorandum of Law in Support of Plaintiffs' Further Motion for Leave to Amend Complaint, filed	06/16/2003
314	Combined Motion for Relief to be heard on 07/30/2003, filed	07/21/2003
315	Defendant Vineyard Conservation Society, Inc.'s Opposition to Plaintiffs' Further Motion for Leave to Amend Complaint, filed	07/21/2003
316	Defendant Vineyard Conservation Society, Inc.'s Opposition to the Combined Motion of Defendant Gossamer Wing Realty Trust, filed	07/21/2003
317	Defendant Gossamer Wing Realty Trust's combined Motion for Relief argued and taken under advisement. (Lombardi, J.)	07/30/2003
318	Plaintiffs' further Motion for Leave to Amend complaint argued and taken under advisement. (Lombardi, J.)	07/30/2003
319	Order (1) Denying Plaintiffs' Further Motion for Leave to Amend Complaint; (2) Denying Defendant Hall's Motion to Clarify, Correct, or Amend; and (3) Granting Plaintiffs' Motion for Entry of Final Judgment Pursuant to Rule 54(b), issued. (Lombardi, J.)(Copies Sent to Nicholas Decoulos, Esq. H. Theodore Cohen, Esq., Cheryl A. Blane, Esq., South Shore Beach, Inc., Jack Fruchtman, Jr., Joann Fruchtman, Brian M. Hurley, Esq., Serge Georges, Jr., Esq., Carol Daniels, Esq., Jennifer S.D. Roberts, Esq.,	08/21/2003

320	Ronald H. Rappaport, Esq., Jason R. Talerman, Esq., Russell H. Smith, Susan Heckler Smith, Benjamin L. Hall, Jr., Esq., Elizabeth B. Ornstein, Esq., Bernard E. Greene, Jr., Judith K. Wyman, Esq., Frank Cappezzera, Esq., Sarah Saltonstall, Richard Sulliva n, Hamilton Cammann, Victor H. Polk, Jr., Esq., Mary Elizabeth Pratt, Ellen B. Kaplan, Esq., Leslie-Ann Morse, Esq., Richard Edwin Burke, Esq., Thomas Margulis, Esq., David Wayne Lima, Esq., George B. Brush and Betsy Wice.	08/21/2003
321	Judgment Pursuant to Mass. R. Civ. P. 54(b) entered. (Lombardi, J.) (Copies Sent to Nicholas Decoulos, Esq. H. Theodore Cohen, Esq., Cheryl A. Blane, Esq., South Shore Beach, Inc., Jack Fruchtman, Jr., Joann Fruchtman, Brian M. Hurley, Esq., Serge Geor ges, Jr., Esq., Carol Daniels, Esq., Jennifer S.D. Roberts, Esq.,	08/21/2003
322	Ronald H. Rappaport, Esq., Jason R. Talerman, Esq., Russell H. Smith, Susan Heckler Smith, Benjamin L. Hall, Jr., Esq., Elizabeth B. Ornstein, Esq., Bernard E. Greene, Jr., Judith K. Wyman, Esq., Frank Cappezzera, Esq., Sarah Saltonstall, Richard Sulliva n, Hamilton Cammann, Victor H. Polk, Jr., Esq., Mary Elizabeth Pratt, Ellen B. Kaplan, Esq., Leslie-Ann Morse, Esq., Richard Edwin Burke, Esq., Thomas Margulis, Esq., David Wayne Lima, Esq., George B. Brush and Betsy Wice. .	08/21/2003
323	Gossamer Wing Realty Trust Motion for Reconsideration and/or to Correct the Decision and Judgment dated August 21, 2003, filed	09/02/2003
324	Notice of Appeal of Plaintiffs, Maria A. Kitras, as Trustee of Bear Realty Trust, Bear II Realty Trust and Gorda Realty Trust, James J. Decoulos, as Trustee of Bear II Realty Trust and Gorda Realty Trust and Gardner Brown and Victoria Brown to the Appeal s Court , filed	09/17/2003
325	Notice of Appeal by Defendant, Gossamer Wing Realty Trust and Benjamin J, Hall, Jr., to the Appeals Court , filed	09/18/2003
326	Notice of Cross Appeal filed by Defendant, Vineyard Conservation Society, Inc., filed	09/22/2003
327	Notice of Appeal by Plaintiffs, Mark D. Harding and Eleanor P. Harding as she is Trustee of the Eleanor P. Harding Realty Trust to the Appeals Court , filed	09/22/2003
328	Notice of Cross Appeal filed by Defendant, Caroline Kennedy, filed	09/23/2003
329	Certificate Regarding no Ordering of Transcript by Plaintiffs-Appellants, Maria A. Kitras, as Trustee of Bear Realty Trust, Bear II Realty Trust and Gorda Realty Trust, James J. Decoulos, as Trustee of Bear II Realty Trust and Gorda Realty Trust and Gard ner Brown and Victoria Brown, filed	09/26/2003
330	Appearance of BENJAMIN HALL for Brian M. Hall Trustee(s) of Barons' Land Trust	10/28/2003
331	Gossamer Wing Realty Trust Motion to sever the Lot 302 & 242 Claims & for Leave to Intervene or for Substitution as to Lot 242, filed.	11/10/2003
332	Memorandum of Law in Support of (1) Gossamer Wing Realty Trust Motion for Reconsideration and/or to Correct the Decision and Judgment Dated August 21, 2003 and (2) Gossamer Wing Realty Trust Motion to Sever the Lot 302 & 242 Claims & for Leave to Interve ne or for substitution as to Lot 242, filed.	11/10/2003
333	Baron's Land Trust Motion to (1) Subsitute or for Leave to Intervene, and (2) To Sever and/or to Bifurcate the Claims Relating to Lot 177 and for Leave to filed a Responsive Pleading, filed.	11/10/2003
334	Gossamer Wing Realty Trust Motion to sever the Lot 302 & 242 Claims & for Leave to Intervene or for Substitution as to Lot 242 to be heard on 11/14/2003	11/10/2003

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335	Baron's Land Trust Motion to (1) Subsitute or for Leave to Intervene, and (2) To Sever and/or to Bifurcate the Claims Relating to Lot 177 and for Leave to filed a Responsive Pleading to be heard on 11/14/2003	11/10/2003
336	Gossamer Wing Realty Trust Motion for Reconsideration and/or to Correct the Decision and Judgment dated August 21, 2003 to be heard on 11/14/2003	11/10/2003
337	Gossamer Wing Realty Trust Motion for Reconsideration and/or to Correct the Decision and Judgment dated August 21, 2003 argued and taken under advisement. (Lombardi, J.)	11/14/2003
338	Gossamer Wing Realty Trust Motion to sever the Lot 302 & 242 Claims & for Leave to Intervene or for Substitution as to Lot 242 argued and taken under advisement. Supplemental Memoranda (no longer than 5 pages in length) regarding Lot 302 to be submitted , if the parties so desire, within three weeks. (Lombardi, J.)	11/14/2003
339	Barons' Land Trust Motion to (1) Substitute or for Leave to Intervene, and (2) to sever and/or to Bifurcate the Claims Relations to Lot 177, and (3) for Leave to file a Responsive Pleading argued and taken under advisement. (Lombardi, J.)	11/14/2003
340	Further Memorandum of Law in Support of Gossamer Wing Realty Trust Motion to Sever the Lot 302 Claims, filed	12/05/2003
341	Defendant Vineyard Conservation Society, Inc.'s Memorandum of Law Addressing Mr. Hall's Motion to Sever Lot 302, filed	12/05/2003
342	Plaintiffs' Memorandum of Law with Regard to Gossamer Wing Realty Trust's Motion to Sever Lot 302 and Lot 242 Claims, filed	12/08/2003
343	Further Memorandum of Law in support of both Barons Land Trust & Gossamer Wing Realty Trust Motion to 1) Sever the Lot 177 & 242 Claims and 2) For Substitution & 3) For Leave to File a Late Answer, filed	12/10/2003
344	Reply Memorandum to Plaintiffs' Opposition to Defendant Gossamer Wing Realty Trust & Barons Land Trust Motions Regarding Lots 302, 242 & 177, filed	12/15/2003
345	Order Denying Hall Motion for Reconsideration and/or to Correct; Hall Motion to Sever and for Intervention or Substitution; and Barons' Land Trust Motion (1) To Substitute or Intervene, (2) to Sever, and (3) For Leave to File Responsive Pleading, issued. (Lombardi, J.) (Copies Sent to Nicholas Decoulos, Esq. H. Theodore Cohen, Esq., Cheryl A. Blane, Esq., South Shore Beach, Inc., Jack Fruchtman, Jr., Joann Fruchtman, Brian M. Hurley, Esq., Serge Georges, Jr., Esq., Carol Daniels, Esq.,	12/22/2003
346	Ronald H. Rappaport, Esq., Jason R. Talerman, Esq., Russell H. Smith, Susan Heckler Smith, Benjamin L. Hall, Jr., Esq., Elizabeth B. Ornstein, Esq., Bernard E. Greene, Jr., Judith K. Wyman, Esq., Frank Cappezzera, Esq., Sarah Saltonstall, Richard Sulliva n, Hamilton Cammann, Victor H. Polk, Jr., Esq., Mary Elizabeth Pratt, Ellen B. Kaplan, Esq., Leslie-Ann Morse, Esq., Richard Edwin Burke, Esq., Thomas Margulis, Esq., David Wayne Lima, Esq., Jennifer S.D. Roberts, Esq., George B. Brush and Betsy Wice).	12/22/2003
347	Notice of Appeal by Defendant, Benjamin L. Hall, Jr., Trustee of Gossamer Wing Realty Trust to the Appeals Court , filed	01/02/2004
348	Notice of Appeal by Brian M. Hall, Trustee of Barons' Land Trust ("Barons' Land") to the Appeals Court , filed	01/02/2004
349	Renewed Notice of Appeal of Plaintiffs Maria A. Kitras, as Trustee of Bear Realty Trust, Bear II Realty Trust and Gorda Realty Trust, James J. Decoulos, as Trustee of Bear II Realty Trust and Gorda Realty Trust and Gardner Brown and Victoria Brown to the Appeals Court , filed	01/08/2004

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350	Renewed Notice of Appeal of Plaintiffs, Mark D. Harding and Elenor P. Harding as she is Trustee of the Eleanor P. Harding Realty Trust, filed.	01/22/2004
351	Transcript of Hearing held on July 30, 2003 before Justice Lombardi, filed	03/01/2004
352	Notice of Assembly of the Record on Appeal sent to the Clerk of the Appeals Court and to all Counsel of Record	03/24/2004
353	Notice of Service of Notice of Appeal sent to H. Theodore Cohen, Esq., Cheryl A. Blaine, Esq., Nicholas Decoulos, Esq., John H. Montgomery, Jr., Esq., Brian M. Hurley, Esq., Serge Georges, Jr., Esq., Cara Daniels, Esq., Hamilton Cammon, Trustee of NickM. Realty Trust, Jack Fruchtman, Jr., JoAnn Fruchtman, Ronald H. Rappaport, Esq., Jason Redlo Talerman, Esq., Judith K. Wyman, Esq., Frank M. Capezzera, Esq., Elizabeth B. Ornstein, Esq.,	03/24/2004
354	Benjamin L. Hall, Jr., Esq., Russell H. Smith, Susan Heckler Smith, Thomas Margulis, Esq., David Wayne Lima, Esq., David H. Wice, Betsy W. Wice, Victor H. Polk, Jr., Esq., Monica L. Swanson, Esq., Ellen N. Kaplan, Esq., Sarah Saltonstall, Mary ElizabethP ratt, Richard Sullivan, Ronald L. Monterosso, Esq., Richard Erwin Burke, Jr., Esq., Leslie-Ann Morse, Esq., George B. Brush, Duncan Kreamer, Esq., Thomas Seeman, and Ashley Brown Ahearn, Clerk of the Appeals Court .	03/24/2004
355	Case entered in the Appeals Court as Case No. 2004-P-0472	04/05/2004
356	Corrected transcript of Hearing held on July 30, 2003 before Justice Lombardi, filed	05/13/2004
357	Defendant Vineyard Conservation Society, Inc.'s Answer to Amended Answer/Counterclaim & Cross-Claims of Defendant Benjamin L. Hall, Jr., filed	06/10/2004
358	Defendant Vineyard Conservation Society, Inc.'s Response to Interrogatories Propounded by the Defendant Benjamin L. Hall Jr., as he is Trustee of Gossamer Wing Realty Trust, filed	06/16/2004
359	Motion for General Default filed	08/06/2004
360	Defendant Gossamer Wing Realty Trust's Motion to Strike the Defendant Vineyard Conservation Society, Inc.'s Answer to Amended Answer/Counterclaim & Cross-Claims of Defendant Benjamin L. Hall, Jr. as Untimely and without Leave of Court & Request for Sanct ions, filed	08/06/2004
361	Defendant Gossamer Wing Realty Trust's Motion to Strike the Def. Vineyard Conservation Society, Inc.'s Answer to Amended Answer/Counterclaim & Cross-Claims of Def. Benjamin L. Hall, Jr. as Untimely and without Leave of Court & Request for Sanctions to be heard on 09/23/2004	08/23/2004
362	Defendant Gossamer Wing Realty Trust's Request for General Default to be heard on 09/23/2004, filed	08/23/2004
363	Stipulation of Plaintiffs, Gardner and Victoria Brown, and Defendant, Benjamin L. Hall, Jr., Trustee to Filing of Answer to Counterclaim and Cross-Claims, filed	09/13/2004
364	Plaintiffs Gardner and Victoria Brown's Answer to Benjamin L. Hall, Jr., Trustee's Counterclaim and Cross-Claims, filed	09/13/2004
365	Stipulation of Plaintiffs, Maria A. Kitras, Trustee, and James J. Decoulas, Trustee, and Defendant, Benjamin L. Hall, Jr., Trustee, to Filing of Answer to Counterclaim and cross-claims, filed	09/13/2004
366	Plaintiffs, Maria A. Kitras, Trustee, and James J. Decoulos, Trustee's Answer to Benjamin L. Hall, Jr., Trustee's Counterclaim and Cross-claims, filed	09/13/2004

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367	Defendant Vineyard Conservation Society, Inc.'s Opposition to Defendant Gossamer Wing Realty Trust's Motion to Strike the Defendant Vineyard Conservation Society, Inc.'s Answer to Amended Answer/Counterclaim & Cross-Claims of Defendant Benjamin L. Hall,J r., as untimely and without Leave of Court & Request for Sanctions, filed	09/17/2004
368	No action taken on Defendant Gossamer Wing Realty Trust's Request for General Default. (Lombardi, J.)	09/23/2004
369	Hearing held on Defendant Gossamer Wing Realty Trust's Motion to Strike the Defendant Vineyard Conservation Society, Inc.'s Answer to Amend Answer/Counterclaims of Defendant Benjamin L. Hall, Jr. as untimely and without Leave of Court & Request for Sanct ions. Motion denied. Filing of Amended Answer/Counterclaim & Cross-Claims by Attorney Hall on June 22, 1998 now deemed allowed. Answer to this Pleading filed by Vineyard Conservation Society, Inc. on June 10, 2004 allowed. (CONT'D)...	09/23/2004
370	...(CONT'D) Proposed Order to be submitted. Attorney Hall to also submit Letter of Diligent Search regarding Estate of the late Mr. Vanderloop. (Lombardi, J.)	09/23/2004
371	Affidavit of BENJAMIN L. HALL JR Trustee(s) of GOSSAMER WING REALTY TRUST Regarding the Publication of the Citation in the Vineyard Gazette on October 13, 2004, filed	09/23/2004
372	Motion for Leave of Court to File Answer to Amended Cross-Claim of Gossamer Wing Realty Trust, filed	10/05/2004
373	Defendants John F. Kennedy, Jr. and Caroline Kennedy's Motion for Leave to File Answer to Cross-Claim of Gossamer Wing Realty Trust to be heard on 11/09/2004	10/12/2004
374	Motion for Leave of Court to File Answer to Amended Cross-Claim of Gossamer Wing Realty Trust heard. No Action Taken. Suggestion of Death to be Filed. (Lombardi, J.)	11/09/2004
375	Motion for Substitution of Parties to be heard on 12/21/2004, filed	12/07/2004
376	Suggestion of Death, filed .	12/07/2004
377	Motion for Substitution of Parties Heard and Taken under advisement. (Lombardi, J.)	12/21/2004
378	Documents Concerning Ownership of Set-Off Lot No. 562, filed .	01/05/2005
379	Motion for Leave of Court to File Answer to Amended Cross-Claim of Gossamer Wing Realty Trust, allowed. (Lombardi, J.) .	01/05/2005
380	Motion for Substitution of Parties, allowed. (Lombardi, J.) .	01/05/2005
381	Answer to Amended Cross-Claim of Gossamer Wing Realty Trust, filed .	01/05/2005
382	Letter Sent to Parties Informing them that Justice Lombardi Allowed Motion for Leave of Court to File Answer to Amended Cross-Claim of Gossamer Wing Realty Trust filed by Cara J. Daniels, Esq. on October 4, 2004 and Allowed Motion for Substitution of Par ties filed by Cara J. Daniels, Esq. on December 6, 2004. .	01/05/2005
383	Answer of TOWN OF AQUINNAH to Amended Cross-Claim of Gossamer Wing Realty Trust, filed	01/26/2005
384	Motion for Leave of Court to ile Answer to Amended Cross-Claim of Gossamer Wing Realty Trust, filed	01/26/2005
385	CONV CASE OF FoxPro	01/28/2005

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386	Letter sent to Court by Attorney Benjamin L. Hall.	05/19/2005	
387	Letter sent to Attorney Benjamin Hall. (Copies sent to Attorneys to Nicholas J. Decoulos, Jennifer S. D. Roberts, H. Theodore Cohen, Cheryl Ann Blain, Leslie Ann Morse, Richard Erwin Burke, David Wayne Lima, and John Montgomery)	05/24/2005	LOMBARDI
388	Motion for Approval of Proposed Order regarding September 2004 hearing, filed.	05/31/2005	
389	Event Scheduled Event: Motion Date: 06/07/2005 Time: 10:00 am Result: Taken under advisement.	05/31/2005	
390	Event Resulted The following event: Motion scheduled for 06/07/2005 at 10:00 am has been resulted as follows: Result: Motion for Approval of Proposed Order Regarding September 2004 Hearing Argued and Taken under advisement.	06/07/2005	LOMBARDI
391	Motion for Leave of Court to ile Answer to Amended Cross-Claim of Gossamer Wing Realty Trust, Allowed.	06/10/2005	LOMBARDI
392	Order on Motion to Amend Answer, Counterclaim, and Cross-Claim of Hall and Orders on Related Documents, issued. (Copies Sent to Mary E. Pratt, Richard Sullivan, Richard E. Burke, Jr., Esq., H. Theodore Cohen, Esq., Duncan Kraemer, Esq., Ronald L. Monterosso, Esq., George B. Brush, Thomas Seeman, Benjamin L. Hall, Jr., Esq., Mr. & Mrs. Russell H. Smith, Thomas Margulis, David Wayne Lima, Esq., Thomas K. Zebrowski, Esq., Victor H. Polk, Jr., Esq., Monica L. Swanson, Esq., Ellen B. Kaplan, Esq., Sarah Saltonstall, Nicholas J. Decoulos, Esq., Hamilton Cammon, Jennifer S.D. Roberts, Esq., Leslie-Ann Morse, Esq., Mr. & Mrs. Jack Fruchtman, Jr., John H. Montgomery, Jr., Esq., Ronald H. Rappaport, Esq., Judith K. Kyman, Esq., Frank Cappezzera, Esq., Elizabeth B. Ornstein, Esq., Brian M. Hurley and Cara J. Daniels, Esq.)	06/10/2005	LOMBARDI
393	Rescript Received from the Appeals Court. The judgment is reversed, the order of December 22, 2003 is vacated, and the case is remanded to the Land Court for further proceedings consistent with the opinion of the Appeals Court.	12/29/2005	
394	Scheduled Event: Status Conference Date: 04/25/2006 Time: 3:00 pm Notice sent to Nicholas J. Decoulos, Esquire; Jennifer S.D. Roberts, Esquire; Brian M. Hurley, Esquire; H. Theodore Cohen, Esquire; Leslie-Ann Morse, Esquire; Thomas N. Margulis, Esquire; Ellen B. Kaplan, Esquire; Benjamin L. Hall Jr., Esquire; and File Copy. Also sent copies to Victor H. Polk, Esquire; David W. Lima, Esquire; Duncan Kramer, Esquire; Richard E. Burke, Jr., Esquire; and Pro Se's Richard Sullivan; Mary E. Pratt; Sarah Saltonstall; Mr. and Mrs. David H. Wice; Mr. and Mrs. Jack Fruchtman, Jr.; Hamilton Cammon; Mr. and Mrs. Russell H. Smith. Result: Status Conference held.	03/10/2006	

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395	Event Resulted The following event: Status Conference scheduled for 04/25/2006 at 3:00 pm has been resulted as follows: Result: Status Conference held. Vineyard Conservation Society, Inc's oral motion to bifurcate heard, argued, and taken under advisement. Timetable established as follows: plaintiff shall update the service list by May 15, 2006; parties shall agree upon the updated service list by May 19, 2006; Vineyard Conservation Society, Inc. shall file and serve written bifurcation motion by May 31, 2006; parties may submit briefs on issue of bifurcation by June 30, 2006. Thereafter, court will rule on the papers.	04/25/2006	LOMBARDI
396	Motion To Bifurcate Proceedings, filed.	05/31/2006	
397	Defendant Caroline Kennedy's Motion to Bifurcate, filed.	06/14/2006	
398	Defendants Jack and JoAnn Fruchtman Joiner Motion To Bifurcate, filed.	06/19/2006	
399	Town of Aquinnah's Joinder in Motion to Bifurcate Proceedings by Vineyard Conservation Society, Inc, filed.	06/23/2006	
400	Defendant Gossamer Wing Realty Trust and Baron Land Trust Opposition to the Motion of Defendant Vineyard Conservation Society To Bi-Furcate the Issue of Intent to Create an Easement by Necessity, filed.	06/30/2006	
401	David H. Wice and Betsy W. Wice's Joinder in Motion to Bifurcate Proceedings filed by Vineyard COnservation Society, Inc, filed.	06/30/2006	
402	Memorandum of Plaintiff, Maria A. Kitras, Trustee to Support Postponement of Bifurcation Order, filed.	07/03/2006	
403	Order Allowing Motion to Bifurcate, issued. (See Service List for Copies Sent)	08/14/2006	LOMBARDI
404	Letter From Nicholas J. Decoulos, Esq. on Behalf of Maria A. Kitras, Trustee, Requesting a PreTrial Conference Pursuant to Judge Lombardi's Order Allowing Motion to Bifurcate, filed.	08/21/2006	
405	Scheduled Event: Status Conference Notice sent to Nicholas J. Decoulos, Esquire; Jennifer S.D. Roberts, Esquire; Brian M. Hurley, Esquire; H. Theodore Cohen, Esquire; Leslie-Ann Morse, Esquire; Thomas N. Margulis, Esquire; Ellen B. Kaplan, Esquire; Benjamin L. Hall Jr., Esquire; and File Copy. Also sent copies to Victor H. Polk, Esquire; David W. Lima, Esquire; Duncan Kramer, Esquire; Richard E. Burke, Jr., Esquire; and Pro Se's Richard Sullivan; Mary E. Pratt; Sarah Saltonstall; Mr. and Mrs. David H. Wice; Mr. and Mrs. Jack Fruchtman, Jr.; Hamilton Cammon; Mr. and Mrs. Russell H. Smith. Date: 09/12/2006 Time: 10:00 am Result: Event Held	08/23/2006	
406	Defendant Gossamer Wing Realty Trust & Baron Land Trust Motion To Reconsider the Decision Allowing Bifurcation and Prioritizing the Determination on the Issue of Intent to Create an Easement, filed.	08/24/2006	

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407	Scheduled Event: Motion for Reconsideration Notice sent to Nicholas J. Decoulos, Esquire; Jennifer S.D. Roberts, Esquire; Brian M. Hurley, Esquire; H. Theodore Cohen, Esquire; Leslie-Ann Morse, Esquire; Thomas N. Margulis, Esquire; Ellen B. Kaplan, Esquire; Benjamin L. Hall Jr., Esquire; and File Copy. Also sent copies to Victor H. Polk, Esquire; David W. Lima, Esquire; Duncan Kramer, Esquire; Richard E. Burke, Jr., Esquire; and Pro Se's Richard Sullivan; Mary E. Pratt; Sarah Saltonstall; Mr. and Mrs. David H. Wice; Mr. and Mrs. Jack Fruchtman, Jr.; Hamilton Cammon; Mr. and Mrs. Russell H. Smith Date: 09/12/2006 Time: 10:00 am Result: Motion Denied	08/25/2006	
408	Order Scheduling Hearing on Motion for Reconsideration, issued. (Copies sent to Attorneys Nicholas Decoulos, Jennifer S.D. Roberts, Leslie-Ann Morse, Brian Michael Hurley, Victor Polk, Monica Swanson, Ellen Kaplan, Ronald H. Rappaport, David Wayne Lima, John H. Montgomery, Jr., Benjamin L. Hall, Jr., Richard E. Burke, Jr., H. Theodore Cohen, Cheryl A. Blame, Ira H. Zaleznik, Judith K. Wyman, Duncan Kraemer, Frank Cappezzera, Judith Wyman, Elizabeth Orenstein, Thomas Margulis, Ronald L. Monterosso, and Thomas Zebrowski; also sent to Pro se Defendants Susan and Russell Smith, Sarah Saltonstall, Joann and Jack Fruchtman, Peter Ochs, Richard Fabio, Hamilton Camman, Mary Elizabeth Pratt, Thomas Seeman, George B. Brush, Richard and Beverly, Sullivan, Steven Yaffe, Sharon Nowell, David H. Wice, and Betsy W. Wice)	08/25/2006	LOMBARDI
409	Motion To Dismiss Plaintiffs' Victoria Brown and Gardner Brown,filed.	08/31/2006	
410	Affidavit of Victoria Brown, filed.	08/31/2006	
411	Scheduled Event: Motion to Dismiss Notice was given to all parties by Theodore Cohen,Esq. Date: 09/12/2006 Time: 10:00 am Result: Taken under advisement.	08/31/2006	
412	Memorandum from Jack and JoAnn Fruchtman, Concerning the Sept.12,2006,PreTrial Status Conference,filed.	09/07/2006	
413	Defendant Gossamer Wing Realty Trust & Baron Land Trust Opposition To The Motion of Plaintiffs Victoria and Gardner Brown,Jr.,To Dismiss,filed.	09/11/2006	
414	Event Resulted The following event: Motion to Dismiss scheduled for 09/12/2006 at 10:00 am has been resulted as follows: Result: Motion to Dismiss Plaintiffs Victoria and Gardner Brown Held continued for Plaintiffs Brown To Give Notice To Martha's Vineyard Land Bank Commission.	09/12/2006	LOMBARDI
415	Event Resulted The following event: Motion scheduled for 09/12/2006 at 10:00 am has been resulted as follows: Result: Motion for Reconsideration of Bifurcation Held and Motion Denied	09/12/2006	LOMBARDI

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416	Event Resulted The following event: Status Conference scheduled for 09/12/2006 at 10:00 am has been resulted as follows: Result: Status Conference Held. Hearing on any Motion for Changes in Parties is Scheduled for October 12, 2006 at 2:00pm.	09/12/2006	LOMBARDI
417	Scheduled Event: Hearing on Motion for changes in any parties Notice sent to service list. Date: 10/12/2006 Time: 2:00 pm Result: Motion allowed	09/13/2006	
418	Motion to Dismiss Argued and Treated As A Motion To Substitute Martha's Vineyard Land Bank Commission,allowed. (See Service List)	09/15/2006	LOMBARDI
419	Suggestion of Death, Eleanor P. Heading,filed.	10/06/2006	
420	Motion To Dismiss, filed.	10/06/2006	
421	Defendant, Thomas Seeman's Motion To Dismiss or In the Alternative for Summary Judgement,filed.	10/11/2006	
422	Memorandum of Law In Support of Defendant, Thomas Seeman's Motion To Dismiss or In the Alternative for Summary Judgement,filed.	10/11/2006	
423	Scheduled Event: Motion to Dismiss Date: 10/12/2006 Time: 2:00 pm Result: Event Held	10/11/2006	
424	Defendant Gossamer Wing Realty Trust and Baron Land Trust Cross Motion For more Time to Prepare Opposition To The Motion of Defendant Vineyard Conservation Society To Dismiss As To Lots 1-188,filed.	10/12/2006	
425	Event Resulted The following event: Hearing on Motion for Changes in Parties scheduled for 10/12/2006 at 2:00 pm has been resulted as follows: Result: Motion argued and allowed.	10/12/2006	LOMBARDI
426	Event Resulted The following event: 3 Motions to Dismiss scheduled for 10/12/2006 at 2:00 pm has been resulted as follows: Result: Event Held. Defendant, Thomas Seeman's Motion To Dismiss or in the Alternative for Summary Judgment argued and continued. Defendant, Vineyard Conservation Society's Motion To Dismiss argued and continued. Defendant, Gossamer Wing Realty Trust & Baron Land Trust Cross Motion For More Time to Prepare Opposition to the Motion of Defendant Vineyard Conservation Society To Dismiss as to Lots 1 - 188, argued and continued. Paries have until Nov. 2, 2006 to file papers. Atty. Leslie Morse has until Nov. 10, 2006 to file papers. Parties have until Nov. 27, 2006 to file any opposition. Responses to opposition due by Dec. 1, 2006. Any motions will be heard on Dec. 4, 2006.	10/12/2006	LOMBARDI

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427	Scheduled Event: Plaintiffs Motion To Dismiss Certain Parties , Motion To Substitue & Add A Party. Notice sent to Nicholas Decoulos,Esq.,Jennifer Roberts,Esq.,Brian Hurley,Esq.,Cara Daniels,Leslie-Ann Morse,Esq.,David Lima,Esq.,Benjamin Hall,Esq.,Steven Saltonstall,Esq.,John Rappaport,Esq., and file copy. Date: 12/04/2006 Time: 2:00 pm Result: Event Held	10/19/2006	
428	Plaintiff's Motion To Dismiss Certain Parties,filed.	10/23/2006	
429	Memorandum To Support Plaintiff's Motion To Dismiss Certain Parties,filed.	10/23/2006	
430	Material Facts Contained In Memorandum of Law In Support of Defendant, Thomas Seeman's Motion To Dismiss or In The Alternative For Summary Judgment,filed.	10/25/2006	
431	Appendix To Memorandum of Law In Support of Defendant, Thomas Seeman's Motion To Dismiss or in The Alternative For Summary Judgement,filed.	10/25/2006	
432	Defendant Vineyard Conservation Society's Motion To Dismiss,filed.	11/03/2006	
433	Memorandum of Law In Support of Defendant Vineyard Conservation Society,Inc.'s Motion To Dismiss,filed.	11/03/2006	
434	Motion To Substitute, filed.	11/20/2006	
435	Motion To Add A Party,filed.	11/20/2006	
436	Plaintiff's Verifed Opposition To Defendant, Vineyward Conservation Society's Motion To Dismiss,filed.	11/27/2006	
437	Event Resulted The following event: Motion scheduled for 12/04/2006 at 2:00 pm has been resulted as follows: Result: Motion To Add Party Argued and Allowed. Motion To Substitute Charles D. Harding Jr. for Eleanor Harding Argued and Allowed.Defendnat Vineyard Conservation Society's Motion To Dismiss Argued and Taken Under Advisement. Defendant, Thomas Seeman's Motion To Dismiss Argued and Taken Under Advisement. Plaintiff's Motion To Dismiss Certain Parties Argued and Taken Under Advisement. Defendant, Gossamer Wing Realty Trust Motion for Leave To File Late Opposition Argued and Allowed.	12/04/2006	LOMBARDI
438	Defendant Gossamer Wing Realty Trust & Barons' Land Trust Cross Motion For Leave To File Late Opposition To Motion of Defendant Vineyard Conservation Society To Dismiss As To Lots 1-188 & Motion of Defendant Thomas Seeman To Dismiss,filed.	12/04/2006	
439	Parties hereby Stipulate and Agree To The Withdrawl, Without Prejudice, of Plaintiff's Motion To Dismiss Certain Parties and Defendant Vineyard Conservation Society, Inc.'s Motion To Dismiss dated November 1, 2006,filed.	12/11/2006	
440	Motion To Establish Summary Judgment Schedule,filed.	12/27/2006	
441	Scheduled Event: Motion To Establish Summary Judgment Schedule Notice was given to parties by Leslie-Ann Morse,Esq. Date: 01/04/2007 Time: 2:00 pm Result: Continued	12/28/2006	

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442	Event Resulted The following event: Motion scheduled for 01/04/2007 at 2:00 pm has been resulted as follows: Result: Continued	01/02/2007
443	Scheduled Event: Motion To Establish Summary Judgment Schedule Notice given to parties by Leslie Ann-Morse,Esq. Date: 01/16/2007 Time: 11:00 am Result: Event Held	01/02/2007
444	Event Resulted The following event: Motion scheduled for 01/16/2007 at 11:00 am has been resulted as follows: Result: Motion To Establish Summary Judgment Schedule, continued for hearing on Motion To Amend, scheduled for February 12, 2007 at 10:00am.	01/16/2007
445	Scheduled Event: Motion to Amend Notice was given to parties at hearing on January 16, 2007. Date: 02/12/2007 Time: 10:00 am Result: Case Taken Off of the List.	01/16/2007
446	Plaintiffs' Motion To Amend Complaint,filed.	01/24/2007
447	Event Resulted The following event: Motion to Amend scheduled for 02/12/2007 at 10:00 am has been resulted as follows: Result: Case Taken Off of the List.	01/24/2007
448	Scheduled Event: Motion to Amend Notice given to parties by Nick Dicoulous,Esq. Date: 02/15/2007 Time: 11:00 am Result: Event Held	01/24/2007
449	Barons' Land Trust Motion To Substitute or for Leave To Intervene To Defend The Claims Relating TO Lot 177,filed.	02/07/2007
450	Barons' Land Trust Memorandum In To Substitute or for Leave To Intervene To Defend The Claims Relating To Lot 177,filed.	02/07/2007
451	Scheduled Event: Barons' Land Trust Motion To Substitute or for Leave To Intervene To Defend The Claims Relating To Lot 177 Notice given to parties by Ben Hall,esq. Date: 02/15/2007 Time: 11:00 am Result: Event Held	02/09/2007
452	Opposition of Town of Aquinnah To Plaintiff's Motion To Amend Complaint,filed.	02/14/2007

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453	Event Resulted The following event: Motion to Amend scheduled for 02/15/2007 at 11:00 am has been resulted as follows: Result: Motion To Amend, argued and Taken under advisement.	02/15/2007	LOMBARDI
454	Event Resulted The following event: Motion scheduled for 02/15/2007 at 11:00 am has been resulted as follows: Result: Barons Land Trust Motion To Substitute or Leave To Intervene To Defend Claims Relating To Lot 177, argued and taken under advisement.	02/15/2007	LOMBARDI
455	Plaintiffs' Motion To Consolidate,filed.	03/09/2007	
456	Letter Sent to Attorneys Brian M. Hurley, and Nicholas J. Decoulos Regarding Motion for Substitution of Parties.	03/13/2007	LOMBARDI
457	Town of Aquinnah's Opposition To Motion To Consolidate,filed.	03/26/2007	
458	Commonwealth's Answer and Objections To The Plaintiffs' Third Amended Verified COmplaint,filed.	03/28/2007	
459	Third Amended Verified Complaint, March 12, 2007,filed.	03/29/2007	
460	Order on Motion to Amend Seeking to File Third Amended Verified Complaint, and Order Declaring Moot Baron's Land Trust Motion to Substitute or for Leave to Intervene, issued. (Copies sent to Attorneys John M. Donnelly, Nicholas Decoulos, Jennifer S.D. Roberts, Leslie-Ann Morse, Brian Michael Hurley, Victor Polk, Monica Swanson, Ellen Kaplan, Ronald H. Rappaport, David Wayne Lima, John H. Montgomery, Jr., Benjamin L. Hall, Jr., Richard E. Burke, Jr., H. Theodore Cohen, Cheryl A. Blame, Ira H. Zaleznik, Judith K. Wyman, Duncan Kraemer, Frank Cappezzera, Elizabeth Orenstein, Thomas Margulis, Ronald L. Monterosso, and Thomas Zebrowski; also sent to Pro se Defendants Susan and Russell Smith, Sarah Saltonstall, Joann and Jack Fruchtman, Peter Ochs, Richard Fabio, Hamilton Camman, Mary Elizabeth Pratt, Thomas Seeman, George B. Brush, Richard and Beverly, Sullivan, Steven Yaffe, Sharon Nowell, David H. Wice, Betsy W. Wice and Martha's Vineyard Land Bank Commission)	03/29/2007	LOMBARDI
461	Commonwealth's Opposition To Motion To Consolidate,filed.	03/29/2007	
462	Vineyard Conservation Society,Inc.'s Opposition To Motion To Consolidate,filed.	03/30/2007	
463	Order Denying Motion to Consolidate, issued. (Copies sent to Attorneys Nicolas Decoulos, Robert Rappaport, Brian Michael Hurley, Jennifer S. D. Roberts, Leslie-Ann Morse, Benjamin L. Hall, Jr., John M. Donnelly, and Barry White; also sent to Pro se Defendants, Jeffrey Madison, Charles E. Derby, Joann Fruchtman, Jack Fruchtman, Jr., George B. Brush, David Wice, Betty W. Wice, Martha's Vineyard Land Bank Commission, Barbara Vanderhoop, Peter Ochs, Susan Smith, and Russell Smith)	04/02/2007	LOMBARDI
464	Order Imposing Stay, issued. (Copies sent to Attorneys Nicolas Decoulos, Robert Rappaport, Brian Michael Hurley, Jennifer S. D. Roberts, Leslie-Ann Morse, Benjamin L. Hall, Jr., John M. Donnelly, and Barry White; also sent to Pro se Defendants, Jeffrey Madison, Charles E. Derby, Joann Fruchtman, Jack Fruchtman, Jr., George B. Brush, David Wice, Betty W. Wice, Martha's Vineyard Land Bank Commission, Barbara Vanderhoop, Peter Ochs, Susan Smith, and Russell Smith)	04/03/2007	LOMBARDI

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465	Third Amended Verified Complaint, March 12, 2007, As Modified By Order Dated March 29, 2007,filed.	04/04/2007
466	Town of Aquinnah's Answer To Third Amended Verified Complaint, March 12, 2007, as Modified By Order Dated March 29, 2007,filed.	05/01/2007
467	Answer of Caroline Kennedy and Caroline Kennedy and Edwin Schlossberg,Guardians, To Plaintiffs' Amended Verified Complaint,filed.	05/07/2007
468	Answer of Defendants JoAnn and Jack Fruchtman, Jr., to Plaintiffs' Third Amended Verified Complaint, filed.	05/14/2007
469	Answer of Defendant Vineyard Conservation Society, Inc. to Third Amended Verified Complaint, March 12, 2007 as Modified by Order Dated MArch 29, 2007, filed.	05/14/2007
470	Answer of David H. Wice and Betsy W. Wice to the Third Amended Complaint, March 12, 2007, as Modified By Order of the Court Dated March 29, 2007, filed.	05/18/2007
471	Plaintiffs' Request for Default and Affidavit, filed.	06/18/2007
472	Plaintiffs' Motion for Status Conference, filed.	06/18/2007
473	Baron Land Trust Answer, Counterclaims and Cross-Claims to the Third Amended Complaint, March 12, 2007, As Modified by Order Dated March 29, 2007, filed.	06/19/2007
474	Gossamer Wing Realty Trust Answer, Counterclaims and Cross-Claims to the Third Amended Complaint, March 12, 2007, As Modified by Order Dated March 29, 2007, filed.	06/19/2007
475	Appearance of Diane C Tillotson Esq. for The Martha's Vineyard Land Bank.	06/20/2007
476	Defendant's Opposition to Motion for Entry of Default and Request to Submit Responsive pleading, filed.	06/20/2007
477	Defendant Martha's Vineyard Land Bank's Motion for Additional Time to File Responsive Pleading, filed.	06/20/2007
478	Plaintiffs' Amended Request for Default and Affidavit, filed.	06/25/2007
479	Commonwealth's Answer and Objections to Plaintiffs' Third Amended Verified Complaint as Modified by Order Dated March 29, 2007, filed.	06/25/2007
480	Commonwealth's Opposition to Plainitiffs' Amended Request for Default and Affidavit, filed.	06/25/2007
481	Answer of Plaintiffs, Maria A. Kitras as Trustee of the Bear Realty Trust, Maria A. Kitras and James J. Decoulos as Trustees of the Bear II Realty Trust, and Maria A. Kitras and James J. Decoulos as Trustees of the Gorda Realty Trust to Counterclaim of Brian M. Hall as he is Trustee of Baron Land Trust, filed.	06/26/2007
482	Answer of Plaintiffs, Maria A. Kitras as Trustee of the Bear Realty Trust, Maria A. Kitras and James J. Decoulos as Trustees of the Bear II Realty Trust, and Maria A. Kitras and James J. Decoulos as Trustees of the Gorda Realty Trust to Counterclaim of Benjamin L. Hall as he is Trustee of Gossamer Wing Realty Trust, filed.	06/26/2007
483	Plaintiff's Request for Status Conference to be held on July 10, 2007, filed.	07/02/2007

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484	Certified mail notice sent to Vineyard Conservation Society, Inc.,, David Wice, Betsy Wice, Susan Smith, Russell Smith, Peter Ochs, Moshup Trail II Limited Partnership, The Martha's Vineyard Land Bank, Jeffrey L Madison Trustee of Tacknash Realty Trust, Brian M. Hall Trustee of Barons' Land Trust, Benjamin L. Hall Trustee(s) of Gossamer Wing Realty Trust, Joanne Fruchtman, Jack Fruchtman, Charles E Derby, Geroge B. Brush Trustee(s) of Toad Rock Realty Trust, Commonwealth of Massachusetts, Town of Gay Head successful.	07/02/2007
485	Defendant Vineyard Conservation Society, Inc's Motion to Dismiss Cross-Claims of Gossamer Wing Realty Trust and Barron Land Trust, filed.	07/02/2007
486	Memorandum in Support of Defendant Vineyard Conservation Society, Inc's Motion to Dismiss Cross-Claims of Gossamer Wing Realty Trust and Barron Land Trust, filed.	07/02/2007
487	Scheduled Event: Status Conference Date: 07/10/2007 Time: 10:00 am Notice sent to Jennifer Roberts, Esq., David Wice, Betsy Wice, Brian Michael Hurley, Esq., Cara Daniels, Esq., Leslie-Ann Morse, Esq., Benjamin L. Hall, Esq., John M. Donnelly, Esq., Diane C. Tillotson, Esq., Barbara Vanderhoop Executrix of the Estate of Leonard Vanderhoop. Result: Status Conference held.	07/03/2007
488	Defendant Town of Aquinnah's Motion to Dismiss Crossclaims of Gossamer Wing Realty Trust and Barron Land Trust, filed.	07/03/2007
489	Defendant Town of Aquinnah's Memorandum in Support of Motion to Dismiss Crossclaims of Gossamer Wing Realty Trust and Barron Land Trust, filed.	07/03/2007
490	Defendant Jeffrey L Madison Trustee of Tacknash Realty Trust, Moshup Trail II Limited Partnership, Peter Ochs, Susan Smith, Russell Smith, Geroge B. Brush Trustee(s) of Toad Rock Realty Trust, Charles E Derby defaulted pursuant to Mass. R.Civ. P. 55(a). (Patterson, Rec.)	07/03/2007
491	Scheduled Event: Defendant Vineyard Conservation Society, Inc's Motion to Dismiss Cross-Claims of Gossamer Wing Realty Trust and Barron Land Trust Date: 08/30/2007 Time: 11:30 am Notice sent to Nicholas J Decoulos, Esq., Ronald Rappaport, Esq., Jennifer S D Roberts, Esq., David Wice, Betsy Wice, Brian Michael Hurley, Esq., Leslie-Ann Morse, Esq., Joanne Fruchtman, Jack Fruchtman, Ellen B Kaplan, Esq., Benjamin L Hall, Jr., Esq., Diane C Tillotson, Esq., John M. Donnelly, Esq. Result: Taken under advisement.	07/06/2007
492	Scheduled Event: Defendant Town of Aquinnah's Motion to Dismiss Crossclaims of Gossamer Wing Realty Trust and Barron Land Trust Date: 08/30/2007 Time: 11:30 am Notice sent to Nicholas J Decoulos, Esq., Ronald Rappaport, Esq., Jennifer S D Roberts, Esq., David Wice, Betsy Wice, Brian Michael Hurley, Esq., Leslie-Ann Morse, Esq., Joanne Fruchtman, Jack Fruchtman, Ellen B Kaplan, Esq., Benjamin L Hall, Jr., Esq., Diane C Tillotson, Esq., John M. Donnelly, Esq. Result: Taken under advisement.	07/09/2007

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493	Motion of Caroline Kennedy and Edwin Schlossberg to dismiss Crossclaims of Gossamer Wing Realty Trust and Baron Land Trust filed.	07/09/2007	
494	Memorandum of Law in Support of Motion of Caroline Kennedy and Edwin Schlossberg to Dismiss Crossclaims of Gossamer Wing Realty Trust and Baron Land Trust filed.	07/09/2007	
495	Event Resulted The following event: Status Conference scheduled for 07/10/2007 at 10:00 am has been resulted as follows: Result: Status Conference held. Attorneys Decoulos, Daniels, Tillotson, Donnelly, Morse, Roberts, Hall and David Wice Participated. Defendant, Martha's Vineyard Land Bank's Motion for Additinal Time to File Response Heard. Order to Issue. Presumptive Date for Conclusion of Discovery is September 30, 2007. Status Conference to be Scheduled for October 12, 2007.	07/10/2007	LOMBARDI
496	Scheduled Event: Status Conference Date: 10/12/2007 Time: 11:00 am (Copies Sent to Attorneys Nicholas Decoulos, Jennifer S.D. Roberts, Leslie-Ann Morse, Brian Michael Hurley, Ronald Rappaport, Benjamin L. Hall, Jr., John Donnelly, Jack Fruchtman, Pro Se, Joann Fruchtman, Pro Se, David H. Wice, Pro Se, Betsy W. Wice, Pro Se, Martha's Vineyard Land Bank Commission, Pro Se and Barbara Vanderhoop, Executrix of the Estate of Leonard F. Vanderhoop, Pro Se) Result: Continued	07/11/2007	
497	Scheduled Event: Motion to Dismiss Date: 08/30/2007 Time: 11:30 am	07/11/2007	
498	Scheduled Event: Motion to Dismiss Date: 08/30/2007 Time: 11:30 am Result: Taken under advisement.	07/11/2007	
499	Order Pursuant to Land Court Rule 6, issued. (Copies Sent to Attorneys Nicholas Decoulos, Jennifer S.D. Roberts, Leslie-Ann Morse, Brian Michael Hurley, Ronald Rappaport, Benjamin L. Hall, Jr., John Donnelly, Jack Fruchtman, Pro Se, Joann Fruchtman, Pro Se, David H. Wice, Pro Se, Betsy W. Wice, Pro Se, Martha's Vineyard Land Bank Commission, Pro Se and Barbara Vanderhoop, Executrix of the Estate of Leonard F. Vanderhoop, Pro Se)	07/11/2007	LOMBARDI
500	Gossamer Wing Realty Trust & Barons' Land Trust Memorandum in Opposition to the Motion of Plaintiff, Martha's Vineyard Land Bank for Additional Time to File a Responsive Pleading, and Request to See if Sanctions are Warranted, filed.	07/20/2007	

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501	Order Allowing Motion for Additional Time to File Responsive Pleading, issued. (Copies Sent to Attorneys Nicholas Decoulos, Jennifer S.D. Roberts, Leslie-Ann Morse, Brian Michael Hurley, Ronald Rappaport, Benjamin L. Hall, Jr., John Donnelly,Diane C. Tillotson, Jack Fruchtman, Pro Se, Joann Fruchtman, Pro Se, David H. Wice, Pro Se, Betsy W. Wice, Pro Se, Martha's Vineyard Land Bank Commission, Pro Se and Barbara Vanderhoop, Executrix of the Estate of Leonard F. Vanderhoop, Pro Se)	07/24/2007	LOMBARDI
502	Answer of the Martha's Vineyard Land Bank to the Third Amended Verified Complaint, March 12, 2007 as Modified by Order dated March 29, 2007, filed.	08/03/2007	
503	Notice of Special Appearance, filed (as to the August 30, 2007 hearing).	08/06/2007	
504	Scheduled Event: Defendant Martha's Vineyard Land Banks's Joinder in Defendant Vineyard Conservation Society INC's Motion to Dismiss Cross Claim of Gossamer Wing Realty Trust and Baron Land Trust, filed Date: 08/30/2007 Time: 11:30 A/M Notice sent to Atty's Morse, Rappaport,Donnelly, Hall, White, Hurley, and Roberts. Notice also sent to Mr. and Mrs. Wice, Ms. Vanderhoop,Mr. and Mrs. Smith, Mr. Ochs,Mr. Madison, Mr. and Mrs. Fruchtman, Mr. Derby, Mr. Brush and Nicholas Decoulos. Result: Event not held.	08/10/2007	
505	Table of Contents of Documents, filed.	08/20/2007	
506	Letter from (Pro-se) Mr. and Mrs. Jack Fruchtman, Jr., filed.	08/23/2007	
507	Defendant VIneyard Conservation Society, INC's Motion to Extend Discovery Deadline and Date for Status Conference Joined by the Town of Aquinnah, the Kennedy Defendants and the Martha's Vineyard Land Bank, filed.	08/27/2007	
508	Scheduled Event: Motion to Extend Discovery Deadline and Date for Status Conference Joined by the Town of Aquinnah, the Kennedy Defendants and the Martha's Vineyard Date: 09/20/2007 Time: 10:00 A/M Result: Taken under advisement.	08/28/2007	
509	Event Resulted The following event: Motion to Dismiss scheduled for 08/30/2007 at 11:30 A/M has been resulted as follows: Result: Caroline Kennedy and Edwin Schlossberg Motion to DismissCross-claims argued and Taken under advisement. Parties have two weeks to respond to opposition.	08/30/2007	LOMBARDI
510	Event Resulted The following event: Motion to Extend Discovery Deadline and Date for Status Conference Joined by the Town of Aquinnah, the Kennedy Defendants and the Martha's Vineyard scheduled for 08/30/2007 at 11:30 A/M has been resulted as follows: Result: Event not held. Motion will be heard September 20, 2007.	08/30/2007	LOMBARDI

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511	Event Resulted The following event: Motion to Dismiss scheduled for 08/30/2007 at 11:30 A/M has been resulted as follows: Result: Vineyard Conservation Society, Inc.'s Motion To Dismiss Cross-Claims argued and Taken under advisement. Parties have two weeks to respond to opposition.	08/30/2007	LOMBARDI
512	Event Resulted The following event: Motion to Dismiss scheduled for 08/30/2007 at 11:30 A/M has been resulted as follows: Result: Town of Aquinnah's Motion to Dismiss Cross-claims argued and Taken under advisement. Parties have two weeks to respond to opposition.	08/30/2007	LOMBARDI
513	Gossamer Wing Realty Trust and Barons' Land Trust Memorandum In Opposition To The Motions of Defendants Vineyard Conservation Society and Town of Aquinnah and Others To Dismiss Cross Claims and Counterclaims and Cross Motion For Leave To Amend the Pleadings, filed in Court.	08/30/2007	
514	Supplement to Defendant Vineyard Conservation Society, INC's Motion to Dismiss Cross-Claims of Gossamer Wing Realty Trust and Baron Land Trust, filed.	09/07/2007	
515	Joinder by JoAnn and Jack Fruchtman (Jr.), pro se, to the Motion to Extend the Discovery Deadline and Date of Status Conference filed by the Vineyard Conservaton Society, the Town of Aquinnah, the Kennedy Defendants, and the Martha's Vineyard Land Bank, filed.	09/12/2007	
516	Order Allowing Motions to Dismiss Cross-Claims, issued. (Copies Sent to Attorneys Nicholas Decoulos, Jennfier S. D. Roberts, Leslie-Ann Morse, Brian Michael Hurley, Ronald H. Rappaport, Benjamin L. Hall, Jr., Diane C. Tillotson, and John M. Donnelly; also Sent to Pro Se Parties Joann Fruchtman, Jack Fruchtman, Jr., David H. Wice, Betsy Wice, and Barbara Vanderhoop)	09/14/2007	LOMBARDI
517	Event Resulted The following event: Motion scheduled for 09/20/2007 at 10:00 A/M has been resulted as follows: Result: Taken under advisement. Atty's Roberts, Daniels, DeCoulous, Morse, Hall via phone, Donnelly and Rappaport appeared.	09/20/2007	
518	Order Allowing Motion to Extend Discovery Deadline and Date of Status Conferece, issued. (Copies Sent to Attorneys Nicolas J. Decoulos, Leslie-Ann Morse, Benjamin L. Hall, Jr., Diane C. Tilloston, Ronald Rappaport, John M. Donnelly, Brian Michael Hurley, and Jennifer S.D. Roberts; also Sent to Pro Se Defendants, JoAnn Fruchtman, Jack Fruchtman, Jr., David H. Wice, Betsy W. Wice, and Barbara Vanderhoop)	09/21/2007	LOMBARDI
519	Event Resulted The following event: Status Conference scheduled for 10/12/2007 at 11:00 A/M has been resulted as follows: Result: Continued	09/21/2007	
520	Motion of Plaintiff, Maria A. Kitras as Trustee of the Bear Realty Trust, to Amend Third Amended Complaint, filed.	09/28/2007	

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521	Scheduled Event: Motion Date: 10/12/2007 Time: 10:00 A/M Result: Taken under advisement.	10/01/2007	
522	Opposition of the Town of Aquinnah to Motion of Plaintiff, Maria A. Kitras, as Trustee of the Bear Realty Trust, to Amend Third Amended Complaint, filed.	10/11/2007	
523	Defendant Vineyard Conservation Society, INC's Opposition to Motion of Plaintiff, Maria A. Kitras as Trustee of the Bear Realty Trust, to Amend Third Amended Complaint, filed.	10/11/2007	
524	Defendant Martha's Vineyard Land Bank Bank's Opposition to Motion of Plaintiff Maria A. Kitras as Trustee of the Bear Realty Trust to Amend Third Amended Complaint, filed.	10/12/2007	
525	Affidavit of James J. Decoulos to Support Plaintiff's Motion to Amend Third Amended Complaint, filed.	10/12/2007	
526	Event Resulted The following event: Motion to Amend Third Amended Complaint scheduled for 10/12/2007 at 10:00 A/M has been resulted as follows: Result: Taken under advisement. Atty's Morse,Maldonado,Daniels,Roberts,Donnelly, and Decoulos appeared. Parties have two weeks to file Response to Affidavit filed by Mr. Decoulos.	10/12/2007	
527	Opposition of Caroline Kennedy and Edwin Schlossberg to the Motion of Plaintiff Maria A. Kitras, Trustee of the Bear Realty Trust, to Amend the Third Amended Complaint, filed.	10/12/2007	
528	Joinder by Joann and Jack Fruchtman (Jr.), pro se to the Opposition to the Motion of Plaintiff, Maria A. Kitras, as Trustee of the Bear Realty trust to Amend the Third Amended Verified Complaint filed by the Vineyard Conservation Society, the Town of Aquinnah, the Kennedy Defendants, and the Martha's Vineyard Land Bank, filed.	10/17/2007	
529	Defendant Vineyard Conservation Society, INC's Supplemental Opposition to Motion of Plaintiff, Maria A. Kitras as Trustee of the Bear Realty Trust, to Amend Third Amended Complaint, filed.	10/25/2007	
530	Supplemental Opposition of Caroline Kennedy and Edwin Schlossberg to the Motion of Plaintiff Maria A. Kitras, Trustee of the Bear Realty Trust, to Amend the Third Amended Complaint, filed.	10/25/2007	
531	Joinder by JoAnn and Jack Fruchtman (Jr.), pro se. Supplemental Opposition of JoAnn and Jack Fruchtman (Jr.) to the Motion of the Plaintiff, Maria A. Kitras, as Trustee of the Bear Realty Trust, to Amend the Third Amended Verified Complaint. The Joinder is to the October 24, 2007, Motion in Opposition filed by the Vineyard Conservation Society, filed.	10/31/2007	
532	Order Denying Motion to Amend Third Amended Complaint, issued. (Copies Sent to Attorneys Nicolas J. Decoulos, Leslie-Ann Morse, Benjamin L. Hall, Jr., Diane C. Tillotson, Ronald Rappaport, John M. Donnelly, Brian Michael Hurley, and Jennifer S.D. Roberts; also Sent to Pro Se Defendants, JoAnn Fruchtman, Jack Fruchtman, Jr., David H. Wice, Betsy W. Wice, and Barbara Vanderhoop)	11/09/2007	LOMBARDI

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533	Order on Further Amendments to Pleadings and Order Correcting Order of November 9, 2007, issued. (Copies Sent to Attorneys Nicolas J. Decoulos, Leslie-Ann Morse, Benjamin L. Hall, Jr., Diane C. Tilloston, Ronald Rappaport, John M. Donnelly, Brian Michael Hurley, and Jennifer S.D. Roberts; also Sent to Pro Se Defendants, JoAnn Fruchtman, Jack Fruchtman, Jr., David H. Wice, Betsy W. Wice, and Barbara Vanderhoop)	11/13/2007	LOMBARDI
534	Notice of Appeal of Plaintiff, Maria A. Kitras as Trustee of the Bear Realty Trust,filed.	11/19/2007	
535	Additional Joint Motion of Barons' Land Trust and Gossamer Wing Realty Trust to Amend Answer ,Cross-Claims and Counterclaims,filed.	12/07/2007	
536	Gossamer Wing Realty Trust & Barons' Land Trust Memorandum in Support of the Additional Motion for Leave to Amend the Pleadings,filed.	12/07/2007	
537	Motion of Plaintiffs, Maria A. Kitras as Trustee of the Bear Realty Trust, Maria A. Kitras and James J. Decoulos as Trustees of the Bear II Realty Trust,and Maria A. Kitras and James J. Decoulos as Trustees of the Gorda Realty Trust to Amend Third Amended Complaint,filed.	12/07/2007	
538	Memorandum to Support Motion of Plaintiffs, Maria A. Kitras as Trustee of the Bear Realty Trust, Maria A. Kitras and James J. Decoulos as Trustees of the Bear II Realty Trust,and Maria A. Kitras and James J. Decoulos as Trustees of the Gorda Realty Trust to Amend Thid Amended Complaint,filed.	12/07/2007	
539	Defendant Vineyard Conservation Society, INC's Opposition to Motion of Plaintiffs, Maria A. Kitras as Trustee of the Bear Realty Trust, Maria A. Kitras and James J. Decoulos as Trustees of the Bear II Realty Trust,and Maria A. Kitras and James J. Decoulos as Trustees of the Gorda Realty Trust to Amend Third Amended Complaint,filed.	12/19/2007	
540	Defendant Town of Aquinnah's Opposition to Additional Joint Motion of Baron's Land Trust and Gossamer Wing Realty Trust to Amend Answer,Crossclaims, and Counterclaims,filed.	12/20/2007	
541	Defendant Town of Aquinnah's Opposition to Motion of Plaintiff's, MAria A. Kitras as Trustee of the Bear Realty Trust, Maria A. Kitras and James J. Decoulos as Trustees of the Bear II Realty Trust, and Maria A. kitras and James J. Decoulos as Trustees of the Gorda Realty Trust to Amend Third Amended Complaint,filed.	12/20/2007	
542	Opposition of Caroline Kennedy and Edwin Schlossberg to the Motion of the Plainitff's Maria A. Kitras, Trustee of the Bear Realty Trust, Maria A. Kitras and James J. Decoulos, Trustee of the Bear II Realty Trust, and Maria A. Kitras and James J. Decoulos, Trustees of the Gorda Realty Trust to Amend the Third Amended Complaint,filed.	12/21/2007	
543	Joinder by JoAnn and Jack Fruchtman (Jr.), pro se. in Opposition to the Motion by the Bear Realty, Bear II Realty, and Gorda Realty Trusts to Amend the Third Amended Verified Complaint. The Joinder is to the Motion in Opposition filed by the Vineyard Conservation Society on December 17, 2007,filed.	12/24/2007	
544	Commonwealth's Opposition to Motion of Plaintiff, Maria A. Kitras as Trustee of the Bear Realty Trust to Amend Third Amended Complaint,filed.	12/24/2007	
545	Defendant Martha's Vineyard Land Bank's Opposition to Motion of Plaintiff, Maria A. Kitras as Trustee of the Bear Realty Trust to Amend Third Amended Complaint,filed.	12/24/2007	
546	Notice of Assembly of Record on Appeal sent to all counsel of record.	01/10/2008	
547	Notice of Assembly of Record on Appeal sent to the Clerk of the Appeals Court.	01/10/2008	

548	Letter received from Mr. Decoulos, indicating that, "due to the interlocutory nature of the Order on Appeal, assembly of the record is premature at this time."	01/25/2008	
549	Order Denying Motions to Amend, issued. (Copies Sent to Attorneys Nicolas J. Decoulos, Leslie-Ann Morse, Benjamin L. Hall, Jr., Diane C. Tillotson, Ronald Rappaport, John M. Donnelly, Brian Michael Hurley, and Jennifer S.D. Roberts; also Sent to Pro Se Defendants, JoAnn Fruchtman, Jack Fruchtman, Jr., David H. Wice, Betsy W. Wice, and Barbara Vanderhoop)	02/04/2008	LOMBARDI
550	Notice of Interlocutory Appeal of Plaintiffs, Maria A. Kitras as Trustee of the Bear Realty Trust, Maria A. Kitras and James J. Decoulos as Trustees of Bear II Realty Trust, and Maria A.Kitras and James J. Decoulos as Trustees of Gorda Realty Trust,filed.	02/11/2008	
551	Notice of Appeal of Gossamer Wing Realty Trust,filed.	03/05/2008	
552	Notice of Appeal of Barons' Land Trust,filed.	03/05/2008	
553	Motion for Default Judgment,filed.	03/05/2008	
554	Letter from Benjamin L. Hall, Jr., Esq., Notifying Court of his Selection of a Transcriber for Hearing Notes of October 12, 2007, filed.	05/08/2008	
555	Defendant Vineyard Conservation Society, Inc.'s Motion to Strike Interlocutory Notices of Appeal by Plaintiff Maria A. Kitras, Trustee of Bear Realty Trust, Maria A. Kitras, and James J. Decoulos, Trustees of Bear II Realty Trust and of Gorda Realty Trust, Brian M. Hall, Trustee of Barons' Land Trust and Benjamin L. Hall, Jr., Trustee of Gossamer Wing Realty Trust, filed.	05/14/2008	
556	Memorandum of Law in Support of Defendant Vineyard Conservation Society, Inc.'s Motion to Strike Interlocutory Notices of Appeal by Plaintiff Maria A. Kitras, Trustee of Bear Realty Trust, Maria A. Kitras, and James J. Decoulos, Trustees of Bear II Realty Trust and of Gorda Realty Trust, Brian M. Hall, Trustee of Barons' Land Trust and Benjamin L. Hall, Jr., Trustee of Gossamer Wing Realty Trust	05/14/2008	
557	Notice of Motion for June 13, 2008 at 10:00 a.m., filed.	05/14/2008	
558	Scheduled Event: Motion Date: 06/13/2008 Time: 10:00 AM Result: Taken under advisement.	05/14/2008	
559	Letter from Attorney Benjamin L. Hall, Jr., Reporting he will use Ms. Linda Wesson to Transcribe Hearings, filed.	05/23/2008	
560	Memorandum in Support of Defendant Vineyard Conservation Society, INC.'s Motion to Strike Interlocutory Notices of Appeal,filed.	05/27/2008	
561	Gossamer Wing Realty Trust & Barons' Land Trust Opposition to the Motion of Defendant Vineyard Conservation Society, INC.(Joined by other Defendants to Strike the Notices of Appeal filed Respectively by Gossamer Wing Realty Tust & Barons' Land Trust & Cross Motion to Correct the Order dated September 14, 2007 to now Order Amendment of the Cross-Claims or Allow the Prior Cross Motion of Gossamer Wing Realty Trust & Baronns' Land Trust filed August 30, 2007 to Amend their Answers, Counterclaims and Cross-Claims, or, Alternatively, to Order a Separate Judgment Under Rule 54(b) Finally Dismissing the Cross-Claims of Gossamer Wing Realty Trust & Barons' Land Trust Pursuant to the September 14, 2007 Order,filed.	06/11/2008	

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562	Gossamer Wing Realty Trust & Barons' Land Trust Memorandum in Opposition to the Motion of Defendant Vineyard Conservation Society, INC. (Joined by other Defendants to Strike the Notices of Appeal filed Respectively by Gossamer Wing Realty Tust & Barons' Land Trust,filed.	06/11/2008	
563	Gossamer Wing Realty Trust & Barons' Land Trust Memorandum in Support ogf their Cross-Motion to A. Correct the Order dated September 14, 2007 to Now Order. i. Amendment of the Cross-Claims or ii. Allow the Gossamer Wing Realty Trust & Barons' Land Trust Cross Motions to Amend their Answers,Counterclaims and Cross-Claims filed August 30, 2007. and/or, Alternatively B. To order a Separate Judgment under Rule 54(b) Dismissing the Cross-Claims of Gossamer Wing Realty Trust & Barons' LAnd Trust Pursuant to Said Order,filed.	06/11/2008	
564	Event Resulted The following event: Motion scheduled for 06/13/2008 10:00 AM has been resulted as follows: Result: Taken under advisement. Atty's Roberts, Donnelly and Tillotson appeared. Atty's. Rappaport Hall and Pro-Se David Wice participated via phone.	06/13/2008	LOMBARDI
565	Event Resulted The following event: Motion scheduled for 06/13/2008 10:00 AM has been resulted as follows: Cross Motion to Correct the Order dated September 14, 2007 to now Order Amendment of the Cross-Claims or Allow the Prior Cross Motion of Gossamer Wing Realty Trust & Baronns' Land Trust filed August 30, 2007 to Amend their Answers, Counterclaims and Cross-Claims, or, Alternatively, to Order a Separate Judgment Under Rule 54(b) Finally Dismissing the Cross-Claims of Gossamer Wing Realty Trust & Barons' Land Trust Pursuant to the September 14, 2007 Order taken under Advisement. Atty's Roberts, Donnelly and Tillotson appeared. Atty's. Rappaport Hall and Pro-Se David Wice participated via phone.	06/13/2008	LOMBARDI
566	Defendant Vineyard Conservation Society, Inc.'s Motion to Strike Interlocutory Notices of Appeal by Plaintiff, Maria A. Kitras, Trustee of Bear Realty Trust, Maria A. Kitras and James J. Decoulos, Trustees of Bear II Realty Trust and of Gorda Realty Trust, Brian M. Hall, Trustee of Barons' Land Trust, and Benjamin L. Hall, Jr., Trustee of Gossamer Wing Realty Trust, DENIED.	06/13/2008	LOMBARDI
567	Cross-Motion to Correct the Order Dated September 14, 2007 to now Order Amendment of the Cross-Claims or Allow the Prior Cross-Motion of Gossamer Wing Realty Trust & Barons' Land Trust Filed August 30, 2007 to Amend their Answers, Counterclaims, and Cross-Claims, or Alternatively, to Order a Separate Judgment Under Rule 54(b) Finally Dismissing the Cross-Claims of Gossamer Wing Realty Trust & Barons' Land Trust Pursuant to the September 14, 2007 Order, DENIED.	06/13/2008	LOMBARDI
568	Notice of June 13, 2008 Docket Entries Denying: 1) Motion to Strike Interlocutory Notices of Appeal, and 2) Cross-Motion to Correct the Order, Sent to Attorneys Nicholas J. Decoulos, Jennifer S.D. Roberts, Leslie-Ann Morse, Brian Michael Hurley, Ronald Rappaport, Benjamin L. Hall, Jr., Diane C. Tillotson, and John M. Donnelly; also sent to Joann Fruchtman, Jack Fruchtman, Jr., David H. Wice, Betsy W. Wice and Barbara Vanderhoop.	06/13/2008	LOMBARDI

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569	Notice of Appeal by Benjamin L. Hall Trustee(s) of Gossamer Wing Realty Trust to the Appeals Court filed.	07/11/2008	
570	Notice of Appeal by Brian M. Hall Trustee of Barons' Land Trust to the Appeals Court filed.	07/11/2008	
571	Scheduled Event: Status Conference Date: 09/09/2008 Time: 10:00 AM Result: Status Conference held.	07/16/2008	TROMBLY
572	(Plaintiffs') Documents Relating to the Division of Common Lands in the Town of Aquinnah, Formerly Gay Head, filed	07/29/2008	
573	Notice of selection of transcriber	08/13/2008	
574	Request of Plaintiffs, Maria A. Kitras as Trustee of the Bear Realty Trust, Maria A. Kitras and James J. Decoulos as Trustees of the Bear II Realty Trust, and Maria A. Kitras and James J. Decoulos as Trustees of the Gorda Realty Trust, to Enter on Land of the Defendants, filed.	08/14/2008	
575	Letter of Jo Ann and Jack Fruchtman Jr., re September 9, 2008 Status Conference, filed	08/19/2008	
576	Commonwealth's Response to the Plaintiffs' Request to Enter on Land of the Defendants, filed	08/21/2008	
577	Denial by JoAnn and Jack Fruchtman (Jr.), of the Request, Dated August 12, 2008, to Enter on Land of the Defendants JoAnn and Jack Fruchtman Filed by Plaintiffs Maria A. Kitras as Trustee of the Bear Realty Trust, Maria A. Kitras and James J. Decoulos as Trustees of the Bear II Realty Trust, and Maria A. Kitras and James J. Decoulos as Trustees of the Gorda Realty Trust, filed.	08/29/2008	
578	Defendants David H. Wice and Betsy W. Wice Response to Plaintiffs' Request to Enter on Land, filed	09/03/2008	
579	Event Resulted The following event: Status Conference scheduled for 09/09/2008 10:00 AM has been resulted as follows: Result: Status Conference held. Additional Motions to be Heard on December 4, 2008.	09/09/2008	TROMBLY
580	Scheduled Event: Motion Date: 12/04/2008 Time: 11:00 AM Result: Taken under advisement.	09/09/2008	TROMBLY
581	(Proposed) Order, filed	09/18/2008	
582	Defendant Vineyard Conservation Society, Inc., Motion to Compel Answers to Interrogatories filed.	09/22/2008	
583	Scheduled Event: Motion to Compel Interrogatories Date: 09/30/2008 Time: 10:00 AM Result: Motion allowed	09/22/2008	TROMBLY
584	Land Court Rule 7 Certification filed	09/23/2008	

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585	Event Resulted The following event: Motion to Compel Interrogatories scheduled for 09/30/2008 10:00 AM has been resulted as follows: Result: Motion to Compel Answers Argued and Allowed. Court Orders that Specific Answers to Interrogatories Nos. 1(i) and 1(ii) must be Filed on or before October 15, 2008. Said Answers to Include Facts Relied upon by Plaintiffs to Substantiate their Claims of Easement by Prescription and Easement by Necessity.	09/30/2008	TROMBLY
586	Notice of September 30, 2008 Docket Entry Sent to Jennifer S.D. Roberts, Esq., Nicholas J. Decoulos, Esq., Brian M. Hurley, Esq., Leslie-Ann Morse, Esq., Ronald H. Rappaport, Esq., Benjamin L. Hall, Jr., Esq., Ellen B. Kaplan, Esq., John M. Donnelly, Esq., Mr. & Mrs. Jack Fruchtman, Jr., Pro Se, Mr & Mrs. David H. Wice, Pro Se, Mr. & Mr. Russell H. Smith, Pro Se, George D. Brush, Esq., and Diane D. Tillotson, Esq.	09/30/2008	
587	Order, issued. (Copies Sent to Attorneys Nicholas J. Decoulos, Brian M. Hurley, Leslie-Ann Morse, Ronald H. Rappaport, Benjamin L. Hall, Jr., John M. Donnelly, George D. Brush, Diane D. Tillotson, Jennifer S.D. Roberts, Kelley A. Jordan-Price, Ellen B. Kaplan, Pro Se's: Mr. & Mrs. Jack Fruchtman, Jr., Mr. & Mrs. David H. Wice, Barbara Vanderhoop and Mr. & Mrs. Russell H. Smith)	10/23/2008	TROMBLY
588	Motion of Defendants Vineyard Conservation Society, Inc., et al to Amend Scheduling Order, filed	10/29/2008	
589	Motion of Defendants, Vineyard Conservation Society, Inc., Town of Aquinnah, Carline Kennedy and Edwin Schlossberg, the Martha's Vineyard Land Bank, Commonwealth of Massachusetts, and David and Betsy Wice, to Amend Scheduling Order, filed.	10/30/2008	
590	Motion of Plaintiffs, Bear Realty Trust, Bear II Realty Trust, and Gorda Realty Trust for an Order to Permit Entry and Allow Instpection of the Land of the Defendants, filed.	10/30/2008	
591	Scheduled Event: Motion to Amend Date: 11/14/2008 Time: 02:00 PM Result: Continued	11/05/2008	TROMBLY
592	Commonwealth's Opposition to Plaintiffs' Motion for an Order to Permit Entry and Allow Inspection of the Land of the Defendants, filed.	11/06/2008	
593	Vineyard Conservation Society, Inc.'s Opposition to Plaintiffs' Motion for an Order to Permit Entry and to Allow Inspection of the Land of the Defendants, filed.	11/12/2008	
594	Gossamer Wing Realty Trust Opposition to the Motion of Defendant Vineyard Conservation Society to Amend the Scheduling Order, and Cross-Motion to Compel the Defendant Vineyard Conservation Society, Inc. to Respond to Interrogatories without Objection and for Costs and Attorneys Fees under Rule 37, filed.	11/13/2008	
595	Gossamer Wing Realty Trust Opposition to the Motion of Defendant Vineyard Conservation Society to Amend the Scheduling Order, and Cross-Motion to Determine the Sufficiency of Responses to Admissions of the Defendant, Vineyard Conservation Society, Inc. and for Costs and Attorneys Fees Under Rule 37, filed.	11/13/2008	

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596	Gossamer Wing Realty Trust Cross-Motion for Sanctions or Otherwise to Compel the Defendant Town of Aquinnah to Respond to Interrogatories without Objection and for Costs and Attorneys Fees Under Rule 37, filed.	11/13/2008
597	Gossamer Wing Realty Trust Cross-Motion for Sanctions or Otherwise to Compel the Defendant Martha's Vineyard Land Bank to Respond to Interrogatories and to Produce Documents Both without Objection and for Costs and Attorneys Fees Under Rule 37, filed.	11/13/2008
598	Gossamer Wing Realty Trust Cross-Motion to Determine the Sufficiency of Responses to Admissions of the Defendant Martha's Vineyard Land Bank and for Costs and Attorneys Fees Under Rule 37, filed.	11/13/2008
599	Gossamer Realty Trust Cross-Motion to Determine the Sufficiency of Responses to Admissions of the Defendant Town of Aquinnah and for Costs and Attorneys Fees Under Rule 37, filed.	11/13/2008
600	Joinder by Joann and Jack Fruchtman, Jr., in Opposition to the Motion by the Bear Realty, Bear II Realty, and Gorda Realty Trusts for an Order to Permit Entry and Allow Inspection of the Land of the Defendants, filed.	11/13/2008
601	Event Resulted The following event: Motion to Amend scheduled for 11/14/2008 02:00 PM has been resulted as follows: Result: Continued	11/14/2008
602	Opposition of Caroline B. Kennedy and Edwin Schlossberg to Plaintiffs' Motion for an Order to Permit Entry and to Allow Inspection of the Land of the Defendants, filed.	11/17/2008
603	David Wice and Betsy Wice's Opposition to Plaintiffs' Motion for an Order to Permit Entry and to Allow Inspection of the Land of the Defendants, filed.	11/17/2008
604	Defendant Martha's Vineyard Land Bank's Opposition to Gossamer Wing Realty Trust's Cross-Motion for Sanctions or otherwise to Compel the Defendant Martha's Vineyard Land Bank to Respond to Interrogatories and to Produce Documents without Objection and for Costs and Attorneys Fees Under Rule 37 and Cross Motion to Determine the Sufficiency of Responses to Admissions of the Defendant Martha's Vineyard Land Bank and for Costs and Attorneys Fees Under Rule 37, issued.	11/19/2008
605	Defendant Martha's Vineyard Land Bank's Opposition to Plaintiffs' Motion for an Order to Permit Entry and to Allow Inspection of the Land of the Defendants, filed.	11/19/2008
606	Defendant Town of Aquinnah's Opposition to Gossamer Wing Realty Trust's Cross-Motion for Sanctions or Otherwise to Compel the Defendant Town of Aquinnah to Respond to Interrogatories without Objection and for Costs and Attorneys Fees under Rule 37 and Cross-Motion to Determine the Sufficiency of Responses to Admissions of the Defendant Town of Aquinnah and for Costs and Attorneys Fees under Rule 37, filed.	11/19/2008
607	Defendant Vineyard Conservation Society, Inc.'s Opposition to Gossamer Wing Realty Trust's Cross-Motion to Compel the Defendant Vineyard Conservation Society, Inc. to Respond to Interrogatories without Objection and for Costs and Attorneys Fees Under Rule 37 and Cross-Motion to Determine the Sufficiency of Responses to Admissions of the Defendant Vineyard Conservation Society, Inc. and for Costs and Attorneys Fees Under Rule 37, filed.	11/20/2008

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608	Order, issued. (Copies Sent to Attorneys Nicholas J. Decoulos, Brian M. Hurley, Leslie-Ann Morse, Ronald H. Rappaport, Benjamin L. Hall, Jr., John M. Donnelly, George D. Brush, Diane D. Tillotson, Jennifer S.D. Roberts, Kelley A. Jordan-Price, Ellen B. Kaplan, Pro Se's: Mr. & Mrs. Jack Fruchtman, Jr., Mr. & Mrs. David H. Wice, Barbara Vanderhoop and Mr. & Mrs. Russell H. Smith)	11/21/2008	TROMBLY
609	Scheduled Event: Motion Date: 02/04/2009 Time: 11:00 AM Result: Taken under advisement.	11/21/2008	TROMBLY
610	Town of Aquinnah's Opposition to Plaintiffs' Motion for an Order to Permit Entry and Allow Inspection of the Land of Defendants, filed.	11/26/2008	
611	Volume II - Documents Relating to the Division of Common Lands in the Town of Aquinnah, Formerly Gay Head, with a Table of Contents, filed.	12/01/2008	
612	Order Denying Plaintiffs' Motion to Permit Entry and Allow Inspection of Land, issued. (Copies Sent to Attorneys Nicholas Decoulos, Jennifer S.D. Roberts, Leslie-Ann Morse, Brian Michael Hurley, Ronald H. Rappaport, Benjamin L. Hall, Jr., Diane C. Tillotson, John M. Donnelly, Ellen B. Kaplan, George D. Brush and Kelley A. Jordan-Price; also Sent to Joann Fruchtman, Jack Fruchtman, Jr., Russell H. Smith, Susan Smith, David Wice, Betsy W. Wice and Barbara Vanderhoop)	12/04/2008	TROMBLY
613	Order Denying Motions to Compel Responses to Discovery Requests and to Determine the Sufficiency of Responses to Discovery Requests, issued. (Copies Sent to Attorneys Nicholas Decoulos, Jennifer S.D. Roberts, Leslie-Ann Morse, Brian Michael Hurley, Ronald H. Rappaport, Benjamin L. Hall, Jr., Diane C. Tillotson, John M. Donnelly, Ellen B. Kaplan, George D. Brush and Kelley A. Jordan-Price; also Sent to Joann Fruchtman, Jack Fruchtman, Jr., Russell H. Smith, Susan Smith, David Wice, Betsy W. Wice and Barbara Vanderhoop)	12/04/2008	TROMBLY
614	Event Resulted The following event: Motion scheduled for 12/04/2008 11:00 AM has been resulted as follows: Result: Taken under advisement.	12/04/2008	
615	Title to Lot 555 - filed by Attorney Morse	12/08/2008	
616	Volume IV - Documents Relating to the Division of Common Lands in the Town of Aquinnah, Formerly Gay Head--filed by Attorney Decoulos	12/11/2008	
617	Plaintiffs', Bear Realty Trust, Bear II Realty Trust, and Gorda Realty Trust, Motion to Strike, filed	01/30/2009	
618	Motion to Strike of the Town of Aqinnah, Martha's Vineyard Land Bank Commission, Vineyard Conservation Society, Inc., Caroline B.Kennedy and Edwin Schlossberg, The Commonwealth of Massachusetts and David Wice and Betsy Wice, filed	02/02/2009	
619	Defendants Martha's Vineyard Land Bank, Town of Aquinnah, Caroline B. Kennedy and Edwin Schlossberg, David Wice and Betsy Wice, The Commonwealth of Massachusetts and Vineyard Conservation Society, Inc.'s, Motion to Strike Plaintiffs' Proposed Exhibits, filed	02/02/2009	

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620	Memorandum in Support of Defendants Martha's Vineyard Land Bank, Town of Aquinnah, Caroline B. Kennedy and Edwin Schlossberg, David Wice and Betsy Wice, The Commonwealth of Massachusetts and Vineyard Conservation Society, Inc.'s, Motion to Strike Plaintiffs' Proposed Exhibits, filed	02/02/2009	
621	Event Resulted The following event: Motion scheduled for 02/04/2009 11:00 AM has been resulted as follows: Result: Motions to Strike Argued and Taken under advisement.	02/04/2009	TROMBLY
622	Joinder by Joann Fruchtman and Jack Fruchtman (Jr.), in Support of the Motion to Strike filed by the Town of Aqinnah, Martha's Vineyard Land Bank Commission, The Vineyard Conservation Society, Inc., Caroline Kennedy and Edwin Schlossberg, The Commonwealth of Massachusetts, and David Wice and Betsy Wice, filed	02/04/2009	
623	Joinder by Joann Fruchtman and Jack Fruchtman (Jr.), to Support the Motion to Strike Various Exhibits and a Memorandum filed by the Plaintiffs, Maria Kitras, et al, filed	02/09/2009	
624	Defendants Gossamer Wing Realty Trust and Barons Land Trust Opposition to	02/10/2009	
625	Copy of documents designated by Defendants Martha's Vineyard Land Bank,the Town of Aqinnah, Caroline B. Kennedy and Edwin Schlossberg, David Wice and Betsy Wice and Vineyard Conservation Society, filed	02/11/2009	
626	Notice of Joint Designation of Rebuttal Documents, filed	02/11/2009	
627	Table of Contents and Vineyard Conservation Society, Inc.'s Proposed Evidence (items 68-74), filed	02/11/2009	
628	Defendants's Reply to Defendants Gossamer Wing Realty Trust's and Barons Land Trust's Opposition to the Motion to Strike of Various Other Defendants, filed	02/18/2009	
629	Joint Submission Relating to the Introduction of and Objections to Exhibits 1 Through 86, filed	02/23/2009	
630	Defendants Gossamer Wing Realty Trust and Barons Land Trust Sur Reply to the Vineyard Conservation Society's Reply to Opposition to the Motion to Strike of Various Other Defendants, filed	02/25/2009	
631	Order on the Parties' Motions to Strike Proposed Exhibits, issued. (Copies Sent to Attorneys Nicholas Decoulos, Jennifer S.D. Roberts, Leslie-Ann Morse, Brian Michael Hurley, Ronald H. Rappaport, Benjamin L. Hall, Jr., Diane C. Tillotson, John M. Donnelly, Ellen B. Kaplan, George D. Brush and Kelley A. Jordan-Price; also Sent to Joann Fruchtman, Jack Fruchtman, Jr., Russell H. Smith, Susan Smith, David Wice, Betsy W. Wice and Barbara Vanderhoop)	04/27/2009	TROMBLY
632	Defendants' Motion for Reconsideration of Order on the Parties' Motions to Strike Proposed Exhibits, filed	06/15/2009	
633	Memorandum of Law in Support of Defendants' Motion for Reconsideration of Order on the Parties' Motions to Strike Proposed Exhibits, filed	06/15/2009	
634	Order Pursuant to Land Court Rule 9, issued. (Copies Sent to Attorneys Nicholas Decoulos, Jennifer S.D. Roberts, Leslie-Ann Morse, Brian Michael Hurley, Ronald H. Rappaport, Benjamin L. Hall, Jr., Diane C. Tillotson, John M. Donnelly, Ellen B. Kaplan, George D. Brush and Kelley A. Jordan-Price; also Sent to Joann Fruchtman, Jack Fruchtman, Jr., Russell H. Smith, Susan Smith, David Wice, Betsy W. Wice and Barbara Vanderhoop)	07/20/2009	TROMBLY

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635	Defendants Gossamer Wing Realty Trust and Barons Land Trust Opposition to the Motion for Reconsideration of the Court Order dated April 27, 2009 by Various other Defendants & Cross-Motion to Reconsider the Same Order,filed.	08/03/2009	
636	Plaintiffs' Opposition to Defendants' Motion for Reconsideration,filed.	08/07/2009	
637	Order Allowing Defendants, Vineyard Conservation Society, et al.'s Motion for Reconsideration, and Denying Defendants, Gossamer Wing Realty Trust, et al.'s Cross-Motion for Reconsideration, issued. (Copies Sent to Attorneys Nicholas Decoulos, Jennifer S.D. Roberts, Leslie-Ann Morse, Brian Michael Hurley, Ronald H. Rappaport, Benjamin L. Hall, Jr., Diane C. Tillotson, John M. Donnelly, Ellen B. Kaplan, George D. Brush and Kelley A. Jordan-Price; also Sent to Joann Fruchtman, Jack Fruchtman, Jr., Russell H. Smith, Susan Smith, David Wice, Betsy W. Wice and Barbara Vanderhoop)	08/18/2009	TROMBLY
638	Plaintiffs' Motion for Reconsideration of Order dated April 27, 2009,filed.	08/24/2009	
639	Plaintiffs' Motion to Include Exhibit 87,filed.	08/24/2009	
640	Opposition to Plaintiffs' Motion to Include Exhibit 87,filed	09/02/2009	
641	Motion to Establish Briefing Schedule,filed.	09/02/2009	
642	David Wice and Betsy Wice's Notice of Joining Defendants' Motion to Establish Briefing Schedule and Opposition to Plaintiffs' Motion to Exclude Exhibit 87,filed.	09/04/2009	
643	Plaintiffs' Opposition to Defendants' Motion to Establish Briefing Schedule,filed	09/08/2009	
644	Joinder by JoAnn and Jack Fruchtman (Jr.),pro se to Support Motion to Establish a Briefing Schedule and the Opposition to Plaintiffs' Motion to Include Exhibit 87, filed on August 31, 2009, by the Martha's Vineyard Land Bank, the Town of Aquinnah, the Vineyard Conservation Society, Caroline Kennedy, Edwin Scholssberg and the Commonwealth of Massachusetts,filed.	09/11/2009	
645	Order Denying the Plaintiffs' Motion for Reconsideration of Order Dated April 27, 2009, issued. (Copies Sent to Attorneys Nicholas Decoulos, Jennifer S.D. Roberts, Leslie-Ann Morse, Brian Michael Hurley, Ronald H. Rappaport, Benjamin L. Hall, Jr., Diane C. Tillotson, John M. Donnelly, Ellen B. Kaplan, George D. Brush and Kelley A. Jordan-Price; also Sent to Joann Fruchtman, Jack Fruchtman, Jr., Russell H. Smith, Susan Smith, David Wice, Betsy W. Wice and Barbara Vanderhoop)	01/21/2010	TROMBLY
646	Plaintiffs' Offer of Proof as to the exclusion of Exhibits 24,38 and 87,filed.	02/08/2010	
647	Plaintiffs' Brief,filed.	03/08/2010	
648	Plaintiffs' Notice of Adoption, filed.	03/29/2010	
649	Defendants Gossamer Wing Realty Trust and Barons Land Trust Motion to Clarify (I) What Exactly is Being Decided, (II) The Mode the Court has Chosen to Resolve and Determine the Facts and Inferences to be Drawn therefrom; and (III) that the Burden of Production is on Defendants to Show an Intent to Landlock, filed.	04/20/2010	
650	Defendants Gossamer Wing Realty Trust and Barons Land Trust Memorandum of Law in Support of their Motion to Clarify (I) What Exactly is Being Decided, (II) The Mode the Court has Chosen to Resolve and Determine the Facts and Inferences to be Drawn therefrom; and (III) that the Burden of Production is on Defendants to Show an Intent to Landlock, filed.	04/20/2010	
651	Defendants Gossamer Wing Realty Trust and Barons Land Trust Brief as Ordered by the Court on January 21, 2010, filed.	04/20/2010	

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652	Exhibits for Defendants Gossamer Wing Realty Trust and Barons Land Trust Brief as Ordered by the Court on January 21, 2010, filed.	04/20/2010	
653	Memorandum of Law on the Issue of Intent Submitted by Defendants the Town of Aquinnah, Vineyard Conservation Society, Inc., Martha's Vineyard Land Bank, Caroline B. Kennedy, and Edwin Schlossberg, Jack and Joann Fruchtman and David and Betsy Wice, filed.	04/22/2010	
654	Memorandum of the Commonwealth of Massachusetts, filed.	04/22/2010	
655	Plaintiffs' Mark D. Harding, and Trustees Sheila H. Besse and Charles D. Harding, Jr., Reply Brief of Defendants' Memorandum of Law on the Issue of Intent, filed.	05/10/2010	
656	Plaintiffs' Reply Brief to Defendants' Memorandum of Law on the Issue of Intent, filed.	05/10/2010	
657	Surreply of the Commonwealth of Massachusetts, filed.	05/24/2010	
658	Defendants Gossamer Wing Realty Trust and Barons Land Trust Sur-Reply Brief as Ordered by the Court on January 21, 2010, filed.	05/24/2010	
659	Defendants Martha's Vineyard Land Bank, Town of Aquinnah, and Vineyard Conservation Society, Inc.'s Response to Certain Issues Raised in the Defendants' Gossamer Wing Realty Trust and Barons' Land Trust Brief as Ordered by the Court on January 21, 2010, filed.	05/24/2010	
660	Surreply of Defendants the Town of Aquinnah Vineyard Conservation Society, Inc., Martha's Vineyard Land Bank, Caroline B. Kennedy and Edwin Schlossberg, Jack and Joann Fruchtman, and David and Betsy Wice, filed.	05/24/2010	
661	Motion to Strike Evidence Referenced in Support of Defendants Gossamer Wing Realty Trust and Barons Land Trust Sur-Reply Brief, filed.	06/02/2010	
662	Scheduled Event: Motion Date: 06/21/2010 Time: 10:00 AM Result: Taken under advisement.	06/02/2010	TROMBLY
663	Letter from Attorney Benjamin L. Hall, Jr., Requesting that Hearing be Rescheduled to June 21, 2010, at 11:30AM, filed. All Counsel of Record were Notified of Time Change.	06/14/2010	
664	Defendants Gossamer Wing Realty Trust and Barons Land Trust Opposition to the Other Defendants' Motion to Strike Evidence, filed.	06/21/2010	
665	Defendants Goassamer Wing Realty Trust and Barons Land Trust Offer of Proof, filed.	06/21/2010	
666	Event Resulted The following event: Motion scheduled for 06/21/2010 11:30 AM has been resulted as follows: Result: Motion to Strike Evidence Referenced in Support of Defendants Gossamer Wing Realty Trust and Barons Land Trust Sur-Reply Argued and Taken under advisement.	06/21/2010	TROMBLY
667	Affidavit of Dianne E. Powers, filed.	06/30/2010	
668	Letter from Attorney Brian M. Hurley, filed.	07/27/2010	
669	Letter from Attorney Benjamin L. Hall, Jr., filed.	07/28/2010	
670	Decision issued. (Copies Sent to: See Service List)	08/12/2010	TROMBLY
671	Judgment entered. (Copies sent to Attys. on the Kitras Service List.)	08/12/2010	TROMBLY

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672	Defendants Gossamer Wing Realty Trust and Barons Land Trust Motion to Correct, Amend or Modify the Order and Judgment of Judge Trombly Dated August 12, 2010, filed.	08/25/2010	
673	Defendants Gossamer Wing Realty Trust and Barons Land Trust Memorandum of Law in Support of their Motion to Correct, Amend or Modify the Order and Judgment of Judge Trombly Dated August 12, 2010, filed.	08/25/2010	
674	Notice of Appeal by Maria A. Kitras Trustee(s) of Bear Realty Trust to the Appeals Court filed.	08/25/2010	
675	Scheduled Event: Motion Date: 09/08/2010 Time: 11:00 AM Result: Taken under advisement.	08/31/2010	TROMBLY
676	Request for Status Conference, filed.	09/01/2010	
677	Scheduled Event: Status Conference Date: 09/08/2010 Time: 11:00 AM Result: Status Conference held.	09/02/2010	TROMBLY
678	Joinder by Joann and Jack Fruchtman, Jr., Pro Se, to Support the Motion for Status Conference Concerning Any Outstanding Issues Involved in the Above-Captioned, Now Decided Case, filed.	09/07/2010	
679	Event Resulted The following event: Motion scheduled for 09/08/2010 11:00 AM has been resulted as follows: Result: Motion of Defendants, Gossamer Wing Realty Trust and Barons Land Trust to Correct, Amend, or Modify the Order and Judgment dated August 12, 2010 Argued and Taken under advisement. All Counsel Present, Except for Benjamin Hall, Esq., who Participated Via Telephone.	09/08/2010	TROMBLY
680	Event Resulted The following event: Status Conference scheduled for 09/08/2010 11:00 AM has been resulted as follows: Result: Status Conference Held with All Counsel of Record, and Mr. Benjamin Hall, Jr., Esq., Participating Via Telephone.	09/08/2010	TROMBLY
681	Defendants Martha's Vineyard Land Bank, Town of Aquinnah, Caronline B. Kennedy and Edwin Schlossberg, David Wice, and Betsy Wice, and Vineyard Conservation Society's Inc.'s Reply to Defendants' Gossamer Wing Realty Trust's and Baron's Land Trust's Motion to Correct, Amend or Modify the Order and Judgment dated August 12, 2010, filed.	09/08/2010	
682	Joint Submission Relating to the Introduction of and Objections to Exhibits 1 through 86, filed.	09/08/2010	
683	Supplemental Memorandum of Law Defendants Gossamer Wing Realty Trust and Barons Land Trust in Support of their Motion to Correct, Amend or Modify the Order and Judgment Dated August 12, 2010, filed.	09/14/2010	

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No.	Entry	Date	Judge
684	Notice of Docket Entry: On September 8, 2010, at a Status Conference Held in this Matter, the Parties Discussed how this Case would move Forward on the Remaining Count of Prescriptive Easement in Light of this Court's August 12, 2010 Decision. At this Conference, Counsel for the Vineyard Conservation Society Indicated that it would File a Memorandum Regarding the Extant Issues. To Date the Court has not Received any Submissions. Therefore, the Vineyard Conservation Society has until February 14, 2011 to File a Memorandum Regarding the Issues it Believes to be Extant after this Court's Decision. Any Party that Wishes to Respond to this Submission shall do so in Writing no later than March 4, 2011. (Notice Sent to Attorneys Nicholas Decoulos, Jennifer S.D. Roberts, Leslie-Ann Morse, Brian Michael Hurley, Ronald H. Rappaport, Benjamin L. Hall, Jr., Diane C. Tillotson, John M. Donnelly, Ellen B. Kaplan, George D. Brush and Kelley A. Jordan-Price; also Sent to Joann Fruchtman, Jack Fruchtman, Jr., Russell H. Smith, Susan Smith, David Wice, Betsy W. Wice and Barbara Vanderhoop)	01/14/2011	TROMBLY
685	Joinder in Motion for Summary Judgment of Vineyard Conservation Society, Inc. on Count II of the Complaint, filed.	02/10/2011	
686	The Commonwealth's Motion for Summary Judgment on Count II, filed.	02/14/2011	
687	Town of Aquinnah's Joinder in Motion for Summary Judgment by Vineyard Conservation Society, Inc., filed.	02/15/2011	
688	Defendant Martha's Vineyard Land Bank Commission's Joinder in Motion for Summary Judgment of Vineyard Conservation Society, Inc. on Count Two of the Complaint, filed.	02/16/2011	
689	Motion for Summary Judgment of Defendant Vineyard Conservation Society, Inc. on Count Two of the Complaint, filed.	02/16/2011	
690	Memorandum of Law in Support of Motion for Summary Judgment of Defendant Vineyard Conservation Society, Inc. on Count Two of the Complaint, filed.	02/16/2011	
691	Joinder by Joann and Jack Fruchtman, Jr., to Join the Motion for Summary Judgment, filed.	02/24/2011	
692	Defendants Gossamer Wing Realty Trust & Barons Land Trust Opposition to the Other Defendants' Motion for Summary Judgment, and Memorandum Supporting Striking the Same, filed.	03/01/2011	
693	Defendants Gossamer Wing Realty Trust & Barons Land Trust Cross Motion to Strike the Other Defendants' Motion for Summary Judgment, filed.	03/01/2011	
694	Defendants Gossamer Wing Realty Trust & Barons Land Trust Alternative Cross Motion for Leave for Further Time to Respond to the Substance of the Other Defendants' Motion for Summary Judgment, filed.	03/01/2011	
695	Defendants David H. Wice and Betsy W. Wice's Joinder in Motion for Summary Judgment of Vineyard Conservation Society, Inc., on Count II of the Complaint, filed.	03/01/2011	
696	Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, filed.	03/04/2011	
697	Order Denying Motion to Correct, Amend or Modify Order and Judgment Dated August 12, 2010, issued. (Copies Sent to Attorneys on Kitras List)	03/08/2011	TROMBLY

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698	First Supplemental Memorandum of Defendants Gossamer Wing Realty Trust & Barons Land Trust in Opposition to the Other Defendants' Motion for Summary Judgment and Further Memorandum Supporting Striking the Same, filed.	03/21/2011	
699	Notice of Appeal by Maria A. Kitras Trustee(s) of Bear Realty Trust to the Appeals Court filed.	03/31/2011	
700	Order Allowing Motion For Summary Judgment Of Defendant Vineyard Conservation Society, Inc. On Count II Of The Complaint And Dismissing Count III Of The Complaint, issued. (Copies sent to Attys. on the Kitras Service List.)	04/04/2011	TROMBLY
701	Amended and Final Judgment, issued. (Copies sent to Attys. on the Kitras Service List.)	04/04/2011	TROMBLY
702	Notice of Appeal by Maria A. Kitras Trustee(s) of Bear Realty Trust to the Appeals Court filed.	04/08/2011	
703	Defendants Gossamer Wing Realty Trust and Barson Land Trust Motion to Correct, Amend or Modify the Order and Amended Judgment of Judge Trombly, Dated April 4, 2011, filed.	04/13/2011	
704	Defendants Gossamer Wing Realty Trust and Barson Land Trust Memorandum of Law in Support of their Motion to Correct, Amend or Modify the Order and Amended Judgment of Judge Trombly, Dated April 4, 2011, filed.	04/13/2011	
705	Order Pursuant to Land Court Rule 6, Issued. (Trombly, J.); Copies Sent to Attorneys Nicholas J. Decoulos, Brian Michael Hurley, Leslie-Ann Morse, Ronald Rappaport, Kelley A. Jordan-Price, Jennifer S D Roberts, George B. Brush, Ronald L. Monterosso, John M. Donnelly, Diane C. Tillotson, and Pro-Se Litigants Jack A. Fruchtman, JoAnn Fructman, Russell H. Smith, Susan Heckler Smith	04/19/2011	TROMBLY
706	Notice of Cross Appeal of Barons' Land Trust, filed.	04/19/2011	
707	Notice of Cross Appeal of Gossamer Wing Realty Trust, filed.	04/19/2011	
708	Opposition by Joann and Jack Fruchtman (Jr.), pro se, to the Motion by Goassamer Wing Realty Trust and Barons Land Trust, Seeking to Correct, Amend, and Modify the April 4, 2011 Final Decision of the Land Court in Its Amended and Final Judgment in the Above-Captioned Matter filed.	04/29/2011	
709	Response and Opposition to Defendants Gossamer Wing Realty Trust and Barons Land Trust's Motion to Correct, Amend, or Modify the Order and Amended Judgment of Judge Trombly Dated April 4, 2011, filed.	05/02/2011	
710	Order Denying Motion of Gossamer Wing Realty Trust and Barons Land Trust to Correct, Amend or Modify the Judgment, issued. (Copy Sent to All Counsel and Parties on Service List)	05/03/2011	TROMBLY
711	Second Amended and Final Judgment, issued. (Copies Sent to All Parties on Service List)	05/03/2011	TROMBLY
712	Letter from Mr. and Mrs. Fruchtman Regarding their Response dated April 22, 2011, which was sent to Causeway Street, filed.	05/09/2011	
713	Notice of Appeal by Plaintiffs from the Second Amended and Final Judgment Dated May 3, 2011, filed.	05/17/2011	
714	Notice of Appeal of Plaintiffs, Sheila H. Besse, and Charles D. Harding as they are Trustees of the Eleanor P. Harding Realty Trust, filed.	06/01/2011	
715	Notice of Appeal of Plaintiff, Mark D. Harding, filed.	06/01/2011	

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716	Notice of Cross Appeal of Gossamer Wing Realty Trust, filed.	06/06/2011
717	Notice of Cross Appeal of Barons Land Trust, filed.	06/06/2011
718	Appearance of Wendy H Sibbison Esq. for Maria A. Kitras Trustee(s) of Bear Realty Trust. Appearance for the Purposes of Appeal filed.	06/08/2011
719	Appellants' Notice Pursuant to Mass. R. App. P. 8(b)(3), filed.	08/23/2011
720	Appellants' Second Notice Pursuant to Mass. R. App. P. 8(b)(3)(ii), filed.	09/15/2011
721	Transcripts of Conferences, Motions and Post-Remand Before Justice Leon J. Lombardi Dated April 25, 2006, September 12, 2006, December 4, 2006, January 16, 2007, July 10, 2007 and June 13, 2008, filed. Transcripts of Status Conferences and Motions Before Justice Charles W. Trombly, Jr. Dated September 9, 2008, September 30, 2008, February 4, 2009, June 21, 2010 and September 8, 2010, filed.	11/21/2011
722	Notice of Assembly of Record on Appeal sent to all counsel of record.	02/14/2012
723	Notice of Assembly of Record on Appeal sent to the Clerk of the Appeals Court.	02/14/2012
724	Case entered in the Appeals Court as Case No. 2012-P-0260.	02/24/2012

55 PAGES
I HEREBY ATTEST AND CERTIFY ON APRIL 11TH 2012 THAT THE FORGOING DOCUMENT IS A FULL ORIGINAL ON FILE IN MY OFFICE AND IN MY LEGAL CUSTODY.

DEBORAH J. PATTERSON
RECORDER
LAND COURT
BY Deborah J. Patterson
KO.

(SEAL)

COMMONWEALTH OF MASSACHUSETTS
Land Court
Department of the Trial Court
Miscellaneous Case No. 238738

MARIA A. KITRAS, as TRUSTEE,[1] & others,[2]
Plaintiffs

vs.

TOWN OF AQUINNAH & others,[3]
Defendants

**DECISION ON
CROSS-MOTIONS FOR SUMMARY JUDGMENT
AND MOTIONS TO DISMISS**

In this action, plaintiffs seek 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

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[1]Of Bear Realty Trust and of Bear II Realty Trust.

[2]Paul D. Pettegrove, as trustee of Gorda Realty Trust; Victoria Brown; Gardner Brown, Jr; Mark Harding; Benjamin L. Hall, Jr., as trustee of Gossamer Wing Realty Trust; and Eleanor Harding, as trustee of Eleanor P. Harding Trust.

[3]Vineyard Conservation Society, Inc.; David Wice and Betsy Wice; Susan Smith and Russell Smith; John F. Kennedy, Jr., and Caroline Kennedy; George B. Brush, as trustee of Toad Rock Realty Trust; South Shore Beach, Inc.; Leonard F. Vanderhoop, Jr.; Joanne Fruchtman a/k/a JoAnn Fruchtman and Jack Fruchtman; Peter Ochs; Hope E. Horgan; Helen S. James; Donald Taylor; Moshup Trail II Limited Partnership; Richard Hoye; Charles E. Derby; Shirley A. Jardin; persons unknown or unascertained being the heirs of Wallace E. Francis; Jeffrey Madison, as trustee of Tacknash Realty Trust; Estate of Edwin D. Vanderhoop; John A. Wiener; Sally D. Wiener; Patrick J. Evans; Scott Harrison; Julie B. Hoyle; Carmella Stephens, as trustee of Deer Meadow Realty Trust; Stella Winifred Hopkins a/k/a Winifred S. Hopkins; persons unknown or unascertained being the heirs of Esther Howwasswee; persons unknown or unascertained being the heirs of Savannah F. Cooper; Heidi B. Stutz; Michael W. Stutz; Hamilton Camman; Mary Elizabeth Pratt; persons unknown or unascertained being the heirs of Amos Smalley; June Noble; Richard Sullivan; Sarah Saltonstall; Steven Yaffe; Thomas Seeman; Lawrence B. Evans; Beverly A. Evans; Estate of William Vanderhoop; Kevin Craig; Cynthia Craig; Flavia Stutz; Robert Stutz; Selma Greenberg; William Greenberg; Wilma Greenberg; Alexandra Whitcomb; Rolph Lumley; Aurilla Fabio; other persons unknown or unascertained; and United States of America as trustee for the Wampanoag Tribe of Gay Head (Aquinnah).

set-off, in 1871 and 1878, of separate lots of land for ownership by individual members of the Wampanoag tribe. The two set-off reports made no express provision for easement or other 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.[4]

Following a status conference held on February 29, 2000, and pursuant to the schedule established at the conference, VCS on October 6, 2000 filed its motion for summary judgment or, alternatively, to dismiss, together with a memorandum in support of the motion. A number of defendants thereafter joined in the VCS motion, including: JoAnn Fruchtman, Jack Fruchtman, Jr., Sarah Saltonstall, Mary Elizabeth Pratt, Caroline Kennedy, South Shore Beach, Inc., David Wice, and Betsy Wice. Defendants David Wice and Betsy Wice, defendant Thomas Seeman, defendant Caroline Kennedy, and defendants Russell Smith and Susan Smith, filed separate motions to dismiss the complaint. Defendants Beverly Evans, Patrick Evans and Lawrence Evans filed a separate motion for summary judgment. On November 7, 2000, plaintiff Kitras filed a cross-motion for summary judgment, together with a memorandum in support of the cross-motion, and plaintiffs Gardner Brown and Victoria Brown filed a separate motion adopting the arguments advanced in Ms. Kitras's memorandum.

I heard argument on the cross-motions and the motions to dismiss on December 18, 2000. At

[4]A summary of the procedural history of this matter appears in orders entered on April 21, 1998, and November 30, 1999. The latter order includes reference to the dismissal of the complaint as to defendants Heidi B. Stutz; Michael W. Stutz; Kevin Craig; Cynthia Craig; Flavia Stutz; Selma Greenburg; William Greenburg; Wilma Greenburg, and (following removal to the Federal District Court and preceding the remand to this court) the United States of America. The dismissal as to the named private defendants was based on the failure of the complaint to assert a claim against the lots owned by such defendants. The dismissal as to the United States of America, entered in the Federal District Court on motion by the United States, was based on sovereign immunity.

the hearing, plaintiffs stipulated to the dismissal of the complaint as to the following defendants: Thomas Seeman; Lawrence B. Evans; Patrick J. Evans; and Beverly A. Evans.

In addition to the verified amended complaint, the summary judgment record includes (i) two affidavits of Jennifer S. D. Roberts, Esq., authenticating various documents; (ii) an affidavit of Brendan T. O'Neill, the executive director of defendant Vineyard Conservation Society, Inc. (VCS); (iii) an affidavit, with attachments, of James J. Decoulos;[5] (iv) an affidavit of Gardner Brown; (v) answers furnished by plaintiffs Victoria and Gardner Brown to interrogatories propounded by VCS; and (vi) responses and further responses furnished by plaintiffs Maria A. Kitras and Paul D. Pettegrove to interrogatories propounded by defendant VCS.[6]

The following facts are not in dispute.

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). As shown on the 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

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[5]At the summary judgment hearing, I allowed VCS's motion to strike portions of the Decoulos affidavit as to paragraphs 11, 12, 14, 15, 27, 28, 29, 30, 31, 32, 33, 39, 42 and 43. I denied the motion to strike as to paragraphs 3, 4, 5, 6, 7, 8, 9, 20 and 38.

[6]The items listed in clause (vi) are in the record on the motion of defendant Vineyard Conservation Society, Inc. to supplement the summary judgment record filed on December 22, 2000, and heard and allowed on February 14, 2001.

under an agreement recorded with the Dukes County registry of deeds in book 640, page 895.[7]

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

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 one of the Kitras lots (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. Lot 710 is contiguous to one of the Kitras lots (lot 711); the other Gossamer Wing lots are not contiguous to any of the Kitras lots.

6. Defendants own various other lots on the set-off plan, as described in the verified complaint and as identified on the sketch plan submitted by plaintiffs and attached as appendix A.[8]

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 and commissioned

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[7] I take judicial notice of the record in land court miscellaneous case numbers 248339 and 249539.

[8] Some of the lot number designations on the sketch plan do not correspond to the designations on the set-off plan. For example, there is a lot numbered 242 shown on the sketch plan as owned by "Weiner;" that lot appears on the set-off plan as part of lot 96, adjacent to lot 314 (which is omitted from the sketch plan). In addition, certain of the designated owners are not current. For example, following the commencement of this action VCS acquired set-off lot 532, shown on appendix A as owned by "Nuovo." Nonetheless, for purposes of this decision the sketch plan is sufficiently accurate to serve as a useful guide to the general layout of the area and the relationship among the several parcels involved.

the treasurer of the district of Marshpee [sic] "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. The commissioner appointed in 1863 died before completing the assigned task, and the General Court appointed a new commissioner, Richard L. Pease, in 1866. Resolves 1866, c. 67. 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.[9]

10. 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. St. 1870, c. 213. 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

[9] A report submitted to the Senate observes that approximately nineteen hundred acres remained common lands, compared to approximately fifteen hundred acres held in severalty. See Sen. Doc. No. 14, 1869, p 4-5.

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.

11. 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]

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

12. 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."[11]

13. Chapter 213 of the Acts of 1870 also directed the Dukes County county commissioners to lay out and construct a road from Chilmark to the Gay Head lighthouse. The road thus established (now called State Road) is shown on the set-off plan, passing in a generally east-west direction in the area north of plaintiffs' lots. At the time of the 1871 and 1878 commissioners' reports, there were no other public roads in the vicinity of the set-off lots.

14. By 1939, an unpaved way leading from State Road to and across the Kitras lots had developed on the ground. That way, known as "Zack's Cliffs Road," is visible on aerial photographs taken in 1939 and during the 1940s, and is shown on topographic maps from that and later periods.[12] The summary judgment record does not reveal when Zack's Cliffs Road first came into use, if at any time before 1939.

15. In 1954, a new road (called Moshup Trail) was established by layout approved by the Dukes County county commissioners and recorded with the Dukes County registry of deeds in book

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[11]The record does not include the portion of the report assigning lot 189, which is described in the quoted excerpt within both the lots resulting from the partition of common lands and the lots described on claims of ownership in severalty. It is immaterial for purposes of this decision which category applies to lot 189.

[12]A portion of the unpaved way, running in an east-west direction, appears to be known as "Old South Road," and provides the connection to State Road. Zack's Cliffs Road extends southerly from Old South Road, at a point west of the intersection between Old South Road and State Road.

227, page 564.[13] From its intersection with State Road east of plaintiffs' lots, Moshup Trail branches to the south and passes in a generally east-west direction in the area south of plaintiffs' lots.

16. By easement dated April 29, 1987, and recorded in book 472, page 317 (Gossamer Wing easement), Moshup Trail Limited Partnership acquired from Gossamer Wing for the benefit of lots 711 and 178 (as well as other lots not currently owned by any plaintiff) an express easement over lots 320 and 323 then owned by Gossamer Wing. A sketch plan attached to the Gossamer Wing easement shows a way, described to be forty feet wide, extending from lot 86 to State Road, and traversing lots 324, 325, 320, 179, 319, 300, 309 and 316. By contemporaneous easement recorded in book 472, page 319 (Moshup Trail easement), Gossamer Wing acquired from Moshup Trail Limited Partnership for the benefit of lots 302, 707 and 710 (as well as other lots not currently owned by any plaintiff) an express easement over lots 68, 71, 72, 73, 78, 79, 80, 85, 86, 87, 178, 179, 231, 246, 254, 294, 299, 300, 301, 309, 316, 319, 322, 324, 325, 334, 335, 351, 514, 52, 525, 700, 703, 705, and 711 then owned by Moshup Trail Limited Partnership. The Moshup Trail easement refers to an attached sketch plan, but the copy of the instrument in the record does not include such a plan. Following execution of the Gossamer Wing easement, Gossamer Wing acquired additional set-off lots. By first amendment to easement dated February 1, 1988, and recorded in book 493, page 293, the parties agreed that the Gossamer Wing easement would burden lots 302, 322, 334, 339, 707 and 710 (in addition to lots 320 and 323).[14] Combined, however, the Gossamer Wing easement (as amended) and the Moshup Trail easement do not extend from plaintiffs' property to State Road, as other land not

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[13]All references herein to recorded instruments or plans are to this registry, unless otherwise noted.

[14]The amendment does not include or refer to a plan illustrating where the way would be located on the newly-burdened lots, and they are not shown on the sketch plan attached to the original Gossamer Wing easement.

owned by any party to either easement intervenes between State Road and the lots benefitted by the easements.[15] The Gossamer Wing easement and the Moshup Trail easement do not appear to coincide with the historic traveled way of Zack's Cliffs Road.

17. In 1989, the United States of America, using its power of eminent domain, took set-off lots 78, 79 and 87.[16] A short time earlier, the United States also acquired from Moshup Trail Limited Partnership lots 68, 71, 72, 73, 80, 86, 179, 246, 254, 294, 299, 300, 301, 309, 316, 319, 324, and 325, under a deed dated February 1, 1988 and recorded in book 493, page 222. The deed states that the lots so conveyed enjoy the benefit of certain recorded easements, including the easement described in the Gossamer Wing easement agreement. The United States holds such property as trustee for the Wampanoag Tribe of Gay Head. Zack's Cliffs Road previously passed across lot 87; the eminent domain taking had the effect of extinguishing all rights of other parties in Zack's Cliffs Road over lot 87.[17] Zack's Cliffs Road also passed across lot 319, among the lots the United States acquired by deed from Moshup Trail Limited Partnership.

* * * * *

By their amended verified complaint, plaintiffs claim easement rights (i) by implication or necessity in an unspecified location (count one), (ii) by prescription over Zack's Cliffs Road (count two), (iii) by prescription over a way called the "radio tower road" (count three), and (iv) by virtue of the alleged status of Zack's Cliffs Road as a public way by prescription (count iv). However, in response to interrogatories propounded by VCS, plaintiffs Kitras, Pettegrove and the Browns stated

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[15]As shown on appendix A, the intervening land appears to include set-off lots 88 and 244, and an unnumbered tract described on the sketch plan as owned by "Tacknash R. T."

[16]According to the declaration of taking, Moshup Trail Limited Partnership held an interest in each of the lots taken by eminent domain.

[17]Plaintiffs acknowledge this result in paragraph 29 of the amended verified complaint.

as to each of counts two, three and four that they "at the present time waive their claim, without prejudice." Accordingly, counts two, three and four of the amended verified complaint are dismissed as to plaintiffs Kitras, Pettegrove and the Browns. In addition, counts two and four are dismissed as to the remaining plaintiffs as against all defendants other than those defendants owning land across which Zack's Cliffs Road passes. According to the summary judgment record, those defendants (in other words, the remaining defendants as to counts two and four) are: VCS; George Brush, as trustee of Toad Rock Realty Trust; heirs of Esther Howwasswee; Moshup Trail II Limited Partnership; and Julie B. Hoyle. Similarly, count three of the complaint is dismissed as to all defendants other than those defendants owning land across which the radio tower road passes. According to the summary judgment record, those defendants (in other words, the remaining defendants as to count three) are: VCS; the Town of Aquinnah; and John F. Kennedy, Jr. and Caroline Kennedy.[18]

The parties' cross-motions principally address plaintiffs' claim of an easement by implication or necessity, arising from the severance of plaintiffs' respective lots from access to any public way as a result of the 1871 and 1878 set-offs.

The land subject to this action falls into three categories. The first category is the land held in severalty and determined according to the commissioner's 1871 report (in other words, lots 1-173). The record is unclear regarding the status of title to those lots prior to the commissioner's 1871 report, but at least as of the submission of the commissioner's 1871 report, set-off lots 1-173 were owned by the owners determined by the commissioner's 1871 report, and enjoyed such rights in the remaining common lands as may have appertained to tribal members. The second category is the land held in

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[18]The response of defendant Caroline Kennedy to the cross-motions for summary judgment advises that defendant John F. Kennedy, Jr. is deceased, but that no motion has yet sought to substitute the executor of his estate.

severalty and determined according to the commissioners' 1878 report (in other words, lots 174-189).[19] The third category is the common land partitioned in favor of separate owners pursuant to the commissioners' 1878 report.[20]

On the summary judgment record, State Road was the only public way providing access to the set-off lots at the time of the commissioners' 1871 and 1878 reports. The commissioner's 1871 report did not sever the set-off lots from access to the public way, since the owners of such lots held rights in the common lands. By partitioning the common lands and assigning the resulting set-off lots to individual owners, the commissioners' 1878 report severed from the public way (i) each of the set-off lots (nos. 1-173) determined under the commissioner's 1871 report which did not have frontage on the public way, and (ii) each of the set-off lots (nos. 174 and higher) determined in severalty or partitioned and assigned under the commissioners' 1878 report which did not have frontage on the public highway. Plaintiffs' lots fall into the latter group.

"It 'is familiar law that if one conveys a part of his land in such form as to deprive himself of access to the remainder of it unless he goes across the land sold, he has a way of necessity over the granted portion. This comes by implication from the situation of the parties and from the terms of the grant when applied to the subject matter. The law presumes that one will not sell land to another without an understanding that the grantee shall have a legal right of access to it, if it is in the power of the grantor to give it, and it equally presumes an understanding of the parties that one selling a

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[19]VCS's memorandum suggests that lots 174-189 somehow came into separate ownership between the 1871 and 1878 reports. A more likely interpretation of the historical records is that the commissioner appointed under the 1866 resolution concluded his report upon the status of his efforts as of the adoption of St. 1870, § 213, before determining all claims of owners holding land in severalty, and that the commissioners' 1878 report completed the determination of such claims under the supervision of the probate court.

[20]A fourth category, not implicated in this action, is the land reserved as common land in the commissioners' 1878 report.

portion of his land shall have a legal right of access to the remainder over the part sold if he can reach it in no other way.'" Davis v. Sikes, 254 Mass. 540, 545-546 (1926), quoting New York & New England Railroad v. Railroad Commissioners, 162 Mass. 81, 83 (1894). See generally Restatement Third, Property (Servitudes) § 2.15.

"Easements by implication generally are created when land under single ownership is severed and the easement is reasonably necessary for the enjoyment of one of the parcels." Silverlieb v. Hebshie, 33 Mass. App. Ct. 911, 912 (1992). The severance of common ownership need not occur by means of a deed of conveyance; a severance occurring by partition will, under appropriate circumstances, give rise to an easement by implication. Mt. Holyoke Realty Corp. v. Holyoke Realty Corp., 284 Mass. 100, 106 (1933); Viall v. Carpenter, 14 Gray 126, 127 (1859). As the parties claiming an easement by implication, plaintiffs bear the burden of proving its existence. Boudreau v. Coleman, 29 Mass. App. Ct. 621, 633 (1990).

"The origin of an implied easement 'whether by grant or by reservation . . . 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.'" Labounty v. Vickers, 352 Mass. 337, 344 (1967), quoting Dale v. Bedal, 305 Mass. 102, 103 (1940). "What is required, however, is not an actual subjective intent on the part of the grantor but a presumed objective intent of the grantor and grantee based upon the circumstances of the conveyance." Flax v. Smith, 20 Mass. App. Ct. 149, 153 (1985). "There are cases where a single circumstance may be so compelling as to require the finding of an intent to create an easement. For example, if, after a conveyance of some of his land, an owner is left with a parcel entirely surrounded by the land conveyed, the sole fact that he has no access to the land retained without crossing the land conveyed may be sufficient basis for the implication of

an easement . . ." Mt. Holyoke Realty Corp. v. Holyoke Realty Corp., 284 Mass. at 104. However, "[i]t is not the necessity which creates the right of way, but the fair construction of the act of the parties." Nichols v. Luce, 24 Pick. 102, 104 (1834).

The presumption noted in Davis v. Sikes (that one will not sell land to another without an understanding that the grantee shall have a legal right of access to it, if it is in the power of the grantor to give it) finds its root in the principle that a grant of land is presumed to include everything reasonably necessary for its use and enjoyment. See Gayetty v. Bethune, 14 Mass. 49, 56 (1817). See also Restatement Third, Property (Servitudes) § 2.15. The presumption "is, however, a pure presumption raised by the law . . . Such a presumption ought to be and is construed with strictness." Orpin v. Morrison, 230 Mass. 529, 533 (1918). Accordingly, the presumption may be overcome by evidence that the parties did not intend to provide a way of access. Id. at 533-534.

An easement often may be implied over a way already in existence and use when a parcel is severed from common ownership. See Dale v. Bedal, 305 Mass. 102, 104 (1940), and cases cited. However, it is not necessary for a way to be in existence and use at the time of such severance where the severance creates an absolute physical necessity. See, e.g., Nichols v. Luce, supra; Viall v. Carpenter, supra. Cf. Davis v. Sikes, 254 Mass. at 546.

"[A] party moving for summary judgment in a case in which the opposing party will have the burden of proof at trial is entitled to summary judgment if he demonstrates, by reference to material described in Mass. R. Civ. P. 56(c), unmet by countervailing materials, that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case." Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991).[21]

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[21] I note that plaintiffs have stipulated that they will not present any testimony on their claims beyond the summary judgment record.

The fact that the commissioners' 1878 report severed plaintiffs' lots from access to the only public way then in existence creates a presumption that the partition intended that each owner of a set-off lot would hold a way by necessity for access to their lot from the public way. Though, as noted, the presumption may be overcome by evidence of an intent to create a parcel without access, no such evidence appears in the present case.[22] For the reasons discussed below, however, I do not reach the question whether a way arose by necessity on the commissioners' 1878 report, but I assume for purposes of the following discussion that a way by necessity did so arise.[23]

A right of way not defined in the instrument creating it may be located by implication, in the location of a way in use at the time the easement was created. See, e.g., Dunham v. Dodge, 235 Mass. 367, 371 (1920). Alternatively, an undefined easement may be located by express agreement of the parties. Cheever v. Graves, 32 Mass. App. Ct. 601, 605 (1992). "The practical adoption and use, for a long time, of a particular route, under a right of way granted by deed, without fixed and defined limits, if acquiesced in by the grantor, operate to determine the location of the way as effectually as if the same had been described in the deed." Davis v. Sikes, 254 Mass. 540, 546 (1926) (citations omitted). "After the location of an undefined way has been fixed, it cannot be changed except by agreement." Id. An easement created by necessity ceases when the necessity ceases. Viall v.

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[22]VCS's argument regarding tribal customs of common use is interesting, but it does not support a conclusion that either the commissioners or the several set-off lot owners intended that there would be no access to the set-off lots. In so stating, I am not shifting from plaintiffs the burden of proof on the existence of a way by necessity; instead, I am applying in support of that burden the presumption that severance of land from a way implies an intention that the land should have a means of access to the way.

[23]Even if an easement arose by necessity in 1878, however, such an easement does not include (as requested in plaintiffs' prayer for relief) the right to install utilities in the way. See Nylander v. Potter, 423 Mass. 158, 160 n.6 (1996); Nantucket Conservation Found., Inc. v. Russell Management, Inc., 2 Mass. App. Ct. (1974). See also Cumbie v. Goldsmith, 387 Mass. 409, 411-412 n.8 (1982).

Carpenter, 14 Gray at 127.[24]

As the only public way in the area in 1878 was State Road, located to the north of plaintiffs' lots, any way that arose by necessity on the commissioners' 1878 report must extend northerly from plaintiffs' lots to State Road. The record does not indicate the existence of any way in use on the ground at the time of the commissioners' 1878 report, and the present record is insufficient to establish conclusively the location of a way by necessity. The record does establish that Zack's Cliffs Road eventually came into use and served as the principal means of access from plaintiffs' lots to State Road.[25] That use suggests that the landowners in the area may have adopted Zack's Cliffs Road as the means of access to State Road, or at least from plaintiffs' lots to State Road.[26] However, Zack's Cliffs Road traverses, among other land, lots 87 and 88. Because set-off lots 87 and 88 were among the lots determined in severalty under the commissioner's 1871 report, they were not part of the common lands at the time the commissioners' 1878 report severed plaintiffs' lots from their access to State Road. Accordingly, a way by necessity arising from the commissioners' 1878 report cannot be imposed on lot 87 or lot 88.[27] In other words, to the extent Zack's Cliffs Road might serve to locate a way by

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[24]Accordingly, Pettegrove's claim of a way by necessity for the benefit of lot 232 fails, by reason of the express easement benefitting that lot.

[25]Paragraph 43 of plaintiffs' amended verified complaint asserts that, prior to the opening of the Moshup Trail, Zack's Cliffs Road and the other connecting ways were the sole means of access to plaintiffs' lots. That assertion is supported by the various aerial photographs and maps submitted in the record.

[26]Plaintiffs' complaint asserts that other ways, connecting to Zack's Cliffs Road, served other lots. However, the existence of such other ways does not affect plaintiffs' claim, as Zack's Cliffs Road runs directly through the Kitras lots.

[27]Because the parties have not addressed the question of plaintiffs' prescriptive use of Zack's Cliffs Road, I do not consider on the present record whether the use of Zack's Cliffs Road over the years gave rise to prescriptive rights in that way, or whether such prescriptive rights would serve to supercede an inchoate way by necessity in another location. Similarly, the record is not sufficient to allow me to determine whether the Moshup Trail easement and the Gossamer Wing easement served

necessity resulting from the partition under the commissioners' 1878 report, it may do so only over the lots it traverses which were partitioned into separate ownership under the commissioners' 1878 report, and not over the lots determined in severalty under the commissioner's 1871 report.[28]

Despite the difficulty of determining on the present record the definitive location of an easement by necessity for the benefit of plaintiffs' lots, any claim of an easement by necessity for the benefit of plaintiffs' lots necessarily implicates the lots currently held by the United States in trust for the Wampanoag Tribe of Gay Head which came out of the partition under the commissioners' 1878 report. Defendants accordingly argue that the United States is an indispensable party to this action, and that the complaint must be dismissed because the United States cannot be joined.

Mass. R. Civ. P. 19(a) provides:

> "A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent

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to relocate, by agreement, any way by necessity as it extends across the lots affected by those easements. A third possibility, not addressed by the parties (but suggested in the present record), is that Moshup Trail Limited Partnership (Kitras's predecessor in title) formerly held the Kitras lots in common with the lots currently owned by the United States. Such ownership could have merged any easement benefitting the Kitras lots with the fee in the lots currently held by the United States, and would suggest examination of plaintiffs' claim of an easement by necessity in the context of the 1988 conveyance by Moshup Trail Limited Partnership to the United States.

[28]Defendants argue that the 1989 eminent domain taking (which extinguished all rights in Zack's Cliffs Road as it passed through lot 87) terminated any easement by necessity plaintiffs may have acquired by virtue of the commissioners' 1878 report. A taking by eminent domain that deprives a parcel of its sole means of access does not give rise to an easement by necessity, or a right to extend or relocate the prior means of access. See Darman v. Dunderdale, 362 Mass. 633, 641 (1972); New England Continental Media, Inc. v. Milton, 32 Mass. App. Ct. 374, 378 (1992). Cf. Nylander v. Potter, 423 Mass. 158, 163 n.10 (1996). However, as any easement by necessity arising from the commissioners' 1878 report cannot traverse lot 87, the 1989 eminent domain taking cannot have extinguished plaintiffs' rights in such a way by necessity (unless the way had relocated onto lot 87 by other means).

> obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant."

Mass. R. Civ. P. 19(b) addresses the possibility that an indispensable party cannot be joined:

> "If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."

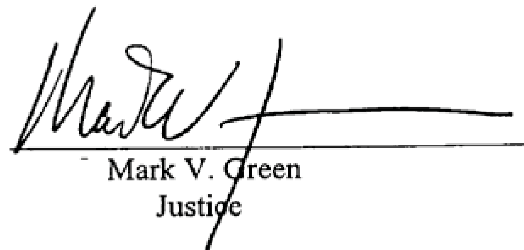
Because plaintiffs' claim of an easement by necessity necessarily implicates the land currently held by the United States, I consider the United States to be a party necessary for a just adjudication of the present action. As noted above, the summary judgment record strongly suggests that any easement by necessity that arose as a result of the commissioners' 1878 report was located by common use across a number of the lots now held by the United States. Any determination of plaintiffs' claim without the United States as a party presents a substantial likelihood of prejudice to the remaining defendants, who face the threat that an easement by necessity might now be located over their property simply because the easement cannot be placed on land of the United States.

"When, as here, a necessary party under Rule 19(a) is immune from suit, 'there is very little room for balancing other factors' set out in Rule 19(b), because immunity 'may be viewed as one of those interests compelling by themselves.'" Enterprise Management Consultants, Inc. v. United States of America, 883 F.2d 890, 894 (10th Cir. 1989), quoting Wichita & Affiliated Tribes of Oklahoma v. Hodel, 788 F.2d 765, 777 n.13 (D.C. Cir. 1986).

Because the present action cannot be determined in the absence of the United States without

substantial and unavoidable risk of prejudice to the remaining parties, I conclude that count one of the complaint must be dismissed pursuant to Mass. R. Civ. P. 19(b). In dismissing plaintiffs' claim, I am aware that the dismissal likely precludes plaintiffs' opportunity to prosecute their claims of an easement by necessity for so long as the United States owns lots set-off by partition under the commissioners' 1878 report. In mitigation of the apparent harshness of that result, I note that (i) plaintiffs (and their predecessors in title) waited to present their claims for more than one hundred years after the commissioners' 1878 report and before the United States acquired the land it now holds (and for nine more years after the United States acquired such land); and (ii) the situation producing this dismissal (ownership of set-off lots by a party immune from suit) is a result of the 1988 conveyance to the United States by Kitras's immediate predecessor in title, without reservation of any right of access for its remaining land.[29]

Defendants' motions to dismiss are allowed, and plaintiffs' cross-motions for summary judgment are denied. Count one of the complaint is dismissed. The prescriptive claims of certain plaintiffs over the land of certain defendants remain for determination in such further proceedings as may be appropriate.[30]



Mark V. Green
Justice

Dated: June 4, 2001

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[29]I do not consider whether plaintiffs have any action in damages by reason of the United States' refusal to waive sovereign immunity.

[30]See the discussion on page 10, above.

REFERENCES

1. 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
2. AERIAL PHOTOGRAMMETRY PROVIDED BY LOCKWOOD MAPPING ROCHESTER, NY, MARCH, 1979
3. U.S. GEOLOGICAL SURVEY TOPOGRAPHIC QUANDRANGLE SQUIBNOCKET, MA; 1977
4. TOWN OF GAY HEAD ASSESSOR RECORDS OCTOBER 1998
5. U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT PERIMETER SURVEY OF WAMPANOAG TRUST LANDS DIRECTED BY STEPHEN B. DOUGLAS, CADASTRAL SURVEYOR
6. ACCESS ROAD DRAWINGS, WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH); 1993; DECOULOS & COMPANY
7. AQUINNAH WAMPANOAG TRIBAL HOUSING AUTHORITY PROJECT, 1994; BUNKER, STINSON, SOLIEN, INC.

LEGEND

LANDS HELD IN TRUST FOR THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH) BY THE U.S. DEPARTMENT OF THE INTERIOR

- LOCATION OF ROAD OBSTRUCTIONS

FORMER RADIO TOWER LOCATION WITH SUPPORT SHEDS

AQUINNAH WAMPANOAG HOUSING AUTHORITY

MOSHUP TRAIL II LIMITED PARTNERSHIP

TACKNASH R.T. (NO SET-OFF #)

TO MOSHUP TRAIL

ATLANTIC OCEAN

MOSHUP TRAIL TO STATE ROAD ALONG ZACK'S CLIFFS ROAD SET-OFF LOT DELINEATIONS AQUINNAH, MASSACHUSETTS

DATE	10/14/98
SCALE	1" = 1000'
PLAN NO.	1

APPENDIX A

(SEAL)

COMMONWEALTH OF MASSACHUSETTS
Land Court
Department of the Trial Court
Miscellaneous Case No. 238738

MARIA A. KITRAS, as TRUSTEE,[1] & others,[2]
Plaintiffs

vs.

TOWN OF AQUINNAH & others,[3]
Defendants

ORDER (1) DENYING PLAINTIFFS' FURTHER MOTION FOR LEAVE TO AMEND COMPLAINT; (2) DENYING DEFENDANT HALL'S MOTION TO CLARIFY, CORRECT, OR AMEND; AND (3) GRANTING PLAINTIFFS' MOTION FOR ENTRY OF FINAL JUDGMENT PURSUANT TO RULE 54(b)

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[1]of Bear Realty Trust, Bear II Realty Trust, and Gorda Realty Trust. Maria A. Kitras replaced Paul D. Pettegrove as Trustee of Gorda Realty Trust by instrument dated July 11, 2001, and recorded in the Dukes County Registry of Deeds in book 841, at page 628.

[2]James J. Decoulos, as co-trustee of Gorda Realty Trust and Bear II Realty Trust (James J. Decoulos accepted appointment as co-trustee of the two trusts by instruments recorded in the Dukes County Registry of Deeds on June 10, 2002, in book 886, at page 851, and on December 23, 2002, in book 917, at page 296, respectively); Victoria Brown; Gardner Brown, Jr; Mark Harding and Eleanor P. Harding, as trustee of Eleanor P. Harding Trust (Hardings).

[3]Benjamin L. Hall, Jr. (Hall), as trustee of Gossamer Wing Realty Trust; David Wice; Betsy Wice; Susan Smith; Russell Smith; Vineyard Conservation Society, Inc. (VCS); Caroline Kennedy (Kennedy) (John F. Kennedy, Jr. and Caroline Kennedy filed an answer December 24, 1998; the docket shows that Caroline Kennedy alone filed a response to motions for summary judgment October 12, 2000, though no suggestion of death or motion to substitute an executor has been filed); George B. Brush (Brush), as trustee of Toad Rock Realty Trust; South Shore Beach, Inc.; Leonard F. Vanderhoop, Jr.; Joanne Fruchtman a/k/a JoAnn Fruchtman; Jack Fruchtman; Peter Ochs; Hope E. Horgan; Helen S. James; Donald Taylor; Moshup Trail II Limited Partnership (Moshup Trail partnership); Richard Hoyle; Charles E. Derby; Shirley A. Jardin; persons unknown or unascertained being the heirs of Wallace E. Francis; Jeffrey Madison, as trustee of Tacknash Realty Trust; Estate of Edwin D. Vanderhoop; John A. Wiener; Sally D. Wiener; Patrick J. Evans; Scott Harrison; Julie B. Hoyle (Hoyle); Carmella Stephens, as trustee of Deer Meadow Realty Trust; Stella Winifred Hopkins a/k/a Winifred S. Hopkins; persons unknown or unascertained being the heirs of Esther Howwasswee (Howwasswee heirs); persons unknown or unascertained being the heirs of Savannah F. Cooper; Heidi B. Stutz; Michael W. Stutz; Hamilton Cammann; Mary Elizabeth Pratt; persons unknown or unascertained being the heirs of Amos Smalley; June Noble; Richard Sullivan; Sarah Saltonstall; Steven Yaffe; Thomas Seeman; Lawrence B. Evans; Beverly A. Evans; Estate of William Vanderhoop; Kevin Craig; Cynthia Craig; Flavia Stutz; Robert Stutz; Selma Greenberg; William Greenberg; Wilma Greenberg; Alexandra Whitcomb; Rolph Lumley; Aurilla Fabio; other persons unknown or unascertained; and theUnited States of America, as trustee for the Wampanoag Tribe of Gay Head (Aquinnah).The June 2001 decision (discussed below) found that only the Hardings' counts two, three, and four remained and only as to VCS, Brush, the Howwasswee heirs, the Moshup Trail partnership, Hoyle, Kennedy, and the Town of Aquinnah. 9 LCR 273 at 276. The Hardings have since waived those claims. See Motion of Plaintiffs Mark and Eleanor Harding to dismiss filed May 19, 2003, allowed (Lombardi, J.) May 29, 2003; Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Entry of Final Judgment Pursuant to Rule 54(b) filed May 6, 2003, at pp. 4-5. Thus, at present, all counts of the complaint have been dismissed as to all defendants and the only claims remaining are Hall's cross-claims.

I. Background

Plaintiffs and defendant Benjamin L. Hall, Jr. (Hall) seek access to certain lots which they own in Aquinnah (set-off lots). Plaintiffs, in count one of the Amended Verified Complaint filed November 30, 1998, and Hall, in count one of his Amended Answer/Counterclaim & Cross-Claims filed June 22, 1998, seek to assert an easement by implication or necessity. On June 4, 2001, the court (Green, J.) issued Decision on Cross-Motions for Summary Judgment and Motions to Dismiss (June 2001 decision). Kitras v. Aquinnah, 9 LCR 273 (2001). The June 2001 decision found that the set-off lots were severed from common ownership and from an adjoining public way in 1878, and hence benefit from "the presumption that severance of land from a way implies an intention that the land should have a means of access to the way." Id. at 277; 277 n. 22. Although the summary judgment record contained no evidence to counter that presumption, the court did not consider whether a way, benefitting the lots, had arisen by necessity in 1878 because such consideration "necessarily implicates . . . lots currently held by the United States in trust for the Wampanoag Tribe of Gay Head . . . ." Id. at 278.[4] As the court found,

> "[T]he summary judgment record strongly suggests that any easement by necessity. . . was located by common use across a number of the lots now held by the United States. Any determination of plaintiffs' claims without the United States as a party presents a substantial likelihood of prejudice to the remaining defendants, who face the threat that an easement by necessity might now be located over their property simply because the easement cannot be placed on land of the United States."

Id. at 279. Because the United States could not be joined, the court dismissed count one of the complaint pursuant to Mass. R. Civ. P. 19 (b).[5]

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[4]The United States of America had been added as a defendant by an earlier amendment to the complaint. After removal of the case at bar to U.S. District Court, the complaint was dismissed as to the United States on the ground of sovereign immunity.

[5]Hall had been named a defendant in the original complaint. In the June 2001 decision, the court re-designated him a party plaintiff without explanation, perhaps because of the identity of his count one with plaintiffs' count one, and the general congruence of his position and prayers for relief with those of plaintiffs. Kitras, 9 LCR at 274. This court (Lombardi, J.) subsequently granted Hall's motion to be returned to his defendant status, although Hall's party status is irrelevant as to count

On June 3, 2002, plaintiffs and Hall filed separate motions seeking, among other relief, leave to amend their respective pleadings to name the Wampanoag Tribe of Gay Head (Aquinnah) (tribe) as a defendant in the hope that this would revive their respective counts one. By order dated September 17, 2002 (September 2002 order), this court (Lombardi, J.) denied the motions, primarily on the grounds of lack of state court jurisdiction over the tribe, the prospect of tribal immunity, lateness of the motions to amend, and potential prejudice to other parties.

On May 6, 2003, plaintiffs filed Motion for Entry of Final Judgment Pursuant to Rule 54(b) (Rule 54 (b) motion) in order to seek appellate review. At a hearing on that motion held on May 29, 2003, Hall filed an opposition to the Rule 54(b) motion and a "Combined Motion . . . to Clarify, Correct, Amend or Modify" the September 2002 order (Hall's combined motion for relief), in both of which he argued that a recent order of Judge Woodlock of the U. S. District Court for the District of Massachusetts in Wiener v. Wampanoag Aquinnah Shellfish Hatchery Corp.[6] (Woodlock order) undermined a principal finding in support of the September 2002 order, i.e. the lack of state court jurisdiction over the tribe. Plaintiffs filed Further Motion for Leave to Amend Complaint on June 16, 2003 (plaintiffs' further motion to amend), wherein they adopted Hall's position in light of the Woodlock order and sought leave to name the tribe as a party defendant.

This court heard argument on plaintiffs' further motion to amend and Hall's combined motion for relief on July 30, 2003. Much of the argument centered not only on the Woodlock order but also on Memorandum of Decision and Order on Parties' Cross-Motions for Summary Judgment issued on June 11, 2003, by Dukes County Superior Court (Connon, J.) entered

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one of his counterclaim. Whether plaintiff or defendant, Hall's claim of an easement by implication or necessity was dismissed by the June 2001 decision for the same reason that plaintiffs' identical claim was - the inability to join the United States.

[6]Memorandum and Order dated September 30, 2002, Civil Action No. 01-10924-DPW.

in Wiener[7] (Connon order), then on remand from the U. S. District Court.

II. Motions to Add Tribe as Defendant

The primary ground for the September 2002 order was that naming the tribe would be futile, since it appeared that this court might lack jurisdiction, and in any case the tribe was likely to remove the case to federal court where it would plead sovereign immunity. The Woodlock order contains a lengthy exposition of the "well-pleaded complaint rule" which precluded federal jurisdiction "given these pleadings." While the Woodlock order carefully avoids any conclusion as to whether and under what circumstances a state court would have jurisdiction, Judge Connon necessarily found jurisdiction on remand. On the question of jurisdiction, the same statutes and case law under consideration in Wiener apply here. Thus, to the extent that the likelihood of lack of jurisdiction was a ground for the September 2002 order, the Woodlock and Connon orders strongly suggest that ground is gone. This court, however, need not decide the question in light of the finding in the June 2001 decision that the United States is a necessary party.

Plaintiffs and Hall have also argued that tribal sovereign immunity has been either abrogated by Congress or waived. Although the Connon order concludes, after lengthy and careful consideration, that the tribe's immunity remained intact (again, construing the same statutes and federal cases applicable here), this court need not resolve the question. In the first place, it would be premature to do so before the tribe has been named and has pled the defense. Further, plaintiffs have not convinced this court either that (a) the tribe may properly defend against the easement claim or (b) the necessity to join the United States would be eliminated even if the tribe could defend such a claim.[8]

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[7]Civil Action No. 2001-00027.

[8]At the hearing on the present motions, counsel for the Town of Aquinnah informed the court that the Town is appealing the Connon order. Resolution of that appeal could bear directly on an appeal from the judgment that follows this order.

Plaintiffs argue that 25 U.S.C. § 1771e(c)(3)(B), which apparently gives the tribe the power to convey easements over land held in trust for it by the United States without the latter's consent, necessarily implies the power to defend against others' claims of easements over the same land. The argument is intuitively appealing, but plaintiffs have not cited any cases in support of the proposition, and this court has been unable to find any. Nor have plaintiffs attempted to counter the rule that a trustee, as holder of legal title, is a necessary party to a suit over rights in the trust property. See Sadler v. Industrial Trust Co., 321 Mass. 10, 13 (1951). The June 2001 decision found that the United States was a necessary party, and subsequent events have not demonstrated that this court has any reason to disturb that conclusion. Plaintiffs and Hall may raise the issue on appeal.

III. Rule 54(b) Motion

A. Hall's Set-Off Lot 302

The June 2001 decision found that Gossamer Wing Realty Trust owns set-off lots 707, 710, and 302. Kitras, 9 LCR at 274. It also found that the only public way in existence at the time of the 1878 severance was State Road. Id. at 277. According to the plan appended to the June 2001 decision, set-off lot 302 is not separated from State Road by land of the United States. Therefore, Hall's claim of an easement by necessity, insofar as it pertains to set-off lot 302, does not appear to necessarily implicate land of the United States. This was an allegation of error made by Hall in his motion to "Correct, Amend or Modify" the June 2001 decision. However, as stated in the September 2002 order, "this court does not sit to review the orders and decisions already made by another trial judge or to rule on alleged errors." The 2001 decision fully disposed of both plaintiffs' and Hall's claims of an easement by implication or necessity.

B. Rule 54(b) Certification

Plaintiffs have never conceded that their count one necessarily implicates land held by the United States, but in any event that count (and Hall's analog count one) was finally adjudicated by the June 2001 decision. As noted in footnote 3 above, the remainder of plaintiffs'

claims have been dismissed. The only outstanding claims are Hall's second and third cross-claims, which assert two different theories of prescription over the same driveway - a driveway unconnected to "Zack's Cliffs Road" or the "radio tower road," the two ways over which plaintiffs sought prescriptive rights by their now-dismissed claims - and implicate the land of a small number of defendants.[9] The existence of Hall's cross-claims thus do not detract from the ripeness of plaintiffs' claims for entry of judgment. See Long v. Wickett, 50 Mass. App. Ct. 380, 385-386 (2000).

Judge Green acknowledged that the record on summary judgment was not sufficiently developed to allow him to locate any easement by necessity that may have arisen in 1878. See Kitras, 9 LCR at 278. Although claims of easements arising by necessity are "garden-variety" in the Land Court, see Long v. Wickett at 397, such claims are rarely stopped in their tracks by federal-law issues like tribal and federal sovereign immunity. Resolution of those purely legal questions by an appellate court is appropriate at this stage of the proceedings. Rather than constituting "piecemeal review," an appeal at this juncture would address the main question of interest to the majority of the parties. It is Hall's prescriptive claim that is the odd piece, allowed in as a permissive cross-claim only because the easement-by-necessity claims implicate all of the land in common ownership in 1878, including the lots over which he asserts prescriptive rights. Adjudication in this court of Hall's factually unrelated prescriptive claim will not moot the issue on appeal.

The complaint was filed in the spring of 1997, and the parties are entitled to test their

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[9]Count Two of Hall's Amended Answer/Counterclaim & Crossclaims names Leonard F. Vanderhoop, Jr., Margaret B. Gubser (Gubser) as she is the Trustee of the Testamentary Trust of Alice Stone Blackwell, Joanne and Jack Fructman (sic), and Peter Ochs. Judging by the plan attached to the June 2001 decision, counts two and three seek to assert rights to use a driveway, not connected to Zack's Cliffs road or the "radio tower road," for the benefit of Gossamer Wing's set-off lot 707. According to plaintiffs' assented-to motion to dismiss Gubser filed April 3, 1998, VCS took title to Gubser's set-off lot 548 in 1997. The docket shows that VCS was allowed to substitute itself for Gubser on April 16, 1998. It is important to note for purposes of Rule 54(b) certification that the driveway in question could not be implicated in the easement by necessity claims because it goes to Moshups Trail, a way not in existence at the time of severance.

theories on appeal. There is no just reason for delaying that appeal until Hall has fully prosecuted his factually unrelated claim of prescription.

Based upon the foregoing, this court (a) denies Hall's combined motion for relief, (b) denies plaintiffs' further motion to amend, and (c) allows the Rule 54 (b) motion. Separate judgment on count one of plaintiffs' amended verified complaint and count one of Hall's Amended Answer/Counterclaim & Crossclaims to enter accordingly.

So ordered.

By the Court. (Lombardi, J.)

Attest:

Ann-Marie J. Breuer
Deputy Recorder

Dated: August 21, 2003

A TRUE COPY
ATTEST:

DEPUTY RECORDER

(SEAL)

COMMONWEALTH OF MASSACHUSETTS
Land Court
Department of the Trial Court
Miscellaneous Case No. 238738

MARIA A. KITRAS, as TRUSTEE,[1] & others,[2]
Plaintiffs

vs.

TOWN OF AQUINNAH & others,[3]
Defendants

JUDGMENT PURSUANT TO MASS. R. CIV. P. 54 (b)

This cause came to be heard on Motion for Entry of Final Judgment Pursuant to Rule 54(b) (Rule 54 (b) motion) filed by plaintiffs on May 6, 2003. An order has entered this day allowing the Rule 54 (b) motion determining that there is no just reason for delay and directing the entry of this judgment. In accordance with that order, it is hereby

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[1]of Bear Realty Trust, Bear II Realty Trust, and Gorda Realty Trust. Maria A. Kitras replaced Paul D. Pettegrove as Trustee of Gorda Realty Trust by instrument dated July 11, 2001, and recorded in the Dukes County Registry of Deeds in book 841, at page 628.

[2]James J. Decoulos, as co-trustee of Gorda Realty Trust and Bear II Realty Trust (James J. Decoulos accepted appointment as co-trustee of the two trusts by instruments recorded in the Dukes County Registry of Deeds on June 10, 2002, in book 886, at page 851, and on December 23, 2002, in book 917, at page 296, respectively); Victoria Brown and Gardner Brown, Jr (Browns); Mark Harding; and Eleanor P. Harding, as trustee of Eleanor P. Harding Trust.

[3]Benjamin L. Hall, Jr., as trustee of Gossamer Wing Realty Trust; David Wice; Betsy Wice; Susan Smith; Russell Smith; Vineyard Conservation Society, Inc.; Caroline Kennedy; John F. Kennedy. Jr.; George B. Brush, as trustee of Toad Rock Realty Trust; South Shore Beach, Inc.; Leonard F. Vanderhoop, Jr.; Joanne Fruchtman a/k/a JoAnn Fruchtman; Jack Fruchtman; Peter Ochs; Hope E. Horgan; Helen S. James; Donald Taylor; Moshup Trail II Limited Partnership; Richard Hoyle; Charles E. Derby; Shirley A. Jardin; persons unknown or unascertained being the heirs of Wallace E. Francis; Jeffrey Madison, as trustee of Tacknash Realty Trust; Estate of Edwin D. Vanderhoop; John A. Wiener; Sally D. Wiener; Patrick J. Evans; Scott Harrison; Julie B. Hoyle; Carmella Stephens, as trustee of Deer Meadow Realty Trust; Stella Winifred Hopkins a/k/a Winifred S. Hopkins; persons unknown or unascertained being the heirs of Esther Howwasswee; persons unknown or unascertained being the heirs of Savannah F. Cooper; Heidi B. Stutz; Michael W. Stutz; Hamilton Cammann; Mary Elizabeth Pratt; persons unknown or unascertained being the heirs of Amos Smalley; June Noble; Richard Sullivan; Sarah Saltonstall; Steven Yaffe; Thomas Seeman; Lawrence B. Evans; Beverly A. Evans; Estate of William Vanderhoop; Kevin Craig; Cynthia Craig; Flavia Stutz; Robert Stutz; Selma Greenberg; William Greenberg; Wilma Greenberg; Alexandra Whitcomb; Rolph Lumley; Aurilla Fabio; other persons unknown or unascertained; and the United States of America, as trustee for the Wampanoag Tribe of Gay Head (Aquinnah).

ORDERED and ADJUDGED that count one of plaintiffs' amended verified complaint and count one of defendant Hall's Amended Answer/Counterclaim & Crossclaims are hereby DISMISSED, and it is further

ORDERED and ADJUDGED that counts two, three, and four of plaintiffs' amended verified complaint are DISMISSED.[4]

By the Court. (Lombardi, J.)

Attest:

Ann-Marie J. Breuer
Deputy Recorder

Dated: August 21, 2003

A TRUE COPY
ATTEST:

DEPUTY RECORDER

[4] On May 29, 2003, this court allowed the motion of plaintiffs Mark Harding and Eleanor P. Harding to dismiss, without prejudice, counts two, three, and four of the amended verified complaint as to them. The June 2001 decision recited that plaintiffs Kitras and the Browns had waived those same counts. Kitras v. Aquinnah, 9 LCR 273, 276 (2001). Thus, those counts have been waived by all plaintiffs.

MARIA A. KITRAS, trustee, [1] & others [2] vs. TOWN OF AQUINNAH & others. [3]

1 Of Bear Realty Trust, Bear II Realty Trust, and Gorda Realty Trust.
2 James J. Decoulos, as trustee of Bear II Realty Trust and Gorda Realty Trust; Victoria Brown; Gardner Brown, Jr.; Mark D. Harding; and Eleanor P. Harding, as trustee of the Eleanor P. Harding Trust.
3 Vineyard Conservation Society, Inc.; Benjamin L. Hall, Jr., as trustee of Gossamer Wing Realty Trust; David Wice; Betsy Wice; Susan Smith; Russell Smith; John F. Kennedy, Jr.; Caroline Kennedy; George B. Brush, as trustee of Toad Rock Realty Trust; South Shore Beach, Inc.; Leonard F. Vanderhoop, Jr.; Joanne Fruchtman; Jack Fruchtman; Peter Ochs; Hope E. Horgan; Helen S. James; Donald Taylor; Moshup Trail II Limited Partnership; Richard Hoyle; Charles E. Derby; Shirley A. Jardin; heirs of Wallace E. Francis; Jeffrey Madison, as trustee of Tacknash Realty Trust; estate of Edwin D. Vanderhoop; John A. Wiener; Sally D. Wiener; Patrick J. Evans; Scott Harrison; Julie B. Hoyle; Carmella Stephens, as trustee of Deer Meadow Realty Trust; Stella Winifred Hopkins, also known as Winifred S. Hopkins; heirs of Esther Howwasswee; heirs of Savannah F. Cooper; Heidi B. Stutz; Michael W. Stutz; Hamilton Camman; Mary Elizabeth Pratt; heirs of Amos Smalley; June Noble; Richard Sullivan; Sarah Saltonstall; Steven Yaffe; Thomas Seeman; Lawrence B. Evans; Beverly A. Evans; estate of William Vanderhoop; Kevin Craig; Cynthia Craig; Flavia Stutz; Robert Stutz; Selma Greenberg; William Greenberg; Wilma Greenberg; Alexandra Whitcomb; Rolph Lumley; and Aurilla Fabio.

No. 04-P-472

APPEALS COURT OF MASSACHUSETTS

64 Mass. App. Ct. 285; 833 N.E.2d 157; 2005 Mass. App. LEXIS 773

April 11, 2005, Argued
August 18, 2005, Decided

SUBSEQUENT HISTORY: As Corrected October 5, 2005.
Review denied by Kitras v. Town of Aquinnah, 445 Mass. 1109, 840 N.E.2d 56, 2005 Mass. LEXIS 806 (2005)
On remand at, Findings of fact/conclusions of law at, Judgment entered by, in part Kitras v. Town of Aquinnah, 2010 Mass. LCR LEXIS 87 (2010)

PRIOR HISTORY: [***1] Suffolk. Civil action commenced in the Land Court Department on May 20, 1997. Motions to dismiss were heard by Mark V. Green, J.; motions to amend the complaint were heard by Leon J. Lombardi, J., and entry of judgment was ordered by him.
Kitras v. Town of Aquinnah, 2003 Mass. LCR LEXIS 54 (2003)

HEADNOTES

Easement. *Real Property*, Easement. *Wampanoag Tribal Council*. *Governmental Immunity*.

COUNSEL: H. Theodore Cohen (Leslie-Ann Morse with him) for the plaintiffs.

Jennifer S.D. Roberts for Vineyard Conservation Society, Inc.

Ronald H. Rappaport for town of Aquinnah.

Benjamin L. Hall, Jr., Pro se.

JUDGES: Present: Grasso, Brown, Trainor, JJ.

OPINION BY: BROWN

OPINION

[*286] [**160] BROWN, J. Before us are the owners of certain landlocked lots lying within the town of Aquinnah (town) on Martha's Vineyard. Desirous of developing their lots but having no road frontage or access to utilities, these owners claim easements by necessity crossing their neighbors' lots. One of those neighbors is the United States, which holds a number of town lots in trust for the Wampanoag Tribal Council of Gay Head, Inc. (Tribe), a Federally recognized Native American Tribe. On cross motions for dismissal or summary judgment, a Land Court judge concluded that any easements by necessity would burden tribal land; that the claims could not fairly be adjudicated in the absence [***2] of that land's trustee, the United States (which had been dismissed from the litigation on sovereign immunity grounds); and that the owners' claims therefore must be dismissed for want of an indispensable party. A different judge denied subsequent attempts to join the Tribe directly and, pursuant to Mass.R.Civ.P. 54(b), 365 Mass. 820 (1974), entered a partial judgment from which these appeals and cross appeals mainly have been taken. We reverse and remand.

I

The area of Martha's Vineyard originally known as Gay Head, now the town of Aquinnah, was "and is still the home of a [*287] remnant of that race, which . . . the white man found here as lords of the soil." Report of the Commissioners, 1856 House Doc. No. 48, at 3. On May 6, 1687, "Joseph Mittark, sachem of Gay Head," an Algonquian and chief's son, purportedly deeded Gay Head to New York Governor Thomas Dongan. *Id*. at 6. Dongan, in turn, on May 10, 1711, transferred his fee to an English religious entity. *Id*. at 4. This entity neglected Gay Head, neither "demanding rents" nor "exercising over it any jurisdiction or control." *Id*. at 5. Although it is not entirely clear how, or under [***3] what authority, sometime after the Revolutionary War the Commonwealth assumed control of Gay Head and its residents became wards of the State.

So matters stood until mid-Nineteenth Century when, apparently as part of the move to grant full citizenship to the Commonwealth's Native American residents, commissioners appointed by the Governor recommended that a boundary marked by a stone fence be established "between the lands of [the Gay Head Indians] and the lands of the white inhabitants of Chilmark." *Id*. at 2. Later, by St. 1862, c. 184, §§ 4 and 5, the Legislature established the district of Gay Head and directed the clerk of the district to make and maintain "a register of the lands of [the district], as at present held, whether in common or severalty, and if in severalty, by whom held." Charles Marston then was appointed as a commissioner to

> "examine, and fully and finally to determine, all boundary lines between the individual owners of land located in the [**161] Indian district of Gay Head . . . and also to determine the boundary line between the common lands of said district and the individual owners adjoining said common lands."

Resolves 1863, c. 42. Marston [***4] died soon thereafter; Richard Pease was appointed in his stead. Resolves 1866, c. 67.

In its 1870 report to the Senate, a legislative committee noted that Gay Head "contains, within its area, about two thousand four hundred acres of land. About four hundred and fifty acres of the land is held in severalty, and is fenced and occupied by the several owners, and the remainder is held by the tribe in common." Report of the Committee, 1869 Senate Doc. No. 14, at 4. The committee observed that this common land was [*288] "uneven, rough, and not remarkably fertile. . . . It is, perhaps, better that these lands should

continue to lie in common for the benefit of the whole community as pasturage and berry lands, than to be divided up into small lots to lie untilled and comparatively unused." *Id*. at 5.

Situated on a peninsula and separated from the main island by an isthmus, Gay Head at that time was served by a single main road "much travelled in summer by people from the main land, pleasure-seeking on the Vineyard"; this road nonetheless was described as being "in most deplorable condition of which your Committee had most 'striking' proof," and as blocked by "a substantial stone wall" and "bars" [***5] that "have to be removed whenever a carriage crosses." *Id*. at 9. The committee thus recommended "that provision be made at an early day whereby the road in Gay Head from the light-house to Chilmark shall be put in good travelling order at the expense of the State." *Id*. at 10.

After receiving the committee's 1870 report, the Legislature abolished the district of Gay Head, in its place incorporating the town of Gay Head (later renamed the town of Aquinnah), St. 1870, c. 213, § 1. The act also required the Dukes County "judge of probate . . ., [upon proper application for division of] any or all of the common lands of [the town], [to] appoint two discreet, disinterested persons commissioners to make partition of the same," and charged the judge to "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." St. 1870, c. 213, § 6. The act also directed the county commissioners of Dukes County to lay out and construct a road -- what is [***6] now called State Road -- from Chilmark to the Gay Head lighthouse. St. 1870, c. 213, § 5. See the Appendix to this opinion for a sketch plan depicting the roads and lots at issue.

With the command of St. 1870, c. 213, commissioners Joseph Pease and Richard Pease proceeded to identify and fix the lots. At that time, as noted, the land was already held either in severalty or in common. By reports of 1871 and 1878, the Pease [*289] brothers formalized the boundaries of those lots already held in severalty, numbering them 1 through 188 or 189. With the exception of certain land not relevant here, the common land was partitioned in 1878 into lots numbered 189 or [**162] 190 and above. [4] The vast majority of the lots so set off have no frontage on or other access to what became State Road. None of the reports or original deeds makes mention of easements, either to State Road or to any other location.

4 The lot numbered 189 is an anomaly, described in the record as held prior to these events both in severalty and in common.

The [***7] years since have seen changes, most notably with respect to the perceived value of the town's "uneven, rough, and not remarkably fertile" land. Also relevant here, by at least 1939 an unpaved way now known as Zack's Cliffs Road, leading generally south from State Road (via Old South Road) to and across certain of the lots here at issue, appears to have been in regular use. Nothing in this record establishes that Zack's Cliffs Road was in use significantly before that date. In 1954 a new road, called the Moshup Trail, was laid out and, over the next several years, constructed; this paved road travels generally south and west from State Road through the area generally under consideration here (although none of the persons here claiming easements own lots with road frontage).

Perhaps most important, as part of a comprehensive settlement resolving "Indian claims to certain lands within the town," St. 1985, c. 277, § 1, the Tribe acquired in the mid- to late 1980's several hundred acres of town land (the Settlement Lands); the Settlement Lands are held by a State-chartered corporation, called the Tribal Land Corporation, with the United States acting as trustee. See *Building Inspector & Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp*., 443 Mass. 1, 3, 8, 818 N.E.2d 1040 (2004). [***8] The Settlement Lands consist of several physically unconnected parcels in and about the town; for our purposes, we focus on the central parcels, consisting of numerous lots generally lying between State Road and the lots here at issue.

Before identifying the lots and interests most directly relevant here, we pause to note that it sometimes is difficult to determine from the pleadings what owners are claiming what easements [*290] for what lots, or even what parties remain interested in the case. In the interest of expediency and because our decision today does not depend upon it, we proceed as if all persons and lots noted below properly are before us and under consideration. On remand it will be for the trial judge and parties to resolve these uncertainties.

That said, as described by the motion judge in his decision, and as presented in the summary judgment materials and the appellate briefs, plaintiffs Maria Kitras (as trustee of Bear Realty Trust, Bear II Realty Trust, and Gorda Realty Trust) and James Decoulos (as trustee of Bear II Realty Trust and Gorda Realty Trust) (collectively, Kitras) claim ownership of five lots, numbered 178, 711, 713, 232 and 243. Plaintiffs Gardner and Victoria [***9] Brown (collectively, Brown) own lot 238. Plaintiffs Eleanor Harding (as trustee of the Eleanor P. Harding Trust) and Mark Harding own two lots, numbered 554 and 555. Defendant Benjamin Hall (as trustee of either Gossamer Wing Realty Trust or Baron Land Realty Trust) (Hall) here claims ownership of lots 707, 710, 302, 177 and 242 (the latter two lots are labeled Howwasswee in the Appendix). The remaining defendants own various other lots in the general vicinity of the plaintiffs' and Hall's lots.

II

Rule 19(a) of the Massachusetts Rules of Civil Procedure generally provides that [**163] the category of "persons to be joined if feasible" includes one whose absence would prevent complete relief from being afforded those already parties. Mass.R.Civ.P. 19(a), 365 Mass. 765 (1974). If it is not feasible to join such a person, "the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." Mass.R.Civ.P. 19(b), 365 Mass. 765 (1974). See G. L. c. 231A, § 8 [***10] .

A person with an interest in land ordinarily should be joined if a judgment could affect that interest. See *Uliasz v. Gillette*, 357 Mass. 96, 105, 256 N.E.2d 290 (1970). Persons in possession of land burdened by an easement have an interest in land such that they ordinarily should be joined in actions that concern that [*291] easement. See *Vance v. Ford*, 187 Or. App. 412, 423-425, 67 P.3d 412 (2003). No party suggests that the United States has waived its sovereign immunity such that it may be joined in this action. See *Alaska v. Babbitt*, 38 F.3d 1068, 1072-1074 (9th Cir. 1994). The question presented by the judgment before us, then, is whether the United States, as trustee over the Settlement Lands, was an indispensable party in an action seeking a declaration that certain lots in the general vicinity of the Settlement Lands had the benefit of easements by necessity. See and compare *Bay Colony Constr. Co.* v. *Norwell*, 5 Mass. App. Ct. 801, 360 N.E.2d 1278 (1977). Of course, we need not reach that question unless easements by necessity may be implied for some or all of the lots in question.

A. "An easement is by definition a limited, nonpossessory interest in realty. [***11] " *M.P.M. Builders, LLC v. Dwyer*, 442 Mass. 87, 92, 809 N.E.2d 1053 (2004). It may be created either expressly, see, e.g., *id*. at 88, or, in some limited cases, implicitly from circumstance; an easement by necessity is of the latter sort. In general, such an easement is "said to arise (or be implied) . . . when a common grantor carves out what would otherwise be a landlocked parcel." *Bedford v. Cerasuolo*, 62 Mass. App. Ct. 73, 76-77, 818 N.E.2d 561 (2004), quoting from *New England Continental Media, Inc*. v. *Milton*, 32 Mass. App. Ct. 374, 378, 588 N.E.2d 1382 (1992). More specifically, an easement by necessity may be implied if we can fairly conclude that the grantor and grantee, had they considered the matter, would have wanted to create one. To make this deduction, we require that (1) both dominant and servient estates once were owned by the same person or persons, i.e., that there existed a unity of title; (2) a severance of that unity by conveyance; and (3) necessity arising from that severance, all considered "with reference to all the facts within the knowledge of the parties respecting the subject of the grant, to the end that their assumed design may be carried [***12] into effect." *Orpin v. Morrison*, 230 Mass. 529, 533, 120 N.E. 183 (1918). See *Nichols v. Luce*, 41 Mass. 102, 24 Pick. 102, 104 (1834); *Davis v. Sikes*, 254 Mass. 540, 545-546, 151 N.E. 291 (1926); *Joyce v. Devaney*, 322 Mass. 544, 549, 78 N.E.2d 641 (1948); *Nylander v. Potter*, 423 Mass. 158, 162, 667 N.E.2d 244 (1996); Restatement (Third) of Property (Servitudes) § 2.15 (2000).

Of critical importance for the present analysis is the unity of title requirement, which derives from the simple observation [*292] that, whatever the intent, one may not grant what one does not own. See *Boudreau v. Coleman*, 29 Mass. App. Ct. 621, 632, 564 N.E.2d 1 (1990). Thus, easements can be created only "out of other land of the grantor, or reserved to the grantor out of the land granted; never out of the land of a stranger." *Richards v.* [**164] *Attleborough Branch R.R. Co*., 153 Mass. 120, 122, 26 N.E. 418 (1891). See *Uliasz v. Gillette*, 357 Mass. at 102. Here, with respect to the lots numbered 1 through 188 or 189, the Commonwealth, whom the parties assume to be the grantor, [5] could not grant or reserve an easement

because, at [***13] the times at interest here, it did not own the lots: each of those lots already was owned by other persons. There was thus no unity of title and no easements can be implied.

5 We do not doubt that the Commonwealth, a governmental entity, can act as a grantor for these purposes, though this is a question of some controversy not previously decided in this Commonwealth. See Bruce & Ely, Easements & Licenses in Land § 4:7, at 4-18 to 4-20 (2001) (collecting authorities). "The rationale for [rejecting governmental ownership of both lots as satisfying the unity-of-title standard] is unclear, but one commentator suggests that it may be based on 'some remnant of the prerogative of the sovereign.'" *Id.* at 4-18 to 4-19 (footnotes omitted), quoting from Simonton, Ways by Necessity, 25 Colum. L. Rev. 571, 579 (1925). The Restatement has, without discussion, taken the position that easements "by necessity arise on conveyances by governmental bodies as well as by other grantors." Restatement (Third) of Property (Servitudes) § 2.15 comment c (2000). There appears no compelling modern reason here to distinguish between governmental and private grantors, and we adopt the Restatement's approach.

[***14] As Hall observes, this "was *not* just a routine subdivision development invoking the application of traditional easement principles" (emphasis original). It will be recalled that the commissioners' process did not operate on virgin, untenanted land. Instead, what eventually became the town was tenanted at the times under discussion by individuals, many of whom claimed ownership of discrete and separated portions of that land. These claims developed out of what the commissioners understood to be the prevailing tribal law or tradition, with the "rule [being] that any native could, at any time, appropriate to his own use such portion of the unimproved common land, as he wished, and, as soon as he enclosed it, with a fence, of however frail structure, it belonged to him and his heirs forever." Report of the Commissioners, 1849 House Doc. No. 46, at 20. As another commissioner noted, "the title to land, so taken up and enclosed, [*293] is never called in question" under "the unwritten Indian traditional law." Report to the Governor and Council Concerning the Indians of the Commonwealth, 1862 House Doc. No. 215, at 34.

The commissioners appointed with the task of "examining and defining" [***15] those who already claimed partitions respected this unwritten Indian traditional law, and a legislative committee described the land so claimed as being in "severalty." Report of the Committee, 1869 Senate Doc. No. 14, at 4. Indeed, far from "partitioning" or "severing" the land so held, the commissioners acted, under charge from the Legislature, simply to acknowledge "the boundaries of the lands *rightfully held by individual owners*" (emphasis added). St. 1870, c. 213, § 6. Nor can it be said that the Commonwealth had in those already claimed lots a right of present possession or some other title carrying with it the right to grant presently operative easements; instead, at most, the Commonwealth held a "fee title" on those lots, meaning it had only "a contingent future interest which ripened into a fee simple only when the Indians abandoned their possessory interest [Indian title] (or when the sovereign, holding fee title, took that possessory interest)." *James v. Watt*, 716 F.2d 71, 74-75 (1st Cir. 1983), cert. denied, 467 U.S. 1209, 104 S. Ct. 2397, 81 L. Ed. 2d 354 (1984) (internal quotation marks, citation and emphasis omitted).

Thus, considered most favorably from the complainants' [***16] perspective, the titles for [**165] each of the lots numbered 1 through 188 or 189 can best be described as an unusual mixture of the aboriginal or beneficial title and corresponding unlimited right of possession held by an individual, on the one hand, and the Commonwealth's contingent future interest represented by its fee, on the other. But however title is described, each lot was owned by a different individual, and the unity of title required to imply an easement by necessity fails. See *Richards v. Attleborough Branch R.R. Co.*, 153 Mass. at 122; *Uliasz v. Gillette*, 357 Mass. at 102.

Lots 189 or 190 and above, however, are on a very different footing; those lots consisted before division of a single tract of unclaimed and untenanted common land. Though owned in equal measure by numerous persons, each partitioned lot thereby [*294] had, before severance, common owners, and the unity of title requirement is satisfied for those commonly owned lots. We also note that the plaintiffs' and Hall's remaining lots -- those numbered 189 or 190 and above -- were landlocked as a result of that partition. Accordingly, like the motion judge, we assume that easements by necessity [***17] could be implied for those lots.

B. But we part company with the motion judge as to his conclusion that such easements, if implied, must inevitably traverse or otherwise burden the Settlement Lands. [6] To be sure, for most of the affected lots -- with the exception of Hall's lot 302 -- a more or less direct route north through what are now the Settlement Lands would have been at the time of partition the most logical routing choice to access what at some point became State Road. However, we have certain reservations about whether Zack's Cliffs Road could serve as a routing choice for all of the lots, insofar as only three of the lots at issue -- Kitras lots 243 and 178, and Hall lot 242 -- touch upon on Zack's Cliffs Road. The remaining lots -- Kitras lots 232, 711, and 713; Hall lots 302, 707, and 710; and the Brown and Harding lots -- have no direct access to Zack's Cliffs Road. See Appendix. Still, in principle, we grant the general logic of the motion judge's observation.

6 The motion judge explicitly ruled that the "record does not indicate the existence of any way in use on the ground at the time of the commissioners' [the Peases'] 1878 report, and the present record is insufficient to establish conclusively the location of a way by necessity."

[***18] But that a thing is probable is not to say it is necessary or inevitable where circumstances revealed in the record suggest different possible results. See *Bedford v. Cerasuolo*, 62 Mass. App. Ct. at 80 (location and precise bounds of easement, when not specified in deed, presented question of fact). On the record before us it requires no great stretch to imagine any number of routes from the various lots to State Road. Many traverse the Settlement Lands; many do not. For example, while we do not presume to specify any particular location, we observe that a public way, the Moshup Trail, opened in the general vicinity of the plaintiffs' and Hall's lots in the early 1960's. Many of the lots at issue are separated from this way, which leads to State Road, by only an intervening lot or two. Locating easements to [*295] this road, therefore, would (i) not affect the Settlement Lands; (ii) minimize the total number of lots burdened; (iii) advantageously exploit the assumed Zack's Cliffs Road routing, which intersects the Moshup Trail running south; (iv) for the most part avoid lots 1 through 188 or 189; and (v) give expression to what we assume was the town's intent in allowing [***19] the Moshup Trail [**166] to be constructed in the first instance (that it be used by local residents to gain access to State Road).

For present purposes we are not troubled that the Moshup Trail did not exist when the common lots were partitioned. The same objection, after all, applies to an easement routed to or over Zack's Cliffs Road, yet no party suggests that this road would be an inappropriate easement location. In any case, we focus here on route and location, not creation (about which we will have additional comments later). At this procedural stage, and given our stated assumptions, we have no difficulty envisioning a multiplicity of intentions implied from the circumstances prevailing at the time of partition, *Orpin v. Morrison*, 230 Mass. at 533, including that the lots were to have access to whatever road was most convenient or might be constructed at some future date. It will be recalled in this regard that State Road in the 1870's was described as being in "deplorable condition" and blocked to free traffic by barriers at the isthmus. Compare *Crotty v. New River & Pocahontas Consol. Coal Co.*, 72 W. Va. 68, 71, 78 S.E. 233 (1913) (upon severance of a common [***20] parcel, the "parties may well be presumed to have contemplated such conditions as the future was likely to bring forth").

In so considering we also remain mindful of the nature of the easement claimed. Whereas a preexisting use might in some cases give rise to an implied easement, see *Bedford v. Cerasuolo*, 62 Mass. App. Ct. at 78, we imply an easement by necessity not from use but from a "severance of rights [once] held in a unity of ownership." Restatement (Third) of Property (Servitudes) § 2.15 comment c (2000). In this sense an easement by necessity, initially having no determined physical location, may be located as circumstances or the parties later dictate. Compare *Bass v. Edwards*, 126 Mass. 445, 449 (1879) (a way by necessity arising, owner of dominant estate retained "the [*296] right to deviate from the usual way and go over other parts of the land, doing no unnecessary damage," when owner of servient estate blocked the usual route); *Crotty v. New River & Pocahontas Consol. Coal Co.*, 72 W. Va. at 71 (easement by necessity could be routed to road not in existence at time of partition). Cf. *M.P.M. Builders, LLC v. Dwyer*, 442 Mass. at 90-91 [***21] (adopting Restatement [Third] of Property [Servitudes] § 4.8[3] [2000]); Restatement (Third) of Property (Servitudes) § 4.8(1) (2000). We see no reason why this flexibility should not, in principle, be applied to establish, in light of the town's changing circumstances, present easement locations. With these differing possibilities thus before us, we are unable to conclude with confidence that any easements

implied necessarily burden the Settlement Lands or that the United States inevitably has an interest in whatever judgment may be entered.

C. In any case, should easements by necessity be located on or routed through the Settlement Lands, those claims may be fairly adjudicated by joining the Tribe directly. [7] Because of our remand, the joinder issue is likely to arise again. Accordingly, we discuss this matter here. [8]

7 Deciding as we do, we do not reach the question whether the various parties' motions to join were correctly denied.

8 In doing so we express no opinion as to what effect, if any, the Tribe's settlement agreement, implementing State and Federal legislation, or subsequent conveyances may have had on the continuing status of any claimed easements burdening the Settlement Lands. [**167]

[***22] Title 25 of the United States Code, § 1771e(c)(3)(B) (2000), specifically reserves to the Tribe, not the United States, the right to transfer "any easement for public or private purposes in accordance with the laws of the Commonwealth of Massachusetts or the ordinances of the" town. Any doubt that this provision permits the Tribe to be joined was dispelled by *Building Inspector & Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp.*, 443 Mass. 1, 818 N.E.2d 1040 (2004) (*Shellfish Hatchery Corp.*), decided after the partial judgment before us entered. In *Shellfish Hatchery Corp.*, after reviewing the Tribe's history and the various land disputes, all of which were resolved by a comprehensive settlement agreement implemented at both the State and Federal level by legislation, 443 Mass. at 3-8, the Supreme Judicial Court "concluded that the Tribe [*297] waived its sovereign immunity as to land use on the Cook Lands." *Id.* at 16-17. In so concluding the court found particularly compelling language in the Tribe's settlement agreement specifying that the Tribe agreed to hold its land "in the same manner, and subject to the same laws, as any [***23] other Massachusetts corporation." [9] *Id.* at 13.

9 This language, the court held, "is clear and the words 'in the same manner' convey a special, known, and obvious meaning. These words are used by the United States and by the Commonwealth to waive sovereign immunity." *Shellfish Hatchery Corp.*, 443 Mass. at 13.

Although *Shellfish Hatchery Corp.* dealt with the Cook Lands and involved a zoning dispute (rather than the easement rights here at issue) we see little reason to suppose the court's rationale would not control the present proceedings. The central Settlement Lands here at issue are subject to the same settlement agreement and implementing State and Federal legislation as the Cook Lands. Section 3 of the settlement agreement, also cited in *Shellfish Hatchery Corp.*, specifies that the Tribe

> "shall hold the Settlement Lands, and any other land it may acquire [e.g., the Cook Lands], in the same manner, and subject to the same laws, as any other Massachusetts [***24] corporation . . . . Under no circumstances . . . shall the civil . . . jurisdiction of the Commonwealth of Massachusetts, or any of its political subdivisions, over the settlement lands, or any land owned by the [Tribe] in the [town], or the Commonwealth of Massachusetts . . . be impaired or otherwise altered . . . ."

We also note that § 13 of that agreement provides that all "Federal, State and Town laws shall apply to the Settlement Lands" subject only to limited exceptions not relevant here, a provision mirrored in both the State and Federal implementing acts. See St. 1985, c. 277, § 5; 25 U.S.C. § 1771g (2000).

In light of *Shellfish Hatchery Corp.*, and given the explicit right to transfer easements, 25 U.S.C. § 1771e(c)(3)(B) (2000), in accordance with the Commonwealth's laws and subject to the Commonwealth's jurisdiction, it would be anomalous indeed were we to conclude that the Tribe could not be joined in a suit to resolve easement claims potentially burdening the Settlement Lands. As observed in *Shellfish Hatchery Corp.*, "although [*298] the Tribe may not desire the precise result now occurring, the Tribe's agreement [***25] had a 'real world objective' and 'practical consequence.' . . . By employing the 'in the same manner . . . as' language in paragraph three of the settlement agreement, the parties ensured, in unequivocal wording, that the Tribe would have no special [**168] status in its land holdings different from an ordinary Massachusetts business corporation. That status confers, inter alia, the right to sue and be sued, and thus waives the Tribe's sovereign immunity with respect to its"

Settlement Lands. *Shellfish Hatchery Corp.*, 443 Mass. at 15-16 (footnote omitted). The same rationale also eliminates any need to join the United States as trustee. See *id.* at 15 n.14.

In sum, given the possibility that at least some easements by necessity benefitting lots formerly part of the common land properly could be routed on nontribal land, and because any easement claims that do affect the Settlement Lands may be resolved by joining the Tribe directly, we do not think that the United States is an indispensable party within the meaning of rule 19. Compare *Brookline v. County Commrs. of the County of Norfolk*, 367 Mass. 345, 349, 327 N.E.2d 690 (1975) (all towns potentially affected [***26] by judgment need not have been joined because "they [were] not disputants to the immediate controversy"). As we have concluded that the United States is not an indispensable party within the meaning of rule 19, the present claims were not properly dismissed on that basis.

III

We have until now assumed, for lots numbered 189 or 190 and above, the intent to create easements. This assumption seemingly arises naturally from the necessity created by dividing the common land; the assumption may ultimately be found to be factually correct, but this is not inevitable. It is well established in this Commonwealth: necessity alone does not an easement create. *Nichols v. Luce*, 24 Pick. at 104. *Orpin v. Morrison*, 230 Mass. at 533. Neither does there exist a public policy favoring the creation of implied easements when needed to render land either accessible or productive. *Richards v. Attleborough Branch R.R. Co.*, 153 Mass. at 122 ("The law does not give a right of way over the land of other persons to every [*299] owner of land who otherwise would have no means of access to it"). *Orpin v. Morrison*, 230 Mass. at 533-534 (if one purchases [***27] land knowing "he had no access to the back part of it, but over the land of another, it was his own folly; and he should not burden another with a way over his land, for his convenience"), quoting from *Gayetty v. Bethune*, 14 Mass. 49, 56 (1817). As previously noted, our charge, then, is not to look simply at the necessity, but to consider all "the circumstances under which [the severance] was executed and all the material conditions known to the parties at the time." *Orpin v. Morrison*, 230 Mass. at 533. In doing so, in the unique circumstances of this case, the fact that certain lots were landlocked as a result of partition does not persuade us as being the definitive measure of intent.

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 the common lands to public roads (at least those arguably existing at the time) without traversing those lands already held in severalty, [***28] that is, lots 1 through 188 or 189. With these 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.

[**169] 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, 25 N.E.2d 175 (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. The 1869 Legislative committee, at least, expected that these lots would "lie untilled and comparatively unused" following division. Report of the Committee, 1869 Senate Doc. No. 14, at 5.

[*300] We consider relevant the historical [***29] sources of information on tribal use and common custom applicable to the time. Though by itself hardly conclusive, and assuming the material's admissibility, we see no reason why the common practice, understanding and expectations of those persons receiving title could not shed light on the parties' probable, objectively considered intent. See *Flax v. Smith*, 20 Mass. App. Ct. 149, 153, 479 N.E.2d 183 ("what is required . . . is not an actual subjective intent on the part of the grantor but a presumed objective intent of the grantor and grantee based upon the circumstances of the conveyance").

We do not mean to suggest by our discussion that an easement by necessity for any given lot carved out of the

common land either does or does not exist, but rather that the question requires thoughtful consideration and resolution by a fact finder. This question thus is best left for the trial judge, after the parties have had an opportunity to make whatever showing they wish or are able, [10] remaining mindful that it is the proponents' burden to prove the existence of an implied easement. *Cheever v. Graves*, 32 Mass. App. Ct. 601, 607, 609, 592 N.E.2d 758 (1992).

10 The trial judge may consider whether to relieve certain of the plaintiffs of their respective stipulations to the effect that they would offer no evidence (the Hardings) or certain described testimony (Kitras) at the trial of this action. We are aware of no similar stipulation by any defendant.

[***30] Should the requisite intent be found for some or all of the partitioned common lots, this will not end the inquiry: numerous questions remain, including the merger and extinguishment matters noted by the motion judge. In addition, we note that a "right of way by necessity can only be presumed when the necessity existed at the time of the grant; and it continues only so long as the necessity continues." *Schmidt v. Quinn*, 136 Mass. 575, 576-577 (1884). Relatively recently several lots appear to have acquired -- or at least the lot owners have claimed -- the benefit of express or prescriptive easements. Such easements, to the extent they moderated the original necessity, may thereby have extinguished any easements implied from that necessity. Compare *Viall v. Carpenter*, 80 Mass. 126, 14 Gray 126, 128 (1859); *Hart v. Deering*, 222 Mass. 407, 411, 111 N.E. 37 (1916). The recent eminent domain takings may also have extinguished any easements located on the lots so taken. See *Darman v. Dunderdale*, 362 Mass. 633, 641, [*301] 289 N.E.2d 847 (1972); *New England Continental Media, Inc*. v. *Milton*, 32 Mass. App. Ct. at 378. We also leave the [***31] question of scope of any easements to trial.

[**170] IV

The judgment is reversed, the order of December 22, 2003, is vacated, and the case is remanded to the Land Court for further proceedings consistent with this opinion.

So ordered.

[*302] [EDITOR'S NOTE: SEE APPENDIX IN ORIGINAL]

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

FAR NO. 14999

APPEALS COURT NO. 2004-P-472

Maria A. Kitras, as Trustee of Bear Realty Trust, Bear II Realty Trust and Gorda Realty Trust, James J. Decoulos, as Trustee of Bear II Realty Trust and Gorda Realty Trust, Victoria Brown and Gardner Brown, Mark D. Harding and Eleanor P. Harding, as Trustee of the Eleanor P. Harding Trust,

Plaintiffs - Appellants,

v.

Town of Aquinnah & others,[1]

Defendants - Appellees.

ON APPEAL FROM A JUDGMENT OF THE LAND COURT

APPLICATION OF THE PLAINTIFF-APPELLANT, MARIA A. KITRAS, AS TRUSTEE OF BEAR REALTY TRUST, FOR FURTHER APPELLATE REVIEW

Maria A. Kitras,
as Trustee,
by:

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[1]Town of Aquinnah, Vineyard Conservation Society, Inc., David Wice and Betsy Wice, Susan Smith and Russell Smith, John F. Kennedy, Jr. and Caroline Kennedy, George B. Brush, as Trustee of Toad Rock Realty Trust, South Shore Beach, Inc., Benjamin L. Hall, Jr., as Trustee of Gossamer Wing Realty Trust, Leonard F. Vanderhoop, Jr., Joanne Fruchtman and Jack Fruchtman, Peter Ochs, Hope E. Horgan, Helen S. James, Donald Taylor, Moshup Trail II Limited Partnership, Richard Hoyle, Charles E. Derby, Shirley A. Jardin, Persons Unknown or Unascertained Being the Heirs of Wallace E. Francis, Jeffrey Madison, as Trustee of Tacknash Realty Trust, Estate of Edwin D. Vanderhoop, John A. Wiener and Sally D. Wiener, Patrick J. Evans, Scott Harrison, Julie B. Hoyle, Carmella Stephens, as Trustee of Deer Meadow Realty Trust, Stella Winifred Hopkins a.k.a. Winifred S. Hopkins, Persons Unknown or Unascertained Being the Heirs of Esther Howwasswee, Persons Unknown or Unascertained Being the Heirs of Savannah F. Cooper, Heidi B. Stutz and Michael W. Stutz, Hamilton Cammann, Mary Elizabeth Pratt, Persons Unknown or Unascertained Being the Heirs of Amos Smalley, June Noble, Richard Sullivan, Sarah Saltonstall, Steven Yaffe, Thomas Seeman, Lawrence B. Evans and Beverly A. Evans, Estate of William Vanderhoop, Kevin Craig and Cynthia Craig, Flavia Stutz and Robert Stutz, Selma Greenberg, William Greenberg, Wilma Greenberg, Alexandra Whitcomb, Rolph Lumley, Aurilla Fabio and other Persons Unknown or Unascertained, United States of America as Trustee for the Wampanoag Tribe of Gay Head (Aquinnah).

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I. REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

The Plaintiff-Appellant, Maria A. Kitras, as Trustee of Bear Realty Trust ("Bear"), hereby requests leave pursuant to Mass. R. App. P. 27.1 to obtain further appellate review of the Appeals Court's decision in case No. 2004-P-472, 64 Mass. App. Ct. 285 (2005), (the "Decision"), on the sole issue of whether the Appeals Court should have determined that certain landlocked "severalty" lots in Aquinnah, MA had been in common ownership with other land in Aquinnah at the time of 1871 and 1878 set-offs of land, so that there was the unity of title required to imply access easements by necessity to benefit all of the landlocked lots arising out of those set-offs. A copy of the Decision is attached hereto as Addenda A.

In the Decision, the Appeals Court wrongly concluded that each of the severalty lots was in separate ownership in 1871 and 1878 so that no easements by necessity could be implied to them. Bear is the current title owner of one of these severalty lots. The interests of justice to Bear and the other current owners of such lots provide the basis for this request for further appellate review.

II. STATEMENT OF PRIOR PROCEEDINGS

By Complaint filed in the Land Court on May 20, 1997 (No. 238738), the then Plaintiffs, owners of landlocked property in Gay Head, MA, brought suit against the Town of Gay Head, MA, the Vineyard Conservation Society, Inc. ("VCS"), and others seeking, *inter alia*, to have the Court declare that an access easement by implication or necessity exists over the Defendants' land for their benefit.

An Amended Complaint adding additional parties was filed on November 30, 1998. Per the Amended Complaint and other motions, the current Plaintiffs are: Maria A. Kitras, as Trustee of Bear Realty Trust, Bear II Realty Trust and Gorda Realty Trust ("Kitras"), James J. Decoulos, as Trustee of Bear II Realty Trust and Gorda Realty Trust ("Decoulos"), Victoria Brown and Gardner Brown ("Browns"), and Mark D. Harding and Eleanor P. Harding as Trustee of the Eleanor P. Harding Trust ("Hardings").

The Defendants include the Town of Aquinnah (formerly the Town of Gay Head), VCS, 58 individuals, entities or heirs of certain estates, and the United States of America ("United States") as Trustee for the Wampanoag Tribe of Gay Head (Aquinnah).

Count One of the Amended Complaint seeks a declaration that an access easement by implication or necessity exists over the Defendants' land for the Plaintiffs' benefit, including the right to install and maintain utility systems in the easements, and that the Court determine the location of said easements.[1]

On January 19, 1999, the United States removed the case to the U. S. District Court for the District of Massachusetts and thereafter filed a motion to dismiss any claims against it based on sovereign immunity. The motion was allowed on June 30, 1999, and the case was remanded to the Land Court.[2]

On October 6, 2000, VCS filed a motion for summary judgment or, alternatively, to dismiss. On November 7, 2000, Kitras and the Browns filed separate cross-motions for summary judgment. By Decision on Cross-Motions for Summary Judgment and Motions to

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[1] Counts Two, Three and Four of the Amended Complaint which sought, *inter alia,* easements by prescription were waived without prejudice by the Plaintiffs. The dismissal of those Counts is not an issue on Appeal.

[2] During the course of the Land Court proceedings, certain of the Defendants were dismissed by Motion or by Stipulation.

Dismiss dated June 4, 2001 (the "2001 Decision"), the Land Court Dismissed Count One of the Amended Complaint pursuant to Mass. R. Civ. P. 19(b). A copy of the 2001 Decision is attached hereto as Addenda B.

In the 2001 Decision, the Land Court assumed that easements by necessity for the Plaintiffs' benefit existed, but concluded that: the Plaintiffs' easement claims necessarily implicate the land held by the United States; the United States is a necessary party; and the case could not proceed in its absence.[3] 2001 Decision, 14. In response, on June 3, 2002, the Plaintiffs filed a Motion to Amend Complaint, and to the Extent Necessary, Motion for Relief Under Mass. R. Civ. P. 60(b), seeking to name the Wampanoag Tribal Council of Gay Head, Inc., now known as the Wampanoag Tribe of Gay Head (Aquinnah) (the "Tribe"), as a party. This motion was denied on September 17, 2002.

Plaintiffs filed a Motion for Entry of Final

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[3] With regard to the issue of unity, the Land Court held that the lots that were set-off in 1871 were not in common ownership with the Plaintiffs' lots at the time of the 1878 set-off and, hence, could not be used to provide an easement by necessity for the benefit of the 1878 set-off lots. 2001 Decision, 15. The Plaintiffs challenged this view on appeal.

Judgment Pursuant to Rule 54(b) on May 6, 2003,[4] and a Further Motion for Leave to Amend Complaint on June 16, 2003. On August 21, 2003, the Court denied this Further Motion and entered Separate Judgment.

Notices of Appeal were filed by Kitras, Decoulos the Browns, the Hardings and Gossamer Wing. Notices of Cross-Appeal were filed by VCS and Caroline Kennedy.

On September 2, 2003 Gossamer Wing filed a Motion for Reconsideration and/or to Correct the Decision and Judgment dated August 21, 2003. This and other Motions filed by Gossamer Wing and the Baron Land Trust were denied on December 22, 2003. Renewed Notices of Appeal were by Kitras, Decoulos, the Browns and the Hardings.

The case was docketed in the Appeals Court on April 1, 2004.

A three judge panel of the Appeals Court heard Oral Argument on April 11, 2005 and on August 18,

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[4] Because the only outstanding claims were those of Defendant Gossamer Wing Realty Trust ("Gossamer Wing"), Plaintiffs argued there was no reason to delay entry of judgment under Rule 54(b) with regard to Count One.

2005, issued an opinion reversing the Judgment of the Land Court, vacating the order of December 22, 2003 and remanding the case to the Land Court for further proceedings. In so acting the Appeals Court held that the Tribe could be joined directly in the lawsuit, that the United States as Trustee did not need to be joined and that since the United States was not an indispensable party within the meaning of Mass. R. Civ. P. 19 the Plaintiffs' claims were not properly dismissed on that basis. The Appeals Court also held that the title to each of the lots numbered 1 through 188 or 189[5] shown on the so-called "set-off" plan (the "severalty lots") was owned by a different individual so that there was no unity of title and therefore easements by necessity to benefit those lots resulting from the 1871 and 1878 set-offs could not be implied.[6]

On August 31, 2005, Gossamer Wing and the Baron Land Trust filed a Petition for Rehearing/Reargument with the Appeals Court.

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[5] As noted by the Land Court, 2001 Decision, 7, ftne 11, the status of lot 189 is unclear.

[6] The map accompanying the 1878 Report of Commissioners Richard L. Pease and Joseph T. Pease is known as the "set-off plan." The Appendix to the Decision also

III. STATEMENT OF THE FACTS

Bear relies upon the facts set forth in the Decision, as supplemented by the additional facts concerning the relationship between Indian traditional law and Massachusetts common law set forth herein. However, Bear disagrees that the severalty lots were in separate ownership; and Bear disagrees with the conclusions drawn from certain facts relied on by the Appeals Court as they relate to the ability to imply easements by necessity to benefit lots 1 through 188 or 189.

IV. POINT FOR FURTHER APPELLATE REVIEW

Whether the Appeals Court was in error in concluding that the severalty lots, lots 1 through 188 or 189, and especially lots 174 through 189, on the set-off plan, were "owned" individually so that there was no unity of title as required to imply an access easement by necessity arising out of the set-offs of the land in 1871 and 1878; or whether the proper conclusion is that those lots were in the common ownership of and with the Commonwealth of Massachusetts and accordingly do meet the unity requirement for

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shows the relevant set-off lots.

easements by necessity to benefit those lots.

V. REASONS WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

1. All of the Set-Off Lots were in Common Ownership.

The Appeals Court concluded that with regard to lots 1 through 188 or 189 on the set-off plan "each lot was owned by a different individual, and unity of title required to imply an easement by necessity fails." 64 Mass. App. Ct. at 293. In support of this holding, the Appeals Court relied on excerpts from the Report of the Commissioners, 1849 House Doc. No. 46 ("1849 Report") and 1862 House Doc. No. 215 ("1862 Report") to conclude that under "prevailing tribal law or tradition" there existed aboriginal or beneficial title and right of possession to these lots in individuals as distinct from the Commonwealth. Id., 292-293.

Bear believes that the Appeals Court erred in even considering "tribal law or tradition" in determining unity of title, since such a consideration presumes that the Commonwealth was acting under both English common law and Tribal laws of property. To the contrary, the establishment of title to the lands in Gay Head was done solely pursuant to St. 1862, c.

184, St. 1863, c. 42, St. 1866, c. 67 and St. 1870, c. 213. Even assuming that Tribal law was considered by the Commissioners, the Appeals Court erred in its consideration and application of Tribal laws, as set forth below.

The Appeals Court quoted from the 1849 and 1862 Reports that "any native could, at any time, appropriate to his own use such portion of the unimproved common land as he wished, and, as soon as he enclosed it, with a fence, of however frail structure, it belonged to him and his heirs forever," 1849 Report at 20, Id., 292, and that "'title to land, so taken up and enclosed, is never called in question' under the 'unwritten Indian traditional law.'" 1862 Report at 34, Id., 292-293.

While these excerpts may provide some support for the Appeals Court's conclusion, the Reports contain other statements that contradict the Appeals Court's holding and support Bear's position that both the severalty and common land should be viewed as in the common ownership of the Commonwealth at the time of the set-offs.

For example, the 1862 Report describes the members of the Tribe as "involuntary wards of the

State" and states that the State has taken the Tribe's property "*into its own keeping, so far as any transfer of it is concerned* - they can make no sale of their land or improvements to any but other members of the tribe. . . . 1862 Report at 39. (Emphasis supplied.) Thus, the Tribe was tied to the "plantation" by the act of the State. Id. Moreover, the State had "declared [the Tribe] incompetent to take care of their own, to be mere children. . .incapable even of choosing their own guardian." Id., 43.

As to the relationship of the members of the Tribe to the land: "*None of the lands are held, as far as we could learn, by any title, depending for its validity upon statute law.* The primitive title, possession, to which has been added, inclosure, is the only title recognized or required." 1849 Report at 20. (Emphasis supplied.)

In ignoring or failing to consider the above, the Appeals Court failed to acknowledge the overarching and paternalistic role of the Commonwealth in the lives of the Tribe and in all its land. Instead, it found that "the titles for each of the lots numbered 1 through 188 or 189 can best be described as an unusual mixture of the aboriginal or beneficial title and

corresponding unlimited right of possession held by an individual, on the one hand, and the Commonwealth's contingent future interest represented by its fee, on the other." 64 Mass. App. Ct. at 293.

In support of this conclusion, the Appeals Court cited *James v. Watt*, 716 F. 2d 71 (1st Cir. 1983), cert. denied, 467 U.S. 1209 (1984), a case involving Indians who claimed interests in land in Gay Head and sought to have declared invalid prior conveyances. However, Bear believes to the contrary that *James* supports the position that all the lots at issue were in common ownership. *James* summarized the ownership of Indian lands and the interaction between Indian traditional law and Massachusetts common law, stating:

> . . .American courts recognize two distinct levels of ownership in Indian lands: fee title and Indian title. The common-law fee title passed to the European sovereign at discovery, and it could be transferred by him to his grantees. The fee title in lands that the British king retained passed to the individual states at the time of the revolution. . .*Title to Indian lands within their borders, however, was retained by the thirteen original states. . .*
>
> Indian title, which gave Indians a "right of occupancy," coexisted with the fee title. *This "right of occupancy" was legally significant in several ways. For one thing, only the sovereign (the king, the state, the federal government) could destroy this right; and, as long as the Indians*

> *retained it, ownership of the fee title brought with it no present right of possession. Rather, the fee owner "received a contingent future interest which ripened into a fee simple" only when the Indians abandoned their possessory interest (or when the sovereign, holding fee title, took that possessory interest).* F. Cohen, *Handbook of Federal Indian Law* 321 n. 372 (1942). For another thing, the courts did not otherwise recognize transactions involving this "right of occupancy." Because *the owner of fee title held the "exclusive right to extinguish" the "right of occupancy", Johnson v. McIntosh,* 21 U.S. (8 Wheat.) 543, 585, 5 L.Ed. 681 (1823), efforts by Indians to convey their possessory rights were not recognized by American courts. . . *James* at 74. (Emphasis supplied.)

From this analysis it is clear that while the Commonwealth's fee title arguably may not have included a present right of possession, the Commonwealth could at any time obtain such right of possession by extinguishing the Tribe's right of occupancy or by taking a possessory interest in the land in addition to its fee title. Thus it was error for the Appeals Court to conclude that lots 1 through 188 or 189 were "owned" by individuals other than the Commonwealth because the Commonwealth only had a fee title to these lands. The Appeals Court should have recognized that *only the Commonwealth had fee title;* and, in addition, the Commonwealth had near total

control over those lots.

Moreover, the *James* Court discussed two distinct theories about certain Massachusetts laws permitting conveyances of Indian lands:

> . . .one might argue that the Massachusetts statutes giving Indians fee title and the power to alienate land, were not efforts to take land rights from the Indians, but rather efforts to convey the state's fee title to them and thereby to grant them their lands in fee simple absolute. These statutes may have been Massachusetts' own attempt to undo its earlier cases and statutes limiting the rights of Indians in their aboriginal lands to possessory title and invalidating conveyances of that title.
>
> * * * * *
>
> . . .On the other hand, one could have argued, in support of the statutes, that Massachusetts was entitled under its general police powers to provide a fair, expeditious, and judicially recognized mechanism for a tribe to convey its possessory rights to its own members if it chose to do so, and that Massachusetts was entitled as fee owner to transfer its title to such members of the tribe. *James* at 75.

Again, both of these theories describe exactly the Commonwealth's actions in the 1871 and 1878 set-offs of the lots in Aquinnah. As the holder of fee title with the power to extinguish the Tribe's rights of occupancy, the Commonwealth, by the actions of the Commissioners, conveyed its very substantial bundle of rights and fee title interest to each member of the

Tribe who was determined to be entitled to a lot of land in severalty or in partition of the common lands. Given the extent of the interests the Commonwealth had and conveyed, the Commonwealth can only be viewed as the "owner" under Massachusetts common law of both the severalty and common lands, so that the unity requirement was met and easements by necessity could be implied over all lots.

This view of the unity of ownership is supported by further reference to Indian traditional law. In F. Cohen, *Handbook of Federal Indian Law,* (1982) the ownership of tribal property is discussed in detail:

> . . . tribal property interests are held in common for the benefit of all living members of the tribe, a class whose composition continually changes as a result of births, deaths, and other factors. The manner in which a tribe chooses to use its property can be controlled by individual tribal members only to the extent that the members participate in the governmental processes of the tribe. *Cohen* at 472.

Cohen also describes individual lot "ownership":

> Although ownership of tribal property is vested in the tribe rather than in individual members, an orderly distribution of occupancy among tribal members is necessary so that the land may be used. Thus tribes commonly allocate rights of occupancy in certain tracts of tribal land to their members. Right of occupancy may be established by tribal custom and usage, or assigned in writing pursuant to tribal

> constitutions and codes. *These assignments are governed by tribal law and usually are revocable at the will of the tribe. The rights are transferable or inheritable only to the extent the tribe allows.* *Cohen* at 610. (Emphasis supplied.)

Based on this view of tribal ownership, no individual member of the Tribe held any personal transferable title to the severalty lots under Indian traditional law and did not obtain any rights to the same until the actions of the Commissioners in 1871 and 1878. Hence, at all times both the severalty lots and the common lots were at a minimum jointly held by the Tribe (under Indian traditional law) and by the Commonwealth (under Massachusetts common law).[7]

2. The Appeals Court's Holding Produces Illogical and Unequal Results.

Under the Appeals Court's view that there was no unity of ownership, the successors of the members of the Tribe who in the Court's opinion had ownership rights in lots 1 through 188 or 189 cannot obtain easements by necessity today, while the successors of

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[7] Even if one views the Commonwealth's title as non-possessory, title to *all* of the land remains in the Tribe. Thus, there still is complete unity of title in the Tribe and easements by necessity can be implied over all the lots that were subject to the Commissioners' actions.

the members of the Tribe who had no such ownership rights can. This is an illogical and unequal result.

As the Land Court noted, the Commissioner's 1871 report *did not* sever lots 1 through 173 from access to the public way "since the owners of such lots held rights in the common lands." 2001 Decision, 11. But in partitioning the common lands and setting-off lots to individual owners, the Commissioners' 1878 report did sever from the public way each of the set-off lots determined under the Commissioner's 1871 report and each of the set-off lots determined under the Commissioners' 1878 report which did not have frontage on a public way. Id. Accordingly, in 1878 the owners of the set-off lots below 189 or 190 lost their preexisting access rights over the common lands; but under the Appeals Court's holding, they did not obtain any potential rights of access by easements by necessity. However, while the new owners of the lots above 189 or 190 also lost access rights over the common lands, those lot owners simultaneously obtained the potential right of access by easements by necessity.

Since fee absolute title to *all* of the lots comes out of the Commonwealth's title and interests as

described above, this unequal treatment makes little sense. Logic demands that all of the lots set-off in 1871 and 1878 be treated the same way.

This is particularly true when one considers the totality of the actions taken by the Commonwealth in the period 1862-1878, which was to create the town of Gay Head, grant citizenship to the Indian residents thereof and to set-off the land that was held by the Commonwealth. That such actions proceeded over a period of years and by different Commissioners does not negate the obvious conclusion that the Commissioners' actions were part of a common scheme that should be considered as one act. As such, all of the lots that were set-off in 1871 and in 1878 should be viewed equally as having the necessary unity of ownership to allow for access easements. Indeed, *James* recognizes this need to maintain equality among all the members of the Tribe:

> ...where individual Indians are involved, the state has a valid interest in maintaining the stability of land transactions entered into according to its laws, in treating all of its citizens equally, and in providing the same property rights to all of its citizens. *James* at 76.

VI. CONCLUSION

For the foregoing reasons, Bear respectfully requests that this Court grant Further Appellate Review solely in order to determine that the Commonwealth should be viewed as the owner of all the set-off lots and that easements by necessity can be implied for the benefit of lots 1 through 188 or 189 and above.

Respectfully submitted,

Maria A. Kitras, As
Trustee of Bear Realty Trust,

By her attorneys,

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September 15, 2005

Supreme Judicial Court for the Commonwealth of Massachusetts
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H. Theodore Cohen, Esquire
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RE: Docket No. FAR-14999

MARIA A. KITRAS, trustee, & others
vs.
TOWN OF AQUINNAH & others

Land Court No. 238738
A.C. No. 2004-P-0472

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on 12/21/05, the above-captioned Applications for Further Appellate Review were denied. In the event the plaintiffs again seek to join the Tribe in the Land Court, the defendants can relitigate the question of delay in the plaintiffs' attempts to join the Tribe. (Cowin, J., recused)

Susan Mellen, Clerk

Dated: December 21, 2005

To: H. Theodore Cohen, Esquire
Nicholas J. Decoulos, Esquire
Ronald H. Rappaport, Esquire
Jennifer S.D. Roberts, Esquire
David Wice
Betsy W. Wice
Susan Heckler Smith

(SEAL)

COMMONWEALTH OF MASSACHUSETTS
Land Court
Department of the Trial Court
Miscellaneous Case No. 238738

RECEIVED
AUG 1 5 2006
Decoulos & Decoulos

MARIA A. KITRAS, as TRUSTEE,[1] & others,[2]
Plaintiffs

vs.

TOWN OF AQUINNAH & others,[3]
Defendants

ORDER ALLOWING MOTION TO BIFURCATE

Pursuant to Mass. R. Civ. P. 54 (b), this court (Lombardi, J.) directed the entry of judgment (Rule 54 (b) judgment) on August 21, 2003. A number of parties filed and argued various motions following the Rule 54 (b) judgment. In particular, one motion led to this court issuing an order on December 22, 2003, which denied a motion to reconsider or correct the June 4, 2001 decision of the court (Green, J.) and the Rule 54 (b) judgment. Thereafter, four notices of appeal entered on the docket during January 2004.

The Appeals Court heard oral argument on April 11, 2005, and issued its decision on

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[1]of Bear Realty Trust, Bear II Realty Trust, and Gorda Realty Trust.

[2]James J. Decoulos, as co-trustee of Gorda Realty Trust and Bear II Realty Trust; Victoria Brown; Gardner Brown, Jr; Mark Harding and Eleanor P. Harding, as trustee of Eleanor P. Harding Trust.

[3]Benjamin L. Hall, Jr., as trustee of Gossamer Wing Realty Trust; David Wice; Betsy Wice; Susan Smith; Russell Smith; Vineyard Conservation Society, Inc.; Caroline Kennedy; Caroline Kennedy and Edward Schlossberg, as they are guardians of Rose Kennedy Schlossberg, Tatiana Celia Kennedy Schlossberg, and John Bouvier Kennedy Schlossberg; George B. Brush, as trustee of Toad Rock Realty Trust; South Shore Beach, Inc.; Leonard F. Vanderhoop, Jr.; Joanne Fruchtman a/k/a JoAnn Fruchtman; Jack Fruchtman; Peter Ochs; Hope E. Horgan; Helen S. James; Donald Taylor; Moshup Trail II Limited Partnership; Richard Hoyle; Charles E. Derby; Shirley A. Jardin; persons unknown or unascertained being the heirs of Wallace E. Francis; Jeffrey Madison, as trustee of Tacknash Realty Trust; Estate of Edwin D. Vanderhoop; John A. Wiener; Sally D. Wiener; Patrick J. Evans; Scott Harrison; Julie B. Hoyle; Carmella Stephens, as trustee of Deer Meadow Realty Trust; Stella Winifred Hopkins a/k/a Winifred S. Hopkins; persons unknown or unascertained being the heirs of Esther Howwasswee; persons unknown or unascertained being the heirs of Savannah F. Cooper; Heidi B. Stutz; Michael W. Stutz; Hamilton Cammann; Mary Elizabeth Pratt; persons unknown or unascertained being the heirs of Amos Smalley; June Noble; Richard Sullivan; Sarah Saltonstall; Steven Yaffe; Thomas Seeman; Lawrence B. Evans; Beverly A. Evans; Estate of William Vanderhoop; Kevin Craig; Cynthia Craig; Flavia Stutz; Robert Stutz; Selma Greenberg; William Greenberg; Wilma Greenberg; Alexandra Whitcomb; Rolph Lumley; Aurilla Fabio; other persons unknown or unascertained; and the United States of America, as trustee for the Wampanoag Tribe of Gay Head.

August 18, 2005. Kitras v. Aquinnah, 64 Mass. App. Ct. 285, further appellate review denied, 445 Mass. 1109 (2005).[4] The Kitras court reversed the Rule 54 (b) judgment, vacated the order of December 22, 2003, and remanded the case to this court for further proceedings consistent with the opinion of the court. Id. at 301.

On or about March 6, 2006, Vineyard Conservation Society, Inc. (VCS) submitted a request for a status conference. At a status conference held on April 25, 2006, VCS moved orally to bifurcate the further proceedings in the case at bar. This court established a deadlines by which VCS would file and serve a written motion and any other party could submit a responsive filing.

Accordingly, VCS filed on May 31, 2006, Motion to Bifurcate Proceedings (bifurcation motion). The following filings entered on the docket: (a) Joinder in Motion to Bifurcate by Caroline Kennedy on June 14, 2006; (b) Joiner [sic] in Motion to Bifurcate by Jack Fruchtman, Jr. and JoAnn Fruchtman on June 19, 2006; (c) Town of Aquinnah's Joinder in Motion to Bifurcate Proceedings by Vineyard Conservation Society, Inc. on June 23, 2006; (d) Defendant Gossamer Wing Realty Trust & Baron Land Trust Opposition to the Motion of Defendant Vineyard Conservation Society to Bi-Furcate [sic] the Issue of Intent to Create an Easement by Necessity on June 30, 2006; (e) David H. Wice and Betsy W. Wice's Joinder in Motion to Bifurcate Proceedings Filed by Vineyard Conservation Society, Inc. on June 30, 2006; and (f) Memorandum of Plaintiff, Maria A. Kitras, Trustee to Support Postponement of Bifurcation Order (Kitras memorandum) on July 3, 2006.

This court will first consider the Kitras memorandum. While not submitting a motion, Kitras "requests that the Court postpone the bifurcation and consider assigning this case to a Tracking Order" under Standing Order 1-04. Additionally, Kitras notes that the Town of Aquinnah

[4]In denying the application for further appellate review (FAR application), the Court issued an order stating that "[i]n the event the plaintiffs again seek to join the Tribe in the Land Court, the defendants can relitigate the question of delay in the plaintiffs' attempts to join the Tribe." While not part of the published disposition of the FAR application, the above quoted order appears on the Kitras docket maintained by the Court.

joined in support of the bifurcation motion and states that "[a]lthough it is not specifically requested, it appears that the Town of Aquinnah may, in the future, want to include the 'Aquinnah District of Planning Concern' as a necessary party."

The instant action commenced on May 20, 1997, long before the effective date of Standing Order 1-04, i.e. October 4, 2004. This court finds that the most prudent and efficient approach to advance the case after nine years of litigation is to rule on the pending bifurcation motion without further delay. Thus, the request contained in the Kitras memorandum is DENIED.

The bifurcation motion seeks to have this court first consider whether an easement was intended at the time of the setoff in the 1870s and, if so, then to determine the location of such an easement. VCS contends that

> "[b]ecause of the effort and expense involved in adjudicating the location of any easement, which would not be necessary if this Court finds that there was no intent to create an easement, it would be a more efficient use of the Court's and the parties' time and resources to resolve that issue first."

In opposition to the bifurcation motion, Benjamin L. Hall, Jr. (Hall), as trustee of Gossamer Wing Realty Trust and Baron Land Trust, argues that "the first order of business" should a determination as to what lots and what parties remain interested in the case. Hall correctly observes that the uncertainty as to lots and parties was a matter worthy of note by the Kitras court. See id. at 289-290.

This court, however, disagrees with the Hall argument. With the number of individuals and entities actively participating in the case at bar, this court finds that it has before it those parties necessary to present pertinent evidence and to argue the question of law concerning the existence vel non of certain easements. The adversarial process will be well-served by the present parties and their advocates.

The question of what lots and what parties were implicated by a claim of possible easements did not deter the Appeals Court from deciding certain legal issues. The Kitras court proceeded as if all persons and lots were properly before it "[i]n the interest of expediency and

because our decision today does not depend upon it . . . ." Id. at 290. In considering the bifurcation motion, this court finds that it is appropriate to apply that same reasoning as the Kitras court.

In their filing, David H. Wice and Betsy W. Wice argue cogently in favor of the bifurcation motion: "Before Defendants are put to the additional effort and expense of preparing documentation and retaining counsel, surveyors, engineers and historians to address the issues 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." (emphasis in original). This court agrees with that approach.

In issuing its decision, the court "assumed, for lots numbered 189 or 190 and above, the intent to create easements . . . . [T]he assumption may ultimately be found to be factually correct, but this is not inevitable." Id. at 298. The first task for this court, therefore, is to decide whether there is a factual or legal basis for that assumption.

Should this court find, after full briefing and argument, that the requisite intent was present in 1878 to create one or more easements by necessity, it will then be timely to identify the universe of lot owners that might be affected by such easements. Once additional persons, if any, have been joined as necessary parties, this court will proceed with the second phase of the proceedings to determine the location of those easements.

Based upon the foregoing, this court ALLOWS the bifurcation motion. The parties must now decide upon the procedural route to follow on the question of the existence of easements. This court recognizes the general rule that "[w]hen intent is at the core of a controversy, summary judgment seldom lies." Madden v. Estin, 28 Mass. App. Ct. 392, 395 (1990). See Brunner v. Stone & Webster Eng'g Corp., 413 Mass. 698, 705 (1992). See also Flesner v. Technical Communications Corp., 410 Mass. 805, 809 (1991). "That is not to say, however, that, in such cases, summary judgment is always inappropriate." Brunner, 413 Mass. at 705.

Here, the question of intent pertains to a state of mind surround events that occurred

over 125 years ago. Suffice it to say that no witness would be competent to provide direct testimony as to the intent of the parties to the setoff of lots in 1878. This court, however, does not know whether the parties wish to call witnesses to present other evidence to support their arguments. Accordingly, it is left to the parties to decide whether to bring a motion under Mass. R. Civ. P. 56 or whether to file a request for a pretrial conference.[5]

Regardless of the route taken, the parties must be mindful of the well-established standard articulated by the Kitras court: "[I]t is the proponents' burden to prove the existence of an implied easement. Cheever v. Graves, 32 Mass. App. Ct. 601, 607, 609 (1992)." Kitras, 64 Mass. App. Ct. at 300. See Mt. Holyoke Realty Corp. v. Holyoke Realty Corp., 284 Mass. 100, 105 (1933) (holding burden of proving intent to create easement unexpressed in deed upon the party asserting right). See also Swensen v. Marino, 306 Mass. 582, 583 (1940).

So ordered.

By the Court. (Lombardi, J.)

Attest:

Deborah J. Patterson
Recorder

Dated: August 14, 2006

A TRUE COPY
ATTEST:

RECORDER

[5]All dispositive motions are now governed by Rule 4 of the Rules of the Land Court (2005).

COMMONWEALTH OF MASSACHUSETTS

DUKES, ss. LAND COURT DEPARTMENT
MISC. CASE NO. 238738

MARIA A. KITRAS, AS SHE IS THE TRUSTEE OF BEAR REALTY TRUST, MARIA A. KITRAS and JAMES J. DECOULOS, AS THEY ARE THE CO-TRUSTEES OF BEAR II REALTY TRUST, MARIA A. KITRAS and JAMES J. DECOULOS, AS THEY ARE THE CO-TRUSTEES OF GORDA REALTY TRUST, MARK D. HARDING, SHEILA H. BESSE AND CHARLES D. HARDING, JR., AS THEY ARE THE TRUSTEES OF THE ELEANOR P. HARDING REALTY TRUST,

Plaintiffs

vs.

TOWN of AQUINNAH, COMMONWEALTH OF MASSACHUSETTS ACTING THROUGH ITS EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS, GEORGE D. BRUSH AS TRUSTEE OF THE TOAD ROCK REALTY TRUST, CHARLES E. DERBY, JOANNE FRUCHTMAN AND JACK FRUCHTMAN, BENJAMIN L. HALL, JR. AS TRUSTEE OF GOSSAMER WING REALTY TRUST, BRIAN M. HALL AS TRUSTEE OF THE BARON'S LAND TRUST, CAROLINE KENNEDY, CAROLINE KENNEDY AND EDWIN SCHLOSSBERG, AS THEY ARE THE GUARDIANS OF THEIR MINOR CHILDREN, ROSE KENNEDY SCHLOSSBERG, TATIANA CELIA KENNEDY SCHLOSSBERG, AND JOHN BOUVIER KENNEDY SCHLOSSBERG, JEFFREY MADISON AS TRUSTEE OF TACKNASH REALTY TRUST, THE MARTHA'S VINEYARD LAND BANK, MOSHUP TRAIL II LIMITED PARTNERSHIP, PETER OCHS, PERSONS UNKNOWN OR UNASCERTAINED BEING THE HEIRS OF SAVANNAH COOPER, SUSAN SMITH AND RUSSELL SMITH, BARBARA VANDERHOOP, EXECUTRIX OF THE ESTATE OF LEONARD F. VANDERHOOP, JR., VINEYARD CONSERVATION SOCIETY, INC., DAVID WICE AND BETSY WICE, AND PERSONS UNKNOWN OR UNASCERTAINED WHO MAY HAVE AN INTEREST IN ANY LAND HERETOFORE OR HEREINAFTER MENTIONED OR DESCRIBED

Defendants

THIRD AMENDED VERIFIED COMPLAINT, MARCH 12, 2007, AS MODIFIED BY ORDER DATED MARCH 29, 2007

INTRODUCTION

This action is brought under the provisions of General Laws, Chapter 185, Section 1(k), Chapter 240, Section 6, and Chapter 231A to determine the claims or rights of the Plaintiffs and the Defendants named herein and persons unascertained, not in being, unknown, out of the Commonwealth, or who cannot be actually served with process and made personally amenable to the Judgment of the Court, and that such persons should be made Defendants and are described generally.

PARTIES

1. The plaintiff, Maria A. Kitras is the Trustee of Bear Realty Trust ("Bear"), under a Declaration of Trust recorded at the Dukes County Registry of Deeds in Book 650, Page 282 with an address at 38 Bow Road, Belmont, Middlesex County, Massachusetts. (Lots 178, 241 and 711)[1]
2. The plaintiffs, Maria A. Kitras and James J. Decoulos are the Trustees of Bear II Realty Trust ("Bear II"), under a Declaration of Trust recorded at said Registry of Deeds, Book 745, Page 475, with an address at 38 Bow Road, Belmont, Middlesex County, Massachusetts. (Lot 713)

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1 The lot numbers after the name of each party refer to lots that are depicted on either of the following plans. "Sectional Plans of Indian Lands of Gay Head recorded at Dukes County Registry of Deeds on October 26, 1871" (Sectional Plans) or "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 the Probate under Section 6 of Chapter 213 of the Acts of 1870, by John H. Mullin, Scale: 200 feet to an inch" (the "Partition Plan").

3. The plaintiff, Maria A. Kitras is a Trustee of Gorda Realty Trust ("Gorda") with an address at 38 Bow Road, Belmont, Middlesex County, Massachusetts. Kitras was appointed Trustee of Gorda in a Certificate of Appointment recorded at said Registry of Deeds in Book 841, Page 628. (Lots 232 and 243)
4. The plaintiff, James J. Decoulos is a Trustee of Gorda with an address at 38 Bow Road, Belmont, Middlesex County, Massachusetts. Decoulos was appointed Trustee of Gorda in a Certificate of Appointment recorded at said Registry of Deeds in Book 886, Page 851. (Lots 232 and 243)
5. The plaintiff, Mark D. Harding, resides at 299 Falmouth Road, Mashpee, Massachusetts. (Lot 554)
6. The plaintiffs, Sheila H. Besse and Charles D. Harding are the Trustees of the Eleanor P. Harding Realty Trust. The address of the Trust is 141 Herring Pond Road, Buzzard Bay, Massachusetts. (Lot 555)
7. The defendants are as follows:

i. Town of Aquinnah (the "Town"), is a municipal corporation having a usual place of business at 65 State Road, Aquinnah, Dukes County, Massachusetts; (Lots 549, 550, 556 and 570 with Commonwealth).

ii. Commonwealth of Massachusetts acting through its Executive Office of Environmental Affairs, with an address of 100 Cambridge Street, Suite 900, Boston, Suffolk County, Massachusetts; (Lots 549, 550 and 570 with Aquinnah)

iii. George B. Brush as Trustee of Toad Rock Realty Trust, with an address c/o Muskeget Associates, State Road, West Tisbury, Dukes County, Massachusetts; (Lot 712)

iv. Charles E. Derby, residing at 2 Massasoit Avenue, Northampton, Hampshire County, Massachusetts; (Lot 561 with VCS)

v. Joanne Fruchtman and Jack Fruchtman, residing at 1807 Kenway Road, Baltimore, Maryland; (Lots 543 and 544)

vi. Benjamin L. Hall, Jr. as Trustee of Gossamer Wing Realty Trust, with an address at 45 Main Street, Edgartown, Dukes County, Massachusetts; (Lots 242 and 710)

vii. Brian M. Hall, as Trustee of the Baron's Land Trust, with an address of 45 Main Street, Edgartown, Dukes County, Massachusetts; (Lot 177)

viii. Caroline Kennedy, and Caroline Kennedy and Edwin Schlossberg as they are Guardians of their minor children, Rose Kennedy Schlossberg, Tatiana Celia Kennedy Schlossberg and John Bouvier Kennedy Schlossberg, as tenants in common, with an address c/o Edwin Schlossberg, Inc., 641 6th Avenue, 5th floor, New York, New York; (Lots 240, 560, 562, 572, 577)

ix. Jeffrey Madison, as Trustee of Tacknash Realty Trust, with an address at State Road, Aquinnah, Dukes County, Massachusetts;

x. The Martha's Vineyard Land Bank, a corporate body politic, with a principal place of business at 167 Main Street, Edgartown, Massachusetts. (Part of Lot 578, Lots 238 and 569)

xi. Moshup Trail II Limited Partnership c/o Barry White, Esq., Foley, Hoag & Eliot, 155 Seaport Boulevard, Boston, Suffolk County, Massachusetts;

xii. Peter Ochs, residing at 39 Moshup Trail, Aquinnah, Dukes County, Massachusetts; (Lot 708)

xiii. Persons unknown or unascertained being the heirs of Savannah F. Cooper; (Lot 547)

xiv. Susan Smith and Russell Smith, residing at 4 Towhee Lane, Aquinnah, Dukes County, Massachusetts; (Part of Lot 578, Lot 580)

xv. Barbara Vanderhoop, Executrix of the Estate of Leonard F. Vanderhoop, Jr., residing at 568 East Foothill Boulevard No. 205, Asuza, California; (Lot 709 and Walmsley Homestead)

xvi. Vineyard Conservation Society, Inc. (the "VCS"), is a Massachusetts corporation having a usual place of business at The Wakeman Center, Lambert's Cove Road, Vineyard Haven, Dukes County, Massachusetts; (Lots 548, 553, 559, 561 as tenant in common with Charles Derby, 563, 564, 567, 568, 571, 714)

xvii. David Wice and Betsy Wice, residing at 2410 Spruce Street, Philadelphia, Pennsylvania; (Lots 89, 237, 239, 247, 579);

xviii. Persons unknown or unascertained who may have an interest in any land heretofore or hereinafter mentioned or described.

ALLEGATION OF FACTS COMMON TO ALL DEMANDS AND CAUSES OF ACTION

8. All of the lots that are owned by the plaintiffs and the defendants were held in common by the Commonwealth of Massachusetts prior to 1856.

9. The general location of this dispute is shown on the Locus Map attached hereto as Exhibit 1.[2]

10. The plaintiffs and the defendants are the owners of record of land located in Aquinnah as shown on the plan attached hereto as Exhibit 2 and further identified under the "PARTIES" section hereof.

11. The plaintiffs claim a right of access over the property of the defendants from their property to the Moshup Trail, Zack's Cliffs Road and the Radio Tower Road, although no easement has ever been expressly granted to plaintiffs or their predecessor in title to pass over the property of the defendants and an easement to drain surface water from their properties to the Atlantic Ocean.

12. Prior to 1856, the plaintiffs' and the defendants' land was located in an area known as the Plantation of Gay Head and the Commonwealth of Massachusetts held title in fee simple to all of the lands occupied by and for the benefit of the Wampanoag Indians residing there.

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2 All exhibits are attached hereto, expressly made a part hereof and incorporated herein by reference.

13. On February 12, 1856, Massachusetts House of Representatives Report No. 48 was transmitted to the Speaker of the House and Commissioners were appointed under c. 15 of the Resolves of 1855 to establish the boundary line between the Plantation of Gay Head and the Town of Chilmark.
14. The District of Gay Head was established under c. 184, § 4 of the Acts of 1862. Section 5 of the Act ordered the clerk of the District to establish "a register of the lands of each Plantation, as at present held, whether in common or severalty, and if in severalty, by whom held."
15. By Chapter 42 of the Resolves of 1863, Charles Marston was appointed to "ascertain and determine the existing boundary lines of the land held in severalty."
16. Marston issued his final report to the Governor and the Executive Council on February 27, 1866. House Document No. 219 of 1866.
17. Marston died before completing his work and Richard L. Pease was appointed in accordance with Chapter 67 of the Resolves of 1866 to replace him.
18. On April 30, 1870, Chapter 213 of the Acts of 1870 was approved by the Commonwealth to incorporate the Town of Gay Head (the "Town Act").
19. Section 2 of the Town Act conveyed all Common Lands to the Town of Gay Head.

20. Section 5 of the Town Act required the Commissioners of the County of Dukes to lay out and construct a road from Chilmark to the light house on Gay Head.
21. Section 6 of the Town Act confirmed the rights of individuals who held land in severalty at the time of the Town Act to establish title.
22. Pursuant to Section 6 of the Town Act, Pease confirmed and established the lots held in severalty and assigned lot numbers 1 through 173 to these lands, which lots are depicted on the Sectional Plans, and confirmed that the remaining land, which was also depicted on the Sectional Plans, was held in common by the Town. Pease executed deeds confirming the title to the land held in severalty, Lots 1 through 173, to the respective owners and the deeds were recorded on October 22, 1871, at the Registry of Deeds in Book 49, Pages 116 to 198. All of these activities were set forth in Pease's 1871 Report to the Governor and Council.
23. Section 7 of the Town Act provided that the Selectmen of Gay Head, or any ten residents of the Town, may apply to the Probate Court of the County of Dukes to partition any or all of the Common Lands. If said petition was made, the Judge of the Probate Court was directed to identify lands rightfully held by individual owners and that upon the completion of the partition, all of the deeds were to be recorded at the Registry upon final approval of the Judge.

24. On September 1, 1870, a Petition to Partition the Common Lands was filed by seventeen (17) residents of the Town of Gay Head with the Probate Court.
25. On December 1, 1878, the Commissioners, Joseph T. Pease and Richard L. Pease, filed their report to the Probate Court (the "Commissioners' Report"), together with a map 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 the Probate under Section 6 of Chapter 213 of the Acts of 1870, by John H. Mullin, Scale: 200 feet to an inch" (the "Partition Plan"). The original map is currently held by the office of the Dukes County Register of Probate.
26. The Commissioners' Report was approved by Judge Thaddeus G. Defriez of the Probate Court on December 1, 1878 and was recorded on January 20, 1879, at the Registry in Book 65, from Pages 150 to 376.
27. The parcels of real estate which are the subject of this dispute were created from the partition of the Common Lands previously owned by the Commonwealth of Massachusetts and the Town.
28. The Partition Plan depicts all of the land located in the Town of Aquinnah, and all of the houses in the Town are located on those lots which were subdivided from the original lots and are presently being used for residential purposes, except for approximately five lots which are being used for commercial

purposes.

29. At the time that the Sectional Plans and Partition Plan were prepared and the deeds were delivered by a common grantor to the initial grantees and predecessors in title of the parties hereto, none of the lots that are the subject matter of this complaint had any access on any public way.
30. At the time of the partition of the Common Lands, Old South Road and State Road were the only ways existing in the Town of Gay Head.
31. There is no evidence that either Old South Road or State Road were public ways at the time of the passage of the Town Act or the conveyance of the Common Lands.
32. Exhibit 3 is a reasonable, although not completely accurate, depiction of all of the lots shown on the Partition Plan combined with the Sectional Plans and also shows the location of State Road beginning at the Chilmark town line and ending at Gay Head and another road known as Old South Road which were the only ways servicing the entire Town.
33. Prior to 1940, traveled ways developed on and within the vicinity of Plaintiffs' and Defendants' lands that were used for access, pedestrian, horseback, cart, and vehicle travel.
34. One of the traveled ways that was developed on and within the vicinity of Plaintiffs' lands was known as "Zack's Cliffs Road", which is depicted on the 1944 U.S Geological Survey Map.
35. Also depicted on the 1944 U.S. Geological Survey Map is the

Radio Tower Road which intersected with Zack's Cliffs Road.

36. In 1954, the Dukes County Commissioners laid out Moshope Trail, now known as the Moshup Trail. The purpose of the layout was that "common convenience and necessity require the layout of a new highway to be known as the Moshope Trail" quoting layout as recorded at the Registry in Book 227, Page 564.
37. The construction of Moshup Trail, was completed around 1960.
38. The Town owns Moshup Trail in fee simple absolute.
39. Moshup Trail is a public right-of-way.
40. Prior to the construction of the Moshup Trail, the surface waters drained and flowed from the lots owned by the plaintiffs and the defendants and followed the topography directly to the Atlantic Ocean.
41. By the construction of the Moshup Trail, the topography of the land was changed and thus prevents the flow of surface water to the Atlantic Ocean which has caused perching of the water up gradient of the Moshup Trail.
42. In 1996, the Town acquired title to Lots 549, 550 and 570 with funds given to the Town by the Commonwealth of Massachusetts pursuant to the Self-Help Program, which Program provides municipalities with funding to purchase land for conservation purposes, and the Commonwealth of Massachusetts has the benefit of a restriction on those three lots which prevents the sale of the lots without the approval of the Commonwealth.
43. In order for the plaintiffs to obtain access to public ways, it

will be necessary for the Court to establish public ways, the width thereof to be in compliance with the Town of Aquinnah Planning Board's Regulations, not to be located as reasonably possible within any areas subject to the jurisdiction of Chapter 131 of the General Laws of Massachusetts, the Town of Aquinnah Wetland Bylaws and the Massachusetts Endangered Species Act, Chapter 131A.

44. For the Court's assistance in locating an access road to the Moshup Trail, the plaintiffs, being the owners of landlocked lots, have prepared a plan (Exhibit 4) depicting a roadway which will allow the plaintiffs to have access to the Moshup Trail.

45. None of the deeds of the common grantors to the individual lots described any right of access or easement for access to and from any of the lots.

46. When the Commonwealth, through its appointed commissioners who had unity of title, divided and conveyed the Common Lands, it is by operation of law and incidental to the common grant presumed that the common grantors intended to provide every grantee of the Common Lands with whatever was necessary for the beneficial use and enjoyment of the granted land.

47. At the time of the subdivision and conveyance of the Common Lands, the Commonwealth, through its appointed commissioners, knew that passage over the Common Lands was necessary to access otherwise landlocked parcels of land.

48. At the time of the subdivision and conveyance of the Common Lands, the Commonwealth, through its appointed commissioners, knew that the residents of the Town traveled over the lands of others to gain access to otherwise landlocked parcels of land.

49. At the time of the subdivision and conveyance of the Common Lands by the common grantor, it was never the intent of the Commonwealth or its appointed commissioners to create lots without any means of access or to deprive landowners of any means of access to their set-off lots from existing ways.

50. The plaintiffs and their predecessors in title have used Zack's Cliffs Rod in an open, notorious, adverse and continuous manner for 20 years in order to gain access to their properties.

51. The plaintiffs and their predecessors in title have used the Radio Tower Road in conjunction with Zack's Cliffs Road in an open, notorious, adverse and continuous manner for 20 years in order to gain access to their properties.

52. An actual controversy exists as to the existence of easements by necessity, prescription and drainage required by the plaintiffs to gain access to their property which will allow their property to be used to its fullest extent and where such an easement may be located.

CAUSES OF ACTION

Count One

(Easement by Necessity)

53. The plaintiffs, being the owners of lots that were landlocked by the common grantors who had unity of title of the lots, are entitled by operation of law and incidental to that common grant to have access to public ways by a road network to be determined by the Court, taking into consideration the topography of the land, the soil conditions and compliance with the Rules and Regulations of the Planning Board of the Town of Aquinnah, which will grant to the plaintiffs the right to use the roadways and streets as commonly used in the Town of Aquinnah with the right to install utilities above ground and below ground to service the lots owned by the plaintiffs and the proper drainage of surface waters, which lots could be further subdivided provided that the subdivision meets the zoning requirements of the Town of Aquinnah and the rules and regulations of all governmental agencies.

Count Two

(Easement by Prescription)

54. The Plaintiffs and their predecessors in title have used Zack’s Cliffs Road and the Radio Tower Road in an open, notorious, adverse and continuous manner for 20 years and have acquired an easement by prescription to gain access to their properties over Zack’s Cliffs Road and the Radio Tower Road to install

above and below ground utilities therein, to be used as streets are commonly used in the Town of Aquinnah.

REQUEST FOR RELIEF AS TO COUNTS ONE AND TWO

WHEREFORE, the plaintiffs request that the Court enter a Judgment declaring that:

1. It was the intent of the common grantors who had unity of title, when they subdivided the common lands, that the grantees of the lots conveyed by the common grantors were to have access to a road network which would have included the roads in existence in 1870 and any new roads that were created thereafter and that the access would be equivalent to streets as presently used in the Town of Aquinnah and that the plaintiffs and defendants would have the right to install and maintain above and below ground utility systems, drainage and any other improvements as found on ways commonly used in the Town of Aquinnah.

2. Each and every defendant is permanently enjoined from preventing the plaintiffs from using said road network as streets are commonly used in the Town of Aquinnah and any and all other improvements thereon.

3. For such further relief as this Court deems just and proper.

Maria A. Kitras as she is the Trustee of Bear Realty Trust, Bear II Realty Trust and Gorda Realty Trust; James J. Decoulos as he is the Trustee of Bear II Realty Trust and Gorda Realty Trust; Plaintiffs

By their Attorneys,

Nicholas J. Decoulos
BBO# 117760
39 Cross Street, Suite 204
Peabody, MA 01960
Tel. 978-532-1020

Mark D. Harding; Sheila H. Besse and Charles D. Harding, Jr., as they are the Trustees of the Eleanor P. Harding Realty Trust,

By their attorney:

Leslie-Ann Morse
BBO#542301
477 Old Kings Highway
Yarmouthport, MA 02675
Tel. 508-375-9080

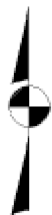
I, James J. Decoulos, hereby state that I have read the above Third Amended Complaint; that I am familiar with all matters stated therein; that I have actual personal knowledge of such matters and that from such knowledge I know the matters stated are true and correct and so far as based upon information and belief, I do believe the information to be true.

James J. Decoulos

LOCUS

REFERENCE:

USGS QUADRANGLE
SQUIBNOCKET, MA
DATE: 1977
SCALE: 1:25 000



LOCUS MAP
EXHIBIT 1

ESTATE OF LEONARD F. VANDERHOOP, JR.
AND TACKNASH R.T.

(ORIGINAL HOMESTEAD OF HEBRON WAMSLEY
LOT HELD IN SEVERALTY - NO SET-OFF #)

232 GORDA R.T.

ROAD

GORDA R.T.
243

OCHS
708

ESTATE OF
LEONARD F.
VANDERHOOP, JR.
709

BARON LAND TRUST
177

242

MTLP II
AND
BEAR
241

KENNEDY
240

FRUCHTMAN
543

FRUCHTMAN
544

VCS
548

GOSSAMER WING R.T.
710

CLIFFS

BEAR R.T.
178

239

89
WICE

COOPER
547

TOWN
549

BEAR R.T.
711

BEAR II R.T.
713

MV LAND BANK
238

237

TOWN
550

HARDING
554

TOAD ROCK R.T.
712

561
VCS AND DERBY

VCS
714

247

579

MOSHUP

VCS
553

ELEANOR P.
HARDING
TRUST
555

FORMER LORAN
RADIO ANTENNA

SUPPORT SHEDS

MV LAND BANK
569

TOWN
556

KENNEDY
560

VCS
563

RADIO

KENNEDY
562

SMITH
578

580

TRAIL

EDGE OF PAVEMENT

PUBLIC WAY
60 FT WIDE

VCS
559

VCS
563

TOWER

TOWN
570

KENNEDY
577

UTILITY POLE (TYP.)

VCS
564

ZACK'S

VCS
568

ROAD

567

VCS
571

TOWN
576

572

KENNEDY

LAST UTILITY POLE
ON MOSHUP TRAIL
FROM NORTHEAST

BOULDERS PLACED IN DECEMBER, 1997
TO OBSTRUCT RADIO TOWER
ROAD ENTRANCE

LOCKED GATE PROHIBITING
SOUTHERLY ACCESS ON
ZACK'S CLIFFS ROAD

REFERENCES

1. 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.
2. AERIAL PHOTOGRAMMETRY PROVIDED BY LOCKWOOD MAPPING ROCHESTER, NY, MARCH, 1979
3. U.S. GEOLOGICAL SURVEY TOPOGRAPHIC QUANDRANGLES SQUIBNOCKET, MA; 1944, 1951 and 1977
4. TOWN OF AQUINNAH ASSESSOR RECORDS. OCTOBER 2006

EXHIBIT 2 - EXISTING OWNERSHIP
MARIA A. KITRAS, TRUSTEE ET AL. V. TOWN OF AQUINNAH ET AL.
MASSACHUSETTS LAND COURT MISC. CASE NO. 238738

DATE
JAN 2007
SCALE
1"= 500'
FIGURE NO.
2

VINEYARD SOUND

STATE ROAD

OLD SOUTH ROAD

ATLANTIC OCEAN

MENEMSHA POND

SQUIBNOCKET POND

AQUINNAH

CHILMARK

N

188 189 182 183 181 184 185 186 187 180 174 176 179 177 178

LEGEND

HOMESTEAD LOTS AND SET-OFF LOTS 1 THROUGH 173 ESTABLISHED BY COMMISSIONERS CHARLES MARSTON AND RICHARD L. PEASE AS LAND HELD IN SEVERALTY UNDER THE AUTHORITY OF CHAPTER 42 OF THE ACTS OF 1863 AND CHAPTER 67 OF THE ACTS OF 1866.

REFERENCES

1. "SECTION PLANS OF INDIAN LANDS ON GAY HEAD, MADE UNDER THE DIRECTION OF RICHARD L. PEASE, ESQ., COMMISSIONER APPOINTED BY GOV. BULLOCK UNDER CHAPTER 67 OF 1866 TO DETERMINE THE BOUNDARY LINES OF INDIAN LANDS AT GAY HEAD", SCALE: 25 ROADS TO AN INCH; JOHN H. MULLIN, CIVIL ENGINEER.

2. "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 THE PROBATE UNDER SECTION 6 OF CHAPTER 213 OF THE ACTS OF 1870, BY JOHN H. MULLIN, SCALE: 200 FEET TO AN INCH" ON FILE WITH THE DUKES COUNTY REGISTRY OF PROBATE.

3. ASSESSOR COMPILATION MAP, SCALE: 1"= 500', 1980 CONDITIONS, SCHOFIELD, BARBINI & HOEHN, INC., VINEYARD HAVEN, MA

EXHIBIT 3 - LOTS ESTABLISHED UNDER C. 42 OF 1863, C. 67 OF 1866 AND 1878 ORDER OF DUKES COUNTY PROBATE COURT AQUINNAH, MASSACHUSETTS

DATE JAN 2007

SCALE 1"= 2000'

FIGURE NO. 3

ESTATE OF LEONARD F. VANDERHOOP, JR.
AND TACKNASH R.T.

(ORIGINAL HOMESTEAD OF HEBRON WAMSLEY
LOT HELD IN SEVERALTY - NO SET-OFF #)

232 GORDA R.T.

PUBLIC RIGHT-OF-WAY ROAD

GORDA R.T. 243

242

OCHS 708

ESTATE OF LEONARD F. VANDERHOOP, JR.

709

BARON LAND TRUST 177

FRUCHTMAN 543

MTLP II AND BEAR 241

KENNEDY 240

GOSSAMER WING R.T. 710

40 FOOT WIDE

VCS 548

FRUCHTMAN 544

BEAR R.T. 178

CLIFFS

239

89 WICE

BEAR R.T. 711

TOWN 549

COOPER 547

BEAR II R.T. 713

PROPOSED

237

MV LAND BANK 238

TOWN 550

HARDING 554

TOAD ROCK R.T. 712

561 VCS AND DERBY

VCS 714

ELEANOR P. HARDING TRUST 555

247

MOSHUP

VCS 553

FORMER LORAN RADIO ANTENNA

SUPPORT SHEDS

MV LAND BANK 569

579

KENNEDY 560

KENNEDY 562

TOWN 556

SMITH 578

580

TRAIL

VCS 563

RADIO TOWER ROAD

PUBLIC WAY 60 FT WIDE

VCS 559

VCS 563

TOWN 570

KENNEDY 577

UTILITY POLE (TYP.)

VCS 564

VCS 568

ZACK'S

567

VCS 571

TOWN 576

572

EDGE OF PAVEMENT

KENNEDY

LAST UTILITY POLE ON MOSHUP TRAIL FROM NORTHEAST

BOULDERS PLACED IN DECEMBER, 1997 TO OBSTRUCT RADIO TOWER ROAD ENTRANCE

LOCKED GATE PROHIBITING SOUTHERLY ACCESS ON ZACK'S CLIFFS ROAD

REFERENCES

1. 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.
2. AERIAL PHOTOGRAMMETRY PROVIDED BY LOCKWOOD MAPPING ROCHESTER, NY, MARCH, 1979
3. U.S. GEOLOGICAL SURVEY TOPOGRAPHIC QUANDRANGLES SQUIBNOCKET, MA; 1944, 1951 and 1977
4. TOWN OF AQUINNAH ASSESSOR RECORDS. OCTOBER 2006

EXHIBIT 4 - PROPOSED ACCESS ROAD TO MOSHUP TRAIL
MARIA A. KITRAS, TRUSTEE ET AL. V. TOWN OF AQUINNAH ET AL.
MASSACHUSETTS LAND COURT MISC. CASE NO. 238738

DATE JAN 2007
SCALE 1"= 500'
FIGURE NO. 4

(466)

COMMONWEALTH OF MASSACHUSETTS

DUKES COUNTY, SS.

LAND COURT DEPARTMENT
MISC. CASE NO. 238738

MARIA A. KITRAS, as Trustee, & others,

Plaintiffs,

vs.

TOWN OF AQUINNAH & others,

Defendants.

TOWN OF AQUINNAH'S ANSWER TO THIRD AMENDED VERIFIED COMPLAINT, MARCH 12, 2007, AS MODIFIED BY ORDER DATED MARCH 29, 2007

The Town of Aquinnah answers the Third Amended Verified Complaint, March 12, 2007, As Modified By Order Dated March 29, 2007 (the "Third Amended Complaint") as follows:

INTRODUCTION

This paragraph contains prefatory information as therefore no responsive pleading is required.

PARTIES

1. The Town of Aquinnah (the "Town") is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.

2. The Town is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.

3. The Town is without sufficient knowledge or information to form a belief as to the truth of the allegations

contained in this paragraph.

4. The Town is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.

5. The Town is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.

6. The Town is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.

7. i. Admit.

ii. - xviii. The Town acknowledges that the plaintiff asserts that the parties listed in these paragraphs are the defendants, but is without sufficient knowledge or information to form an opinion or belief as to the basis for making them defendants, or to the specific information concerning the parties listed in the allegations.

ALLEGATION OF FACTS COMMON TO ALL DEMANDS AND CAUSES OF ACTION

8. The Town is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.

9. Admit.

10. The Town admits that numerous of the plaintiffs and the defendants are assessed as owners of the various lots

located in Aquinnah as attributed to them on Exhibit 2.

11. The Town admits that no easement has ever been expressly granted to the plaintiffs or their predecessor-in-title to pass over the property of the defendants or to drain surface water from their properties to the Atlantic Ocean. The remaining allegations of this paragraph are not factual averments, and therefore no responsive pleading is required.

12. The Town is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.

13. The Town is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.

14. The Town is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.

15. The Town admits that the allegations contained in this paragraph are substantially correct, but further answers that the referenced Act speaks for itself.

16. The Town is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.

17. Admit.

18. Admit.

19. The Town answers that Section 2 of the referenced Act speaks for itself.

20. The Town answers that Section 5 of the referenced Act speaks for itself.

21. The Town answers that Section 6 of the referenced Act speaks for itself.

22. The Town is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph, and further answers that Section 6 of the referenced Act speaks for itself.

23. The Town answers that Section 7 of the referenced Act speaks for itself.

24. The Town admits that the allegations contained in this paragraph are substantially correct, but further answers that the contents of the petition speak for itself.

25. The Town admits that the Commissioners filed their report on December 1, 1878.

26. The Town answers that the recorded documents speak for themselves.

27. Denied.

28. The Town is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.

29. The Town is without sufficient knowledge or

information to form a belief as to the truth of the allegations contained in this paragraph.

30. Denied.

31. The Town is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.

32. The Town is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.

33. The Town is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.

34. The Town is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.

35. The Town is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.

36. The Town admits that the allegations contained in this paragraph are substantially correct, but further answers that the referenced document speaks for itself.

37. The Town admits that the allegations contained in this paragraph are substantially correct.

38. Denied.

39. Admit.

40. The Town is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.

41. The Town is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.

42. The Town admits that it has acquired title to Lots 549, 550 and 570, and that the Commonwealth of Massachusetts holds the benefit of a restriction as to these three lots. The Town denies the allegation that funds were "given to the Town," and further answers by stating that the relevant documents speak for themselves.

43. This paragraph does not contain averments of fact and therefore no responsive pleading is required. To the extent this paragraph does contain allegations of fact, the Town is without sufficient information to form a belief as to the truth of the allegations contained in this paragraph.

44. This paragraph does not contain averments of fact, and therefore no responsive pleading is required.

45. The Town is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.

46. Denied.

47. The Town is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.

48. The Town is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.

49. The Town is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.

50. The Town is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.

51. The Town is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.

52. This paragraph does not contain factual averments, and therefore no responsive pleading is required. To the extent a response is required, the Town does not have sufficient knowledge or information to form a belief as to the truth of the allegations contained in this paragraph.

CAUSES OF ACTION

Count One

(Easement by Necessity)

53. Denied.

Count Two

(Easement by Prescription)

54. Denied.

FIRST AFFIRMATIVE DEFENSE

The Third Amended Complaint does not state claims upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

The plaintiffs have failed to join necessary and/or indispensable parties.

THIRD AFFIRMATIVE DEFENSE

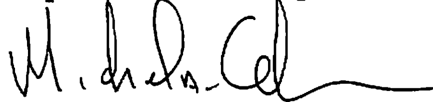
The plaintiffs and their predecessors-in-title are barred by the doctrine of laches.

FOURTH AFFIRMATIVE DEFENSE

The plaintiffs are estopped from asserting the claims set forth in the Third Amended Complaint.

TOWN OF AQUINNAH

By its attorneys,



Ronald H. Rappaport
BBO No. 412260
Michael A. Goldsmith
BBO No. 558971
Reynolds, Rappaport & Kaplan, LLC
106 Cooke Street
P.O. Box 2540
Edgartown, MA 02539
(508) 627-3711

Dated: April 30, 2007

4601-006\Towns Ans 3rd Amd Cmp.doc

(467)

COMMONWEALTH OF MASSACHUSETTS

DUKES, SS.

LAND COURT
DOCKET NO. 238738

MARIA A. KITRAS as she is the Trustees of BEAR REALTY TRUST and BEAR II REALTY TRUST, FRANK NUOVO, PAUL D. PETTEGROVE, as he is the Trustee of GORDA REALTY TRUST, VICTORIA and GARDNER BROWN, JR.,
Plaintiffs,

v.

TOWN OF AQUINNAH, et al.,
Defendants.

ANSWER OF CAROLINE KENNEDY and
CAROLINE KENNEDY AND EDWIN SCHLOSSBERG,
GUARDIANS, TO PLAINTIFFS' AMENDED VERIFIED COMPLAINT

Caroline Kennedy and Caroline Kennedy and Edwin Schlossberg as they are Guardians of their minor children, Rose Kennedy Schlossberg, Tatiana Celia Kennedy Schlossberg and John Bouvier Kennedy Schlossberg (the "defendants"), through counsel, hereby respond to the plaintiffs' third amended verified complaint dated March 12, 2007 as modified by order dated March 29, 2007.

1. The defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph 1.

2. The defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph 2.

3. The defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph 3.

4. The defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph 4.

5. The defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph 5.

6. The defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph 6.

7. The defendants admit having an address at Edwin Schlossberg, Inc., 641 6th Avenue, 5th floor, New York, New York. The defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the remaining allegations of paragraph 7.

Allegations of Fact Common to All Counts

8. The defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph 8.

9. The defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph 9.

10. The defendants admit to being the record owners of the lots attributed to them on the plan attached hereto as Exhibit 2. The defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the remaining allegations of paragraph 10.

11. Admitted, on information and belief, that this is plaintiff's claim. This right of access is denied as to the property owned by the defendants. It is admitted that defendants have granted no express easement to plaintiffs or their predecessors in title to pass over the property of the defendants.

12. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph 12.

13. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph 13.

14. The Act is in writing and speaks for itself.

15. The Resolves are in writing and speak for themselves.

16. The Report is in writing and speaks for itself.

17. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph 17.

18. The Town Act is in writing and speaks for itself.

19. The Town Act is in writing and speaks for itself.

20. The Town Act is in writing and speaks for itself.

21. The deeds and the 1871 Report to the Governor and Counsel are in writing and speak for themselves. The defendants are without sufficient knowledge or information to form a belief as to the truth of the remainder of the paragraph.

22. The Town Act is in writing and speaks for itself.

Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the remaining allegations.

23. The Town Act is in writing and speaks for itself.

24. The Petition to Partition Common Lands is in writing and speaks for itself.

25. The Report and Map are in writing and speak for themselves.

26. The Commissioner's Plan is in writing and speaks for itself.

27. Denied.

28. The Partition Plan is in writing and speaks for itself.

29. The defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph 29.

30. Denied.

31. The defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph 31.

32. The defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph 32.

33. The defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph 33.

34. The defendants are without sufficient knowledge or

information to form an opinion or belief as to the truth of the allegations of paragraph 34.

35. The defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph 35.

36. The defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph 36.

37. The defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph 37.

38. Denied.

39. Admitted, on information and belief.

40. Denied with respect to the properties owned by the defendants. The defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the remaining allegations of paragraph 40.

41. Denied with respect to the properties owned by the defendants. The defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph 41.

42. The defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph 42.

43. The defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the

allegations of paragraph 43.

44. The defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph 44.

45. Admitted with respect to properties owned by the defendants. The defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the remaining allegations of paragraph 45.

46. Denied.

47. The defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph 47.

48. The defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph 48.

49. The defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph 49.

50. Denied.

51. Denied.

52. Because paragraph 52 states a legal conclusion, no response is required.

Count One

53. Denied.

Count Two

54. Denied.

Requests for Relief

1. This paragraph contains no allegations of fact, thus no response is required. To the extent this paragraph contains any statement of facts, those facts are denied.

2. This paragraph contains no allegations of fact, thus no response is required. To the extent this paragraph contains any statement of facts, those facts are denied.

3. This paragraph contains no allegations of fact, thus no response is required. To the extent this paragraph contains any statement of facts, those facts are denied.

AFFIRMATIVE DEFENSES

1. The Third Amended Verified Complaint fails to state a claim against the defendants upon which relief can be granted.

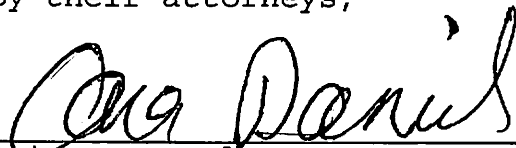
2. Plaintiff's claims are barred by the doctrine of laches.

3. Plaintiffs are estopped from seeking the requested relief.

4. The Plaintiffs who allegedly own land with one or more defendants, as tenants in common, lack standing to assert these claims.

5. The Plaintiffs have failed to join necessary parties and/or indispensable parties.

CAROLINE KENNEDY and CAROLYN KENNEDY AND EDWIN SCHLOSSBERG, GUARDIANS,
By their attorneys,



Brian M. Hurley
BBO #245240
Cara J. Daniels
BBO #647523
RACKEMANN, SAWYER & BREWSTER
Professional Corporation
One Financial Center
Boston, MA 02111
(617) 542-2300

CERTIFICATE OF SERVICE

I, Cara J. Daniels, certify that I have served a copy of the foregoing by mail on all parties or counsel appearing on the attached service list.

Cara J. Daniels

Dated: May 4, 2007
A0505859.DOC;1

Commonwealth of Massachusetts

Dukes, ss.

Land Court Department
Docket No: 238738

Maria A. Kitras, as she is the Trustee of Bear Realty Trust
and Maria A. Kitras and James J. Decoulos, as they are trustees of
Bear II Realty Trust, Maria A. Kitras and James J. Decoulos, as they are co-trustees of
Gorda Realty Trust, Mark D. Harding, Sheila Besse and Charles D. Harding Jr.,
as they are co-trustees of the Eleanor Harding RealtyTrust,
Plaintiffs
v.
Town of Aquinnah, et al., including JoAnn and Jack Fruchtman Jr.,
Defendants

This Answer, undertaken *pro se*, to the plaintiff's third amended verified complaint dated Mar. 12, 2007, and modified by order dated Mar. 29, 3007, is filed in the above-captioned Court in the Commonwealth of Massachusetts on behalf of both JoAnn and Jack Fruchtman, Jr., ("Defendants').

1. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph one.
2. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph two.
3. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph three.
4. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph four.
5. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph five.
6. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph six.
7. Defendants admit having an address as alleged in paragraph seven. Defendants are however without sufficient knowledge or information to form an opinion or belief as the truth of the remaining allegations of paragraph seven.

Allegations of Fact Common to All Counts

8. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations in paragraph eight.
9. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations in paragraph nine.
10. Defendants admit to being the owners of record of the lots attributed to them on the plan attached as Exhibit 2, but the defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the remaining allegations in paragraph ten.
11. Admitted on information and belief that this is the plaintiff's claim. This right of access is denied as to the property owned by the defendants. It is admitted that defendants have granted no express easement to plaintiffs or their predecessors in title to pass over the property of the defendants, though plaintiffs argue they have such access.
12. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations in paragraph twelve.
13. Defendants are without sufficient knowledge or information as to form an opinion or belief as to the truth of the allegations in paragraph thirteen.

14. The act is in writing and speaks for itself.
15. The resolves are in writing and speak for themselves.
16. The report is in writing and speaks for itself.
17. Defendants are without sufficient knowledge or information as to form an opinion or belief as to the truth of the allegations in paragraph seventeen.
18. The town act is in writing and speaks for itself.
19. The town act is in writing and speaks for itself.
20. The town act is in writing and speaks for itself.
21. The deeds and the 1871 report to the governor and counsel are in writing and speak for themselves. The defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the remainder of paragraph twenty-one.
22. The town act is in writing and speaks for itself. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the remaining allegations in paragraph twenty-two.
23. The town act is in writing and speaks for itself.
24. The petition to partition common lands is in writing and speaks for itself.
25. The report and map are in writing and speak for themselves.
26. The commissioner's plan is in writing and speaks for itself.
27. Denied.
28. The partition plan is in writing and speaks for itself.
29. Defendants are without sufficient knowledge or information as to form an opinion or belief as to the truth of the allegations in paragraph twenty-nine.
30. Denied.
31. Defendants are without sufficient knowledge or information as to form an opinion or belief as to the truth of the allegations in paragraph thirty-one.
32. Defendants are without sufficient knowledge or information as to form an opinion or belief as to the truth of the allegations in paragraph thirty-two.
33. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations in paragraph thirty-three.
34. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations in paragraph thirty-four.
35. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations in paragraph thirty-five.
36. Defendants are without sufficient knowledge or information as to form an opinion or belief as to the truth of the allegations in paragraph thirty-six.
37. Defendants are without sufficient knowledge or information as to form an opinion or belief as to the truth of the allegations in paragraph thirty-seven.
38. Denied.
39. Admitted on information and belief.
40. Defendants deny the allegations as they have to do with property owned by defendants, but as to the remaining allegations of paragraph forty, defendants are without sufficient knowledge or information as to form an opinion or belief as to the truth of the allegations in the rest of paragraph forty.
41. Defendants deny the allegations as they have to do with defendants, but as to the remaining allegations of paragraph forty-one, defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations in the rest of paragraph forty-one.
42. Defendants are without sufficient knowledge or information as to form an opinion or belief as to the truth of the allegations in paragraph forty-two.
43. Defendants are without sufficient knowledge or information as to form an opinion or belief as to the truth of the allegations in paragraph forty-three.

44. Defendants are without sufficient knowledge or information as to form an opinion or belief as to the truth of the allegations in paragraph forty-four.
45. Defendants are without sufficient knowledge or information as to form an opinion or belief as to the truth of the allegations in paragraph forty-five.
46. Denied.
47. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph forty-seven.
48. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph forty-eight.
49. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph forty-nine.
50. Denied.
51. Denied.
52. No response is required since this paragraph states a legal conclusion.

Count one

53. Denied.

Count Two

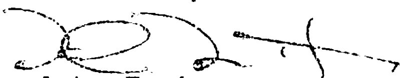
54. Denied.

Requests for Relief

1. This paragraph contains no allegation of fact, so no response is required. To the extent that this paragraph contains any statement of facts, defendants deny those facts.
2. This paragraph contains no allegations of fact so no response is required. To the extend that this paragraph contains any statement of facts, defendants deny those facts.

Affirmative Defenses

1. The third amended complaint fails to state a claim against the defendants upon which relief can be granted.
2. Plaintiff's claims are barred by the doctrine of *laches*.
3. Plaintiffs are estopped from seeking the requested relief.
4. Plaintiffs who allegedly own land with one or more defendants, as tenants in common, lack standing to assert these claims.
5. The plaintiffs have failed to join necessary parties and/or indispensable parties.


JoAnn Fruchtman
Date: May 11, 2007

Jack Fruchtman Jr.

We certify that we have served a copy of the foregoing by first-class mail to all parties appearing on the attached service list.

JoAnn Fruchtman

Jack Fruchtman Jr.

(469)

COMMONWEALTH OF MASSACHUSETTS

DUKES, ss.

LAND COURT DEPARTMENT
MISC. CASE NO. 238738

* * * * * * * * * * * * * * * *

MARIA KITRAS, as She is Trustee of Bear Realty Trust, and others,

Plaintiffs,

v.

TOWN OF AQUINNAH, and others,

Defendants.

* * * * * * * * * * * * * * * *

ANSWER OF DEFENDANT VINEYARD CONSERVATION SOCIETY, INC. TO THIRD AMENDED VERIFIED COMPLAINT, MARCH 12, 2007 AS MODIFIED BY ORDER DATED MARCH 29, 2007

Introduction

This paragraph does not contain allegations of fact and no response is, therefore, required.

Parties

1. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 1.

2. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 2.

3. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 3.

4. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 4.

5. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 5.

6. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 6.

7. Defendant Vineyard Conservation Society, Inc. ("VCS") admits that it is a Massachusetts corporation having a usual place of business at The Wakeman Center, Lamber's Cove Road, Vineyard Haven, Dukes County, Massachusetts. VCS denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth in paragraph 7.

Allegations of Fact Common To All
Demands And Causes Of Action

8. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 8.

9. Admitted.

10. VCS admits to being the record owner of the lots attributed to them on the plan attached to the instant complaint as Exhibit 2. VCS denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth in paragraph 10.

11. To the extent that this paragraph contains allegations of fact, those allegations are admitted. Otherwise, no response is required.

12. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 12.

13. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 13.

14. Admit the existence of c.184 of the Acts of 1862, the terms of which speak for themselves. Otherwise, denied.

15. Admit the existence of Chapter 42 of the Resolves of 1863, the terms of which speak for themselves. Otherwise, denied.

16. Admit the existence of House Document No. 219 of 1866, the terms of which speak for themselves. Otherwise, denied.

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17. Admit the existence of Chapter 213 of the Acts of 1870, the terms of which speak for themselves. Otherwise, deny knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth in paragraph 17.

18. Admit the existence of Chapter 213 of the Acts of 1870 ("the Town Act"), the terms of which speak for themselves. Otherwise, denied.

19. Admit the existence of the Town Act, the terms of which speak for themselves. Otherwise, denied.

20. Admit the existence of the Town Act, the terms of which speak for themselves. Otherwise, denied.

21. Admit the existence of the Town Act, the terms of which speak for themselves. Otherwise, denied.

22. Admit the existence of Pease's 1871 Report to the Governor and Council, the terms of which speak for themselves. Otherwise, denied.

23. Admit the existence of the Town Act, the terms of which speak for themselves. Otherwise, denied.

24. Admit the existence of the petition to partition the common lands, the terms of which speak for themselves. Otherwise, denied.

25. Admit the existence of the report of Joseph T. Pease and Richard L. Pease, Commissioners, prepared on or

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about December 1, 1878, and the plan on file with the Dukes County Register of Probate showing the partition of the common lands ("the Partition Plan"), the terms of which speak for themselves. Otherwise, denied.

26. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 26.

27. Denied.

28. Admit the existence of the Partition Plan, the terms of which speak for themselves. Othewise, denied.

29. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 29.

30. Denied.

31. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 31.

32. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 32.

33. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 33.

34. Admit the existence of the 1944 U.S. Geological Survey Map, the terms of which speak for themselves. Otherwise, denied.

35. Admit the existence of the 1944 U.S. Geological Survey Map, the terms of which speak for themselves. Otherwise, denied.

36. Admit the existence of the Dukes County Commissioner's document laying out Moshup Trail, the terms of which speak for themselves. Otherwise, denied.

37. On information and belief, admitted.

38. Denied.

39. On information and belief, admitted.

40. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 40.

41. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 41.

42. Admit that the Town acquired title to Lots 549, 550 and 570 and that the Commonwealth of Massachusetts holds conservation restrictions on those lots, the terms of which speak for themselves. Otherwise, denied.

43. Denied.

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44. Because paragraph 44 does not contain allegations of fact, no response is required.

45. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 45.

46. Denied.

47. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 47.

48. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 48.

49. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 49.

50. Denied.

51. Denied.

52. Because paragraph 52 does not contain allegations of fact, no response is required.

<u>Count I</u>

53. Denied.

<u>Count II</u>

54. Denied.

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First Affirmative Defense

The Third Amended Verified Complaint, March 12, 2007, As Modified By Order Dated March 29, 2007 ("the Complaint") fails to state a claim upon which relief could be granted.

Second Affirmative Defense

The plaintiffs have failed to join necessary and/or indispensable parties.

Third Affirmative Defense

The plaintiffs' claims are barred by the doctrine of laches.

Fourth Affirmative Defense

The plaintiffs are estopped from asserting the claims set forth in the Complaint.

Fifth Affirmative Defense

Access over certain property claimed by plaintiffs was with the license of the then owner, and so their claims are barred.

WHEREFORE, defendant Vineyard Conservation Society, Inc. respectfully requests that this Court issue an order:

a. Entering judgment in VCS's favor on Counts I and II of the Complaint, and declaring that the plaintiffs have no right to pass over land owned by VCS;

b. Awarding VCS its costs and attorney's fees; and

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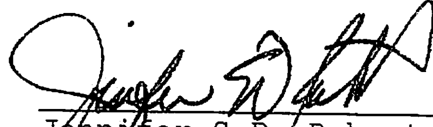
c. Granting such other and further relief as this Court deems equitable and just.



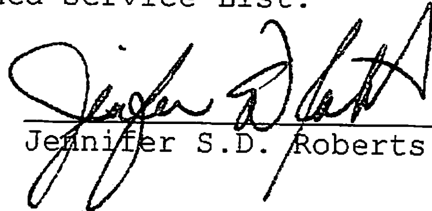
Jennifer S.D. Roberts
BBO No. 541715
Attorney for Vineyard
Conservation Society, Inc.

LaTanzi, Spaulding & Landreth
8 Cardinal Lane,
P.O. Box 2300
Orleans, MA 02653
(508) 255-2133

Dated: May 9, 2007

Certificate Of Service

I hereby certify that I served a copy of the foregoing document by mailing a copy of the same, postage prepaid, to the individuals on the attached Service List.



Jennifer S.D. Roberts

COMMONWEALTH OF MASSACHUSETTS

DUKES, ss.

LAND COURT DEPARTMENT
MISC. CASE NO: 238738

RECEIVED
MAY 1 0 2007
Decoulos & Decoulos

MARIA A KITRAS, as she is the Trustee of Bear Realty Trust, et als.,

Plaintiffs,

v.

TOWN OF AQUINNAH, et als., including DAVID H. WICE AND BETSY W. WICE,

Defendants

ANSWER OF DEFENDANTS DAVID H. WICE AND BETSY W. WICE TO THIRD AMENDED VERIFIED COMPLAINT STATED MARCH 12, 2007, AND MODIFIED BY ORDER DATED MARCH 29, 2007

Parties.

1. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph one.

2. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph two.

3. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph three.

4. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph four.

5. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph five.

6. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph six.

7. Denied as to Defendants. The correct address for Defendants is 1901 Walnut Street - Apt. 12A, Philadelphia, PA 1`9103. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the other allegations of paragraph seven.

Allegations of Fact Common to All Demands and Causes of Action

8. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph eight.

9. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph nine.

10. Defendants admit to being the owners of record of the lots attributed to them on the plan attached to the complaint as Exhibit 2. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the other allegations of paragraph ten.

11. Admitted on information and belief that this is plaintiffs' claim. The right of access is denied as to the property owned by Defendants. It is admitted that Defendants have granted no express easement to or their predecessors in title to pass over the property owned by Defendants.

12. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph twelve.

13. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph thirteen.

14. The act is in writing and speaks for itself.

15. The resolves are in writing and speak for themselves.

16. The report is in writing and speaks for itself.

17. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph.

18. The Town act is in writing and speaks for itself.

19. The Town act is in writing and speaks for itself.

20. The Town act is in writing and speaks for itself.

21. Admit the existence of the deed and the 1871 report to the governor and counsel, the terms of which speak for themselves. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the remainder of paragraph twenty-one.

22. Admit the existence of Pease's 1871 Report, the terms of which speak for themselves.. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the remainder of paragraph twenty-two.

23. The Town act is in writing and speaks for itself.

24. The Petition to Partition Common Lands is in writing and speaks for itself..

25. The report and map are in writing and speak for themselves.

26. The commissioner's plan is in writing and speaks for itself.

27. Denied.

28. The partition plan is in writing and speaks for itself.

29. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph twenty-nine.

30. Denied.

31. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph thirty-one.

32. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph thirty-two.

33. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph thirty-three.

34. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph thirty-four.

35. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph thirty-five.

36. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph thirty-six.

37. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of paragraph thirty-seven.

38. Denied.

39. Admitted on information and belief.

40. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the remaining allegations of paragraph forty

41. Defendants are without sufficient knowledge or information to form an opinion or belief as

to the truth of the remaining allegations of paragraph forty-one.

42. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of the remaining allegations of paragraph forty-two.

43. Denied.

44. Paragraph 44 contains no allegations of fact. Therefore, no response is required.

45. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of the remaining allegations of paragraph forty-five.

46. Denied.

47. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of the remaining allegations of paragraph forty-seven.

48. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of the remaining allegations of paragraph forty-eight.

49. Defendants are without sufficient knowledge or information to form an opinion or belief as to the truth of the allegations of the remaining allegations of paragraph forty-nine

50. Denied.

51. Denied.

52. Denied. No response is required as this paragraph states a legal conclusion.

Count One

53. Denied.

Count Two

54. Denied.

Requests for Relief

1. No response is required as this paragraph contains no allegation of fact. To the extent this paragraph contains any statement of facts, defendants deny those facts.

2. No response is required as this paragraph contains no allegation of fact. To the extent this paragraph contains any statement of facts, defendants deny those facts.

Affirmative Defenses

1. Plaintiff's Third Amended Verified Complaint fails to state a claim against the defendants upon which relief can be granted.

2. Plaintiff's claims are barred by the doctrine of *laches*.

3. Plaintiffs are estopped from seeking the relief granted.

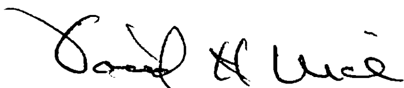
4. Access over property claimed by plaintiffs was not adverse

5. Plaintiffs have failed to join necessary parties and/or indispensable parties.

WHEREFORE, defendants David H. Wice and Betsy W. Wice respectfully request that this Court issue an order:

A. Entering judgment in favor of David H. Wice and Betsy W. Wice on Counts I and Count II of the complaint, and declaring that plaintiffs have no right to pass over land owned by David H. Wice and Betsy W. Wice; and

B. Granting such other and further relief as this Court deems equitable and just.

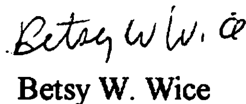


David H. Wice, *pro se*
Date: May 15, 2007

Betsy W. Wice, *pro se*
Date: May 15, 2007

We certify that we have served a copy of the foregoing Answer by first class mail to all parties appearing on the attached service list.

David H. Wice



Betsy W. Wice

473

97

COMMONWEALTH OF MASSACHUSETTS

DUKES, ss.

LAND COURT DEPARTMENT
MISC. 238738 (1997 LJL)

MARIA A. KITRAS, AS SHE IS THE TRUSTEE OF BEAR REALTY TRUST, et als.,

Plaintiffs

vs.

TOWN of AQUINNAH, et als.

Defendants

BARON LAND TRUST ANSWER,
COUNTERCLAIMS & CROSS-CLAIMS TO THE THIRD AMENDED COMPLAINT,
March 12, 2007, AS MODIFIED BY ORDER DATED March 29, 2007

Defendant Brian M. Hall, as he is Trustee of Baron Land Trust ("Hall"), through his attorney, Benjamin L. Hall, Jr., Esq., hereby files the following as his Answer, Counterclaims and Cross-claims to the Third Amended Verified Complaint, March 12, 2007, As Modified By Order Dated March 29, 2007:

1. Hall admits the allegations set forth in paragraphs numbered: 7 (vi and vii), 8, 12-13 inclusive, 16-20 inclusive, 24-28 inclusive, 30-31 inclusive, 33-37 inclusive, 39, 45-49 inclusive.

2. Hall can neither deny nor admit the allegations set forth in paragraphs numbered hereafter as he is unable to ascertain the truth of the allegations contained therein: 1-6 inclusive, 7 (i-v inclusive and viii-xviii inclusive), 38, 40-42 inclusive.

3. As to Paragraph numbered 9, Hall admits that Exhibit 1 shows the general location of the dispute, but denies any inference from the Footnote Numbered 2 to Paragraph 9 that the statements made by way of the Exhibits, except as otherwise admitted herein are true, and is otherwise unable to determine the truth of the remaining allegations.

4. As to Paragraph numbered 10, Hall admits that Exhibit 2 depicts the general location of the lots involved in the dispute, and admits further that the true owners of the land shown thereon to Lots 710, 177 and 242 are depicted, and is otherwise unable to determine the truth of the remaining allegations.

5. As to paragraph numbered 11, Hall admits that Plaintiffs make such claims and further Hall further claims the same rights of access.

6. As to paragraphs 14 and 15 inclusive, Hall denies any legal interpretation, but admits what the noted Acts state.

7. As to paragraph numbered 17 and 18, to the extent these paragraphs place a chronology of seminal events in order, Hall admits the same and further states that Chapter 463 of the Acts of 1869 declared all Indians within the Commonwealth to be citizens, but reserved declaring lands held by the Commonwealth in Gay Head to thereby be transferred to those occupying certain parcels in severalty, thereby inferentially confirming title remained in the Commonwealth.

8. As to paragraphs 21 and 22 inclusive, Hall denies any legal interpretation as to Section 6 of the Town Act, and denies as lacking sufficient information to so do that Pease's act of executing deeds for Lots 1-173 was performed under the Town Act but admits that Pease did execute the deeds to Lots 1-173.

9. As to paragraphs 23, Hall denies any legal interpretation as to Section 7 of the Town Act.

10. As to paragraph 29, Hall admits that there were no formal public ways within Gay Head, Hall denies any legal interpretation that ways that may have been regularly traversed by people within Gay Head to the extent the lands were owned by the Commonwealth as a public entity, could not be construed to be, in a generic sense, "public."

11. As to paragraph 32 inclusive, Hall admits the statements made therein but denies any inference from the Footnote Numbered 2 to Paragraph 9 that the statements made by way of the Exhibits, except as otherwise admitted herein are true, and is otherwise unable to determine the truth of the remaining allegations as noted in Exhibit 3 as incorporated by reference.

12. As to paragraphs 43 and 44 inclusive, Hall believes the allegations to be true and claims the same for its own lands.

13. As to paragraphs 50-52 inclusive, Hall admits and further claims the same rights and use and admits to the same controversy.

14. As to paragraphs 53-54 inclusive, Hall admits and further claims the same rights and use and admits to the same controversy; and further, Hall counterclaims and cross claims for the same relief as noted therein; and further Hall claims that Zack's Cliffs Road and Radio Tower Road have acquired the status of public ways by prescription; and further that that Hall is entitled to such relief as noted or otherwise under all theories of implied or reasonably necessary easements or other form of servitudes or by prescription or as a public way by prescription or by estoppel, and Hall claims the same easement as the Plaintiffs assert and is

otherwise unable to determine the truth of the remaining allegations.

DEFENSE: ESTOPPEL

Testimony presented on behalf of one Broscheit, under oath, that Radio Tower Road was in condition passable for vehicles and appeared to have been in regular use and was probably adequate for emergency vehicles estops the successor, the Town of Aquinnah, from arguing differently.

CROSS CLAIMS & COUNTERCLAIMS

Hall hereby counterclaims against the Plaintiffs and cross claims against the other Defendants as follows:

WHEREFORE, Hall requests Judgment against the Plaintiffs and Defendants jointly as follows:

1. Declaring that an easement by implication or necessity or under all theories of implied or reasonably necessary easements or other form of servitudes or implied by prior use or by prescription or as a public way by prescription or otherwise by estoppel exists over the land of the Defendants and of the Plaintiffs for the benefit of Hall's land including the right to travel over said Defendants' and Plaintiffs' lands by vehicle or other means and to install and maintain above and below ground utility systems thereon as ways are commonly used in the Town of Aquinnah.

2. That this Honorable Court determine the location of said easement over the land of the Defendants and of the Plaintiffs for the benefit of Hall including the right to travel over said land by vehicle or other means and to install and maintain above and below ground utility systems thereon as ways are commonly used in the Town of Aquinnah.

3. That none of the Defendants nor the Plaintiffs have any right, title or interest therein to prevent Hall from traveling over said easement by vehicle or other means, from improving said ways for travel by vehicle and from installing and maintaining above and below ground utility systems thereon.

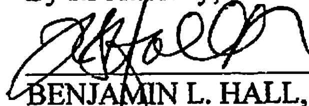
4. That all of the Defendants and Plaintiffs be permanently enjoined, and each of them, and all persons claiming under them from preventing Hall from traveling over said easement by vehicle or other means, from improving said ways for travel by vehicle and from installing and maintaining above and below ground utility systems thereon.

5. For such further relief as this Court deems just and proper.

Other Claims:

To the extent the court determines that an easement, servitude or way is reasonably required to be placed on the lands owned on behalf of the Wampanoag Tribe of Gay Head (Aquinnah), and that the Tribe does not reasonably agree to the placement of the same, that the Tribe then be deemed an necessary party as to those lots that would benefit from such a way.

Baron Land Trust
By Its Attorney,



BENJAMIN L. HALL, JR.
45 Main Street, P.O. Bx 5155
Edgartown, MA 02539
(508) 627-3700
BBO# 547622

COMMONWEALTH OF MASSACHUSETTS

DUKES, ss.

LAND COURT DEPARTMENT
MISC. 238738 (1997 LJL)

MARIA A. KITRAS, AS SHE IS THE TRUSTEE OF BEAR REALTY TRUST, et als.,

Plaintiffs

vs.

TOWN of AQUINNAH, et als.
Defendants

GOSSAMER WING REALTY TRUST ANSWER, COUNTERCLAIMS & CROSS-CLAIMS TO THE THIRD AMENDED COMPLAINT, March 12, 2007, AS MODIFIED BY ORDER DATED March 29, 2007

Defendant Benjamin L. Hall, Jr., as he is Trustee of Gossamer Wing Realty Trust ("Hall"), through his attorney, Benjamin L. Hall, Jr., Esq., hereby files the following as his Answer, Counterclaims and Cross-claims to the Third Amended Verified Complaint, March 12, 2007, As Modified By Order Dated March 29, 2007:

1. Hall admits the allegations set forth in paragraphs numbered: 7 (vi and vii), 8, 12-13 inclusive, 16-20 inclusive, 24-28 inclusive, 30-31 inclusive, 33-37 inclusive, 39, 45-49 inclusive.

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otherwise unable to determine the truth of the remaining allegations.

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Testimony presented on behalf of one Broscheit, under oath, that Radio Tower Road was in condition passable for vehicles and appeared to have been in regular use and was probably adequate for emergency vehicles estops the successor, the Town of Aquinnah, from arguing differently.

CROSS CLAIMS & COUNTERCLAIMS

Hall hereby counterclaims against the Plaintiffs and cross claims against the other Defendants as follows:

WHEREFORE, Hall requests Judgment against the Plaintiffs and Defendants jointly as follows:

1. Declaring that an easement by implication or necessity or under all theories of implied or reasonably necessary easements or other form of servitudes or implied by prior use or by prescription or as a public way by prescription or otherwise by estoppel exists over the land of the Defendants and of the Plaintiffs for the benefit of Hall's land including the right to travel over said Defendants' and Plaintiffs' lands by vehicle or other means and to install and maintain above and below ground utility systems thereon as ways are commonly used in the Town of Aquinnah.

2. That this Honorable Court determine the location of said easement over the land of the Defendants and of the Plaintiffs for the benefit of Hall including the right to travel over said land by vehicle or other means and to install and maintain above and below ground utility systems thereon as ways are commonly used in the Town of Aquinnah.

3. That none of the Defendants nor the Plaintiffs have any right, title or interest therein to prevent Hall from traveling over said easement by vehicle or other means, from improving said ways for travel by vehicle and from installing and maintaining above and below ground utility systems thereon.

4. That all of the Defendants and Plaintiffs be permanently enjoined, and each of them, and all persons claiming under them from preventing Hall from traveling over said easement by vehicle or other means, from improving said ways for travel by vehicle and from installing and maintaining above and below ground utility systems thereon.

5. For such further relief as this Court deems just and proper.

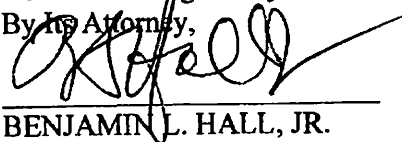
Other Claims:

Hall owns set-off Lot 302 for which all forms of easement and servitude sought in the complaint had previously been sought over land of the Plaintiffs and Defendants to be determined by the court, but particularly over the lands of Smalley, Vanderhoop, Wiener, Cammann, Pratt, and Evans as shown on the plan and given that such Lot 302 is distinctly separated from the bulk of

the lots for which the claims have been made by Plaintiffs, Hall had sought the claims for Lot 302 be adjudicated in a severed action. To the extent that the 3rd Amended Complaint no longer names Smalley, Vanderhoop, Wiener, Cammann, Pratt, and Evans, Hall does not seek to adjudicate the claims to Lot 302 herein, but reserves all rights to the same.

To the extent the court determines that an easement, servitude or way is reasonably required to be placed on the lands owned on behalf of the Wampanoag Tribe of Gay Head (Aquinnah), and that the Tribe does not reasonably agree to the placement of the same, that the Tribe then be deemed an necessary party as to those lots that would benefit from such a way.

Gossamer Wing Realty Trust
By Its Attorney,



BENJAMIN L. HALL, JR.
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(508) 627-3700
BBO# 547622

COMMONWEALTH OF MASSACHUSETTS

DUKES, ss.

LAND COURT
C. A. No. 1997 MISC 238738 (LJL)

MARIA A. KITRAS, TRUSTEE, & Others,
Plaintiffs

v.

TOWN OF AQUINNAH, & Others,
Defendants

COMMONWEALTH'S ANSWER AND OBJECTIONS TO THE PLAINTIFFS' THIRD AMENDED VERIFIED COMPLAINT AS MODIFIED BY ORDER DATED MARCH 29, 2007

The Commonwealth denies that the plaintiff has title sufficient to claim any interest in the land of the Commonwealth or eliminate any interest of the Commonwealth in locus.

And further answering, the Commonwealth objects to all descriptions that reference any way, highway, or street as alleged in the petition in the above-entitled action, or that fails to acknowledge easements, limited access, or other interests of the Commonwealth.

And further answering, the Commonwealth objects to all descriptions that reference any pond, waterway, brook or drainage ditch as alleged in the petition in the

above-entitled action.

And further answering, the Commonwealth objects to any elimination of the rights of the public in any cart paths, woods roads, or any other access rights of the public.

And further answering, the Commonwealth says that the burden of proof is upon the plaintiff(s) to prove all descriptions, bounds, and property rights as alleged in the petition.

And further answering, the Commonwealth claims the right to be heard on any issue that arises or may arise that may affect any right, claim, interest or statutory claims.

AFFIRMATIVE DEFENSES

FIRST DEFENSE

Any order that may issue in this action is subject to the rights of the public in any ocean, tidal creek, river, tidal estuary, pond, land below high water, or access thereto in which the public has rights and is referenced in the petition in this action.

SECOND DEFENSE

Any order showing a natural fresh waterway, stream or brook flowing through the land referenced in the petition is subject to the natural flow of that waterway.

THIRD DEFENSE

Any order showing wetlands shall reflect Department of Environmental Protection orders that have issued.

FOURTH DEFENSE

Any order shall reflect any Department of Environmental Protection orders or liens pertaining to contamination issues such as G.L. c. 21E or Title 5.

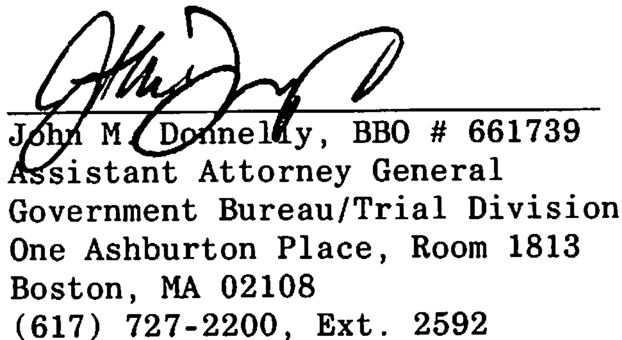
FIFTH DEFENSE

Any fill, structure or encroachments in upon or over any of the tide waters or great ponds of the Commonwealth is subject to the license provisions of General Laws Chapter 91 and the further obtaining of a license to continue and maintain said fill, structure or encroachment where no license is shown to authorize said fill, structure or encroachment.

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS
By its Attorneys

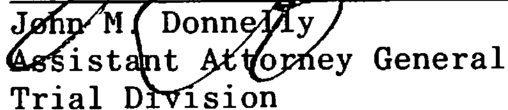
MARTHA COAKLEY
ATTORNEY GENERAL



John M. Donnelly, BBO # 661739
Assistant Attorney General
Government Bureau/Trial Division
One Ashburton Place, Room 1813
Boston, MA 02108
(617) 727-2200, Ext. 2592

CERTIFICATE OF SERVICE

I, John M. Donnelly, Assistant Attorney General, hereby certify that this date, I served the foregoing upon all parties, by mailing a copy, first class, postage prepaid to all parties on the attached service list.



John M. Donnelly
Assistant Attorney General
Trial Division

Dated: June 22, 2007

(431)

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

DUKES, ss. MISC. CASE NO. 238738

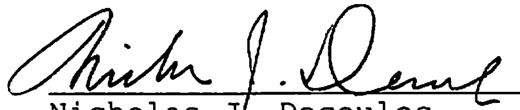
****
MARIA A. KITRAS, TRUSTEE, et als. *
Plaintiffs *
*
v. *
*
TOWN OF AQUINNAH, et als., *
Defendants *
****

Answer of Plaintiffs, Maria A. Kitras as Trustee of the Bear Realty Trust, Maria A. Kitras and James J. Decoulos as Trustees of the Bear II Realty Trust, and Maria A. Kitras and James J. Decoulos as Trustees of the Gorda Realty Trust to Counterclaim of Brian M. Hall as he is Trustee of Baron Land Trust

As to the statements contained in paragraphs 1-4 under the heading "Cross Claims & Counterclaims" the above-named Plaintiffs, Defendants-in-Counterclaim, answer that they are without sufficient knowledge or information to form a belief as to the truth of those statements.

Maria A. Kitras as she is the Trustee of Bear Realty Trust, Bear II Realty Trust and Gorda Realty Trust; James J. Decoulos as he is the Trustee of Bear II Realty Trust and Gorda Realty Trust; Plaintiffs

By their Attorney,



Nicholas J. Decoulos
BBO# 117760
39 Cross Street, Suite 204
Peabody, MA 01960
Tel. 978-532-1020
June 22, 2007

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

DUKES, ss. MISC. CASE NO. 238738

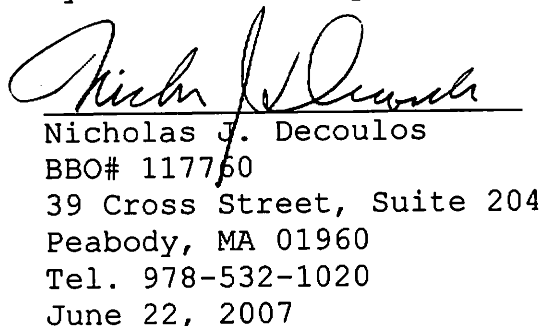
****
MARIA A. KITRAS, TRUSTEE, et als. *
Plaintiffs *
*
v. *
*
TOWN OF AQUINNAH, et als., *
Defendants *
****

Answer of Plaintiffs, Maria A. Kitras as Trustee of the Bear Realty Trust, Maria A. Kitras and James J. Decoulos as Trustees of the Bear II Realty Trust, and Maria A. Kitras and James J. Decoulos as Trustees of the Gorda Realty Trust to Counterclaim of Benjamim L. Hall as he is Trustee of Gossamer Wing Realty Trust

As to the statements contained in paragraphs 1-4 under the heading "Cross Claims & Counterclaims" the above-named Plaintiffs, Defendants-in-Counterclaim, answer that they are without sufficient knowledge or information to form a belief as to the truth of those statements.

Maria A. Kitras as she is the Trustee of Bear Realty Trust, Bear II Realty Trust and Gorda Realty Trust; James J. Decoulos as he is the Trustee of Bear II Realty Trust and Gorda Realty Trust; Plaintiffs

By their Attorney,



Nicholas J. Decoulos
BBO# 117760
39 Cross Street, Suite 204
Peabody, MA 01960
Tel. 978-532-1020
June 22, 2007

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14v

(SEAL)

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COMMONWEALTH OF MASSACHUSETTS
Land Court
Department of the Trial Court
Miscellaneous Case No. 238738 (LJL)

RECEIVED
JUL 1 2 2007
Decoulos & Decoulos

MARIA A. KITRAS, as TRUSTEE,[1] & others,[2]

Plaintiffs

vs.

TOWN OF AQUINNAH & others,[3]

Defendants

ORDER PURSUANT TO LAND COURT RULE 6

On June 20, 2007, defendant The Martha's Vineyard Land Bank filed Motion for Additional Time to File Responsive Pleading (MVLB motion). Rule 6 of the Rules of the Land Court (2005) provides that "[t]he court in its discretion may decide matters on submitted papers without oral argument, but only after having received written statements of reasons in support and opposition from all interested parties, or having given those parties fair opportunity to submit written statements."

This court (Lombardi, J.) intends to utilize Rule 6 in ruling on the MVLB motion. Any party wishing to submit a written statement concerning the MVLB motion may do so by filing and serving such statement on or before July 24, 2007. A ruling on the MVLB motion shall issue

---

[1] of Bear Realty Trust, Bear II Realty Trust, and Gorda Realty Trust.

[2] James J. Decoulos, as co-trustee of Bear II Realty Trust and Gorda Realty Trust; Mark D. Harding, Sheila H. Besse and Charles D. Harding, Jr., as trustees of Eleanor P. Harding Realty Trust.

[3] Commonwealth of Massachusetts acting through its Executive Office of Environmental Affairs; George B. Brush, as trustee of Toad Rock Realty Trust; Charles E. Derby; Joanne Fruchtman and Jack Fruchtman; Benjamin L. Hall, Jr., as trustee of Gossamer Wing Realty Trust; Brian M. Hall, as trustee of the Baron's Land Trust; Caroline Kennedy; Caroline Kennedy and Edward Schlossberg, as they are guardians of Rose Kennedy Schlossberg, Tatiana Celia Kennedy Schlossberg, and John Bouvier Kennedy Schlossberg; Jeffrey Madison, as trustee of Tacknash Realty Trust; the Martha's Vineyard Land Bank Commission; Moshup Trail II Limited Partnership; Peter Ochs; persons unknown or unascertained being the heirs of Savannah F. Cooper; Susan Smith; Russell Smith; Barbara Vanderhoop, executrix of the estate of Leonard F. Vanderhoop, Jr.; Vineyard Conservation Society, Inc.; David Wice and Betsy Wice; and persons unknown or unascertained who may have an interest in any land heretofore or hereinafter mentioned or described.

on or after July 25, 2007.

So ordered.

By the Court. (Lombardi, J.)

Attest:

Deborah J. Patterson
Recorder

Dated: July 11, 2007

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER

(502) 124

COMMONWEALTH OF MASSACHUSETTS

DUKES, ss

LAND COURT DEPARTMENT
MISC. CASE NO. 238738,
LOMBARDI, J

MARIA A. KITRAS, AS SHE IS THE TRUSTEE OF BEAR REALTY TRUST, MARIA A. KITRAS AND JAMES J. DECOULOS, AS THEY ARE THE CO-TRUSTEES OF BEAR II REALTY TRUST, MARIA A. KITRAS AND JAMES J. DECOULOS, AS THEY ARE THE CO-TRUSTEES OF GORDA REALTY TRUST, MARK D. HARDING, SHEILA H. BESSE AND CHARLES HARDING, JR. AS THEY ARE THE TRUSTEES OF THE ELEANOR P. HARDING REALTY TRUST,

Plaintiffs

v.

TOWN of AQUINNAH, COMMONWEALTH OF MASSACHUSETTS ACTING THROUGH ITS EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS, GEORGE D. BRUSH AS TRUSTEE OF THE TOAD ROCK REALTY TRUST, CHARLES E. DERBY, JOANNE FRUCHTMAN AND JACK FRUCHTMAN, BENJAMIN L. HALL, JR. AS TRUSTEE OF GOSSAMER WING REALTY TRUST, BRIAN M. HALL AS TRUSTEE OF THE BARON'S LAND TRUST, CAROLINE KENNEDY, CAROLINE KENNEDY AND EDWIN SCHLOSSBERG, AS THEY ARE THE GUARDIANS) OF THEIR MINOR CHILDREN, ROSE KENNEDY SCHLOSSBERG, TATIANA CELIA KENNEDY SCHLOSSBERG, AND JOHN BOUVIER KENNEDY SCHLOSSBERG, JEFFREY MADISON AS TRUSTEE OF TACKNASH REALTY TRUST, THE MARTHA'S VINEYARD LAND BANK, MOSHUP TRAIL II LIMITED PARTNERSHIP, PETER OCHS, PERSONS UNKNOWN OR UNASCERTAINED BEING THE HEIRS OF SAVANNAH COOPER, SUSAN SMITH AND RUSSELL SMITH, BARBARA VANDERHOOP, EXECUTRIX OF THE ESTATE OF LEONARD F. VANDERHOOP, JR., VINEYARD CONSERVATION SOCIETY, INC., DAVID WICE AND BETSY WICE, AND PERSONS UNKNOWN OR UNASCERTAINED WHO MAY HAVE AN INTEREST IN ANY LAND HERETOFORE OR HEREINAFTER MENTIONED OR DESCRIBED,

Defendants

ANSWER OF THE MARTHA'S VINEYARD LAND BANK TO THE THIRD AMENDED VERIFIED COMPLAINT, MARCH 12, 2007 AS MODIFIED BY ORDER DATED MARCH 29, 2007

416928

Now comes the Martha's Vineyard Land Bank ("the Land Bank") and answers Plaintiffs' Third Amended Verified Complaint as follows:

The Land Bank makes no response to the introductory paragraph of the complaint except that to the extent it is intended to state that the Land Court has jurisdiction, the Land Bank does not contest such jurisdiction.

1. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 1 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

2. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 2 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

3. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 3 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

4. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 4 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

5. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 5 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

6. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 6 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

7. The Land Bank admits the allegations set forth in paragraph 7x. The Land Bank acknowledges that the other parties listed in paragraph 7 are named as defendants in this action but is without knowledge or information concerning whether the parties listed are all necessary parties to the action or the basis upon which the other parties are listed as defendants or the ownership rights ascribed to those defendants as set forth in that paragraph and therefore neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

8. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 8 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

9. Admitted.

10. The defendant Land Bank admits that it is the record owner of Lots 238, 569 and a portion of Lot 578 as shown on Exhibit 2. The Land Bank is without information concerning the ownership rights of the plaintiffs and remaining defendants and therefore neither admits nor denies those ownership rights but calls upon plaintiffs to prove the same at trial, if relevant.

11. The defendant Land Bank admits that on information and belief there is no express easement granting plaintiffs the rights as set forth in paragraph 11. Otherwise, paragraph 11 states no facts requiring a response.

15

12. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 12 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

13. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 13 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

14. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 14 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

15. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 15 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

16. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 16 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

17. Admitted.

18. Admitted.

19. The Land Bank answers that the referenced section of the Town Act speaks for itself.

20. The Land Bank answers that the referenced section of the Town Act speaks for itself.

21. The Land Bank answers that the referenced section of the Town Act speaks for itself.

22. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 22 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

23. The Land Bank answers that the referenced section of the Town Act speaks for itself.

24. Admitted.

25. Admitted.

26. The Land Bank admits that the document in question is recorded and further answering states that the recorded document speaks for itself

27. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 27 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

28. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 28 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

29. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 29 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

30. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 30 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

31. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 31 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

32. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 32 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

33. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 33 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

34. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 34 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

35. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 35 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

36. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 36 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

37. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 37 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

38. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 38 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

39. Admitted.

40. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 40 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

41. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 41 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

42. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 42 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

43. Paragraph 43 contains no statements of fact and therefore no answer is required.

44. Paragraph 44 contains no statements of fact and therefore no answer is required.

45. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 45 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

46. Paragraph 46 contains legal argument that does not require a response from the Land Bank. To the extent that paragraph 46 alleges facts, these facts are denied.

47. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 47 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

48. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 48 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

49. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 49 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

50. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 50 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

51. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 51 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

52. The defendant Land Bank is without sufficient knowledge as to the truth of the allegations set forth in paragraph 52 and accordingly neither admits nor denies those allegations but calls upon plaintiffs to prove the same at trial, if relevant.

53. Denied.

54. Denied.

And further answering, the Land Bank asserts the following affirmative defenses:

1. The Third Amended Complaint fails to state a claim upon which relief may be granted.

2. The plaintiffs have failed to join necessary and/or indispensable parties.

3. The plaintiffs and their predecessors in title are barred by the doctrine of laches.

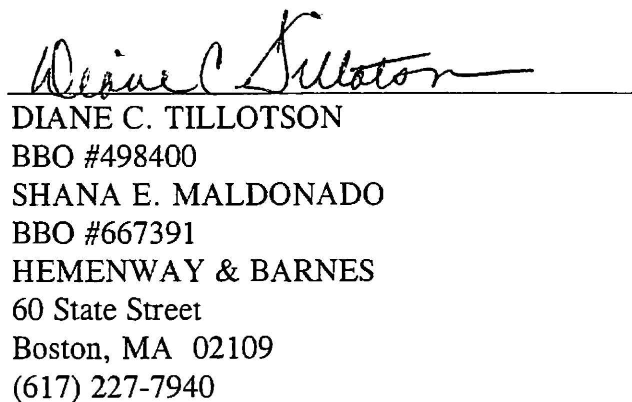
4. The plaintiffs are estopped from asserting the claims set forth in the Third Amended Complaint.

WHEREFORE, the Land Bank respectfully urges this court to dismiss plaintiffs' action and award it costs, attorney's fees and such other relief as this court deems appropriate.

Respectfully submitted,

THE MARTHA'S VINEYARD LAND BANK

By its Attorneys,



DIANE C. TILLOTSON
BBO #498400
SHANA E. MALDONADO
BBO #667391
HEMENWAY & BARNES
60 State Street
Boston, MA 02109
(617) 227-7940

Dated: August 3, 2007

COMMONWEALTH OF MASSACHUSETTS
Land Court
Department of the Trial Court
Miscellaneous Case No. 238738 (LJL)

(SEAL)

RECEIVED
SEP 17 2007
Decoulos & Decoulos

MARIA A. KITRAS, as TRUSTEE,[1] & others,[2]

Plaintiffs

vs.

TOWN OF AQUINNAH & others,[3]

Defendants

ORDER ALLOWING MOTIONS TO DISMISS CROSS-CLAIMS

On June 19, 2007, defendant Brian M. Hall, as trustee of Barons' Land Trust (BLT), and defendant Benjamin L. Hall, Jr., as trustee of Gossamer Wing Realty Trust (GWRT), each filed answers to the Third Amended Verified Complaint (third complaint).[4] After responding to the allegations of the complaint, each responsive pleading of BLT and GWRT raised an affirmative defense of estoppel. Under the heading of "CROSS CLAIMS & COUNTERCLAIMS" following the estoppel defense paragraph, each responsive pleading read as follows:

"Hall hereby counterclaims against the Plaintiffs and cross claims against the other

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[1]of Bear Realty Trust, Bear II Realty Trust, and Gorda Realty Trust.

[2]James J. Decoulos, as co-trustee of Bear II Realty Trust and Gorda Realty Trust; Mark D. Harding, Sheila H. Besse and Charles D. Harding, Jr., as trustees of Eleanor P. Harding Realty Trust.

[3]Commonwealth of Massachusetts acting through its Executive Office of Environmental Affairs; George B. Brush, as trustee of Toad Rock Realty Trust; Charles E. Derby; Joanne Fruchtman and Jack Fruchtman; Benjamin L. Hall, Jr., as trustee of Gossamer Wing Realty Trust; Brian M. Hall, as trustee of the Baron's Land Trust; Caroline Kennedy; Caroline Kennedy and Edward Schlossberg, as they are guardians of Rose Kennedy Schlossberg, Tatiana Celia Kennedy Schlossberg, and John Bouvier Kennedy Schlossberg; Jeffrey Madison, as trustee of Tacknash Realty Trust; The Martha's Vineyard Land Bank Commission; Moshup Trail II Limited Partnership; Peter Ochs; persons unknown or unascertained being the heirs of Savannah F. Cooper; Susan Smith; Russell Smith; Barbara Vanderhoop, executrix of the estate of Leonard F. Vanderhoop, Jr.; Vineyard Conservation Society, Inc.; David Wice and Betsy Wice; and persons unknown or unascertained who may have an interest in any land heretofore or hereinafter mentioned or described.

[4]The instant action commenced on May 20, 1997. With leave of court, plaintiffs submitted the third complaint on April 4, 2007.

Defendants as follows:

WHEREFORE, Hall requests Judgment against the Plaintiffs and Defendants jointly as follows . . ."

BLT and GWRT then included four identical paragraphs detailing the relief sought and a fifth paragraph requesting "such further relief as this Court deems just and proper."

A flurry of filings followed. On July 2, 2007, defendant Vineyard Conservation Society, Inc. (VCS) brought a motion to dismiss the cross-claims. The following day defendant Town of Aquinnah (Aquinnah) filed a motion to dismiss the cross-claims. In their various capacities, defendants Caroline Kennedy and Edwin Schlossberg (collectively, Kennedys) filed a motion to dismiss the cross-claims on July 9, 2007. Each of these motions to dismiss were brought pursuant to Mass. R. Civ. P. 12 (b) (6) and was supported by a memorandum of law. On August 10, 2007, defendant Martha's Vineyard Land Bank (MVLB) filed a joinder in the motion brought by VCS. No plaintiff filed a motion to dismiss the counterclaims.

On August 30, 2007, VCS, Aquinnah, the Kennedys, MVLB, BLT, GWRT, together with defendant Commonwealth of Massachusetts and plaintiffs Mark D. Harding, Sheila H. Besse, and Charles D. Harding, Jr., as trustees of Eleanor P. Harding Realty Trust (Harding trustees), appeared before this court (Lombardi, J.) sitting in Fall River Superior Court.[5] At the outset of the oral argument on the pending motions, BLT and GWRT submitted in open court Gossamer Wing Realty Trust & Barons' Land Trust Memorandum in Opposition to the Motions of Defendants Vineyard Conservation Society & Town of Aquinnah & Others to Dismiss Cross Claims & Counterclaims (joint opposition). In addition, the joint opposition included a motion for leave to amend the

[5]The Harding trustees, while present, did not seek to argue in favor or in opposition to the pending motions and stated they had nothing to add to the arguments made by the other parties.

pleadings (motion to amend).[6]

Upon reviewing the joint opposition on the bench, this court ruled that the motion to amend had not been marked for hearing and was not properly before the court. This court advised counsel for BLT and GWRT that he could mark the motion to amend for another date. As a remedy for the late filing of the joint opposition, this court allowed any interested party leave until September 13, 2007, to file a further response.

On September 7, 2007, VCS filed a supplement to its motion to dismiss that responded to the joint opposition. As of September 13, 2007, no other party responded to the joint opposition.

In essence, each party seeking the dismissal of the cross-claims argues that BLT and GWRT do not state a claim upon which relief could be granted, particularly where the cross-claims allege no facts. Aquinnah adds an additional argument that, although leave was granted to plaintiffs to file the third complaint in order to update the status of the parties, it was not understood that other parties were thus permitted to bring additional claims.

The first sentence of Mass. R. Civ. P. 8 (a) provides:

> "A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled."

Thus, the rules apply equally to complaints and other pleading such as counterclaims and cross-claims.

For support, BLT and GWRT rely upon Conley v. Gibson, 355 U.S. 41, 47 (1957). "Federal

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[6]In a letter to this court's sessions clerk dated August 29, 2007, counsel for BLT and GWRT claimed that his "usual assistant" was out sick the day he expected the joint opposition to have been mailed to all parties. In the words of counsel, "despite instructions to copy and mail packets of the opposition . . . , I have no way of knowing if it was done." Counsel wrote that he had recently spoken to attorneys representing a number of the parties and learned that none had received the joint opposition. In addition disclosing that he intended to e-mail the joint opposition to as many of the attorneys as he could, counsel sought guidance as to whether the court would accept the filing at the hearing. The sessions clerk called and authorized counsel to file the original joint opposition the following day.

Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim . . . [but only] require 'a short and plain statement of the claim' that will give . . . fair notice . . . of . . . the claim . . . and the grounds upon which it rests." Id.[7]

This court finds Conley to be of little help to BLT and GWRT. As a threshold matter,Conley is distinguishable on the facts. The Conley Court recited that the complaint before it "made the following allegations relevant to [its] decision." Id. at 42-43. In the next six sentences of its opinion, the Court summarized the factual allegations of the complaint. Id. at 43. Neither BLT nor GWRT has provided comparable detail in the pleading at issue here.

Even the language quoted by BLT and GWRT indicates that a party has the obligation to provide other parties with a short and plain statement of the claim that gives fair notice of the claim. While they have taken pains to include demands for judgments to which they deem themselves entitled as required by Mass. R. Civ. P. 8 (a) (2), BLT and GWRT have overlooked the equally essential requirement of Mass. R. Civ. P. 8 (a) (1).

During oral argument, BLT and GWRT contended that all the cross-claim defendants need do is look at the answers of BLT and GWRT to the allegations of the third complaint. Where they have admitted or otherwise agreed with plaintiffs' allegations, BLT and GWRT adopt those allegations as their own in the cross-claims. Those allegations of the complaint denied by BLT and GWRT are not considered by them as part of the cross-claims.

This court finds the views of BLT and GWRT concerning the drafting and construction of pleadings to be unreasonable and without authority. On more than one occasion, the Court has considered the issue as to the proper drafting of pleadings. See e.g. Garrity v. Garrity, 399 Mass. 367,

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[7]While the Conley Court addressed a Federal rule, Massachusetts courts "look to Federal decisions for guidance when construing the cognate Massachusetts rule of civil procedure, 'absent compelling reasons to the contrary of significant differences in content.'" Berman v. Linnane, 434 Mass. 301, 304 n.5 (2001), quoting Rollins Envtl. Servs., Inc. v. Superior Court, 368 Mass. 174, 180 (1975).

369 (1987); Mmoe v. Commonwealth, 393 Mass. 617, 618 (1985); Druker v. Roland Wm. Jutras Assocs., 370 Mass. 383385 (1976).

After stating that Mass. R. Civ. P. 8 (a) requires a pleading to include a short and plain statement of a claim, the Mmoe Court quoted the provision of Mass. R. Civ. P. 8 (e) (1) that "requires . . . '[e]ach averment of a pleading shall be simple, concise, and direct.' In the interests of clarity, rule 10 (b) addresses the organization of averments and claims." Mmoe, 393 Mass. at 618. In particular, the first sentence of Mass. R. Civ. 10 (b) mandates that "[a]ll averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances. . . ."

While Mass. R. Civ. P. 8 (a) (1) makes no reference to facts, the question is whether a party "fairly notifies [opposing parties] of the nature of the . . . claim and the grounds on which he relies . . . ." Reporter's Notes to Mass. R. Civ. P. 8 (1973). "The test of a [cross-claim]'s sufficiency turns on whether: (1) it provides enough information to tell the defendant what the dispute is about; and (2) asserts a right to recovery cognizable on some acceptable legal theory." J. W. Smith & H. B. Zobel, Rules Practice § 8.2 (2006). The cross-claims of BLT and GWRT fail this test.

The cross-claim is "free standing" and within the four corners of the pleading a party should have a fair sense of the claim and the request for relief. There is no support for the contention of BLT and GWRT that cross-claim defendants are under a duty to deduce from the responses of the cross-claim plaintiff to the allegations found in a complaint to determine the underlying averments of the cross-claim.

Based upon the foregoing, the motions to dismiss brought by MVC, Aquinnah, and the Kennedys are ALLOWED. As noted above, those motions do not relate to the counterclaims asserted against plaintiffs. Although the rulings contained in this order may apply equally to the counterclaims, this court has before it no motion and finds no basis to act sua sponte.

As an additional ground for its motion to dismiss, Aquinnah argues that "it was not [its] understanding that other parties were permitted, as a result of [the] filing [of the third complaint], to bring additional claims." Aquinnah did not cite any authority to suggest that, as a matter of law, this court should dismiss the cross-claim at this time.

In the order issued on March 29, 1997, this court directed each defendant to plead in response to the third complaint within twenty days after service. The order, however, was silent on whether a party had the right to assert counterclaims or cross-claims. Should BLT and GWRT mark their motion to amend their answer to the third complaint to assert cross-claims, parties interested in supporting or opposing the motion will have the opportunity to present their arguments to this court.

So ordered.

By the Court. (Lombardi, J.)

Attest:

Deborah J. Patterson
Recorder

Dated: September 14, 2007

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

DUKES, ss. MISC. CASE NO. 238738

****
MARIA A. KITRAS, TRUSTEE, et als. *
Plaintiffs *
*
v. *
*
TOWN OF AQUINNAH, et als., *
Defendants *
****

Motion of Plaintiff, Maria A. Kitras as Trustee of the Bear Realty Trust, to Amend Third Amended Complaint

The Plaintiff, Maria A. Kitras as she is Trustee of the Bear Realty Trust (Bear), moves this Honorable Court that she be allowed to amend the Third Amended Complaint as it relates to Lot 178, and states the following reasons as grounds therefor.

1. Since the filing of the Third Amended Complaint, March 12, 2007, as Modified by Order Dated March 29, 2007, Bear has determined that the Deed from the Commonwealth of Massachusetts to Zacheus Howwaswee (Zacheus) dated March 13, 1866, recorded in Book 49, Page 17, conveyed a tract of land containing approximately 11 acres, which description reads as follows:

> One tract southerly of Ester Howwaswee's homestead and bounded as follows: Beginning at Willow Brook by Willow Pond, thence by said Ester N 60½° E sixteen and a half rods to a rock, thence S 61 ½° E eighteen rods to a heap of stones, thence N 77° E forty five rods to a heap of stones, thence by commons, S 3° W twenty five and two fifths rods, thence S 24° E eight rods to a rock by a road, thence S 79° W sixteen rods, thence

N 34 ¼° W twenty rods, thence S 61° W forty five rods to a waterhole at the beach, thence N 17 ½° W twenty seven and three fourths rods to the first named bounds containing about eleven acres.

2. The set-off plans prepared by John Mullin and filed with the Dukes County Probate Court in 1878 depict Lots 178 and 711 for the first time.

3. On December 21, 1878, a deed was run out for Lot 178 from Commissioners Richard L. Pease and Joseph T. Pease, appointed under the authority of the Statutes of 1870, Chapter 213 to partition the common lands, to Elizabeth Howwaswee (Elizabeth), who was entitled thereto under the Last Will and Testament of Zacheus. The grantor of the deed to Lot 178 was the Commonwealth of Massachusetts and it was recorded in Book 65, Page 154 and is described as follows:

> Lot No. 178 - one hundred seventy eight.
>
> Ran out for Elizabeth Howwassee, widow of Zaccheus Howwasswee, a tract of land in the South Pasture, formerly her husband's and left to her by his will, bounded and described as follows:
>
> Beginning at the southeasterly corner bound of Lot No. 177, or the land of Esther Howwasswee, thence by Lot No. 241, S 2° 30′ W, four hundred twenty two feet to a bound; thence still by the same lot, S 31° 15′ E, one hundred thirty one feet to a bound being a rock nearly level with the ground; thence by Lot No. 238, S 79° 10′ W, two hundred sixty four feet to a bound; thence by Lot No. 713, N 34° W, three hundred thirty feet to a bound; thence still by the same lot, S 61° 15′ W, two hundred eighty five 80/100 feet to a bound; thence by the same course by Lot No. 712, four hundred twenty 30/100 feet to a bound; thence by Lot No. 711, N 15° 16′ E, six hundred twelve feet to a

bound; thence by Lot No. 177, or the land of Esther Howwasswee, N 58° E, two hundred fourteen 30/100 feet to a bound; thence by the same lot, S 46° 50′ E, two hundred fifty seven 30/100 feet to a bound; thence by the same lot, N 75° 55′ E, four hundred ninety seven 55/100 feet to the first mentioned bound, or the place of commencement.

4. On December 21, 1878, a deed for Lot 711 was assigned to Elizabeth and the description reads as follows:

> Lot No. 711 - seven hundred eleven - was assigned to Elizabeth Howwasswee - Census No. 196.
>
> And is thus bounded and described:
>
> Beginning at the southerly corner bound of Lot No. 710; thence by the same N 68° 23′ E, five hundred seven 70/100 feet to a bound; thence by land of said Elizabeth, S 15° 16′ W, six hundred twelve feet to a bound; thence by Lot No. 712, S 61° 15′ W, fifty three 30/100 feet to a bound; thence by Lot No. 555, N 31° 36′ W, two hundred thirty nine 65/100 feet; and on the same course, by Lot No. 554, two hundred sixty four feet to the first mentioned bound, or the place of commencement.

5. The premises described in the deed to Zacheus and in the deeds of Lots 178 and 711 to Elizabeth are in the same locality.

6. The metes and bounds in the deeds to Elizabeth are similar to those in the deed to Zacheus as shown on the three plans attached hereto.

7. The easterly bound in the deed to Zacheus identifies a rock by a road.

8. The easterly boundary of the deed to Zacheus is described as "by commons".

9. At the time that the Third Amended Complaint was filed, Bear was unaware that an old road, identified as Toad Rock Road, bounded the easterly sideline of the future Lot 178.

Bear proposes to amend the Third Amended Complaint by inserting the following paragraphs:

(1) Under "Allegations of Fact Common to All Demands and Causes of Action":

Since the filing of the Third Amended Complaint and the ruling of the Appeals Court that Lot 178 is not included in the unity of title to claim an easement by necessity, Bear has found the Deed from the Commonwealth of Massachusetts to Zacheus Howwaswee dated March 13, 1866, recorded in Book 49, Page 17, which states that the future Lot 178 was bounded by commons and a road and as a result thereof, Bear has acquired by estoppel access to the commons and the road, together with adjoining owners as passage to other roads in the immediate area of Lot 178, which lot was not included in the Common Lands but was part of the Lots held in severalty prior to the filing of the Petition for Partition.

(2) Under "Causes of Action":

Count Three

(Easement by Estoppel)

Bear, and her predecessors in title to Lot 178, has acquired an easement by estoppel to gain access to her property over the commons and road network which was in existence at the time of the conveyance of Lot 178, to wit: March 13, 1866.

(3) Under "Request for Relief"

The Plaintiff, Bear, has acquired an easement by estoppel to use the commons and the road network that was in existence at the time of the conveyance of Lot 178 to the initial grantee, Zacheus Howwaswee, and all of the Defendants are enjoined from preventing Bear from using the commons and the road network for access to Lot 178.

Maria A. Kitras as she is the Trustee
of Bear Realty Trust

By her Attorney,

Nicholas J. Decoulos
BBO# 117760
39 Cross Street, Suite 204
Peabody, MA 01960
Tel. 978-532-1020
September 26, 2007

POINT OF BEGINNING: AT WILLOW BROOK BY WILLOW POND

ESTER HOWWASWEE HOMESTEAD

ROCK

HEAP OF STONES

HEAP OF STONES

N 60 1/2 E
16 1/2 RODS
272.25'

S 61 1/2 E
18 RODS
297.00'

N 77 E
45 RODS
742.50'

S 3 W
25 2/5 RODS
419.10'

COMMONS

AREA = 11.27 ACRES

N 17 1/2 W
27 3/4 RODS
457.88'

742.50'
45 RODS
S 61 W

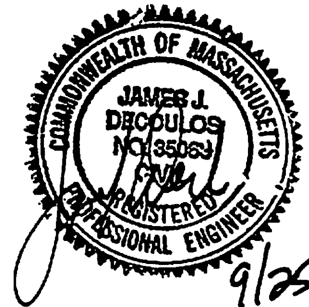
N 34 1/4 W
20 RODS
330.00'

S 24 E
8 RODS
132.00'

264.00'
16 RODS
S 79 W

WATER HOLE AT THE BEACH

ROCK BY A ROAD



DECOULOS & COMPANY 185 ALEWIFE BROOK PKWY, CAMBRIDGE, MA 02138 WWW.DECOULOS.COM 617.489.7795	**DEED TO ZACHEUS HOWWASWEE** **DUKES REGISTRY BOOK 49, PAGE 17** **AQUINNAH, MASSACHUSETTS**	DATE SEPT 2007 SCALE 1" = 200' FIGURE NO. 1

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BROOK FROM AERIAL PHOTOGRAMMETRY PROVIDED BY LOCKWOOD MAPPING, FLOWN MARCH, 1979

POND FROM AERIAL PHOTOGRAMMETRY PROVIDED BY LOCKWOOD MAPPING, FLOWN MARCH, 1979

POINT OF BEGINNING: SOUTHEASTERLY CORNER BOUND OF LOT NO. 177, OR THE LAND OF ESTHER HOWWASSWEE

LAND OF ESTHER HOWWASSWEE

BOUND

BOUND

N 58°00'00" E 214.30'

S 46°50'00" E 257.30'

BOUND

N 75°55'00" E 497.55'

SURFACE WATER FLOW

BOUND

N 68°23'00" E 507.70'

TOTAL AREA = 12.40 ACRES

LOT 178

AREA = 9.24 ACRES

S 02°30'00" W 422.00'

LOT 711

AREA = 3.16 ACRES

N 15°16'00" E 612.00'

BOUND

706.10' TOTAL

285.80' S 61°15'00" W

N 34°00'00" W 330.00'

S 31°15'00" E 131.00'

N 31°36'00" W 503.65'

BOUND

420.30' S 61°15'00" W

264.00' S 79°10'00" W

BOUND

BOUND

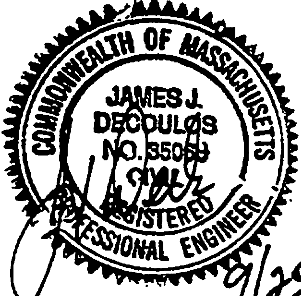
53.30' S 61°15'00" W

BOUND

BOUND

BOUND, BEING A ROCK NEARLY LEVEL WITH THE GROUND

DIVIDING LINE BETWEEN UPLAND AND BEACHLAND AS SHOWN ON PARTITION PLAN OF GAY HEAD ON FILE AT THE MARTHA'S VINEYARD HISTORICAL SOCIETY, RECORD G-8



9/25/07

DECOULOS & COMPANY 185 ALEWIFE BROOK PKWY, CAMBRIDGE, MA 02138 WWW.DECOULOS.COM 617.489.7795	**DEEDS TO ELIZABETH HOWWASSWEE DUKES REGISTRY BOOK 65, PGS 154 & 365 AQUINNAH, MASSACHUSETTS**	DATE SEPT 2007 SCALE 1" = 200' FIGURE NO. 2

226

INTERSECTING AREA OF ZACHEUS' LOT
AND LOT 178 = 8.29 ACRES,
OR 89.7% OF LOT 178

BOUNDARY OF
ZACHEUS' LOT

BOUNDARY OF LOT 178

BOUNDARY
OF LOT 711

COMMON HELD POINT OF ZACHEUS' LOT
AND ELIZABETH'S LOT 178.

INTERSECTING AREA OF ZACHEUS' LOT
AND LOT 711 = 2.27 ACRES,
OR 71.8% OF LOT 711

DECOULOS & COMPANY 185 ALEWIFE BROOK PKWY, CAMBRIDGE, MA 02138 WWW.DECOULOS.COM 617.489.7795	COMPARISON OF HOWWASSWEE DEEDS BK 49, PG 17 AND BK 65, PGS 154 & 365 AQUINNAH, MASSACHUSETTS	DATE SEPT 2007 SCALE 1"= 200' FIGURE NO. 3

COMMONWEALTH OF MASSACHUSETTS
Land Court
Department of the Trial Court
Miscellaneous Case No. 238738 (LJL)

(SEAL)

MARIA A. KITRAS, as TRUSTEE,[1] & others,[2]

Plaintiffs

RECEIVED
NOV 1 4 2007
Decoulos & Decoulos

vs.

TOWN OF AQUINNAH & others,[3]

Defendants

ORDER DENYING MOTION TO AMEND THIRD AMENDED COMPLAINT

The instant action commenced with the filing of a complaint on May 20, 1997. On an appeal from a judgment entered pursuant to Mass. R. Civ. P. 54 (b), the Appeals Court issued a decision on August 18, 2005, remanding the case to this court (Lombardi, J.) "for further proceedings consistent with this opinion." Kitras v. Aquinnah, 64 Mass. App. Ct. 285, 301 (2005).

On September 28, 2007, plaintiff Maria A. Kitras (Kitras), as trustee of Bear Realty Trust, filed a motion to amend Third Amended Complaint (motion to amend).[4] Defendants Vineyard Conservation Society, Inc. (VCS); Town of Aquinnah (Aquinnah); The Martha's Vineyard Land

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[1]of Bear Realty Trust, Bear II Realty Trust, and Gorda Realty Trust.

[2]James J. Decoulos, as co-trustee of Bear II Realty Trust and Gorda Realty Trust; Mark D. Harding, Sheila H. Besse and Charles D. Harding, Jr., as trustees of Eleanor P. Harding Realty Trust.

[3]Commonwealth of Massachusetts acting through its Executive Office of Environmental Affairs; George B. Brush, as trustee of Toad Rock Realty Trust; Charles E. Derby; Joanne Fruchtman and Jack Fruchtman; Benjamin L. Hall, Jr., as trustee of Gossamer Wing Realty Trust; Brian M. Hall, as trustee of the Baron's Land Trust; Caroline Kennedy; Caroline Kennedy and Edward Schlossberg, as they are guardians of Rose Kennedy Schlossberg, Tatiana Celia Kennedy Schlossberg, and John Bouvier Kennedy Schlossberg; Jeffrey Madison, as trustee of Tacknash Realty Trust; The Martha's Vineyard Land Bank Commission; Moshup Trail II Limited Partnership; Peter Ochs; persons unknown or unascertained being the heirs of Savannah F. Cooper; Susan Smith; Russell Smith; Barbara Vanderhoop, executrix of the estate of Leonard F. Vanderhoop, Jr.; Vineyard Conservation Society, Inc.; David Wice and Betsy Wice; and persons unknown or unascertained who may have an interest in any land heretofore or hereinafter mentioned or described.

[4]While a plaintiff in her capacity as a trustee in three separate trusts, Kitras filed the motion to amend only as trustee of Bear Realty Trust.

Bank (MVLB); and in various capacities, Caroline Kennedy and Edwin Schlossberg (collectively, Kennedys) submitted oppositions to the motion to amend either on October 11 or 12, 2007.[5]

A number of parties appeared before this court on October 12, 2007, to argue the motion to amend.[6] At the commencement of the hearing, Kitras presented an affidavit of plaintiff James J. Decoulos in support of the motion to amend (Decoulos affidavit). Those arguing in favor of the motion to amend were Kitras, Decoulos, and defendants Brian M. Hall and Benjamin L. Hall, Jr., as trustees of their respective trusts. VCS, Aquinnah, MVLB, the Kennedys, and defendant Commonwealth of Massachusetts either argued in opposition or stated they wished to join in the opposition.

The filing of an affidavit by a moving party on the day of the scheduled hearing is untimely under various court rules. See Mass. R. Civ. P. 6 (c); Rule 5 of the Rules of the Land Court (2005). This court exercised its discretion to allow the late filing of the Decoulos affidavit on the condition that any interested party could file a response after the hearing.

Accordingly, VCS submitted a supplemental opposition on October 25, 2007. On the same day, the Kennedys filed a supplemental opposition to join in the filing of VCS. Defendants Jack Fruchtman and JoAnn Fruchtman on October 31, 2007, submitted a joinder to the supplemental opposition of VCS.

Kitras states in the motion to amend that, since the filing of the Third Amended Complaint, she has determined that a deed from the Commonwealth of Massachusetts to Zacheus Howwaswee dated March 13, 1866 (1866 deed), recorded with Dukes County Registry of Deeds (Registry) in

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[5]On October 17, 2007, defendants Jack Fruchtman and JoAnn Fruchtman submitted a joinder to the previously filed oppositions.

[6]Those appearing in person or by telephone conference call were Kitras; VCS; the Kennedys; Aquinnah; MVLB; plaintiff James J. Decoulos, as co-trustee of Bear II Realty Trust and Gorda Realty Trust; plaintiffs Mark D. Harding, Sheila H. Besse and Charles D. Harding, Jr., as trustees of Eleanor P. Harding Realty Trust; defendant Commonwealth of Massachusetts; defendant Brian M. Hall, as trustee of Barons' Land Trust; and defendant Benjamin L. Hall, Jr., as trustee of Gossamer Wing Realty Trust.

book 49, at page 17, contained approximately eleven acres (Zacheus parcel). In pertinent part, the legal description reads as follows:

> "Beginning at Willow Brook by Willow Pond, thence by said Ester [Howwaswee] N 60 ½° E sixteen and a half rods to a rock, thence S 61 ½° E eighteen rods to a heap of stones, thence N 77° E forty five rods to a heap of stones, thence by commons, S 3° W twenty five and two fifth rods, thence S 24° E eight rods to a rock by a road, thence S 79° W sixteen rods . . . ."

According to Kitras, "the easterly bound in the [1866] deed . . . identifies a rock by a road." Kitras also states that, at the time the Third Amended Complaint was filed, she "was unaware that an old road, identified as Toad Rock Road, bounded the easterly sideline of the future Lot 178."[7]

The Decoulos affidavit asserts that a plan entitled "Plan of Land in Gay Head, Mass. Surveyed for Madeline J. & Jean W. Missud, Jr." dated July 21, 1959 (1959 plan), and recorded with the Registry in book 249, at page 528, depicts way identified as Toad Rock Road.[8] The affiant claims that Toad Rock Road

> "appears to be a.) the same road identified in the 1866 deed . . . which defines its easterly boundary; b.) the same road shown on the 1897-1898 topographic plan on file with the Historical Society . . . and c.) the same road shown on the overlay of Set-Off Lots on the 1941 aerial photo . . . ."

Based upon the foregoing, Kitras now seeks to assert a new cause of action as Count Three alleging an easement by estoppel. Kitras alleges that Bear Realty Trust "has acquired an easement by estoppel to use the commons and the road network that was in existence at the time of the conveyance of Lot 178 to the initial grantee, Zacheus Howwaswee . . . ."

The general rule is that leave to amend a pleading "shall be freely given when justice so

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[7]The motion also provides the legal descriptions of two 1878 deeds, one to Lot 178 and the other to Lot 711. Neither description mentions any boundary by a road or way. Three attachments to the motion to amend attempt to show the relationship of Lots 178 and 711to the parcel conveyed by the 1866 deed.

[8]The 1959 plan depicts a portion of Toad Rock Road as it crosses portions of Lots 569 and 238. Toad Rock Road as shown on the 1959 plan has neither a starting nor ending point and is not shown connecting to any other road. Additionally, the 1959 plan does not show any portion of Lot 178.

requires." Mass. R. Civ. P. 15 (a). "[A] trial judge on remand still possesses, as a general matter, broad discretion to allow any appropriate amendment." Jones v. Wayland, 380 Mass. 110, 115 (1980). The Court has identified the factors that might justify denial of a motion to amend, including undue delay, bad faith, repeated failure to cure deficiencies in pleadings, undue prejudice to the opposing party, and futility of amendment. See Castellucci v. United States Fid. & Guar. Co., 372 Mass. 288, 290 (1977). Those factors are to be considered whether before judgment enters or after remand. Jones, 380 Mass. at 116-117.

Those opposing the motion to amend, led chiefly by VCS, do so on three bases: undue delay, futility, and prejudice to other parties. VCS observes that the original complaint and amendments to it did not assert a claim of an easement by estoppel for the benefit of Lot 178. After remand in 2005, VCS contends that Kitras filed additional amendments to her pleading over a period of eighteen months and did not raise the easement by estoppel claim until the instant motion to amend.

Recently, the Court held that a motion judge properly exercised his discretion to deny a motion to amend, after remand, on the ground that the moving party had ample opportunity to raise the claim at earlier stages of the litigation. See Pielech v. Massasoit Greyhound, Inc., 441 Mass. 188, 197 (2004).

For ten years, plaintiffs have prosecuted this case based upon claims of necessity and prescription. While the Kitras court left it to the trial judge to weigh admissible evidence on the issues of easements by necessity and implication, nothing in the decision suggests that the parties had the right to bring new claims. The documents relied upon by Kitras are not of recent vintage.[9] As Kitras and the other plaintiffs considered their options for claims of access to various lots, there is nothing to suggest that they could not have brought an easement by estoppel claim at a much

[9]Although the Decoulos affidavit includes a copy of a deed of David H. Wice and Betsy W. Wice conveying Lot 569 to MVLB dated December 15, 2005, this court finds that the instrument adds nothing of significance to the discussion.

earlier time.

Aquinnah and VCS also oppose the motion to amend on the ground of futility. Those parties note that the relevant portion of the legal description of the Zacheus parcel runs "S 24° E eight rods to a rock by a road" and then runs "S 79° W sixteen rods." From this description as well as the sketches provided by Kitras, it is clear that the 1866 deed describes a line extending to a point marked by a rock next to a road and then turning in different direction for a distance of sixteen rods. There is no indication in the 1866 deed that the sixteen rod line lies along any road. Even if the road mentioned in the 1866 deed were Toad Rock Road, an assumption this court does not make, nothing in the deeds indicates that any boundary of the Zacheus parcel lies along a road.

"The Massachusetts cases recognizing that an easement may be created by estoppel have fallen into two general categories." Patel v. Planning Bd. of N. Andover, 27 Mass. App. Ct. 477, 481 (1989). Under the first category,

> "'when a grantor conveys land bounded on a street or way, he and those claiming under him are estopped to deny the existence of such a . . . way, and the right thus acquired by the grantee (an easement of way) is not only coextensive with the land conveyed, but embraces the entire length of the way, as it is then laid out or clearly indicated and prescribed.' Casella v. Sneierson, 325 Mass. 85, 89 (1949) . . . This rule is applicable even if the way is not yet in existence, so long as it is contemplated and sufficiently designated."

Murphy v. Mart Realty of Brockton, Inc., 348 Mass. 675, 677-678 (1965). See Lane v. Zoning Bd. of Appeals of Falmouth, 65 Mass. App. Ct. 434, 437 (2006). The second category also estops a grantor and those claiming under him from denying the existence of a street "where land situated on a street is conveyed according to a recorded plan on which the street is shown . . . ." Goldstein v. Beal, 317 Mass. 750, 755 (1945). After reviewing these two categories of easement by estoppel, the Patel court noted that it was "aware of no case in Massachusetts recognizing the creation of an easement on broader principles of estoppel." Patel, 27 Mass. App. Ct. at 482.

The evidence relied upon by Kitras is legally insufficient to qualify for an easement by

estoppel under either category recognized by case law. In particular, Toad Rock Road was not "laid out or clearly indicated and prescribed" in either 1866 or 1878. Furthermore, the legal descriptions of the Zacheus parcel and Lot 178 are both silent as being bounded by a way. Thus, the easement by prescription claim is futile.

Based upon the foregoing, the motion to amend is DENIED on the grounds of futility and undue delay. This court need not reach the further argument based upon prejudice to the opposing parties.

So ordered.

By the Court. (Lombardi, J.)

Attest:

Deborah J. Patterson
Recorder

Dated: November 9, 2007

**A TRUE COPY
ATTEST:**
Deborah J. Patterson
RECORDER

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Decoulos & Decoulos

COMMONWEALTH OF MASSACHUSETTS
Land Court
Department of the Trial Court
Miscellaneous Case No. 238738 (LJL)

MARIA A. KITRAS, as TRUSTEE,[1] & others,[2]

Plaintiffs

vs.

TOWN OF AQUINNAH & others,[3]

Defendants

ORDER ON FURTHER AMENDMENTS TO PLEADINGS
and
ORDER CORRECTING ORDER OF NOVEMBER 9, 2007

This court (Lombardi, J.) issued an order on September 21, 2007 (September 2007 order), calling for a status conference hearing after the filing of notice that the service of a final set of trial documents has been completed. The September 2007 order also stated that "the time deadlines may be subject to further extensions if parties are successful in bringing motions to amend the pleadings. This court will consider arguments of the parties as to the effect, if any, one or more amendments to the pleadings would have on the time for discovery." As of the date hereof, this court has received no notice that service of the set of trial documents has occurred.

In order to bring closure to the amendment process and to move the case toward trial and

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[1]of Bear Realty Trust, Bear II Realty Trust, and Gorda Realty Trust.

[2]James J. Decoulos, as co-trustee of Bear II Realty Trust and Gorda Realty Trust; Mark D. Harding, Sheila H. Besse and Charles D. Harding, Jr., as trustees of Eleanor P. Harding Realty Trust.

[3]Commonwealth of Massachusetts acting through its Executive Office of Environmental Affairs; George B. Brush, as trustee of Toad Rock Realty Trust; Charles E. Derby; Joanne Fruchtman and Jack Fruchtman; Benjamin L. Hall, Jr., as trustee of Gossamer Wing Realty Trust; Brian M. Hall, as trustee of the Baron's Land Trust; Caroline Kennedy; Caroline Kennedy and Edward Schlossberg, as they are guardians of Rose Kennedy Schlossberg, Tatiana Celia Kennedy Schlossberg, and John Bouvier Kennedy Schlossberg; Jeffrey Madison, as trustee of Tacknash Realty Trust; The Martha's Vineyard Land Bank Commission; Moshup Trail II Limited Partnership; Peter Ochs; persons unknown or unascertained being the heirs of Savannah F. Cooper; Susan Smith; Russell Smith; Barbara Vanderhoop, executrix of the estate of Leonard F. Vanderhoop, Jr.; Vineyard Conservation Society, Inc.; David Wice and Betsy Wice; and persons unknown or unascertained who may have an interest in any land heretofore or hereinafter mentioned or described.

judgment, this court ORDERS the parties to file and serve any additional motions to amend their pleadings on or before December 7, 2007. Relying upon Rule 6 of the Rules of the Land Court (2005), this court will issue an order ruling on any motion to amend without hearing following the response of any party to such motion. Such a response to a motion to amend, if any, must be filed on or before December 21, 2007. In filing any motion to amend or response pursuant to this paragraph, a party should address whether the allowance of such motion to amend would necessitate further time for discovery.

Pursuant to Mass. R. Civ. P. 60 (a), the last sentence of the penultimate paragraph of Order Denying Motion to Amend Third Amended Complaint issued on November 9, 2007, is hereby deleted and the following sentence is inserted in place thereof: "Thus, the easement by estoppel claim is futile."

So ordered.

By the Court. (Lombardi, J.)

Attest:

Deborah J. Patterson
Recorder

Dated: November 13, 2007

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

DUKES, ss. MISC. CASE NO. 238738

MARIA A. KITRAS, TRUSTEE, et als.
Plaintiffs

v.

TOWN OF AQUINNAH, et als.,
Defendants

Motion of Plaintiffs, Maria A. Kitras as Trustee of the Bear Realty Trust, Maria A. Kitras and James J. Decoulos as Trustees of the Bear II Realty Trust, and Maria A. Kitras and James J. Decoulos as Trustees of the Gorda Realty Trust to Amend Third Amended Complaint

The Plaintiffs, Maria A. Kitras as Trustee of the Bear Realty Trust, Maria A. Kitras and James J. Decoulos as Trustees of the Bear II Realty Trust, and Maria A. Kitras and James J. Decoulos as Trustees of the Gorda Realty Trust, move this Honorable Court that they be allowed to amend their Third Amended Complaint as it relates to Lot 178, and state the following reasons as grounds therefor.

Lot 178 has the benefit of an implied easement by grant to travel over existing ways and common lands, as shown on the following plans:

1. "Map of Gay Head Martha's Vineyard, Mass., Showing the Lands of Individual Owners and the General Fields or Commons, made under the direction of Richard L. Pease, Esq., Commissioner Appointed by Gov. Bullock Under Chapter 67 of 1866 to Determine the Boundary Lines of

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Indian Lands at Gay Head", By John H. Mullin, Scale, 50 rods = one inch. (Emphasis supplied). (1866 Mullin Map)

2. "Sectional Plans of Indian Lands on Gay Head, made under the Direction of Richard L. Pease, Esq., Commissioner Appointed by Gov. Bullock Under Chapter 67 of 1866 to Determine the Boundary Lines of Indian Lands at Gay Head", Scale: 25 Rods to an Inch: John H. Mullin, Civil Engineer. (Sectional Plans)

3. "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 the Probate Under Section 6 of Chapter 213 of the Acts of 1870, by John H. Mullin, Scale: 200 feet to an inch" on file with the Dukes County Registry of Probate." (Common Scheme Plan)

The moving parties propose to amend their Third Amended Complaint by inserting the following paragraphs:

(1) Under "Allegations of Fact Common to All Demands and Causes of Action":

52A. Lot 178 has the benefit of an implied easement by grant as a result of the conveyance of Lot 178 being part of a common scheme.

(2) Under "Causes of Action":

Count Three

(Implied Easement by Grant)

The Plaintiff, Maria A. Kitras as Trustee of Bear Realty Trust, and her predecessors in title to Lot 178, has acquired an implied easement by grant to gain access to her property over

the commons and the road network which was in existence at the time of the conveyance of Lot 178.

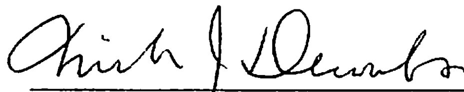
(3) Under "Request for Relief"

REQUEST FOR RELIEF AS TO COUNT THREE

The Plaintiffs have acquired an implied easement by grant to use the commons and the road network that were in existence at the time of the conveyance of all of the set-off lots, particularly Lot 178, to the initial grantees, and all of the Defendants are enjoined from preventing the Plaintiffs from using the commons and the road network for access to Lot 178 and all other lots acquired and depicted on the Partition Plan on file with Dukes County Registry of Probate.

Maria A. Kitras as she is the Trustee of Bear Realty Trust, Maria A. Kitras and James J. Decoulos as Trustees of Bear II Realty Trust, and Maria A. Kitras and James J. Decoulos as Trustees of the Gorda Realty Trust

By their Attorney,



Nicholas J. Decoulos
BBO# 117760
39 Cross Street, Suite 204
Peabody, MA 01960
Tel. 978-532-1020
December 6, 2007

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COMMONWEALTH OF MASSACHUSETTS
Land Court
Department of the Trial Court
Miscellaneous Case No. 238738 (LJL)

(SEAL)

MARIA A. KITRAS, as TRUSTEE,[1] & others,[2]

Plaintiffs

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FEB 5 200_
Decoulos & Decoulos

vs.

TOWN OF AQUINNAH & others,[3]

Defendants

ORDER DENYING MOTIONS TO AMEND

This court (Lombardi, J.) issued an order on November 13, 2007 (November 2007 order). In pertinent part, the November 2007 order provided as follows:

> "In order to bring closure to the amendment process and to move the case toward trial and judgment, this court ORDERS the parties to file and serve any additional motions to amend their pleadings on or before December 7, 2007. Relying upon Rule 6 of the Rules of the Land Court (2005), this court will issue an order ruling on any motion to amend without hearing following the response of any party to such motion. Such a response to a motion to amend, if any, must be filed on or before December 21, 2007."

On December 7, 2007, the court received a joint motion submitted by Brian M. Hall, as trustee of Barons' Land Trust (BLT) and Benjamin L. Hall, Jr., as trustee of Gossamer Wing Realty Trust (GWRT) seeking to amend their answer, cross-claims and counterclaims (Hall motion) and

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[1] of Bear Realty Trust, Bear II Realty Trust, and Gorda Realty Trust.

[2] James J. Decoulos, as co-trustee of Bear II Realty Trust and Gorda Realty Trust; Mark D. Harding, Sheila H. Besse and Charles D. Harding, Jr., as trustees of Eleanor P. Harding Realty Trust.

[3] Commonwealth of Massachusetts acting through its Executive Office of Environmental Affairs; George B. Brush, as trustee of Toad Rock Realty Trust; Charles E. Derby; Joanne Fruchtman and Jack Fruchtman; Benjamin L. Hall, Jr., as trustee of Gossamer Wing Realty Trust; Brian M. Hall, as trustee of the Baron's Land Trust; Caroline Kennedy; Caroline Kennedy and Edward Schlossberg, as they are guardians of Rose Kennedy Schlossberg, Tatiana Celia Kennedy Schlossberg, and John Bouvier Kennedy Schlossberg; Jeffrey Madison, as trustee of Tacknash Realty Trust; The Martha's Vineyard Land Bank Commission; Moshup Trail II Limited Partnership; Peter Ochs; persons unknown or unascertained being the heirs of Savannah F. Cooper; Susan Smith; Russell Smith; Barbara Vanderhoop, executrix of the estate of Leonard F. Vanderhoop, Jr.; Vineyard Conservation Society, Inc.; David Wice and Betsy Wice; and persons unknown or unascertained who may have an interest in any land heretofore or hereinafter mentioned or described.

a motion of plaintiffs Maria A. Kitras, as Trustee of the Bear Realty Trust; Maria A. Kitras and James J. Decoulos, as Trustees of the Bear II Realty Trust; and Maria A. Kitras and James J. Decoulos as Trustees of the Gorda Realty Trust (collectively, Kitras plaintiffs) to amend Third Amended Complaint (Kitras motion). Both sets of moving parties filed supporting memoranda.

This court received an opposition to the Kitras motion from defendant Vineyard Conservation Society, Inc. (VCS) on December 19, 2007. The following day, defendant Town of Aquinnah (Aquinnah) filed its opposition to the Kitras motion "for the same reasons articulated in [the VCS opposition]." Simultaneously, Aquinnah submitted an opposition to the Hall motion. The Kennedy defendants filed an opposition to the Kitras motion on December 21, 2007.[4]

In considering the pending motions and the oppositions, this court applies well-settled principals of law. "The decision to grant a motion to amend falls within the motion judge's broad discretion . . . ." Pielech v. Massasoit Greyhound, Inc., 441 Mass. 188, 197-198 (2004). "A trial judge on remand still possesses, as a general matter, broad discretion to allow any appropriate amendment." Jones v. Wayland, 380 Mass. 110, 115 (1980). While leave to amend is ordinarily given, a court may deny a motion to amend on certain grounds that include undue delay, futility, repeated failure to cure deficiencies by amendments previously allowed, and prejudice to other parties. See Castelluci v. United States Fid. & Guar. Co., 372 Mass. 288, 290 (1977).

I. Kitras motion

The Kitras plaintiffs seek to amend the Third Amended Complaint filed on April 4, 2007, as it relates to Lot 178. The Kitras motion contains three elements. As an additional allegation of fact, the Kitras plaintiffs first seek to add the following paragraph:

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[4]Additional oppositions were filed and docketed on December 24, 2007, beyond the December 21, 2007 deadline established in the November 2007 order. Those filings were from defendants Martha's Vineyard Land Bank, Joan and Jack Fruchtman, and the Commonwealth of Massachusetts. While received late, none of the oppositions stated anything of substance beyond the fact that the particular defendants wished to join in the opposition of VCS.

"52A. Lot 178 has the benefit of an implied easement by grant as a result of the conveyance of Lot 178 being part of a common scheme."

The Kitras motion next proposes adding the following additional cause of action as Count Three:

"The plaintiff, Maria A. Kitras as Trustee of Bear Realty Trust, and her predecessors in title to Lot 178 , has acquired an implied easement by grant to gain access to her property over the commons and the road network which was in existence at the time of the conveyance of Lot 178."

Lastly, the Kitras motion seeks to add a request for relief based on Count Three, including an injunction preventing defendants from preventing the Kitras plaintiffs "from using the commons and the road network for access to Lot 178 and all other lots acquired and depicted on the Partition Plan on file with Dukes County Registry of Probate."[5]

According to VCS, none of the prior complaints asserted a claim of access to Lot 178 by an implied easement by grant.[6] Even after the Appeals Court remanded the action in 2005, VCS argues that the Kitras plaintiffs did not raise the implied easement claim in prior motions to amend.

The Kitras plaintiffs, VCS notes, rely on three plans created in the period of the 1860's to the 1870's and on a deed dated March 13, 1866. VCS rightly observes that this "evidence was available to the plaintiffs all along . . ."

On the issue of futility, VCS claims that the Kitras plaintiffs' argument for an easement by estoppel fails because the 1866 deed makes no reference to a plan or to any easements. VCS further disputes the Kitras plaintiffs' contention that G. L. c. 183, § 58, applies here as a consequence of the

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[5]The Kitras motion maintains that Lot 178 has the benefit of an implied easement by grant to travel over existing ways and common lands, as shown on the so-called (a) 1866 Mullin Map, (b) Sectional Plans, and (c) Common Scheme Plan. Each of these plans was created in the nineteenth century..

[6]VCS contends that the latest proposed amendment to the complaint is the ninth.

1866 deed containing a bound "thence by commons, S 3° W twenty five and two fifths rods . . . ."[7] The "commons," VCS maintains, is not a linear monument. The Kitras plaintiffs have offered no authority to suggest otherwise.

Lastly, VCS insists that, after a decade of litigation on the original claims of the Kitras plaintiffs, the other parties would be prejudiced by the expense of having to defend against this new claim.

Based upon the grounds of undue delay and futility and for the reasons set forth by VCS, this court denies the Kitras motion. See Sharon v. Newton, 437 Mass. 99, 102 (2002) (noting denials based on undue delay generally coupled with other facts such as imminence of trial and futility of claim).

II. Hall motion

The trustees of BLT and GWRT (collectively, Halls) state in the Hall motion that they seek leave to file an amended pleading that they claim addresses the deficiencies identified by this court in an order issued on September 14, 2007 (September 2007 order). Those deficiencies centered on the failure of the earlier responsive pleading to meet the various requirements of Mass. R. Civ. P. 8, 10. The Hall motion included the proposed amended pleadings for both BLT and GWRT.

In each of their proposed amended pleadings, BLT and GWRT attempt to assert counterclaims against plaintiffs and cross-claims against other defendants in a single set of five, identical paragraphs. In paragraph one, each trust alleges "Hall owns lots as set forth in the complaint . . . ." Paragraph two claims that the owners of those lots "have the benefit of getting to and from their land by foot and by vehicle and have the right to run utilities to their lands across

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[7]In pertinent part, G. L. c. 183, § 58 provides that "[e]very instrument passing title to real estate abutting a way, whether public or private, watercourse, wall, fence or other similar linear monument, shall be construed to include any fee interest of the grantor in such way . . . or monument . . . ."

adjacent lands or across roads that were in place at the time of the creation or created thereafter." In pertinent part, paragraph three states that "Hall counterclaims and cross claims for the same relief as Plaintiffs seek, that being a declaration that they hold an easement . . . over the lands of Plaintiffs and/or Defendants. In paragraph four, "Hall counterclaims and cross claims that Zack's Cliffs Road and Radio Tower Road have acquired the status of public ways by prescription." Paragraph five states, in pertinent part, that

> "Hall is entitled to such relief . . under all theories of implied or reasonably necessary easements or other form of servitudes or by prescription or as a public way by prescription or otherwise, and Hall claims the same easement as the Plaintiffs assert . . . . Hall further claims right of access . . . over all common lands and all ways in existence in the 1800's or at all times thereafter . . . ."

Even reading this purported allegations in a light most favorable to the Halls, this court agrees with Aquinnah that "none of [the five paragraphs] contains <u>any</u> factual allegations. Instead, these paragraphs contain a tangle of legal theories, but none contain an alleged factual basis." (emphasis in original). This court finds that once again the proposed pleading put forth by the Halls fails to "fairly notif[y] [opposing parties] of the nature of the . . . claim and the grounds on which he relies . . . ." Reporter's Notes to Mass. R. Civ. P. 8 (1973). Just as with the Kitras motion, the issues that the Halls seek to raise now are based upon evidence that was available earlier.

For the reasons set forth in the opposition of Aquinnah, this court denies the Hall motion on the grounds of undue delay, futility, and prejudice to other parties.[8] As specified in the order issued on September 21, 2007, once this court receives notification that plaintiffs have served a complete, final set of the documents they propose to introduce at trial, a status conference will be scheduled

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[8]Aquinnah also contends that the Hall motion should be denied on the ground of repeated failure to cure deficiencies. While true that the Hall motion is again deficient, this court does not find this type of failure is of the sort identified in <u>Foman v. Davis</u>, 371 U.S. 178 (1962). The repeated failure here does not come after amendments previously allowed. <u>Id</u>. at 182.

for a date not less than thirty days after service of those documents.

So ordered.

By the Court. (Lombardi, J.)

Attest:

Deborah J. Patterson
Recorder

Dated: February 4, 2008

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER

COMMONWEALTH OF MASSACHUSETTS

DUKES COUNTY, ss.

TRIAL COURT
LAND COURT DEPARTMENT
DOCKET NO. 238738 (CWT)

MARIA A. KITRAS as she is TRUSTEE OF BEAR REALTY TRUST, et als.,

Plaintiffs,

-versus-

TOWN OF AQUINNAH, et als.

Defendants.

GOSSAMER WING REALTY TRUST
CROSS-MOTION TO DETERMINE THE SUFFICIENCY OF RESPONSES TO ADMISSIONS OF THE DEFENDANT MARTHA'S VINEYARD LAND BANK & FOR COSTS & ATTORNEY FEES
UNDER RULE 37

Now comes Defendant Gossamer Wing Realty Trnst, Benjamin L. Hall, Jr., Trustee ("GWRT"), by and through his attorney, Benjamin L. Hall, Jr., Esq., having otherwise opposed the Motion of the Vineyard Conservation Society to Amend the Scheduling Order, hereby cross-moves the court pursuant to Mass.R.Civ.P. 36 & 37 to review and determine the sufficiency of answers and responses to First Request for Admissions by Defendant Benjamin L. Hall, Jr., as he is Trustee of Gossamer Wing Realty Trust and Brian M. Hall as he is Trustee of Barons Land Trust to be answered by the Defendant Martha's Vineyard Land Bank ("MVLB"), and if found to be lacking in good faith, for sanctions including, in combination or in the alternative as the court finds just and equitable, judgment of dismissal with prejudice, and/or deeming all Requested Admissions as established for purposes of either trial or summary judgment, and/or exclusion of Petitioners' expert, AND / OR alternatively, for an order compelling the MVLB to completely answer, without objection, in proper form, to all of the GWRT requests for admission, and for attorneys fees and costs pursuant to Rules 36 & 37, due to the MVLB's dilatory tactics in providing discovery, and in support thereof, states as follows:

ORDER: DISCOVERY PERIOD EXTENDED TO OCTOBER 3, 2008

At the status conference in September 9, 2008, VCS counsel proposed that the discovery deadline be lifted for all defendants. VCS stated reasons why it wished the deadline to be extended on its own behalf. But, the court agreed to so extend the discovery deadline for all defendants to October 3, 2008, without any limitations. Accordingly, there was no need to repeat any similar requests that GWRT might have sought at that time, since the court had already acceded to such a request by VCS.

The court then asked the parties to circulate and settle the order to be submitted to the court for approval and entry. VCS counsel circulated such an order that set forth unrealistic deadlines given the extension of the discovery deadline to October 3, 2008. GWRT objected because the order did not contemplate the time to respond to discovery that might be propounded by October 3, 2008. GWRT anticipated serving discovery requests including interrogatories that would allow 45 days for response. The proposed order did not allow for inclusion of responses served according to the rules that would be as late as November 20, 2008, let alone for time to resolve discovery disputes. The order was submitted and entered on October 20, 2008. The order expressly allows discovery by defendants to occur at any time up to October 3, 2008, without limitation.

TIMELY SERVICE OF DISCOVERY BY DEADLINE EXTENDED TO OCTOBER 3, 2008

On October 3, 2003, accordingly, GWRT duly served First Request for Admissions by Defendant Benjamin L. Hall, Jr., as he is Trustee of Gossamer Wing Realty Trust and Brian M. Hall as he is Trustee of Barons Land Trust to be answered by the Defendant Martha's Vineyard Land Bank [attached at Ex. A].

The MVLB responded to the discovery requests submitted by GWRT on October 9, 2008, [attached at Ex. B]. The MVLB response is a wholly blanket response to the GWRT discovery requests without specifying how or why each individual request is deficient, failing to comply with the spirit of the analogous requirements of Land Court Rule 8. The MVLB argument is that since GWRT cross- claims were dismissed, GWRT has no basis for seeking ANY discovery. Further, disingenuously, MVLB claims that the discovery was "outside the time limit and scope further discovery permitted by the order", regardless of the fact that GWRT

discovery was timely served exactly according to the order. Such objections are wholly without merit and deserving of sanctions as dilatory.

There is one discovery period in this case. As noted below GWRT is not limited to seeking discovery of pleadings. Regardless, if GWRT is allowed to later cross-claim, such discovery will be essential to the prosecution of its case.

CERTIFICATE PURSUANT TO RULE 7. On November 3, 2008, GWRT counsel initiated a conference under Land Court Rule 7, telephoning MVLB counsel and leaving a message that GWRT counsel wished to discuss MVLB answering any discovery prior to having to make a motion. MVLB counsel to date has not returned the call, compelling GWRT to move absent any discussion.

MVLB ANSWERS ARE WHOLLY INADEQUATE & DILATORY

Mass. Rule of Civil Procedure 36 in pertinent part states as follows:

> The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

Mass.R.Civ.P. 36.

GWRT IS ENTITLED TO FULL AND COMPLETE ANSWERS

GWRT is a party to this action with pending claims in this case. At whatever process is used to determine the facts, the pleadings shall be amended to conform to the proof, and the law applied in providing relief to all parties so entitled. It matters no t that the cross-claims were dismissed. They remain on appeal. This is the only discovery period contemplated in this case. The MVLB can make no valid argument why MVLB should be entitled to fail to respond to essential discovery. Massachusetts law follows federal law in allowing broad discovery as the Supreme Judicial Court stated:

> We look to Federal decisions interpreting the Federal Rules of Civil Procedure for guidance. See Rollins Envtl. Servs., Inc. v. Superior Court, 368 Mass. 174, 179-180 (1975). The United States Supreme Court has defined relevancy under Fed. R. Civ. P. 26 (b) (1), the parallel rule to Mass. R. Civ. P. 26 (b) (1), 365 Mass. 772 (1974), "broadly to encompass any matter that bears on, or that reasonably

could lead to other matter that could bear on, any issue that is or may be in the case. See Hickman v. Taylor, 329 U.S. 495, 501 (1947). Consistently with the notice-pleading system established by the Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues. Id. at 500-501. Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits." Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978).

Cronin v. Strayer, 392 Mass. 525, 534, 467 N.E.2d 143, 149; 1984 Mass. LEXIS 1662 (1984).

Accordingly, any argument that GWRT is limited to issues raised by the pleadings is wholly without merit, and indicative of the dilatory nature of the MVLB objections. Id.

MVLB FAILURE RESULTS IN DEEMED ADMISSIONS UNDER RULE 36

Moreover, "[a]n evasive or incomplete answer is treated as a failure to answer." Rule 37(a)(3). The MVLB response, as construed overtly by Rule 37, is a failure to answer. This would make the responses thus late. Under Rule 36, accordingly, The MVLB's failure to fully respond to the request for admission results in a deemed admission.

SANCTIONS ARE IN ORDER

Courts, respectfully, tend to and should apply more stringent sanctions on parties who are simply flouting the discovery timetables or are intentionally evading compliance as a dilatory tactic. See, e.g. Roxse Homes Ltd P'ship v. Roxse Homes, Inc., 399 Mass. 401(1987)(aff'd judgment as appropriate sanction for discovery violations); Partlow v. Hertz Corp., 370 Mass. 787 (1976)(aff'd dismissal as proper sanction for plaintiff's failure to provide sufficient and proper answers to interrogatories); Shapiro v. Pub. Serv. Mut. Ins. Co., 19 Mass. App. Ct. 648, 658-660 , rev. den'd, 395 Mass. 1102 (1985)(appropriate sanction for failiug to produce documents as ordered was finding for other party on 93A claim). It is respectfully submitted that deeming the admissions as established under Rule 36, together with other sanctions under Rule 37 for willful disobedieuce to the rules of discovery are in order. MVLB is flouting the rules of discovery, WITHOUT ANY REAL EXCUSE. MVLB is playing a game of brinksmanship, trying to have the court allow it to NOT fully comply with discovery requests, unfairly impeding GWRT's rightful attempts to gather information to put on its case. Such willful violations are clearly intending to prevent GWRT from having completed discovery to use for dispositive motions or to save on the costs of having to put on a full trial.

The responses are simply objections as a substitute for further evasive and incomplete answers, and the fact that there is still unanswered discovery to date, severe sanctions, including attorney's fees incurred as a result of the MVLB's failure to duly and fully respond in good faith (see Mass.R.Civ.P. 37(b), 365 Mass. 798 [1974]), are appropriate. See 8 Wright & Miller, Federal Practice & Procedure § 2284 (1970). Ticchi v. Ambassador Cab, Inc, 11 Mass. App. Ct. 912 (1981).

OBJECTIONS WAIVED IF LATE
& RULE 37 SANCTIONS OF COSTS AND ATTORNEYS FEES

GWRT requests that severe sanctions under MRCP 36 and 37 be imposed for these intentional delays, including preclusion orders against the MVLB, prohibiting any testimony on any issue that was not timely forthcoming, deeming all evidence precluded and subject to a missing witness instruction,, and, because Rule 37 deems the failure to fully answer as a failure to answer thus making the responses late (see argument above), that would call for including an order deeming a waiver of all objections (Marx v. Kelly, Hart & Hallman, P.C., 929 F.2d 8; 19 Fed. R. Serv. 3d (Callaghan) 166 (1st Cir. 1991)[1] (objections to discovery barred if late response); See also Clark v. General Motors Corp., 20 Fed. R. Serv. 2d (Callaghan) 679, 1975 U.S. Dist. LEXIS 12095, 12-15 (D. Mass. 1975)), an order deeming all admissions so admitted or, alternatively, an order compelling full and complete responses to all discovery as well as costs and attorneys fees for any related work now or that that might be required in the future.
The lack of good faith attempt is apparent and is absolutely unexplained. It is clear that MVLB act is a bad faith attempt to force GWRT to have to incur legal costs to move to compel. Defendant requests leave to submit affidavits of the costs and attorneys fees in handling the matter of the discovery failures.

RULE 37 SANCTIONS OF COSTS AND ATTORNEYS FEES

Defendant requests leave to submit affidavits of the costs and attorneys fees in handling the matter of the discovery failures.

WHEREFORE GWRT respectfully requests that the court review and determine the sufficiency of answers and responses to GWRT's First Request for Admissions of MVLB, and if

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[1] In interpreting the Massachusetts Rules of Civil Procedure, where the rule language is substantially the same, the courts typically apply the interpretation of the Federal Rules. *Rollins Envtl. Servs., Inc.* v. *Superior Court*, 368 Mass. 174, 179-180 (1975); See *Giacobbe* v. *First Coolidge Corp.*, 367 Mass. 309, 315-317 (1975).

found to be lacking in good faith, for sanctions including, in combination or in the alternative as the court finds just and equitable, judgment of dismissal with prejudice, and/or deeming all Requested Admissions as established for purposes of either trial or summary judgment, AND /OR alternatively, for an order compelling the MVLB to completely answer, without objection, in proper form, to all of the GWRT requests for admission, and for attorneys fees and costs pursuant to Rules 36 & 37, due to the MVLB's dilatory tactics in providing discovery.

Edgartown, Massachusetts

Gossamer Wing Realty Trust
By Its Attorney,

BENJAMIN L. HALL, JR.
45 Main Street, P.O. Bx 5155
Edgartown, MA 02539
(508) 627-3700
BBO# 547622

EXHIBIT A

EXHIBIT A

COMMONWEALTH OF MASSACHUSETTS

DUKES, SS.

LAND COURT
DOCKET NO. 238738 (CT)

MARIA A. KITRAS, Trustee, et als.,	)
Plaintiffs,	)
V.	)
TOWN OF AQUINNAH, et als.,	)
Defendants.	)

FIRST REQUEST FOR ADMISSIONS BY DEFENDANT BENJAMIN L. HALL, JR, As he is TRUSTEE OF GOSSAMER WING REALTY TRUST, AND BRIAN M. HALL as he is TRUSTEE OF BARONS LAND TRUST TO BE ANSWERED BY THE DEFENDANT, MARTHA'S VINEYARD LAND BANK

DEFENDANT BENJAMIN L. HALL, JR, As he is TRUSTEE of GOSSAMER WING REALTY TRUST joined by BRIAN M. HALL as he is TRUSTEE OF BARONS LAND TRUST (collectively "Hall"), by their attorney, Benjamin L. Hall, Jr., demand that defendant Martha's Vineyard Land Bank respond to the following Request for Admissions, under oath and in writing, pursuant to Rule 36 of the Massachusetts Rules of Civil Procedure and deliver to the undersigued counsel within 30 days of the date of service thereof.

DEFINITIONS AND INSTRUCTIONS

These Instructions and Definitions form are an integral part of the Request for Admissions that follow:

DEFINITIONS

As used herein, the following words and phrases will have the following meanings:

A. As used herein, the words "identify" or "identification" shall have their regular meaning but shall include provision of specific information as follows: (1) when used in reference to a natural person, state his or her full name, present or last known home and business address, occupation and telephone number including employer's name, address and telephone number; (2) when used in reference to a business, state its full name and present or last known address and telephone number, the general business in which it is engaged, its form of organization (corporation, partnership, etc.), the states or places in which it was organized, the states or places

in which it does business and the states or places in which it is headquartered, the states or places in which it has agents and whether those agents are registered for the service of process and the general business engaged in by the agent(s); (3) when used in reference to a governmental entity, state its full name and present or last known address and telephone number, the general governmental activities, purposes of and for and in which it is engaged, its form of organization (corporation, partnership, etc.), the states or places in which it was organized, all sources of its authority. and the states or places in which it is headquartered, the states or places in which it has agents and whether those agents are registered for the service of process and the general business or governmental activity engaged in by the agent(s);and (4) when used in reference to a document, state its date including the dates of any and all revisions (including a listing of the material content of each revision), identify all or each of the authors of each version including their addresses(s) and all recipient(s) including their addresses, whether intended or not, from and to whom addressed, and the type of natnre thereof including a summary of its material content, and its present location and custodian. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person. Once a business has been identified in accordance with this subparagraph, only the name of that business need be listed in response to subsequent discovery requesting the identification of that business. Once a governmental entity has been identified in accordance with this subparagraph, only the name of that business need be listed in response to subsequent discovery requesting the identification of that governmental entity. Once a document has been identified in accordance with this subparagraph, only the name of that document need be listed in response to subsequent discovery requesting the identification of that document.

B. Document: "Document" includes any kind of written, graphic, or electronic magnetic, optical, written or typed or other form of media including data, held in any form of media, however stored, produced or reproduced, or any kind of description, whether sent or received or neither, including but not limited to: papers, letters, drawings, including architectural drawing, books, book entries, accounts, letters, electronic mail or e-mail messages, photographs, objects, tangible things, including architectural models, correspondence, telegrams, cables, telex messages, telephone messages, memoranda, notes, data, notations, work papers, preliminary drafts of final work product, interoffice communications, interdepartmental communications, transcripts, minutes, reports and recordings of telephone and other conversations, or of interviews, or of conferences, or of committee or other meetings, affidavits, statements, summaries, opinions, reports, studies, analyses, formulas, plans, specifications, evaluations, contracts, licenses, agreements, instrnments, deeds, offers, ledgers, journals, time sheets or records, books or records of accounts, summaries of accounts, tax returns, bank statements, financial records, calendars, computations, tax returns, minntes of or notes of any meeting, photocopies, xerox or xerographic or mimeographic copies or similes, facsimiles, descriptions, invoices, receipts, purchase orders evidence of payment, sound recordings, video recordings, films, photographs, slides, negatives, microfilm, barcode, whether originals or copies and however copied, instructions, notebooks, drafts, chits, checks and stubs thereof, scrapbooks, agreements, bills, receipts, balance sheets, income statements, questionnaires, answers to questionnaires, statistical records, desk calendars, appointment books, diaries, lists, tabulations, charts, graphs, maps, surveys, sound recordings, computer disks, tapes, and other computer storage media, magnetic tapes, computer printouts, data processing input and output, microfilm, sound recordings, video recordings, films,

photographs, slides, negatives, microfilm, barcode, whether originals or copies and however copied, and including all non-identical copies, wherever located, however produced or reproduced, and in whatever language or encryption form, and any underlying or supporting material when used in the preparation thereof, all other records kept by electronic, photographic or mechanical means, and things similar to any of the foregoing however denominated, whether currently in existence or already destroyed. A draft or non-identical or annotated copy is a separate document in this meaning of this term.

C. "Identify the source" means to: (1) identify all documents and non-written communications upon which you rely in support of a contention, allegation, or answer at issue; (2) state the inferences you draw from each source upon which you rely in support of such contention, allegation, or answer; and (3) identify all persons whom you know or believe to be knowledgeable with respect to the subject matter of contention, allegation or answer including the full name, residential address, occupation, employer including employer's address and telephone number of each and every such person.

D. "Person" or "Persons" means any individual, natural person, corporation, partnership, limited liability entity, trust, unincorporated association business, governmental unit, agency or authority, or any other entity whatsoever and shall include not only natural persons but also firms, partnerships, associations and corporations, divisions, departments, bureaus, offices or other units thereof, as well as any foreign equivalent thereof, and shall simultaneously require the answer to include all persons (plural) though the singular use is set forth in the question.

E. "Communication" includes any transmission of any information whatsoever including but not limited to data or document and all forms of inter-personal communication, including but not limited to meetings, telephone, telex, telecopier or facsimile and verbal and non-verbal acts intended to or actually conveying information.

F. "Plaintiff(s)" shall be synonymous and refers to the Plaintiff uamed in this action, either together, individually, or in any relevant or related fiduciary capacity and any of their agents, attorneys, employees, or representatives. See also Parties.

H. "Defendant" shall be synonymous and refers to the Defendants named in this action, together, individually, or in any relevant of related fiduciary capacity and any of their agents, attorneys, employees or representatives, successors, predecessors or assigns. See also Parties below.

I. Parties/Deponent: The terms "plaintiff', "petitioner", "respondent" and "defendant" as well as "deponent" as well as a party's or the deponent's full or abbreviated name or a pronoun referring to a party or deponent mean the party or deponent and, where applicable, its officers, directors, employees, partners, corporate parents, subsidiaries of affiliates. This definition is not intended to impose a discovery obligation on any person who is not the deponent nor a party to the litigation, but is intended to call for all responsive documents within the possession, custody or control of the party or deponent whether within or without this country, including without limitation the deponent's or party's foreign offices, officers directors, employees, partners, corporate parents, subsidiaries or affiliates.

J. Concerning: The term "concerning" means of, from, to, among, between, relating to, referring to, describing, evidencing (evincing) or constituting.

SPECIFIC DEFINITIONS

A. "Hall" shall mean Defendant Benjamin L. Hall, Jr., as he is the Trustee of Gossamer Wing Realty Trust joined by Brian M. Hall as he is Trustee of Barons Land Trust, unless otherwise specified.

B. "VCS" shall Defendant Vineyard Conservation Society, Inc. unless otherwise specified.

C. "VCS Premises" shall mean and include all lands or ways owned or managed by or on behalf of VCS on or in the vicinity of Moshup Trail, Aquinnah, Massachusetts which are subject to the claims herein.

D. "Hall Premises" shall mean and include all lands owned or managed by or on behalf of Hall on or in the vicinity of Moshup Trail, Aquinnah, Massachusetts which are subject to the claims herein including Set-off lots 710, 177 and 242..

E. "Town" shall mean include the Town of Aquinnah, including every agency, board, committee, employee, agent, administrator, attorney, or other person that are a part thereof.

F. "Town Premises" shall mean and include all lands or ways owned or managed by or on behalf of the Town on or in the vicinity of Moshup Trail, Aquinnah, Massachusetts which are subject to the claims herein.

G. "Lot" or "lots" shall be all parcels of land subject to the within matter, whether in their original size and shape as set-off by the Commissioner Richard Pease or in the petition to partition in 1878 that created them, those being set-off Lots 1-173, Lots 174-178 inclusive, and Lots 179 et seq., or any portions thereafter divided.

H. "Land Bank" shall mean include the Martha's Vineyard Land Bank, including every agency, board, committee, employee, agent, administrator, attorney, or other person that are a part thereof.

I. "Land Bank Premises" shall mean and include all lands or ways owned or managed by or on behalf of the Land Bank on or in the vicinity of Moshup Trail, Aquinnah, Massachusetts which are subject to the claims herein.

Rules of Construction

1. All/Each. The terms "all" and "each" shall be construed as all and each.

2. And/Or. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request ail responses that might otherwise be construed to be outside of its scope.

3. Number. The use of the singular form of any word includes the plural and vice versa.

4. Gender. Words in the masculiue gender include the feminine gender.

5. Conjuntive/disjunctive. The conjunctive includes the disjunctive, and vice versa.

6. Verb tenses. Each verb is meant to include, where appropriate, the present, past and future tenses of that verb.

INSTRUCTIONS

A. These Request for Admissions are deemed to be continuing and defendant is required to supplement its answers thereto as to the extent that it becomes aware of further information called for by these Request for Admissions.

B. To the extent that an Request for Admission calls for information which cannot at this time be furuished precisely and completely, such information as the defendant can furnish should be included in the answer together with a statement that further information sought cannot be furnished and the reasons why it is not available. If informatiou that cannot be furnished is or may be available from another person, identify this person in a manner suitable for identification in a subpoena duces tecum and state in detail your reasons for believing that this person has the described or requested information.

C. If the defendant claims that any of the information or documents to be identified hereunder are privileged, the plaintiff should; (1) identify the document or information; (2) state in general terms its subject matter and the Reqnest for Admission to which it is responsive; and (3) state the basis for its claim of privilege.

D. The defendant is required to repeat each Request for Admission immediately prior to the answer to the said Request for Admission.

REQUESTS FOR ADMISSION

That the following statements are true:

1. That the Town does not list Zack's Cliffs Road as a public way.

2. That the Town does uot list Radio Tower Road as a public way.

3. That the Town does not list Old South Road as it extends north and east from the intersection with Church Street as a public way.

4. That State Road as it travels today did not exist as a public road until after 1900.

5. That there was no laid out and accepted public way in the Town of Gay Head at the time of its establishment.

6. That owners of Set Off lots 1 through 173 inclusive as recorded at the Dukes County Registry of Deeds at Book 49, had rights of passage across the common lands from 1870 to at least the date of the partition dated 1878.

7. There is no evidence that there was an actual (subjective) intent to give only landlocked land to those persons given title to lots numbered 1-173 as recorded at the Dukes County Registry of Deeds at Book 49.

8. There is no evidence that there was an actual (subjective) intent to give only landlocked land to those persons given title to lots numbered 1-178 as recorded at the Dukes County Registry of Deeds at Book 49 and 65.

9. There is no evidence that there was an actual (subjective) intent to give only landlocked land to those persons given title to lots numbered 179 and above as recorded at the Dukes County Registry of Deeds at Book 65.

10. That the Land Bank waives any claim of easement for Land Bank premises that do not benefit either from an appurtenant express easement to or from froutage on a public way.

11. Zack's Cliffs Road is a public way.

12. Radio Tower Road is a public way.

13. Old South Road as it extends north and east from the intersection with Church Street is a public way by prescription.

14. The Land Bank has not formally voted to adopt a set of policies or rules or regulations regarding acquiring partial interests in realty.

15. That a member of the firm of Reynolds, Rappaport & Kaplan works for the Land Bank in acquiring partial interests.

DATED: October 3, 2008
Edgartown, Massachusetts

Benjamin L. Hall, Jr.
And Brian M. Hall
As they are Trustees aforesaid
By Their Attorney,

Benjamin Lambert Hall, Jr.
45 Main Street, Box 5155
Edgartown, MA 02539
(508) 627-5900
BBO #547622

EXHIBIT B

EXHIBIT B

COMMONWEALTH OF MASSACHUSETTS

DUKES, ss

LAND COURT DEPARTMENT
MISC. CASE NO. 238738,
TROMBLY, J

MARIA A. KITRAS, AS SHE IS THE TRUSTEE OF BEAR REALTY TRUST, ET AL,

Plaintiffs

v.

TOWN of AQUINNAH, ET AL,

Defendants

DEFENDANT MARTHA'S VINEYARD LAND BANK'S OBJECTIONS TO FIRST REQUEST FOR ADMISSIONS AND INTERROGATORIES BY DEFENDANT BENJAMIN L. HALL, JR.

Pursuant to Rules 26(b)(1), 33(a)(3), and 36(a), Mass. R. Civ. P., defendant Martha's Vineyard Land Bank ("MVLB") hereby objects to defendant Benjamin L. Hall, Jr.'s ("defendant Hall") first request for admissions, request for production of documents and interrogatories directed to MVLB in their entirety. As grounds therefor, MVLB states:

1. Each of the discovery requests propounded by defendant Hall seeks information that is neither relevant to the above-captioned action nor reasonably calculated to lead to the discovery of admissible evidence, because defendant Hall's cross-claims against other defendants, including MVLB, were dismissed by this Court (Lombardi, J.) on September 14, 2007 and accordingly there is no claim by defendant Hall to which these discovery requests relate.

2. The last order relating to discovery in this case was entered by Judge Lombardi on September 21, 2007 in response to a motion by defendant Vineyard

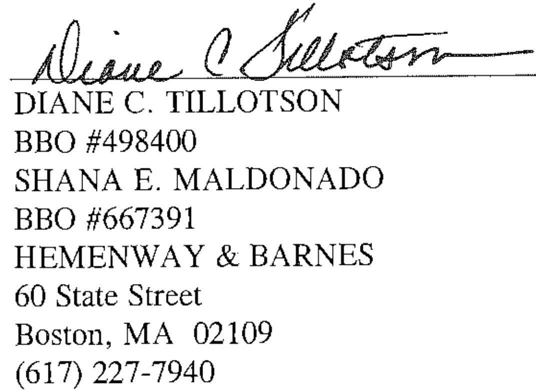
Conservation Society ("VCS"), joined by others, including MVLB, to extend the discovery deadline. That order stated that discovery was to be completed by all parties within 30 days of plaintiffs' service on all defendants of copies of the documents plaintiffs intended to use at trial. Plaintiffs served these documents on July 28, 2008; accordingly, discovery was to have been completed by August 28, 2008. Pursuant to the Court's order of September 21, 2007, defendant VCS noticed the deposition of John J. Decoulos for August 27, 2008 and served interrogatories on the plaintiffs on August 19, 2008, all prior to the 30 day discovery deadline of August 28, 2008. Defendant Hall propounded no discovery prior to August 28, 2008 and requested no extension of the discovery deadline.

3. At the status hearing on September 9, 2008, counsel for VCS requested a further brief extension on discovery in order to review the answers to interrogatories served by plaintiffs (not due as of the date of the conference) for purposes of determining whom plaintiffs intended to call as witnesses and whether any of these persons needed to be deposed. After discussion, there was agreement (memorialized in a proposed order submitted by counsel for VCS but not yet entered by the court) that discovery would be completed by October 3, 2008 in order to allow the possibility of further depositions necessitated by identification of new witnesses in plaintiffs answers to interrogatories. Even assuming the court adopts the proposed order, the discovery requests propounded by defendant Hall are outside both the time limit and scope of further discovery permitted by the order.

Respectfully submitted,

MARTHA'S VINEYARD LAND
BANK

By its Attorneys,



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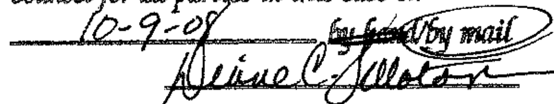
(617) 227-7940

Dated: October 9, 2008

I hereby certify under pains and penalties of perjury that this document was served upon counsel for all parties in this case on



COMMONWEALTH OF MASSACHUSETTS

DUKES, ss

LAND COURT DEPARTMENT
MISC. CASE NO. 238738,
TROMBLY, J

MARIA A. KITRAS, AS SHE IS THE TRUSTEE OF BEAR REALTY TRUST, ET AL,

Plaintiffs

v.

TOWN of AQUINNAH, ET AL,

Defendants

NOTICE OF JOINT DESIGNATION OF REBUTTAL DOCUMENTS

In accordance with the court's order of November 21, 2008, Defendants Martha's Vineyard Land Bank, Town of Aquinnah, Caroline B. Kennedy and Edwin Schlossberg, David Wice and Betsy Wice and Vineyard Conservation Society, Inc. hereby give notice that they will offer the following documents as rebuttal to documents previously designated by other parties:

1. Gay Head homestead set offs, unnumbered tracts, dated 1866 and recorded with the Dukes County Registry of Deeds on October 26, 1871 in Book 49, Page 1.

2. Gay Head homestead set offs, tracts numbered 1 through 173, recorded with the Dukes County Registry of Deeds on October 26, 1871 in Book 49, Page 89.

3. Gay Head set offs, tracts numbered 174 through 736, recorded with the Dukes County Registry of Deeds on January 20, 1879 in Book 65, Page 150.

4. 1850 Chappaquiddick set off, recorded with the Dukes County Registry of Deeds in Book 34, Page 390.

475036

5. Plan of Gay Head recorded with the Dukes County Registry of Deeds in Plan Book 5, Page 34.

Copies of documents designated are enclosed herewith.

Respectfully submitted,

MARTHA'S VINEYARD LAND BANK

By its Attorneys,

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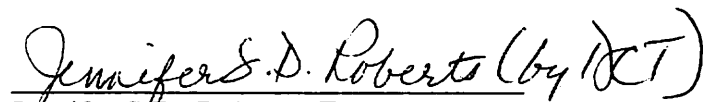

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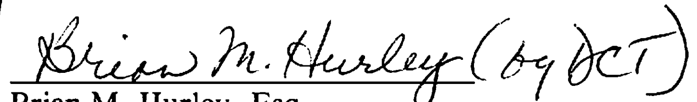
By its Attorney,



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DAVID WICE AND BETSY WICE

By their Attorney,

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Kelley A. Jordon-Price (BBO #565964)
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Dated: December 15, 2008

COMMONWEALTH OF MASSACHUSETTS

DUKES, ss

LAND COURT DEPARTMENT
MISC. CASE NO. 238738, TROMBLY, J

MARIA A. KITRAS, AS SHE IS THE TRUSTEE OF BEAR REALTY TRUST, ET AL,

Plaintiffs

v.

TOWN of AQUINNAH, ET AL,

Defendants

JOINT SUBMISSION RELATING TO THE INTRODUCTION OF AND OBJECTIONS TO EXHIBITS 1 THROUGH 86

The Plaintiffs, Maria A. Kitras as Trustee of the Bear Realty Trust, Maria A. Kitras and James J. Decoulos as Trustees of the Bear II Realty Trust, Maria A. Kitras and James J. Decoulos as Trustees of the Gorda Realty Trust and the Defendants, Martha's Vineyard Land Bank, Town of Aquinnah, the Commonwealth of Massachusetts, Vineyard Conservation Society, Inc., and Jack Fruchtman, Jr., hereby submit to the Court the following chart listing Exhibits 1 through 86 with the parties' respective positions and objections, if any.

Proposed Exhibit	Position of Defendants	Basis for objection, if any
Plaintiffs' Proposed Exhibits		
1. Plan of existing ownership of all parties - plaintiffs and defendants **Pg. 1**	Objection **Plaintiff agrees. Will use as a chalk.**	Hearsay. No foundation as to information on plan; not a "Survey"; No objection to use as a chalk.
2. August 25, 1859: Letter from Zacheus Howwasswee to John Milton Earle, Indian Commissioner, reproduced from the records of the American Antiquarian Society,	No objection	

Proposed Exhibit	Position of Defendants	Basis for objection, if any
with transcription, re: custom of holding lots in severalty and title thereto **Pg. 2**		
3. January 28, 1860: Letter from Leavitt Thaxter to John Milton Earle, Indian Commissioner, with transcript **Pg. 5**	No objection	
4. March 30, 1862: Report of John Milton Earle, Indian Commissioner, consisting of excerpts pertaining to the Gay Head tribe **Pg. 11**	No objection	
5. March 30, 1863: Chapter 42 of the Acts of 1863 - Resolve relating to the establishment of boundary lines of Indian lands **Pg. 56**	No objection	
6. March 13, 1866: Report statement by Charles Marston recorded in Book 49, Page 2 [it reads page 3 on bottom, but is recorded in Page 2], with transcription **Pg. 58**	No objection	
7. March 23, 1866: Boundary Lines in Gay Head, House No. 219. Report of Charles Marston, Commissioner, to Governor Alexander H. Bullock and the Executive Council of the Commonwealth of Massachusetts, re: boundary lines between the common lands and individual owners adjoining said lands **Pg. 60**	No objection	
8. April 30, 1866: Chapter 67 of the Acts of 1866 - Resolve relating to the establishment of the boundary lines of Indian lands at Gay Head **Pg. 65**	No objection	

Proposed Exhibit	Position of Defendants	Basis for objection, if any
9. Undated, "Map of Gay Head, Martha's Vineyard, Mass. Showing the Lands of Individual Owners and the General Fields or Commons, Made Under the Direction of Richard L. Pease, Esq. Commissioner Appointed by Gov. Bullock Under Resolve Chap. by 1866 to Determine the Boundary Lines of the Indian Lands at Gay Head. By: John H. Mullin, Top. Engr. Scale 50 Rods = One Inch." (Full scale is not available) **Pg. 67**	No objection	
10. January, 1870: Report of the condition of the Gay Head Indians, including proposed act to incorporate the Town of Gay Head **Pg. 68**	No objection	
11. April 30, 1870: Chapter 213 of the Acts of 1870 - An Act to incorporate the Town of Gay Head. Section 2 conveys title to the Common Lands to the Town of Gay Head, which includes Lots 174 to 736 **Pg. 85**	No objection	
12. September 1, 1870: Petition, Citation and Decree to the Dukes County Probate Court (the "Probate Court") for the Division and Setting Off of Our Lands in Gay Head (returned on December 5, 1870) pursuant to Chapter 213, Section 6 of the Acts of 1870, with transcription **Pg. 88**	No objection	
13. September 7, 1870: Remonstrance to the Petition of persons in Gay Head for Division of Common Lands, with transcription **Pg. 91**	No objection	

Proposed Exhibit	Position of Defendants	Basis for objection, if any
14. October 17, 1870: Petition in and of the Citizens of Gay Head, with transcription **Pg. 94**	No objection	
15. December 5, 1870: Decree for Division of Gay Head Common Lands and Establishing Boundaries of Other Lands. Appointment of Joseph T. Pease and Richard L. Pease to make division of lands by Judge Theodore G. Mayhew, with transcription **Pg. 97**	No objection	
16. December 5, 1870: Appointment of Joseph T. Pease and Richard L. Pease by the Probate Court, with transcription **Pg. 101**	No objection	
17. May 12, 1879: Return of Warrant by Joseph T. Pease and Richard L. Pease, with transcription **Pg. 104**	No objection	
18. May 22, 1871: Report of the Commissioner, Richard L. Pease, appointed to complete the examination and determination of all questions of title to land, and of all boundary lines between the individual owners, at Gay Head, on the island of Martha's Vineyard; under a Resolve of the Legislature of 1866, Chapter 67 **Pg. 107**	No objection	
19. May, 1871: Summary Land titles and Boundary Lines of the Indian Lands at Gay Head, Martha's Vineyard, Mass., as Reported to his Excellency, the Governor and the Honorable Council, by Richard L. Pease, Commissioner, May, 1871. Deeds conveyed by Richard L. Pease to the aforementioned	No objection	

Proposed Exhibit	**Position of Defendants**	**Basis for objection, if any**
Lots 1-173 recorded at Book 49, Pages 100-198 **Pg. 152**		
20. October 26, 1871: Reduced Sectional Plans recorded at the Registry and referenced at Book 49, Pages 89-198, depicting Lots 1-173, consisting of 23 pages, with letter dated May 22, 2007, acknowledging the original receipt of the Sectional Plans, signed by Diane E. Powers, Register, Dukes County Registry of Deeds **Pg. 162**	No objection	
21. December 21, 1878: Report of Joseph T. Pease and Richard L. Pease to the Probate Court and order and approval by the Probate Court, as recorded in Book 65, Pages 150 to 152, with transcription. The original set off plan measures over 10 feet in length. That plan has been cut in sheets of 26 x 28 and is in a bound volume consisting of approximately 15 sheets and is on file with the Dukes County Probate Court. It cannot be copied because of its size **Pg. 189**	No objection	
22. December 21, 1878: Summary Map of Gay Head lands depicting a substantial portion of lots partitioned from the common land by Joseph T. Pease and Richard L. Pease, prepared by John Mullin, Civil Engineer, (1878). Lots 1-173 and homestead lots deeded between 1866-1871 are cross-hatched and Lots 174-189 conveyed in 1878 are labeled **Pg. 195**	No objection	

Proposed Exhibit	Position of Defendants	Basis for objection, if any
23. September 1, 1872: Last Will and Testament of Zacheus Howwasswee, filed in Probate Court. Docket I/1612, Date of Death: June 26, 1873, with transcription **Pg. 196**	Objection	Relevance. Lot 178 not included in remand. [1]*"The Defendants misinterpreted the Appeals Court decision. Lot 178 was first depicted on the plan submitted to the Probate Court on December 21, 1878.*
24. December 21, 1878: Deed conveying Lot 178 to Elizabeth Howwasswee, widow of Zaccheus Howwasswee, with transcription **Pg. 201**	Objection	Relevance. Lot 178 not included in remand. *Previously submitted. See Document No. 21.*
25. Reduction of 1897-1898 Treasury Department, U.S. Coast and Geodetic Survey, Henry S. Pritchett, Supt., Martha's Vineyard Island, Western Part, Massachusetts, Plan Table Survey by W.C. Hodgkins, Assistant, Chief of Party; on file with the National Archives, depicting road network, together with a letter dated November 7, 2007, from the National Archives and Records Administration and zoomed section of affected land. Full size plan .will be forwarded to any party upon request **Pg. 204**	Objection	Relevance. Not relevant (1897-1898) time period. *At the meeting (the Meeting) after the Court hearing, among J. Roberts, B. Hall and N. Decoulos, the parties agreed that Document No. 25 was offered by the Plaintiffs on the issues of prescription and "ancient way", not on the issue of intent to create an easement by necessity. So, out for now but may be offered later. That is to say, the second part of the bifurcated case. (Hereinafter referred to as "Deferred").*
26. February 27, 1941: (i) Aerial photograph RG373 Can ON 10573 - Exp. G-27 on file with the National Archives; (ii) zoomed section of aerial photograph enhanced to depict set of locations on Moshup Trail **Pg. 207**	Objection	Relevance. 1941 photo not relevant time period. *Deferred.*
27. Special Place Designation in Aquinnah Zoning By-Laws for Toad Rock **Pg. 209**	Objection	Relevance. *Deferred.*

[1] ***All italicized comments are those being made by the Plaintiffs.***

28. September, 1860: Harper's New Monthly Magazine", specific reference to Toad Rock at pages 451-454 **Pg. 216**	Objection	Relevance, hearsay. *Deferred.*
29. December 15, 2005: Deed from David Wice, et ux. to Martha's Vineyard Land Bank, with Plan of Land prepared by Hollis A. Smith as referenced in Deed **Pg. 237**	Objection	Relevance. *Deferred.*
30. Chain of Title to Lots 178 and 711 **Pg. 241**	Objection The parties agree to defer the resolution to the second part of the bifurcated case.	Relevance. Back title not in dispute. *At the Meeting it was stated by J. Roberts, that the Defendants concede that title is vested in all of the Plaintiffs. The Defendants limit that concession to this litigation. That concession is not made as to the Hall trusts.*
31. Chain of Title to Lot 241 **Pg. 277**	Objection The parties agree to defer the resolution to the second part of the bifurcated case.	Relevance. Back title not in dispute. *At the Meeting it was stated by J. Roberts, that the Defendants concede that title is vested in all of the Plaintiffs. The Defendants limit that concession to this litigation. That concession is not made as to the Hall trusts.*
32. Chain of Title to Lot 243 **Pg. 306**	Objection The parties agree to defer the resolution to the second part of the bifurcated case.	Relevance. Back title not in dispute. *At the Meeting it was stated by J. Roberts, that the Defendants concede that title is vested in all of the Plaintiffs. The Defendants limit that concession to this litigation. That concession is not made as to the Hall trusts.*
33. Chain of Title to Lot 554 **Pg. 317**	Objection The parties agree to defer the resolution to the second part of the bifurcated case.	Relevance. Back title not in dispute. *At the Meeting it was stated by J. Roberts, that the Defendants concede that title is vested in all of the Plaintiffs. The Defendants limit that concession to this litigation. That concession is not made as to the Hall trusts.*

34. Chain of Title to Lot 555 **To be submitted by Besse.**	Objection The parties agree to defer the resolution to the second part of the bifurcated case.	Relevance. Back title not in dispute. *At the Meeting it was stated by J. Roberts, that the Defendants concede that title is vested in all of the Plaintiffs. The Defendants limit that concession to this litigation. That concession is not made as to the Hall Trusts.*

35. Chain of Title to Lot 713 **Pg. 339**	Objection The parties agree to defer the resolution to the second part of the bifurcated case.	Relevance. Back title not in dispute. *At the Meeting it was stated by J. Roberts, that the Defendants concede that title is vested in all of the Plaintiffs. The Defendants limit that concession to this litigation. That concession is not made as to the Hall trusts.*

36. Chain of Title to Lot 557 **Pg. 349**	Objection The parties agree to defer the resolution to the second part of the bifurcated case.	Relevance. Back title not in dispute. *At the Meeting it was stated by J. Roberts, that the Defendants concede that title is vested in all of the Plaintiffs. The Defendants limit that concession to this litigation. That concession is not made as to the Hall trusts.*
37. Plan of set-off Lot 79, held in severalty by Zaccheus Howwasswee, with existing conditions as of December 11, 1992, depicting stone walls and old foundations, and Deed dated October 26, 1871, recorded at Book 49, Pages 153-154, with transcription **Pg. 379**	Objection	Relevance. Lot 79 not included in remand. *This evidence will prove that Lot 79 was bounded by stone walls; therefore, the grantee had possession and enclosure at the time the Deed was granted to him. Furthermore, the deed states that it was Zaccheus Howwasswee's homestead.*
38. Plan depicting Lot 178, existing conditions and certification **Pg. 383**	Objection	Relevance. Lot 178 not included in remand. *The Defendants misinterpreted the Appeals Court decision. Lot 178 was not created until the 1878 Set-off Plan was utilized.*

39. Deed to set-off Lot 89 dated October 26, 1871, held in severalty by Serena Randolph, with transcription **Pg. 384**	Objection	Relevance. Lot 89 not included in remand. *This evidence will prove that Lot 89 was bounded by stone walls; therefore, the grantee had possession and enclosure at the time the Deed was granted to her.*
40. Circa 1887: Photograph of Gay Head from the lighthouse; Martha's Vineyard Landscapes: The Nature of Change, by Peter W. Dunwiddie, published by the Vineyard Conservation Society and Peter W. Dunwiddie, 1994, Page 56 **Pg. 386**	No objection	
41. Letter dated August 31, 2005, from Benjamin L. Hall, Jr. to the Appeals Court, attempting to call attention to the Appeals Court that Lots 174 thru 189 were not held in severalty. N.B. No one was aware of or had the benefit of the Sectional Plans until May 22, 2007. (See Ex. 20) **Pg. 387**	Objection	Hearsay, relevance, argument of counsel. *The Plaintiffs agree that Document No. 41 not be admitted.*
42. July 1926: publication of the Dukes County Historical Society "The Old South Road of Gay Head" by Edward S. Burgess, particularly pages 2-12, 19-20, 25-26. **Pg. 394**	Objection	Hearsay, relevance. *Document No. 42 should be read by the Court in order to acquaint the Court with the conditions of the land regarding lots in severalty and common lands.*
43. November, 1938: (i) Aerial photograph from USGS; and (ii) zoomed section of photograph **Pg. 431**	Objection	Relevance. 1938 time period not relevant. *Deferred.*
44. October 14, 1940 - October 1, 1941: File of the Land Court, Petition No. 17763, Relating to Lot 585, with plans **Pg. 433**	Objection	Relevance, hearsay. *Deferred.*
45. 1943: USGS quadrangle of Squibnocket (2 sheets) **Pg. 464**	Objection	Relevance. 1943 time period not relevant. *Deferred.*

46. June 20, 1950: Plan of land owned by Squibnocket Bass & Surf Club, Inc., Land Court Case No. 12591 (larger plan available) **Pg. 466**	Objection	Relevance. 1950 time period not relevant. *Deferred.*
47. 1951: USGS quadrangle of Squibnocket (2 sheets) **Pg. 467**	Objection	Relevance. 1951 time period not relevant. *Deferred.*
48. February, 1955: Layout of Moshup Trail, with plans **Pg. 469**	Objection	Relevance. 1955 time period not relevant. *Deferred.*
49. 1972: USGS quadrangle of Squibnocket, with Lots 178, 241, 711 and 713 shaded in red **Pg. 477**	Objection	Relevance. 1972 time period not relevant. *Deferred.*
50. July 14, 1975: Decision of the Land Court in *Black v. Cape Cod Co.*, Case No. 69813, by Judge William Randall **Pg. 478**	Objection+	Relevance, hearsay. *Document No. 50 sets forth many findings of fact which would be useful to the Court in the determination of this case.*
51. May 18, 1978: Petition of Alexander D. Forger and other documents in Land Court Case No. 39904 **Pg. 487**	Objection	Relevance, hearsay.* *Deferred.*
52. October 28, 1988: Affidavit of Philip J. Norton, Jr. filed with Land Court Case No. 129925, *Taylor v. Vanderhoop* **Pg. 516**	Objection	Relevance, hearsay.* *Document No. 52 evidences the policies of the Land Court relating to property that was included in the Set-Offs and Plan of 1878.*
53. July 19, 1989: Decision of the Land Court, Case No. 129925, *Taylor* v. *Vanderhoop*, by Judge Robert V. Cauchon, with 6 plans (larger plans available) **Pg. 524**	Objection	Relevance, hearsay.* *Document No. 53 sets forth many findings of fact which would be useful to the Court in the determination of this case.*
54. September 26, 1989: 3 Plans of Land in Gay Head prepared for Wampanoag Tribal Council of Gay Head, Inc. (larger plans available). **Pg. 543**	Objection	Relevance. 1989 time period not relevant. *Deferred.*

+ The Commonwealth of Massachusetts does not join in this objection.

* The Commonwealth of Massachusetts does not join in these objections to the extent they are based on grounds of hearsay. The Commonwealth does object on the basis of relevance.

55. September 4, 1990: Plan of Land in Gay Head surveyed for Rebecca J. Cournoyer, et al **Pg. 546**	Objection	Relevance. 1990 time period not relevant *Deferred.*
56. 1994: publication of Vineyard Conservation Society, Martha's Vineyard Landscapes: The Nature Of Change, pages 54-55 **Pg. 547**	Objection	Relevance. 1994 time period not relevant *Deferred.*
57. 1997: Affidavits relating to an application for a preliminary injunction in the case of *Vineyard Conservation Society, Inc.* v. *Broscheit,* Dukes County Superior Court No. 97-0028: (1) David Howell (2) Joseph DeLerno (3) George Rousell (4) William Vanderhoop **Pg. 549**	Objection	Relevance, hearsay. *Deferred.*
58. December 31, 1997: Plan of land in 'Gay Head owned by David B. smith and South Shore Beach, Inc. (larger plan available) **Pg. 558**	Objection	Relevance. 1997 time period not relevant. *Deferred.*
59. December·18, 2001: Letter of Bernard E. McCourt District Highway Director to James J. Decoulos **Pg. 559**	Objection	Hearsay, relevance.* *Deferred.*
60. June 3, 2002: Plan of Moshup Trail to State Road along Zach's Cliffs Road; Set-Off Lot Delineations; Aquinnah, Massachusetts **Pg. 560**	Objection	Hearsay, relevance. No foundation as to data shown on plan. *This Plan should be introduced as a chalk.*
61. March 22, 2002: Composite Development, Town of Aquinnah, Prepared by Commonwealth of Massachusetts Executive Office of Environmental Affairs **Pg. 561**	Objection	Relevance. 2002 time period not relevant. *Deferred.*

62. May 28, 2003: Deposition transcript of Jeffrey Madison, pages 146-152 **Pg. 563**	Objection	Relevance, hearsay. *Deferred.*
63. May 9, 2008: Plan of existing wetland resources Moshup Trail (larger plan available) **Pg. 572**	Objection	Relevance, hearsay. *This Plan should be introduced as a chalk.*
64. August 27, 2008: Deposition transcript of John J. Decoulos, pages 22-25 **Pg. 573**	Objection	Hearsay, relevance. *Deferred.*
65. April 15, 2008: Plan of land in Aquinnah, Mass. Subdivision of Red Gate Farm 5 sheets (larger plans available) **Pg. 576**	Objection	Hearsay, relevance. *Deferred.*
66. October 30, 2008: Deposition transcript of James J. Decoulos, pages 25-29, 106-117 **Pg. 581**	Objection	Hearsay, relevance. *Deferred.*
67. November 3, 2008: Aquinnah Overlay Zoning Map **Pg. 602**	Objection	Relevance. Current zoning overlay has no relevance to issue before court. *Deferred.*
<u>Defendants' Exhibits</u>		**<u>Position of Plaintiffs:</u>**
68. Certified copy, plan of Gay Head Showing the Petition 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 and Exhibit 4 to the Affidavit of Jennifer S.D. Roberts sworn to on October 3, 2000, previously filed in this matter **Pg. 603**		*Plaintiffs agree.*
69. Charles Edward Banks, M.D., <u>The History of Martha's Vineyard, Dukes County, Massachusetts</u>, Vol. I, Preface,	**History was prepared between 1890 and 1911. See preface.**	*Relevance. This history was prepared in 1966 and therefore is not relevant.*

pp. 5-10; Vol. II, Town Annals, Preface, pp. 5-10 and Annals of Gay Head, pp. 1-19, 28-29; Vol. III, Preface **Pg. 605**		
70. Vol. V., North American Review (1817), pp. 312-324 **Pg. 633**		*Relevance. 1817 time period is not relevant.*
71. F.W. Bird's Report, House Doc., No. 46 (1849) **Pg. 647**		*Relevance. 1849 time period is not relevant.*
72. 1856 House Doc., No. 48 **Pg. 734**		*Relevance. 1856 time period is not relevant.*
73. St. 1862, c. 184 **Pg. 750**		*Relevance. 1862 time period is not relevant.*
74. Certified copy, first three pages of "Set-Off" book of Indian Lands at Gay Head, on file with the Probate & Family Court Department of the Trial Court, Dukes County **Pg. 755**		Already included as Document 21, Page 189, of Plaintiffs' submittal.
Plaintiffs' Proposed Exhibits	**Defendants' Position:**	
75. May 28, 1995: Application for Self-Help Program, Moshup Trail, SH #2. See Affidavit of Nicholas J. Decoulos. See also, Town of Aquinnah's Answers to Plaintiff's Interrogatories in the case of Frangos, Trustee v. Town of Aquinnah, U.S. District Court, District of Massachusetts, Docket No. 03-CV-11159-MLW, in particular, #2 and #12. **Pg. 760**	Objection	Relevance, hearsay.* *Since the preparation of Document No. 25, Page 775, John Donnelly has submitted to the Plaintiffs copies of all of the records pertaining to the Self-Help Program which should be included in the record.*
76. March 14, 1996: Self-Help Program Agreement recorded at Book 672, Page 436 **Pg. 775**	Objection	Relevance, hearsay.* Deferred.
77. March 15, 1996: Deed of Haskell to Town of Gay Head conveying Lot 549, recorded at Book 672, Page 439 **Pg. 778**	Objection	Relevance. Title to Lot 549 not in dispute. Deferred.
78. May 29, 1996: Letter of Conservation Commission to Joel Lerner with Application **Pg. 780**	Objection	Hearsay, relevance.* *Deferred.*

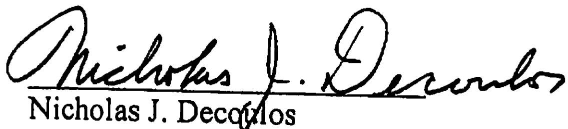
79. April 3, 1996: Deed of Flanders to Vineyard Conservation Society, ėt al. conveying Lot 556, recorded at Book 674, Page 57 **Pg. 788**	Objection	Relevance. Title to Lot 556 not in dispute. Deferred.
80. June 22, 1996: Deed of Vineyard Conservation Society, et al. to Town of Gay Head through its Conservation Commission conveying Lot 556, recorded at Book 688, Page 102 **Pg. 790**	Objection	Relevance. Title to Lot 556 not in dispute. Deferred.
81. December, 1997: Moshup Trial Project. Letter of Friends of Moshup Trail Project **Pg. 793**	Objection	Relevance, hearsay. *The relevancy of Document No. 81 is that it clearly states the intentions of the parties named in the header of the notice. See 4th paragraph, p. 794. "The Vineyard Conservation Society is currently in litigation with would-be developers of landlocked property to the north of the project area, who seek to force access to Moshup Trail over land acquired by the Moshup Trail Project. We strongly believe that this attempt will fail."*
ADDITIONAL DEFENDANTS' EXHIBITS		
82. March 13, 1866: Deeds recorded at Book 49, Pages 1-39.		*Plaintiffs object. See Plaintiffs' Motion to Strike in opposition to this exhibit filed with the Court on or about January 30, 2009.*
83. October 26, 1871. Gay Head lots held in severalty, numbered 1-173.		*No objection by Plaintiffs.*
84. December 21, 1878. Gay Head lots derived from common lands, numbered 174-736.		*No objection by Plaintiffs.*
85. 1850 Set-off of lands in Chappaquiddick.		*Plaintiffs object. relevance. 1850 time period not relevant.*
86. Map of Gay Head recorded in 1917 at the Dukes County Registry of Deeds, Plan Book 5, Plan 34.		*No objection by Plaintiffs.*

Dated: February 20, 2009

Respectfully submitted,

Maria A. Kitras as she is the Trustee of Bear Realty Trust, Maria A. Kitras and James J. Decoulos as Trustees of Bear II Realty Trust, and Maria A. Kitras and James J. Decoulos as Trustees of the Gorda Realty Trust

By their Attorney,



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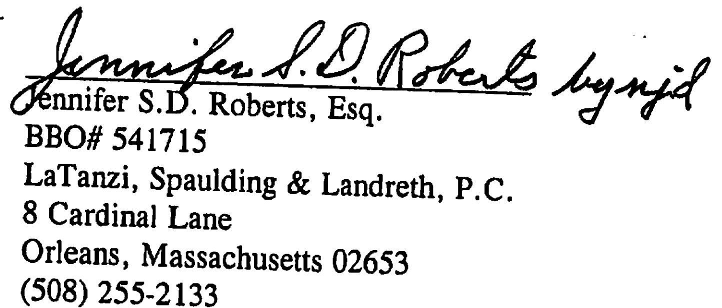
VINEYARD CONSERVATION SOCIETY, INC.

By its Attorney,



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TOWN OF AQUINNAH

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COMMONWEALTH OF MASSACHUSETTS

By its Attorney,

MARTHA COAKLEY
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(SEAL)

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APR 29 2009

Nicholas J. Decoulos

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

DUKES, 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

ORDER ON THE PARTIES' MOTIONS TO STRIKE PROPOSED EXHIBITS

This case comes before the Court on the objections by various parties to proposed exhibits for trial. On January 30, 2009, plaintiffs, Maria A. Kitras, as Trustee of Bear Realty Trust, Maria A. Kitras and James J. Decoulos, as Trustees of Bear II Realty Trust, Maria A. Kitras and James J. Decoulos, as Trustees of Gorda Realty Trust, filed a Motion to Strike certain trial exhibits proposed by defendants, the Town of Aquinnah, Martha's Vineyard Land Bank Commission, Vineyard Conservation Society, Inc., Caroline B. Kennedy, Edwin Schlossberg, David Wice, Betsy Wice, and the Commonwealth of Massachusetts ("Defendants"). On February 2, 2009, defendants filed a Motion to Strike certain trial exhibits proposed by plaintiffs as well as certain trial exhibits proposed by defendants, Gossamer Wing Realty Trust and Barons Land Trust ("Trusts").

The motions were argued on February 4, 2009, and these are the matters presently before the Court. On February 9, 2009, JoAnn Fruchtman and Jack Fruchtman, Jr. Joined in the defendant's motion. The Trusts opposed the defendants' motion on February 10, 2009. On February 23, 2009, the parties submitted a joint statement listing the parties' proposed exhibits and the objections, if any, to each.

I. THE DEFENDANTS' PROPOSED EXHIBITS

a. Proposed Exhibits 69-73

Proposed exhibits 69-73 are documents from a period prior to the 1878 Set-Off Plan and, therefore, not relevant. Accordingly, it is hereby ORDERED that proposed exhibits 69-73 are not admitted.

b. Proposed Exhibit 74

Plaintiffs' only objection to proposed exhibit 74 is that it is duplicative of part of one of their own proposed exhibits. Accordingly, it is hereby ORDERED that proposed exhibit 74 is admitted.

c. Proposed Exhibit 82

Proposed exhibit 82 is a collection of deeds. Plaintiffs object that these deeds may not have much relevance because they lack descriptions of the boundary lines between the common lands and the individual owners adjoining the common lands. However, I do not see how plaintiffs will be prejudiced by the admission of this evidence. Accordingly, it is hereby ORDERED that proposed exhibit 82 is admitted.

d. Proposed Exhibit 85

Proposed Exhibit 85 is an 1850 commissioner set-off of lands in Chappaquiddick. Plaintiffs object to the relevance of this proposed exhibit. However, this evidence could

be relevant to show the practice and intent of the commissioner in the instant case. Accordingly, it is hereby ORDERED that proposed exhibit 85 is admitted.

II. THE PLAINTIFFS' PROPOSED EXHIBITS

a. Proposed Exhibit 1

Plaintiffs have agreed to limit the use of this exhibit to a chalk. Accordingly, it is hereby ORDERED that proposed exhibit 1 is to be identified as a chalk.

b. Proposed Exhibits 23 and 24, and 37-39

Proposed exhibits 23 and 24 concern Lot 178, and proposed exhibits 37-39 concern Lot 79. The Appeals Court has determined that Lots 1-188 or 189 do not hold any easement rights. Accordingly, it is hereby ORDERED that to extent that these proposed exhibits involve Lot 178 or Lot 79, they are not admitted.

c. Proposed Exhibit 42

This proposed exhibit is a publication by the Dukes County Historical Society concerning Old South Road. Plaintiffs propose this exhibit for the purpose of informing the Court of the conditions of the land in this case. This literature is hearsay, and I am not satisfied that it is substantively relevant to the particular facts of this case. Accordingly, it is hereby ORDERED that proposed exhibit 42 is not admitted.

d. Proposed Exhibit 50, 52, and 53

These proposed exhibits are case law, which are not relevant as exhibits in this case, but may be cited by the parties in their briefs. Accordingly, it is hereby ORDERED that proposed exhibits 50, 52, and 53 are not admitted.

e. Proposed Exhibit 60

This proposed exhibit is a plan of Moshup Trail. Defendants object to this proposed exhibit as having no foundation as to the data shown. However, the plan may be limited to use as a chalk. Accordingly, it is hereby ORDERED that proposed exhibit 60 is to be identified as a chalk.

f. Proposed Exhibit 63

This proposed exhibit is a plan of existing wetland resources surrounding Moshup Trial. Defendants object to it on grounds of relevance and hearsay. I see no reason why it should not be admitted. Accordingly, it is hereby ORDERED that proposed exhibit 63 is admitted.

g. Proposed Exhibit 75

Proposed exhibit 75 consists of documents concerning plaintiffs' application for the Self-Help Program concerning Moshup Trial. I see no relevance to this proposed exhibit. Accordingly, it is hereby ORDERED that proposed exhibit 75 is not admitted.

h. Proposed Exhibit 81

Proposed exhibit 81 is a December 1997 letter from the Friends of Moshup Trial. Defendants object to this proposed exhibit on the grounds of relevance and hearsay. I see no relevance to this proposed exhibit. Accordingly, it is hereby ORDERED that proposed exhibit 81 is not admitted.

i. Proposed Exhibits 25-36; 43-49; 51; 54-59; 61; 62; 64-67; and 76-80

The parties have agreed to defer the issue of the admissibility of these proposed exhibits until the second half of this bifurcated case, as they concern the issues of easement by prescription and "ancient way." Accordingly, it is hereby ORDERED that

proposed exhibits 25-36; 43-49; 51; 54-59; 61; 62; 64-67; and 76-80 are not admitted in this half of the bifurcated case.

j. Proposed Exhibit 41

The plaintiffs have agreed that this proposed exhibit will not be admitted. Accordingly, it is hereby ORDERED that proposed exhibit 41 is not admitted.

III. THE TRUSTS PROPOSED EXHIBITS

The Trust's proposed exhibits consist of certain documents concerning lots, which the Appeals Court has previously determined do not hold easement rights. Accordingly, it is hereby ORDERED that the Trust's proposed exhibits are not admitted.

All other proposed exhibits have not been objected to. Accordingly, it is hereby ORDERED that the remaining proposed exhibits are admitted.

So Ordered

By the Court (Trombly, J.).

Attest:

Deborah J. Patterson
Recorder

Dated: April 27, 2009

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER

634

706

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

(SEAL)

DEPARTMENT OF THE TRIAL COURT

DUKES, 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

317

RECEIVED
JUL 21 2009
Nicholas J. Decoulos

ORDER PURSUANT TO LAND COURT RULE 9

This case comes before the Court on motion of defendants, Town of Aquinnah, Vineyard Conservation Society, Inc., Caroline Kennedy, and Edwin Schlossberg, for reconsideration, pursuant to Land Court Rule 9, of an Order on the parties' Motions to Strike.

Rule 9 of the Land Court provides that "[n]o response to [a] motion for reconsideration shall be required, and no hearing shall be marked or scheduled, unless the judge so requests, and the judge may deny the motion without the need of such a response or hearing." The Court so requests. Accordingly, it is hereby:

ORDERED that plaintiffs shall file a response, if any, to the defendants' Motion for Reconsideration and make service on all parties of any such filing, on or before August 3, 2009.

Thereafter, the parties are directed to contact Sessions Clerk, Emily Rosa at the Court to schedule a Telephone Status Conference, concerning a trial schedule for this case.

So Ordered.

CWT

By the Court (Trombly, J.).

Attest:

Deborah J. Patterson
Recorder

Dated: July 20, 2009

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER

COMMONWEALTH OF MASSACHUSETTS

(SEAL)

LAND COURT

DEPARTMENT OF THE TRIAL COURT

COUNTY OF DUKES, ss

97 MISC 238738 (CWT)

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

Plaintiffs

v.

TOWN OF AQUINNAH, *et al.*,

Defendants

RECEIVED
AUG 19 2009
Nicholas J. Decoulos

ORDER ALLOWING DEFENDANTS, VINEYARD CONSERVATION SOCIETY, *ET AL.*'S MOTION FOR RECONSIDERATION AND DENYING DEFENDANTS, GOSSAMER WING REALTY TRUST, *ET AL.*'S CROSS-MOTION FOR RECONSIDERATION

This case comes before the court on Cross-Motions for Reconsideration of this court's April 27, 2009 Order striking certain proposed exhibits of the parties. On June 15, 2009, Defendants, Vineyard Conservation Society, Inc., the Town of Aquinnah, Caroline Kennedy, Edwin Schlossberg, The Martha's Vineyard Land Bank, Cthe Commonwealth of Massachusetts, David Wice, and Betsy Wice (VCS), filed a Motion for Reconsideration, seeking to reinstate proposed exhibits 69, 71, 72, and 73. Defendants, Gossamer Wing Realty Trust, Benjamin L. Hall, Jr., as Trustee of Gossamer Wing Realty Trust, and Brian M. Hall, as Trustee of Barons Land Trust (Trusts), opposed the motion on August 3, 2009, and filed a Cross-Motion for Reconsideration, seeking to reinstate their proposed exhibits and seeking also to strike the Defendant's proposed exhibit 85. Plaintiffs opposed VCS's motion on August 7, 2009.

After considering the papers, it is hereby:

ORDERED that the VCS Motion for Reconsideration is **ALLOWED**. Proposed exhibits 69, 71, 72, and 73 are reinstated and not stricken from the record; and it is further

ORDERED that the Trusts Cross-Motion for Reconsideration is **DENIED**.

So Ordered.

By the court (Trombly, J.).

Attest:

Deborah J. Patterson
Recorder

Dated: August 18, 2009

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

DUKES, ss. MISC. CASE NO. 238738

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************************************
MARIA A. KITRAS, TRUSTEE, et als.  *
Plaintiffs                         *
                                   *
v.                                 *
                                   *
TOWN OF AQUINNAH, et als.,         *
Defendants                         *
************************************
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PLAINTIFFS' MOTION FOR RECONSIDERATION OF ORDER DATED APRIL 27, 2009

The Plaintiffs, Maria A. Kitras, as Trustee of Bear Realty Trust, Maria A. Kitras and James J. Decoulos, as Trustees of Bear II Realty Trust, and Maria A. Kitras and James J. Decoulos, as Trustees of Gorda Realty Trust, move the Court to reconsider the following rulings in its Order dated April 27, 2009, on the parties' motions to strike proposed exhibits.

The issue that has been raised by the Court's Order is whether Lot 178 was land held in severalty or in common in 1878 (II b p.3). The ruling on that issue will either benefit or deprive Lot 178 of an easement by necessity.

The Court has ordered that the following exhibits are not admitted:

II. THE PLAINTIFFS' PROPOSED EXHIBITS

b. *Proposed Exhibits 23 and 24, and 37-39*

Proposed exhibits 23 and 24 concern Lot 178, and proposed exhibits 37-39 concern Lot 79. The Appeals Court has determined that Lots 1-188 or 189 do not hold any easement rights. Accordingly, it is hereby ORDERED that to the extent that these proposed exhibits involve Lot 178 or Lot 79, they are not admitted.

i. Proposed Exhibits 25-36; 43-49; 51; 54-59; 61; 62; 64-67; and 76-80

The parties have agreed to defer the issue of the admissibility of these proposed exhibits until the second half of the bifurcated case, as they concern the issues of easement by prescription and "ancient way." Accordingly, it is ORDERED that proposed exhibits 25-36; 43-49; 51; 54-59; 61; 62; 64-67; and 76-80 are not admitted in this half of the bifurcated case.

The reason given by the Court for not admitting exhibits 23-24 and 37-39, is that the Appeals Court has determined that Lots 1-188 or 189 do not hold any easement rights.

It is the Plaintiffs' contention that the following exhibits should not have been stricken because they will evidence beyond any doubt that Lot 178 was part of the common land and not granted as a severalty lot and, therefore, having the benefit of an easement by necessity.

1. Exhibit 24 (Page 202) 1878 Deed conveying Lot 178
2. Exhibit 30 (Page 241) Chain of Title to Lot 178
3. Exhibit 38 (Page 383) Plan depicting existing conditions of Lot 178, July 21, 2008.

Issues Before the Appeals Court.

The issues that were before the Appeals Court are stated in the Briefs filed by all of the parties and did not include the issue of whether Lot 178 was part of the common land.

The Brief of the Plaintiffs-Appellants contained the following Statement of Issues, as required by Rule 16(a)(2) of the Rules of Appellate Procedure:

> A. Whether the Land Court erred in ruling that:
> (1) any claim of an easement by implication or necessity for the benefit of Plaintiffs' lots could arise only from the actions of Commissioners appointed in 1870 in their 1878 Report;
> (2) any such easement must extend only northerly from Plaintiffs' lots to State Road;
> (3) any claim of such easement necessarily implicates the lots currently held by the United States in trust for the Wampanoag Tribe of Gay Head (Aquinnah); and
> (4) any such easement does not include the right to install utilities in the easement way so determined.
>
> B. Whether the Land Court erred in ruling that the United States is a necessary party and an indispensable party under Mass. R. Civ. P. 19 and, therefore, in its absence, Count One of the Plaintiffs' Amended Complaint must be dismissed.
>
> C. Whether the Land Court erred in denying Plaintiffs' Motions to add the Wampanoag Tribe as a Defendant.

The Brief of the Defendant, VCS, contained the following Statement of Issues:

> "Whether the lower court correctly concluded that the United States of America ("USA"), as Trustee for the Wampanoag Tribal Council of Gay Head,

> Inc. ("the Tribe"), is an indispensable party to this action.
>
> Whether the lower court properly exercised its discretion to deny motions to amend the complaint which (1) were filed five years after the commencement of the action and after a dispositive ruling by the lower court and (2) were futile, because the party sought to be joined by the amendment (the Tribe) is not the proper party, is not amenable to suit in state court and has not waived its sovereign immunity.
>
> Whether, if this Court concludes that all necessary parties are before it, it should instruct the lower. court to issue a judgment declaring that no easement by necessity benefits the Plaintiffs' land, either (1) because no such easement was necessary or intended by the parties or (2) because any such easement was extinguished.
>
> Whether the issue of whether easements by necessity include utilities is ripe for review."

The Brief of the Defendant, Town of Aquinnah, contained the following Statement of Issues:

> "The Defendant-Appellee/Cross-Appellant, Town of Aquinnah (the "Town"), adopts the Statement of Issues Presented for Review set out in the Brief of Defendant-Appellee/Cross-Appellant, Vineyard Conservation Society, ("VCS")."

The principal issue before the Appeals Court, which was unambiguously decided, was whether the United States and the Wampanoag Tribe were indispensable parties to this action.

The only facts relating to Lot 178, upon which the Appeals Court could rely, were those facts stated in the Land Court Decision of Judge Green.

The Land Court Decision, which was before the Appeals Court, contained the following paragraphs which relate to Lot 178.

Paragraph 9:

> The commissioner appointed in 1863 died before completing the assigned task, and the General Court appointed a new commissioner, Richard L. Pease, in 1866. Resolves 1866, c.67. 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.

Paragraph 12:

> 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 [in 1878] were run out and bounded afterwards by the Commissioners who made partition of the Indian common lands.' (Emphasis supplied).

In the undisputed factual portion of the Land Court decision, paragraph 12, there is no mention that Lots 174-189 were ever held in severalty. In fact, the decision states "Lots 174 to 189 were run out and bounded by the Commissioners who made partition of the Indian common lands." (Ex. 21, p. 191).

Accordingly, the Appeals Court was never presented with the issue of which land specifically was held in severalty or in common, nor was it necessary to render it in its opinion.

Documents Not Part of the Record Before the Appeals Court.

The Appeals Court did not have before it the following documents, which are presently before the Court, because they were not included in the Record Appendix filed with the Appeals Court.

1. Exhibit 2, Page 2, August 25, 1859: Letter from Zacheus Hiawassee to John Milton Earle, Indian Commissioner, reproduced from the records of the American Antiquarian Society, with transcription, Page 4, re: custom of holding lots in severalty and title thereto.

2. Exhibit 3, Page 5, January 28, 1860: Letter from Leavitt Thaxter to John Milton Earle, Indian Commissioner, with transcript, Pages 9-10, which was in response to Exhibit 2, and the context thereof refers to the division of lands and the injurious consequences thereby.

3. Exhibit 4, Page 11, March 30, 1862: Report of John Milton Earle, Indian Commissioner, who was appointed pursuant to the Act of April 6, 1859.

   "3. The economical state of all such persons, including the specification of all property of theirs in lands, and <u>whether the same is held in severalty or in common,</u> and whether now in their own possession, or lawfully possessed and occupied by others, and, in the latter case, by what color of alleged title; and also what proportion of such persons are paupers dependent on the towns in which they dwell, or on the State. (Emphasis supplied). (Ex. 4, pp. 15-16).

4. Exhibit 5, Page 56, March 30, 1862: Chapter 42 of the Acts of 1863 - Resolve relating to the establishment of boundary lines of Indian lands.

5. Exhibit 7, Pages 60-64, March 23, 1866: Boundary Lines in Gay Head, House No. 219. Report of Charles Marston, Commissioner.

6. Exhibit 8, Page 65, April 30, 1866: Chapter 67 of the Acts of 1866.

7. Exhibit 10, Page 68, January 1870: Report of the condition of the Gay Head Indians (particularly pp. 71-72).

8. Exhibit 20, Pages 162-168, the Sectional Plans, recorded October 26, 1871, Book 49, Pages 89-198.

9. Exhibit 24, Page 201, Conveyance of Lot 178. (The Appeals Court had the Deed, but it was illegible).

10. Exhibit 38, Page 383, Plan depicting Lot 178, existing conditions and certification.

11. Exhibit 86, (Mentioned at Page 131) "Map of Gay Head [undated] Martha's Vineyard, Mass. Showing the Land of Individual Owners and the General Fields or Commons. Made under the direction of Richard L. Please Esq. Commissioner appointed by Gov. Bullock under Resolve Chap. 67 of 1866. To determine the boundary lines of the Indian Lands at Gay Head. Scale 50 rods = one inch. By: John H. Mullin. Top. Engr.

12. PROPOSED Exhibit 87, Plan prepared by John J. Decoulos, PE PLS, supported by his Affidavit, which locates Lot 178 in the common lands.
    Note - Proposed Exhibit 87 is the subject of a motion to add Exhibit 87 which accompanies this motion.

Decision of the Appeals Court Relating to Remand.

At p. 286, the Appeals Court set forth the issues before it:

> On cross motions for dismissal or summary judgment, a Land Court judge concluded that any easements by necessity would burden tribal land; that the claims could not fairly be adjudicated in the absence of that land's trustee, the United States (which had been dismissed from the litigation on sovereign immunity grounds); and that the owners' claims therefore must be dismissed for want of an indispensable party. A different judge denied subsequent attempts to join the Tribe directly and, pursuant to Mass.R.Civ.P. 54(b),

> 365 Mass. 820 (1974), entered a partial judgment from which these appeals and cross appeals mainly have been taken. We reverse and remand.

At p. 298, the Appeals Court unambiguously stated that it was assuming facts:

> We have until now assumed, for lots numbered 189 or 190 and above, the intent to create easements. This assumption seemingly arises naturally from the necessity created by dividing the common land; the assumption may ultimately be found to be factually correct, but this is not inevitable. (Emphasis supplied).

This Appeals Court statement was also reiterated by Justice Leon J. Lombardi in his August 14, 2006 Order at page 4. Justice Lombardi also stated that "The first task for this court, therefore, is to decide whether there is a factual or legal basis for that assumption." Ibid.

The Appeals Court could not and did not make any findings of fact as was stated at page 300:

> We do not mean to suggest by our discussion that an easement by necessity for any given lot carved out of the common land either does or does not exist, but rather that the question requires thoughtful consideration and resolution by a fact finder. This question thus is best left for the trial judge, after the parties have had an opportunity to make whatever showing they wish or are able, [FN10] remaining mindful that it is the proponents' burden to prove the existence of an implied easement. (Emphasis supplied).

The Appeals Court erred the cardinal rule of findings of fact, when it stated that it "assumed" that Lots 189 or above were part of the common land. In the same paragraph, the

Appeals Court stated to this Court, that the assumption could inevitably be wrong.

The Appeals Court delegated to this Court the task of making findings of fact, when it stated: "We have until now assumed, . . ." and remanded the matter to this Court for that explicit purpose.

Obiter Dictum

The portion of the decision of the Appeals Court relating to whether or not Lot 178 was held in severalty is to be considered as obiter dictum, which is defined in Black's Law Dictionary (8th ed. 2004), as follows:

> **obiter dictum** (**ob**-i-t<<schwa>>r **dik**-t<<schwa>>m). [Latin "something said in passing"] A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive). – Often shortened to *dictum* or, less commonly, *obiter*. . ..
>
> "Strictly speaking an 'obiter dictum' is a remark made or opinion expressed by a judge, in his decision upon a cause, 'by the way' – that is, incidentally or collaterally, and not directly upon the question before the court; or it is any statement of law enunciated by the judge or court merely by way of illustration, argument, analogy, or suggestion.... In the common speech of lawyers, all such extrajudicial expressions of legal opinion are referred to as 'dicta,' or 'obiter dicta,' these two terms being used interchangeably." William M. Lile et al., *Brief Making and the Use of Law Books* 304 (3d ed. 1914).

The trial court is authorized to reject dictum.

United States of America v. Crawley, 837 F.2d 291, 292-293 (1988).

> An alternative to definition is to ask what is at stake in the definition. What is at stake in

> distinguishing holding from dictum is that a dictum is not authoritative. It is the part of an opinion that a later court, even if it is an inferior court, is free to reject. (Emphasis supplied).

Dictum is not law or precedence.

Dedham Water Co., Inc. v. Cumberland Farms Dairy, Inc., 972 F.2d 453, 459 (1992).

> To be sure, these statements are *obiter dictum,* that is, observations relevant, but not essential, to the determination of the legal questions then before the court. Dictum constitutes neither the law of the case nor the stuff of binding precedent. *See* *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller,* 957 F.2d 1575, 1578 (11th Cir.1992); *Milgard Tempering, Inc. v. Selas Corp.,* 902 F.2d 703, 715-16 (9th Cir.1990). In short, dictum contained in an appellate court's opinion has no preclusive effect in subsequent proceedings in the same, or any other, case.

Because it was not an issue before the Appeals Court, this Court should consider the conveyance of Lots 174-189 and make its own determination as to whether those lots have the benefit of an easement by necessity.

Erickson v. Ames, 264 Mass. 436, 444 (1928).

> Expressions in some of the earlier cases, which bear a contrary aspect, are to be taken as not essential to the point decided and hence not binding upon the court or falling within the protection of the doctrine of stare decisis.

Gould v. Wagner, 196 Mass. 270, 277 (1907).

> It may be doubted whether the point now under consideration was in the mind of any one of the judges. However that may be, the statement was obiter and does not conclude us from deciding the point the other way in case we are of opinion that it should be so decided.

The decision of the Appeals Court, as it relates to lots held in severalty or the common land, was not factual when it used the word "assume" and went beyond the issue before it as stated in the briefs of all of the parties. This court should consider the assumption made by the Appeals Court, as what it actually is, obiter dictum.

Origin of Land Titles in Gay Head.

The documentary evidence is undisputed.

On August 25, 1859, the term "severalty" was first mentioned and described in the exhibits submitted to the Court in a letter from Zacheus Howwasswee to John Milton Earle (Ex. 2, pp. 2-3 transcribed on p. 4) in which he stated:

> The land that we hold in severalty which come by heirship or purchase enclosed or taken in the rough and cleared as ours according to all Indian customs in severalty, we think our titles ought be confirmed.

Pursuant to the Act of April 6, 1859, John Milton Earle was appointed Commissioner and was ordered to make a report concerning the Indians of the Commonwealth. Earle's Report was submitted on March 8, 1862 to Governor John A. Andrew (Ex. 4, pp. 15-55). Earle was commissioned to examine into the

condition of all Indians. Relative to this case, Commissioner Earle examined:

> "3. The economical state of all such persons, including the specification of all property of theirs in lands, and whether the same is held in severalty or in common, and whether now in their own possession, or lawfully possessed and occupied by others, and, in the latter case, by what color of alleged title; . . . (Emphasis supplied). (Ex. 4, pp. 15-16).

Commissioner Earle's Report provided a tabular listing of all of the land they held in severalty (Ex. 4, pp. 44 to 55). According to Earle's tabulation at page 47, Zacheus Howwasswee held 34 acres of land in severalty.

Earle stated in his 1861 Report the method by which a member of the tribe could obtain possession.

> The land is generally rough, affording abundance of stone for fencing, ... Any member of the tribe may take up, fence in, and improve as much of this land as he pleases, and, when enclosed it becomes his own. The benefit to the plantation of having more land subdued and brought into cultivation, is considered a fair equivalent for its value in the natural state, and the title to land, so taken up and enclosed, is never called in question. (Ex. 4. p. 30)

> If any man wishes for more land than he has, he has only to go upon the public domain and select what he wants, wherever he chooses, and fence it in, and it then becomes his own. If he will not do so much as this, for the sake of the land he wants, why should he have it? (Ex. 4, p. 39)

In January, 1870, a report was made by the Committee of the Legislature of 1869. (Ex. 10, Pgs. 68-84). At page 72, it is

stated: "In addition to what is held in severalty, there is a large tract of some 1900 acres held in common."

On April 30, 1870, pursuant to the enactment of Chapter 213 of the Acts of 1870 (Ex. 11, Pgs. 85-87), the District of Gay Head was abolished [by Section 1] and the Town of Gay Head was incorporated. Section 2 conveyed in fee simple absolute all of common lands to the Town of Gay Head. Section 6 began the division of the common lands and the defining by the Commissioners of boundaries of land held by individual owners and recognized the lands rightfully held by individual owners by stating, at pages 86-87:

> [The judge] shall appoint two discreet, disinterested persons commissioners to make partition of the same [i.e., the common lands] . . .; 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; . . . .

Thereafter, in an orderly process pursuant to Chapter 213, the following events occurred.

> September 1, 1870, a petition was filed for the division and setting off of land held in severalty. (Pgs. 88-90).
>
> October 17, 1870, a petition for partition was filed (Pgs. 94-96).
>
> December 5, 1870, a warrant was returned to the Probate Court and Joseph T. Pease and Richard L. Pease

(the Peases) were appointed to make division of all of the common and undivided lands.

May, 1871, Richard L. Pease, as required by § 6 of c. 213, reported to the governor all of the boundary lines by the individual owners and the deeds to Lots 1-173 were recorded at the Registry of Deeds on October 26, 1871, Book 49, (Ex. 83, Pgs. 89-198) together with the Sectional Plans, upon which plans the lots were numbered from 1 through 173.

Zacheus Howwasswee, as requested by him in his letter to Earle (Ex. 1, Pgs. 2-3), received the land that he possessed which included Lots 51, 79, 93, 94 and 96, containing 35.3 acres, and the deeds are recorded at Book 49, Pages 140, 153, 160, 161 and 162. Zacheus Howwasswee died on June 26, 1873 (Ex. 23, Pg. 198).

The sectional plans and the map of Gay Head (Ex. 86) depict the subdivided lots of land held in severalty and the common lands. The sectional plans and the map of Gay Head were not available to the Land Court or to the Appeals Court and became newly discovered evidence after the Appeals Court decision.

December 21, 1878, the Peases reported to the Probate Court that they had completed their work and pursuant to the order of the judge of the probate court, the report was deposited in the office of the town clerk. (Ex. 21, Pgs. 189-194).

On December 21, 1878, in accordance with Section 6, the judge approved the report and ordered that the same be recorded at the Registry of Deeds.

As a result of the services performed by the Commissioners, from 1870 and 1878, the grantees of Lots 1-736 obtained deeds conveying fee simple absolute title, which accurately described the lots by metes and bounds and all of the lots are depicted on the set off plan. The deeds to Lots 1-736 are found in Exhibits 83 and 84.

The title that was vested in all of the grantees by the Commissioners has been the origin for the conveyances to the Plaintiffs and Defendants in this case.

The first time that Lot 178 was ever mentioned, depicted or described was on the set-off plan (Ex. 68) and in the Deed (Ex. 24, Pg. 202), both of which were the subject matter of the Report submitted by Commissioners to the Court dated May 12, 1879 (Ex. 17, Pg. 104) and the Report of the Commissioners dated December 12, 1878 (Ex. 21, Pg. 189 Transcript at Pg. 192).

There was no evidence or reference in any of the documents before the Appeals Court or this Court, that Lot 178 was part of the severalty lots.

The 1878 Report of Joseph T. Pease and Richard L. Pease was before the Appeals Court and is before this Court as Exhibit 21, Page 189. The Appeals Court did not have the Report of Richard L. Pease dated May 22, 1871, Exhibit 18; the Sectional Plans, Exhibit 20; or the Map of Gay Head, Exhibit 86.

There is no evidence that Lot 178 was possessed by an Indian or that there was any stone wall defining its boundaries. (See Exhibit 38, Plan of Existing Conditions). Lot 178 was located on the common land as depicted on the map of Gay Head (Ex. 86).

See the Manual of Instructions for the Survey of Lands and Preparation of Plans, particularly, Section 2.1.3.5.9. "Because stone walls often mark property lines or evidence of property lines, they are important monuments to be located."

In consideration of the foregoing, it is respectfully requested that the Court reconsider its Order dated April 27, 2009, and include Exhibits 24, 30, 38 and the proposed Exhibit 87, which is the subject of the motion heretofore mentioned.

Maria A. Kitras as she is the Trustee of Bear Realty Trust, Bear II Realty Trust and Gorda Realty Trust; James J. Decoulos as he is the Trustee of Bear II Realty Trust and Gorda Realty Trust

By their Attorney:

Nicholas J. Decoulos
BBO# 117760
39 Cross Street, Suite 204
Peabody, MA 01960
Tel. 978-532-1020
August 20, 2009

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

DUKES, ss.

MISC. CASE NO. 238738

****
MARIA A. KITRAS, TRUSTEE, et als. *
Plaintiffs *
*
v. *
*
TOWN OF AQUINNAH, et als., *
Defendants *
****

PLAINTIFFS' MOTION TO INCLUDE EXHIBIT 87

The Plaintiffs, Maria A. Kitras, as Trustee of Bear Realty Trust, Maria A. Kitras and James J. Decoulos, as Trustees of Bear II Realty Trust, and Maria A. Kitras and James J. Decoulos, as Trustees of Gorda Realty Trust, move the Court to include as Exhibit 87 the attached plan prepared by John J. Decoulos, which locates Lot 178 in the common lands. This motion is supported by the Affidavit of John J. Decoulos also attached hereto.

Maria A. Kitras as she is the Trustee of Bear Realty Trust, Bear II Realty Trust and Gorda Realty Trust; James J. Decoulos as he is the Trustee of Bear II Realty Trust and Gorda Realty Trust

By their Attorney:

Nicholas J. Decoulos
BBO# 117760
39 Cross Street, Suite 204
Peabody, MA 01960
Tel. 978-532-1020
August 20, 2009

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

DUKES, ss.

MISC. CASE NO. 238738

****
MARIA A. KITRAS, TRUSTEE, et als. *
Plaintiffs *
*
v. *
*
TOWN OF AQUINNAH, et als., *
Defendants *
****

AFFIDAVIT OF JOHN J. DECOULOS

I, John J. Decoulos, do hereby state that the following statements are based upon my own knowledge, information and extensive field work, and that the facts and matters set forth herein are true and correct, and so far as based upon information and belief, I do believe the information to be true:

1. I am a graduate of Worcester Polytechnic Institute and I am a registered Professional Engineer and a registered Professional Land Surveyor.

2. I was commissioned by the Trustees of the Bear Realty Trust and Bear II Realty Trust to measure the area of Lots 51, 79, 93, 94 and 96.

3. I was given copies of the five deeds conveying those lots to Zacheus Howwasswee in 1871.

4. In order to obtain the area measurements, I obtained access to the deeds recorded at the Dukes County Registry of Deeds (the "Registry") in Book 49, between pages 89 and 198; traversed each of the five lots by metes and bounds; reviewed the location and drawing of the lots as shown on the "Sectional Plans of Indian Lands on Gay Head made under the direction of Richard L. Pease, Esq., Commissioner appointed by Gov. Bullock under the Resolve of Chapter 67, 1866 to determine the boundary lines of Indian Lands at Gay Head; Scale 25 rods to an inch, by John H. Mullin, Top. Eng." recorded at the Registry of Deeds on May 22, 2007 (the "Sectional Plans"); and reviewed the "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 the Probate under Section 6 of Chapter 213 of the Acts of 1870, by John J. Mullin; Scale: 200 feet to an inch" (the "1878 Plan Showing the Partition of the Common Lands") on file with the Dukes County Registry of Probate.

5. According to my study and calculations:

Lot 51 contains 4.5 acres;

Lot 79 contains 24.8 acres;

Lot 93 contains 1.3 acres;

Lot 94 contains 1.8 acres; and

Lot 96 contains 2.9 acres.

The total area of the five lots is 35.3 acres.

6. I have computed the area of Lot 178 as 9.237 acres shown on a plan entitled "Plan of Land in Aquinnah, MA, Set Off Lot 178; Date: July 21, 2008; Scale: 1" = 200'; By: John J. Decoulos" (Exhibit 38, page 383).

7. I have placed Lots 174 through 189 from the *1878 Plan Showing the Partition of the Common Lands* onto the "Map of Gay Head, Martha's Vineyard, Mass., Showing the Lands of Individual Owners and the General Fields or Commons, made under the direction of Richard L. Pease, Esq., Commissioner appointed by Gov. Bullock under Resolve Chap. 67 1866, to Determine the Boundary Lines of the Indian Lands at Gay Head; Scale: 50 rods = one inch; By: John H. Mullin, Top. Engr." recorded at the Registry in Plan Book 5, Plan 34 (the "1871 Map of Gay Head"). A plan showing the placement of Lots 174 through 189 on the *1871 Map of Gay Head* is attached hereto as Exhibit A.

8. Lots 174 through 189 are located on the General Fields or Commons as shown on the *Sectional Plans* and the *1871 Map of Gay Head*.

Signed under the pains and penalties of perjury this 18th day of August, 2009.

John J. Decoulos

LEGEND

79 Lot Numbers 1 - 173 established in 1871 shown in blue. See also "Sectional Plans on Gay Head made under the Direction of Richard L. Pease, Esq., Commissioner appointed by Gov. Bullock, under Resolve Chapter 67, 1866 to determine the boundary lines of Indian Lands at Gay Head; Scale: 25 Rods to an Inch; John H. Mullin, Top. Eng." on file with the Dukes County Registry of Deeds.

174 Lot Numbers 174 - 189 established in 1878 shown in red. See "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 the Probate under Section 6 of Chapter 213 of the Acts of 1870, by John H. Mullin, Scale: 200 feet to an inch" on file with the Dukes County Registry of Probate.

Plan modifications by: John J. Decoulos, PE, PLS
Approximate Scale: 1"= 1000'
Date: July 20, 2009

MAP of GAY HEAD

MARTHA'S VINEYARD, MASS.

SHOWING THE LANDS OF INDIVIDUAL OWNERS and the GENERAL FIELDS OR COMMONS,

made under the direction of

RICHARD L. PEASE Esq,

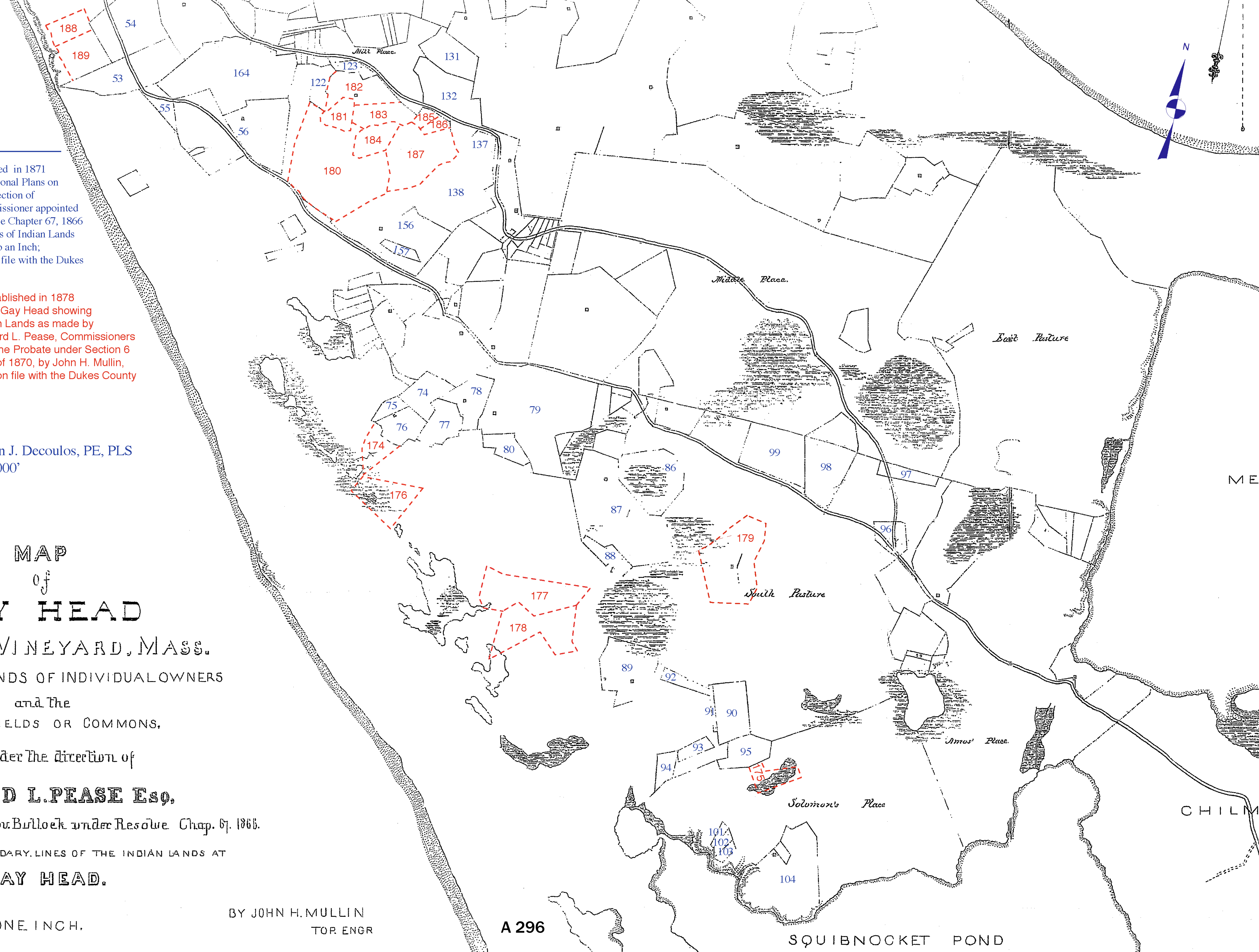
Commissioner appointed by Gov. Bullock under Resolve Chap. 67. 1866.

TO DETERMINE THE BOUNDARY LINES OF THE INDIAN LANDS AT

GAY HEAD.

SCALE 50 RODS = ONE INCH.

BY JOHN H. MULLIN
TOP. ENGR



COMMONWEALTH OF MASSACHUSETTS

(SEAL)

LAND COURT

DEPARTMENT OF THE TRIAL COURT

COUNTY OF DUKES, ss

CASE NO. 97 MISC 238738 (CWT)

RECEIVED

JAN 22 2010

Nicholas J. Decoulos

MARIA A. KITRAS, as Trustee of BEAR REALTY TRUST; MARIA A. KITRAS and JAMES J. DECOULOS, as Trustees of BEAR II REALTY TRUST and GORDA REALTY TRUST; and MARK D. HARDING, SHEILA H. BESSE, and CHARLES D. HARDING, JR., as Trustees of the ELEANOR P. HARDING REALTY TRUST,

Plaintiffs

v.

TOWN OF AQUINNAH, COMMONWEALTH OF MASSACHUSETTS, acting through its EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS, GEORGE D. BRUSH, as Trustee of the TOAD ROCK REALTY TRUST; CHARLES E. DERBY; JOANNE FRUCHTMAN; JACK FRUCHTMAN; BENJAMIN L. HALL, as Trustee of GOSSAMER WING REALTY TRUST; BRIAN M. HALL, as Trustee of BARON'S LAND TRUST; CAROLINE KENNEDY, individually, and with EDWIN SCHLOSSBERG, as guardians of their minor children ROSE KENNEDY SCHLOSSBERG, TATIANA CELIA KENNEDY SCHLOSSBERG, and JOHN BOUVIER KENNEDY SCHLOSSBERG; JEFFREY MADISON, as Trustee of TACKNASH REALTY TRUST; THE MARTHA'S VINEYARD LAND BANK; MOSHUP TRAIL II LIMITED PARTNERSHIP; PETER OCHS; PERSONS UNKNOWN OR UNASCERTAINED BEING THE HEIRS OF SAVANNAH COOPER, SUSAN SMITH, AND RUSSELL SMITH; BARBARA VANDERHOOP, as Executrix of the ESTATE OF LEONARD F. VANDERHOOP, JR.; VINEYARD CONSERVATION SOCIETY, INC.; DAVID WICE; BETSY WICE; and PERSONS UNKNOWN OR UNASCERTAINED WHO MAY HAVE AN INTEREST IN ANY LAND HERETOFORE OR HEREINAFTER MENTIONED OR DESCRIBED,

Defendants

ORDER DENYING THE PLAINTIFFS' MOTION FOR RECONSIDERATION OF ORDER DATED APRIL 27, 2009

AND
MOTION TO INCLUDE EXHIBIT 87

This case comes before the Court on motions of the Plaintiffs, Maria A. Kitras, as Trustee of Bear Realty Trust; and Maria A. Kitras and James J. Decoulos, as Trustees of Bear II Realty Trust and Gorda Realty Trust, for reconsideration of a this Court's Order of April 27, 2009, and to admit proposed exhibit 87 into evidence. The action underlying this motion is for declaratory judgment, pursuant to G.L. c. 231A, § 1, to determine the rights of the parties to easements implied by necessity crossing certain parcels of real property, located in the Town of Aquinnah, owned of record by Defendants.

Through this motion, Plaintiffs seek to have the Court admit previously stricken exhibits 24, 30, and 38. In addition, Plaintiffs submit proposed exhibit 87 for admission. Defendants, Martha's Vineyard Land Bank, Town of Aquinnah, Caroline B. Kennedy, Edwin Schlossberg, Commonwealth of Massachusetts, and Vineyard Conservation Society, Inc., opposed the Motion to Include Exhibit 87 on September 2, 2009, and Defendants, David Wice and Betsy Wice, joined in the opposition on September 4, 2009. In support of their motions, Plaintiffs argue that these exhibits contain evidence that Lot 178 was held by the common grantor, not separately and, therefore, is not disqualified from being the beneficiary of an easement by necessity.

However, it is clear from the 2005 Appeals Court decision in this case that the court properly considered and foreclosed the issue of which lots were held separately and which lots were held in common ownership; Lot 178 was among the former. This determination is not dicta, as Plaintiffs suggest, but is explicitly a threshold determination made by the court in order to reach the question of whether the United States is an indispensable party. The Appeals Court found, affirmatively, that Lots 1 through 188 or 189 do not benefit from an easement implied by necessity but that Lots 189 or 190 and above may be so benefited, and remanded the case to this Court for further proceedings consistent with that opinion. Therefore, the issue of whether Lot 178 was held in separate ownership has been adjudicated, and this Court has no authority to consider it further.

Accordingly, it is hereby:

ORDERED that the Plaintiffs' Motion for Reconsideration of Order Dated April 27, 2009 is **DENIED**; and it is further

ORDERED that the Plaintiffs' Motion to Include Exhibit 87 is **DENIED**.

The admissibility of evidence in this case having been settled, this case is ready to be scheduled for briefing. Accordingly, it is further:

ORDERED that Plaintiffs shall file a brief of their case on or before March 8, 2010. Defendants shall file all reply briefs on or before forty-five (45) days after service of Plaintiffs' brief. Plaintiffs shall file a reply brief, if any, on or before fifteen (15) days

after service of Defendants' reply brief. Defendant shall file all surreply briefs, if any, on or before fifteen (15) days after service of Plaintiffs' reply brief.

So Ordered.

By the Court (Trombly, J.).

CWT

Attest:

Deborah J. Patterson
Recorder

Dated: January 21, 2010

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER

646

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

DUKES, ss.

MISC. CASE NO. 238738

MARIA A. KITRAS, TRUSTEE, et als.
Plaintiffs

v.

TOWN OF AQUINNAH, et als.,
Defendants

PLAINTIFFS' OFFER OF PROOF

The Plaintiffs, Maria A. Kitras, as Trustee of Bear Realty Trust, Maria A. Kitras and James J. Decoulos, as Trustees of Bear II Realty Trust, and Maria A. Kitras and James J. Decoulos, as Trustees of Gorda Realty Trust, in response to the Court's denial of the Plaintiffs' Motion for Reconsideration, invoke the Mass.R.Civ.P., **Rule 43(c) Record of Excluded Evidence:**

> . . . In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

Pursuant to Rule 43(c), as to the exclusion of Exhibits 24, 38, and 87, the Plaintiffs make the following offer of proof.

> **Exhibit 24** - Deed to Lot 178. The deed shows that the lot was created in 1878 from the Common Land granted to the town of Gay Head (the "Town") from the Commonwealth of Massachusetts. The land had unity of title with all other Common Land owned by the Town and is therefore entitled to an easement by necessity. If

the Petition to Partition the Common Lands was not filed by Isaac D. Rose and sixteen other inhabitants of the Town (Exhibit 12) and approved by the Probate Court on December 5, 1870 (Exhibit 15), Lot 178 would have remained Common Land.

Exhibit 38 - Plan of Set-Off Lot 178. This plan depicts that there are no stone walls which define any of the boundaries of Lot 178, thereby demonstrating lack of possession. Without possession and enclosure, the evidence further supports the fact that the land was part of the Common Land owned by the Town between 1870 and 1878.

Exhibit 87 - John J. Decoulos, a Registered Land Surveyor, would testify as follows:

1. I am a graduate of Worcester Polytechnic Institute and I am a registered Professional Engineer and a registered Professional Land Surveyor.

2. I was commissioned by the Trustees of the Bear Realty Trust and Bear II Realty Trust to perform land surveying services as directed.

3. I was given copies of the five deeds conveying those lots to Zacheus Howwasswee in 1871.

4. In order to properly perform my services, I obtained access to the deeds recorded at the Dukes County Registry of Deeds (the "Registry") in Book 49, between pages 89 and 198; traversed each of the five lots by metes and bounds; reviewed the location and drawing of the lots

as depicted on the "Sectional Plans of Indian Lands on Gay Head made under the direction of Richard L. Pease, Esq., Commissioner appointed by Gov. Bullock under the Resolve of Chapter 67, 1866 to determine the boundary lines of Indian Lands at Gay Head; Scale 25 rods to an inch, by John H. Mullin, Top. Eng." recorded at the Registry of Deeds on May 22, 2007 (the "Sectional Plans"); and reviewed the "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 the Probate under Section 6 of Chapter 213 of the Acts of 1870, by John J. Mullin; Scale: 200 feet to an inch" (the "1878 Plan Showing the Partition of the Common Lands") on file with the Dukes County Registry of Probate.

5. According to my study and calculations:

Lot 51 contains 4.5 acres;
Lot 79 contains 24.8 acres;
Lot 93 contains 1.3 acres;
Lot 94 contains 1.8 acres; and
Lot 96 contains 2.9 acres.

The total area of the five lots owned by Zacheus Howwasswee is 35.3 acres.

6. I have computed the area of Lot 178 as 9.237 acres depicted on a plan entitled "Plan of Land in Aquinnah, MA, Set Off Lot 178; Date: July 21, 2008; Scale: 1" = 200'; By: John J.

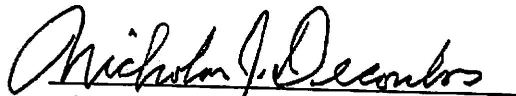
Decoulos" (Exhibit 38, page 383). I have placed Lots 174 through 189 from the *1878 Plan Showing the Partition of the Common Lands* onto the "Map of Gay Head, Martha's Vineyard, Mass., Showing the Lands of Individual Owners and the General Fields or Commons, made under the direction of Richard L. Pease, Esq., Commissioner appointed by Gov. Bullock under Resolve Chap. 67 1866, to Determine the Boundary Lines of the Indian Lands at Gay Head; Scale: 50 rods = one inch; By: John H. Mullin, Top. Engr." recorded at the Registry in Plan Book 5, Plan 34 (the "1871 Map of Gay Head"). I have prepared a plan, which is Exhibit 87, depicting the placement of Lots 174 through 189 on the *1871 Map of Gay Head*. Lots 174 through 189 are located on the General Fields or Commons as shown on the *Sectional Plans* and the *1871 Map of Gay Head*.

In further support of the Plaintiffs' contention that Lot 178 was not an issue before the Appeals Court, but was part of the common land and was not granted as a severalty lot, the Plaintiffs submit as part of this Offer of Proof the Statement of Issues contained in the Briefs of the Plaintiffs and the Defendants, Town of Aquinnah and Vineyard Conservation Society, Inc.

792

Maria A. Kitras as she is the Trustee of Bear Realty Trust, Bear II Realty Trust and Gorda Realty Trust; James J. Decoulos as he is the Trustee of Bear II Realty Trust and Gorda Realty Trust

By their Attorney:



Nicholas J. Decoulos
BBO# 117760
39 Cross Street, Suite 204
Peabody, MA 01960
Tel. 978-532-1020
February 2, 2010

4

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 2004-P-472

MARIA A. KITRAS, AS TRUSTEE OF BEAR REALTY TRUST, BEAR II REALTY TRUST AND GORDA REALTY TRUST, JAMES J. DECOULOS, AS TRUSTEE OF BEAR II REALTY TRUST AND GORDA REALTY TRUST, VICTORIA BROWN AND GARDNER BROWN, MARK D. HARDING AND ELEANOR P. HARDING, AS TRUSTEE OF THE ELEANOR P. HARDING TRUST,

Plaintiffs-Appellants,

v.

TOWN OF AQUINNAH & OTHERS[1],

Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE LAND COURT

BRIEF OF THE PLAINTIFFS-APPELLANTS

Maria A. Kitras,
as Trustee,
James J. Decoulos,
as Trustee,
Victoria Brown and
Gardner Brown,
by:

H Theodore Cohen
BBO # 089100
Cheryl A. Blaine
BBO # 564077
Keegan, Werlin & Pabian, LLP
265 Franklin Street
Boston, MA 02110
(617) 951-1400

Mark D. Harding,
Eleanor P. Harding,
as Trustee,

by:

Leslie-Ann Morse
BBO # 542301
456 Bearse's Way
P.O. Box 84
Hyannis, MA 02610
(508) 790-3030

I. STATEMENT OF THE ISSUES

A. Whether the Land Court erred in ruling that: (1) any claim of an easement by implication or necessity for the benefit of Plaintiffs' lots could arise only from the actions of Commissioners appointed in 1870 in their 1878 Report; (2) any such easement must extend only northerly from Plaintiffs' lots to State Road; (3) any claim of such easement necessarily implicates the lots currently held by the United States in trust for the Wampanoag Tribe of Gay Head (Aquinnah); and (4) any such easement does not include the right to install utilities in the easement way so determined.

B. Whether the Land Court erred in ruling that the United States is a necessary party and an indispensable party under Mass. R. Civ. P. 19 and, therefore, in its absence, Count One of the Plaintiffs' Amended Complaint must be dismissed.

C. Whether the Land Court erred in denying Plaintiffs' Motions to add the Wampanoag Tribe as a Defendant.

II. STATEMENT OF THE CASE

By Complaint filed in the Land Court on May 20,

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 2004-P-472

MARIA A. KITRAS, AS TRUSTEE OF BEAR REALTY TRUST, BEAR II REALTY TRUST AND GORDA REALTY TRUST, JAMES J. DECOULOS, AS TRUSTEE OF BEAR II REALTY TRUST AND GORDA REALTY TRUST, VICTORIA BROWN AND GARDNER BROWN, MARK D. HARDING AND ELEANOR P. HARDING, AS TRUSTEE OF THE ELEANOR P. HARDING REALTY TRUST,

Plaintiffs-Appellants,

v.

TOWN OF AQUINNAH & OTHERS,[1]

Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE LAND COURT

BRIEF OF DEFENDANT-APPELLEE/ CROSS-APPELLANT

VINEYARD CONSERVATION SOCIETY, INC.

Jennifer S.D. Roberts
BBO No. 541715
8 West Bay Road
P.O. Box 1026
Osterville, Massachusetts 02655
(508) 428-5094

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the lower court correctly concluded that the United States of America ("USA"), as Trustee for the Wampanoag Tribal Council of Gay Head, Inc. ("the Tribe"), is an indispensable party to this action.

Whether the lower court properly exercised its discretion to deny motions to amend the complaint which (1) were filed five years after the commencement of the action and after a dispositive ruling by the lower court and (2) were futile, because the party sought to be joined by the amendment (the Tribe) is not the proper party, is not amenable to suit in state court and has not waived its sovereign immunity.

Whether, if this Court concludes that all necessary parties are before it, it should instruct the lower court to issue a judgment declaring that no easement by necessity benefits the Plaintiffs'[1] land, either (1) because no such easement was necessary or intended by the parties or (2) because any such easement was extinguished.

Whether the issue of whether easements by necessity include utilities is ripe for review.

---

[1] The plaintiffs-appellants, as denominated in the caption of this action, are referred to herein collectively as "Plaintiffs."

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

DOCKET NO. 2004-P-0472

MARIA A. KITRAS, ET AL.,

Plaintiffs-Appellants,

vs.

TOWN OF AQUINNAH, ET AL.,

Defendants-Appellees,
Cross-Appelles

ON APPEAL FROM A JUDGMENT OF THE LAND COURT

DEFENDANT-APPELLEE,
TOWN OF AQUINNAH'S BRIEF

Ronald H. Rappaport
BBO No. 412260
Michael A. Goldsmith
BBO No. 558971
Reynolds, Rappaport & Kaplan,
L.L.P.
106 Cooke Street
P.O. Box 2540
Edgartown, MA 02539
(508) 727-3711

Dated: September 9, 2004

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Defendant-Appellee/Cross-Appellant, Town of Aquinnah (the "Town"), adopts the Statement of Issues Presented for Review set out in the Brief of Defendant-Appellee/Cross-Appellant, Vineyard Conservation Society, Inc. ("VCS").

II. STATEMENT OF THE CASE

The Town adopts the Statement of the Case set out in the Brief of VCS.

III. STATEMENT OF THE FACTS

The Town substantially adopts the Statement of the Facts set out in the Brief of VCS.

IV. ARGUMENT

1. The Town adopts the substantial portions of the arguments contained in the Brief of VCS:

a.) Section I: That the Land Court correctly concluded that the United States of America is an indispensable party to this action;

b.) Section II, Paragraphs A (Abuse of Discretion Standard) and B (Plaintiffs' Motions for Reconsideration Came Too Late).

2. <u>The Land Court Properly Denied the Motions to Add the Wampanoag Tribe of Aquinnah (the "Tribe") as a Party.</u>

Whether the Tribe is subject to this Court's

COMMONWEALTH OF MASSACHUSETS
LAND COURT DEPARTMENT

Dukes County   Docket No. 238738 Misc.

MARIA A. KITRAS, Trustee et als,
Plaintiffs

Vs.

TOWN OF QUINNAH, et al.
Defendants

NOTICE OF ADOPTION

Now come the Plaintiffs, Mark D. Harding, and Sheila H. Besse and Charles D. Harding JR as they are the Trustees of the Eleanor P. Haring Realty Trust and hereby adopt the Brief filed by the Plaintiffs, Marie A. Kitras, as Trustee of Bear Realty Trust, as Trustees of Bear II Realty Trust, and Maria A. Kitras and James J. Decoulas, as Trustees of Gorda Realty Trust relative to the above-entitled matter.

Respectfully submitted
Mark D. Harding and
Sheila H. Besse and
Charles D. Harding, JR
Trustees of the Eleanor P.
Harding Realty Trust
By their attorney

Dated: March 25, 2010

Leslie-Ann Morse BBO 542301
477 Old Kings Highway
Yarmouth Port, MA 02675
508-375-9080

649 9 M

COMMONWEALTH OF MASSACHUSETTS

DUKES COUNTY, ss.

TRIAL COURT
LAND COURT DEPARTMENT
CASE No. 97 Misc. 238738 (CWT)

MARIA A. KITRAS as she is TRUSTEE OF BEAR REALTY TRUST, et als.,

Plaintiffs,

-versus-

TOWN OF AQUINNAH, et als.

Defendants.

DEFENDANTS GOSSAMER WING REALTY TRUST
AND BARONS LAND TRUST MOTION TO CLARIFY
(I) WHAT EXACTLY IS BEING DECIDED;
(II) THE MODE THE COURT HAS CHOSEN TO RESOLVE AND DETERMINE THE FACTS AND INFERENCES TO BE DRAWN THEREFROM; AND,
(III) THAT THE BURDEN OF PRODUCTION IS ON DEFENDANTS TO SHOW AN INTENT TO LANDLOCK

Now comes Defendant Gossamer Wing Realty Trust, Benjamin L. Hall, Jr., Trustee ("GWRT"), and Brian M. Hall as he is Trustee of Barons Land Trust ("BLT")(collectively the "Trusts"), by and through their attorney, Benjamin L. Hall, Jr., Esq., and, move this Honorable Court for an order clarifying three factors vital to understand the nature of the tasks required of the parties as ordered by the court on January 21, 2010, to wit, as follows:

(I) what EXACTLY is to be decided in respect to the limited issue of the intent of the Probate Court and the appointed Commissioners in 1878 to landlock what properties by intentionally withholding an access easement barring any use of such properties and to rule that the facts to be found relate to the intent to NOT landlock any lots carved from the Common Lands in 1878;

(II) what process has the court decided it is using to determine the facts and inferences to be drawn therefrom, and to rule that a trial must be held; and,

(III) that the presumption has arisen favoring the Trusts and Plaintiffs that Lots 174 and above, being those lots carved from the Common Lands (which

boundaries of the Common Lands had been fully and finally established by Richard Pease in his report in 1871 and delineated on the Sectional Plans), have an easement by necessity implied for their benefit to a public way and that the burden of production is on the other Defendants to show that the Probate Court and the appointed Commissioners, in 1878, when they set off Lots 174 and above from the Common Lands, intended to landlock all of these parcels, leaving them with no easement to get to any public way.

WHEREFORE the Trusts request that the court rule and specifically clarify the following:

(I) what EXACTLY is to be decided in respect to the limited issue of the intent of the Probate Court and the appointed Commissioners in 1878 to landlock what properties by intentionally withholding an access easement barring any use of such properties and to rule that the facts to be found relate to the intent to NOT landlock any lots carved from the Common Lands in 1878;

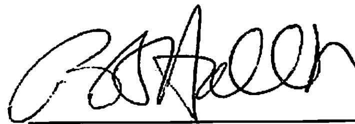
(II) what process has the court decided it is using to determine the facts and inferences to be drawn therefrom, and to rule that a trial must be held; and,

(III) that the presumption has arisen favoring the Trusts and Plaintiffs that Lots 174 and above, being those lots carved from the Common Lands (which boundaries of the Common Lands had been fully and finally established by Richard Pease in his report in 1871 and delineated on the Sectional Plans), have an easement by necessity implied for their benefit to a public way and that the burden of production is on the other Defendants to show that the Probate Court and the appointed Commissioners, in 1878, when they set off Lots 174 and above from the Common Lands, intended to landlock all of these parcels, leaving them with no easement to get to any public way.

94

Edgartown, Massachusetts

Gossamer Wing Realty Trust
Baron's Land Trust
By Its Attorney,



BENJAMIN L. HALL, JR.
45 Main Street, P.O. Bx 5155
Edgartown, MA 02539
(508) 627-3700
BBO# 547622

COMMONWEALTH OF MASSACHUSETTS

DUKES COUNTY, ss.	TRIAL COURT LAND COURT DEPARTMENT DOCKET NO. 238738

MARIA A. KITRAS as she is TRUSTEE OF BEAR REALTY TRUST, et als.,

Plaintiffs,

-versus-

TOWN OF AQUINNAH, et als.

Defendants.

EXHIBITS
FOR DEFENDANTS GOSSAMER WING REALTY TRUST
AND BARONS LAND TRUST BRIEF
AS ORDERED BY THE COURT ON JANUARY 21, 2010

**LIST OF EXHIBITS
FOR DEFENDANTS GOSSAMER WING REALTY TRUST
AND BARONS LAND TRUST BRIEF
AS ORDERED BY THE COURT ON JANUARY 21, 2010**

Description	Exhibit
First Request for Admissions by Defendant Benjamin L. Hall, Jr., as he is Trustee of Gossamer Wing Realty Trust, and Brian M. Hall, as he is Trustee of Barons Land Trust to be Answered by the Defendant, Town of Aquinnah	A-1
Defendant Town of Aquinnah's Objection to First Request for Admissions and Interrogatories by Benjamin L. Hall, Jr.	A-2
First Request for Admissions by Defendant Benjamin L. Hall, Jr., as he is Trustee of Gossamer Wing Realty Trust, and Brian M. Hall, as he is Trustee of Barons Land Trust to be Answered by the Defendant, Martha's Vineyard Land Bank	B-1
Defendant Martha's Vineyard Land Bank's objections to Request for Admissions and Interrogatories by Benjamin L. Hall, Jr.	B-2
First Request for Admissions by Defendant Benjamin L. Hall, Jr., as he is Trustee of Gossamer Wing Realty Trust, and Brian M. Hall, as he is Trustee of Barons Land Trust to be Answered by the Defendant, Vineyard Conservation Society	C-1
Vineyard Conservation Society's response to First Request for Admissions and Interrogatories by Benjamin L. Hall, Jr.	C-2
Order Allowing Motion to Bifurcate dated August 14, 2006	D-1
Order Allowing Motion to Extend Discovery Deadline and Date of Status Conference dated September 21, 2007	D-2
Motion to Strike the Town of Aquinnah, Martha's Vineyard Land Bank Commission, Vineyard Conservation Society, Inc., Caroline B. Kennedy And Edwin Schlossberg, the Commonwealth of Massachusetts, and David Wice and Betsy Wice dated January 30, 2009	E

EXHIBIT A-1

COMMONWEALTH OF MASSACHUSETTS

DUKES, SS.

LAND COURT
DOCKET NO. 238738 (CT)

MARIA A. KITRAS, Trustee, et als.,

Plaintiffs,

V.

TOWN OF AQUINNAH, et als.,

Defendants.

FIRST REQUEST FOR ADMISSIONS BY DEFENDANT BENJAMIN L. HALL, JR, As he is TRUSTEE OF GOSSAMER WING REALTY TRUST, AND BRIAN M. HALL as he is TRUSTEE OF BARONS LAND TRUST TO BE ANSWERED BY THE DEFENDANT, TOWN OF AQUINNAH

DEFENDANT BENJAMIN L. HALL, JR, As he is TRUSTEE of GOSSAMER WING REALTY TRUST joined by BRIAN M. HALL as he is TRUSTEE OF BARONS LAND TRUST (collectively "Hall"), by their attorney, Benjamin L. Hall, Jr., demand that defendant TOWN OF AQUINNAH respond to the following Request for Admissions, under oath and in writing, pursuant to Rule 36 of the Massachusetts Rules of Civil Procedure and deliver to the undersigned counsel within 30 days of the date of service thereof.

DEFINITIONS AND INSTRUCTIONS

These Instructions and Definitions form are an integral part of the Request for Admissions that follow:

DEFINITIONS

As used herein, the following words and phrases will have the following meanings:

A. As used herein, the words "identify" or "identification" shall have their regular meaning but shall include provision of specific information as follows: (1) when used in reference to a natural person, state his or her full name, present or last known home and business address, occupation and telephone number including employer's name, address and telephone number; (2) when used in reference to a business, state its full name and present or last known address and telephone number, the general business in which it is engaged, its form of organization (corporation, partnership, etc.), the states or places in which it was organized, the states or places

in which it does business and the states or places in which it is headquartered, the states or places in which it has agents and whether those agents are registered for the service of process and the general business engaged in by the agent(s); (3) when used in reference to a governmental entity, state its full name and present or last known address and telephone number, the general governmental activities, purposes of and for and in which it is engaged, its form of organization (corporation, partnership, etc.), the states or places in which it was organized, all sources of its authority. and the states or places in which it is headquartered, the states or places in which it has agents and whether those agents are registered for the service of process and the general business or governmental activity engaged in by the agent(s);and (4) when used in reference to a document, state its date including the dates of any and all revisions (including a listing of the material content of each revision), identify all or each of the authors of each version including their addresses(s) and all recipient(s) including their addresses, whether intended or not, from and to whom addressed, and the type of nature thereof including a summary of its material content, and its present location and custodian. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person. Once a business has been identified in accordance with this subparagraph, only the name of that business need be listed in response to subsequent discovery requesting the identification of that business. Once a governmental entity has been identified in accordance with this subparagraph, only the name of that business need be listed in response to subsequent discovery requesting the identification of that governmental entity. Once a document has been identified in accordance with this subparagraph, only the name of that document need be listed in response to subsequent discovery requesting the identification of that document.

B. Document: "Document" includes any kind of written, graphic, or electronic magnetic, optical, written or typed or other form of media including data, held in any form of media, however stored, produced or reproduced, or any kind of description, whether sent or received or neither, including but not limited to: papers, letters, drawings, including architectural drawing, books, book entries, accounts, letters, electronic mail or e-mail messages, photographs, objects, tangible things, including architectural models, correspondence, telegrams, cables, telex messages, telephone messages, memoranda, notes, data, notations, work papers, preliminary drafts of final work product, interoffice communications, interdepartmental communications, transcripts, minutes, reports and recordings of telephone and other conversations, or of interviews, or of conferences, or of committee or other meetings, affidavits, statements, summaries, opinions, reports, studies, analyses, formulas, plans, specifications, evaluations, contracts, licenses, agreements, instruments, deeds, offers, ledgers, journals, time sheets or records, books or records of accounts, summaries of accounts, tax returns, bank statements, financial records, calendars, computations, tax returns, minutes of or notes of any meeting, photocopies, xerox or xerographic or mimeographic copies or similes, facsimiles, descriptions, invoices, receipts, purchase orders evidence of payment, sound recordings, video recordings, films, photographs, slides, negatives, microfilm, barcode, whether originals or copies and however copied, instructions, notebooks, drafts, chits, checks and stubs thereof, scrapbooks, agreements, bills, receipts, balance sheets, income statements, questionnaires, answers to questionnaires, statistical records, desk calendars, appointment books, diaries, lists, tabulations, charts, graphs, maps, surveys, sound recordings, computer disks, tapes, and other computer storage media, magnetic tapes, computer printouts, data processing input and output, microfilm, sound recordings, video recordings, films,

photographs, slides, negatives, microfilm, barcode, whether originals or copies and however copied, and including all non-identical copies, wherever located, however produced or reproduced, and in whatever language or encryption form, and any underlying or supporting material when used in the preparation thereof, all other records kept by electronic, photographic or mechanical means, and things similar to any of the foregoing however denominated, whether currently in existence or already destroyed. A draft or non-identical or annotated copy is a separate document in this meaning of this term.

C. "Identify the source" means to: (1) identify all documents and non-written communications upon which you rely in support of a contention, allegation, or answer at issue; (2) state the inferences you draw from each source upon which you rely in support of such contention, allegation, or answer; and (3) identify all persons whom you know or believe to be knowledgeable with respect to the subject matter of contention, allegation or answer including the full name, residential address, occupation, employer including employer's address and telephone number of each and every such person.

D. "Person" or "Persons" means any individual, natural person, corporation, partnership, limited liability entity, trust, unincorporated association business, governmental unit, agency or authority, or any other entity whatsoever and shall include not only natural persons but also firms, partnerships, associations and corporations, divisions, departments, bureaus, offices or other units thereof, as well as any foreign equivalent thereof, and shall simultaneously require the answer to include all persons (plural) though the singular use is set forth in the question.

E. "Communication" includes any transmission of any information whatsoever including but not limited to data or document and all forms of inter-personal communication, including but not limited to meetings, telephone, telex, telecopier or facsimile and verbal and non-verbal acts intended to or actually conveying information.

F. "Plaintiff(s)" shall be synonymous and refers to the Plaintiff named in this action, either together, individually, or in any relevant or related fiduciary capacity and any of their agents, attorneys, employees, or representatives. See also Parties.

H. "Defendant" shall be synonymous and refers to the Defendants named in this action, together, individually, or in any relevant of related fiduciary capacity and any of their agents, attorneys, employees or representatives, successors, predecessors or assigns. See also Parties below.

I. Parties/Deponent: The terms "plaintiff', "petitioner", "respondent" and "defendant" as well as "deponent" as well as a party's or the deponent's full or abbreviated name or a pronoun referring to a party or deponent mean the party or deponent and, where applicable, its officers, directors, employees, partners, corporate parents, subsidiaries of affiliates. This definition is not intended to impose a discovery obligation on any person who is not the deponent nor a party to the litigation, but is intended to call for all responsive documents within the possession, custody or control of the party or deponent whether within or without this country, including without limitation the deponent's or party's foreign offices, officers directors, employees, partners, corporate parents, subsidiaries or affiliates.

J. Concerning: The term "concerning" means of, from, to, among, between, relating to, referring to, describing, evidencing (evincing) or constituting.

SPECIFIC DEFINITIONS

A. "Hall" shall mean Defendant Benjamin L. Hall, Jr., as he is the Trustee of Gossamer Wing Realty Trust joined by Brian M. Hall as he is Trustee of Barons Land Trust, unless otherwise specified.

B. "VCS" shall Defendant Vineyard Conservation Society, Inc. unless otherwise specified.

C. "VCS Premises" shall mean and include all lands or ways owned or managed by or on behalf of VCS on or in the vicinity of Moshup Trail, Aquinnah, Massachusetts which are subject to the claims herein.

D. "Hall Premises" shall mean and include all lands owned or managed by or on behalf of Hall on or in the vicinity of Moshup Trail, Aquinnah, Massachusetts which are subject to the complaint and amended complaint herein including Set-off lots 710, 177 and 242..

E. "Town" shall mean include the Town of Aquinnah, including every agency, board, committee, employee, agent, administrator, attorney, or other person that are a part thereof.

F. "Town Premises" shall mean and include all lands or ways owned or managed by or on behalf of the Town on or in the vicinity of Moshup Trail, Aquinnah, Massachusetts which are subject to the claims herein.

G. "Lot" or "lots" shall be all parcels of land subject to the within matter, whether in their original size and shape as set-off by the Commissioner Richard Pease or in the petition to partition in 1878 that created them, those being set-off Lots 1-173, Lots 174-178 inclusive, and Lots 179 et seq., or any portions thereafter divided.

Rules of Construction

1. All/Each. The terms "all" and "each" shall be construed as all and each.

2. And/Or. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request ail responses that might otherwise be construed to be outside of its scope.

3. Number. The use of the singular form of any word includes the plural and vice versa.

4. Gender. Words in the masculine gender include the feminine gender.

5. Conjuntive/disjunctive. The conjunctive includes the disjunctive, and vice versa.

6. Verb tenses. Each verb is meant to include, where appropriate, the present, past and future tenses of that verb.

INSTRUCTIONS

A. These Request for Admissions are deemed to be continuing and defendant is required to supplement its answers thereto as to the extent that it becomes aware of further information called for by these Request for Admissions.

B. To the extent that an Request for Admission calls for information which cannot at this time be furnished precisely and completely, such information as the defendant can furnish should be included in the answer together with a statement that further information sought cannot be furnished and the reasons why it is not available. If information that cannot be furnished is or may be available from another person, identify this person in a manner suitable for identification in a subpoena duces tecum and state in detail your reasons for believing that this person has the described or requested information.

C. If the defendant claims that any of the information or documents to be identified hereunder are privileged, the plaintiff should; (1) identify the document or information; (2) state in general terms its subject matter and the Request for Admission to which it is responsive; and (3) state the basis for its claim of privilege.

D. The defendant is required to repeat each Request for Admission immediately prior to the answer to the said Request for Admission.

REQUESTS FOR ADMISSION

That the following statements are true:

1. That the Town does not list Zack's Cliffs Road as a public way.

2. That the Town does not list Radio Tower Road as a public way.

3. That the Town does not list Old South Road as it extends north and east from the intersection with Church Street as a public way.

4. That State Road as it travels today did not exist as a public road until after 1900.

5. That there was no laid out and accepted public way in the Town of Gay Head at the time of its establishment.

6. That owners of Set Off lots 1 through 173 inclusive as recorded at the Dukes County Registry of Deeds at Book 49, had rights of passage across the common lands from 1870 to at least the date of the partition dated 1878.

7. That the Town assesses all lots that are now subject to the within action as if they have access to them.

8. That the Town's general policy is that lots in Town are to be assessed as if they have access.

9. That it has been and continues to be the general policy of the Town to assess lands in the Town presuming they have vehicular access to and from a public way.

10. There is no evidence that there was an actual (subjective) intent to give only landlocked land to those persons given title to lots numbered 1-173 as recorded at the Dukes County Registry of Deeds at Book 49.

11. There is no evidence that there was an actual (subjective) intent to give only landlocked land to those persons given title to lots numbered 1-178 as recorded at the Dukes County Registry of Deeds at Book 49 and 65.

12. There is no evidence that there was an actual (subjective) intent to give only landlocked land to those persons given title to lots numbered 179 and above as recorded at the Dukes County Registry of Deeds at Book 65.

13. That the Town waives any claim of easement for Town-owned lands that do not benefit either from an appurtenant express easement to or from frontage on a public way.

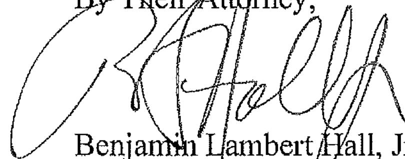
14. Zack's Cliffs Road is a public way.

15. Radio Tower Road is a public way.

16. Old South Road as it extends north and east from the intersection with Church Street is a public way.

DATED: October 3, 2008
Edgartown, Massachusetts

Benjamin L. Hall, Jr.
And Brian M. Hall
As they are Trustees aforesaid
By Their Attorney,



Benjamin Lambert Hall, Jr.
45 Main Street, Box 5155
Edgartown, MA 02539
(508) 627-5900
BBO #547622

EXHIBIT A-2

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COUNSELORS AT LAW

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KAREN D. BURKE
JONATHAN M. HOLTER

OF COUNSEL

KATHRYN R. HAM
JENNIFER S. RAKO
MELISSA MCKEE HACKNEY

October 9, 2008

Benjamin L. Hall, Jr., Esq.
45 Main Street
P.O. Box 5155
Edgartown, MA 02539

RE: Maria A. Kitras, Trustee, et al. v. Town of Aquinnah, et al., Land Court Misc. Case No. 238738 (Lombardi, J.)

Dear Ben:

Enclosed please find Defendant Town of Aquinnah's Objection to First Request For Admissions and Interrogatories by Benjamin L. Hall, Jr.

Very truly yours,

Ronald H. Rappaport

RHR/jmh
cc (w/encl.): Service List

4601-006\Hall Town's Resp 1st Admissions & Ints file ltr.doc

COMMONWEALTH OF MASSACHUSETTS

DUKES, ss.

LAND COURT
DOCKET NO. 238738

* * * * * * * * * * * * * * * *

MARIA A. KITRAS, Trustee, et als.,

Plaintiffs,

vs.

TOWN OF AQUINNAH, et als.,

Defendants.

* * * * * * * * * * * * * * * *

DEFENDANT TOWN OF AQUINNAH'S
OBJECTION TO FIRST REQUEST FOR ADMISSIONS
AND INTERROGATORIES
BY DEFENDANT BENAJMIN L. HALL, JR.

Pursuant to Rules 26(b)(1), 33(a)(3), and 36(a), Mass. R. Civ. P., defendant Town of Aquinnah (the "Town") hereby joins in the objection filed by The Vineyard Conservation Society, Inc. ("VCS") and the Martha's Vineyard Land Bank ("MVLB") and also objects to defendant Benjamin L. Hall, Jr.'s ("defendant Hall") first request for admissions and interrogatories directed to the Town. The Town states, as does the VCS and MVLB:

1. That the discovery propounded by defendant Hall seeks information that is neither relevant to the above-captioned action nor reasonably calculated to lead to the

discovery of admissible evidence, because defendant Hall's cross-claims against other defendants, including the Town, were dismissed by this Court (Lombardi, J.) in September, 2007 and accordingly there is no claim by defendant Hall to which these discovery requests relate.

2. The last order relating to discovery in this case was entered by Judge Lombardi on September 21, 2007. That order stated that discovery was to be completed by all parties within 30 days of plaintiffs' service on all defendants of copies of the documents plaintiffs intended to use at trial. Plaintiffs served these documents on July 28, 2008; accordingly, discovery was to have been completed by August 28, 2008. Defendant Hall propounded no discovery prior to August 28, 2008 and requested no extension of the discovery deadline.

3. At the status hearing on September 9, 2008, counsel for VCS requested a further brief extension on discovery in order to review the answers to interrogatories served by plaintiffs (not due as of the date of the conference) for purposes of determining whom plaintiffs intended to call as witnesses and whether any of these persons needed to be deposed. After discussion, there was agreement (memorialized in a proposed order submitted by counsel for VCS but not yet entered by the court) that

discovery would be completed by October 3, 2008 in order to allow the possibility of further depositions necessitated by identification of new witnesses in plaintiffs answers to interrogatories. Even assuming the court adopts the proposed order, the discovery requests propounded by defendant Hall are outside both the time limit and scope of further discovery permitted by the order.

TOWN OF AQUINNAH

By its attorneys,

Ronald H. Rappaport
BBO No. 412260
Michael A. Goldsmith
BBO No. 558971
Reynolds, Rappaport & Kaplan, LLC
106 Cooke Street, Box 2540
Edgartown, MA 02539
(508) 627-3711

Dated: October 9, 2008

Certificate Of Service

I hereby certify that on October 9, 2008, I served a copy of the foregoing document by mailing a copy of the same, postage prepaid, to the individuals on the attached Service List.

Ronald H. Rappaport

4601-006\Objection to Hall Ints and Admissions.doc

EXHIBIT B-1

COMMONWEALTH OF MASSACHUSETTS

DUKES, SS.

LAND COURT
DOCKET NO. 238738 (CT)

MARIA A. KITRAS, Trustee, et als.,

Plaintiffs,

V.

TOWN OF AQUINNAH, et als.,

Defendants.

FIRST REQUEST FOR ADMISSIONS BY DEFENDANT BENJAMIN L. HALL, JR, As he is TRUSTEE OF GOSSAMER WING REALTY TRUST, AND BRIAN M. HALL as he is TRUSTEE OF BARONS LAND TRUST TO BE ANSWERED BY THE DEFENDANT, MARTHA'S VINEYARD LAND BANK

DEFENDANT BENJAMIN L. HALL, JR, As he is TRUSTEE of GOSSAMER WING REALTY TRUST joined by BRIAN M. HALL as he is TRUSTEE OF BARONS LAND TRUST (collectively "Hall"), by their attorney, Benjamin L. Hall, Jr., demand that defendant Martha's Vineyard Land Bank respond to the following Request for Admissions, under oath and in writing, pursuant to Rule 36 of the Massachusetts Rules of Civil Procedure and deliver to the undersigned counsel within 30 days of the date of service thereof.

DEFINITIONS AND INSTRUCTIONS

These Instructions and Definitions form are an integral part of the Request for Admissions that follow:

DEFINITIONS

As used herein, the following words and phrases will have the following meanings:

A. As used herein, the words "identify" or "identification" shall have their regular meaning but shall include provision of specific information as follows: (1) when used in reference to a natural person, state his or her full name, present or last known home and business address, occupation and telephone number including employer's name, address and telephone number; (2) when used in reference to a business, state its full name and present or last known address and telephone number, the general business in which it is engaged, its form of organization (corporation, partnership, etc.), the states or places in which it was organized, the states or places

in which it does business and the states or places in which it is headquartered, the states or places in which it has agents and whether those agents are registered for the service of process and the general business engaged in by the agent(s); (3) when used in reference to a governmental entity, state its full name and present or last known address and telephone number, the general governmental activities, purposes of and for and in which it is engaged, its form of organization (corporation, partnership, etc.), the states or places in which it was organized, all sources of its authority. and the states or places in which it is headquartered, the states or places in which it has agents and whether those agents are registered for the service of process and the general business or governmental activity engaged in by the agent(s);and (4) when used in reference to a document, state its date including the dates of any and all revisions (including a listing of the material content of each revision), identify all or each of the authors of each version including their addresses(s) and all recipient(s) including their addresses, whether intended or not, from and to whom addressed, and the type of nature thereof including a summary of its material content, and its present location and custodian. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person. Once a business has been identified in accordance with this subparagraph, only the name of that business need be listed in response to subsequent discovery requesting the identification of that business. Once a governmental entity has been identified in accordance with this subparagraph, only the name of that business need be listed in response to subsequent discovery requesting the identification of that governmental entity. Once a document has been identified in accordance with this subparagraph, only the name of that document need be listed in response to subsequent discovery requesting the identification of that document.

B. Document: "Document" includes any kind of written, graphic, or electronic magnetic, optical, written or typed or other form of media including data, held in any form of media, however stored, produced or reproduced, or any kind of description, whether sent or received or neither, including but not limited to: papers, letters, drawings, including architectural drawing, books, book entries, accounts, letters, electronic mail or e-mail messages, photographs, objects, tangible things, including architectural models, correspondence, telegrams, cables, telex messages, telephone messages, memoranda, notes, data, notations, work papers, preliminary drafts of final work product, interoffice communications, interdepartmental communications, transcripts, minutes, reports and recordings of telephone and other conversations, or of interviews, or of conferences, or of committee or other meetings, affidavits, statements, summaries, opinions, reports, studies, analyses, formulas, plans, specifications, evaluations, contracts, licenses, agreements, instruments, deeds, offers, ledgers, journals, time sheets or records, books or records of accounts, summaries of accounts, tax returns, bank statements, financial records, calendars, computations, tax returns, minutes of or notes of any meeting, photocopies, xerox or xerographic or mimeographic copies or similes, facsimiles, descriptions, invoices, receipts, purchase orders evidence of payment, sound recordings, video recordings, films, photographs, slides, negatives, microfilm, barcode, whether originals or copies and however copied, instructions, notebooks, drafts, chits, checks and stubs thereof, scrapbooks, agreements, bills, receipts, balance sheets, income statements, questionnaires, answers to questionnaires, statistical records, desk calendars, appointment books, diaries, lists, tabulations, charts, graphs, maps, surveys, sound recordings, computer disks, tapes, and other computer storage media, magnetic tapes, computer printouts, data processing input and output, microfilm, sound recordings, video recordings, films,

photographs, slides, negatives, microfilm, barcode, whether originals or copies and however copied, and including all non-identical copies, wherever located, however produced or reproduced, and in whatever language or encryption form, and any underlying or supporting material when used in the preparation thereof, all other records kept by electronic, photographic or mechanical means, and things similar to any of the foregoing however denominated, whether currently in existence or already destroyed. A draft or non-identical or annotated copy is a separate document in this meaning of this term.

C. "Identify the source" means to: (1) identify all documents and non-written communications upon which you rely in support of a contention, allegation, or answer at issue; (2) state the inferences you draw from each source upon which you rely in support of such contention, allegation, or answer; and (3) identify all persons whom you know or believe to be knowledgeable with respect to the subject matter of contention, allegation or answer including the full name, residential address, occupation, employer including employer's address and telephone number of each and every such person.

D. "Person" or "Persons" means any individual, natural person, corporation, partnership, limited liability entity, trust, unincorporated association business, governmental unit, agency or authority, or any other entity whatsoever and shall include not only natural persons but also firms, partnerships, associations and corporations, divisions, departments, bureaus, offices or other units thereof, as well as any foreign equivalent thereof, and shall simultaneously require the answer to include all persons (plural) though the singular use is set forth in the question.

E. "Communication" includes any transmission of any information whatsoever including but not limited to data or document and all forms of inter-personal communication, including but not limited to meetings, telephone, telex, telecopier or facsimile and verbal and non-verbal acts intended to or actually conveying information.

F. "Plaintiff(s)" shall be synonymous and refers to the Plaintiff named in this action, either together, individually, or in any relevant or related fiduciary capacity and any of their agents, attorneys, employees, or representatives. See also Parties.

H. "Defendant" shall be synonymous and refers to the Defendants named in this action, together, individually, or in any relevant of related fiduciary capacity and any of their agents, attorneys, employees or representatives, successors, predecessors or assigns. See also Parties below.

I. Parties/Deponent: The terms "plaintiff', "petitioner", "respondent" and "defendant" as well as "deponent" as well as a party's or the deponent's full or abbreviated name or a pronoun referring to a party or deponent mean the party or deponent and, where applicable, its officers, directors, employees, partners, corporate parents, subsidiaries of affiliates. This definition is not intended to impose a discovery obligation on any person who is not the deponent nor a party to the litigation, but is intended to call for all responsive documents within the possession, custody or control of the party or deponent whether within or without this country, including without limitation the deponent's or party's foreign offices, officers directors, employees, partners, corporate parents, subsidiaries or affiliates.

J. Concerning: The term "concerning" means of, from, to, among, between, relating to, referring to, describing, evidencing (evincing) or constituting.

SPECIFIC DEFINITIONS

A. "Hall" shall mean Defendant Benjamin L. Hall, Jr., as he is the Trustee of Gossamer Wing Realty Trust joined by Brian M. Hall as he is Trustee of Barons Land Trust, unless otherwise specified.

B. "VCS" shall Defendant Vineyard Conservation Society, Inc. unless otherwise specified.

C. "VCS Premises" shall mean and include all lands or ways owned or managed by or on behalf of VCS on or in the vicinity of Moshup Trail, Aquinnah, Massachusetts which are subject to the claims herein.

D. "Hall Premises" shall mean and include all lands owned or managed by or on behalf of Hall on or in the vicinity of Moshup Trail, Aquinnah, Massachusetts which are subject to the claims herein including Set-off lots 710, 177 and 242..

E. "Town" shall mean include the Town of Aquinnah, including every agency, board, committee, employee, agent, administrator, attorney, or other person that are a part thereof.

F. "Town Premises" shall mean and include all lands or ways owned or managed by or on behalf of the Town on or in the vicinity of Moshup Trail, Aquinnah, Massachusetts which are subject to the claims herein.

G. "Lot" or "lots" shall be all parcels of land subject to the within matter, whether in their original size and shape as set-off by the Commissioner Richard Pease or in the petition to partition in 1878 that created them, those being set-off Lots 1-173, Lots 174-178 inclusive, and Lots 179 et seq., or any portions thereafter divided.

H. "Land Bank" shall mean include the Martha's Vineyard Land Bank, including every agency, board, committee, employee, agent, administrator, attorney, or other person that are a part thereof.

I. "Land Bank Premises" shall mean and include all lands or ways owned or managed by or on behalf of the Land Bank on or in the vicinity of Moshup Trail, Aquinnah, Massachusetts which are subject to the claims herein.

Rules of Construction

1. All/Each. The terms "all" and "each" shall be construed as all and each.

2. And/Or. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request ail responses that might otherwise be construed to be outside of its scope.

3. Number. The use of the singular form of any word includes the plural and vice versa.

4. Gender. Words in the masculine gender include the feminine gender.

5. Conjuntive/disjunctive. The conjunctive includes the disjunctive, and vice versa.

6. Verb tenses. Each verb is meant to include, where appropriate, the present, past and future tenses of that verb.

INSTRUCTIONS

A. These Request for Admissions are deemed to be continuing and defendant is required to supplement its answers thereto as to the extent that it becomes aware of further information called for by these Request for Admissions.

B. To the extent that an Request for Admission calls for information which cannot at this time be furnished precisely and completely, such information as the defendant can furnish should be included in the answer together with a statement that further information sought cannot be furnished and the reasons why it is not available. If information that cannot be furnished is or may be available from another person, identify this person in a manner suitable for identification in a subpoena duces tecum and state in detail your reasons for believing that this person has the described or requested information.

C. If the defendant claims that any of the information or documents to be identified hereunder are privileged, the plaintiff should; (1) identify the document or information; (2) state in general terms its subject matter and the Request for Admission to which it is responsive; and (3) state the basis for its claim of privilege.

D. The defendant is required to repeat each Request for Admission immediately prior to the answer to the said Request for Admission.

REQUESTS FOR ADMISSION

That the following statements are true:

1. That the Town does not list Zack's Cliffs Road as a public way.

2. That the Town does not list Radio Tower Road as a public way.

3. That the Town does not list Old South Road as it extends north and east from the intersection with Church Street as a public way.

4. That State Road as it travels today did not exist as a public road until after 1900.

5. That there was no laid out and accepted public way in the Town of Gay Head at the time of its establishment.

6. That owners of Set Off lots 1 through 173 inclusive as recorded at the Dukes County Registry of Deeds at Book 49, had rights of passage across the common lands from 1870 to at least the date of the partition dated 1878.

7. There is no evidence that there was an actual (subjective) intent to give only landlocked land to those persons given title to lots numbered 1-173 as recorded at the Dukes County Registry of Deeds at Book 49.

8. There is no evidence that there was an actual (subjective) intent to give only landlocked land to those persons given title to lots numbered 1-178 as recorded at the Dukes County Registry of Deeds at Book 49 and 65.

9. There is no evidence that there was an actual (subjective) intent to give only landlocked land to those persons given title to lots numbered 179 and above as recorded at the Dukes County Registry of Deeds at Book 65.

10. That the Land Bank waives any claim of easement for Land Bank premises that do not benefit either from an appurtenant express easement to or from frontage on a public way.

11. Zack's Cliffs Road is a public way.

12. Radio Tower Road is a public way.

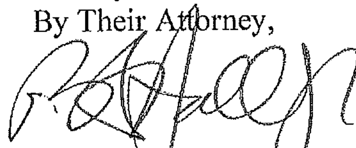
13. Old South Road as it extends north and east from the intersection with Church Street is a public way by prescription.

14. The Land Bank has not formally voted to adopt a set of policies or rules or regulations regarding acquiring partial interests in realty.

15. That a member of the firm of Reynolds, Rappaport & Kaplan works for the Land Bank in acquiring partial interests.

DATED: October 3, 2008
Edgartown, Massachusetts

Benjamin L. Hall, Jr.
And Brian M. Hall
As they are Trustees aforesaid
By Their Attorney,



Benjamin Lambert Hall, Jr.
45 Main Street, Box 5155
Edgartown, MA 02539
(508) 627-5900
BBO #547622

EXHIBIT B-2

Hemenway&Barnes LLP

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TELEPHONE 617-227-7940
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ALFRED HEMENWAY
(1863-1927)
CHARLES B. BARNES
(1893-1956)

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MICHAEL B. ELEFANTE
MICHAEL J. PUZO
THOMAS L. GUIDI
EDWARD NOTIS-MCCONARTY
DIANE C. TILLOTSON
STEPHEN W. KIDDER
SUSAN HUGHES BANNING
FREDERIC J. MARX
NANCY B. GARDINER
KURT F. SOMERVILLE
TERESA A. BELMONTE
BRIAN C. BRODERICK
CHARLES FAYERWEATHER
NANCY E. DEMPZE
JOSEPH L. BIERWIRTH, JR
DENNIS R. DELANEY
MARK B. ELEFANTE

CORNELIA R. TENNEY
JOHN J. SICILIANO
ROBIN L. SHEEDY
MARCIA M. GOVERNALE
NISHA MARKS SARDELLA
SARAH M. WAELCHLI
SHANA E. MALDONADO

GEORGE H. KIDDER
DAVID H. MORSE
ROY A. HAMMER
LAWRENCE T. PERERA
JOHN J. MADDEN
GEORGE T. SHAW
DEBORAH J. HALL
OF COUNSEL

DIANE C. TILLOTSON
Direct Dial (617) 557-9725
dtillotson@hembar.com

October 9, 2008

Benjamin Lambert Hall, Jr., Esq.
45 Main Street
P.O. Box 5155
Edgartown, MA 02539

Re: *Maria A. Kitras, et al. v. Town of Aquinnah, et al.*
Misc. Case No. 238738, TROMBLY, J

Dear Mr. Hall:

Enclosed please find the defendant Martha's Vineyard Land Bank's objections to your recently propounded discovery.

Sincerely,

Diane C. Tillotson

DCT/mac
Enclosure

cc: Service list

425442

COMMONWEALTH OF MASSACHUSETTS

DUKES, ss

LAND COURT DEPARTMENT
MISC. CASE NO. 238738,
TROMBLY, J

MARIA A. KITRAS, AS SHE IS THE TRUSTEE OF BEAR REALTY TRUST, ET AL,

Plaintiffs

v.

TOWN of AQUINNAH, ET AL,

Defendants

DEFENDANT MARTHA'S VINEYARD LAND BANK'S OBJECTIONS TO FIRST REQUEST FOR ADMISSIONS AND INTERROGATORIES BY DEFENDANT BENJAMIN L. HALL, JR.

Pursuant to Rules 26(b)(1), 33(a)(3), and 36(a), Mass. R. Civ. P., defendant Martha's Vineyard Land Bank ("MVLB") hereby objects to defendant Benjamin L. Hall, Jr.'s ("defendant Hall") first request for admissions, request for production of documents and interrogatories directed to MVLB in their entirety. As grounds therefor, MVLB states:

1. Each of the discovery requests propounded by defendant Hall seeks information that is neither relevant to the above-captioned action nor reasonably calculated to lead to the discovery of admissible evidence, because defendant Hall's cross-claims against other defendants, including MVLB, were dismissed by this Court (Lombardi, J.) on September 14, 2007 and accordingly there is no claim by defendant Hall to which these discovery requests relate.

2. The last order relating to discovery in this case was entered by Judge Lombardi on September 21, 2007 in response to a motion by defendant Vineyard

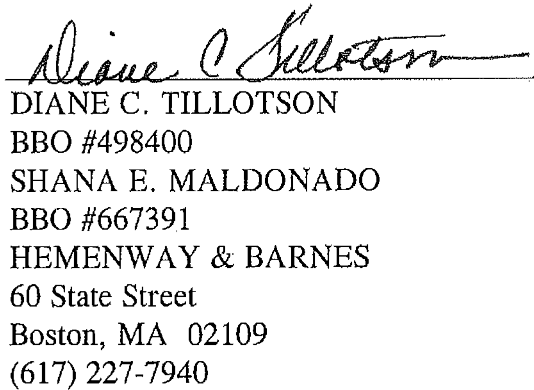
Conservation Society ("VCS"), joined by others, including MVLB, to extend the discovery deadline. That order stated that discovery was to be completed by all parties within 30 days of plaintiffs' service on all defendants of copies of the documents plaintiffs intended to use at trial. Plaintiffs served these documents on July 28, 2008; accordingly, discovery was to have been completed by August 28, 2008. Pursuant to the Court's order of September 21, 2007, defendant VCS noticed the deposition of John J. Decoulos for August 27, 2008 and served interrogatories on the plaintiffs on August 19, 2008, all prior to the 30 day discovery deadline of August 28, 2008. Defendant Hall propounded no discovery prior to August 28, 2008 and requested no extension of the discovery deadline.

3. At the status hearing on September 9, 2008, counsel for VCS requested a further brief extension on discovery in order to review the answers to interrogatories served by plaintiffs (not due as of the date of the conference) for purposes of determining whom plaintiffs intended to call as witnesses and whether any of these persons needed to be deposed. After discussion, there was agreement (memorialized in a proposed order submitted by counsel for VCS but not yet entered by the court) that discovery would be completed by October 3, 2008 in order to allow the possibility of further depositions necessitated by identification of new witnesses in plaintiffs answers to interrogatories. Even assuming the court adopts the proposed order, the discovery requests propounded by defendant Hall are outside both the time limit and scope of further discovery permitted by the order.

Respectfully submitted,

MARTHA'S VINEYARD LAND
BANK

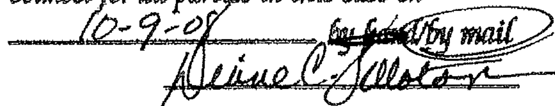
By its Attorneys,



DIANE C. TILLOTSON
BBO #498400
SHANA E. MALDONADO
BBO #667391
HEMENWAY & BARNES
60 State Street
Boston, MA 02109
(617) 227-7940

Dated: October 9, 2008

I hereby certify under pains and penalties of perjury that this document was served upon counsel for all parties in this case on



10-9-08 ~~by hand~~/by mail

EXHIBIT C-1

COMMONWEALTH OF MASSACHUSETTS

DUKES, SS.

LAND COURT
DOCKET NO. 238738 (CT)

MARIA A. KITRAS, Trustee, et als.,

Plaintiffs,

V.

TOWN OF AQUINNAH, et als.,

Defendants.

FIRST REQUEST FOR ADMISSIONS BY DEFENDANT BENJAMIN L. HALL, JR, As he is TRUSTEE OF GOSSAMER WING REALTY TRUST, AND BRIAN M. HALL as he is TRUSTEE OF BARONS LAND TRUST TO BE ANSWERED BY THE DEFENDANT, VINEYARD CONSERVATION SOCIETY

DEFENDANT BENJAMIN L. HALL, JR, As he is TRUSTEE of GOSSAMER WING REALTY TRUST joined by BRIAN M. HALL as he is TRUSTEE OF BARONS LAND TRUST (collectively "Hall"), by their attorney, Benjamin L. Hall, Jr., demand that defendant VINEYARD CONSERVATION SOCIETY respond to the following Request for Admissions, under oath and in writing, pursuant to Rule 36 of the Massachusetts Rules of Civil Procedure and deliver to the undersigned counsel within 30 days of the date of service thereof.

DEFINITIONS AND INSTRUCTIONS

These Instructions and Definitions form are an integral part of the Request for Admissions that follow:

DEFINITIONS

As used herein, the following words and phrases will have the following meanings:

A. As used herein, the words "identify" or "identification" shall have their regular meaning but shall include provision of specific information as follows: (1) when used in reference to a natural person, state his or her full name, present or last known home and business address, occupation and telephone number including employer's name, address and telephone number; (2) when used in reference to a business, state its full name and present or last known address and telephone number, the general business in which it is engaged, its form of organization (corporation, partnership, etc.), the states or places in which it was organized, the states or places

in which it does business and the states or places in which it is headquartered, the states or places in which it has agents and whether those agents are registered for the service of process and the general business engaged in by the agent(s); (3) when used in reference to a governmental entity, state its full name and present or last known address and telephone number, the general governmental activities, purposes of and for and in which it is engaged, its form of organization (corporation, partnership, etc.), the states or places in which it was organized, all sources of its authority. and the states or places in which it is headquartered, the states or places in which it has agents and whether those agents are registered for the service of process and the general business or governmental activity engaged in by the agent(s);and (4) when used in reference to a document, state its date including the dates of any and all revisions (including a listing of the material content of each revision), identify all or each of the authors of each version including their addresses(s) and all recipient(s) including their addresses, whether intended or not, from and to whom addressed, and the type of nature thereof including a summary of its material content, and its present location and custodian. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person. Once a business has been identified in accordance with this subparagraph, only the name of that business need be listed in response to subsequent discovery requesting the identification of that business. Once a governmental entity has been identified in accordance with this subparagraph, only the name of that business need be listed in response to subsequent discovery requesting the identification of that governmental entity. Once a document has been identified in accordance with this subparagraph, only the name of that document need be listed in response to subsequent discovery requesting the identification of that document.

B. Document: "Document" includes any kind of written, graphic, or electronic magnetic, optical, written or typed or other form of media including data, held in any form of media, however stored, produced or reproduced, or any kind of description, whether sent or received or neither, including but not limited to: papers, letters, drawings, including architectural drawing, books, book entries, accounts, letters, electronic mail or e-mail messages, photographs, objects, tangible things, including architectural models, correspondence, telegrams, cables, telex messages, telephone messages, memoranda, notes, data, notations, work papers, preliminary drafts of final work product, interoffice communications, interdepartmental communications, transcripts, minutes, reports and recordings of telephone and other conversations, or of interviews, or of conferences, or of committee or other meetings, affidavits, statements, summaries, opinions, reports, studies, analyses, formulas, plans, specifications, evaluations, contracts, licenses, agreements, instruments, deeds, offers, ledgers, journals, time sheets or records, books or records of accounts, summaries of accounts, tax returns, bank statements, financial records, calendars, computations, tax returns, minutes of or notes of any meeting, photocopies, xerox or xerographic or mimeographic copies or similes, facsimiles, descriptions, invoices, receipts, purchase orders evidence of payment, sound recordings, video recordings, films, photographs, slides, negatives, microfilm, barcode, whether originals or copies and however copied, instructions, notebooks, drafts, chits, checks and stubs thereof, scrapbooks, agreements, bills, receipts, balance sheets, income statements, questionnaires, answers to questionnaires, statistical records, desk calendars, appointment books, diaries, lists, tabulations, charts, graphs, maps, surveys, sound recordings, computer disks, tapes, and other computer storage media, magnetic tapes, computer printouts, data processing input and output, microfilm, sound recordings, video recordings, films,

photographs, slides, negatives, microfilm, barcode, whether originals or copies and however copied, and including all non-identical copies, wherever located, however produced or reproduced, and in whatever language or encryption form, and any underlying or supporting material when used in the preparation thereof, all other records kept by electronic, photographic or mechanical means, and things similar to any of the foregoing however denominated, whether currently in existence or already destroyed. A draft or non-identical or annotated copy is a separate document in this meaning of this term.

C. "Identify the source" means to: (1) identify all documents and non-written communications upon which you rely in support of a contention, allegation, or answer at issue; (2) state the inferences you draw from each source upon which you rely in support of such contention, allegation, or answer; and (3) identify all persons whom you know or believe to be knowledgeable with respect to the subject matter of contention, allegation or answer including the full name, residential address, occupation, employer including employer's address and telephone number of each and every such person.

D. "Person" or "Persons" means any individual, natural person, corporation, partnership, limited liability entity, trust, unincorporated association business, governmental unit, agency or authority, or any other entity whatsoever and shall include not only natural persons but also firms, partnerships, associations and corporations, divisions, departments, bureaus, offices or other units thereof, as well as any foreign equivalent thereof, and shall simultaneously require the answer to include all persons (plural) though the singular use is set forth in the question.

E. "Communication" includes any transmission of any information whatsoever including but not limited to data or document and all forms of inter-personal communication, including but not limited to meetings, telephone, telex, telecopier or facsimile and verbal and non-verbal acts intended to or actually conveying information.

F. "Plaintiff(s)" shall be synonymous and refers to the Plaintiff named in this action, either together, individually, or in any relevant or related fiduciary capacity and any of their agents, attorneys, employees, or representatives. See also Parties.

H. "Defendant" shall be synonymous and refers to the Defendants named in this action, together, individually, or in any relevant of related fiduciary capacity and any of their agents, attorneys, employees or representatives, successors, predecessors or assigns. See also Parties below.

I. Parties/Deponent: The terms "plaintiff', "petitioner", "respondent" and "defendant" as well as "deponent" as well as a party's or the deponent's full or abbreviated name or a pronoun referring to a party or deponent mean the party or deponent and, where applicable, its officers, directors, employees, partners, corporate parents, subsidiaries of affiliates. This definition is not intended to impose a discovery obligation on any person who is not the deponent nor a party to the litigation, but is intended to call for all responsive documents within the possession, custody or control of the party or deponent whether within or without this country, including without limitation the deponent's or party's foreign offices, officers directors, employees, partners, corporate parents, subsidiaries or affiliates.

J. Concerning: The term "concerning" means of, from, to, among, between, relating to, referring to, describing, evidencing (evincing) or constituting.

SPECIFIC DEFINITIONS

A. "Hall" shall mean Defendant Benjamin L. Hall, Jr., as he is the Trustee of Gossamer Wing Realty Trust joined by Brian M. Hall as he is Trustee of Barons Land Trust, unless otherwise specified.

B. "VCS" shall Defendant Vineyard Conservation Society, Inc. unless otherwise specified.

C. "VCS Premises" shall mean and include all lands or ways owned or managed by or on behalf of VCS on or in the vicinity of Moshup Trail, Aquinnah, Massachusetts which are subject to the claims herein.

D. "Hall Premises" shall mean and include all lands owned or managed by or on behalf of Hall on or in the vicinity of Moshup Trail, Aquinnah, Massachusetts which are subject to the claims herein including Set-off lots 710, 177 and 242..

E. "Town" shall mean include the Town of Aquinnah, including every agency, board, committee, employee, agent, administrator, attorney, or other person that are a part thereof.

F. "Town Premises" shall mean and include all lands or ways owned or managed by or on behalf of the Town on or in the vicinity of Moshup Trail, Aquinnah, Massachusetts which are subject to the claims herein.

G. "Lot" or "lots" shall be all parcels of land subject to the within matter, whether in their original size and shape as set-off by the Commissioner Richard Pease or in the petition to partition in 1878 that created them, those being set-off Lots 1-173, Lots 174-178 inclusive, and Lots 179 et seq., or any portions thereafter divided.

Rules of Construction

1. All/Each. The terms "all" and "each" shall be construed as all and each.

2. And/Or. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request ail responses that might otherwise be construed to be outside of its scope.

3. Number. The use of the singular form of any word includes the plural and vice versa.

4. Gender. Words in the masculine gender include the feminine gender.

5. Conjuntive/disjunctive. The conjunctive includes the disjunctive, and vice versa.

6. Verb tenses. Each verb is meant to include, where appropriate, the present, past and future tenses of that verb.

INSTRUCTIONS

A. These Request for Admissions are deemed to be continuing and defendant is required to supplement its answers thereto as to the extent that it becomes aware of further information called for by these Request for Admissions.

B. To the extent that an Request for Admission calls for information which cannot at this time be furnished precisely and completely, such information as the defendant can furnish should be included in the answer together with a statement that further information sought cannot be furnished and the reasons why it is not available. If information that cannot be furnished is or may be available from another person, identify this person in a manner suitable for identification in a subpoena duces tecum and state in detail your reasons for believing that this person has the described or requested information.

C. If the defendant claims that any of the information or documents to be identified hereunder are privileged, the plaintiff should; (1) identify the document or information; (2) state in general terms its subject matter and the Request for Admission to which it is responsive; and (3) state the basis for its claim of privilege.

D. The defendant is required to repeat each Request for Admission immediately prior to the answer to the said Request for Admission.

REQUESTS FOR ADMISSION

That the following statements are true:

1. That the Town does not list Zack's Cliffs Road as a public way.

2. That the Town does not list Radio Tower Road as a public way.

3. That the Town does not list Old South Road as it extends north and east from the intersection with Church Street as a public way.

4. That State Road as it travels today did not exist as a public road until after 1900.

5. That there was no laid out and accepted public way in the Town of Gay Head at the time of its establishment.

6. That owners of Set Off lots 1 through 173 inclusive as recorded at the Dukes County Registry of Deeds at Book 49, had rights of passage across the common lands from 1870 to at least the date of the partition dated 1878.

7. There is no evidence that there was an actual (subjective) intent to give only landlocked land to those persons given title to lots numbered 1-173 as recorded at the Dukes County Registry of Deeds at Book 49.

8. There is no evidence that there was an actual (subjective) intent to give only landlocked land to those persons given title to lots numbered 1-178 as recorded at the Dukes County Registry of Deeds at Book 49 and 65.

9. There is no evidence that there was an actual (subjective) intent to give only landlocked land to those persons given title to lots numbered 179 and above as recorded at the Dukes County Registry of Deeds at Book 65.

10. That VCS waives any claim of easement for VCS premises that do not benefit either from an appurtenant express easement to or from frontage on a public way.

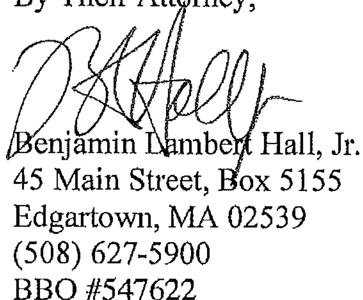
11. Zack's Cliffs Road is a public way.

12. Radio Tower Road is a public way.

13. Old South Road as it extends north and east from the intersection with Church Street is a public way by prescription.

DATED: October 3, 2008
Edgartown, Massachusetts

Benjamin L. Hall, Jr.
And Brian M. Hall
As they are Trustees aforesaid
By Their Attorney,



Benjamin Lambert Hall, Jr.
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Edgartown, MA 02539
(508) 627-5900
BBO #547622

EXHIBIT C-2

THOMAS A. LA TANZI
LAWRENCE O. SPAULDING, JR.
DUANE P. LANDRETH
BROOKS S. THAYER
LISA F. SHERMAN
MELANIE J. O'KEEFE
BONNIE-JEAN A. NUNHEIMER

LA TANZI, SPAULDING & LANDRETH, P.C.
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DANA A. BERRY
JOSEPH E. MULLIN
CHRISTOPHER J. WARD**

OF COUNSEL
HARRY SARKIS TERKANIAN
JENNIFER S. D. ROBERTS*
*ALSO ADMITTED IN NY
**ALSO ADMITTED IN FL

October 7, 2008

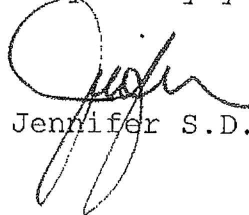
Benjamin Lambert Hall, Jr.
45 Main Street,
P.O. Box 5155
Edgartown, MA 02539

Re: Maria Kitras, et al.
vs. Town of Aquinnah, et al.
Misc. No. 238738

Dear Ben:

Enclosed please find the defendant Vineyard Conservation Society, Inc.'s response to your recently propounded discovery.

Very truly yours,



Jennifer S.D. Roberts

Encl.

cc: Service List

COMMONWEALTH OF MASSACHUSETTS

DUKES, ss.

LAND COURT
DOCKET NO. 238738

* * * * * * * * * * * * * * * *

MARIA A. KITRAS, Trustee, et als.,

Plaintiffs,

vs.

TOWN OF AQUINNAH, et als.,

Defendants.

* * * * * * * * * * * * * * * *

DEFENDANT VINEYARD CONSERVATION SOCIETY, INC.'S RESPONSE TO FIRST REQUEST FOR ADMISSIONS AND INTERROGATORIES BY DEFENDANT BENAJMIN L. HALL, JR.

Pursuant to Rules 26(b)(1), 33(a)(3), and 36(a), Mass. R. Civ. P., defendant Vineyard Conservation Society, Inc. ("VCS") hereby objects to defendant Benjamin L. Hall, Jr.'s ("defendant Hall") first request for admissions and interrogatories directed to VCS. As grounds therefor, VCS states:

1. That the discovery propounded by defendant Hall seeks information that is neither relevant to the above-captioned action nor reasonably calculated to lead to the discovery of admissible evidence, because defendant Hall's cross-claims against other defendants, including VCS, were

dismissed by this Court (Lombardi, J.) in September, 2007 and so there is no claim by defendant Hall to which these discovery requests relate.

2. That, pursuant to the proposed order submitted to the Court, defendants were to complete discovery on or before October 3, 2008 and defendant Hall's discovery requests were not even received by counsel for VCS until October 7, 2008.

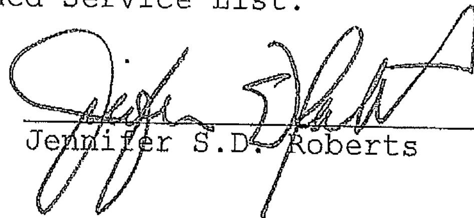
Jennifer S.D. Roberts
BBO No. 541715
Attorney for Defendant
Vineyard Conservation
Society, Inc.

LaTanzi, Spaulding & Landreth
8 Cardinal Lane,
P.O. Box 2300
Orleans, MA 02653
(508) 255-2133

Dated: October 7, 2008

Certificate Of Service

I hereby certify that I served a copy of the foregoing document by mailing a copy of the same, postage prepaid, to the individuals on the attached Service List.



Jennifer S.D. Roberts

EXHIBIT D-1

(SEAL)

COMMONWEALTH OF MASSACHUSETTS
Land Court
Department of the Trial Court
Miscellaneous Case No. 238738

MARIA A. KITRAS, as TRUSTEE,[1] & others,[2]
Plaintiffs

vs.

TOWN OF AQUINNAH & others,[3]
Defendants

ORDER ALLOWING MOTION TO BIFURCATE

Pursuant to Mass. R. Civ. P. 54 (b), this court (Lombardi, J.) directed the entry of judgment (Rule 54 (b) judgment) on August 21, 2003. A number of parties filed and argued various motions following the Rule 54 (b) judgment. In particular, one motion led to this court issuing an order on December 22, 2003, which denied a motion to reconsider or correct the June 4, 2001 decision of the court (Green, J.) and the Rule 54 (b) judgment. Thereafter, four notices of appeal entered on the docket during January 2004.

The Appeals Court heard oral argument on April 11, 2005, and issued its decision on

---

[1] of Bear Realty Trust, Bear II Realty Trust, and Gorda Realty Trust.

[2] James J. Decoulos, as co-trustee of Gorda Realty Trust and Bear II Realty Trust; Victoria Brown; Gardner Brown, Jr; Mark Harding and Eleanor P. Harding, as trustee of Eleanor P. Harding Trust.

[3] Benjamin L. Hall, Jr., as trustee of Gossamer Wing Realty Trust; David Wice; Betsy Wice; Susan Smith; Russell Smith; Vineyard Conservation Society, Inc.; Caroline Kennedy; Caroline Kennedy and Edward Schlossberg, as they are guardians of Rose Kennedy Schlossberg, Tatiana Celia Kennedy Schlossberg, and John Bouvier Kennedy Schlossberg; George B. Brush, as trustee of Toad Rock Realty Trust; South Shore Beach, Inc.; Leonard F. Vanderhoop, Jr.; Joanne Fruchtman a/k/a JoAnn Fruchtman; Jack Fruchtman; Peter Ochs; Hope E. Horgan; Helen S. James; Donald Taylor; Moshup Trail II Limited Partnership; Richard Hoyle; Charles E. Derby; Shirley A. Jardin; persons unknown or unascertained being the heirs of Wallace E. Francis; Jeffrey Madison, as trustee of Tacknash Realty Trust; Estate of Edwin D. Vanderhoop; John A. Wiener; Sally D. Wiener; Patrick J. Evans; Scott Harrison; Julie B. Hoyle; Carmella Stephens, as trustee of Deer Meadow Realty Trust; Stella Winifred Hopkins a/k/a Winifred S. Hopkins; persons unknown or unascertained being the heirs of Esther Howwasswee; persons unknown or unascertained being the heirs of Savannah F. Cooper; Heidi B. Stutz; Michael W. Stutz; Hamilton Cammann; Mary Elizabeth Pratt; persons unknown or unascertained being the heirs of Amos Smalley; June Noble; Richard Sullivan; Sarah Saltonstall; Steven Yaffe; Thomas Seeman; Lawrence B. Evans; Beverly A. Evans; Estate of William Vanderhoop; Kevin Craig; Cynthia Craig; Flavia Stutz; Robert Stutz; Selma Greenberg; William Greenberg; Wilma Greenberg; Alexandra Whitcomb; Rolph Lumley; Aurilla Fabio; other persons unknown or unascertained; and the United States of America, as trustee for the Wampanoag Tribe of Gay Head.

August 18, 2005. Kitras v. Aquinnah, 64 Mass. App. Ct. 285, further appellate review denied, 445 Mass. 1109 (2005).[4] The Kitras court reversed the Rule 54 (b) judgment, vacated the order of December 22, 2003, and remanded the case to this court for further proceedings consistent with the opinion of the court. Id. at 301.

On or about March 6, 2006, Vineyard Conservation Society, Inc. (VCS) submitted a request for a status conference. At a status conference held on April 25, 2006, VCS moved orally to bifurcate the further proceedings in the case at bar. This court established a deadlines by which VCS would file and serve a written motion and any other party could submit a responsive filing.

Accordingly, VCS filed on May 31, 2006, Motion to Bifurcate Proceedings (bifurcation motion). The following filings entered on the docket: (a) Joinder in Motion to Bifurcate by Caroline Kennedy on June 14, 2006; (b) Joiner [sic] in Motion to Bifurcate by Jack Fruchtman, Jr. and JoAnn Fruchtman on June 19, 2006; (c) Town of Aquinnah's Joinder in Motion to Bifurcate Proceedings by Vineyard Conservation Society, Inc. on June 23, 2006; (d) Defendant Gossamer Wing Realty Trust & Baron Land Trust Opposition to the Motion of Defendant Vineyard Conservation Society to Bi-Furcate [sic] the Issue of Intent to Create an Easement by Necessity on June 30, 2006; (e) David H. Wice and Betsy W. Wice's Joinder in Motion to Bifurcate Proceedings Filed by Vineyard Conservation Society, Inc. on June 30, 2006; and (f) Memorandum of Plaintiff, Maria A. Kitras, Trustee to Support Postponement of Bifurcation Order (Kitras memorandum) on July 3, 2006.

This court will first consider the Kitras memorandum. While not submitting a motion, Kitras "requests that the Court postpone the bifurcation and consider assigning this case to a Tracking Order" under Standing Order 1-04. Additionally, Kitras notes that the Town of Aquinnah

---

[4] In denying the application for further appellate review (FAR application), the Court issued an order stating that "[i]n the event the plaintiffs again seek to join the Tribe in the Land Court, the defendants can relitigate the question of delay in the plaintiffs' attempts to join the Tribe." While not part of the published disposition of the FAR application, the above quoted order appears on the Kitras docket maintained by the Court.

joined in support of the bifurcation motion and states that "[a]lthough it is not specifically requested, it appears that the Town of Aquinnah may, in the future, want to include the 'Aquinnah District of Planning Concern' as a necessary party."

The instant action commenced on May 20, 1997, long before the effective date of Standing Order 1-04, i.e., October 4, 2004. This court finds that the most prudent and efficient approach to advance the case after nine years of litigation is to rule on the pending bifurcation motion without further delay. Thus, the request contained in the Kitras memorandum is DENIED.

The bifurcation motion seeks to have this court first consider whether an easement was intended at the time of the setoff in the 1870s and, if so, then to determine the location of such an easement. VCS contends that

> "[b]ecause of the effort and expense involved in adjudicating the location of any easement, which would not be necessary if this Court finds that there was no intent to create an easement, it would be a more efficient use of the Court's and the parties' time and resources to resolve that issue first."

In opposition to the bifurcation motion, Benjamin L. Hall, Jr. (Hall), as trustee of Gossamer Wing Realty Trust and Baron Land Trust, argues that "the first order of business" should a determination as to what lots and what parties remain interested in the case. Hall correctly observes that the uncertainty as to lots and parties was a matter worthy of note by the Kitras court. See id. at 289-290.

This court, however, disagrees with the Hall argument. With the number of individuals and entities actively participating in the case at bar, this court finds that it has before it those parties necessary to present pertinent evidence and to argue the question of law concerning the existence vel non of certain easements. The adversarial process will be well-served by the present parties and their advocates.

The question of what lots and what parties were implicated by a claim of possible easements did not deter the Appeals Court from deciding certain legal issues. The Kitras court proceeded as if all persons and lots were properly before it "[i]n the interest of expediency and

because our decision today does not depend upon it . . . ." Id. at 290. In considering the bifurcation motion, this court finds that it is appropriate to apply that same reasoning as the Kitras court.

In their filing, David H. Wice and Betsy W. Wice argue cogently in favor of the bifurcation motion: "Before Defendants are put to the additional effort and expense of preparing documentation and retaining counsel, surveyors, engineers and historians to address the issues 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." (emphasis in original). This court agrees with that approach.

In issuing its decision, the court "assumed, for lots numbered 189 or 190 and above, the intent to create easements . . . . [T]he assumption may ultimately be found to be factually correct, but this is not inevitable." Id. at 298. The first task for this court, therefore, is to decide whether there is a factual or legal basis for that assumption.

Should this court find, after full briefing and argument, that the requisite intent was present in 1878 to create one or more easements by necessity, it will then be timely to identify the universe of lot owners that might be affected by such easements. Once additional persons, if any, have been joined as necessary parties, this court will proceed with the second phase of the proceedings to determine the location of those easements.

Based upon the foregoing, this court ALLOWS the bifurcation motion. The parties must now decide upon the procedural route to follow on the question of the existence of easements. This court recognizes the general rule that "[w]hen intent is at the core of a controversy, summary judgment seldom lies." Madden v. Estin, 28 Mass. App. Ct. 392, 395 (1990). See Brunner v. Stone & Webster Eng'g Corp., 413 Mass. 698, 705 (1992). See also Flesner v. Technical Communications Corp., 410 Mass. 805, 809 (1991). "That is not to say, however, that, in such cases, summary judgment is always inappropriate." Brunner, 413 Mass. at 705.

Here, the question of intent pertains to a state of mind surround events that occurred

over 125 years ago. Suffice it to say that no witness would be competent to provide direct testimony as to the intent of the parties to the setoff of lots in 1878. This court, however, does not know whether the parties wish to call witnesses to present other evidence to support their arguments. Accordingly, it is left to the parties to decide whether to bring a motion under Mass. R. Civ. P. 56 or whether to file a request for a pretrial conference.[5]

Regardless of the route taken, the parties must be mindful of the well-established standard articulated by the Kitras court: "[I]t is the proponents' burden to prove the existence of an implied easement. Cheever v. Graves, 32 Mass. App. Ct. 601, 607, 609 (1992)." Kitras, 64 Mass. App. Ct. at 300. See Mt. Holyoke Realty Corp. v. Holyoke Realty Corp., 284 Mass. 100, 105 (1933) (holding burden of proving intent to create easement unexpressed in deed upon the party asserting right). See also Swensen v. Marino, 306 Mass. 582, 583 (1940).

So ordered.

By the Court. (Lombardi, J.)

Attest:

Deborah J. Patterson
Recorder

Dated: August 14, 2006

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER

[5] All dispositive motions are now governed by Rule 4 of the Rules of the Land Court (2005).

EXHIBIT D-2

COMMONWEALTH OF MASSACHUSETTS
Land Court
Department of the Trial Court
Miscellaneous Case No. 238738 (LJL)

(SEAL)

MARIA A. KITRAS, as TRUSTEE,[1] & others,[2]

Plaintiffs

vs.

TOWN OF AQUINNAH & others,[3]

Defendants

ORDER ALLOWING MOTION TO EXTEND DISCOVERY DEADLINE AND DATE OF STATUS CONFERENCE

On August 21, 2007, defendant Vineyard Conservation Society, Inc. (VCS), together with the Town of Aquinnah (Aquinnah), the Kennedy defendants, and The Martha's Vineyard Land Bank Commission, filed a motion to extend the discovery deadline and the scheduled date for a status conference (extension motion). In a letter received on September 12, 2007, defendants Jack Fruchtman and JoAnn C. Fruchtman joined in the extension motion.

At a hearing held on September 20, 2007, VCS, Aquinnah, and the Kennedy defendants appeared and argued the extension motion, along with plaintiffs Kitras, trustee; Decoulos, trustee; and Mark D. Harding, Sheila H. Besse, and Charles D. Harding, Jr., trustees. Defendants Benjamin L. Hall, Jr., trustee, and Brian M. Hall, trustee participated by telephone. Following the oral

---

[1]of Bear Realty Trust, Bear II Realty Trust, and Gorda Realty Trust.

[2]James J. Decoulos, as co-trustee of Bear II Realty Trust and Gorda Realty Trust; Mark D. Harding, Sheila H. Besse and Charles D. Harding, Jr., as trustees of Eleanor P. Harding Realty Trust.

[3]Commonwealth of Massachusetts acting through its Executive Office of Environmental Affairs; George B. Brush, as trustee of Toad Rock Realty Trust; Charles E. Derby; Joanne Fruchtman and Jack Fruchtman; Benjamin L. Hall, Jr., as trustee of Gossamer Wing Realty Trust; Brian M. Hall, as trustee of the Baron's Land Trust; Caroline Kennedy; Caroline Kennedy and Edward Schlossberg, as they are guardians of Rose Kennedy Schlossberg, Tatiana Celia Kennedy Schlossberg, and John Bouvier Kennedy Schlossberg; Jeffrey Madison, as trustee of Tacknash Realty Trust; The Martha's Vineyard Land Bank Commission; Moshup Trail II Limited Partnership; Peter Ochs; persons unknown or unascertained being the heirs of Savannah F. Cooper; Susan Smith; Russell Smith; Barbara Vanderhoop, executrix of the estate of Leonard F. Vanderhoop, Jr.; Vineyard Conservation Society, Inc.; David Wice and Betsy Wice; and persons unknown or unascertained who may have an interest in any land heretofore or hereinafter mentioned or described.

— EX 1 —

argument, this court (Lombardi, J.) took the matter under advisement.

Based upon the arguments of the parties, the extension motion is ALLOWED to the extent of the following terms and conditions. The deadline for discovery in the instant action shall be continued to a date thirty days after plaintiffs serve on each defendant a complete, final set of the documents they propose to introduce at trial. If they are unable to provide full-size reproductions of documents, plaintiffs must explain the reasons why they are unable to do so. The status conference, presently scheduled for October 12, 2007, is continued to a date after the close of discovery. VCS shall file and serve a notice of the date on which it was served with the set of documents. Any party not having been served with a set of documents by the time of the notice by VCS shall so inform this court. Notices of a status conference hearing will issue for a date not less than thirty days after service of the set of documents. These orders shall also enter in Frangos v. Aquinnah, Miscellaneous Case No. 299511.

The above time deadlines may be subject to further extensions if parties are successful in bringing motions to amend the pleadings. This court will consider arguments of the parties as to the effect, if any, one or more amendments to the pleadings would have on the time for discovery.

So ordered.

By the Court. (Lombardi, J.)

Attest:

Deborah J. Patterson
Recorder

Dated: September 21, 2007

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER

EXHIBIT E

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COUNSELORS AT LAW

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www.rrklaw.net

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KAREN D. BURKE
JONATHAN M. HOLTER

OF COUNSEL

KATHRYN R. HAM
JENNIFER S. RAKO
MELISSA MCKEE HACKNEY

January 30, 2009

FEDERAL EXPRESS

Mr. Frank Richmond
Sessions Clerk to
The Honorable Charles W. Trombly, Jr.
Land Court
226 Causeway Street
Boston, MA 02114

RE: Maria A. Kitras, et al., v. Town of Gay Head, et al., Land Court Docket No. 238738

Dear Mr. Richmond:

Enclosed for filing please find the following document:

Motion to Strike of the Town of Aquinnah, Martha's Vineyard Land Bank Commission, Vineyard Conservation Society, Inc., Caroline B. Kenney and Edwin Schlossberg, the Commonwealth of Massachusetts, and David Wice and Betsy Wice.

Thank you for your attention to this matter.

Very truly yours,

Ronald H. Rappaport

RHR/jmh
Enclosure
cc: Service list
4601-006\Motion Strike by Defs file ltr.doc

COMMONWEALTH OF MASSACHUSETTS

DUKES COUNTY, SS.

LAND COURT DEPARTMENT
DOCKET NO. 238738

MARIA A. KITRAS and HAROLD ADLER, as they are the Trustees of BEAR REALTY TRUST, et al.,

Plaintiffs

vs.

TOWN OF GAY HEAD, et al.,

Defendants

MOTION TO STRIKE OF THE TOWN OF AQUINNAH,
MARTHA'S VINEYARD LAND BANK COMMISSION,
VINEYARD CONSERVATION SOCIETY, INC.,
CAROLINE B. KENNEDY AND EDWIN SCHLOSSBERG,
THE COMMONWEALTH OF MASSACHUSETTS AND
DAVID WICE AND BETSY WICE

Pursuant to Paragraph 6 of this Court's Order dated November 21, 2008, the Town of Aquinnah (the "Town"), the Martha's Vineyard Land Bank Commission (the "Land Bank"), the Vineyard Conservation Society, Inc. (the "VCS"), Caroline B. Kennedy and Edwin Schlossberg, the Commonwealth of Massachusetts and David Wice and Betsy Wice (collectively, the "moving parties"), move to strike a.) all of the documents designated by Gossamer Wing Realty Trust and Baron's Land Trust (together, the "Trusts") under correspondence to the parties dated December 1, 2008 and December 12, 2008; and b.) all but one of the documents

designated by Charles D. Harding and Sheila H. Besse, as they are Trustees of the Eleanor P. Harding Realty Trust (the "Hardings"). In so moving, the moving parties adopt as additional reasons those set forth in the memorandum they are filing this day in support of their motion to strike the plaintiffs' exhibits.

The documents designated by the Trusts - almost entirely consisting of discovery responses by the moving parties (some in other litigation) - are not relevant to the issues to be tried and have no independent evidentiary basis, as set forth below.

I. The December 1, 2008 Designation:

The letter dated December 1, 2008 attaches: a.) four discovery responses by VCS (three of which are in the so-called "Frangos litigation" (Land Court Miscellaneous Number 299511) and one of which is in Land Court Number 238738)); and b.) interrogatory answers by the Town in a case brought in Federal Court (now dismissed) by Anthony G. Frangos, Docket Number 02-CV-11159-MLW.

A. VCS's Response to Plaintiff's First Set of Requests for Admissions (Land Court Misc. No. 299511

The defendants object to this designation on relevance grounds. Specifically, there is no information in the documents which has any relevance to any claims raised by the Trusts. The parties draw the Court's attention to the Order of Judge

Lombardi dated September 14, 2007, dismissing the cross-claims of the Trusts, and the December 4, 2008 Order denying the Trusts' Motions to Compel Responses to Discovery Requests. In the December Order, this Court stated as follows:

> "[I]t is evident from the fact that the Trust is requesting discovery from its fellow defendants, and the nature of these requests, that it is attempting to litigate its former cross-claims against those defendants. The Trust's cross-claims sought to establish an easement over the land of the plaintiffs and other defendants. In its discovery requests, the Trust seeks information from the defendants regarding the basis for their contention that the Trust property is landlocked and does not hold an easement over their lands. Those claims having been dismissed, these requests are irrelevant and inappropriate."

The documents sought to be introduced appear to offer information pertaining to the Trusts' cross-claims, which have been dismissed. Further, the Trusts seek to admit the discovery "en masse". At a minimum, the Trusts should be required to point out which admissions are relevant to the issues to be tried and why a specific admission is relevant - which they have not done.

B. VCS's Reply to Plaintiff's First Request for Production of Documents.

Objection. See paragraph A above. In addition, discovery responses are not admissible per se. Cf. G. L. c. 287, § 31. While Rule 36 admissions may bind a party, if relevant, and admissions contained in interrogatory answers may, under certain circumstances, be read into the record at trial, there is

absolutely no basis whatsoever to admit a party's Rule 34 responses.

C. VCS's Response to Plaintiff's First Set of Interrogatories.

Objection. See paragraphs A and B above. Further, interrogatory answers are not necessarily admissible en masse. See Liacos, Handbook of Massachusetts Evidence § 2.3.1, at 23 (1994). See also G. L. c. 231, § 89, which provides, in the Court's discretion, for the reading of interrogatory answers at trial, propounded in the case under litigation.

Absent an independent evidentiary basis for each separate interrogatory answer, the Trusts have no right to offer the entire set of responses. Accordingly, these "exhibits", as offered, are irrelevant and inadmissible.

D. VCS's Response to Interrogatories Propounded by the Defendant Benjamin L. Hall as he is Trustee of Gossamer Wing Realty Trust.

Objection. See paragraphs A-C above.

E. The Town's Answers to Plaintiff's First Set of Interrogatories.

Objection. See paragraphs A-D above.

II. The Letter of December 12, 2008:

The Trust sought to designate the following rebuttal documents:

A. Defendant Town of Aquinnah's Opposition to Additional Joint Motion of Baron's Land Trust and Gossamer Wing Realty Trust to Amend Answer, Cross-Claims and

Counterclaims.

B. A certification by Court stenographer Marilyn Sylvia pertaining to a transcription done in 1998 pertaining to litigation involving the Broscheit matter.

Objection. Again, these documents are not relevant as set forth above, given that the Trusts' cross-claims have been dismissed. Further, pleadings, again, are not evidence. G.L. c. 231, § 87. The Trusts have pointed to no binding "admissions" contained within the submitted pleading.

The 1998 transcription is even farther afield. Absent an explanation of its relevance and any the reasons why a transcript from a prior matter has any bearing on this case, the transcription should not be "marked".

III. The Designation by the Hardings:

The Hardings propose to admit twenty-seven documents which constitute the chain of title of their property (Lot 555) from the set-off to the present day. As is noted in the memorandum, there is no dispute as to the Hardings' title. Accordingly, with the exception of the set-off document (proposed Exhibit 1) all the remaining documents are irrelevant to any issue raised in this case for all the reasons set forth in the memorandum.

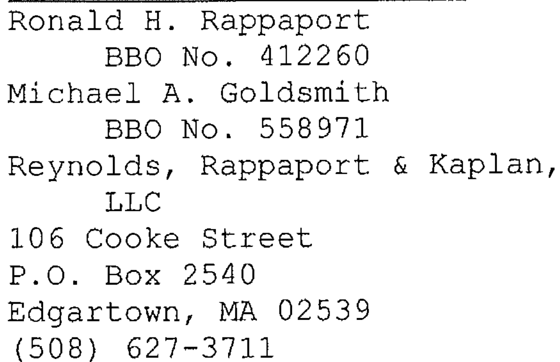
CONCLUSION

For all the reasons set forth above, the moving parties respectfully request that the Court strike all the documents designated by the Trusts all but one of the documents designated

by the Hardings under the November 21, 2008, procedural order.

TOWN OF AQUINNAH

By its attorneys,



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P.O. Box 2540
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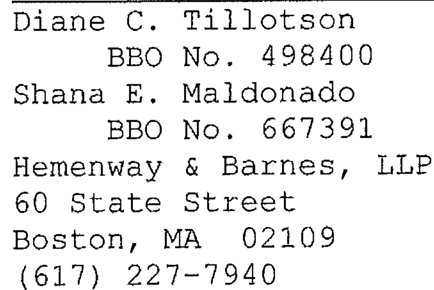
MARTHA'S VINEYARD LAND BANK COMMISSION

By its attorney,



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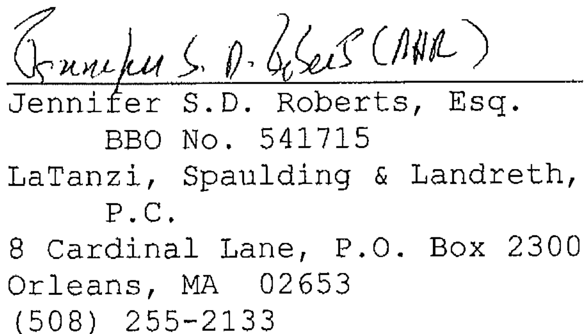
By its attorney,



Jennifer S.D. Roberts, Esq.
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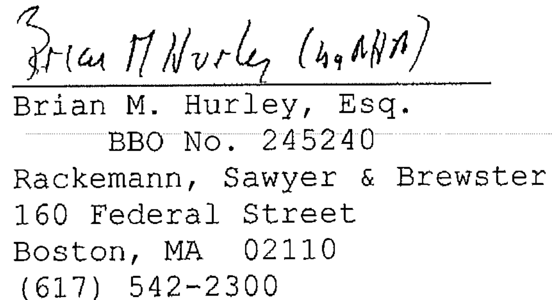
CAROLINE B. KENNEDY and EDWIN SCHLOSSBERG

By their attorney,



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COMMONWEALTH OF MASSACHUSETTS

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By their attorneys,

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Boston, MA 02109
(617) 345-9000

Dated: January 30, 2009

4601-006\Mot Strike of Aq LB VCS & Kennedy.doc

(661)

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COMMONWEALTH OF MASSACHUSETTS

DUKES, SS.

LAND COURT
DOCKET NO.
238738(CWT)

* * * * * * * * * * * * * * * *

MARIA A. KITRAS, Trustee, et als.,

Plaintiffs,

v.

TOWN OF AQUINNAH, et als.,

Defendants.

* * * * * * * * * * * * * * * *

MOTION TO STRIKE EVIDENCE REFERENCED IN SUPPORT OF DEFENDANTS GOSSAMER WING REALTY TRUST AND BARONS LAND TRUST SUR-REPLY BRIEF

Defendants Town of Aquinnah, Vineyard Conservation Society, Inc., Martha's Vineyard Land Bank, Jack and JoAnn Fruchtman, Caroline B. Kennedy and Edwin Schlossberg, David and Betsy Wice and Commonwealth of Massachusetts ("Defendants") hereby move this Court for an order striking the exhibits attached to Defendants Gossamer Wing Realty Trust And Barons Land Trust Sur-Reply Brief As Ordered By The Court On January 21, 2010 ("Gossamer Defendants" and "Gossamer Surreply," respectively). As ground therefor, the Defendants state:

1. By order of this Court (Trombly, J.) dated November 21, 2008, a schedule was established for

exchanging all evidence proposed to be submitted by all parties and for filing and hearing motions to strike any evidence objected to by any party (December 1, 2008 for service of all evidence to be offered on behalf of any party, December 15, 2008 for service of all evidence to be offered in rebuttal by any party, and January 31, 2009 for filing and serving motions to strike).

2. On or about May 21, 2010, the Gossamer Defendants submitted the Gossamaer Surreply, in which they cited to and to which they attached evidence that was not previously produced under this Court's November 21, 2008 order.

3. The copies of the Gossamer Defendants' Exhibit G (House Report H.R. No. 68 by H.R. Child dated March 1, 1827) are of such poor quality as to be unreadable.

4. The Defendants will be prejudiced if the Gossamer Defendants' proposed evidence is admitted: because the proposed evidence was proffered at the end of the briefing schedule, the Defendants were denied the opportunity to consider that evidence in crafting their own submissions and, due to the illegibility of at least some of the proposed evidence, are still denied a meaningful opportunity to consider that evidence.

5. The Defendants also contest the Gossamer Defendants' contention that the Sectional Plans admitted as

Exhibit 20 in these proceedings "were discovered after the prior Appeals Court decision herein." Gossamer Surreply at 3 n.2. Those plans have been freely available in the records of the Dukes County Registry Of Deeds since at least the 1970s. See Exhibit A hereto (letter dated May 27, 2010 from Dianne E. Powers, Register of Deeds, to Jennifer S.D. Roberts, Esq.).

WHEREFORE, defendants Town of Aquinnah, Vineyard Conservation Society, Inc., Martha's Vineyard Land Bank, Jack and JoAnn Fruchtman, Caroline B. Kennedy and Edwin Schlossberg, David and Betsy Wice and Commonwealth of Massachusetts respectfully request that this Court strike Exhibits F, G and H to Defendants Gossamer Wing Realty Trust And Barons Land Trust Sur-Reply Brief As Ordered By The Court On January 21, 2010.

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Attorney for Defendant
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Kelley A. Jordon-Price /js
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Assistant Attorney General
Government Bureau/Trial Division
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617-963-2592

Dated: June 1, 2010

Certificate Of Service

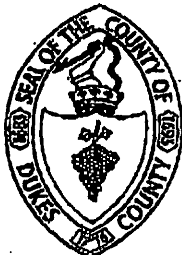
I hereby certify that I served a copy of the foregoing document by mailing a copy of the same, postage prepaid, to

Nicholas J. Decoulos, Esq.
Decoulos & Decoulos
39 Cross Street
Peabody, MA 01960

Brian M. Hurley, Esq.

115

EXHIBIT A



1136

DUKES COUNTY REGISTRY OF DEEDS
P. O. BOX 5231
EDGARTOWN, MA. 02539

TELEPHONE
(508) 627-4025

FAX
(508) 627-7821

EMAIL
registry@dukescounty.org

DIANNE E. POWERS
REGISTER

DEBRA S. LEVESQUE
ASST. REGISTER

May 27, 2010

Jennifer S.D. Roberts, Esq.
LaTanzi, Apaulding & Landreth, PC
8 Cardinal Lane
PO Box 2300
Orleans, MA 02653

Dear Ms. Roberts:

Confirming our telephone conversation of earlier today, I have been the Register of the Dukes County Registry of Deeds since 1995, and prior to that was a title examiner or Registry staff person since 1974. As noted in my May 22, 2007 letter to Benjamin Hall, Jr., Esq., the Sectional Plans of Gay Head were not noted as part of the document recorded on October 26, 1871 in Book 49, Pages 89 to 198 of the Registry's records until 2007. However, before that date, and for as long as I have been familiar with the materials available at the Registry, the Sectional Plans have been freely available in the records room of the Registry. That room is open to the public and well known to the Registry staff and examiners working there.

Please feel free to contact me if I can be of further assistance.

Sincerely,

Dianne E. Powers
Register

BENJAMIN LAMBERT HALL, JR., ESQ.

ATTORNEY-AT-LAW
45 MAIN STREET PO Box 5155
EDGARTOWN, MASSACHUSETTS 02539-5155
(508) 627-5900
(508) 627-3702 FACSIMILE [NO SERVICE ACCEPTED]
B.HALL.JR@HALLLAWOFFICES.COM [NO SERVICE ACCEPTED]

June 17, 2010

Land Court
226 Causeway St. 2d Flr.
Boston, MA 02114

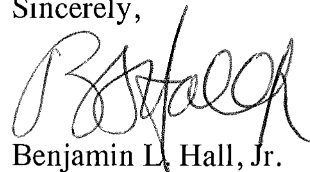
Re: Kitras, et al, v. Town of Aquinnah, et als. Land Court 238738 (CWT)

Dear Ms. Misset:

As you know, I represent Gossamer Wing Realty Trust ("GWRT") as well as Barons Land Trust ("BLT") in the referenced matter. Enclosed please find for filing and docketing the Defendants Gossamer Wing Realty Trust And Barons Land Trust Opposition to Defendants Town of Aquinnah, Vineyard Conservation Society, Inc., Martha's Vineyard Land Bank, Jack and Joann Fruchtman, Caroline B. Kennedy And Edwin Schlossberg, David and Betsy Wice, and Commonwealth of Massachusetts Motion To Strike Evidence prepared on behalf of BLT and GWRT.

Thank you for your courteous attention.

Sincerely,



Benjamin L. Hall, Jr.

Cc: service list

COMMONWEALTH OF MASSACHUSETTS

DUKES COUNTY, ss.	TRIAL COURT LAND COURT DEPARTMENT CASE No. 97 Misc. 238738 (CWT)

MARIA A. KITRAS as she is TRUSTEE OF BEAR REALTY TRUST, et als.,	)
Plaintiffs,	)
-versus-	)
TOWN OF AQUINNAH, et als.	)
Defendants.	)

DEFENDANTS GOSSAMER WING REALTY TRUST
AND BARONS LAND TRUST OPPOSITION TO THE OTHER DEFENDANTS' MOTION TO STRIKE EVIDENCE

Now comes Defendant Gossamer Wing Realty Trust, Benjamin L. Hall, Jr., Trustee ("GWRT"), and Brian M. Hall as he is Trustee of Barons Land Trust ("BLT")(collectively the "Trusts"), by and through their attorney, Benjamin L. Hall, Jr., Esq., and hereby present this memorandum in opposition to the other Defendants' Motion to Strike Evidence and state as follows:

DEFENDANTS SEEK TO STRIKE RELEVANT REBUTTAL DOCUMENTS THEY CITE OVERTLY AND IMPLICITLY BUT WHICH THEY, THEMSELVES INTENTIONALLY OMITTED FROM THE RECORD

The other Defendants seek to strike documents submitted by the Trusts with their Sur-Reply in rebuttal to the arguments of the other Defendants in their brief. These include the Ch. CXIV of the Acts of 1828 (the "1828 Statute")-Ex. F - repeatedly cited in the other Defendants' Brief, which was sponsored and originally drafted and attached as a part of House Report H.R. No. 68 by H.R. Child dated March 1, 1827 (the "Child Report") -Ex. G, implicitly cited (under a doctrine of completeness - noted below) in the Defendants' Briefs but never provided by Defendants as part of the record, and a Petition to Partition the Common Lands at Chappaquiddick under Ch 463 of the Acts of 1869.- Ex. H. - that is strictly rebuttal.

The other Defendants argue prejudice against the court reviewing a complete set of documents directly arising out of the documents submitted by the Defendants, as part of the

truth-finding determination by the court.

Defendants argue that they are being "denied the opportunity to consider that evidence in crafting their own submissions and, due to the illegibility of at least some of the proposed evidence, are still denied a meaningful opportunity to consider that evidence." Upon receipt of the motion, the Trusts counsel sent additional clear copies of the documents to the Defendants.

The record has not yet been tested for admissibility (See order of 4/27/09 and argument below) and thus is not yet evidence. Therefore, the "evidence" cannot be said to have been closed.

Regardless, if these documents are to be considered "evidence" at this time, the documents are clearly relevant to a consideration of the relevance and weight to be accorded to the Defendants' Proposed Ex. 85, the 1850 Set-Off of Chappaquiddick. Massachusetts Guide to Evidence §401 (Flashner Judicial Institute, 2008-2009 guide prepared for the SJC Advisory Committee on Evidence Law)("Evid. Guide"). They cannot be excluded, except upon a showing of substantial unfair prejudice. Id. at 403. Moreover, because the 1850 set-off was authorized by the 1828 Statute (which the moving parties themselves repeatedly cited in their briefs, but did not submit as part of the record), which statute itself came out of the House Report of 1827, these documents come before the court for help in judicial notice, as well as for rebuttal. see argument below.

The other Defendants arguments are disingenuine at best. Repeatedly at pages 5-8 of their Brief they cite to the 1828 Act (Ex. F to the GWRT - BLT Surreply), which they did NOT provide to the court. An adverse inference for the same, respectfully, ought to be applied to this intentional omission. The 1828 Act is based on the very bill proffered in the Child Report (Ex. G to the GWRT - BLT Surreply). The rebuttal evidence consists entirely of official records of the Commonwealth, including, a special act of the legislature and the report that preceded the same explaining the legislative intent in regard thereto. These documents are required to be reviewed by the court as the court is required to take Judicial Notice of such public acts of the Legislature. Evid. Guide §202.

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1828 Act, which itself resulted from the Child Report with what became the 1828 Act attached as a proposed bill, and had access to all of the other exhibits placed in rebuttal. There can be no prejudice under these circumstances.

Since it was impossible to predict how the other Defendants might try to use the 1850 Chappaquiddick set-off to argue inferences about an intent to landlock by the Probate Court and its appointed Commissioners under the 1870 Statute in the partition of 1878 in Gay Head, there was no need to seek any documentation to refute the same arguments until after they were presented in April, 2010. Upon seeing the distortion foisted on this court by the other Defendants in their Brief, rebuttal of the same by other documentation not then in the record should, respectfully, be considered by the court.

BACKGROUND

On April 27, 2009, the court ruled on certain motions to strike documents that had been proffered between the parties as part of a "record" which were to be submitted in some evidentiary proceeding involving written briefs only regarding the issue of intent to provide implied easements to the lots carved from the Common Lands[1], which proceeding has not yet, respectfully, been fully delineated by the court. Regardless, such a proceeding is not a full trial on the merits, and the court expressly left open the question of ultimate admissibility, and, accordingly, the evidence has not yet closed.

The court initially found that documents pre-dating the 1878 Set-off (Defendants proposed Exhibits 69-73) were not relevant and struck them, yet did not strike Defendants' Proposed Exhibit 85, the 1850 Chappaquiddick set-off, finding "this evidence could be relevant to show the practice and intent of the commissioner in the instant case." Order 4/27/09. Respectfully, the court did NOT determine the relevance of the 1850 Set-off, but merely found that it "could be relevant," leaving the question of when relevance would be determined to a future date.[2]

The court, on 4/27/09, respectfully, applied a different standard to the admissibility of the

[1] This was one of the issues to be determined on remand as ordered by the Appeals Court. Kitras, 64 Mass. App. Ct. at 300. Note the Plan of Lands carved from the Common Lands was submitted as an attachment to the Defendants' Brief, which plan showed Lots 177 and 178 thereupon.
[2] The Trusts have moved the court to clarify the mode of fact-finding and have marked the same for hearing with the instant motion. The mode of fact-finding must further account for disputes on the relevance, and thus admissibility of the evidence.

proposed Exhibit 85, the 1850 Chappaquiddick set-off than was applied to proposed Exhibits 69-73. Later, on August 18, 2009, on reconsideration, the court reversed itself, and, without any explanation, agreed that Defendants' Proposed Exhibits 69-73 would be "reinstated and not stricken from the record." Order 8/18/09. Regardless, the court left the 1850 set-off as part of the documents that would be considered.

On January 21, 2010, the court ordered a briefing schedule, respectfully, without establishing a method for (1) determining admissibility of the documents then in the record, and (2) without establishing what mode for fact-finding was being used by the briefing.

WITHOUT ANY MODE FOR TESTING ADMISSIBILITY, THOUGH EXPRESSLY LEFT BY THE COURT FOR A FUTURE TIME, DOCUMENTS TO REBUT THE ARGUMENTS IN RESPECT TO INFERENCES TO BE DRAWN, MUST BE CONSIDERED BY THE COURT

It was, and continues to be, respectfully, not entirely clear how the court would determine the admissibility of documents submitted in the "record" and further not clear how the Defendants would use this 1850 set-off, so distant in time from the 1878 set-off, as part of the argument in respect to inferences to be drawn. Since the court's modality for determining these issues remains an open question, documents rebutting the arguments now set forth by the Defendants in the briefs, are admissible to the record simply in rebuttal to the documents the court had previously admitted into the record, leaving open the question of admissibility as evidence as noted by the court on 4/27/09.

To the extent the admissibility of the 1850 set-off has not yet been determined, it appearing the court by allowing the same into the record might be inclined to admit the same, countervailing evidence rebutting the inferences that the Defendants seek the court to draw should likewise be placed before the court. These documents are relevant to rebut the arguments made by the other Defendants. A party may present rebuttal evidence as a matter of right and in which the denial of that right would be an error of law when a party seeks to present evidence to refute evidence of the other side so long as it is not inconsistent with his own case. Drake v. Goodman, 386 Mass. 88, 92 (1982) citing McCormick, Evidence § 4, at 6 (2d ed. 1972); K.B. Hughes, Evidence § 182 (1961); 6 J. Wigmore, Evidence § 1873 (Chadbourn rev. 1976). This can be done after a party has rested his case, (Cobb, Bates & Yerxa Co. v. Hills, 208 Mass. 270, 272), or even after oral arguments have begun, (Short v. Farmer, 260 Mass. 102 (1927)).

Here, the inferences to be drawn from the documents submitted by the other Defendants,

to wit, the 1850 Chappaquiddick set-off, were never presented prior to the Brief of the other Defendants. Rebuttal documents to these newly proffered inferences, respectfully, ought to be considered by the court. Drake, supra. Moreover, it is only fair, that the court should consider the complete set of documents. The 1850 set-off was authorized by the 1828 Statute, which, as noted, the Defendants even cited in their own brief. Implicitly then, the Defendants have opened the door to provide the basis for the 1828 Statute, which is the House Report of 1827, which set forth the bill that became the 1828 Statute as a part thereof. See Doctrine of Completeness. Evid. Guide §106.

ADVERSE INFERENCE TO BE DRAWN FROM LACK OF SUBMISSION

If the court determines to strike this relevant rebuttal documentation, the Trusts respectfully request that the court draw an adverse inference from the lack of presentation of the 1827 House Report and the 1828 Statute when making rulings on the relevance, admissibility and the weight to be placed on the 1850 Chappaquiddick set-off.

THE PROCEDURAL PROCESS OF FACT-FINDING LACKS THE REQUISITE AGREEMENT UNDER FRATI AS NOTED BY THE TRUSTS IN THE MOTION TO CLARIFY

Where even the documents to be reviewed by a court were never agreed but were, nonetheless, as the court determined, respectfully, placed in an un-agreed manner, with the admissibility of the documents to be later determined, before any inferences to be drawn therefrom could be argued, there should be an opportunity to rebut. See Drake, supra and arguments above.

Since there has been no trial, the evidence cannot be said to have been "closed." The arguments and submissions were made with the court-ordered sur-reply in a rebuttal format.

In order to establish what exactly is to be "briefed" and why, all of the facts must be somehow be placed before the Court, either by trial, by agreement as to the evidence or by an agreement upon all of the material facts. See the case of Frati v. Jannini, 226 Mass. 430, 431 (1917), which was cited for authority in the case of Paradigm Properties, LLC.v. Zoning Board of Appeals of Somerville, Land Court Case No. 315232 (LJL). The court has ordered briefing, but has not established the mechanism by which it will resolve the facts.

There are three ways in which a case at law may be presented for decision on its merits.

(1) One is by the introduction of oral and documentary evidence in the ordinary way, which results ultimately in a verdict if the trial is had before the jury, or in a finding if trial is had

before the judge. Frati at 431.

(2) The second way is by agreement of parties as to the evidence which shall be considered by the court or jury. In such instance the agreement merely takes the place of the evidence which otherwise would be introduced in the usual way, and either the jury renders a general verdict or the judge makes a general finding founded upon that evidence. Id.

(3) The third way is for the parties to agree upon all the material ultimate facts, on which the rights of the parties are to be determined by the law. Id.

Since the court has, by pre-trial motion, stricken certain documents proposed, and allowed other documents to be reviewed by the court in some undefined pre-trial process, over objection, the facts to be ascertained by the documents so stricken or allowed over objection CANNOT be "by agreement." The court has, in a pre-trial process, already, implicitly and expressly, discarded proposed facts from which inferences could be drawn, thereby barring any agreement on material facts. Scaccia v. Boston Elev. Rwy. Co., 308 Mass. 310, 312-313 (1941)(The Scaccia court quoted from Atlantic Maritime Co. v. Gloucester, 228 Mass. 519, 520-521: ""If such inferences need to be drawn in order to reach the ultimate essential facts, then there has not been 'agreement as to all the material facts' by the parties within the meaning of those words in the statute.'"). Accordingly, the Court has not prescribed exactly that manner of fact determination it intends to utilize on any one of the principles set forth in the Frati case, and has still to determine the admissibility of the documents.

DEFENDANTS ATTEMPT TO SUBMIT ADDITIONAL BRIEFING WITHOUT LEAVE

Moreover, while the other Defendants seek no relief on the same, they improperly take the opportunity to file a form of Sur_Sur-Reply without leave of court, making claims about the sectional plans in par. 5 of their memorandum. The court established a briefing schedule on January 21, 2010 and permitted no further briefing to occur following the Sur-reply Briefs. Yet, the other Defendants attempt to submit further argument after the Briefing has been closed in a direct violation and attempt to end-run around the court's January 21, 2010 order. The Trusts move to strike this procedurally incorrect and prejudicial effort set forth at par. 5 of the other Defendants' motion together with the letter of Diane Powers attached which is NOT even in an

affidavit form as required to support any motion.[3]

The other Defendants state:

> 5. The Defendants also contest the Gossamer Defendants' contention that the Sectional Plans admitted as Exhibit 20 in these proceedings "were discovered after the prior Appeals Court decision herein. Gossamer Surreply at 3 n.2. Those plans have been freely available in the records of the Dukes County Registry Of Deeds since at least the 1970s. See Exhibit A hereto (letter dated May 27, 2010 from Dianne E. Powers, Register of Deeds, to Jennifer S.D. Roberts, Esq.).

Regardless, the Defendants' statement that these were any sort of official records before May 22, 2007 is incorrect. See attached letter of Diane E. Powers, Register of Deeds dated May 22, 2007, which is part of Ex. 20 of the Record already before the court. The Sectional Plans were not maintained as records and no marginal reference for these Sectional plans existed anywhere in Book 49, which contains all of the set-offs of various homestead lots and Lots 1-173, and includes reference to the report of Pease in which he reported to the Governor that he had fully and finally determined the bounds of the lands held in severalty and the bounds of the Common Lands. The book simply was in the registry. See affidavit of Benjamin L. Hall, Jr. attached. This book entitled "Sectional Plans" simply appeared on a shelf in the main anteroom of the Registry of Deeds in late 2006, following the Appeals Court rescript. Before that time, this book may have been about the Registry, but was never in such an open and obvious place prior thereto, AND no formal index or reference of the same existed in any of the official records of the registry before May 22, 2007, when the Registrar of Deeds decided that the Sectional Plans were a part of the official record. Id. See letter from Diane Powers dated May 22, 2007 included in Ex. 20 and attached hereto for reference. As such, Hall, who had been an attorney doing title work for over 20 years as of 2006, was not aware, nor could he have been, despite diligent search of the set-offs in the Registry, of the existence of or import of this book, because, until 2007, the same was NOT a "record" to which he ever could have been directed.

THE OTHER DEFENDANTS ALSO SUBMITTED REBUTTAL DOCUMENTS ATTACHED TO THEIR BRIEF AND ARE ESTOPPED FROM NOW SEEKING TO STRIKE THE TRUSTS' REBUTTAL EVIDENCE

Attached to the other Defendants' Brief was a list of the exhibits from the Joint Appendix

[3] The other Defendants insertion of this argument in the motion while seeking no relief in respect to the same is a blatant attempt to seek to supplement their briefs already before the court, in open violation of the January 21, 2010 order.

created by them with the Plaintiffs, and disingenuously titled to make it appear that the Trusts had not proffered documents that the other Defendants had NEVER sought to strike, together with two pages of Plans showing the lots carved from the Common Lands (including Lots 177 and 178 - see attached), offered as additional documentary evidence. If these other Defendants could place additional documents before the court, then they are estopped from now arguing that the Trusts cannot put relevant rebuttal documents before the court as well.

WHEREFORE the Trusts request that the court deny the motion to strike and further strike the arguments of the other Defendants in regards to the Sectional Plans in par. 5 of their memorandum.

RESPECTFULLY SUBMITTED,
Gossamer Wing Realty Trust
Baron's Land Trust
By Its Attorney,

Edgartown, Massachusetts

BENJAMIN L. HALL, JR.
45 Main Street, P.O. Bx 5155
Edgartown, MA 02539
(508) 627-3700
BBO# 547622

COMMONWEALTH OF MASSACHUSETTS

DUKES COUNTY, ss.

TRIAL COURT
LAND COURT DEPARTMENT
CASE No. 97 Misc. 238738 (CWT)

MARIA A. KITRAS as she is TRUSTEE OF BEAR REALTY TRUST, et als.,

Plaintiffs,

-versus-

TOWN OF AQUINNAH, et als.

Defendants.

AFFIDAVIT OF BENJAMIN L. HALL, JR.

I, Benjamin L. Hall, Jr. hereby depose and state as follows:

1. I am the attorney for Defendant Gossamer Wing Realty Trust, Benjamin L. Hall, Jr., Trustee ("GWRT"), and Brian M. Hall as he is Trustee of Barons Land Trust ("BLT")(collectively the "Trusts").

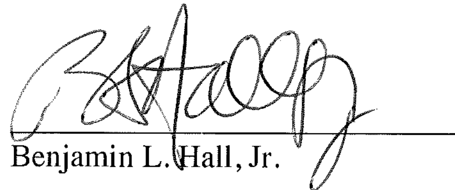
2. I have practiced law in Edgartown since 1986. I have regularly reviewed the records at the Dukes County Registry of Deeds since the 1970's when I was learning the real estate business. I have been active in doing real estate title research since that time, doing a fair number of titles in Aquinnah.

3. The Sectional Plans in the record and before the court for the first time, were not maintained as records and no marginal reference for these Sectional Plans existed anywhere in Book 49, which contains all of the set-offs of various homestead lots and Lots 1-173, and includes reference to the report of Pease in which he reported to the Governor that he had fully and finally determined the bounds of the lands held in severalty and the bounds of the Common Lands.

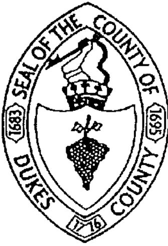
4. This book entitled "Sectional Plans" simply appeared on a shelf in the main anteroom of the Registry of Deeds in late 2006, following the Appeals Court rescript. Before that time, this book may have been about the Registry, but was never in such an open and obvious place prior thereto, AND no formal index or reference of the same existed in any of the official

records of the registry before May 22, 2007, when the Registrar of Deeds decided that the Sectional Plans were a part of the official record. See letter from Diane Powers dated May 22, 2007 included in Ex. 20 and attached hereto for reference. As such, as of 2006, I was not aware, nor could he have been, despite diligent search for all relevant records of the set-offs, of the existence of this record, because, until 2007, the same was NOT a "record" to which I ever would have been directed. Therefore, at best, the Sectional Plans book simply was in the Registry and not a part of any official index of records prior to May, 2007..

Signed this 16th day of June, 2010 under the pains and penalties of perjury.



Benjamin L. Hall, Jr.



DUKES COUNTY REGISTRY OF DEEDS
P. O. BOX 5231
EDGARTOWN, MA. 02539

TELEPHONE
(508) 627-4025

FAX
(508) 627-7821

EMAIL
registry@dukescounty.org

DIANNE E. POWERS
REGISTER

DEBRA S. LEVESQUE
ASST. REGISTER

May 22, 2007

Mr. Benjamin Hall, Jr., Esq
P.O. Box 5155
Edgartown, MA 02539

Re: Sectional Plans of Indian Lands at Gay Head

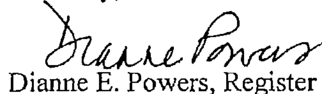
Dear Mr. Hall:

Based on research, information gathered from several sources and input from the chief examiner of the Land Court I have determined that the plans you referred to in your December 6, 2006 email are in fact a part of the document recorded on October 26, 1871 in Book 49, Pages 89 to 198. My apologies for the delay in this determination, but I needed to be 100% certain before I could make this statement.

For purposes of identification I have made a notation in the margin of the document in Book 49, a notation in the inside cover of the book containing the plans (copies enclosed) and have moved the plans to the appropriate location. Should you require certified copies of these plans unfortunately you will need to order the complete document as to the best of my knowledge we cannot certify anything other than a complete document.

If you have additional questions please feel free to contact me.

Sincerely,

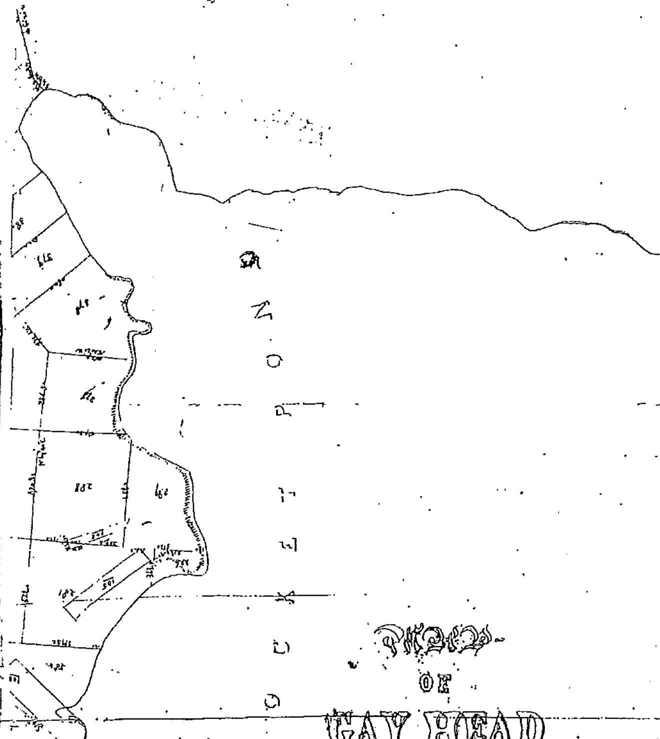


Dianne E. Powers, Register

/dp
Enc.
cc: James Decoulos
Nicholas Decoulos, Esq.

PART OF EX-20
OF THE RECORD

CHILMARK



OF

GAY HEAD

SHOWING THE PARTITION OF THE COMMON LANDS.

AS MADE BY

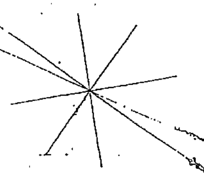
JOSEPH T. PEASE
AND RICHARD L. PEASE

COMMISSIONERS

Appointed by the JUDGE of PROBATE
Under Section 6 Chapter 213 of the Acts of 1870.

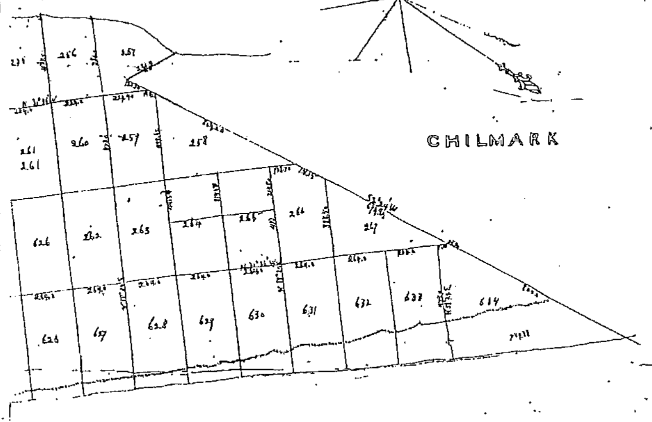
SCALE, [illegible] FEET TO AN INCH

BY JOHN H. MULLIN,
CIVIL ENGINEER



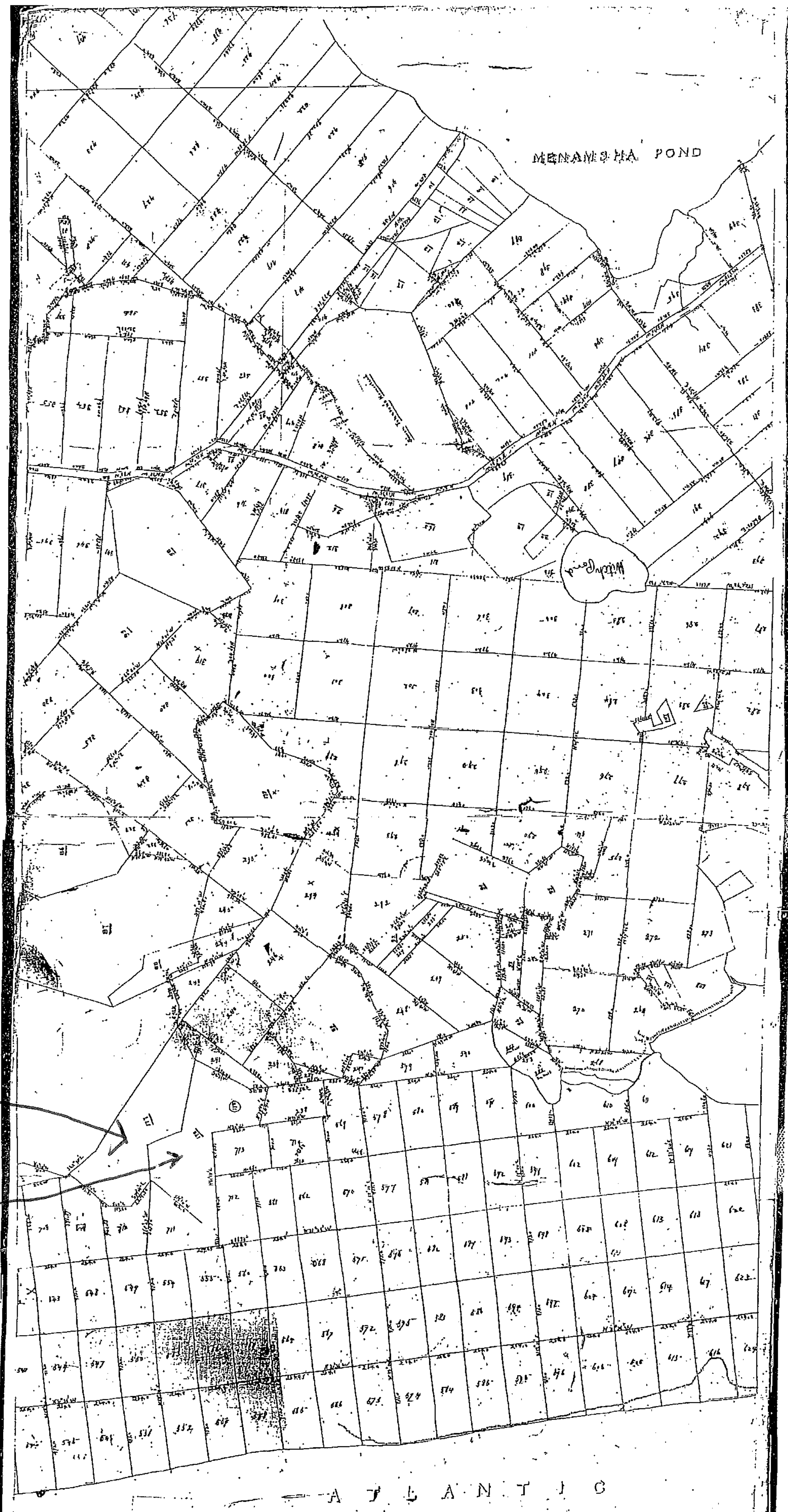
The red lines show the boundaries of the lots indicated by the numerals enclosed. The descriptions of said lots are given in Books, No's 49 and 65 in the Registry of Deeds for Dukes County

November, 1922. [illegible], *Surveyor.*



CHILMARK

O C E A N



Lots
177
178

COMMONWEALTH OF MASSACHUSETTS

DUKES COUNTY, ss.

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Since it was impossible to predict how the other Defendants might try to use the 1850 Chappaquiddick set-off to argue inferences about an intent to landlock by the Probate Court and its appointed Commissioners under the 1870 Statute in the partition of 1878 in Gay Head, there was no need to seek any documentation to refute the same arguments until after they were presented in April, 2010. Upon seeing the distortion foisted on this court by the other Defendants in their Brief, rebuttal of the same by other documentation not then in the record should, respectfully, be considered by the court.

BACKGROUND

On April 27, 2009, the court ruled on certain motions to strike documents that had been proffered between the parties as part of a "record" which were to be submitted in some evidentiary proceeding involving written briefs only regarding the issue of intent to provide implied easements to the lots carved from the Common Lands[1], which proceeding has not yet, respectfully, been fully delineated by the court. Regardless, such a proceeding is not a full trial on the merits, and the court expressly left open the question of ultimate admissibility, and, accordingly, the evidence has not yet closed.

The court initially found that documents pre-dating the 1878 Set-off (Defendants proposed Exhibits 69-73) were not relevant and struck them, yet did not strike Defendants' Proposed Exhibit 85, the 1850 Chappaquiddick set-off, finding "this evidence could be relevant to show the practice and intent of the commissioner in the instant case." Order 4/27/09. Respectfully, the court did NOT determine the relevance of the 1850 Set-off, but merely found that it "could be relevant," leaving the question of when relevance would be determined to a future date.[2]

The court, on 4/27/09, respectfully, applied a different standard to the admissibility of the

[1] This was one of the issues to be determined on remand as ordered by the Appeals Court. Kitras, 64 Mass. App. Ct. at 300. Note the Plan of Lands carved from the Common Lands was submitted as an attachment to the Defendants' Brief, which plan showed Lots 177 and 178 thereupon.
[2] The Trusts have moved the court to clarify the mode of fact-finding and have marked the same for hearing with the instant motion. The mode of fact-finding must further account for disputes on the relevance, and thus admissibility of the evidence.

proposed Exhibit 85, the 1850 Chappaquiddick set-off than was applied to proposed Exhibits 69-73. Later, on August 18, 2009, on reconsideration, the court reversed itself, and, without any explanation, agreed that Defendants' Proposed Exhibits 69-73 would be "reinstated and not stricken from the record." Order 8/18/09. Regardless, the court left the 1850 set-off as part of the documents that would be considered.

On January 21, 2010, the court ordered a briefing schedule, respectfully, without establishing a method for (1) determining admissibility of the documents then in the record, and (2) without establishing what mode for fact-finding was being used by the briefing.

WITHOUT ANY MODE FOR TESTING ADMISSIBILITY, THOUGH EXPRESSLY LEFT BY THE COURT FOR A FUTURE TIME, DOCUMENTS TO REBUT THE ARGUMENTS IN RESPECT TO INFERENCES TO BE DRAWN, MUST BE CONSIDERED BY THE COURT

It was, and continues to be, respectfully, not entirely clear how the court would determine the admissibility of documents submitted in the "record" and further not clear how the Defendants would use this 1850 set-off, so distant in time from the 1878 set-off, as part of the argument in respect to inferences to be drawn. Since the court's modality for determining these issues remains an open question, documents rebutting the arguments now set forth by the Defendants in the briefs, are admissible to the record simply in rebuttal to the documents the court had previously admitted into the record, leaving open the question of admissibility as evidence as noted by the court on 4/27/09.

To the extent the admissibility of the 1850 set-off has not yet been determined, it appearing the court by allowing the same into the record might be inclined to admit the same, countervailing evidence rebutting the inferences that the Defendants seek the court to draw should likewise be placed before the court. These documents are relevant to rebut the arguments made by the other Defendants. A party may present rebuttal evidence as a matter of right and in which the denial of that right would be an error of law when a party seeks to present evidence to refute evidence of the other side so long as it is not inconsistent with his own case. Drake v. Goodman, 386 Mass. 88, 92 (1982) citing McCormick, Evidence § 4, at 6 (2d ed. 1972); K.B. Hughes, Evidence § 182 (1961); 6 J. Wigmore, Evidence § 1873 (Chadbourn rev. 1976). This can be done after a party has rested his case, (Cobb, Bates & Yerxa Co. v. Hills, 208 Mass. 270, 272), or even after oral arguments have begun, (Short v. Farmer, 260 Mass. 102 (1927)).

Here, the inferences to be drawn from the documents submitted by the other Defendants,

to wit, the 1850 Chappaquiddick set-off, were never presented prior to the Brief of the other Defendants. Rebuttal documents to these newly proffered inferences, respectfully, ought to be considered by the court. Drake, supra. Moreover, it is only fair, that the court should consider the complete set of documents. The 1850 set-off was authorized by the 1828 Statute, which, as noted, the Defendants even cited in their own brief. Implicitly then, the Defendants have opened the door to provide the basis for the 1828 Statute, which is the House Report of 1827, which set forth the bill that became the 1828 Statute as a part thereof. See Doctrine of Completeness. Evid. Guide §106.

ADVERSE INFERENCE TO BE DRAWN FROM LACK OF SUBMISSION

If the court determines to strike this relevant rebuttal documentation, the Trusts respectfully request that the court draw an adverse inference from the lack of presentation of the 1827 House Report and the 1828 Statute when making rulings on the relevance, admissibility and the weight to be placed on the 1850 Chappaquiddick set-off.

THE PROCEDURAL PROCESS OF FACT-FINDING LACKS THE REQUISITE AGREEMENT UNDER FRATI AS NOTED BY THE TRUSTS IN THE MOTION TO CLARIFY

Where even the documents to be reviewed by a court were never agreed but were, nonetheless, as the court determined, respectfully, placed in an un-agreed manner, with the admissibility of the documents to be later determined, before any inferences to be drawn therefrom could be argued, there should be an opportunity to rebut. See Drake, supra and arguments above.

Since there has been no trial, the evidence cannot be said to have been "closed." The arguments and submissions were made with the court-ordered sur-reply in a rebuttal format.

In order to establish what exactly is to be "briefed" and why, all of the facts must be somehow be placed before the Court, either by trial, by agreement as to the evidence or by an agreement upon all of the material facts. See the case of Frati v. Jannini, 226 Mass. 430, 431 (1917), which was cited for authority in the case of Paradigm Properties, LLC.v. Zoning Board of Appeals of Somerville, Land Court Case No. 315232 (LJL). The court has ordered briefing, but has not established the mechanism by which it will resolve the facts.

There are three ways in which a case at law may be presented for decision on its merits.

(1) One is by the introduction of oral and documentary evidence in the ordinary way, which results ultimately in a verdict if the trial is had before the jury, or in a finding if trial is had

before the judge. Frati at 431.

(2) The second way is by agreement of parties as to the evidence which shall be considered by the court or jury. In such instance the agreement merely takes the place of the evidence which otherwise would be introduced in the usual way, and either the jury renders a general verdict or the judge makes a general finding founded upon that evidence. Id.

(3) The third way is for the parties to agree upon all the material ultimate facts, on which the rights of the parties are to be determined by the law. Id.

Since the court has, by pre-trial motion, stricken certain documents proposed, and allowed other documents to be reviewed by the court in some undefined pre-trial process, over objection, the facts to be ascertained by the documents so stricken or allowed over objection CANNOT be "by agreement." The court has, in a pre-trial process, already, implicitly and expressly, discarded proposed facts from which inferences could be drawn, thereby barring any agreement on material facts. Scaccia v. Boston Elev. Rwy. Co., 308 Mass. 310, 312-313 (1941)(The Scaccia court quoted from Atlantic Maritime Co. v. Gloucester, 228 Mass. 519, 520-521: ""If such inferences need to be drawn in order to reach the ultimate essential facts, then there has not been 'agreement as to all the material facts' by the parties within the meaning of those words in the statute.'"). Accordingly, the Court has not prescribed exactly that manner of fact determination it intends to utilize on any one of the principles set forth in the Frati case, and has still to determine the admissibility of the documents.

DEFENDANTS ATTEMPT TO SUBMIT ADDITIONAL BRIEFING WITHOUT LEAVE

Moreover, while the other Defendants seek no relief on the same, they improperly take the opportunity to file a form of Sur_Sur-Reply without leave of court, making claims about the sectional plans in par. 5 of their memorandum. The court established a briefing schedule on January 21, 2010 and permitted no further briefing to occur following the Sur-reply Briefs. Yet, the other Defendants attempt to submit further argument after the Briefing has been closed in a direct violation and attempt to end-run around the court's January 21, 2010 order. The Trusts move to strike this procedurally incorrect and prejudicial effort set forth at par. 5 of the other Defendants' motion together with the letter of Diane Powers attached which is NOT even in an

affidavit form as required to support any motion.[3]

The other Defendants state:

> 5. The Defendants also contest the Gossamer Defendants' contention that the Sectional Plans admitted as Exhibit 20 in these proceedings "were discovered after the prior Appeals Court decision herein. Gossamer Surreply at 3 n.2. Those plans have been freely available in the records of the Dukes County Registry Of Deeds since at least the 1970s. See Exhibit A hereto (letter dated May 27, 2010 from Dianne E. Powers, Register of Deeds, to Jennifer S.D. Roberts, Esq.).

Regardless, the Defendants' statement that these were any sort of official records before May 22, 2007 is incorrect. See attached letter of Diane E. Powers, Register of Deeds dated May 22, 2007, which is part of Ex. 20 of the Record already before the court. The Sectional Plans were not maintained as records and no marginal reference for these Sectional plans existed anywhere in Book 49, which contains all of the set-offs of various homestead lots and Lots 1-173, and includes reference to the report of Pease in which he reported to the Governor that he had fully and finally determined the bounds of the lands held in severalty and the bounds of the Common Lands. The book simply was in the registry. See affidavit of Benjamin L. Hall, Jr. attached. This book entitled "Sectional Plans" simply appeared on a shelf in the main anteroom of the Registry of Deeds in late 2006, following the Appeals Court rescript. Before that time, this book may have been about the Registry, but was never in such an open and obvious place prior thereto, AND no formal index or reference of the same existed in any of the official records of the registry before May 22, 2007, when the Registrar of Deeds decided that the Sectional Plans were a part of the official record. Id. See letter from Diane Powers dated May 22, 2007 included in Ex. 20 and attached hereto for reference. As such, Hall, who had been an attorney doing title work for over 20 years as of 2006, was not aware, nor could he have been, despite diligent search of the set-offs in the Registry, of the existence of or import of this book, because, until 2007, the same was NOT a "record" to which he ever could have been directed.

THE OTHER DEFENDANTS ALSO SUBMITTED REBUTTAL DOCUMENTS ATTACHED TO THEIR BRIEF AND ARE ESTOPPED FROM NOW SEEKING TO STRIKE THE TRUSTS' REBUTTAL EVIDENCE

Attached to the other Defendants' Brief was a list of the exhibits from the Joint Appendix

[3] The other Defendants insertion of this argument in the motion while seeking no relief in respect to the same is a blatant attempt to seek to supplement their briefs already before the court, in open violation of the January 21, 2010 order.

created by them with the Plaintiffs, and disingenuously titled to make it appear that the Trusts had not proffered documents that the other Defendants had NEVER sought to strike, together with two pages of Plans showing the lots carved from the Common Lands (including Lots 177 and 178 - see attached), offered as additional documentary evidence. If these other Defendants could place additional documents before the court, then they are estopped from now arguing that the Trusts cannot put relevant rebuttal documents before the court as well.

WHEREFORE the Trusts request that the court deny the motion to strike and further strike the arguments of the other Defendants in regards to the Sectional Plans in par. 5 of their memorandum.

RESPECTFULLY SUBMITTED,
Gossamer Wing Realty Trust
Baron's Land Trust
By Its Attorney,

Edgartown, Massachusetts

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COMMONWEALTH OF MASSACHUSETTS

DUKES COUNTY, ss.

TRIAL COURT
LAND COURT DEPARTMENT
DOCKET NO. 238738

MARIA A. KITRAS as she is TRUSTEE OF BEAR REALTY TRUST, et als.,

Plaintiffs,

-versus-

TOWN OF AQUINNAH, et als.

Defendants.

DEFENDANTS GOSSAMER WING REALTY TRUST AND BARONS LAND TRUST OFFER OF PROOF

Now comes Defendant Gossamer Wing Realty Trust, Benjamin L. Hall, Jr., Trustee ("GWRT"), and Brian M. Hall as he is Trustee of Barons Land Trust ("BLT")(collectively the "Trusts"), by and through their attorney, Benjamin L. Hall, Jr., Esq., and, as and for their Offer of Proof in respect to documents that were struck from the record by the order of the court dated April 27, 2009 and hereby state as follows:

THE COURT MISAPPREHENDS THE ADMISSIBLE BASIS OF THE TRUSTS' PROPOSED EXHIBITS

The court in ruling on the Trusts' proposed exhibits stated that "[t]he Trust's proposed exhibits consist of certain documents concerning lots, which the Appeals Court has previously determined do not hold easement rights." This finding, respectfully, is simply incorrect, and not a fair reading nor interpretation of what are proffered and why. The court, respectfully, appears to have overlooked the arguments in the Trusts' opposition to the motion to strike which involves lots 242 and 710 (as well as 177), lots which unequivocally have been determined to be deserving of a determination of right with respect to easement. While noted elsewhere herein, the Appeals Court did not rule as this court has now re-determined, regardless, the Trusts' proffered documents are admissible with regard to the other lots, 242 and 710, on which a prior judge of this court, has ruled, in this case, the Trusts do have counterclaims, and thus are entitled to a declaration of rights with respect to easements. As noted previously and again below, the Trusts'

proposed documents provide inferential and probative information and judicial admissions by opponents as to facts relevant to the question before the court, which is stated succinctly as follows: "Was there an intent by the Commissioners in 1878, when setting off the common lands, to landlock these properties, rendering them useless to the members of the Wampanoag Tribe of Gay Head, the newly "enfranchised" citizens of the Commonwealth?" The Trusts ask the court to set forth this very question in an order to be clear about what the fact-finding issue in this portion of the bi-furcated case is supposed to be.

THE TRUSTS' PROPOSED DOCUMENTS CONTAIN PROBATIVE INFORMATION OF A RELEVANT NATURE AS TO LOTS 242 AND 710 (& 177) TOGETHER WITH JUDICIAL ADMISSIONS BY THE OPPONENTS

A judicial admission is an act or a statement of a party or his attorney occurring in a court proceeding that conclusively determine an issue, relieving the other party of the need to provide any evidence thereon. Brock & Avery Handbook of Massachusetts Evidence 8th Ed. Aspen Law © 2007 Brock & Avery §2.2 ("Mass. Evid. Handbook").

The Trusts designated the Defendant Town of Aquinnah's Opposition to Additional Joint Motion of [the Trusts] to Amend Answer, Crossclaims and Counterclaims because this document contained judicial admissions. At page 5 thereof, the Town admitted that "Zack's Cliffs Road may provide access to Lots 177 **and 242**..." (emphasis supplied). This is clearly relevant on the issue of an intent to landlock, the burden of which is on the Defendants as noted elsewhere herein.

Certain documents submitted by the Trusts clearly contain extrinsic evidence of inferential and probative value that is clearly admissible. See Mass. Evid. Handbook §5.5.4 citing Conroy v. Fall River Herald News Co., 306 Mass 488, 493 (1940) (inference that state of things once proved to exist, existed earlier – citing Wigmore and other Massachusetts cases). The state of the roads, movement of people due to storms, relieving themselves of possession or occupancy of certain lands, historical studies, etc. all have inferential and extrinsic value with regard to countering any meeting of presumptive burden placed on Defendants on the issue of intent to landlock.

Usually extrinsic evidence may not be adduced to contradict or affect the language of deeds but the "great exception to the application of this rule to the construction of deeds is in the case of ways of necessity, where, by a fiction of law, there is an implied reservation or grant to meet a special emergency, on grounds of public policy, as it has been said, in order that no land

should be left inaccessible for purposes of cultivation." Buss v. Dyer, 125 Mass. 287, 291 (1878).

The Broscheit trial transcript contains testimony by the Executive Director of the VCS. It also contains testimony regarding the presence on the ground of certain roads and their condition. These inferences again relate to the issue of intent.

The court respectfully, is requested to take judicial notice of Frangos v. Town of Aquinnah, (Misc. 299511), that involves the same issue of intent, involving many of the same parties, thus invoking estoppel against these common parties in arguing in a different fashion than they had in Frangos. The VCS Response to Admissions in the Frangos case (Misc. 299511) are offered because VCS admits in #2 that the public does have the right to enjoy the VCS lands in issue in that case. What that means is subject to further inference, to be argued.

The VCS Response to Document Requests in Frangos, numbered 4 and 5, allow the court to draw inferences that VCS has no scientific studies or reports of its lands that could demonstrate an intent to landlock. Otherwise, these would have been provided.

The VCS responses to Gossamer Wing's Interrogatories in this case dated June 14, 2004 are offered to show again that there is no evidence of an intent to landlock. See Responses to numbers 5 (no fact relating to intent to landlock), 7 (limited to crossclaims and says nothing about claims or counterclaims), 9 (no experts to testify on intent to landlock), 15 (no information provided in respect to data on VCS lands that could relate to issue of intent to landlock).

The VCS responses to Interrogatories in Frangos are offered because VCS in response #9 admits it owns no lands which are crossed by private parties to get to the land of the private parties. This is clearly probative on the issue of an intent to landlock.

In the Frangos v. Town of Aquinnah US District Court matter, where, again, many of the parties are common and the issue of intent was also a central question, giving rise to the doctrine of estoppel to bar a party from arguing differently than they have previously on the same issue, the Town responded to interrogatories in which the Town provides no evidence of an intent to landlock in response #1. In #16, the Town provides no evidence that the assessors do not assess all lands in Town as if they have access. This information is clearly inferential as an admission, or probative on the issue of an intent to landlock, and the Town is estopped on the basis of its own statements from arguing in a different fashion.

THE OPPONENTS CONTINUE TO DISTORT THE LAW ON INTENT AND THE SHIFTED BURDEN OF PRODUCTION IN THE ARGUMENT SEEKING REVERSAL

The Opponents continue to try to confound this court into shifting the burden of production away from the Opponents themselves by distorting the law of the presumption on intent in regard to easements by necessity. As shown, the question now before the court since adopting the bi-furcation order of Judge Lombardi, is stated succinctly as follows: "Was there an intent by the Commissioners in 1878, when setting off the common lands, to landlock these properties, rendering them useless to the members of the Wampanoag Tribe of Gay Head, the newly "enfranchised" citizens of the Commonwealth?" The Trusts request that this court incorporate this question and the burden of production as falling upon the opponents into an order outlining the law expected to be determined by the facts presented.

As shown hereinbelow, the Opponents instead subvert the law, by ignoring the shifted burden of production, and try to frame the question as to whether there was an intent to provide the easement at all. Such would re-write the law, and again, impose upon the successors in title to the tribal members, a reading that would have, in essence, enfranchised the tribal members with lands to which they would have no access and thus could use not. This would hardly "enfranchise" the new citizens at all.

As such, the question of relevance must be tested against the question to be decided, among other factors, including the remand order of the Appeals Court, relative areas of discussion based on presumed facts from the limited summary judgment record reviewed and discussed by the Appeals Court, and questions opened for inferential fact finding whether by a review of material not previously seen or now viewed in a fact-finding light.

THE PRESUMPTION ARISING WITH THE 1878 SET-OFF *SHIFTS THE BURDEN OF PRODUCTION* TO THE OPPONENTS TO SHOW THERE WAS AN INTENT TO LANDLOCK

The law ***presumes*** that one will not sell land to another without an understanding that the grantee shall have a legal right of access to it, if it is in the power of the grantor to give it, and it equally presumes an understanding of the parties that one selling a portion of his land shall have a legal right of access to the remainder over the part sold if he can reach it in no other way. Davis v. Sikes, 254 Mass. 540, 545-546 (1926)(emphasis supplied), quoting New York & New England Railroad v. Railroad Commissioners, 162 Mass. 81, 83 (1894). See generally

Restatement Third, Property (Servitudes) ß 2.15. See also Black v Cape Cod Company, Mass. Land Court Misc. No. 69813, pgs 5-6 (1975)[1].

The **presumed** intent is not an actual subjective intent on the part of the grantor but an objective intent of the grantor and grantee based upon the circumstances of the conveyance that land would not be granted without a means to access it. See Restatement of Property § 476, comment g (1944); Restatement of Property (Third) §2.12.

This presumption, shifts the burden of production to the opponents, essentially putting on them the burden of proof that there was an intent to landlock the parcels in issue in this case. See, Massachusetts Guide to Evidence §301(d) (Flashner Judicial Institute, 2008-2009 guide prepared for the SJC Advisory Committee on Evidence Law)("Evid. Guide"). See also Brock & Avery Handbook of Massachusetts Evidence 8th Ed. Aspen Law © 2007 Brock & Avery §5.5 ("Mass. Evid. Handbook").

THE BURDEN OF PRODUCTION SHIFTS TO THE OPPONENTS

It is axiomatic that there are two distinctive parts to the so-called "burden of proof." The first is the burden of persuasion that arises on the filing of the claim and is on the proponent of the claims. Evid. Guide §301(d) Mass. Evid. Handbook §5.5. The other part is the burden of production, which is the burden that one must put on evidence sufficient to carry the overall burden of persuasion. Id.

Accordingly, as noted by the Kitras Appeals Court, the burden of persuasion on the issue of intent **starts** on the persons offering the same. Id. The burden of production on the issue,

[1] The Black court stated therein as follows:

> The partition of 1878 of the land held in common by the Indians was to establish parcels to be owned individually by the Indians, and this partition contained no provision for access to and from landlocked parcels by the designated owners of such parcels. **There is no evidence whatsoever that the Commonwealth intended in the partition of 1878 to provide parcels of land to individual Indians without allowing them any means of access.** Rights of way of necessity are created by a presumption of law. Where a landowner conveys a portion of his land in such a manner that he is unable to reach the land retained without travelling over the land conveyed, the law presumes in the absence of contrary evidence that the intent of the parties to the conveyance was to provide access to the former by passage over the latter. Davis v. Sikes, 254 Mass. 540.

Black v Cape Cod Company, supra (emphasis supplied).

however, shifts to the opponents upon the raising of the presumption to show the negative of the fact presumed.

The Evid. Guide at Section 301(d) states as follows:

> (d) 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 statute, 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 that 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.

Evid. Guide §301(d)(*emphasis italicized*).

This presumption of an intent to provide access by an easement of necessity noted in the law above, then, shifts the burden of production to the opponents, essentially putting on them the burden of producing sufficient evidence that there was an intent to landlock the parcels in issue in this case, the negative of the initial burden of persuasion of the proponent of the easement. Id.

THE SHIFTING OF THE BURDEN OF PRODUCTION ONTO THE OPPONENTS IS THE LAW OF THE CASE

Judge Green's explanation on this point in his decision of June 4, 2001 was quoted in the previously filed Trusts' opposition. This was wholly in accord with the Appeals Court decision and the Evid. Guide §301(d) that the initial burden of persuasion is on the proponent of the easement by necessity. But, **upon showing the 1878 actions by the commissioners in setting off Lots 174 and above, the burden of production shifts to the opponents, who must now prove there was an intent to land lock these parcels.** The Opponents by choral repetition, seek to drum a different framing of the question of intent into the court's viewpoint.

This finding of the shifted burden by Judge Green was NEVER reviewed nor was it overturned by the Appeals Court, and continues to stand as law of the case. The Appeals Court merely reiterated that the initial burden lies with the proponent, but did not discuss the burden shift of the presumption, expressly leaving the collection of evidence, ruling thereupon, and the fact finding for this court.

The Appeals Court, in passing, noted expressly in *dicta*, that the burden was on the proponent of an "implied" easement.[2] This is true of the initial burden, until the division of land from a common grantor (a break of the unity of title) is shown. Once shown, however, the burden shifts to the opponents to show there was an intent to landlock. See Davis v Sikes, supra and discussion above. The Appeals Court did not discuss, nor did it limit in any way, the presumption (noted in the cases cited by the Trusts and by Judge Green in the June 4, 2001 decision herein) that THEN arises upon showing that lots carved by a common grantor (the 1878 Commissioners) had no access to a public way, that shifts the burden of production to the opponents to show the opposite, to wit, that it was the intention of the Commissioners to grant only landlocked lots. The Appeals Court NEVER directed the lower court to ignore nor to interpret the rules of evidence in anyway.

Because the presumption shifts the burden onto the Defendants, many of the arguments of relevance raised in general by the Defendants, are inapposite. The documents provided by the Plaintiffs and the Trusts, in essence, only come into play when and if the Defendants can meet their burden of production to show that there is evidence of an intent to landlock. If not, the intent to provide for such easements by necessity is ESTABLISHED. Evid. Guide §301(d).

Many of the Trusts' proposed documents the court summarily struck, assuming all were being offered with respect to Lot 177 only, address the issue of the burden being on the Defendants, and show that Defendants adduce no evidence of an intent to landlock on the part of the Commissioners. Indeed, the Black, supra court as noted in the footnote above, found that

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[2] The Appeals Court made clear that it was in its "discussion" of the perceived status of certain lots (whether particular lots had easements by necessity to be left to the fact finder) when it merely noted the law on the burden to prove an existence of an implied easement, without further discussing the presumption that is raised with regard to an easement by necessity, stating, as quoted by VCS:

> We do not mean to suggest by our discussion that an easement by necessity for any given lot **carved out of the common land** either does or does not exist, but rather that the question requires thoughtful consideration and resolution by a fact finder. This question thus is best left for the trial judge, after the parties have had an opportunity to make whatever showing they wish or are able, remaining mindful that it is the proponents' burden to prove the existence of an implied easement. Cheeever v. Graves, 32 Mass.App. Ct. 601, 607, 592 N.E.2d 758 (1992).

Kitras, 64 Mass. App. Ct. at 300. (emphasis supplied)

THIS COURT IS REQUIRED TO TEST ALL LOTS IN ISSUE FOR AN EASEMENT BY NECESSITY AT THE FACT-FINDING STAGE, TO DRAW ALL INFERENCES AVAILABLE FROM THE EVIDENCE AS TO WHETHER LOTS 174 AND ABOVE WERE ALL PART OF THE COMMON LANDS PRIOR TO 1878 AND HAS NEW EVIDENCE AS TO WHETHER LOTS 174-189 WERE SEVERALTY LOTS

This court has determined that the Appeals Court has "ruled," on the limited summary judgment record before it, that Lots 174-188 or 189, "do not hold easement rights." Respectfully, such is a mis-reading of the decision of the Kitras court, which simply reversed the decision of Judge Green of June 4, 2001 that dismissed the case ONLY for lack of the United States as a necessary party, and remanded the case for fact finding as noted. The Appeals Court specifically stated that it would "leave the question of scope of any easements to trial." 64 Mass. App. Ct. 285, 301 (2005).

Even as VCS has again quoted directly from the Appeals Court, the court directed:

> "We do not mean to suggest by our **discussion** that an easement by necessity for **any given lot carved out of the common land** either does or does not exist, but rather that the question requires thoughtful consideration and **resolution by a fact finder.** This question thus is best **left for the trial judge**, after the parties have had an opportunity to **make whatever showing** they wish or are able...

64 Mass. App. Ct. 285, 300 (emphasis supplied).

This was part of the remand directive of the Appeals Court for this court to determine whether an easement by necessity exists for any lot carved from the common land. Attached to the other Defendant's Brief was a Plan of Gay Head Showing the Partition of the Common Lands, that clearly denotes Lots 177 and 178. See attached. This plan is submitted by the Defendants and shows that Lots 177 and 178 were carved from the Common Lands.

The Appeals Court expressly left the questions as to "any given lot carved from the common land" to the trial judge, leaving the parties to "make whatever showing they wish." Id.

THE QUESTION OF WHAT LAND CONSTITUTED THE COMMON LANDS AT THE TIME OF COMMENCEMENT OF THE PETITION TO PARTITION THAT CREATED LOTS 174 AND ABOVE REMAINS OPEN

The common lands consisted of all lands in the then District of Gay Head that were not determined to be held in severalty under statutes of 1863 and 1866. [St. 1870, c. 213]. The common lands were given by the Commonwealth to the Town under the 1870 statute that created the Town. [St. 1870, c. 213]. Lots 1-173 were the only lots fully and finally determined in a

report of 1871, by the Commissioner appointed by the General Court, to be the lots held in severalty. This occurred a year after the General Court had enacted the 1870 statute that created the town and gave all of the remaining common lands to the new Town of Gay Head, subject to the rights to have it partitioned. Since only lots 1-173 were found to be in severalty, it is easy to inferentially determine that all of the remaining lands that became the Town were part of the common lands and given to the Town, thus preventing any further Tribal land acquisition under the old method of fencing and occupying. The Tribal members were now full citizens and subject to the laws of the Commonwealth, including that one cannot gain property adversely against a Town. Lots 174 and above were created in 1878, could not have become, after October 1871, a severalty lot. and thus had to be carved from the common lands. This inference has never before been reviewed or adjudged by any fact-finding court and remains an open question that must be resolved as ordered as part of the Appeals Court remand order.

LOTS 174-189 WERE NOT AMONG
PEASE'S 1871 REPORT "FULLY & FINALLY" DETERMINING THE
LANDS HELD IN SEVRALTY AND THUS, AS OF 1871
WERE PART OF THE COMMON LANDS GIVEN TO THE TOWN

In 1871, Richard Pease, as Commissioner under the 1866 Statute [St. 1866, c. 67], that carried forward the work of Mr. Marston from the 1863 Statute [St. 1863, c. 42] that ordered him to determine "fully and finally" the bounds of the lands held in severalty and the bounds of the common lands, in 1871, after the partition action to divide the Common Lands had already commenced under the 1870 Statute that created the Town, filed his report with the governor which was also thereafter recorded at the Dukes County Registry of Deeds in Book 49, setting out ONLY Lot numbers 1-173. Mr. Pease reported to the governor that he had "completed" the work assigned him (i.e. he had "fully and finally" determined the bounds of the lands held in severalty and thus the common lands). Thus, all lands in numbers 174 and above were part of the Common Lands and had to be set-off therefrom.

Pease's report followed the enactment of the 1870 statute, of which he was undoubtedly aware, that dictated that all of the remaining lands were common lands and these were given to the Town. Lots 174-188 or 189 were NOT as of 1871 determined to have been severalty lots under Pease's "final" determination, but were among the lots much later created from these common lands and simply did not exist until 1878. It is a question of inferential fact yet to be reviewed and determined as to whether, after fully and finally determining the bounds of the

common lands and the bounds of the lands held in severalty in 1871 under the 1866 and 1863 statutes, and after the tribal members had all become citizens of the Commonwealth as of 1870 (at the latest), Pease could possibly determine that between 1871 and 1878 additional lands could become occupied and enclosed under the prior tribal law, in a way that would clearly be adverse against the Commonwealth or the Town, or rather that these lands were simply part of the overall partition of the common lands.

As noted hereafter, disputed inferences as to the interpretation of these facts, are beyond summary judgment, were beyond the disputed facts of the record on summary judgment which would only look at undisputed evidence, and can only be resolved with an evidentiary hearing, which the Appeals Court was NOT reviewing.

THE APPEALS COURT REVIEWED A LIMITED SUMMARY JUDGMENT RECORD TO SEE IF ANY LOTS COULD HAVE HAD AN EASEMENT BY NECESSITY BEFORE IT COULD REACH THE SECOND, AND CENTRAL QUESTION, AS TO WHETHER THE US WAS AN INDISPENSIBLE PARTY:
THE APPEALS COURT NOTED IT HAD MERELY DISCUSSED A REVIEW OF FACTS OF A LIMITED RECORD OF SUMMARY JUDGMENT THAT IT THEN EXPRESSLY REMANDED FOR FULL FACT FINDING

Despite the direct quote of the Appeals Court (Kitras at 300) that the prior *discussion* [of unity of title etc.] should not be construed to mean that the record reviewed by the Appeals Court would determine what lots may benefit from an easement by necessity, but that all such determinations are to be made by this court as fact-finder, after any showing the parties wish to make, this court has, respectfully now ruled that Lots 174 – 188 or 189 have NO EASEMENT RIGHTS, at all.

Some of the defendants, including VCS have previously conceded that "[a]s noted by the Appeals Court, it did not need to reach the issue of whether the United States was an indispensable party 'unless easements by necessity may be implied for some or all of the lots in question.' 64 Mass. App. Ct. at 291."

The Appeals Court was expressly looking to see IF ANY of the lots in question could have an easement by necessity implied. If so, it would go to the next step to see if the United States was indeed a necessary party. The Appeals Court was NOT reviewing the summary judgment record to make a determination as to which particular lots may or may not have easements by necessity. Indeed, the Appeals Court expressly left that question for the trial judge on remand. Kitras at 300.

Since the Appeals Court did find, on the standard of review of a summary judgment record only, that there were, at least, some lots that could benefit from an easement by necessity, it then went on to its review of the necessary parties issue and ultimate holding, the expressed "discussion" (Id at 300) about unity of title and the history on lots 174-188 or 189 perceived by the Appeals Court and the inferences drawn according to said standard, had no bearing on its decision, but was "unintegrated *dictum*" not essential to the decision. See Better Boating Assn v. BMG Chart Prods., Inc., 61 Mass. App. Ct. 542, 550 (2004); Commonwealth v. Hall, 48 Mass. App. Ct. 727, 731(2000) (the quoted material was dictum – the court made clear it was discussing matters not essential to its decision)[3]. In the instant case, the Appeals Court went further to remand **all such decisions to this court**. Id at 300. The question of easements for lots carved from the common lands, Lots 174 and above, remains expressly open. By ruling that the Appeals Court ruled that Lots 1-188 or 189 do not have easement rights, respectfully, is NOT the Appeals Court ruling and ought to be corrected.

SUMMARY JUDGMENT REVIEWS A LIMITED RECORD &
DOES NOT BIND THE TRIAL COURT

Not only did the Appeals Court expressly remand the question of whether the lots in issue might have an easement by necessity to the trial court, the Kitras court (at 293 – seven pages before the court specifically remands all such questions) that it had "considered most favorably from the complainants' perspective" the record before it, which was a summary judgment record only, the standard of review and fact finding on such a limited record, as noted below, do not bind a lower court on remand to find the same set of facts, especially where the Appeals Court has expressly directed such further fact-finding.

Given that the record to be developed before this court is to be a fact-finding mission, an entirely different record and facts may yet be presented as the parties wish as the Appeals Court directed. Id at 300. See also, Goulet v. Whitin Mach. Works, 399 Mass. 547 (1987)(new trial judge not bound by prior hearing evidence –pleadings conformed to the evidence presented under liberal Rules of Civil Procedure).

Since the case was remanded for further fact-finding, new documents may be presented and different inferences drawn to determine and establish facts. Facts previously found,

---

[3] These cases support the finding that the unity of title discussion was mere "discussion" as expressed by the Appeals Court, or *dicta* and not part of the holding.

including disputed inferences drawn and interpretation thereof, under a prior summary judgment do not bind a court, if the claim is based on facts (or disputed inferences to be drawn and interpreted) entered into the record subsequently to the prior judgment. See, Phoenix Hardware Co. v Paragon Paint & Hardware Corp. 1 FRD 116 (DCNY 1939).

Additional fact-finding is required to determine the inferences that may be drawn from the documents. The rule of law has been stated as follows:

> In considering a motion for summary judgment, the trial court must determine whether a genuine issue of material fact exists rather than how that issue should be resolved, and a summary judgment should be granted only when the truth is clear. Lighting Fixture & Elec. Sup. Co. v. Continental Ins. Co., 5 Cir., 1969, 420 F.2d 1211, 1213; United States v. Burket, 5 Cir., 1968, 402 F.2d 426, 430. Even though the basic facts are undisputed, **a summary judgment may be improper if the parties disagree regarding the material factual inferences that properly may be drawn from these facts**. *See, e.g.*, N.L.R.B. v. Smith Industries, Inc., 5 Cir., 1968, 403 F.2d 889, 893; Keating v. Jones Development of Missouri, Inc., 5 Cir., 1968, 398 F.2d 1011, 1013.

Cole v Chevron Chemical Co., Oronite Div., 427 F.2d 390. 393 (5th Cir. 1970)(emphasis supplied).

On the same issue, another court stated the rule as follows:

> There are cases, however, such as Cali v Eastern Airlines, Inc., 442 F.2d 65 (2d Cir. 1971) and Empire Electronics Co. v United States, 311 F.2d 175 (2d Cir. 1962), which hold that although there may be no dispute as to the basic evidentiary facts, summary judgment is improper where the case stands or falls on the inference that may be drawn from these facts--particularly, where the inferences depend upon subjective feelings and intent. See comments so holding in Donnelly v Guion, 467 F.2d 290, 294 (2d Cir. 1972) This rule applies where the 'undisputed evidentiary facts disclose competing material inferences as to which reasonable minds might disagree . . .' (442 F.2d at 71)

Dalesio v. Allen-Bradley Co.. 64 F.R.D. 554, 556 (W.D.Pa., 1974)(emphasis supplied).

THE APPEALS COURT REMANDED THE CASE FOR FACT FINDING:
NEW EVIDENCE IN RESPECT TO LOTS 177 AND 178

This court has ruled that the Appeals Court ruled that lots 174-188 or 189 do not have easement rights. The Trusts respectfully, dispute that this was the ruling of the Appeals Court. The Appeals Court expressly sent this issue back to the trial court. There is new evidence to present to the court on this issue, not previously before the court in this matter.

The Appeals Court reversed Judge Green's dismissal under Rule 56 summary judgment, which was based on the papers then presented to the court, and which lower court order had been grounded solely on a determination of a lack of necessary parties. The Appeals Court remanded the case for fact finding to the trial court. Kitras at 300. Some facts already established by Judge Green were NOT overruled, the 1878 Commissioners set-off being one. Other facts were assumed by the Appeals Court under a standard of review for a summary judgment. Still others were stated by the Appeals Court, in "discussion" (*dicta*), on the summary judgment record as perceived by the Appeals Court. Since the case was remanded for fact finding, as noted above, new documents may be presented and different inferences drawn to determine and establish facts.

One of the areas subject to new evidence or establishment of fact is the status of Lots 174-188 or 189. New evidence of the Sectional Plans, together with new documents now brought before the court could lead the court to actually make a firm determination as to these lots that was lacking from the June 4, 2001 decision. Note that this June 2001 order was based on limited evidence since it was only a summary judgment hearing and NOT a trial or other mode for finding of fact.

As noted above, if Lots 1-173 were finally determined to have been those lots held in severalty under the tribal law of possession and this work was completed in 1871, how could more land have been enclosed after 1871 when this land was now the common lands held by the Town? The tribal members were all, after 1870, citizens of Massachusetts and under Massachusetts law, could NOT obtain adverse possession against a Town. The set-off of lots 174-188 or 189 and above HAD TO HAVE BEEN according to the partitioning of the common lands, and cannot be said to have been severalty lots as of the time of their set-off in 1878.

Regardless, this possession of the severalty lots was subject to the right of the Commonwealth to regain full seisin by restoration of the underlying fee, always held in the Commonwealth, if possession was given up. James v Watt, 716 F.2d 71, 74-75 (1st Cir.1983), cert. denied, 467 U.S. 1209 (1984) cited by Kitras v. Town of Aquinnah, 64 Mass. App. Ct. 285, rev. den'd, 445 Mass. 1109 (2005)

New evidence has been discovered that puts into question whether certain lots in the 174-188 or 189 group, those being lots 177 and 178, were possessed or could have been possessed pursuant to the tribal rule of enclosure and possession, during the period 1871 to 1878, regardless

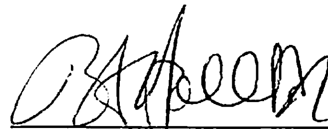
of the fact that the law applied to these new citizens, prohibited them from gaining title adversely by possession against the Town. Richard Pease in 1871 reported he had fully and finally settled all questions with respect to the severalty lots, listing them as Lots 1-173, leaving all other lands in the hands of the new Town under the 1870 statute, then if lots 177 and 178 had become later enclosed and possessed. If these lots were not enclosed or possessed, pursuant to the law of the James v Watt court, the fee would have returned to the Town as part common land and would have been subject to the partitioning.

In the Burgess document, newly proffered by the Plaintiffs, there is new evidence of no occupancy of Lots 177 and 178. This is clearly probative on the issue of an intent to landlock, or whether an easement exists for these lots.

WHEREFORE the Trusts hereby submit this Offer of Proof in respect to the document struck from the record by the court on April 27, 2009, though these arguments were brought be fore the court in a motion to reconsider by the Trusts on August 1, 2009, which motion was denied on August 18, 2009.

Edgartown, Massachusetts

Gossamer Wing Realty Trust
Baron's Land Trust
By Its Attorney,



BENJAMIN L. HALL, JR.
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BBO# 547622

COMMONWEALTH OF MASSACHUSETTS

DUKES, SS.

LAND COURT
DOCKET NO.
238738

* * * * * * * * * * * * * * * *

MARIA A. KITRAS, Trustee, et als.,

Plaintiffs,

v.

TOWN OF AQUINNAH, et als.,

Defendants.

* * * * * * * * * * * * * * * *

AFFIDAVIT OF DIANNE E. POWERS

Dianne E. Powers, being duly sworn, deposes and says:

1. I am the Register for the Dukes County Registry of Deeds. The facts set forth herein are true to the best of my knowledge, information and belief.

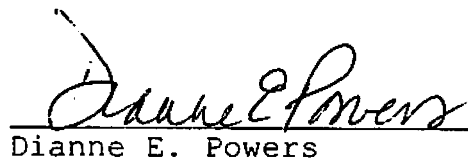
2. I have held my current position since 1995. Prior to that time, and beginning in the 1970s, I worked at the Dukes County Registry of Deeds as a clerk and later as a title examiner. In those capacities, I have been familiar with the records available at the Registry of Deeds since the 1970s.

3. The book entitled "Sectional Plans" was in the same location in the records room at the Dukes County

Registry of Deeds from the 1970s until 2004, filed with other maps of Martha's Vineyard, freely available, open to the public, and well-known to title examiners working there. In 2004 that grouping of maps and books were moved from the records room to their present location referred to as the 'main anteroom' due to space issues.

4. I have reviewed the Affidavit Of Benjamin L. Hall, Jr. dated June 16, 2010. He is wrong in stating that the book entitled "Sectional Plans" "simply appeared on a shelf in the main anteroom of the Registry of Deeds in late 2006." Hall Aff. ¶4. The book has been in the same grouping since the 1970s. He is correct in stating that there was no marginal notation to the Sectional Plans in Book 49 where the set-off deeds are recorded until 2007.

Signed under the pains and penalties of perjury this 24th day of June, 2010.



Dianne E. Powers

(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."

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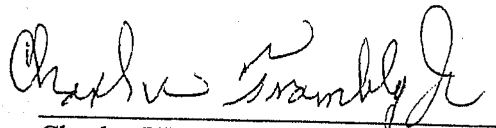
[6] This observation also calls into question how strictly necessary access easements were at the time of division. As noted above, the necessity must have existed at the time of the division. See Viall v. Carpenter, 80 Mass. 126 (1859). If an easement was not necessary *at the time of division* it cannot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

CWT

By the Court (Trombly, J.)

Attest:

Deborah J. Patterson
Recorder

Dated: August 12, 2010

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER

COMMONWEALTH OF MASSACHUSETTS

DUKES COUNTY, ss.

TRIAL COURT
LAND COURT DEPARTMENT
CASE No. 97 Misc. 238738 (CWT)

MARIA A. KITRAS as she is TRUSTEE OF BEAR REALTY TRUST, et als.,

Plaintiffs,

-versus-

TOWN OF AQUINNAH, et als.

Defendants.

DEFENDANTS GOSSAMER WING REALTY TRUST
AND BARONS LAND TRUST MOTION TO CORRECT, AMEND or MODIFY
THE ORDER & JUDGMENT of JUDGE TROMBLY DATED AUGUST 12, 2010

Now comes Defendant Gossamer Wing Realty Trust, Benjamin L. Hall, Jr., Trustee ("GWRT"), and Brian M. Hall as he is Trustee of Barons Land Trust ("BLT")(collectively the "Trusts"), by and through their attorney, Benjamin L. Hall, Jr., Esq., and, move this court, pursuant to Mass.R.Civ.P. 59 and 60 to correct, amend or modify the decision and judgment as ordered by the court on August 12, 2010, and, in support thereof, provide a memorandum of law herewith.

The decision and judgment rendered thereupon by the court on August 12, 2010, with all due respect, contain significant misstatements of fact, chronology, and errors in setting forth the history of proceedings, law of the case, and in applying the facts to the law, respectfully, requiring correction to prevent manifest prejudice to the Trusts.

RULE 60 CORRECTIONS SOUGHT TO DECISION

The Trusts' memorandum of law supporting this motion details the, respectfully, rather numerous erroneous findings of fact and misapplications of law set forth in the decision of August 12, 2010. The requests for correction in the Trusts' memorandum are incorporated herein by reference.

RULE 59(e) CORRECTIONS SOUGHT TO JUDGMENT

The Trusts seek a corollary correction to the facts set forth in the decision that are repeated or implied in the judgment as are set forth above. These are as follows:

1) That the parties, including the Defendants the Trusts and Plaintiffs Gorda and Bear I and II, did not "agree" as that term is defined for purposes of a case stated, to "submit this action to the court on a case-stated basis, without calling witnesses." The fact finding was limited to the issue of intent to provide for implied reasonable easements by necessity to allow for reasonable use of the premises so benefitted.

2) That Defendant GWRT, owning lots 707, 710, and 242 in the relevant area is NOT a Plaintiff.

3) That Defendant BLT, owning Lot 177 in the relevant area, respective rights were not determined nor addressed nor adjudicated.

4) That lot 302 is outside the relevant area and was not subjected to the case with the filing of the Third Amended Complaint.

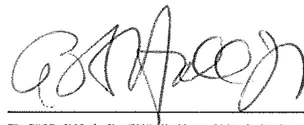
5) That Defendants the Trusts counterclaims have not been addressed nor adjudicated hereby and therefore lots 707, 710 and 302 should NOT be listed as having had any rights declared.

6) That on the law, and the facts, there was no sufficient showing of an intent to landlock by the Commonwealth for either the 1871 or the 1878 set-offs, and that the Plaintiffs' lots and those owned by the Trusts as established in the Third Amended Complaint have the benefit of a reasonable easement by necessity across the lands of the other parties to and from Moshup Trail.

WHEREFORE Defendant Gossamer Wing Realty Trust, Benjamin L. Hall, Jr., Trustee ("GWRT"), and Brian M. Hall as he is Trustee of Barons Land Trust ("BLT")(collectively the "Trusts"), respectfully requests that this Court correct, amend and/or modify, pursuant to Mass.R.Civ.P. 59 and 60 the decision and judgment as ordered by the court on August 12, 2010 as set forth in the Trusts' memorandum and hereinabove and for such other and further relief as this court deems just and equitable.

Dated: August 23, 2010

Benjamin L. Hall, Jr.
Trustee of Gossamer
RESPECTFULLY SUBMITTED,
Gossamer Wing Realty Trust
Baron's Land Trust
By Its Attorney,



BENJAMIN L. HALL, JR.
45 Main Street, P.O. Bx 5155
Edgartown, MA 02539
(508) 627-3700
BBO# 547622

COMMONWEALTH OF MASSACHUSETTS

DUKES COUNTY, ss.

TRIAL COURT
LAND COURT DEPARTMENT
CASE No. 97 Misc. 238738 (CWT)

MARIA A. KITRAS as she is TRUSTEE OF BEAR REALTY TRUST, et als.,

Plaintiffs,

-versus-

TOWN OF AQUINNAH, et als.

Defendants.

DEFENDANTS GOSSAMER WING REALTY TRUST
AND BARONS LAND TRUST MEMORANDUM OF LAW IN SUPPORT OF THEIR
MOTION TO CORRECT, AMEND or MODIFY
THE ORDER & JUDGMENT of JUDGE TROMBLY DATED AUGUST 12, 2010

Now comes Defendant Gossamer Wing Realty Trust, Benjamin L. Hall, Jr., Trustee ("GWRT"), and Brian M. Hall as he is Trustee of Barons Land Trust ("BLT")(collectively the "Trusts"), by and through their attorney, Benjamin L. Hall, Jr., Esq., and, present this memorandum in support of the Trusts' motion, pursuant to Mass.R.Civ.P. 59 and 60 to correct, amend or modify the decision and judgment as ordered by the court on August 12, 2010, and, in support thereof, state as follows:

The decision and judgment rendered thereupon by the court on August 12, 2010, with all due respect, contain significant misstatements of fact, chronology, and errors in setting forth the history of proceedings, law of the case, and in applying the facts to the law, respectfully, requiring correction to prevent manifest prejudice to the Trusts.

MISSTATED OR OMITTED FACTS IN THE DECISION

The August 12, 2010 decision begins by laying out the procedural posture of the case, but immediately incorrectly misstates the background procedure and status of the case. The decision omits a critical procedural fact, that the judgment issued by Judge Lombardi on 8/21/2003 was a Rule 54(b) separate judgment that left all of the other counts then plead in effect and pending

resolution in the lower court. 8/12/2010 Decision Page 1. These included prescriptive cross claims of GWRT.

BIFURCATION WAS TO ADDRESS SOLE ISSUE OF INTENT ON EASEMENTS BY NECESSITY – NEVER ANY AGREEMENT ON CASE STATED NOR THAT ENTIRE CASE TO BE RESOLVED THEREBY

The decision then correctly denotes that Judge Lombardi had bi-furcated the case but immediately misconstrues that bifurcation order and expands, without notice to the parties, the fact-finding being conducted by the court to include the prescriptive easement claims. The decision at page 2 buries this finding and determination in a footnote.

The easement by necessity count of the case was bi-furcated into an "intent" portion, and then the other requisite portions (for e.g. necessary parties, location issues, etc. which Judge Lombardi decided would be left for another day if there was a finding on the question of intent). Order Lombardi, J. August 14, 2006. The bifurcation order did not address determining any aspect of the prescriptive count and such claims have always been left for later determination.

Because the decision does err in making findings on the prescriptive easement count, and expressly tracks many of Judge Green's findings in the decision of June 4, 2001, it is ironic that the June 4, 2001 decision stated that "[t]he record does establish that Zack's Cliffs Road eventually came into use and served as the principal means of access from plaintiffs' lots..." This 2001 finding while in the context of the easement by necessity analysis, also provides a finding supporting the prescriptive claim. This finding not mirrored in the instant decision, is an omission of great import. The decision does not address the use of Zach's Cliffs Road as an indicator of a tacitly agreed location for an easement by necessity that had been serving or would serve from Moshup Trail as noted as a possibility by the Appeals Court, nor does it lend this finding of fact to provide some support for the prescriptive claims, since the court had decided to raise such an issue.

The other Defendants, namely Vineyard Conservation Service repeatedly sought to strike proffered documents from the record based the argument that these documents related solely to the easement by prescription claim, which was NOT before the court in the limited fact finding to be undertaken in whatever process the court had compelled the parties to engage for such purported fact-finding. Yet, Ex. 26, an aerial photograph taken in 1947 with the lot lines superimposed shows Zach's Cliffs Road running through the area in issue as well as other trails running over Lots 710, 709, etc. The photo demonstrates that there was a system of roads used to

access many of the lots in question from before 1947. Other evidence presented, but stricken, would have confirmed that these ways still exist to greater or lesser degrees on the ground.

FAILURE OF AGREEMENT ON FACTS OR INFERENCES BARS DECISION BY CASE STATED – TRIAL SOLE MODE FOR FACT FINDING

The decision also at page 2 asserts that the "parties agreed to submit the action to the court on a case stated basis, without calling witnesses." This is, respectfully, patently incorrect. There is nothing in the record to suggest either any such "agreement" or that the entire "action" was to be so determined. In fact, the record is rife with disagreements as to whether witnesses could present testimony (for e.g. the effort of Plaintiff Kitras to call a surveyor by way of submitting his deposition testimony in respect to evidence found in the field that was suggestive of a failure of enclosure required under Tribal law to gain possessory rights over the enclosed parcel) and whether the procedural mode the court seemed to be ordering to resolve the facts was compliant with Massachusetts jurisprudence.

Both Kitras and the Trusts repeatedly pointed out in motions and memoranda that because there had been no sufficient "agreement" as to the procedure taken, that the only lawful mode for resolving the facts would be through a trial on the issue of "intent" alone. In fact, respectfully, the decision, in a footnote 2 on page 2, misconstrues the Trusts Motion for Clarification served on April 15, 2010, which was a plea for clarification on the issue of what fact-finding procedure the court was going to follow as well as a request for some clarity on the issue to be decided by the court in the fact finding procedure. Rather than provide some decisional analysis, the court omits any discussion of the issues raised by the Trusts in seeking clarification, but simply re-characterizes the Trusts motion as a request for a trial, and denied the same stating "[t]o the extent not clear herein, that request is denied." The motion did contain a request, among several others, that the court clarify the matter by ordering a trial as being the only mode permitted by law to resolve facts under the circumstances. Still, such a request belies the very underpinning for the decision that the "parties had agreed to submit this action to the court on a case stated basis..."

Lastly, Judge Lombardi, who had entertained discussion (during which there had been no "agreement" of using an alternative to trial as a means for the requisite fact-finding on the bifurcated sole issue of intent, indicated that the fact finding would be conducted by way of a trial. Judge Lombardi denoted in his order dated September 21, 2007 on page 2 that "...[t]he

deadline for discovery...shall be continued to a date...after plaintiffs serve...documents they propose to introduce at **trial**..." (emphasis supplied). This further undermines the notion that the parties had agreed to a case stated mode.

Moreover, because there was no agreement on the evidence or the inferences to be drawn therefrom, only a trial could resolve the issues. Frati v. Jannini, 226 Mass. 430, 431 (1917); Paradigm Properties, LLC.v. Zoning Board of Appeals of Somerville, Land Court Case No. 315232 (LJL).[1]

MISCONSTRUCTION AND OMISSION OF CRUCIAL FACTS

The court then uses Judge Green' s June 4, 2001 decision as the basis for finding certain facts, missing several important procedural steps that had occurred subsequent to that decision which greatly altered the landscape upon which the bi-furcated decision should have rested. As a result of the use of the Green decision as a basis for fact determination, there are several repeated remarkable errors of fact, including misnaming of GWRT as a Plaintiff when GWRT has been a Defendant, and ignoring the facts set forth in the Third Amended Complaint, which greatly altered the parties and lots in issue before the court in an effort to limit the parties to those the court felt were necessary to the bi-furcated decision on the sole issue of intent.

GOSSAMER WING MISNAMED A PLAINTIFF AGAIN

At par. 5, the decision finds as follows:

> 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.

In Judge Green's Decision of June 4, 2001, the Court also designated Hall as a Plaintiff. By Motion to Correct, Amend or Modify, GWRT objected to his designation as Plaintiff and sought to have the Decision amended to express the true status of Hall as a Defendant. The

[1] Since the court had, by motion, stricken certain documents proposed, and allowed other documents to be reviewed by the court in some undefined pre-trial process, over objection, the facts to be ascertained by the documents so stricken or allowed over objection CANNOT be "by agreement." The court thus had already discarded proposed facts from which inferences could be drawn, thereby barring any agreement on material facts. Scaccia v. Boston Elev. Rwy. Co., 308 Mass. 310, 312-313 (1941)(The Scaccia court quoted from Atlantic Maritime Co. v. Gloucester, 228 Mass. 519, 520-521: ""If such inferences need to be drawn in order to reach the ultimate essential facts, then there has not been 'agreement as to all the material facts' by the parties within the meaning of those words in the statute.'").

Court (Lombardi, J.) by Order dated September 17, 2002, allowed that portion of GWRT's motion relating to his misnomer claim and indicated that "Hall [GWRT] shall hereinafter be designated as a Defendant." This court, by using Judge Green's decision as a basis, mirrored the same error that previously had been corrected. This ought to be corrected for the same reasons stated in the GWRT Memorandum supporting its prior motion to correct dated August 28, 2002.

DEFENDANT BARONS LAND TRUST CLAIMS NOT ADDRESSED

Further missing from any discussion are the counterclaims of Defendant BLT which owns lot 177, adjacent to Kitras lot 178, and counterclaims of GWRT which owns Lots 242, 707 and 710 in the relevant area in issue. Lot 302 was omitted from the case with the filing of the Third Amended Complaint. So BLT and its lot, and GWRT and its lots remain without any adjudication of right in the decision and judgment

CHRONOLOGICAL MISCONSTRUCTION AND OMISSIONS

The court also, respectfully, failed to take heed of chronologically critical facts that, respectfully, led to a misconstruction of the facts and misinterpretation of legislative edicts.

In par. 7-18 at pages 2-5 of the decision, the court appears to find a chronology of the relevant events, but juxtaposes and overlays certain events in an out-of-order manner, leaving a somewhat distorted chain that impacted the logic and fact basis for the decision.

The decision did not address a central portion of the 1870 Act incorporating the Town of Gay Head [St. 1870, c. 213], Section 2, that conveyed the Common Lands to the new town of Gay Head. The bounds of these Common Lands had not yet been determined as of the date of enactment, but the Legislature was aware that Mr. Pease had been working diligently on the same under the 1863 and 1866 Statutes. The decision at par. 11 does correctly describe Section 6 where a mode is spelled out, much as in an 1869 Statute that made all Indians citizens of the Commonwealth, for dividing Indian lands among the new citizens, intending to enfranchise them.

But, in Stat. 1869, c. 463, the Legislature made all Indians citizens of the Commonwealth, subject to and with the benefit of its laws. (§1). This 1869 Act (§2) provided that all lands held in severalty until that time should become the land of the Indian possessors. It further addressed the landed rights of all Indians save for the Gay Head and Mashpee in providing a mechanism for division by partitioning or otherwise as noted therein. Now being subject to he laws of the Commonwealth as full citizens, there could be no further adverse

possession against the Commonwealth or its subdivisions. The effect of this then is that after the passage of this 1869 Act on June 23, 1869, no further lands could be enclosed and taken in severalty by Indians.

The decision opines that "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." Par. 11 Decision 8/12/10. But, there is no agreed fact or inference in the record to support this determination and there is no express provision in the statute that Section 6 of the 1870 Act was to "substitute" for the procedure under the 1863 Statute.

The SJC has repeatedly made clear the interpretation of statutory mandates as follows:

> We are guided in our analysis . . . by the familiar maxim that a statute must be interpreted "according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." Hanlon v. Rollins, 286 Mass. 444, 447, 190 N.E. 606 (1934). See Sullivan v. Brookline, 435 Mass. 353, 360, 758 N.E.2d 110 (2001). Where the language of a statute is unambiguous, it is conclusive of the Legislature's purpose. See Pyle v. School Comm. of S. Hadley, 423 Mass. 283, 285-286, 667 N.E.2d 869 (1996), and cases cited. A statute should be construed so as to give effect to each word, and no word shall be regarded as surplusage. See Wolfe v. Gormally, 440 Mass. 699, 704, 802 N.E.2d 64 (2004); Bankers Life & Cas. Co. v. Commissioner of Ins., 427 Mass. 136, 140, 691 N.E.2d 929 (1998). When amending a statute or enacting a new one, the Legislature is presumed to be aware of prior statutory language. See Commonwealth v. Callahan, 440 Mass. 436, 440-441, 799 N.E.2d 113 (2003); Charland v. Muzi Motors, Inc., 417 Mass. 580, 582-583, 631 N.E.2d 555 (1994).

Ropes & Gray LLP v. Jalbert, 454 Mass. 407, 412-413 (2009)

> . . . [A]n expansion of the statute is the province of the Legislature, not the judiciary. See Connors v. Boston, 430 Mass. 31, 42-43, 714 N.E.2d 335 (1999). "We are not free to ignore or to tamper with [a] clear expression of legislative intent. If the law is to be changed, the change can only be made by the Legislature." Commonwealth v. Jones, 417 Mass. 661, 664, 632 N.E.2d 408 (1994).

Ropes & Gray LLP v. Jalbert, 454 Mass. 407. 415 (2009)

Indeed, at the time of the enactment of the 1870 Statute, the work of Mr. Pease under the 1863 and 1866 Statutes had not yet been completed. The 1870 Statute, by its silence on the issue of the work Mr. Pease was already undertaking under 1863 and 1866 Statutes, about which the Legislature was aware (See Senate Document 14 of 1869 ("1869 Report") – again the import of

which is missed in the glossing over of this important document in par. 14 of the decision[2]), could not be construed to have contemplated that work would end. Once completed, the work of the determining the bounds of the severalty lots and those of the Common Lands would be finally resolved. See also Ch. 463 Acts 1869 (established Indian ownership of severalty lots created UP TO THE DATE OF ENACTMENT – enfranchised all Indians by making them Commonwealth citizens subject to and with the benefit of all laws – including no adverse possession against the Commonwealth or its cities and Towns). Indeed, when Mr. Pease filed his report in May 1871 with the Secretary of the Commonwealth and reported the same to the governor under the 1863 and 1866 Statutes, there was apparent satisfaction by Mr. Pease with his "fully and finally" determining the bounds of the severalty lots and the Common Lands. After all, it was he who had been conducting the work and who acknowledged it had been performed under the 1866 and 1863 Statutes. An original copy of the Report was also filed with the Probate Court, making the Judge in the partitioning action under the 1870 Statute aware of the fulfillment of the predicate required boundary determination to making a partition of those Common Lands fully and finally determined as of 1871.

Where the decision failed is that it missed the chronology that Mr. Pease's report in 1871, "fully and finally" resolving the boundary issues, established the limits of the Common Lands, as shown on the Sectional Plans as being Homestead lots and Lots 1- 173 only. All other lands thus demarcated were Common Lands that had been given to the Town under Section 2 of the 1870 Act. Because the Indians were now citizens as of 1869, no further lands could be taken adversely

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[2] The committee reported in respect to lands held in severalty that under Pease's "active and judicious supervision, order is being rapidly brought out of chaos and the limits of each person's lot marked out by stakes and bounds" and that "in the performance of his duties, Mr. Pease is obliged, upon such examination and evidence as is accessible, to decide as to the ownership of property... The settling of this matter of ownership has now become absolutely essential in connection with the new condition upon which these people are about to enter;" Senate Document 14 of 1869 at 4-5. In connection with the determination of the extent of the common lands, the Committee noted that "[t]his [the division of the common lands], however, is a question of 'property,' which every 'citizen' should have the privilege of determining for himself, and the people of Gay Head have certainly the right to claim, as among the first proofs of their recognition to full citizenship, the disposition of their landed property, in accordance with their own wishes. Accordingly, we have inserted in the bill accompanying this Report, a section making the same provision for a distribution of their lands as was made last year for the other tribes. [See Stat. 1869, ch. 463, sect. 3.]" Id at 5. The process of setting off the land to the new citizens was called "enfranchisement." 1869 Statute.

by enclosure and possession under the Tribal custom, since the same was prohibited by Massachusetts law (no adverse possession against the government).

What Mr. Pease's 1871 report did was to fully and finally establish the bounds of the severalty lots not only under the 1866 and 1863 Statutes, but because it was filed with the governor and thereafter in October, 1871 recorded with the Dukes County Registry of Deeds, it became the final report of the bounds of the severalty lots in the partition matter as well. The 1870 Statute is not a substitute for the earlier statutes; it was established as another mechanism for establishing the bounds of the Common Lands had Mr. Pease not completed the same in the event of a partitioning under Section 6 of the 1870 Statute. Since the partitioning could be only of the Common Lands, the establishment of their bounds was a predicate to any partitioning, should it occur.

BUT FOR THE PETITION TO PARTITION LOTS 174 AND ABOVE WOULD NEVER HAVE BEEN CREATED AND WOULD HAVE REMAINED OWNED BY THE TOWN

From 1869 and thereafter, NO NEW SEVERALTY LOTS COULD BE CREATED. Therefore, between 1871 and 1878, Mr. Pease who had completed the work in determining the severalty lots "fully and finally" was without authority to find any further new severalty lots, and indeed, none could have been created by any Indians after the 1869 statute. His 1871 report took a snapshot to reflect the bounds as they stood for purposes of enforcing the 1869 and 1870 Statutes – all lands not described in Book 49 of the Registry of Deeds as either homestead lots or lot numbers 1-173 were the Common Lands and thus owned by the Town and subject only to disposition by way of the partition action. But for the partitioning of the Common Lands then, lots 174 and above could NEVER have been created.

ALL LOTS CREATED FROM THE COMMON LANDS HAD TO HAVE BEEN PARTITIONED AND COULD NOT HAVE BEEN SEVERALTY LOTS

The decision omits a crucial part of the 1878 report, and the critical interpretation to be drawn thereby. Because Pease had already established the bounds of the Common Lands, and because no new severalty lots could then be created, as a matter of fact and as a matter of law, all lots thereafter carved from the Common Lands have to be considered to have been partitioned, and simply cannot have been severalty lots, despite any loose language that suggests the contrary. Such loose language is found in the descriptions of lot 189 in Book 65 of the Registry of Deeds which the court also omits.

The Appeals Court remanded the matter to have the Land Court determine what lots were carved from the Common Lands and what easement rights run to the same. 64 Mass. App. Ct. at 300.

LEGISLATIVE INTENT TO ENFRANCHISE THE NEW CITIZENS WITH PROPERTY THEY COULD ACCESS AND USE

The 1869 Statute, the 1869 Report and the Governors Address to the General Court in 1869 all provide guidance of the intent of the legislature in its desire to provide the new citizens with land that they could get to and use. If the legislature had intended to "enfranchise" these new citizens with landlocked property that they could not lawfully access nor could they use, yet they would be burdened to keeping it safe from dangerous conditions and paying taxes and other obligations of ownership, why would the legislature have even bothered to provide for such enfranchisement?

Certainly the court would not opine that the Commonwealth of Massachusetts, a leader in the efforts to abolish slavery and treat all men equally, especially following the Civil War, when Massachusetts recognized that the treatment of its own native population was a form of indenture[3] and subjugation, and wished to enfranchise all of these peoples as full citizens, with the benefit and subject to the laws of the Commonwealth, could have intended to provide lands to the majority of the Gay Head tribal members that they could not even get to and thus could never actually use.

As a matter of law, under this historical context, neither the Legislature, who passed the 1870 Act creating the Town of Gay Head and granting to the new Town all of the Common Lands that were "fully and finally" determined by Pease's 1871 report and intending to enfranchise the new citizens with the right to self determine that they wanted the Common Lands partitioned among themselves as a showing of their new found status as equal citizens, nor the Town that was the grantor of the lands set-off in 1878 (not the Commonwealth as the other Defendants have repeated distorted – since the 1870 Act gave the Common Lands to the new Town), nor the Probate Court or the Commissioners appointed thereunder, could have intended to divide essentially all of the Town's lands and distribute them largely so as to result in no ability for the recipients to access them and thus incapable of use, thus rendering the entire episode as an effort in futility.

[3] See the prophetic words expressed by Mr. Bird in his report at Ex. 71 p. 23.-24, 48-50.

This view of an intent to landlock would render the expressed desires of the legislature as unimportant and cast the set-offs as an effort in futility. Moreover, such a mal-distribution which gave some lots on ways, but gave most lots with no frontage on a way, could never have intended that the non-frontage lots be landlocked as the same would have violated the provisions of equal protection under the US Constitution and under the Massachusetts Declaration of Rights.

THE DECISION SELECTIVELY OMITS LANGUAGE OF THE FINDINGS OF THE SENATE COMMITTEE THAT ADVERT A LEGISLATIVE INTENT THAT IF THE NEW INDIAN CITIZENS DESIRED TO USE THE COMMON LANDS AS THEIR OWN, THEY COULD SO CHOOSE

At par. 14 on page 5 of the decision, the court describes the expectancy that the Common Lands were useless anyway, thus providing evidence of an intent to landlock. Such selective phrasing, respectfully, does not adduce a decision on all of the evidence.

What is missing from this passage is the context in which the Committee made the statement.

> In addition to what is held in severalty, there is the large tract of some nineteen hundred acres held in common. This land is uneven, rough, and not remarkably fertile. **A good deal of it, however, is, or might be made, reasonably productive with a slight expenditure, and, doubtless, would be if the owners had the means;** but, deficient as they are in the "worldly gear," it is, perhaps, better that these lands should continue to lie in common for the benefit of the whole community as pasturage and berry lands, than to be divided up into small lots to lie untilled and comparatively unused. **This, however, is a question of "property", which every "citizen" should have the privilege of determining for himself, and the people of Gay Head have certainly the right to claim, as among the first proofs of their recognition to full citizenship, the disposition of their landed property, in accordance with their own wishes.**

Report of the Committee of the Legislature of 1869, on the Condition of the Gay Head Indians, January, 1870; Page 5. (Ex. 10, Pg. 72)(emphasis supplied).

The Legislature then left it to the new citizens of the Commonwealth to decide for themselves whether the Common Lands should be divided and could be made productive as part of their new privileges. The citizens requested the partitioning indicating a desire to productively use the lands, and the same occurred. Certainly such a scheme whereby the legislature left the decision to the citizens as to the use of their property could NEVER be said to have intended to provide such citizens with landlocked property which they could not access and thus could NEVER make productive.

Further, the decision omits any reference to Peases'own report in 1871 in which he describes the physical characteristics of Gay Head in rather glowing terms:

> Its peculiar geological characteristics have long attracted the attention of scientific men. Hitchcock speaks of it in enthusiastic terms, as "**a most picturesque object of scenery**," and says, "**there is not a more interesting spot in the State to a geologist**." Sir Charles Lyell, the famous English geologist, is highly laudatory of it. There is also **enough of interest about it to attract the curious and the lovers of rare natural scenery, who are neither scientific nor learned**.
>
> "The territory embraces about every variety of soil, a portion of the land is of the very best quality, and capable, under good culture, of producing most abundant harvests." The surface is very irregular, abounding in hills and valleys, ponds and swamps, fine pasture-land and barren beach, with occasional patches of trees and tilled land.
>
> Increasing attention is paid to agriculture, but there is room for great improvement. As an abundance of that most excellent dressing, rockweed, can be procured, additional labor, energy and skill would bring a sure reward. **A very large portion of the lands now inclosed** [sic], **was, a generation since, wild, rough land, unfenced, and seldom tilled, and of course unproductive and of little value.** As it has been cleared up, fenced and tilled, **its value has largely increased.**
>
> . . . The chief interest of Gay Head is not in its agricultural capabilities, which have never yet been developed, but in the rare scenery, the rich and varied colors of its lofty cliffs present to the admiring gaze of the traveler and the passing voyager, in its singularly mixed clays and sands, and in the numerous specimens of fossils and petrifications found in its banks."

Commissioner Appointed to Complete the Examination and Determination of All Questions of Title to Land and of All Boundary Lines Between the Individual Owners, 1871" (Ex. 18, Pgs. 110-111) (emphasis added).

There is broad evidence of great potential in the use of the Common Lands for a variety of purposes.

THE DECISION IS CONTRARY TO ESTABLISHED LAND COURT PRECEDENT AND CREATES A SCHISM IN THE DECISIONAL LAW

The Land Court has repeatedly reserved rights for such easements that were created by the set-offs and has at least twice ruled that easements by necessity did arise from the set-offs.

The Land Court in Taylor v. Vanderhoop, Land Court Misc. 129925 (Cauchon, J. - decision July 19, 1989) ruled as follows:

> . . .[T]he respective properties of the Plaintiffs' and Defendants' originally comprised a portion of the common lands of the District of Gay Head. Following the enactment of Chapter 213 of the Acts and Resolves of 1870, however, the District of Gay

> Head was abolished and the Town of Gay Head established. Thereafter, the common lands were partitioned and conveyed to individual owners, the parcels owned by the Plaintiffs and Defendants being among those created by such partition. Accordingly, as it is immaterial whether the severance of common ownership results from execution of law, See Viall v. Carpenter, 80 Mass. (Gray XIV) 126 (1859); Flax v. Smith, 20 Mass. App. Ct. 149 (1985), a reasonable implication arises that some means of ingress to and egress from the resulting lots is necessary to the lot owners' enjoyment of their property. . . .
>
> . . .While the record is devoid of evidence that the Way existed at the time of the partitioning of the common lands, the easement, nevertheless, came into existence at that time as an undefined easement by necessity.

Taylor v. Vanderhoop, Land Court Misc. 129925 (Cauchon, J. - *Date:* July 19, 1989) at pages 9-10.

See also Black v Cape Cod Company, Mass. Land Court Misc. No. 69813, pgs 5-6 (1975) where the court stated therein as follows:

> The partition of 1878 of the land held in common by the Indians was to establish parcels to be owned individually by the Indians, and this partition contained no provision for access to and from landlocked parcels by the designated owners of such parcels. **There is no evidence whatsoever that the Commonwealth intended in the partition of 1878 to provide parcels of land to individual Indians without allowing them any means of access.** Rights of way of necessity are created by a presumption of law. Where a landowner conveys a portion of his land in such a manner that he is unable to reach the land retained without travelling over the land conveyed, the law presumes in the absence of contrary evidence that the intent of the parties to the conveyance was to provide access to the former by passage over the latter. Davis v. Sikes, 254 Mass. 540.

Black v Cape Cod Company, supra (emphasis supplied).

CHRONOLOGY ERRORS LEAD TO A MISPERCEPTION OF LAW
IN PAR. 18 THAT AS LATE AS 1878 TRIBAL LAW STILL APPLIED

The decision contains another further error that Tribal law still applied as late as 1878 and that it was merely Indian law that granted each tribe member access rights over all the common lands. The second part of the prior sentence is quite a surprising finding in light of the courts use of Judge Green's decision as a basis for entry of findings. There is no evidence of such Indian law existing after 1869; the evidence is to the contrary. See further discussion at page 16 below.

Even Judge Green's decision found that the owners of the severalty lots determined in 1871 by Pease report "enjoyed such rights in the remaining common lands as may have appertained to tribal members... The commissioner's 1871 report did not sever the set-off lots from access to the public way, since the owners of such lots held rights in the common lands." Judge Green made no finding as to Tribal law in regards to crossing the commons. He was viewing the severalty owners as having rights to cross the Common Lands since each owners of a severalty lot would have an ownership interest in the commons as well, sufficient to provide a right of use and to cross in common with other severalty owners entitled thereto.

Judge Green's decision further found as follows:

> Though, as noted, the presumption may be overcome by evidence of an intent to create a parcel without access, no such evidence appears in the present case.[22]
>
> FN 22: VCS's argument regarding tribal customs of common use is interesting, but it does not support a conclusion that either the commissioners or the several set-off lot owners intended that there would be no access to the set-off lots. In so stating, I am not shifting from plaintiffs the burden of proof on the existence of a way by necessity; instead, I am applying in support of that burden the presumption that severance of land from a way implies an intention that the land should have a means of access to the way.

Decision Judge Green June 4, 2001.

As noted above, the Common Lands bounds were determined and accepted by the Commonwealth and by the Probate Court in 1871 and were, pursuant to the 1870 Statute, given to the Town and thus were no longer Indian lands.[4] The prior statute in 1869 had already made the Indians citizens of the Commonwealth and subject to the laws thereof. Even as early as the 1863 Statute did the legislature indicate an intent that the bounds of the severalty lots should be fixed "fully and finally." Par 8 of decision at page 3.

THE COURT MISCONSTRUES THE LAW OF NECESSITY

At page 7 of the decision, the court indicates that it is considering whether there is a strict necessity. However, the court itself quoted the law "... 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). Reasonable necessity is all that is required. Id.

[4] This was confirmed by Congress by passage of 25 USC §1771 et seq. noted by the court at FN 4 on page 5 of the decision.

The Restatement Third, Property (Servitudes) § 2.15 involves easements by necessity. The court in its decision from FN 5 at pg. 6, respectfully, confuses the difference between easements by necessity (§2.15 of the Restatement 3d) and easements by implication (§2.12 of the Restatement 3d). This is a common misperception as even §2.15 of the Restatement 3d uses the term "implied" servitudes in its context.

Access rights are almost always necessary to the enjoyment of property. (Comment b. of §2.15 of the Restatement 3d 3d.). The most common access rights of necessity are those to connect the property to a public way, but there are others. Id. Servitudes by necessity arise on conveyances by governmental bodies as well as by other grantors. (Comment c. of §2.15 of the Restatement 3d.). Servitudes are implied on the basis of necessity alone, without proof of prior use and **the rights claimed must simply be necessary to the reasonable enjoyment of the property, including those rights which are reasonably required to make effective use of the property, and depend on the nature and location of the property and may change over time and include utility services depending on the normal uses of land in the community**. (Comment d of §2.15 of the Restatement 3d)(emphasis supplied) See also, United States v. 176.10 Acres of Land, 558 F.Supp. 1379 (D.Mass. 1983)(access easement by necessity includes right to bring in electricity because it is necessary today for a residence).

The servitudes by necessity will continue to be implied unless it is **clear that the parties intend to deprive the property of rights necessary to its enjoyment**. (Comment e of §2.15 of the Restatement 3d)(emphasis supplied). In determining whether an easement by necessity exists then requires an affirmative showing of a **clear intention** of the parties at the time of the original conveyance separating the parcels to deprive the dominant parcel of rights necessary to its enjoyment. Id. Under no circumstance of conveyance herein has the court found a **clear intention** to deprive, whether in 1871 or in 1878. The court, respectfully then should find an easement by necessity exists. Comment e of §2.15 of the Restatement 3d goes on to clarify this requirement as follows:

> . . . 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 not 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.

(Comment e of §2.15 of the Restatement 3d).

"It is not the necessity which creates the right of way, but the fair construction of the act of the parties." Nichols v. Luce, 24 Pick. 102, 104 (1834). As noted hereinbefore, the partitioning of the Common Lands then owned by the Town was conducted by Commissioners, who were empowered by the Probate Court under direct statutory mandate of the 1870 Act. The power to divide the Town owned common lands derived from the General Court and carried with it the intentions of the legislature in passing that Act. The intentions included that if the citizens of Gay Head were desirous of making use of the Town owned Common lands, they should have that privilege. Provision of landlocked lots would frustrate that very purpose.

THE DECISION INCORRECTLY FINDS THERE ARE EXPRESS EASEMENTS GRANTED TO OTHER LOTS THEREBY NEGATING ACCESS EASEMENTS BY NECESSITY

The decision at page 5 at par. 15-18 finds that certain rights and easements existed for some lots in the 1878 set-off. This finding is an overstatement of the facts in the record. Certain rights that are *profits a prendre* appear to have been granted in some cases, but these are not "easements" at all, but are of a different character. 4 Powell on Real Property § 34.01[2] at 34-7 (2001). In fact, these *profits* contain no express access easement describing how one is to access the lots on which the *profits* are to be taken. *Profits* are subject to termination based upon the limited purpose of which they are created. Makepeace Bros. v. Barnstable, 292 Mass. 518 (1935). A *profit* is a destination right to take from the servient estate and is limited to that purpose while such a use is being made, while an easement has no such destination right and is simply a non-possessory right, such as the right to cross land of another for access. Powell, supra. Regardless, even if, *arguendo*, these *profits a prendre* are to be construed to be easements of some sort, NONE were nor did any include an express access easements for regular and common access to one's lot.

There is no express language anywhere in the deeds that describes how the peat can be removed over other lots and no description of how one is to access the lots on which there are fishing rights. The facts reveal that the only "easements" which the decision finds to rebut the presumption of law of an intent to provide for access are nothing more than express *profits à prendre* which themselves lack any express easement as to how to get to the encumbered lots to draw the *profits* and thus suffer from the same need for implied easements by necessity as every other lot that was set-off in 1878. As such, the other Defendants were estopped from such argument.

Regardless, the decision is erroneous in finding that such *profits* lacking themselves in express access easements, would show evidence of an intent to landlock. In support of this, respectfully, unfounded position, the decision cites Joyce v. Devaney, 322 Mass. 544 (1948) a case that is inapposite. In Joyce, the deeds in issue provided for express access easements which the court held negated the intent to also provide for easements by implication. In the instant matter, there is not one single instance where a lot was provided with an express easement for access that either the court has found or that the other Defendants have argued.

THE DECISION INCORRECTLY FINDS THAT UNTIL AS LATE AS 1878 THE LOTS WERE HELD BY THE COMMONWEALTH UNDER COMMON LAW AND THE TRIBE UNDER TRADITIONAL LAW- AND THEN ERRS IN DEEMING CUSTOMS OF ACCESS TO BE INDICATIVE OF A LACK OF STRICT NECESSITY FOR ACCESS

The decision incorrectly finds that until as late as 1878 the lots were held by the Commonwealth under common law and the Tribe under traditional law and that Tribal custom allowed for access across the common lands and lands in severalty. Page 9 Decision. The decision, in FN 6, incorrectly applies such assumed access privileges to the incorrect standard of strictly necessary, finding their existence to be proof that access rights were intentionally withheld. These findings, respectfully, go beyond the record and are factually incorrect. See also Comment e of §2.15 of the Restatement 3d, supra.

The record provides uncontroverted evidence that the common lands were conveyed to the newly incorporated town of Gay Head from the Commonwealth of Massachusetts (the sovereign state) under Chapter 213, Section 2 of the Acts of 1870 (Ex. 11). There were no enclosures on these lands, no possessory rights – and no individual Indian titles to ratify. The conveyance of the common lands to the Town in 1870 was in fee simple absolute. "Until 1870, title to the Gay Head Indians' land was held on behalf of the tribe as a whole." Cornwall v. Forger, 27 Mass. App. Ct. 336, 341 (1989).

The 1870 Act gave the Common Lands to the Town. **Any aboriginal title** held by the Wampanoag Tribal Council of Gay Head, Inc. or any other entity presently [August 18, 1987] 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**. 25 U.S.C. § 1771b (emphasis added). Because the Town was the grantor of the common lands, the Defendants who have jointly argued each point, hold a "heavier burden" to justify why access rights to the set-off lots were not written, recorded

or expressly reserved. Perodeau v. O'Connor, 336 Mass. 472, 474 (1957); Boudreau v. Coleman, 29 Mass. App. Ct. 621, 629 (1990).

The decision further confuses the title issue by alleging that the common lands were "occupied" and had "two distinct levels of ownership in Indian lands: fee title and Indian title." James v. Watt, 716 F.2d 71, 74 (1st Cir. 1983). Richard L. Pease in 1871 resolved these aboriginal claims in completing his duty under Chapter 67 of the Acts of 1866 - **to complete the examination and determination of all questions of title to land** and of all boundary lines between the individual owners.

As noted hereinabove, the 1869 Act virtually abolished the system of Indian traditional law barring any new severalty lots and granted citizenship, making the Indians subject to and with the benefit of the laws of the Commonwealth. The 1871 report fixed the bounds of the severalty lots and the Common Lands.

The Common Lands, until 1870, were held by the District of Gay Head and were owned by all. Cornwall, supra. The use of the common lands for access is quite compatible with common law principles. See reference to Judge Green's decision on this point above.

Regardless, even if Tribal custom were assumed to still be in effect by the Commissioners, though they would have been mistaken, the behavior and acceptance of a custom of access over lands of the others establishes the exact opposite of that determined by the court, *viz.*, that this activity was actually in accord with an intent to allow for undefined easements by necessity to be fixed in location as the parties agreed. These access rights, unexpressed in any deed from either set-off in 1871 or in 1878, were presumed to have been part of the grant, and thus are implied easements necessary to the enjoyment of the lands granted to enfranchise the new citizens. See Comment e of §2.15 of the Restatement 3d, supra.

RULE 60 CORRECTIONS SOUGHT FOR DECISION

The Trusts seek each of erroneous findings and determinations of fact and law in the decision noted above to be corrected or otherwise addressed. The Decision, respectfully, makes a number of erroneous factual findings which misconstrue the record before the court and which erroneous findings have potential deleterious effects of issue preclusion, collateral estoppel and judicial estoppel against the Trusts on many issues some of which were not germane to the case as hand. Moreover, many of these errors create internal inconsistencies that require, as a matter of justice and judicial economy, correction to the Decision.

The Trusts move pursuant to Mass.R.Civ.P. 60 "and/or otherwise" to correct the Decision and pursuant to Mass.R.Civ.P. 59 to correct, alter or amend the Judgment entered thereunder of Judge Trombly on August 12, 2010. Rule 60(a) reads in relevant part as follows:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

Mass.R.Civ.P.60(a). The court has the power thereunder to address clerical errors, such as the misnomer of GWRT, actually a party defendant, as a "Plaintiff." See, Anderson v. Brady, 6 F.R.D. 587, 10 F.R. Serv. 60a.12, Case 1 (E.D. Ky. 1947).

The Reporters Note to the Mass.R.Civ.P. note that while findings and decisions may not expressly fall within Rule 60(b), they remain subject to the complete power of the court rendering them to afford such relief from them as justice requires. John Simmons Co. v. Grier Brothers Co., 258 U.S. 82, 12 S. Ct. 196, 66 L.Ed. 475 (1922)."

More substantive issues are addressed by the court's plenary power to administer its own decisions and judgments and correct errors therein and otherwise by Rule 60(b).

The Reporters Notes to Rule 60(b) state as follows:

> . . . A motion under Rule 60(b) performs the same function as the former Massachusetts procedures of writ of review, writ of error, writ of audita querela and petition to vacate judgment.
>
> ...Rule 60(b) affords a "party or his legal representative" a means of obtaining substantial relief from a "final judgment, order or proceeding." . . . Rule 60(b) incorporates all possible grounds for relief from judgment; such relief must be sought by "motion as prescribed in these rules or by an independent action." The phrase "independent action" has been interpreted to mean, not that a party could still utilize the older common law and equitable remedies for relief from judgment, but rather "that courts no longer are to be hemmed in by the uncertain boundaries of these and other common law remedial tools." Klapprott v. United States, 335 U.S. 601, 69 S. Ct. 384, 93 L.Ed. 266 (1949). The court now has power "to vacate judgments whenever such action is appropriate to accomplish justice." *Id.*

Rule 60(b), it is respectfully submitted, applicable to orders of dismissal rendered pursuant to the modality of judicial fact finding employed here, though the Trusts dispute the chosen procedure's legal validity.

While it may be argued that some of the factual errors found in the Decision are such as should be decided by an appellate court, commentators and the Appeals Court itself have set forth that it is "better practice" to move pursuant to Rule 60 first noting as follows:

> The filing of a rule 60(b) motion may, of course, be appropriate even if an appeal from the dismissal is taken. Indeed, "the better practice" is to move first to vacate the order under rule 60(b) or Mass.R.Civ.P. 59(e), 365 Mass. 828 (1974). 5 Moore's Federal Practice par. 41.11[2], at 41-143 - 41-144 (2d ed. 1984).

Wilkinson v. Guarino, 19 Mass. App. Ct. 1021, 1023, 476 N.E.2d 983, 986, 1985 Mass. App. LEXIS 1717 (1985).

GOSSAMER WING REALTY TRUST IS NOT A PLAINTIFF & SHOULD BE DENOTED CORRECTLY AS A DEFENDANT SO AS NOT TO IMPOSE UNFAIR ADDITIONAL BURDENS

The Decision denotes GWRT as a Plaintiff in the instant matter. This is patently untrue. No where in the record has GWRT become a progenitor in this action. GWRT (and BLT) has merely filed compulsory cross-claims and counter-claims in essence stating that if the court finds easements benefiting the Plaintiffs, the Trusts should also be awarded the same easement. The Decision also did not specifically deal with the Trust's counterclaim or cross-claims.

Such a determination places GWRT in the untenable position of having to fight for rights which it had never taken on the burden of proving. The Restatement 2d of Judgments provides a multitude of situations in which the declaration of GWRT as a Plaintiff would have unfair and preclusive effects, whereas correcting the record would preserve many of GWRT's rights to maintain positions attendant to his defensive position.

. Moreover, the failure of the decision to address the counterclaims and cross-claims of The Trusts leaves much left as uncertain, which is counter to the tenets of a declaration of rights, preclusion and finality which the courts and the common law seeks to impose.

Restatement 2d of Judgments §17 sets forth the general rule of merger and bar of judgments. Restatement 2d of Judgments §19 states as follows:

§19 Judgment for Defendant – The General Rule of Bar

> A valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim.

Comment g. to Rest. 2d Judgments §19 indicates that this section applies to dismissal of claims pursuant to a motion for summary judgment.

However, the Rest. 2d Judgments, establishes a series of exceptions to the general rules, especially where there are multiple claims and multiple parties, each with varying interests. There are a multitude of potential findings for a reviewing or second court to consider and potential far-reaching effects on the parties and others. See Restatement 2d of Judgments §24 Comment e, f and h and §20 Comment n. Moreover, since the court did not expressly deal with GWRT's counterclaim or cross-claims, the conclusive effect of the decision is widely opened to interpretation and counter to the underlying principles of the common law. Restatement 2d of Judgments §§21, 22, 23.

Restatement 2d of Judgments §27 establishes rules governing Issue Preclusion and leaves many factors up to a determination of later courts. Issue preclusion does not apply to issues actually litigated, Comment e. Rest 2d Judgment §27, but leaves such determinations by a second court to searches of the record and even extrinsic evidence. Erroneously naming GWRT as a Plaintiff leaves much uncertainty as to future litigation, leaving GWRT in a precarious situation of having undetermined issues which could place unfair burdens on him in the future.

Erroneously naming GWRT as Plaintiff also subjects GWRT unfairly to greater likelihood of selective bar attendant with being an initiator of an action. Restatement 2d of Judgments §28 establishes exceptions to the general rule of issue preclusion. Section 28 (4) states as follows:

> The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action.

Restatement 2d of Judgments § 28 (5) states as follows:

> There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact on the determination on the public interest or the interests of those persons not themselves parties in the initial action, (b) because it is not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

The Restatement 2d Judgment thus foresees differing burdens (dependant on whether a Plaintiff or Defendant) as a basis for determining whether an issue is precluded or not. See also, Albernaz v. City of Fall River, 346 Mass. 336; 191 N.E.2d 771; 1963 Mass. LEXIS 604 (1963) (difference in weight given to preclusionary effect of "defensive" versus "offensive" estoppel). See also Eisel v. Columbia Packing Co., 181 F. Supp. 298 (D.Mass 1960). Restatement 2d of Judgments § 29.

OTHER MISTAKES MAY FURTHER BURDEN GWRT
WITH A PRECLUSIVE EFFECT ON
LOTS NOT CENTRAL TO THE DETERMINATION OF THE INSTANT CASE

Moreover, the other factual errors and their implicit determination in the decision have other potential effects on other lands owned by GWRT, and not necessarily only those mentioned in the decision. The Restatement Judgments Second §43 (1) sets forth the preclusive Effect of Judgment Determining Interests in Property on Successors to the Property.

As set forth below, Lot 302, found by the court to be owned by GWRT, simply due to its location, is beyond the area in issue as narrowed by the pleadings in the Third Amended Complaint and by existing parties. If this fact is not corrected in the judgment, there could be an unfair and unintended preclusive effect on GWRT pursuant to Restatement 2d Judgments §43 (1) due to the mere mention of GWRT's ownership of Lot 302 in the Decision.

RULE 59 CORRECTIONS SOUGHT TO JUDGMENT

Rule 59(e) governs motions to alter or amend a judgment. The Trusts seek a corollary correction to the facts set forth in the decision that are repeated or implied in the judgment as are set forth above. These are as follows:

1) That the parties, including the Defendants the Trusts and Plaintiffs Gorda and Bear I and II, did not "agree" as that term is defined for purposes of a case stated, to "submit this action to the court on a case-stated basis, without calling witnesses." The fact finding was limited to the issue of intent to provide for implied reasonable easements by necessity to allow for reasonable use of the premises so benefitted.

2) That Defendant GWRT, owning lots 707, 710, and 242 in the relevant area is NOT a Plaintiff.

3) That Defendant BLT, owning Lot 177 in the relevant area, respective rights were not determined nor addressed nor adjudicated.

4) That lot 302 is outside the relevant area and was not subjected to the case with the filing of the Third Amended Complaint.

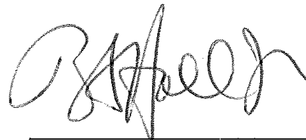
5) That Defendants the Trusts counterclaims have not been addressed nor adjudicated hereby and therefore lots 707, 710 and 302 should NOT be listed as having had any rights declared.

6) That on the law, and the facts, there was no sufficient showing of an intent to landlock by the Commonwealth for either the 1871 or the 1878 set-offs, and that the Plaintiffs' lots and those owned by the Trusts as established in the Third Amended Complaint have the benefit of a reasonable easement by necessity across the lands of the other parties to and from Moshup Trail.

WHEREFORE Defendant Gossamer Wing Realty Trust, Benjamin L. Hall, Jr., Trustee ("GWRT"), and Brian M. Hall as he is Trustee of Barons Land Trust ("BLT")(collectively the "Trusts"), respectfully requests that this Court correct, amend and/or modify, pursuant to Mass.R.Civ.P. 59 and 60 the decision and judgment as ordered by the court on August 12, 2010 as set forth in the Trusts' memorandum hereinabove and for such other and further relief as this court deems just and equitable.

Dated: August 23, 2010

Benjamin L. Hall, Jr.
Trustee of Gossamer
RESPECTFULLY SUBMITTED,
Gossamer Wing Realty Trust
Baron's Land Trust
By Its Attorney,



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COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

DUKES, ss. MISC. CASE NO. 238738

****
MARIA A. KITRAS, TRUSTEE, et als. *
Plaintiffs *
*
v. *
*
TOWN OF AQUINNAH, et als., *
Defendants *
****

PLAINTIFFS' NOTICE OF APPEAL

Notice is hereby given that the Plaintiffs, Maria A. Kitras as Trustee of Bear Realty Trust, Maria A. Kitras and James J. Decoulos as Trustees of Bear II Realty Trust, and Maria A. Kitras and James J. Decoulos as Trustees of Gorda Realty Trust, hereby appeal to the Appeals Court from the Decision and Judgment entered in this action on August 12, 2010.

Maria A. Kitras as she is the Trustee of Bear Realty Trust, Bear II Realty Trust and Gorda Realty Trust; James J. Decoulos as he is the Trustee of Bear II Realty Trust and Gorda Realty Trust

1175

By their Attorney:

Nicholas J. Decoulos

Nicholas J. Decoulos
BBO# 117760
39 Cross Street, Suite 204
Peabody, MA 01960
Tel. 978-532-1020
August 23, 2010

(SEAL)

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

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

MARIA KITRAS, as Trustee of
BEAR REALTY TRUST, et al

Plaintiffs

v.

TOWN OF AQUINNAH, et al

Defendants

ORDER DENYING MOTION OF GOSSAMER WING REALTY TRUST AND BARONS LAND TRUST TO CORRECT, AMEND OR MODIFY JUDGMENT

Amended and Final Judgment entered in this longstanding case on April 4, 2011. On April 8, 2011, Plaintiff Maria Kitras, Trustee, filed a notice of appeal to the Appeals Court. On April 13, 2011, Defendants Gossamer Wings Realty Trust and Barons Land Trust filed a Motion to Correct, Amend or Modify the Amended Judgment. Gossamer Wings and Barons filed notices of appeal on April 19, 2011. On that same day, the Court issued an Order Pursuant to Land Court Rule 6 providing that the Court would consider and rule on the Motion to Correct, Amend and Modify the Amended Judgment on the papers, and would not hold a hearing thereon. All parties were given until May 2, 2010 to file and serve any responses to the motion. A Response and Opposition to the Gossamer Wing and Barons Motion was filed on May 2, 2011 by Martha's Vineyard Land Bank Commission, Town of Aquinnah, Vineyard Conservation Society, Inc., Caroline B. Kennedy, Edwin Schlossberg, David Wice and Betsy Wice.

After fully considering the motion and the opposition, including the memorandums submitted with each, and for substantially the reasons set forth in the opposition, this Court denies the Gossamer Wing and Barons motion.

The Gossamer Wing and Barons motion, while in the guise of a motion to alter or amend, seeks to reopen and reargue this case. I decline to do so. The matters these parties seeks to raise at this late date are best raised and argued before the Appeals Court. I will, however, concur with a point made by the Defendants in their opposition, *namely*, that the Amended and Final Judgment entered on April 4, 2011 must be amended to include Lot 242 as one of the lots not benefitted by any easement by necessity for access over any of the lots owned by the Defendants to this action. Accordingly, for all the above reasons, it is

ORDERED that the Motion of Gossamer Wing Realty Trust and Barons Land Trust to Correct, Amend or Modify the Order and Amended Judgment entered on April 4, 2011 be and is hereby **DENIED**; and it is further

ORDERED that a Second Amended and Final Judgment will enter today including Lot 242 as one of the lots adjudicated in the Amended Judgment entered on April 4, 2011.

By the Court. (Trombly, J.)

Attest:

Deborah J. Patterson
Recorder

Dated: May 3, 2011

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER

1254

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

DUKES, ss. MISC. CASE NO. 238738

****
MARIA A. KITRAS, TRUSTEE, et als. *
Plaintiffs *
*
v. *
*
TOWN OF AQUINNAH, et als., *
Defendants *
****

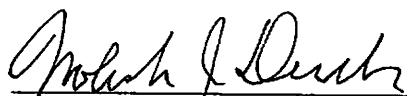
PLAINTIFFS' NOTICE OF APPEAL

Notice is hereby given that the Plaintiffs, Maria A. Kitras as Trustee of Bear Realty Trust, Maria A. Kitras and James J. Decoulos as Trustees of Bear II Realty Trust, and Maria A. Kitras and James J. Decoulos as Trustees of Gorda Realty Trust, hereby appeal to the Appeals Court from the Second Amended and Final Judgment dated May 3, 2011.

Maria A. Kitras as she is the Trustee of Bear Realty Trust, Bear II Realty Trust and Gorda Realty Trust; James J. Decoulos as he is the Trustee of Bear II Realty Trust and Gorda Realty Trust

1257

By their Attorney:



Nicholas J. Decoulos
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39 Cross Street, Suite 204
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May 5, 2011

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT

Dukes County

Docket No. 238738 Misc.

MARIA A. KITRAS, et al.,
Plaintiffs

Vs.

TOWN OF QUINNAH, et al.
Defendants

NOTICE OF APPEAL OF PLAINTIFFS, SHEILA H. BESSE AND CHARLES D. HARDING As they are the Trustees of the ELEANOR P. HARDING REALTY TRUST

Notice is hereby given that the Plaintiffs, Sheila H. Besse and Charles D. Harding, as they are the Trustees of the Eleanor P. Harding Realty Trust, hereby appeal to the Appeals Court from the Land Court's Decision and Judgment dated August 12, 2010 and from the Land Court's SECOND AMENDED AND FINAL JUDGMENT entered on May 3, 2011.

Respectfully submitted
Sheila H. Besse and Charles D. Harding
As they are Trustees of the
Eleanor P. Harding Trust
By their attorney

____

Leslie-Ann Morse BBO 542301
477 Old King's Highway
Yarmouth Port, MA 02675
508-375-9080

Dated: May 31, 2011

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT

Dukes County — Docket No. 238738 Misc.

MARIA A. KITRAS, et al.,
Plaintiffs

Vs.

TOWN OF QUINNAH, et al.
Defendants

NOTICE OF APPEAL OF PLAINTIFF,
MARK D. HARDING

Notice is hereby given that the Plaintiff, Mark D. Harding, hereby appeals to the Appeals Court from the Land Court's Decision and Judgment dated August 12, 2010 and from the Land Court's SECOND AMENDED AND FINAL JUDGMENT entered on May 3, 2011.

Respectfully submitted
Mark D. Harding

Leslie-Ann Morse BBO 542301
477 Old King's Highway
Yarmouth Port, MA 02675
508-375-9080

Dated: May 31, 2011

COMMONWEALTH OF MASSACHUSETTS

DUKES, ss.

LAND COURT DEPARTMENT
DOCKET NO. 238738 CWT

Maria A. Kitras, Trustee[1], *et al.*[2])
Plaintiffs,)
v.)
Town of Aquinnah, *et al.*[3])
Defendants.)

NOTICE of CROSS APPEAL of GOSSAMER WING REALTY TRUST

Now comes Defendant Gossamer Wing Realty Trust, Benjamin L. Hall, Jr., Trustee ("Hall" or "GWRT") by and through its attorney, Benjamin L. Hall, Jr., Esq., and, pursuant to MRAP 3 & 4[4], hereby cross appeals from the judgment in this case,

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[1] of Bear Realty Trust, Bear II Realty Trust, and Gorda Realty Trust.

[2] James J. Decoulos, as co-trustee of Bear II Realty Trust and Gorda Realty Trust; Mark D. Harding, Sheila H. Besse and Charles D. Harding, Jr., as trustees of Eleanor P. Harding Realty Trust.

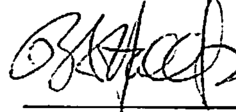
[3] Commonwealth of Massachusetts acting through its Executive Office of Environmental Affairs; George B. Brush, as trustee of Toad Rock Realty Trust; Charles E. Derby; Joanne Fruchtman and Jack Fruchtman; Benjamin L. Hall, Jr., as trustee of Gossamer Wing Realty Trust; Brian M. Hall, as trustee of the Baron's Land Trust; Caroline Kennedy; Caroline Kennedy and Edward Schlossberg, as they are guardians of Rose Kennedy Schlossberg, Tatiana Celia Kennedy Schlossberg, and John Bouvier Kennedy Schlossberg; Jeffrey Madison, as trustee of Tacknash Realty Trust; The Martha's Vineyard Land Bank Commission; Moshup Trail II Limited Partnership; Peter Ochs; persons unknown or unascertained being the heirs of Savannah F. Cooper; Susan Smith; Russell Smith; Barbara Vanderhoop, executrix of the estate of Leonard F. Vanderhoop, Jr.;Vineyard Conservation Society, Inc.; David Wice and Betsy Wice; and persons unknown or unascertained who may have an interest in any land heretofore or hereinafter mentioned or described.

[4] Since the Commonwealth of Massachusetts is a party to this case, under MRAP 4, the time within any party may file a Notice of Appeal is 60 days from the date of the entry of

namely (1) the August 12, 2010 Judgment of this Court – to the extent that the Judgment is construed to be a final judgment; (2) the August 12, 2010 Memorandum of Decision and Order and all orders included therein; (3) the March 8, 2011 order that denied the Motion of GWRT to Correct and Clarify the dated August 23, 2010; (4) the order and decision allowing the Vineyard Conservation Society's motion for summary judgment; (5) the Amended and Final Judgment entered April 4, 2011; (5) the May 3, 2011 order denying the Motion of GWRT to Correct, Amend or Modify Judgment of April 4, 2011; (6) the Second Amended and Final Judgment entered May 3, 2011; and (7) all ancillary and subordinate decisions and orders in this case.

Edgartown, Massachusetts

Gossamer Wing Realty Trust
By Its Attorney,



BENJAMIN L. HALL, JR.
45 Main Street, P.O. Bx 5155
Edgartown, MA 02539
(508) 627-3700
BBO# 54762

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the order denying relief under Mass.R.Civ.P. 59, which order was entered on March 8, 2011.

COMMONWEALTH OF MASSACHUSETTS

DUKES, ss.

LAND COURT DEPARTMENT
DOCKET NO. 238738 CWT

Maria A. Kitras, Trustee[1], *et al.*[2]

Plaintiffs,

v.

Town of Aquinnah, *et al.*[3]

Defendants.

NOTICE of CROSS APPEAL of BARONS' LAND TRUST

Now comes Defendant Barons' Land Trust, Brian M. Hall, Trustee ("Barons' Land" or "BLT") by and through its attorney, Benjamin L. Hall, Jr., Esq., and, pursuant to MRAP 3 & 4[4], cross appeals from the judgment in this case, namely (1) the August

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[1] of Bear Realty Trust, Bear II Realty Trust, and Gorda Realty Trust.

[2] James J. Decoulos, as co-trustee of Bear II Realty Trust and Gorda Realty Trust; Mark D. Harding, Sheila H. Besse and Charles D. Harding, Jr., as trustees of Eleanor P. Harding Realty Trust.

[3] Commonwealth of Massachusetts acting through its Executive Office of Environmental Affairs; George B. Brush, as trustee of Toad Rock Realty Trust; Charles E. Derby; Joanne Fruchtman and Jack Fruchtman; Benjamin L. Hall, Jr., as trustee of Gossamer Wing Realty Trust; Brian M. Hall, as trustee of the Baron's Land Trust; Caroline Kennedy; Caroline Kennedy and Edward Schlossberg, as they are guardians of Rose Kennedy Schlossberg, Tatiana Celia Kennedy Schlossberg, and John Bouvier Kennedy Schlossberg; Jeffrey Madison, as trustee of Tacknash Realty Trust; The Martha's Vineyard Land Bank Commission; Moshup Trail II Limited Partnership; Peter Ochs; persons unknown or unascertained being the heirs of Savannah F. Cooper; Susan Smith; Russell Smith; Barbara Vanderhoop, executrix of the estate of Leonard F. Vanderhoop, Jr.;Vineyard Conservation Society, Inc.; David Wice and Betsy Wice; and persons unknown or unascertained who may have an interest in any land heretofore or hereinafter mentioned or described.

[4] Since the Commonwealth of Massachusetts is a party to this case, under MRAP 4, the time within any party may file a Notice of Appeal is 60 days from the date of the entry of

12, 2010 Judgment of this Court – to the extent that the Judgment is construed to be a final judgment; (2) the August 12, 2010 Memorandum of Decision and Order and all orders included therein; (3) the March 8, 2011 order that denied the Motion of BLT to Correct and Clarify the dated August 23, 2010; (4) the order and decision allowing the Vineyard Conservation Society's motion for summary judgment; (5) the Amended and Final Judgment entered April 4, 2011; (5) the May 3, 2011 order denying the Motion of BLT to Correct, Amend or Modify Judgment of April 4, 2011; (6) the Second Amended and Final Judgment entered May 3, 2011; and (7) all ancillary and subordinate decisions and orders in this case.

Edgartown, Massachusetts

Baron Land Trust
By Its Attorney,

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the order denying relief under Mass.R.Civ.P. 59, which order was entered on March 8, 2011.