

COMMONWEALTH OF MASSACHUSETTS  
APPEALS COURT

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No. 2012-P-0260

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

v.

TOWN OF AQUINNAH, et al.,  
Defendants-Appellees

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ON APPEAL FROM A JUDGMENT  
OF THE LAND COURT

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TRANSCRIPTS

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Days 1 to 6 of 11  
Pages: 1 - 315  
Exhibits: None

COMMONWEALTH OF MASSACHUSETTS  
DUKES, SS. DEPARTMENT OF THE TRIAL COURT  
LAND COURT DEPARTMENT

\* \* \* \* \* \*  
\*  
MARIA A. KITRAS, as Trustee of \*  
BEAR REALTY TRUST et al., \*  
Plaintiffs \*  
\* No. 97-MISC-238738  
v. \*  
\*  
TOWN OF AQUINNAH et al., \*  
Defendants \*  
\*  
\* \* \* \* \* \*

CONFERENCES AND MOTIONS, POST-REMAND  
BEFORE JUDGE LEON J. LOMBARDI

APPEARANCES  
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complete information)

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Ellen H. Dibble  
Approved Court Transcriber

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Pages: 4 - 62  
Exhibits: None

COMMONWEALTH OF MASSACHUSETTS  
DUKES, SS. DEPARTMENT OF THE TRIAL COURT  
LAND COURT DEPARTMENT

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MARIA A. KITRAS, as Trustee of		*
BEAR REALTY TRUST et al.,		*
Plaintiffs		*
	No. 97-MISC-238738	*
v.		*
		*
TOWN OF AQUINNAH et al.,		*
Defendants		*
		*
* * * * *	* * * * *	*

STATUS CONFERENCE, POST-REMAND  
BEFORE JUDGE LEON J. LOMBARDI

APPEARANCES  
(See page following caption page for each date)

Boston, Massachusetts  
Courtroom

Ellen H. Dibble  
Approved Court Transcriber

## APPEARANCES:

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Withdrawing this date on behalf of Aurilla Fabio the  
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By: Ronald Rappaport, Esq.

For the Town of Aquinnah

1 (Time is 3:19:17 PM.)

2 THE CLERK: Today is Tuesday, April 25th, 2006, Land  
3 Court Miscellaneous Case Number 238738, Kitras versus  
4 Aquinnah.

5 THE COURT: Good afternoon, Counsel. Welcome back.  
6 If you would, please identify yourselves for the record,  
7 which is being recorded.

8 MR. DECOULOS: Nicholas Decoulos representing the  
9 plaintiffs Kitras and the Gorda Realty Trust, and James  
10 Decoulos of the Bear II Realty Trust.

11 MR. COHEN: H. Theodore Cohen. I represent Gardner  
12 and Victoria Brown.

13 MS. MORSE: Leslie-Ann Morse. I represent Mark  
14 Harding and the Eleanor P. Harding Realty Trust.

15 MR. HALL: Benjamin L. Hall, Jr.; I represent Gossamer  
16 Wing Realty Trust, and Baron's Land Realty Trust.

17 MS. ROBERTS: Jennifer Roberts for the defendant  
18 Vineyard Conservation Society, Inc.

19 MR. LIMA: David Lima for Thomas Seeman.

20 THE COURT: And I --

21 Yes, sir.

22 MR. FABIO: Richard Fabio, pro se; Aurilla Fabio is  
23 deceased, and my sister's pro se. We filed --

24 THE COURT: All right. We'll get to that in a minute.  
25 Because I did see some papers that recently came in today



1 on that.

2 And we do have counsel on the telephone; is that  
3 correct?

4 MR. RAPPAPORT: (On phone): Yes, Your Honor. It's  
5 Ronald Rappaport for the Town of Aquinnah.

6 THE COURT: All right. Mr. Rappaport, I can hear you.  
7 Could you hear each of the people speaking in the  
8 courtroom?

9 MR. RAPPAPORT: I can hear them, although I would  
10 appreciate if they'd speak up a little bit, but I'm  
11 hard-pressed to make a request, 'cause I'm down here, and  
12 I -- but, whatever. I -- I -- I can hear.

13 THE COURT: Your request is heard by all of us, and  
14 we'll try to comply.

15 This is a status conference, requested, I believe, by  
16 the Vineyard Conservation Society.

17 And I'm sure that a number of parties have points they  
18 wish to discuss this afternoon, but first I want to cover a  
19 few matters as well.

20 As we all know, the decision of the Appeals Court  
21 issued on August 18 of last year, and I'm sure it's given  
22 us a great deal to consider.

23 I'd like to read just a few passages from the  
24 decision, which I believe constitutes direction and some  
25 guidance as to how the case is to proceed.

1           And I don't know if counsel have your copies of it  
2 handy, but I'm going to first start at page 289 of the slip  
3 opinion, and it seems that the panel of the Appeals Court  
4 shares some of the concerns that I think trial judges of  
5 this court have had throughout this case. And let me read  
6 what Justice Brown wrote.

7           "Before identifying the lots and interests most  
8 directly relevant here, we pause to note that it is  
9 sometimes difficult to determine from the pleadings what  
10 owners are claiming what easements for what lots, or even  
11 what parties remain interested in the case."

12           I just say that as a introduction, because I'm going  
13 to insist, now that it's clear that I'm going to be having  
14 control of this case going forward, that we're going to  
15 have this case organized, well-pled, and presented in a  
16 manner that we can all follow what's going on in this  
17 litigation.

18           Page 293. The Appeals Court wrote -- hold on, please?

19           "The titles for each of the lots numbered 1 through  
20 188 or 189" -- the category, as you know, broke the various  
21 lots into two general groupings, those that were numbered,  
22 as indicated, 1 through 188 or 189, and then for 189 or 190  
23 and above.

24           And for that first group, the Court said, "However  
25 title is described, each lot was owned by a different

1 individual, and the unity of title required to imply an  
2 easement by necessity fails."

3 And later on, I believe, the Court again said that  
4 whatever easements may be established for lots with those  
5 higher numbers, it would not apply to those with the lower  
6 numbers.

7 The next point I would make on that is that...

8 Let me move on. And I may not have the page numbers  
9 accurately jotted down, so let me just read from this  
10 earlier copy of the decision which did not have the page  
11 numbers.

12 The Court said, "We have no difficulty envisioning a  
13 multiplicity of intentions implied from the circumstances  
14 prevailing at the time of partition, including that the  
15 lots were to have access to whatever road was most  
16 convenient or might be constructed at some future date."

17 The Court also said that "we remain mindful of the  
18 nature of the easement claimed. Whereas a preexisting use  
19 might in some cases give rise to an implied easement, we  
20 imply an easement by necessity not from use but from a,"  
21 quote, "'severance of rights once held in a unity  
22 ownership,'" end quote.

23 And I will share with all of you here that I think  
24 that the Court does go back and forth at times between  
25 implied easements and easement by necessity.

1           And from my perspective, there is a perhaps mixing of  
2 legal standards involved with those two concepts, and  
3 that's something we're all going to have to deal with as we  
4 go forward, as to what type of easement we're dealing with  
5 and what are the elements necessary for the particular type  
6 of easement that is involved here.

7           Let me continue.

8           The Court said that they had "assumed" until that  
9 point in the decision, for the higher numbered lots - if I  
10 can call them that - "the intent to create easements."  
11 They had assumed the intent to create easements.

12           But they then said, "It is well established in this  
13 Commonwealth: Necessity alone does not an easement create.  
14 Neither does there exist a public policy favoring the  
15 creation of implied easements when needed to render land  
16 either accessible or productive."

17           The Court's "charge, then, is not to look simply at  
18 necessity, but to consider all," quote, "'the circumstances  
19 under which the severance was executed, and all the  
20 material conditions known to the parties at the time,'" end  
21 quote.

22           Those are some of the passages from the decision,  
23 which I think very clearly indicates where we need to go,  
24 going forward. And there are obviously burdens that have  
25 to be met by the parties with these various standards.

1           The Court, just before the final passage, saying that  
2 the earlier judgment was reversed, laid out a number of the  
3 other issues that will have to be addressed, saying that  
4 "Should the requisite intent be found for some or all of  
5 the partitioned common lots, that this will not end the  
6 inquiry," that there were "numerous" other questions that  
7 need to be addressed as well.

8           So we do have a fair amount on our respective plates  
9 as we go forward.

10           I'd like to just touch very briefly on other issues  
11 that I think we can discuss today, and then of course to  
12 hear what the parties have in mind.

13           And that - talking about parties - is one of the  
14 primary concerns: The status of the parties: Who's in  
15 this case. Who used to be in the case but needs to come  
16 back into the case.

17           I'm also concerned that we have - whenever there's any  
18 filings by any one of you - an accurate service list.

19           I'm not going to be spending my time or the clerk's  
20 time going through these files each and every time there's  
21 a filing to check who has appeared or disappeared in this  
22 case. It's going to be up to all of you. And it's going  
23 to be your responsibility; if parties have not been served  
24 and they come in later on complaining that they haven't  
25 been served, then we'll have to deal with that.

1           So I do expect that when you file a motion or any  
2 other matter that requires a certificate of service, that  
3 the service list be attached, and not be merely a  
4 certification that "I have served all parties of record and  
5 counsel of record." I want that service list to be  
6 attached, and if there's changes of parties, it's going to  
7 be your responsibility to keep up on it.

8           MATTER OF WITHDRAWAL OF APPEARANCE,

9           AS TO ESTATE OF AURILLA FABIO:

10          THE COURT: And that will, you know, bring up the  
11 matter of - I would just mention briefly - I received a  
12 withdrawal of appearance by Richard E. Burke, today,  
13 docketed today. He submitted his withdrawal for the estate  
14 of Aurilla -- is that correct? Aurilla?

15          MR. FABIO: Yes, Your Honor.

16          THE COURT: -- Fabio, and said that the proper  
17 parties' interests are her two children, her only heirs,  
18 Richard Fabio and Sharon Nowell.

19          This actually is a motion that comes, of course, as  
20 far as a withdrawal, late in the process, without any  
21 successor counsel appointed. And the rules would require  
22 that the matter have to be allowed by the Court.

23          And so that -- the withdrawal is here but without a  
24 successor attorney to take over on behalf of the estate or  
25 to represent you; there's a question in my mind about

1 whether, you know, we need to have an attorney come in,  
2 present it to the Court, and then have it allowed.

3 It's not as though the estate is going to, in a sense,  
4 continue on as a party. You and -- your sister, is it?

5 MR. FABIO: Yes, Your Honor.

6 THE COURT: -- are going to succeed to the interests.

7 We don't have really much by way of documentation,  
8 that I'm aware of. Again, I haven't gone through the  
9 volumes here to see whether a, what's called a "suggestion  
10 of death" had ever been filed.

11 MR. FABIO: It is in there, Your Honor.

12 THE COURT: It is in there?

13 MR. FABIO: And if I may? We have a fractional  
14 interest, my sister and myself. And if Attorney Burke  
15 suggested -- if... we are pro se. If I just, when I go  
16 back and see him, he may -- it may make sense for him to  
17 get back involved, and...

18 THE COURT: All right. Well, we'll hold on that for  
19 the time being. The other point that I want to -- points I  
20 want to mention is that obviously part of our discussion  
21 this afternoon is going to be what future discovery is  
22 going to be necessary, with the issues that still have to  
23 be adjudicated here.

24 And as you think about doing discovery, it's going to  
25 be critical that you think ahead to the time when you're

1 going to be preparing a joint pretrial memorandum, which is  
2 going to identify the issues, who's claiming what, what the  
3 exhibits are going to be, who the witnesses are going to  
4 be -- because it's absolutely a prerequisite, before you  
5 get to trial, that there be a pretrial memo which puts  
6 everyone on notice what the other one is thinking about,  
7 that there's no element of surprise.

8 And it's been my practice to hold parties to the joint  
9 pretrial memo. If you don't have the witness on the list  
10 or you don't have the exhibit, you have a very difficult  
11 situation to try to get this witness or admitted at the  
12 time of trial if it hadn't been disclosed previously.

13 And then with the matter of future discovery would  
14 come deadlines, to say: How much time are we going to be  
15 spending on future discovery, and how soon you'll be ready  
16 for a pretrial conference.

17 Those are my initial comments and concerns as we  
18 begin.

19 MATTER OF STATUS CONFERENCE BEING REQUESTED BY

20 VINEYARD CONSERVATION SOCIETY

21 AS TO ISSUE OF BIFURCATION

22 THE COURT: And I would turn to the party who  
23 requested the status conference to ask if at this point,  
24 Ms. Roberts, that you would like to raise any particular  
25 matters.



1 MS. ROBERTS: On my list, Your Honor, I have a  
2 procedural issue of: Who are the parties now; what parties  
3 will be brought back in. So we obviously need to tackle  
4 that.

5 And there are some issues... well, I'm going to  
6 leave that for a moment.

7 When you get past the procedural issues and on to the  
8 merits, I'd like to suggest to the Court that we bifurcate  
9 this, because I think it would be more economical to do so.

10  
11 THE COURT: Bifurcate on what basis? As far as what  
12 are the two parts?

13 MS. ROBERTS: It seems to me, from the Appeals Court  
14 decision, that this Court is going to need to make a  
15 determination as to whether there was an intent to create  
16 an easement or not.

17 And if the Court finds that there was such an intent,  
18 then you will get to the issue, the much messier issue, of  
19 where to locate these on the ground.

20 The defendants up until now have presented a pretty  
21 unified front because we have the same interest in  
22 preventing any easement at all.

23 Once -- if the Court decides that there is an easement  
24 and now we're getting down to "where is it going to be,"  
25 then that unanimity among all the defendants I think is

1 going to break down very rapidly.

2 And I also would tend to believe that with respect to  
3 the issue of whether an easement exists at all, that's  
4 something that could be presented to the Court fairly  
5 quickly.

6 I'm happy to hear if anybody has any discovery they  
7 think needs to be done on that issue. My sense of it is  
8 that we pretty much did all the discovery we needed to do  
9 before this case was presented to Judge Green.

10 So my suggestion, Your Honor, would be: Let's deal  
11 with whether there is an easement or not. And then if  
12 the -- I think that -- I can't believe there'll be any  
13 witnesses presented.

14 THE COURT: Well, I mean, it is interesting to think  
15 what the witness list may be.

16 When Justice Brown said, speaking for the Appeals  
17 Court panel: "We have no difficulty envisioning a  
18 multiplicity of intentions implied from the circumstances  
19 prevailing at the time of the partition," um...

20 Well, "multiplicity of intentions" wouldn't mean that  
21 it's a fact-based inquiry as far as -- you know, intention  
22 is not something that ordinarily is resolvable on summary  
23 judgment. You need a trial: What were the intentions of  
24 the parties?

25 And: "At the time of the partition." I don't know

1 who you are calling for witnesses.

2 MS. ROBERTS: If I may, here, that's the issue, Your  
3 Honor.

4 We briefed all this. We did all the discovery on it  
5 before going, presenting the matter to Judge Green.

6 I don't have any more discovery to do on that issue,  
7 subject to what anybody else may come up with.

8 So far in the discussions I have had with plaintiff's  
9 counsel - and I haven't talked to everybody - I haven't  
10 heard anything from then that would lead me to believe that  
11 there's much if any discovery left.

12 And I can't frankly see that there are any witnesses  
13 that are going to testify on that issue of intent.

14 THE COURT: All right. Let's stop on this point, and  
15 that is: Your suggestion of bifurcation.

16 Does anyone want to take the other side of that  
17 argument and suggest that there shouldn't be bifurcation;  
18 that we're going to have a proceeding that's going to go to  
19 trial on everything, at the same time, as far as location  
20 of easement as well as whether the intention of the  
21 easement existed to create one, to whatever roads might be  
22 constructed at some future date?

23 (Pause.)

24 THE COURT: All right. I'm not hearing a lot of --

25 MR. DECOULOS: I'd rather not have it bifurcated, Your

1 Honor, and the reason being, that I think that we've got to  
2 take a fresh look at this case as a result of what the  
3 Appeals Court said.

4 THE COURT: Within the parameters of the Appeals Court  
5 decision.

6 MR. DECOULOS: And most of this case is documentary.  
7 And I've instructed my clients to -- I've got a list of  
8 over 100 items that I want included in there. And that  
9 will include whatever records we can find on Martha's  
10 Vineyard.

11 So I'd rather not have it bifurcated, not at this  
12 particular point. I would rather wait --

13 THE COURT: Well, one of the -- your suggestion,  
14 Mr. Decoulos, is to not bifurcate it and to go forward.

15 But if we get to the point -- and this would have to  
16 get to the assumption that there was this intent to create  
17 easements. Then the question is: Where?

18 And if we are going to go down that road and have a  
19 trial and deal with the issue of the location of the  
20 easement, it's going to be incumbent upon those asserting  
21 the easement to be specific as to where that easement would  
22 lie and who would be affected by it.

23 MR. DECOULOS: Right.

24 THE COURT: So you're going to -- before we ever get  
25 to trial, and assume that we, you know, have it as one

1 matter - or bifurcate it and eventually get to it -  
2 everyone who's asserting the easement is going to have to  
3 say where they think the intent was to create an easement  
4 and whose land would be burdened by it.

5 MR. DECOULOS: I've instructed my client to do that,  
6 Your Honor, so we've hired a surveyor and we're trying to  
7 locate the most feasible place to put that, in view of  
8 everything that's going to be in the record. But --

9 THE COURT: Well, is that just his desire, where he'd  
10 like to have an easement? Or --

11 MR. DECOULOS: No, I couldn't --

12 THE COURT: -- he believes the record would support  
13 that there was the intent to create an easement in a  
14 certain location?

15 MR. DECOULOS: I can't answer that question for you  
16 right now, Your Honor.

17 But I know where we'd like to put the road.

18 THE COURT: Mm-hmm?

19 MR. DECOULOS: And there has been a road there --

20 THE COURT: Okay?

21 MR. DECOULOS: -- that services lots. We've got  
22 evidence to that effect.

23 And we just want to get this all together and move it  
24 along, but you know, just picking up on where you left off  
25 about -- at the very beginning.

1           We don't -- I'm going to get a spreadsheet on this to  
2 find out which defendants were served, which defendants  
3 were not served, and which ones answered and which ones  
4 didn't answer.

5           THE COURT: Yeah.

6           MR. DECOULOS: So that we can find out where we're  
7 going, just so we can... there might be people who we can  
8 call to, who -- we can pick it up from there.

9           But I've got to find out exactly where the parties all  
10 are.

11           And we just can't -- I -- you know. I got the  
12 appeals, the record appendix, there were 290 entries or  
13 thereabouts. Of course they gave me the entries today, and  
14 it's over 390.

15           THE COURT: Yeah, 394, if anyone's counting.

16           MR. DECOULOS: Exactly. Yep.

17           THE COURT: Yep.

18           MR. DECOULOS: And that's just going to go on.

19           And a lot of that should not be in the record.

20           THE COURT: Well, perhaps you're right, but it's all  
21 here at the present time.

22           MR. DECOULOS: Well, what I'm saying is that the  
23 motions for summary judgment, those have to be set aside.

24           And what we ought to have is some kind of a record  
25 that says: "This is the amended complaint."

1 THE COURT: Mm-hmm.

2 MR. DECOULOS: "These are all the answers that are  
3 filed." And go from there, because otherwise, we're just  
4 going to be spinning our wheels trying to find out where  
5 we're going with this thing.

6 THE COURT: All right.

7 MR. DECOULOS: I think it can be done very quickly.

8 THE COURT: All right. Mr. Cohen, you were rising, as  
9 well as Mr. Hall.

10 MR. COHEN: What I was rising for, Your Honor, is that  
11 I don't necessarily agree with your characterization that,  
12 assuming there was an intent to create an easement by  
13 necessity, that we have to determine where it was intended  
14 to go at the time of the partition.

15 I think the Appeals Court made it clear that an  
16 easement by necessity, having no determined physical  
17 location, may be located as circumstances of the parties  
18 later dictate.

19 So I think if we conclude that there was an intent,  
20 then we get to the issue of: Where does it go.

21 And maybe it goes where we could establish an intent  
22 in 1870; or maybe it goes somewhere totally different --

23 THE COURT: Mm-hmm.

24 MR. COHEN: -- as the Court indicates. Moshup's  
25 Trail, and Zack's Cliff Road came into existence much after

1 the partition, but maybe they are the appropriate places  
2 for the easement to run to.

3 THE COURT: All right. Mr. Hall?

4 MR. HALL: I agree. That was one of the reasons why I  
5 was standing, Your Honor, is...

6 THE COURT: Mm-hmm? What about the bifurcation issue?  
7 What's your position? Ms. Roberts and Mr. Decoulos.

8 MR. HALL: As I read the Appeals Court decision, Your  
9 Honor, it's not absolutely clear to me that they have  
10 overruled Judge Green in finding that there was an  
11 intention to create easements to the lots that he  
12 specified.

13 I'm not sure that just because the Appeals Court has  
14 suggested, in dicta, that the matter of intent was one that  
15 had not yet been answered... it was answered by Judge  
16 Green, and I'm not sure that it was overruled by the  
17 Appeals Court. They're making suggestions that -- that the  
18 intent may be.

19 And they have said, in the very beginning of their  
20 decision, that...

21 THE COURT: And keep your voice up for Mr. Rappaport.

22 MR. HALL: -- that: "Before identifying the lots and  
23 interests most directly relevant" hereto ... "on remand, it  
24 will be for the trial judge and the parties to resolve all"  
25 the "uncertainties."



1           So it seems like they've thrown the door wide open  
2 again.

3           But they -- they agree with Judge Green; they disagree  
4 with Judge Green. They say things that are contrary to  
5 Judge Green's decision without saying that they're finding  
6 it to be incorrect.

7           It's kind of hard to kind of follow through this  
8 meandering decision.

9           THE COURT: I'm aware -- I'm aware --

10          MR. HALL: However -- however --

11          THE COURT: -- of some of those problems.

12          MR. HALL: -- to point out one thing that the Court  
13 did say: You tried to draw a distinction between an  
14 implied easement and an easement by necessity.

15          THE COURT: Right.

16          MR. HALL: And in fact I think the distinction that has  
17 been drawn and should be drawn is one that is the difference  
18 between an easement by necessity and an easement by  
19 implication, both of which are easements that are implied to  
20 have occurred by the Court.

21                 So when one speaks of implied easements, one is  
22 including within that context both an easement by necessity  
23 and an easement by implication, as defined in the  
24 Restatement, differentiated by Powell --

25          THE COURT: Well, we'll have to sort that out a little

1 bit later, Mr. Hall, because, you know, there's already  
2 plenty of confusion in the whole arena of easements, and  
3 the terminology. And sometimes the courts at all levels,  
4 unfortunately, don't keep the terms separate where they  
5 need to be separate. And you're suggesting "implied  
6 easement" may be different than "easement by implication."

7 You know, we'll have to see how your authorities play  
8 out on that. But whether it be Bedford versus Cerasuolo,  
9 which had a nice recitation of "implied easements"...

10 The general rule that I'm aware of is: An implied  
11 easement is one where there has been an underlying use that  
12 already occurred; and when there was a severance of  
13 ownership, it was implied that the grantee would still have  
14 the right to use the property as the grantor did, where  
15 there had been actual use.

16 An easement by necessity, as the Court did say, there  
17 may not ever have been a use, but you've now landlocked a  
18 piece of property.

19 Now, if you then -- you know, sure, maybe that's a  
20 form of easement by implication. But I think there is a  
21 distinction to be made. And to try to keep some sanity for  
22 all of us, we should try to follow as much of the  
23 traditional language - where clear - to keep following it.

24 But there's plenty of treatises on easements. And I  
25 do remember participating in a seminar not too many years

1 ago, and one of the presenters said, "If you haven't found  
2 an easement case that supports your theory or position, you  
3 haven't looked hard enough" -- because the cases are all  
4 over the lot.

5 So, enough said on that.

6 So I guess I would go back to you, and then to  
7 Mr. Cohen again. I'll get to the others here.

8 As far as your thoughts on bifurcation versus just  
9 going forward and trying the whole thing at once.

10 MR. HALL: Well, I can see justification for  
11 separating some of the lots. With respect to our lot, 302,  
12 it's so factually and geographically distinct from the  
13 balance of the lots, that I think that one should be  
14 resolved on an in-and-of-itself. I mean, it stands --

15 THE COURT: Have you identified, for let's say  
16 hypothetically lot 302, which land would be burdened by a  
17 easement to service lot 302?

18 MR. HALL: There would be a potential for three  
19 different lots, one owned by Evans, one owned by Pratt, and  
20 one owned by Cammann.

21 THE COURT: All right. Have you ever reduced to  
22 writing your route, and who would be affected by that?

23 MR. HALL: We have not set forth a route, but we have  
24 suggested to the Court in the past which of the -- where --  
25 where, just geographically, looking at the map, where that

1 easement might go.

2 But it would require there to be quite a bit of  
3 engineering work, because there is a brook running near in  
4 the vicinity, so there'd be wetlands issues that need to be  
5 looked at.

6 Indeed, I'm not sure, given that this area is so full  
7 of wetlands, what and where easements might run. I think  
8 wetlands analysis is going to be part of this game plan,  
9 however you we cut it.

10 THE COURT: You said Pratt, Cammann, and who's the  
11 third?

12 MR. HALL: Evans, I believe.

13 MR. DECOULOS: How do they spell that second name,  
14 Your Honor?

15 THE COURT: C-A-M-M-A-N-N.

16 And are they parties to the litigation?

17 MR. HALL: Pratt and Cammann are. I believe Evans may  
18 have been dismissed.

19 THE COURT: All right. Well, unless the parties come  
20 up with a different map or whatever -- I guess both Judge  
21 Green and the Appeals Court are using the same one, which  
22 the parties have previously produced. And that would be  
23 the one I'm going to go with.

24 But I think that as you go forward with your claims  
25 and your case, that whenever appropriate, that we, you

1 know, refer to this and show where it is that you suggest  
2 that this easement would arise.

3 All right. So your issue of bifurcation is not on the  
4 same basis as counsel's was -- Ms. Roberts'. Yours is on  
5 the particular property rather than the legal issue.

6 MR. HALL: Right. I think the Court would need to  
7 make a ruling as to Ms. Roberts whether or not this  
8 decision actually requires the Court to go back and find an  
9 intent, because I think Judge Green already did it.

10 And I'm not sure that was overruled. Heh.

11 THE COURT: Well, I know that there was requests for  
12 rehearings and FAR, and all of it was denied. So this is  
13 the last word.

14 MR. HALL: But what do those words mean when we apply  
15 it to what we're looking at? And how -- I mean, though  
16 this may recite what the law is, it doesn't necessarily say  
17 that Judge Green was wrong.

18 So I'm not sure that the Appeals Court is ordering  
19 this court to go back and make new findings of fact on that  
20 particular issue.

21 MS. ROBERTS: Could I just interject here, Your Honor?

22 THE COURT: Yes. Keep your voice up, Ms. Roberts.

23 MS. ROBERTS: It's my memory that Judge Green said  
24 that he would "assume without deciding" that there was an  
25 easement by necessity, because -- and he went on to find

1 that there were indispensable parties, so he couldn't  
2 ultimately adjudicate that issue.

3 That's my memory of the decision. So I don't think he  
4 decided it. I think the Appeals Court has now said that  
5 that issue is open for decision by this court.

6 MR. HALL: It may well be.

7 THE COURT: All right. And Mr. Cohen, did you opine  
8 on the issue of bifurcation?

9 MR. COHEN: I did not, Your Honor.

10 I knew it had been suggested before, and my initial  
11 reaction was that it would probably be more judicially and  
12 economical for all the parties not to bifurcate it.

13 However, I realize that leaves open or forces us to  
14 try and deal - perhaps in advance of it needing to be dealt  
15 with - the issue of whether the Wampanoags need to be a  
16 party to the proceeding, the Appeals Court having  
17 indicated, as I understand it, that if a determination were  
18 made that it didn't -- that an easement existed, and it  
19 didn't have to impact on the tribal lands, that they don't  
20 need to be parties.

21 And if we handle everything at once, I don't quite  
22 know how we deal with that issue.

23 THE COURT: Okay. Ms. Morse?

24 MS. MORSE: I'm going to simple about this. I agree  
25 with Ms. Roberts. It's going to be much simpler to deal

1 with whether or not there was an intention to create an  
2 easement, and then deal with everything else later, because  
3 with so many parties in here, it's going to be bad enough  
4 just dealing with that.

5 Let's just keep it simple, deal with that issue, and  
6 then we can deal with everything else.

7 MR. DECOULOS: Your Honor --

8 THE COURT: Before you speak again, Mr. Decoulos, let  
9 me ask other counsel if they want to say anything.

10 Before I get to Mr. Rappaport: Mr. Lima.

11 MR. LIMA: Yes.

12 I have no objection to bifurcating. However, first  
13 thing I'd like to do is establish who the parties are.

14 My person was let out on a summary judgment motion,  
15 without any objection from anyone. I'd like to get out  
16 again, quite frankly --

17 THE COURT: Hmm.

18 MR. LIMA: -- because of that.

19 My person is as far to the south as you can go - I  
20 believe it's south - and as far away as any -- from any  
21 road that you can possibly get to.

22 THE COURT: Which lots are your client's?

23 MR. LIMA: My client is Thomas Seeman. If you look at  
24 the very bottom of that map?

25 THE COURT: Number 76?

1 MR. LIMA: And 75.

2 THE COURT: And 75?

3 MR. LIMA: Correct.

4 And if you look where they are located, they're  
5 further up to the right center and very far up, at top of  
6 the map.

7 Any logical route from their lots, the plaintiffs'  
8 lots, to any road --

9 MR. DECOULOS: Here's what I meant (indicating).

10 MR. LIMA: Any logical route that an easement could  
11 take would certainly not go through in that direction.  
12 It's just too far to go. It would impinge upon too many  
13 other lots.

14 Any logical route that an easement could take would  
15 certainly not go through in that direction. It's just too  
16 far to go; it would impinge upon too many other lots.

17 MS. ROBERTS: Your Honor, I think by virtue of the  
18 fact that the Appeals Court has said lots 1 through 189 do  
19 not have common ownership with lots 189 and above, that  
20 anything below 189 is not going to be a possible source of  
21 the location of an easement, so --

22 MR. LIMA: So --

23 MS. ROBERTS: -- so I would not object to lots that  
24 are below 189 being dismissed.

25 THE COURT: Well, the question is whether the lots



1 below 190 or 189 are going to be the dominant estate or the  
2 servient estate.

3 MS. ROBERTS: Well, I understand that, is that they  
4 can't -- because there's no common ownership, they can't be  
5 either.

6 THE COURT: Mm-hmm?

7 MS. ROBERTS: So I would say that the lots 189 and  
8 below are no longer in this fight. The lots above have a  
9 common owner, and therefore --

10 THE COURT: No, I unders- ... Yeah.

11 No, I understand. It's just a question of, I'm  
12 hearing the suggestion, by counsel who wish to get access  
13 to their lots, that they seem to say we'll find the route  
14 that makes the most sense for us to get access to our lots  
15 that are above 189.

16 And I don't know what route that is and how it  
17 implicates anyone else.

18 I mean, that's why I think, you know, it would be nice  
19 if we could start to - even without the formality of a  
20 pretrial conference or something of that nature - the  
21 parties talk and come to some basic understandings as to  
22 what areas are involved here.

23 And if you have certain people - and I'm not saying  
24 that it's necessarily the case with Mr. Lima's clients -  
25 but if you have some that under no stretch of the

1 imagination are going to be impacted, then it would be  
2 terrific to have an agreement to dismiss certain parties.

3 And if there can't be an agreement, then I take there  
4 could be a motion brought, and we'll have to deal with it  
5 on that basis.

6 Mr. Hall.

7 MR. HALL: I hear what the Court is saying, perhaps,  
8 about the lots 189 or 190 and below, that these lots may in  
9 fact have easements by necessity over the common lands, but  
10 remaining (time is 3:55:01 PM) higher numbered lots, and I  
11 don't think that the Appeals Court said that they did not.  
12 I think what they said was that an easement by necessity  
13 could not burden those lots, because they were held in  
14 severalty below.

15 But there is evidence to suggest -- and Judge Green, I  
16 think, had found the lot numbers had gone through 173 as  
17 opposed to 189, and there has been -- we just found in the  
18 Dukes County registry of deeds a document - that magically  
19 just appeared on a shelf - that dates back to 1870 that  
20 shows a plan for lots going through 173 and not to 189 and  
21 190. It's dated October 1870.

22 So it's kind of interesting that new things are  
23 starting to kind of get pulled out of the racks or wherever  
24 this document was, and appeared.

25 But there is a suggestion that the easements could run

1 over the higher number lots, possibly the 174 and above.

2 THE COURT: And you represent a party that owns 177;  
3 is that right?

4 MR. HALL: Yes, Your Honor.

5 THE COURT: Okay. And Mr. Decoulos, 178 is one of  
6 your clients' lots; is that right?

7 MR. DECOULOS: That's right.

8 THE COURT: Yep. Okay.

9 MR. DECOULOS: Judge, I --

10 THE COURT: Mr. Rappaport -- then I'll get back to  
11 Mr. Decoulos.

12 Mr. Rappaport, did you have anything to add?

13 MR. RAPPAPORT: Yes. I'd just like to say several  
14 brief things.

15 First, that I know that Jennifer Roberts' reference  
16 that Judge Green did not find, necessarily, but just  
17 assumed that there was an easement by necessity. And that  
18 is correct; and that appears on page 14 of his decision.

19 Second, I think that it only makes sense to bifurcate,  
20 because, for the reasons stated, we'll have different  
21 people claiming different possible routes over different  
22 people's lands. But we don't whether or not there's an  
23 easement that can be proven at all. And I think it only  
24 makes sense to bifurcate.

25 On the issue of the parties, and who is a party, I

1 think it would be good if we could go through an exercise  
2 and eliminate some people by agreement.

3 Not being an optimist on that: Perhaps there could be  
4 a mechanism where everyone who was formerly a party, and  
5 anybody who's a potential party, including the tribe, be  
6 given notice that this issue was going to be adjudicated  
7 and an invitation to come into court, and if they choose to  
8 ignore that, that the issue of whether or not there's an  
9 easement at all be adjudicated, and they run the risk of  
10 having that be adjudicated in their absence.

11 THE COURT: Well, one thing which - again, from my  
12 perspective - is so important is that the parties claiming  
13 easements sooner rather than later identify the route. And  
14 that way we know who's involved, who's going to be  
15 affected.

16 And I would entertain at some point, I suppose, some  
17 procedure and some process for that to be done so that  
18 we're all not running in circles on these various  
19 questions.

20 Now, that is separate and apart from the issue of:  
21 Was the intent -- again, this raises the issue whether  
22 intent is necessary to be proven here again.

23 And that question could be briefed by the parties.

24 But I am also wondering whether we're going to be  
25 dealing with different claims of intent, if we get into

1 that, for different lots.

2 For instance, using as an example, Mr. Hall's lot,  
3 302. Are we going to be trying to determine whether there  
4 was an intent to create an easement for that particular lot  
5 as opposed to lot 177, that is owned -- well, I shouldn't  
6 use that one as an example today, because, you know, that  
7 one is below the 189.

8 But let's take lot 232.

9 MR. HALL: 242.

10 THE COURT: Well, there's also -- don't I see Gorda as  
11 232?

12 MR. HALL: That's not me, Your Honor. Gorda is  
13 Mr. Decoulos.

14 THE COURT: Okay.

15 MR. HALL: 242 would be...

16 THE COURT: Or 710? Is that one of yours?

17 MR. HALL: 710, yes.

18 THE COURT: Okay. All right.

19 But the point is, what I'm getting at is, if this  
20 question of intent has to be reached to determine that  
21 question, are we looking at the same set of facts for all  
22 of them? Or are we talking about different questions of  
23 intent for different lots?

24 Anyone have any thoughts?

25 MS. ROBERTS: I'm not aware of anything which would

1 distinguish one lot from another once you get above 189.

2 I know the Appeals Court made some reference to  
3 looking at the intent on sort of a lot-by-lot basis  
4 somewhere in the opinion. But I don't know that that -- in  
5 fact if the evidence would be the same for each lot.

6 But of course the burden's on the plaintiffs. If they  
7 think there's some difference lot by lot, I'm not aware of  
8 it, Your Honor.

9 THE COURT: All right. Are you all in the same boat  
10 on this issue of intent? Or is it different?

11 Mr. Cohen?

12 MR. COHEN: Well, I'm not aware of any difference of  
13 intent.

14 We've argued throughout, actually, that we thought  
15 1 -- starting with 1 and going forward, all was part of the  
16 same partition; different from the Appeals Court.

17 So -- but if we assumed, just starting with 189 and  
18 above, that all came out of one partition, I think if we  
19 find an intent for any one lot, it probably is going to  
20 apply to all the lots.

21 THE COURT: Does every lot have its own access route  
22 out to a road? Or is there some kind of common driveway  
23 intent that was established in 1870?

24 MR. COHEN: Well, I think in 1870 none of the lots had  
25 any access --

1 THE COURT: Right.

2 MR. COHEN: -- anywhere except the few lots that  
3 happened to abut on State Road --

4 THE COURT: Oh, I know.

5 MR. COHEN: -- in existence at the time.

6 THE COURT: But that's what this whole case is all  
7 about.

8 MR. COHEN: Right.

9 THE COURT: -- trying to determine the intent at the  
10 time of the partition.

11 And therefore, was it the intent that every single lot  
12 have its own separate means of access?

13 MR. COHEN: Well, I would argue that there was an  
14 intent that the lots -- each lot had -- have access to,  
15 we've argued both to State Road and down to the ocean and  
16 to the cliffs on the western part, although it was not an  
17 automobile type society; the people --

18 THE COURT: Right.

19 MR. COHEN: -- were walking and riding horses and  
20 going in all directions. And access to the beach may have  
21 been much more important to the inhabitants of Aquinnah at  
22 the time than access to State Road.

23 THE COURT: So if you have here some -- and I'm not  
24 sure how many lots are shown, and I know the numbers go way  
25 up --

1 MR. COHEN: Right.

2 THE COURT: -- because we just talked about a  
3 700-whatever. But this appears to be about what, 125 lots  
4 shown on this exhibit?

5 I don't know.

6 MR. COHEN: I don't know the number.

7 THE COURT: But the point is that would each lot,  
8 you're saying, have its own separate access?

9 MR. COHEN: Well, that each lot be granted access,  
10 yes.

11 THE COURT: All right.

12 MR. COHEN: I --

13 THE COURT: Mr. --

14 Go ahead, Mr. Cohen.

15 MR. COHEN: Your Honor, might I address or question a  
16 different issue?

17 I was not involved from the beginning. But my  
18 understanding of what happened historically, procedurally,  
19 was that the initial complaints and the initial amended  
20 complaints by the plaintiffs indeed only had a limited  
21 number of defendants, because the plaintiffs presumed or  
22 made some assumptions about where the most logical location  
23 for the easement would be; and that the defendants  
24 consistently opposed that and consistently insisted that  
25 every lot that could conceivably be burdened by an access



1 easement be brought into it.

2 And that is what ultimately led to the idea of  
3 bringing in the Wampanoag tribe.

4 And it seems to me that somewhere there was a change,  
5 because Judge Green allowed out a number of defendants on  
6 two different occasions.

7 I wasn't involved, but at the time it would appear  
8 that the Court made a determination that those defendants  
9 couldn't possibly be burdened by the lot (sic).

10 And if I understand what you're saying now is you're  
11 asking us to go back and make the same determination that  
12 the plaintiff started out making as to where we would like  
13 the easement to be, and therefore who we think ought to be  
14 the parties to this proceeding.

15 THE COURT: Well, after the Appeals Court decision,  
16 where else would we go?

17 MR. COHEN: Heh. I don't know, because the Appeals  
18 Court leaves open that if a determination is ultimately  
19 made that it burdens the settlement lands, then at that  
20 point in time, the tribe could be brought in as a party.

21 THE COURT: Right. But that's part of the exercise to  
22 decide what is the route; isn't it?

23 MS. ROBERTS: Could I interject? Just, it's always  
24 been my understanding, painful though the prospect is, that  
25 ultimately it's going to be the Court who's going to

1 decide, based on the evidence, where to put this easement -  
2 certainly that's my reading of the Appeals Court decision -  
3 because it's not based on prior use; it's not based on  
4 what's there now. A number of these lots don't even --  
5 don't about whatever trails are through there now.

6 And so it's going to be up to the Court to make a  
7 decision about, based on all the evidence, about where the  
8 Court thinks this easement should go.

9 Which is why I've been pushing to bifurcate, because I  
10 just think that's a very knotty problem. And you're going  
11 to have each landowner coming in here, and they're going be  
12 arguing about why it shouldn't be going over their  
13 particular lot, because, you know, of wetlands or because  
14 they have endangered species, or...

15 THE COURT: I hear you, Ms. Roberts. But you know,  
16 it's -- the old cliché, "You can pay me now or pay me  
17 later."

18 I mean, eventually there's going to have to still be  
19 that determination of who's affected. Either the parties  
20 come up with it, or the Court.

21 And are you suggesting that if the Court finds that  
22 there was an intent to create an easement, that I just  
23 listen to all of you argue about your thoughts about where  
24 the easement should be; the Court's going to adjudicate the  
25 location; and then after the fact, you know, send a letter

1 out, "Guess what; you've won." Heh. "The Court has  
2 selected you to be the servient estate."

3 The point is, somehow we have to, at an earlier stage,  
4 decide who's affected.

5 MS. ROBERTS: Well, that's why we have always taken  
6 the view that you need to bring in everybody: Because you  
7 don't know yet where it's going to go.

8 And so I mean, one of my problems with the Appeals  
9 Court decision, for example, is that if the Court  
10 adjudicates -- you know, the Court can one of two ways. It  
11 can either say, "There was an intent to create an  
12 easement," or "there was not."

13 If it says "there was not," then we all go home --  
14 we'll go up to the Appeals Court first and then we'll all  
15 go home.

16 But if the Court says, "Yes, there was an intent to  
17 create an easement; now let's figure out where it goes,"  
18 and bring the tribe in - or anyone else who was not a party  
19 to that original determination that there was such an  
20 intent - those new parties are going to be able to  
21 say, "Hey, I wasn't a party to the adjudication as to  
22 whether there was this intent or not, and I demand to be  
23 heard on that before we get to where this easement is  
24 located on the ground."

25 And it's because of that that we have always taken the

1 position that everybody needs to be in at every step of the  
2 way. And if they fall out, in this case, based on the  
3 Appeals Court decision, I would say that people under lot  
4 189 have probably now fallen by the wayside.

5 But other than that, I think everybody else needs to  
6 be in.

7 THE COURT: And who is "everybody"?

8 MS. ROBERTS: Well, that goes to the problem: What do  
9 you do with the tribe?

10 I mean, the Appeals Court apparently is of the view  
11 that you can look at other land and make a determination as  
12 to whether you can place this on other land. And it's only  
13 if you get to the point where you decide that you can't,  
14 and you need the tribe, that you would start bringing the  
15 tribe in.

16 But I would suggest to Your Honor that if the Court  
17 concludes that there was no intent to create an easement  
18 here -- and I think so far I'm hearing that we're all in  
19 agreement that the intent is going to be the same, whether  
20 it's lot 242 or lot -- whatever the lot, the evidence is  
21 going to be the same.

22 And so if we can tackle that issue -- burden is on the  
23 plaintiffs; if they don't meet that burden, then that ends  
24 this case, except for going up on appeal.

25 THE COURT: All right. Well, let me say that probably

1 the first order of business would be for me to make a  
2 ruling on this bifurcation question, giving the parties an  
3 opportunity to file their position on that.

4 MR. DECOULOS: Judge, before you make that, can I  
5 make -- you know, you asked the question, "Who is  
6 'everybody'?" -- in this case. "Everybody" in this case is  
7 the person that got served and filed an answer.

8 And if somebody got served and didn't file an answer,  
9 then he's going to be defaulted and he might lose out some  
10 rights. But the fact of the matter is, he was -- you  
11 know, we followed due process there, and I don't -- I don't  
12 understand the --

13 THE COURT: I understand, Mr. Decoulos. But there  
14 were certain parties who were dismissed that perhaps did  
15 answer and were later dismissed. The question --

16 MR. DECOULOS: I don't know why -- why were they later  
17 dismissed?

18 THE COURT: Well, you would have to go back and look  
19 at this file --

20 MR. DECOULOS: Yeah.

21 THE COURT: -- to look at what the procedural history  
22 is.

23 MS. ROBERTS: I can tell the Court that there were --  
24 the Stutz defendants; there were six or seven landowners  
25 that were dismissed based on the plaintiff's representation

1 that these properties didn't abut the Radio Tower Road or  
2 the Zack's Cliff Road.

3 That was done at a conference with Judge Green. And I  
4 made a point of saying: It's the plaintiff's burden to  
5 make sure they have everybody in here that they need; and  
6 we think they need everybody; but if they're not going to  
7 object to the dismissal, okay.

8 So the Court dismissed those people.

9 MR. DECOULOS: I think that once we find out the  
10 interests of the -- the parties who have an interest in  
11 this case, then we can determine the route that the road  
12 should be taking. Until we find out --

13 THE COURT: Find out what?

14 MR. DECOULOS: Find out where the road should be  
15 laid -- laid out.

16 THE COURT: And in your view, Mr. Decoulos, who makes  
17 that determination?

18 MR. DECOULOS: Ultimately, you.

19 THE COURT: All right. But that's going to be based on  
20 advocacy and proposals and arguments --

21 MR. DECOULOS: That's right.

22 THE COURT: At what point in time do you think that  
23 the party with the burden of proof to establish an easement  
24 is going to suggest to the Court what those parties think  
25 the route should be?

1 MR. DECOULOS: I don't understand your question.

2 MR. HALL: It was already done, Your Honor (time is  
3 4:10:52 PM).

4 THE COURT: The parties that are seeking an easement  
5 have the burden for --

6 MR. DECOULOS: There's only a half a dozen of them.

7 THE COURT: All right. So at what point in time will  
8 you be suggesting to the Court what the route is?

9 MR. DECOULOS: Absolutely.

10 THE COURT: When?

11 MR. DECOULOS: When I find out which parties are still  
12 involved in the case --

13 THE COURT: And so you'd be --

14 MR. DECOULOS: -- 'cause that might make a big  
15 difference.

16 THE COURT: All right. So you're saying that you're  
17 limiting your view to those parties who are still in the  
18 case. Or -- let me rephrase.

19 Are you limiting your focus, as far as where you think  
20 the easement should be, and limiting to just those parties  
21 who are still in the case?

22 MR. DECOULOS: Yes. -- we know where we'd like to see  
23 the road. We've got a very good idea. And I want to find  
24 out, if there are any parties that are being affected by  
25 that road -- if they've been defaulted, then we go on from

1 there; if they've been dismissed, we'll have to understand  
2 it.

3 But until we get a complete picture, from the whole  
4 base once again -- 'cause it's gone all over the lot rather  
5 than staying within the confines of what happened in 1870,  
6 and all of the roads that were constructed and laid out  
7 since that time.

8 So I'm not happy with saying that you should bifurcate  
9 this case until you have a very good handle on all the  
10 facts.

11 I mean, this thing can almost be treated as an agreed  
12 statement of facts once we get all our discovery done.

13 THE COURT: That I would like to see.

14 (Mirth.)

15 MR. DECOULOS: Well, nobody's going to testify --

16 THE COURT: All right.

17 MR. DECOULOS: -- in 1870.

18 THE COURT: All right.

19 Before I turn to Mr. Hall...

20 All right, we're going to have this first threshold  
21 question I have to answer, whether we're bifurcating or  
22 not.

23 And assuming we get over that, and we get to your  
24 issue, Mr. Decoulos, about the location of the road, when  
25 would you be prepared? How much time do you need to



1 identify what route you're interested in and who's affected  
2 by that route?

3 MR. DECOULOS: Until I find out which parties are  
4 going to be affected, I can't tell you.

5 And like I said at the beginning, I said I'm going to  
6 create a spreadsheet; I'm going to find out who answered --  
7 who got served, who got answered; and then we can work on  
8 it.

9 We might be able to work our way around another lot  
10 where somebody never showed up.

11 So it's just a question of finding out --

12 THE COURT: Heh. Finding out those who've been  
13 defaulted and putting it over their lands?

14 MR. DECOULOS: Absolutely.

15 THE COURT: Okay. All right.

16 Mr. Hall.

17 MR. DECOULOS: That'll be the easiest way, Your Honor.

18 THE COURT: (Chuckling.)

19 MR. HALL: Your Honor, I believe that the plaintiffs  
20 proposed at the time of summary judgment, did propose to  
21 the Court a series of potential routes, so --

22 THE COURT: All right. I wasn't the summary judgment  
23 judge.

24 MR. HALL: No, that's true. I believe it was  
25 struck --

1 THE COURT: All right, so --

2 MR. HALL: -- I believe it was struck by Judge Green,  
3 but those routes, proposed routes, were in fact - are in  
4 fact - in the file, and they could be revived --

5 THE COURT: Mm-hmm?

6 MR. HALL: -- if the Court would be so inclined.

7 I'm not sure how far the plaintiffs went in terms of  
8 trying to engineer anything, but they did propose some  
9 routes, my recollection is.

10 THE COURT: All right. Well, it may not have been  
11 pertinent at the time when Judge Green was looking at it.  
12 You know, circumstances have changed.

13 MR. HALL: Yes.

14 THE COURT: All right.

15 MR. HALL: And the other issue on the bifurcation,  
16 once more, without beating it to death too much: Just  
17 keeping in mind that this petition to partition was a  
18 petition that was basically submitted under the statute by  
19 ten landowners.

20 So do we look at the intent of those landowners and  
21 what lots they ended up getting? Or --

22 THE COURT: Well, that's the question we're not going  
23 to answer today.

24 MR. HALL: Yes.

25 THE COURT: All right. Let me ask if anyone else has

1 any comment they want to make now on this before I finish on  
2 this issue of bifurcation.

3 Mr. Cohen?

4 MR. COHEN: Well, thank you.

5 A comment that Mr. Hall and Your Honor just made just  
6 raised something in my mind: That if we assume that Judge  
7 Green - because of his determination of the tribe as an  
8 indispensable party - perhaps did not consider everything  
9 that was in the summary judgment record, does it make any  
10 sense to try to address some of the issues by a renewed  
11 motion for summary judgment to this Court, and then  
12 determine, after that determination, what remains to --

13 THE COURT: What would the scope of the issue be that  
14 you think is appropriate for summary judgment?

15 MR. COHEN: Well, certainly, I think the parties  
16 thought that the issue of whether easements by necessity  
17 existed or not was what was being argued before.

18 And I know some of the defendants argued that the  
19 Appeals Court had everything before it and should have  
20 addressed that issue, and that perhaps, you know, now - in  
21 light of the Appeals Court decision and a review of that  
22 record and perhaps some further discovery of the parties to  
23 see if there are other documents that have come to light  
24 that shed any further light on this issue - then perhaps  
25 that isn't (phonetic at 4:16:07 PM, might be heard as

1 "is-in") the issue of whether there -- the -- it was the  
2 intent of the commissioners, at the time, that they not  
3 create landlocked lots.

4 THE COURT: All right. But you're not arguing then  
5 something that's all that different than Ms. Roberts.  
6 You're saying summary judgment - the summary judgment on  
7 the legal issue of whether there was the intent --

8 MR. COHEN: Perhaps, Your Honor.

9 THE COURT: -- which is -- again, you know, you can  
10 take out one of those manuals on summary judgment, and it  
11 says that summary judgment usually is not appropriate where  
12 the intent of the parties is at stake.

13 But I'm also well aware we're talking about something  
14 that is 130 years old. So you're not going to get a lot of  
15 live testimony.

16 No, I hear you on that.

17 What I'm going to --

18 Mr. Rappaport, did you want add anything before I  
19 finish on this?

20 MR. RAPPAPORT: I don't, Your Honor. Thank you.

21 THE COURT: All right. I'm going to ask that -- I'm  
22 going to accept Ms. Roberts' proposal as an oral motion  
23 that there be bifurcation.

24 And I'm going to give each party who's interested here  
25 the opportunity to submit a brief on the question for or

1 against, and to give me your proposal by way of language  
2 for a either -- well, if it's a denial, that's easy. But  
3 if the motion were to be allowed for bifurcation, your  
4 suggestion for the language of that order, proposed -- give  
5 me a proposed order. And I will consider the competing  
6 positions of the party whether to have bifurcation or not.

7 I'm going to be away all next week, so I'm not going  
8 to even have a chance to look at this until I return.

9 How much time do you want to submit these briefs?

10 MS. ROBERTS: Your Honor, I have an Appeals Court  
11 brief that's due in about -- it's due May 15th. So I'm  
12 into that at the moment. If we could --

13 [MR. DECOULOS]: We have a report due September 8th.

14 MS. ROBERTS: -- do it... on the other hand, I don't  
15 want to hold things up. So, heh.

16 THE COURT: This case is 9 years old. I don't think a  
17 couple more days will hurt.

18 MS. ROBERTS: Okay.

19 THE COURT: So the thing is that you're talking about  
20 something after the 15th of May?

21 MS. ROBERTS: Like May 20th? I mean, I'll return to  
22 this immediately after -- May 21st, something like that?  
23 If that's all right with everybody else?

24 UNIDENTIFIED LAWYER: Yup.

25 THE COURT: All right. Counsel, the 22nd is a Monday.

1 If we said May 22nd, is that sufficient time?

2 MR. DECOULOS: Judge, can I? I think she should  
3 reduce her motion to writing, rather than considering it as  
4 an oral motion.

5 "Bifurcate" is just one word. Let her follow the  
6 rules and put it in writing for the -- in the next week or  
7 ten days or two months from now.

8 THE COURT: Is there a rule that says I cannot accept  
9 an oral motion?

10 MR. DECOULOS: No, there isn't, but I think that in  
11 view of the fact that this is not, you know, an easy case,  
12 to say the very least, I think we should obligate her to  
13 put it in writing.

14 'Cause I don't know, she said "bifurcate." Bifurcate  
15 what? Bifurcate the implied easements? Bifurcate the  
16 location? It goes on.

17 MS. ROBERTS: Your Honor, I don't have a problem with  
18 that.

19 THE COURT: All right. You don't have to do your memo  
20 in full at the present time.

21 May 22nd will be the deadline for the memo, but if you  
22 could do, in a couple of pages, the motion, and send it out  
23 to the service list, and then -- because, again, I am going  
24 to stick to my rule, that if something's going to be mailed  
25 in to the Court, that we're going to use the service list.

1           And in that motion, I would say that you should  
2 indicate that the Court has indicated that any party that  
3 wishes to respond must do so on or before May 22.

4           MS. ROBERTS: Just one other sort of little glitch  
5 here, Your Honor. I would like to reach agreement with  
6 everybody here as to who we think is supposed to be on the  
7 service list. That, Your Honor, was one of Your Honor's  
8 first concerns. And I'd like to get that squared away, and  
9 then when we're all in agreement on who should be served,  
10 and then I'll go draft the stuff and serve it.

11           THE COURT: Well, let me say that the most recent  
12 filing by anyone was Mr. Burke. And he had a three-page  
13 service list attached to his motion -- or it wasn't even a  
14 motion. It was just a withdrawal of appearance. And  
15 Mr. Fabio had indicated that he used the attached service  
16 list for the service of the withdrawal.

17           So the point is: This could be a starting point, and  
18 the parties --

19           I want to make sure that we were giving notice to  
20 everyone who's entitled to notice. All right? So if all  
21 of a sudden we find a name here, and all of you say, "Well,  
22 let's not bother with that person," you know, I don't want  
23 it to be an elimination of anyone just because you don't  
24 want to notify them.

25           If they are entitled to notice, they should be

1 notified. And you can all work that out as to who those  
2 parties are.

3 MR. DECOULOS: But that's a risky move for us to take,  
4 "Let's set this person aside." So I don't want to take  
5 that move.

6 THE COURT: Well, that's it.

7 MR. DECOULOS: No, yeah.

8 THE COURT: I would say be overinclusive.

9 MR. DECOULOS: And what I want to do, as I said at the  
10 very outset, I want to list every defendant that got served  
11 and answered.

12 THE COURT: Mm-hmm?

13 MR. DECOULOS: And then if they didn't give answer,  
14 then I'd like to move for a default on it. That's the only  
15 appropriate way to do it, in my mind.

16 THE COURT: Yep. And again --

17 MR. DECOULOS: And I'm going to do that.

18 THE COURT: -- the point is that you can work this  
19 out, but I'm not going to monitor this and referee it,  
20 because again, it's the parties who have to make sure that  
21 they follow the rules and notify those who are entitled,  
22 but if there are people who you know are not in the case  
23 for some reason -- under the rules, if they have than  
24 defaulted, they are not entitled to further notice.

25 MR. DECOULOS: I will move for default against them,



1 Judge, because I want a record that's not going to later on  
2 say, "Well, I didn't get notice of it."

3 THE COURT: I understand. I understand.

4 MR. DECOULOS: Thank you, Judge.

5 THE COURT: Mr. Hall?

6 MR. HALL: Your Honor, regarding the May 22nd,  
7 date, 'cause that could pose a real burden for me.

8 I probably should have gone Mr. Rappaport's route and  
9 called, because I'm an expectant father, and we have a very  
10 high risk situation. My fiancée has been on bedrest for  
11 some months, and the baby is due at the end of May, but --

12 THE COURT: So are you looking for more time?

13 MR. HALL: I'm looking for more time, personally, yes,  
14 Your Honor.

15 THE COURT: All right. Well, the thing is --

16 MR. HALL: I'm thinking the end of June, 'cause the  
17 baby will clearly have been born, and then we'll have had a  
18 month to deal with all the issues that are attendant to  
19 that.

20 THE COURT: I'm well aware that this is, you know,  
21 always an issue, usually, for plaintiffs who want to move a  
22 case along quickly, and so the thing is you're asking for  
23 the end of June?

24 MR. HALL: I'm asking June 25th, 24th, somewhere in  
25 that ballpark. And I know that --

1 MS. ROBERTS: Your Honor, may I make a suggestion that  
2 Mr. Decoulos do whatever he thinks he needs to do in order  
3 to determine who he thinks the parties are, share that with  
4 the rest of us, so that we can make sure that we're all in  
5 agreement on who that should be, who should be served in  
6 this case: Have a deadline for us to accomplish that.

7 And once that's been done, I will commit to have my  
8 motion and memo served on all the people that we think are  
9 still in the case, within ten days of that.

10 And if we could have, I don't know, 30 days for --  
11 maybe 20 days for Mr. Decoulos to determine who he thinks  
12 is involved, share that with us, and give us 10 days to add  
13 or subtract to that list, and then --

14 THE COURT: All right. Mr. Decoulos, the issue is,  
15 are you prepared to --

16 MR. DECOULOS: Yes. I'll take that burden, Judge.

17 But I just want to make sure that -- I want to work  
18 with the most recent service list. You said some --  
19 Attorney Burke filed?

20 THE COURT: Yes.

21 MR. DECOULOS: We don't even know if that's even  
22 correct or not, do we?

23 THE COURT: That's correct. No, we don't.

24 But I think the last time I saw you, maybe a year ago,  
25 I think we had what we thought was a service list that we

1 said we should use, at that time.

2 But things change. And I cannot attest, sitting here,  
3 that that list was 100 percent accurate as to all those  
4 persons who had been defaulted or not.

5 MR. DECOULOS: Well, I'll take the task of looking at  
6 who got served and who filed an answer.

7 Then if somebody thinks somebody else did something  
8 else, they can speak up.

9 THE COURT: You can be my guest, Mr. Decoulos --

10 MR. DECOULOS: Thank you.

11 THE COURT: -- and the files will certainly be  
12 downstairs. And you can go through them as you see fit.

13 MR. DECOULOS: She gave me the most recent docket  
14 list.

15 THE COURT: Yep.

16 MR. DECOULOS: And there's answers filed on the docket  
17 list, so --

18 THE COURT: All right. How soon do you think --

19 MR. DECOULOS: -- I think -- and it shows service --

20 THE COURT: -- that you might be able to complete your  
21 task.

22 MR. DECOULOS: Couple of weeks.

23 THE COURT: All right. Let's start having some target  
24 dates then.

25 MR. DECOULOS: But I need their e-mail addresses so

1 that I can confer with them, not chasing voice-mail.

2 THE COURT: All right. All right. Today's the 25th.  
3 If you talk about 2 weeks, let's say by Friday, May 12th?

4 MR. DECOULOS: Make it Monday.

5 THE COURT: Monday the 15th.

6 MR. DECOULOS: Fine.

7 THE COURT: All right. Mr. Decoulos is going to be  
8 finished and communicate with all of you -- or he's going  
9 to finish his work.

10 Can we then say by the end of that week that the  
11 parties resolve the issues about who should be on the  
12 service list by the 19th? Does that seem reasonable?

13 MS. ROBERTS: That's fine, Your Honor.

14 THE COURT: All right. Then the 19th, you try to  
15 establish the agreed-upon list.

16 And then by the 31st, the end of May, Ms. Roberts, you  
17 should send out your motion.

18 And then by June 30 we'll have the briefs from the  
19 parties on the question of bifurcation.

20 All right. That's the timetable. Is it all clear?

21 MS. ROBERTS: That's fine, Your Honor.

22 MR. DECOULOS: I didn't get the date, Your Honor, when  
23 she's going to file the motion, Your Honor.

24 THE COURT: She's going to file the motion on or  
25 before May 31.

1 MR. DECOULOS: So we've got 30 days after that. Thank  
2 you.

3 THE COURT: Correct. All right.

4 Yes, Ms. Roberts?

5 MS. ROBERTS: Do we need a hearing date, Judge?

6 THE COURT: For what?

7 MS. ROBERTS: For this motion to bifurcate?

8 THE COURT: No. Your motion is just the reduction to  
9 writing of what you've proposed here today.

10 And I'm going to take your briefs and, on the papers,  
11 rule on it.

12 All right. Is there anything else that anyone would  
13 like to raise today?

14 MR. DECOULOS: What I'd like to do, Your Honor, is  
15 also start with an amended complaint and give something  
16 similar to a record appendix which should be before you,  
17 the answers and everything else.

18 And once we get that all done, then we can be very  
19 transparent with one another as to what documents we can  
20 agree to, because those things sometimes can be a  
21 hindrance, if they're not certified; they want 'em  
22 certified.

23 And I'd like to have an understanding about those.

24 THE COURT: Well, you know, that's your decision,  
25 Mr. Decoulos, whether you want to, you know, propose an

1 amended complaint. It would have to be served and argued.  
2 But I'm not looking for or requiring any amended complaint  
3 today.

4 MR. DECOULOS: Well, I'm not talking about an amended  
5 complaint. I'm talking about getting the complaint in  
6 place. Getting the answers in place. So that we've got a  
7 record now of all the people that are involved in this  
8 case. And then get on to the facts of the case rather than  
9 all of the -- you know, let's do something substantive  
10 rather than adjective.

11 THE COURT: I hear you. All right.

12 MR. DECOULOS: Thank you.

13 THE COURT: Anything else, Counsel?

14 All right. Mr. Rappaport, from the Vineyard?

15 MR. RAPPAPORT: I'm intent, Your Honor.

16 THE COURT: Heh. All right. Then I believe the  
17 matter is finished for today. Thank you.

18 MS. ROBERTS: Thank you, Your Honor.

19 COURT OFFICER: All rise.

20 (Matter adjourned at 4:28:53 PM.)

## C E R T I F I C A T I O N

I, Ellen H. Dibble, an Approved Court Transcriber, do hereby certify that the foregoing is a true and accurate transcript, from the audio recording provided to me by Attorney Wendy Sibbison of the Land Court proceedings in the above entitled matter.

I, Ellen H. Dibble, further certify that the foregoing is in compliance with the Administrative Office of the Trial Court Directive on Transcript Format.

I, Ellen H. Dibble, further certify that I neither am counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

*Ellen H. Dibble*

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Volume: I of II  
Day 2 of 11  
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COMMONWEALTH OF MASSACHUSETTS  
DUKES, SS. DEPARTMENT OF THE TRIAL COURT  
LAND COURT DEPARTMENT

\* \* \* \* \* \*  
\*  
MARIA A. KITRAS, as Trustee of \*  
BEAR REALTY TRUST et al., \*  
Plaintiffs \*  
\* No. 97-MISC-238738  
v. \*  
\*  
TOWN OF AQUINNAH et al., \*  
Defendants \*  
\* \* \* \* \* \*

STATUS CONFERENCE, POST-REMAND: MOTION TO  
DISMISS PLAINTIFFS VICTORIA AND GARDNER BROWN;  
MOTION FOR RECONSIDERATION OF BIFURCATION;  
MOTION FOR CHANGES IN PARTIES; STATUS CONFERENCE  
ON APPROACH TO MATTER OF INTENT (CHANGES IN  
PARTIES, ETC.); ISSUES OF TIMING  
BEFORE JUDGE LEON J. LOMBARDI

APPEARANCES (see next page):

Boston, Massachusetts  
Room 1  
September 12, 2006

Ellen H. Dibble  
Approved Court Transcriber



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For: Gossamer Wing Realty Trust and Baron Land Trust

1 (Time is 11:10:29 AM.)

2 THE CLERK: Land Court Miscellaneous case 238738,  
3 Kitras versus Town of Gay Head.

4 THE COURT: Good morning, Counsel. If you would,  
5 please identify yourselves for the record, which is being  
6 recorded. I will start with the attorneys who are in the  
7 courtroom.

8 MR. DECOULOS: Nicholas Decoulos representing Maria A.  
9 Kitras, the plaintiff, Your Honor. Good morning.

10 MS. MORSE: Attorney Leslie-Ann Morse, representing  
11 Mark Harding and the Eleanor P. Harding Realty Trust.

12 MR. COHEN: H. Theodore Cohen. I represent the  
13 plaintiffs Gardner and Victoria Brown.

14 MR. LIMA: David Lima representing Thomas Seeman.

15 MR. SALTONSTALL: Stephen Saltonstall representing  
16 Sarah Saltonstall.

17 MS. ROBERTS: Jennifer Roberts representing the  
18 Vineyard Conservation Society.

19 THE COURT: All right. And if we could have the  
20 attorneys who are connected by telephone.

21 MR. RAPPAPORT: (By phone): Ronald Rappaport  
22 representing the Town of Aquinnah.

23 MR. HALL: (By phone): Benjamin Hall, Jr.,  
24 representing Gossamer Wing Realty Trust and Baron Land  
25 Trust.

1 THE COURT: All right. Requests were made by the  
2 attorneys from Edgartown to do this by telephone, and I was  
3 more than willing to do that. I realize in this case we  
4 also have attorneys coming up from the Cape, a lengthy  
5 distance, and I'll just say, for the record, that when  
6 possible, we will try to accommodate the travel schedules  
7 for people coming long distances.

8 I will say this is a case where there are so many  
9 people that it might be difficult. But I think with  
10 Verizon or Sprint or some major carrier, they have the  
11 capabilities of patching in many, many people. So I will  
12 certainly entertain the requests for those who are coming  
13 from long distances to do it telephonically.

14 There are times, however, where I think the proceeding  
15 is such that everyone's presence is going to be required in  
16 court. But today this is perfectly fine.

17 We have at least three matters before the Court today,  
18 and let me begin with the motion to dismiss plaintiffs  
19 Victoria Brown and Gardner Brown.

20 MOTION TO DISMISS PLAINTIFFS VICTORIA AND GARDNER BROWN

21 THE COURT: I have a motion and affidavit on behalf of  
22 those parties. And I have an opposition that was filed by  
23 Gossamer Wing Realty Trust and Baron Land Trust.

24 So Mr. Cohen, if you wish to proceed on this?

25 And have you seen the opposition?

1 MR. COHEN: Yes, I have, Your Honor.

2 THE COURT: All right. Perhaps -- you know, I  
3 understand your motion on its face is pretty  
4 straightforward: They've sold the land.

5 MR. COHEN: Correct, Your Honor.

6 THE COURT: And Mr. Hall raises different points in  
7 objection. Do you want to address those matters?

8 MR. COHEN: Well, quite simply, Your Honor, as you  
9 point out, the Browns no longer own the property in  
10 question. They sold it to the Martha's Vineyard Land Bank  
11 Commission.

12 THE COURT: And the question, I guess, is why  
13 shouldn't there then be a substitution?

14 MR. COHEN: Well, Your Honor, I think a substitution  
15 is possible, and I would think perhaps one of the other  
16 plaintiffs or other defendants ought to make that motion,  
17 or perhaps they should move to join the Land Bank  
18 Commission in this proceeding.

19 Mr. Rappaport's office represented the Land Bank  
20 Commission in their acquisition of the property. And I  
21 spoke with him and asked him whether the Land Bank intended  
22 to become a party to this proceeding, and he advised me  
23 that they were taking no position right now, and that it  
24 made sense for the Browns to move with a motion to dismiss  
25 to get themselves out of this proceeding, since they no

1 longer own the property.

2 I believe it would be appropriate for someone other  
3 than the Browns who are parties to this proceeding, if they  
4 wish, to bring them in either via a motion for  
5 substitution, or to try to bring them in either as a  
6 plaintiff or a defendant.

7 I believe the Land Bank Commission is not interested  
8 in being a plaintiff in this proceeding.

9 THE COURT: All right. Let me first turn to Mr. Hall.

10 It's your opposition. But then Mr. Rappaport's name  
11 was mentioned, so I'm going to ask Mr. Rappaport to respond  
12 as well.

13 Mr. Hall?

14 MR. HALL: Yes, Your Honor. Thank you.

15 It's Gossamer Wing and Baron Land's position that the  
16 jurisdiction of the Court was brought over the lands, lot  
17 238, that the Browns owned.

18 The Browns took the position -- moved from being  
19 defendant to plaintiff, and assumed a more self-motivated  
20 position in the case.

21 And the jurisdiction of Court has been invoked over  
22 these lands; there are cross-claims and counterclaims over  
23 the land; and it's our position that this case in equity is  
24 an in rem case.

25 Now, once jurisdiction is established over the owner

1 of the land, the land itself is subject to the jurisdiction  
2 of the court.

3 This land is -- the Court has chosen at this time to  
4 not address the issue of necessary party to the action, and  
5 instead to look at the issue of intent.

6 And by so doing, now we have the situation where one  
7 of the potentially necessary parties to the case walks out.  
8 And I don't think it's wise at this time to allow the  
9 Browns' land to fall outside of the jurisdiction of the  
10 Court, before the issue of necessary parties has even been  
11 addressed in a general way by the Court.

12 Secondly, the Browns are free to not come out to the  
13 ball game anymore. They're essentially free to sit on  
14 their hands and do nothing. They have no interest in the  
15 land whatsoever, so what do they care what happens to Court  
16 decisions in the matter? They can sit on their hands and  
17 do nothing, and the Land Bank could sit on its hands and do  
18 absolutely nothing if they so choose.

19 The jurisdiction of the Court I think is paramount on  
20 this land; and to let it out would be premature.

21 THE COURT: All right. Mr. Rappaport, do you wish to  
22 be heard on this?

23 MR. RAPPAPORT: I'm not in a position to respond on  
24 behalf of the Land Bank?

25 THE COURT: Okay.

1 MR. RAPPAPORT: But having heard what Mr. Cohen said,  
2 I must say I agree with him, that I think that the Browns  
3 should be dismissed because they no longer own the  
4 property, and that if any remaining party to the case, we  
5 should bring in the Land Bank, they should do so by motion.  
6 The Land Bank can obtain whatever counsel they desire and  
7 respond to it.

8 THE COURT: Well, I'm also looking at Rule 25(c) of  
9 the Rules of Civil Procedure, which says (reading): "In  
10 the case of any transfer of interest, the action may be  
11 continued by or against the original party, unless the  
12 Court, upon motion, directs the person to whom the interest  
13 is transferred to be substituted in the action or joined  
14 with the original party."

15 And I guess I would turn to those who are interested  
16 in responding on this to ask, why couldn't the Court treat  
17 this motion to dismiss as a motion to substitute the Land  
18 Bank?

19 Mr. Cohen, let's start with you.

20 MR. COHEN: Your Honor, I believe you do have the  
21 power to do that under the rule. I did not feel it was  
22 appropriate for me on behalf of the Browns to make that  
23 motion.

24 If I might just respond to one thing that Mr. Hall  
25 said, which was that the Browns could stay in and simply

1 not respond: Clearly the Browns do not wish to be part of  
2 a proceeding that they no longer have any interest in, and  
3 have no interest in, say, taking no action, defaulting, and  
4 then perhaps some judgment being entered against them,  
5 whether it relates just to the land, or whether by some  
6 reason there are monetary damages or other elements of the  
7 judgment.

8 They simply don't want to be subject to a judgment  
9 with regard to land that they no longer own.

10 THE COURT: All right. Mr. Hall or Mr. Rappaport?

11 MR. HALL: Ben Hall. If I may?

12 The -- if the Court were to substitute in the Land  
13 Bank by -- upon its own motion and by order, that would be  
14 acceptable to us. We just didn't want to have the Browns  
15 leaving the case, imposing additional costs on the parties  
16 to have to serve process and essentially commence the  
17 action against the Land Bank.

18 We believe that since the Land Bank owns holds the  
19 property, it's subject to the jurisdiction of the Court,  
20 that they're the appropriate party to be before the Court,  
21 and we have no problem if the Court were to order  
22 substitution of the new owner - or joinder - without the  
23 need to have to go through an entire new service process;  
24 that would be acceptable.

25 THE COURT: All right. And Mr. Rappaport, you said



1 you're not in a position to speak for the Land Bank today.  
2 You do not represent them in this matter. Just, if you  
3 could enlighten the Court, do you represent the Land Bank  
4 on other matters?

5 MR. RAPPAPORT: I do, Your Honor.

6 THE COURT: Mm-hmm. Is there anything you wish to say  
7 or not say?

8 MR. RAPPAPORT: No, Judge, there isn't.

9 THE COURT: All right. I will take this matter under  
10 advisement and rule, following the hearing, on it.

11 All right. The next matter is --

12 MR. DECOULOS: Can I could be heard on that, Judge?

13 THE COURT: Oh, I'm sorry. Yes. If anything else  
14 wishes to be heard on that.

15 MR. DECOULOS: Judge, we prepared a plan of the lots  
16 that we think are necessary to complete this matter. They  
17 owned lot 238, which is in the middle of the paper  
18 (indicating, paper ruffling apparently) on the right-hand  
19 side.

20 And as you can see, by just looking at the topography  
21 of it, it's a fairly flat lot, and maybe, maybe not, the  
22 road will go through their property if we ever get to that  
23 point in this case.

24 And we think that they should be involved in it.

25 THE COURT: All right.

1 MR. DECOULOS: Thank you.

2 THE COURT: Thank you, Mr. Decoulos.

3 Anyone else who wishes to be heard on this matter?

4 MS. ROBERTS: I would just point out to Your  
5 Honor, 'cause it predates your involvement with this case,  
6 that on a number of instances in the '90s, VCS bought out  
7 lots in this area, and the way that was treated was to  
8 substitute the prior owner for VCS.

9 THE COURT: Substitute VCS for the prior owner.

10 MS. ROBERTS: Yes, I'm sorry. Yes. Correct.

11 THE COURT: All right. Thank you for the background.

12 All right. The --

13 MS. MORSE: Your Honor, just raising the issue because  
14 it's bothering me slightly, if you're going to  
15 substitute -- doesn't the Land Bank deserve notice to be  
16 heard if this is going to be a motion to substitute? Or  
17 did I misunderstand?

18 THE COURT: Well, you didn't misunderstand. That's  
19 one of the reason why I'm taking it under advisement. I  
20 want to look at that issue.

21 If the motion had been brought by a party to  
22 substitute, service was to be made on the party --

23 MS. MORSE: Correct; I looked at ...

24 THE COURT: -- and there are other times -- I'm  
25 thinking of a motion to join, to join parties. Those

1 parties many times, in a motion to join, aren't given  
2 notice before they're brought in. You don't notify a party  
3 before you sue them. And I don't know if there's any great  
4 violence to anyone's rights if they are substituted, and if  
5 they wish to bring a motion to say, "We want out," to hear  
6 them at that time.

7 So I'm going to think about that, and I'm going to  
8 keep in mind this issue of whether one approach or the  
9 other is the proper one here.

10 MS. MORSE: Thank you, Your Honor.

11 THE COURT: And with that, does anyone else wish to  
12 add any points?

13 Okay. Yeah? All right.

14 MS. ROBERTS: No. No. No, just -- no, Your Honor.

15 THE COURT: All right, Ms. Roberts.

16 MOTION FOR RECONSIDERATION OF BIFURCATION.

17 THE COURT: Then the next matter that we'll take up is  
18 the Gossamer Wing Realty Trust and Baron Land trust motion  
19 to reconsider the decision of the Court that was dated on  
20 August 14, 2006, allowing the motion for bifurcation.

21 And I think all received my order which indicated that  
22 this matter typically is not one that is given oral  
23 argument, unless the Court so chooses.

24 I emphasized just a few moments ago about looking at  
25 the new Land Court rules. This would be covered by the

1 rules, but I did feel that where there was already planned  
2 a status conference on the case, that it would be  
3 appropriate to have oral argument.

4 And with that, Mr. Hall, you may proceed.

5 MR. HALL: Thank you, Your Honor. There are  
6 essentially two issues that we'd like the Court to take a  
7 second look at.

8 Of course the first is that the Court in bifurcating  
9 and addressing the issue of intent is essentially going to  
10 make a finding of fact. And with all due respect, we could  
11 find no case law to support a Court engaging in  
12 fact-finding that might affect parties beyond those that  
13 are before the Court.

14 And so we just go back to the fundamental law of the  
15 land, which is that parties that are going to have  
16 fact-findings put against them essentially should have the  
17 right to be heard.

18 And the way that the Court has chosen to not engage in  
19 what we believe to be the requisite action of determining  
20 who all the necessary parties are and bringing them before  
21 the Court, that there's a jurisdictional problem that's  
22 going to arise in that people affected by the fact-findings  
23 are not going to have had an opportunity to be heard on the  
24 issue of intent before that takes place.

25 So we believe that the case law essentially requires

1 that the necessary parties be brought in first, that  
2 they're all before the jurisdiction of the Court before any  
3 fact finding takes place.

4 The second issue, of course, is trying to set the  
5 ground rules of the law, if the Court is going to retain  
6 the bifurcation, essentially as a request for some sort of  
7 clarification.

8 Judge Green and the Appeals Court both, I think,  
9 alluded to presumptions of intent that arise from initial  
10 showings of a severance of the land -- unity of title and a  
11 severance of land, leaving lots without access,  
12 essentially.

13 And we believe that Judge Green - on the record before  
14 him, on the motion to dismiss, on the papers that are  
15 already on file with the Court - found that requisite  
16 intent to be in place in this case. And so even though the  
17 case law is quite clear that it is the burden of the  
18 plaintiff to show that there was intent, that merely by  
19 showing that there was a unity of title and a severance  
20 leaving landlocked parcels, that the presumption of intent  
21 due to the necessity is in place.

22 And this has already been determined by Judge Green in  
23 his June 2001 decision at pages 12 to 14. He goes through  
24 quite a lengthy discussion of the presumptions of law.

25 And in fact now, where we are today, if the Court

1 would take notice of the presumed intent of the parties as  
2 having been shown, that the initial burden on the plaintiff  
3 has now been shifted to the defendants to show some sort of  
4 intent to not grant an easement.

5 And as the Court has noted, and Judge Green noted --  
6 Judge Green noted that there was no record before him of  
7 any evidence showing that there was no intention to grant  
8 such easements by necessity.

9 And the condince (phonetic at 11:27:45 PM, unclear)  
10 courts noted that there couldn't be any real witness  
11 available to show that otherwise.

12 So in a sense, by bifurcating this issue of intent,  
13 we're almost engaging in a interesting dialogue. For what  
14 reason, it's difficult to imagine.

15 So I just wanted the Court, if we are going to  
16 continue down the road of bifurcation, to set those ground  
17 rules and to rule that the presumed intent is present, and  
18 that therefore the burden now has shifted to the defendants  
19 to show that there was no intent.

20 THE COURT: All right. I'm going to certainly turn to  
21 all the other parties, but let me just ask you generally,  
22 though, Mr. Hall: The Appeals Court certainly reviewed  
23 with great care the decision of Judge Green. And they then  
24 decided to take a different approach, to reverse the  
25 judgment, and to remand it to the Court for further

1 proceedings.

2           And there were certain paragraphs in the Appeals Court  
3 decision which indicated - from my view; and perhaps you  
4 have a different take on it - that there was certainly a  
5 couple of different tasks here. One was to determine who  
6 are the parties that would be affected by this; but also,  
7 as the Court said, that they had assumed, for lots numbered  
8 189 or 190 and above, the intent to create easements. And  
9 they also indicated that they considered -- (reading):  
10 "The record reveals other circumstances that may render  
11 doubtful the parties' presumed intent to reserve  
12 easements."

13           They said (reading): "We consider relevant the  
14 historical sources of information on tribal use and common  
15 custom applicable to the time, and though by itself hardly  
16 conclusive in assuming the material's admissibility, we see  
17 no reason why common practice, understanding, and  
18 expectation of those persons receiving title could not shed  
19 light on the parties' probable objectively considered  
20 intent."

21           Was that not the Appeals Court saying that this is  
22 part of the task of the Court: To get into the matter of  
23 intent? And it isn't just a presumption?

24           MR. HALL: Well, Your Honor, I don't believe they've  
25 overruled 50 or 60 cases of the Court that we've cited in

1 not only our memorandum opposing the bifurcation - well,  
2 maybe I'm exaggerating - but the many cases of the SJC and  
3 the Appeals Court which have essentially dictated the  
4 presumption of intent in these cases.

5 And once the presumption -- Orpin and Morrison is one  
6 of the -- the quintessential case that the Appeals Court  
7 cited. And that is pretty much right on point in this  
8 case: Where the actual intent of the parties, in Orpin and  
9 Morrison, only came -- there was some hearsay evidence that  
10 was produced in that case, and that only came before the  
11 Court because, even though it was hearsay, there was no  
12 objection to such evidence.

13 In our case, I don't believe that you'll get any  
14 witnesses to testify as to the actual intent in the case.  
15 Certainly the defendants are free --

16 THE COURT: Nor is the Appeals Court suggesting that.

17 MR. HALL: -- to search out and find any evidence of  
18 an intent not to establish an easement.

19 But I believe that the case law is clear, and I think  
20 that the Appeals Court decision specifically does not  
21 overrule that presumption, but asks the Court to look at  
22 the actual intent.

23 But it's our position that the presumption of -- once  
24 there's a sever- -- once there's the showing of a severance  
25 of a unity of title with a landlocked parcel - which is, I



1 don't think anybody can dispute that those are the facts in  
2 this case - that the burden then shifts to the defendants  
3 to show that there was some sort of intent not to grant an  
4 easement.

5 THE COURT: All right. Let me ask you this, Mr. Hall:  
6 If the issue is as clear as you suggest, why shouldn't the  
7 Court then proceed to decide the question of law?

8 And you may be completely correct.

9 Thus you're saying: This is the simple question; this  
10 is what the existing body of law would lead the Court to  
11 decide.

12 Then I would issue a ruling. Then we move on to the  
13 issue of... Mr. Decoulos has just presented a map - I  
14 guess I would say, a proposed access plan - showing these  
15 potential routes. And I don't know if it's been identified  
16 who the owners are of all those lots.

17 But then, have those parties appropriately made  
18 parties to the litigation.

19 At this point I don't know who owns those lots. I  
20 don't know whether those people are interested in access or  
21 not, whether they want to be plaintiffs or defendants in  
22 the case.

23 But I guess I go back to my earlier point, that if  
24 it's so clear, why don't we just tee up the question of:  
25 Was there the requisite intent - either by presumption or

1 more of an actual intent - and then move on?

2 MR. HALL: All right. Your Honor, thank you.

3 If the Court agrees with me, we still are missing --  
4 the Court has missed a step in that once you presume the  
5 intent, as a matter of law the burden shifts to the  
6 defendant to show that there was no actual intent - no  
7 intent - to grant the easement by ne- -- or to leave an  
8 easement by necessity, or access to these lots.

9 THE COURT: Mr. Hall, whether that's true or not, I'm  
10 still on the issue of bifurcation.

11 MR. HALL: That's true.

12 THE COURT: Why should we not settle that question one  
13 way or the other before we go through the exercise of  
14 bringing everybody in?

15 MR. HALL: Because the issue of intent, Your Honor, is  
16 a fact-based finding. As a matter of law, you can do the  
17 burden-shifting rulings; you can do the presumption  
18 rulings. But you can't -- if you are going to engage in  
19 that, you would have to make the finding.

20 Unless the Court, as a matter of law, on the record  
21 that's been established before the Court, as of today --  
22 and even the Vineyard Conservation Society in their reply  
23 brief to the Appeals Court indicated that they believed  
24 that there was no other evidence which could be presented.

25 If the Court were to rule as a matter of law that the

1 presumption of intent is there and it can't be defeated,  
2 then we can move on.

3 But if you are going to engage in the test of whether  
4 there was some sort of actual intent, then I think the  
5 Court would have to have a fact-finding hearing on that and  
6 allow other people to put in other evidence.

7 I mean, after all, what's before the Court is a  
8 summary judgment record, and as the Court knows, that can  
9 always be supplemented, for trial, or it could be  
10 supplemented with additional summary judgment motions.

11 So the record --

12 THE COURT: Of course one of the --

13 MR. HALL: -- before the Court is not necessarily a  
14 complete and closed record --

15 THE COURT: All right.

16 MR. HALL: -- so there would be fact-finding.

17 So it's up to the Court to decide which way it's going  
18 to go on this. If we are going to have fact-finding, then  
19 I believe we need the necessary parties.

20 If we're going to as a matter of law make these  
21 rulings, then we don't need the necessary parties, and the  
22 Court can make those rulings.

23 THE COURT: Obviously, the purpose of today was to  
24 have a status conference to decide how we're going to move  
25 forward, and so that's part of the discussion that we're

1 going to have now.

2 Let me turn, on this motion, to anyone who's here in  
3 the courtroom that wishes to be heard on it, and then I'll  
4 ask Mr. Rappaport if he wants to be heard.

5 Counsel, anyone here wish to be heard?

6 Mr. Decoulos.

7 MR. DECOULOS: Judge, why don't we just cut to the  
8 chase right here. Let's find out if VCS or any of the  
9 active parties have any evidence that would rebut that  
10 presumption, because that's a rule of law. It's not a rule  
11 of evidence, this implied presumption.

12 If you meet -- as Mr....

13 MR. HALL: Hall.

14 MR. DECOULOS: -- Hall said, there's three or four  
15 elements to an implied easement by necessity. And we've  
16 met all of those elements, not because we're geniuses, but  
17 that's the facts of life in 1870.

18 Now, do they have anything?

19 Either put up, or like they say, shut up. And --

20 THE COURT: Well, let me just say that -- I want to  
21 give you a chance, but I also wanted to go back to what  
22 Mr. Hall was saying, on the record.

23 Yes, it's a summary judgment record. And sometimes  
24 later decisions - whether it's the same judge or different  
25 judge - may look at it differently as the case goes

1 forward.

2           However, another option...

3           There are really three -- three sort of options here.  
4 One is another form of summary judgment. Two would be a  
5 trial. Or three is case stated, where the parties get  
6 together, and they say, "This is the evidence; this is what  
7 we all agree on, and we submit it on a case-stated basis."

8           And the Court takes it and issues what is in many  
9 instances comparable - and it is - a trial decision, where  
10 you can draw inferences from the record; you can take the  
11 full record that everyone says is complete; and there's no  
12 necessity for live witnesses in that context.

13           So I just want to say that that's one of the points I  
14 want to discuss with you, is the various options.

15           And you're suggesting, Mr. Decoulos, in your own way,  
16 that VCS would have the opportunity to put in evidence if  
17 they have it.

18           And that could be all part of the case-stated  
19 approach.

20           I recognize there may be objections raised back and  
21 forth over the evidence.

22           That could be sorted out.

23           But I certainly agree with the suggestion that it's  
24 most unlikely we're going to have any live witnesses to  
25 talk about events in the 19th century.

1 MR. DECOULOS: Well, you know, you've taken the words  
2 out of Ms. Morse's mouth and mine. And I think it was hers  
3 more than mine.

4 We met last week, and she did state that, you know,  
5 this is a good case for a case-stated, to prove the en- --  
6 to come to the point as to whether there was -- whether  
7 they have any rebuttable evidence as to the presumption of  
8 an implied necessity -- easement by necessity.

9 THE COURT: All right. Well, then that's a segue to  
10 Ms. Morse.

11 Didn't mean to take away your point, but it certainly  
12 just does jump up as one of the options. So if you wish to  
13 add anything?

14 MS. MORSE: Are we talking about the motion to  
15 bifurcate?

16 THE COURT: Yes, let's go back to the motion for  
17 bifurcation and your position on that.

18 MS. MORSE: My position is that I'd just as soon go  
19 with the bifurcation and do the intent first. I think it's  
20 simpler; it's easier.

21 And I understand what he's saying, but you need to  
22 bring all the parties in if you're going to make rulings.

23 However, Mr. Decoulos and I did meet for quite a  
24 period of time, and we'll get into some of this later.

25 But I think we feel that we could bring in everybody

1 that we need now, and go with the intent first.

2 THE COURT: All right. Any other counsel wish to  
3 speak to the bifurcation issue, the motion for  
4 reconsideration, who are in the courtroom?

5 MS. ROBERTS: A couple of points, Your Honor.

6 I just don't want them to go unrebutted, the  
7 statements by Mr. Hall and Mr. Decoulos that they've come  
8 forward with evidence satisfactory to show an easement by  
9 necessity, and the burden's now on us.

10 I think the Appeals Court was quite clear in its  
11 decision in saying that there's no public policy favoring  
12 the creation of implied easements, that necessity alone is  
13 not enough to create an implied easement.

14 And when it shipped the issue back here, it stated -  
15 and I quote - that "the issue is best left for the trial  
16 judge after the parties have had an opportunity to make  
17 whatever showing they wish or are able, remaining mindful  
18 that it is the proponent's burden to prove the existence of  
19 an implied easement."

20 So to the extent there's been any talk here this  
21 morning that the burden is somehow on our shoulders, I did  
22 not want to let pass.

23 We, obviously, want to have the issue of intent  
24 bifurcated, and hope that Your Honor will maintain that  
25 decision and will not reconsider it.

1 I do however want to point out that it's been VCS's  
2 position since 1997, oft expressed, that it's the  
3 plaintiff's burden to make sure that everybody who they  
4 need to have in this case is in this case, in order for  
5 them to get a judgment in the end.

6 It's not the defendant's burden. It's not VCS's  
7 burden.

8 What I have done over the last 9 years, though, is  
9 point out to them when I thought that they didn't have the  
10 people they needed -- we did that through two or three  
11 motions to dismiss at the very beginning of these  
12 proceedings.

13 And I would, as things currently stand, would actually  
14 agree with Mr. Hall that there are probably parties who  
15 need to be brought into this. I can say that almost  
16 assuredly. But again, it's not my hunt to make sure that  
17 happens.

18 But I did want to note for the record that it is  
19 certainly our view that not all necessary parties are  
20 before the Court at this point, and it's up to the  
21 plaintiffs to bring them in.

22 And in that regard I would just add one last point:  
23 In terms of the necessity of parties to be brought before  
24 the Court, it is both people whose rights will be affected  
25 because an easement - according to at least the plan we



1 have this morning from Mr. Decoulos - because the  
2 easement's going over their property; but it's also people  
3 all the way around that who are not in here, because it's  
4 not only prejudiced because an easement may go over your  
5 lot because you are in; it's also prejudiced because it's  
6 going over your lot because it's not going over somebody  
7 else's lot, because at least somebody else isn't (time is  
8 11:42:47 AM) in this -- in this lawsuit.

9 So the prejudice needs to be not only is something  
10 going to happen here that's going to affect a nonparty  
11 negatively, but also it's prejudice because it's going to  
12 affect somebody negatively in this case because a nonparty  
13 is not in.

14 And that, I think, clearly applies here, where an  
15 easement may go over VCS property because VCS is a party,  
16 and not - by way of example - go over the Land Bank  
17 property, because the Land Bank is not a party. Or: Not  
18 go over the tribe, because the tribe's not a party. Or any  
19 of the numerous other parties who either have never been  
20 joined in this case, or were joined and then let out.

21 THE COURT: Mm-hmm.

22 MS. ROBERTS: So just to be consistent, I want it  
23 clearly understood by everybody that we don't agree that  
24 all necessary parties are before the Court.

25 THE COURT: All right. Let me, before I turn to

1 Mr. Rappaport on this, pick up where Ms. Roberts left off  
2 on this issue of parties.

3 I think we all agree - and the Appeals Court restated  
4 the proposition - that the party who is asserting an  
5 easement has the burden - the initial burden; and maybe the  
6 complete burden, but certainly the initial burden - to show  
7 the easement.

8 And I would suggest also if there's a claim of an  
9 easement, then a burden to suggest the location of the  
10 easement as well.

11 Now, Mr. Decoulos today has presented a plan showing  
12 various routes.

13 And I assume that these are, as indicated on the plan,  
14 potential easement location.

15 I don't know whether the suggestion is there's only  
16 going to be one, two, or all of them.

17 But it says "potential easement location."

18 I have not gone back to the initial complaint in this  
19 matter, and to see what was specifically pled by way of the  
20 easement in the claim of the location.

21 But clearly the Appeals Court looked at it more  
22 recently, in 2005, and said that (reading): "We pause to  
23 note that it's sometimes difficult to determine from the  
24 pleadings what owners are claiming what easements for what  
25 lots, or even what parties remain interested in the case."

1           There's nothing that bars the plaintiffs, now, if they  
2 so choose, to bring a motion to add parties. And that is  
3 apart from the question of bifurcation.

4           Clearly if we were to go to the point of deciding the  
5 intent question first, and then getting to the matter of  
6 parties, clearly at that time the exercise would have to be  
7 done to make sure that everyone is here.

8           But that does not stop parties from, if they wish,  
9 doing this work themselves. And it looks like Mr. Decoulos  
10 has made a major step in that direction.

11           The only unknown factor right now is the various lot  
12 numbers, who are the owners, which parties are in the case  
13 now and which ones are not.

14           Then we go to the point of Ms. Roberts: Well, the  
15 parties who are in the case shouldn't be prejudiced that it  
16 might go over their lots because it could have gone over  
17 someone else's.

18           There's where, I think, VCS - or those who take that  
19 position - would have to start pointing fingers at their  
20 neighbors to say, "Not us; it should be you that it goes  
21 over."

22           It isn't Mr. Decoulos's hunt, so to speak, as you  
23 indicate, for any of the other plaintiffs', to start  
24 speculating what other parties should have the easement go  
25 over there.

1           Then it's their assertion that, "Here are the  
2 locations." And they proceed against those parties.

3           And if someone says, "Not in my back yard; in somebody  
4 else's," well, then there would have to be further efforts  
5 to bring in other people, if you think that there's a  
6 better route going over someone else's lot.

7           Mr. Rappaport, do you wish to be heard on the issue of  
8 the reconsideration motion?

9           MR. RAPPAPORT: Very briefly, Your Honor.

10          The motion should be denied, because your decision  
11 clearly sets forth the reasons articulated by the Appeals  
12 Court, which for better or worse are now binding on all of  
13 us. And that there's absolutely no basis for the  
14 reconsideration motion.

15          And again, I would point to, particularly on page 5,  
16 where you quote the burden of proof language that the  
17 Appeals Court cites; that's what we all have to live with.

18          So I think the motion should be denied.

19          THE COURT: All right. I've heard from everyone who  
20 wishes to speak on this motion?

21          MR. DECOULOS: Judge, can I just -- one more  
22 observation I have? Please? Thank you very much.

23          You know, I was just looking at the decision by the  
24 Appeals Court, and it would be nice if they stopped where  
25 it said that the United States is not an indispensable

1 party, because after that, that's all they did was, you  
2 know, philosophize as to whether or not these things should  
3 happen or should not happen, when we've got a body of law  
4 that says, "Look-it, you've got an implied easement by  
5 necessity if you meet all of these elements."

6 Thank you very much, Judge.

7 THE COURT: All right. Anyone else wanted to add last  
8 words?

9 MR. HALL: Yes, Your Honor. May I?

10 THE COURT: Yes.

11 MR. HALL: All right. Benjamin Hall.

12 Your Honor, Ms. Roberts -- I wasn't sure, when she was  
13 arguing, whether she was arguing...

14 I thought she was saying that we do need the necessary  
15 parties for this important fact-finding, and that we're  
16 looking -- she looked at the... she argued just how  
17 important the necessary parties were; and if the Court is  
18 going to engage in any fact-finding, whether it's on a  
19 case-stated basis or by way of a trial or by way of summary  
20 judgment, that we still or doing fact-finding. And I point  
21 the Court to page 300 of the Appeals Court decision where  
22 the Court talks about: Should the requisite intent be  
23 found for some "or all" (verbal emphasis) of the petitioned  
24 common lots.

25 Now, I think that that language alone there would

1 require us to go through the process first of determining  
2 who the necessary parties are, so that we're not running  
3 afoul of due process issues. After all, people do have the  
4 right to be -- it's an inviolate right to be heard in a  
5 court proceeding where your rights are affected.

6 And in fact the Appeals Court does talk about that the  
7 easement by necessity question that the Court said - the  
8 Appeals Court said (apparently reading) - "requires  
9 thoughtful consideration and resolution by a fact-finder."

10 So inasmuch as we do have a representative group of  
11 parties and the Court were to rule on the law, I don't  
12 believe we're running afoul of the Appeals Court decision.  
13 However, if we do engage in fact-finding, I think we need  
14 to make sure that we've dotted all the I's and crossed the  
15 T's and made sure that we have all the necessary parties  
16 that would be affected by such fact-finding.

17 And it appears that the Appeals Court envisions this  
18 intent issue is going to look at a grouping of lots, or  
19 individual lots, on a case-by-case basis.

20 THE COURT: All right. Anything else?

21 All right. I'm prepared to say that I'm going to deny  
22 the motion today.

23 I know that Mr. Hall has raised some points, and  
24 raised them with great vigor. And I understand where he's  
25 coming from. But in my judgment, it seems that there's

1 some support for the view that the bifurcation is the  
2 proper approach.

3 I don't envision the process of bifurcation to entail  
4 extensive fact-finding saying that there was an easement  
5 over one lot versus another. I think that the question  
6 that's going to be before the Court is one of law, perhaps  
7 to look at the circumstances - all the attendant  
8 circumstances at the time - as to whether there was the  
9 requisite intent, or whether there's just a mere  
10 presumption that controls; but is not going to be a process  
11 where the outcome of the first question on the intent is  
12 going to settle the route.

13 I certainly agree with everyone - and I think there's  
14 no disagreement on the fact - that as we get to the point  
15 of saying, "Well, there was the" -- "If there was the  
16 intent, now we have to establish a route," that everyone  
17 who is directly affected or perhaps potentially affected  
18 would be made parties.

19 That, again, is something which the parties will need  
20 to discuss now.

21 But clearly, if there is an avenue for review by a  
22 single justice, Mr. Hall can explore that, but it's my  
23 decision today to deny the motion for reconsideration.

24 STATUS CONFERENCE ON APPROACH ON MATTER OF INTENT

25 (CHANGES IN PARTIES ETC.):

1 THE COURT: We will move on now to the status  
2 conference to get your views as to what is the approach  
3 that we're going to take from this point forward to have a  
4 determination of this matter of intent.

5 And Ms. Morse, you were about to stand?

6 Do you want to speak first on this?

7 MS. MORSE: Certainly, Your Honor, since it was my  
8 request.

9 And I have met with the plaintiff to see if --  
10 plaintiff's counsel, the kinter (phonetic at 11:52:53 AM,  
11 might be heard as "counter" or "Kitras") counsel, to see if  
12 we can come to some understanding on how this case goes  
13 forward. And one of the things we did was determine what  
14 lots we believe are going to be affected.

15 And part of the problem with this case is that in my  
16 opinion it sort of got hijacked very early on into the  
17 thing that: "Well, you need everybody in - virtually - in  
18 Aquinnah, in this case."

19 And I just don't think it's necessary.

20 My lots stand about 300 feet from Moshup Trail. I  
21 don't think there's any logic that you're going to put an  
22 easement, you know, a half a mile, so it hits  
23 Mrs. Saltonstall's property.

24 So I think there's going to be also a motion by us to  
25 dismiss some of the people out of this case.



1           That said, I believe there are two parties that need  
2 to be in this case that are not. One is the Martha's  
3 Vineyard Land Bank.

4           And the second one, unfortunately, is the Commonwealth  
5 of Massachusetts. There was recently a case handed down in  
6 the Appeals -- I'm sorry, in the Federal District Court.  
7 It dealt with land directly across the street, on Moshup  
8 Trail. And there was a decision that the Commonwealth of  
9 Massachusetts was an indispensable party in that case.

10           Unfortunately for us, the lot that they were talking  
11 about, which is 556, Moshup Trail bisected that lot. And  
12 it directly abuts my client's property. And if -- I'm not  
13 going to argue; if a federal district court judge says they  
14 were an indispensable party, I'm afraid they probably are.  
15 I've read the decision. I...

16           THE COURT: What was the cause of action in the  
17 federal district court?

18           MS. MORSE: Exactly like this. It was just done in  
19 the federal district court rather than in this court.

20           And they were looking for access. And they sued the  
21 Town of Aquinnah, who owns the lot. The Town of Aquinnah  
22 argued, successfully, for a motion to dismiss because they  
23 could not bring in the Commonwealth of Massachusetts.

24           I can --

25           THE COURT: And that's lot 556 which you say is

1 bisected by Moshup Trail?

2 MS. MORSE: Bisected -- yes.

3 THE COURT: And your client owns which lot?

4 MS. MORSE: 555 -- 554 and 555.

5 THE COURT: Mmm. The depiction that Mr. Decoulos has  
6 offered seems to have one of these proposed easement  
7 locations actually bordering upon but perhaps not  
8 encroaching into 556. Is that the case?

9 MS. MORSE: Yes, I believe so.

10 THE COURT: So again, I realize Ms. Roberts has this  
11 view about, you know, an easement may have an impact on  
12 other lots even though it's not on the lot. What is your  
13 position about why the Commonwealth, if -- has an interest  
14 in 556, needs to be in here if this easement actually isn't  
15 on 556?

16 MS. MORSE: Well, Your Honor, part of it is, I believe  
17 the case law states that you've got to bring in all  
18 abutters. That's...

19 And they would -- their interest is that...

20 The Town of Aquinnah bought this property through a  
21 self-help grant from the Commonwealth, and they retained  
22 certain rights over the property, enough that the -- for  
23 what they -- needs to remain conservation land unless  
24 there's a two-thirds vote of the legislature, and so on and  
25 so forth.

1           And so that's my problem.  If --

2           THE COURT:  Which body of law are you saying that  
3 would require abutters to easements having to be  
4 notified -- or to be made parties?

5           MS. MORSE:  I believe that the whole case law  
6 regarding easements - implied easements - that you have to  
7 bring in your abutters.  And unfortunately, this is one of  
8 the abutters.

9           I am...  and I know, if -- having been successful in  
10 the federal district court, I can pretty much guarantee  
11 that Mr. Rappaport - I'm sure he can speak for himself - is  
12 going to file a similar motion if I don't bring in the  
13 Commonwealth.  So I think that it was easier to just go  
14 ahead and do it.

15           THE COURT:  All right.  Well, let me have  
16 Mr. Rappaport respond, because it's directly on this point.

17           Mr. Rappaport?

18           MR. RAPPAPORT:  Well, the difficulty I have is, my  
19 memory of that case at the federal district court dealt  
20 with lands south of Moshup Trail.  I had not focused on,  
21 till counsel mentioned it, that the lot may flop over onto  
22 the north side.  So I'm really not prepared to respond to  
23 it.

24           THE COURT:  Well, by the ruling that we're going to  
25 have bifurcation, and we're going to have the question of

1 intent on the easements decided first... as I alluded to,  
2 and now Ms. Morse has also suggested, that there may still  
3 be some changes regarding parties.

4 And so if that is the case, without making it a...

5 Well, let me just ask you: What's your intent -- and  
6 this is with all of you here; I'm not barring motions being  
7 brought to either add or dismiss parties. If the parties  
8 wish to do this, you know, that certainly could be done  
9 before the Court, you know, deals with the issue of intent.

10 But I guess what -- and this would actually go a long  
11 ways towards what Mr. Hall's, you know, interests and  
12 concern was: The fact that the parties are prepared to do  
13 it; you can do it.

14 You know, Ms. Morse, you say you intend to file  
15 motions. When are you going to file the motions?

16 MR. DECOULOS: Hey... wait a minute.

17 THE COURT: Well, now, let me turn to Ms. Morse.

18 MR. DECOULOS: Yeah.

19 THE COURT: You said you were going to file motions to  
20 dismiss parties, and you were also going to bring a motion  
21 to add the Commonwealth.

22 MS. MORSE: Yes.

23 THE COURT: Have those motions been filed?

24 MS. MORSE: No, Your Honor.

25 THE COURT: All right. So when were you intending to

1 file those motions?

2 MS. MORSE: Probably within the next month.

3 I don't believe they're sitting again for another  
4 month, if I remember correctly.

5 But -- I set this one up.

6 THE COURT: Yeah. Let me just say for the record that  
7 we're on a six-week rotation period, and during the six --  
8 on a week period I sit two weeks on motions. So you just  
9 have to consult the schedule.

10 So the point is -- and I'm not suggesting that I'm  
11 going to rule on them today, but I'm just saying that you  
12 can file motions. I'm sitting the week of October 9th and  
13 the week of October 23rd on motions.

14 MR. DECOULOS: Judge?

15 Are you all done? I'm sorry. Go ahead.

16 MS. MORSE: Okay.

17 It would probably be the week of October 12th. I'm  
18 out of the state the week of October 23rd.

19 THE COURT: All right. And we have a holiday on  
20 Monday, and I'm not going to be here on Tuesday, but I  
21 think I am sitting at least on the Thursday for motions in  
22 the afternoon.

23 Yes, Mr. Decoulos.

24 MR. DECOULOS: Yes, Judge. The case that was tried  
25 down at the U.S. District Court, the Commonwealth wasn't a

1 party to that case, and what Judge Wolf did was say:

2 "Look-it, the Commonwealth's got an interest in this land  
3 because they advanced this money."

4 THE COURT: Right.

5 MR. DECOULOS: So maybe the Commonwealth should -- I  
6 think she's right in bringing the Commonwealth in, but the  
7 Commonwealth might just as well say, "Look-it, we don't  
8 have an interest in it."

9 THE COURT: Well, they'll -- they have an opportunity  
10 to say that.

11 MR. DECOULOS: Yep.

12 THE COURT: Yeah. All right.

13 Anyone else want to speak on this issue that Ms. Morse  
14 has now raised about changing the parties around a little  
15 bit?

16 Mr. Saltonstall.

17 MR. SALTONSTALL: Yes, Your Honor. My client, her lot  
18 is 326. On the Appeals Court decision it's nowhere near  
19 the proposed access plan. She's separated -- she's I think  
20 about a mile away. She's separated from these lots by  
21 tribal land. It wouldn't be practical, in any event, to  
22 have some sort of easement across her land, because there's  
23 a marsh that would block access.

24 I spoke this morning with Mr. Decoulos and Ms. Morse,  
25 and they would be amenable to letting my client out at this

1 point, and I'm wondering if Your Honor would be willing to  
2 do that this morning.

3 THE COURT: Well, I would say that I am not prepared  
4 to rule on a motion such as that without giving others  
5 notice of it and an opportunity to be heard.

6 So if, you know, parties wish to file a motion and  
7 certain people join onto that motion, they can do so, but  
8 that would have to be brought separately, Mr. Saltonstall.

9 MR. SALTONSTALL: Thank you, Your Honor.

10 THE COURT: All right. Anyone else?

11 MR. HALL: Yes, Your Honor?

12 THE COURT: Yes, Mr. Hall.

13 MR. HALL: Thank you, Your Honor. I think the Court  
14 is bringing up - and Leslie Morse brings up - an  
15 interesting question: Again, the issue of who the  
16 necessary parties are. And if I could make the suggestion,  
17 while the Court has denied my motion for reconsideration,  
18 perhaps the Court could file a report with the Appeals  
19 Court - or request a report with the Appeals Court - on  
20 what exactly the Court is to do under these circumstances.

21 And I mean, obviously the Appeals Court dictated where  
22 we are, in respects; and Ron Rappaport was quite, quite,  
23 quite clear in saying: For good or for bad, we're kind of  
24 living with this Appeals Court decision.

25 I think it might behoove us to ask for a little

1 guidance from the Appeals Court. So I ask that the Court  
2 request a report.

3 THE COURT: I have some familiarity with reports to  
4 the Appeals Court. And I think you may know, as well, that  
5 they don't take reports easily; they're not something that  
6 they act on, on a regular basis. And it has to be a  
7 question of very significant import for them to rule on it.

8 I think in this matter, the Appeals Court has sent a  
9 case back with some instructions, and says it's up to the  
10 trial court. I frankly do not see that the Appeals Court  
11 would be amenable to starting to, you know, get involved in  
12 the actual case management of this matter.

13 So I would decline to report the case at this point.  
14 I don't think it's reportable.

15 Anything else on this?

16 All right.

17 ISSUES OF TIMING:

18 THE COURT: All right. I think what we need to do is  
19 to set a time by which, if there's going to be motions  
20 brought on the matter of parties -- and this is all of  
21 your, perhaps, interests to doing this, which you  
22 certainly, again, can, apart from the bifurcation order.  
23 I'm not saying that you can't do it, but I'm not going to  
24 make it a prerequisite that we have to settle all of the  
25 issues of parties today, or even before we get to the point



1 of the issue of intent, because, as I've stated previously,  
2 that the question that will be answered is a question of  
3 law on the principle of whether these easements exist.

4 And if the parties feel it would be beneficial to have  
5 certain specific people added now, or deleted, that you  
6 certainly can bring that to the Court's attention.

7 But that, as I said, does not foreclose a further  
8 examination of the question of parties at the time when we  
9 actually adjudicate and settle the actual locations.

10 Mr. Decoulos.

11 MR. DECOULOS: Judge, as to the matter of intent:  
12 There's ethical considerations in this case that people are  
13 overlooking: If you don't have a defense to something,  
14 then you ought to tell the Court exactly that -- exactly  
15 that.

16 And I think that the defendants who are claiming that  
17 we have the burden of proof once there's a presumption...

18 Suppose we get by that particular point: What is  
19 their response as to the lack of intent?

20 THE COURT: All right. Let me just say --

21 MR. DECOULOS: They should tell the Court, "We don't  
22 have anything."

23 THE COURT: All right. All right. But hold on,  
24 Mr. Decoulos. Because we're mixing things again. We're  
25 talking about giving you a window of opportunity here to

1 deal with the matter of parties, and then we'll move on to  
2 the bifurcation.

3 But. Let's get there for one second.

4 It would be my view that what we should do is have a  
5 process similar to a pretrial conference where the parties  
6 are put to the task of preparing a joint pretrial  
7 memorandum, where there's going to be the identification of  
8 exhibits, you know, the issues, all of the usual  
9 requirements for a pretrial memorandum.

10 And usually it would list witnesses; again, I don't  
11 think we're going to have them, unless you have certain  
12 people who would be called for authentication of documents.  
13 I don't know if that's going to be an issue or not.

14 But the point is, in the course of putting together a  
15 joint pretrial memorandum, either for a case-stated basis  
16 or an actual trial, the parties will have to put pen to  
17 paper to be specific.

18 MR. DECOULOS: Why can't we then get a pretrial order  
19 today so that we can get to that point very rapidly. And I  
20 understand that you meet every 6 weeks -- you conduct  
21 motion sessions every 6 weeks --

22 THE COURT: No, 2 weeks in every 6; two weeks during  
23 every 6-week period.

24 MR. DECOULOS: Well, let's say, when can we meet in  
25 the first week in December with you? Sometime in December?

1 THE COURT: Well, what's your view about this matter  
2 of other parties that some people would like to --

3 MR. DECOULOS: Well, we can take care of that with  
4 Ms. Morse's motion in October. But I'm talking about  
5 making the parties sit down and say, "Look-it, this is  
6 exactly what we've had to do," and that pretrial order  
7 should state, "You've got to meet in October; you can't  
8 meet the week before December 1," if that's when the  
9 pretrial conference was going to be held -- just so that we  
10 can get all of these things all worked out and stop wasting  
11 everybody's time on it.

12 THE COURT: Ms. Morse, you're on your feet?

13 MS. MORSE: Yeah. I mean, December 1st sounds to me  
14 awfully too fast, even if that's the course you're going to  
15 go, especially if you're going to bring in -- I mean, I  
16 know, the Land Bank, if they choose another attorney rather  
17 than Mr. Rappaport, or what the Commonwealth decides to do.

18 And unfortunately I think that they're both very  
19 necessary here. So I'm looking to go out further,  
20 especially if you almost are putting it together as a case  
21 stated, which is where I think you're going with this.

22 THE COURT: Well, a lot is going to be where the  
23 parties are going with this.

24 All right. I will certainly consider these points and  
25 look at my calendar as far as the proper timing, but let me

1 start, just on this issue of any motions that may pertain  
2 to parties, that if people wish to file such motions, are  
3 you comfortable in saying that all those motions have to be  
4 in by the end of October? -- in fact should be --

5 I know you said you're away, the last full week of  
6 October, Ms. Morse?

7 MS. MORSE: Mm-hmm.

8 THE COURT: All right. Hold on one second.

9 (Pause.)

10 MR. DECOULOS: Ms. Morse and I agreed that we  
11 should -- she should do it before she goes on vacation.

12 MS. MORSE: You said you had --

13 MR. DECOULOS: It's not going to take much work.

14 THE COURT: All right. Well, as I said I'm sitting  
15 October 12th. Is there --

16 MS. MORSE: That's very good. It's in the afternoon.

17 THE COURT: Right.

18 But let me ask the other parties.

19 Are you content with having October 12th being the  
20 date for having a hearing on any additions or deletions,  
21 substitutions, whatever, parties, before we move on to the  
22 matter of the bifurcated proceedings?

23 MS. ROBERTS: Yes, Your Honor.

24 MR. SALTONSTALL: Yes, Your Honor.

25 MR. LIMA: Yes, Your Honor.

1 THE COURT: All right. Mr. Hall?

2 MR. HALL: Yes, Your Honor.

3 THE COURT: All right. Mr. Rappaport?

4 MR. RAPPAPORT: I'm on trial in the superior court in  
5 Edgartown on that day.

6 THE COURT: On the 12th?

7 MR. RAPPAPORT: Yeah. But I'll...

8 THE COURT: Well, do you anticipate -- this would be  
9 at two o'clock in the afternoon. Do you anticipate your  
10 trial being involved in the afternoon?

11 MR. RAPPAPORT: It's scheduled to go all day the 11th  
12 and all day the 12th. I mean, hopefully it won't, and  
13 maybe I could get someone else from my office to  
14 participate.

15 THE COURT: Do you anticipate motions yourself?

16 MR. RAPPAPORT: I don't know.

17 THE COURT: Mm-hmm?

18 MR. RAPPAPORT: But I think schedule it for the 12th,  
19 Your Honor, and we'll just do the best we can.

20 THE COURT: All right. Then why don't we stay with  
21 2:00 PM --

22 MR. HALL: Excuse me, I'm just a little unclear what's  
23 happening on the 12th?

24 THE COURT: That's going to be the date for a hearing  
25 on any motions pertaining to changes of parties.

1 MR. HALL: Thank you, Your Honor.

2 THE COURT: And so those motions should be  
3 appropriately marked, in advance, so that they're timely  
4 served on opposing parties and counsel, so that we can hold  
5 the hearing on the 12th.

6 All right. And at that point, I'll be prepared to  
7 talk about the future deadline on this case for further  
8 filing.

9 In fact, let me back up. I will send a notice out  
10 before then; I think that we shouldn't wait till October  
11 12th for me to at least establish the date for the pretrial  
12 conference. But I will look at my calendar and decide when  
13 that is going to take place.

14 MR. DECOULOS: You know, a pretrial conference is a  
15 wonderful thing, Judge, provided the parties want to work  
16 on it.

17 THE COURT: No, I heard you. And I understood that  
18 you wanted to have an earlier deadline for the parties to  
19 meet to make sure that it's fully vetted.

20 MR. DECOULOS: Right. Fine. Thank you very much,  
21 Judge.

22 THE COURT: All right. Anything else from the parties  
23 here today?

24 All right. With that, we've concluded --

25 (Matter adjourned at 12:11:52 PM, to resume October 12,

2006, at 2:00 PM.)

## C E R T I F I C A T I O N

I, Ellen H. Dibble, an Approved Court Transcriber, do hereby certify that the foregoing is a true and accurate transcript, from the audio recording provided to me by Attorney Wendy Sibbison of the Land Court proceedings in the above entitled matter.

I, Ellen H. Dibble, further certify that the foregoing is in compliance with the Administrative Office of the Trial Court Directive on Transcript Format.

I, Ellen H. Dibble, further certify that I neither am counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

*Ellen H. Dibble*

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Volume: I of II  
Day 3 of 11  
Pages: 112 - 208  
Exhibits: None

COMMONWEALTH OF MASSACHUSETTS  
DUKES, SS. DEPARTMENT OF THE TRIAL COURT  
LAND COURT DEPARTMENT

\* \* \* \* \*  
\*  
MARIA A. KITRAS, as Trustee of \*  
BEAR REALTY TRUST et al., \*  
Plaintiffs \*  
\* No. 97-MISC-238738  
v. \*  
\*  
TOWN OF AQUINNAH et al., \*  
Defendants \*  
\* \* \* \* \*

MOTIONS:  
MOTION TO SUBSTITUTE CHARLES D. HARDING, JR., FOR ELEANOR  
HARDING (Attorney Morse)  
MOTION TO ADD PARTY (COMMONWEALTH) (Attorney Morse)  
MOTION OF THOMAS SEEMAN, TO DISMISS (Attorney Lima)  
PLAINTIFF'S MOTION TO DISMISS CERTAIN PARTIES (Attorney  
Decoulos)  
CLARIFICATION BY THE COURT AS TO MARTHA'S VINEYARD LAND  
BANK SUBSTITUTION FOR BROWNS (at previous session)  
MOTION OF VINEYARD CONSERVATION SOCIETY TO DISMISS  
(Attorney Roberts)  
GOSSAMER WING REALTY TRUST'S MOTION FOR LEAVE TO FILE LATE  
OPPOSITION TO MOTION OF VINEYARD CONSERVATION SOCIETY'S  
MOTION TO DISMISS AS TO LOTS 1-188 (Attorney Hall)  
PLAINTIFF'S MOTION TO DISMISS CERTAIN PARTIES (Attorney  
Decoulos)

BEFORE JUDGE LEON J. LOMBARDI

APPEARANCES (see next page):

Boston, Massachusetts  
Room 1  
December 4, 2006

Ellen H. Dibble  
Approved Court Transcriber

APPEARANCES:

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For: Maria A. Kitras, as she is trustee of the Bear Realty Trust, Bear II Realty Trust and Gorda Realty Trust, and James Decoulos, as he is trustee of the Bear II. Realty Trust and Gorda Realty Trust

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1 (Time is 2:23:08 PM.)

2 THE CLERK: Good afternoon. This is Monday, December  
3 4th, 2006. Miscellaneous Land Court case 238738, Kitras  
4 versus Town of Gay Head.

5 THE COURT: Now known as Aquinnah.

6 Good afternoon. Would all the participants please  
7 identify themselves for the record.

8 MR. DECOULOS: Nicholas Decoulos representing the  
9 plaintiff Maria A. Kitras, Your Honor.

10 MS. MORSE: Leslie-Ann Morse representing Mark Harding  
11 and the Eleanor P. Harding Realty Trust.

12 MS. ROBERTS: Jennifer Roberts for the defendant  
13 Vineyard Conservation Society.

14 MR. RAPPAPORT: Ronald Rappaport for the Town of  
15 Aquinnah.

16 MR. LIMA: David Lima, Thomas Seeman.

17 MR. MARGULIS: Thomas Margulis representing Richard F.  
18 Sullivan.

19 THE COURT: All right. Miss Ziter, have we heard from  
20 Mr. Hall?

21 (Discussion off the record.)

22 THE COURT: All right. He hasn't called about today.  
23 The thing is, do we know whether he's on his way or...

24 (Discussion off the record.)

25 THE COURT: All right.

1           Has anyone been in touch with Mr. Hall? Does anyone  
2 know whether he intends to be here today?

3           MS. ROBERTS: No one has heard from him, Your Honor.

4           THE COURT: All right. Well, it is after two o'clock,  
5 and we'll proceed. We'll conduct our business and see if  
6 he arrives. And hear him if he has any issue concerning  
7 the matters we've already dealt with.

8           There are a number of motions that are before me  
9 today. And I will take a couple of them first.

10          They are filed by Ms. Morse.

11          MOTION TO SUBSTITUTE CHARLES D. HARDING, JR.,

12                         FOR ELEANOR P. HARDING:

13          THE COURT: All right. The first is the motion to  
14 substitute. I take it that the per- -- there's a couple of  
15 different spellings of his name that you have in your  
16 papers. It's Charles D. Harding, H-A-R-D-I-N-G --

17          MS. MORSE: Yes.

18          THE COURT: -- Jr.; is that correct?

19          MS. MORSE: That's correct.

20          THE COURT: All right. And this is a motion to  
21 substitute upon the death of Eleanor P. Harding; and he is  
22 a successor trustee to her and serves as co-trustee with  
23 Sheila H. Besse; is that correct?

24          MS. MORSE: Correct.

25          THE COURT: All right. Is there any opposition to

1 this motion to substitute?

2 MS. ROBERTS: No, Your Honor.

3 MR. DECOULOS: None.

4 THE COURT: All right. Hearing none, the motion to  
5 substitute is allowed.

6 MOTION TO ADD PARTY:

7 THE COURT: The next motion by Ms. Morse on behalf of  
8 her clients is a motion to add a party, and that is... you  
9 indicate the plaintiffs - Harding plaintiffs - say that  
10 (reading): The Commonwealth of Massachusetts holds  
11 conservation easements on set-off lots 556, 550, and 549;  
12 and the failure to add the Commonwealth may impede or  
13 impair its ability to protect its interests.

14 Is that correct?

15 MS. MORSE: Yes, Your Honor.

16 THE COURT: Is there something you wish to add on that  
17 at all? Have you had any communication with the  
18 Commonwealth of Massachusetts on this matter?

19 MS. MORSE: Yes, I have. I happened to be in a  
20 arbitration that lasted seven hours with the Commonwealth  
21 attorney. They agree, that they need to be a party in this  
22 case. It's just a question of bringing them in.

23 I had a long conversation with the assistant attorney  
24 general. He's well aware of this case, in fact, because  
25 there's another case almost identical to this case, and it

1 originally started in the federal district court, and the  
2 federal district court dismissed because it ruled that the  
3 Commonwealth of Massachusetts was an indispensable party,  
4 and they couldn't bring the Commonwealth into the federal  
5 system.

6 In any case, that brought the fact of the easements  
7 forward. And after seeing that, I didn't feel that we had  
8 any choice but to bring them into this case.

9 As I said, I talked to the assistant attorney general.

10 THE COURT: Would that be Mr. Callanan?

11 MS. MORSE: Yes, sir.

12 And he agreed that he needed to be a party, so I don't  
13 think there's any problem.

14 THE COURT: All right. Any comment? Any opposition  
15 to this motion from any of the participants here?

16 MS. ROBERTS: No, Your Honor.

17 THE COURT: And particularly Mr. Rappaport.

18 MR. RAPPAPORT: No, I don't, Your Honor.

19 THE COURT: All right. The motion is allowed. But  
20 let me ask you: It's interesting, Rule 24: If someone  
21 seeks to intervene, they have to bring a motion with a  
22 pleading, either a complaint or an answer showing what  
23 their defense would be.

24 To add a party -- all of a sudden someone's in the mix  
25 of a very involved case. And the question is, what type of

1 notice and what type of service do you believe is  
2 appropriate to give the Commonwealth about this action now?

3 MS. MORSE: My thought, Your Honor, was simply, was to  
4 serve them --

5 THE COURT: With what? (Chuckles.)

6 MS. MORSE: A copy of the complaint.

7 Probably the second amended complaint?

8 MR. DECOULOS: I don't know.

9 MS. MORSE: And I believe Mr. Callanan will accept  
10 service on behalf of the Commonwealth. I don't see that as  
11 a problem.

12 THE COURT: Well, the docket -- in fact, we were  
13 trying to go through this earlier today ourselves.

14 Clearly the original complaint was filed on May 20th,  
15 1997. There was an amended verified complaint filed in  
16 court on November 30, 1998.

17 The file has a variety of later amended complaints,  
18 which were offered but not acted upon, or denied. So I  
19 would suggest that it appears to me today that the last  
20 amendment that we see here is the November 30, 1998.

21 MR. DECOULOS: What docket number is that, Judge?

22 THE COURT: Well, this is another problem,  
23 Mr. Decoulos, that, you know, with different systems and  
24 revisions of our computer system, it doesn't always appear  
25 to be the same number? But the one that was run off here

1 on November 29, 2006 indicates that would be Number 103.

2 MR. DECOULOS: Thank you.

3 THE COURT: But I wouldn't --

4 MR. DECOULOS: -- bet on it.

5 THE COURT: -- stake my life that it's going on to  
6 remain --

7 MR. DECOULOS: Wouldn't bet a nickel on it.

8 THE COURT: -- 103 in perpetuity.

9 All right. All right. So that motion is allowed in,  
10 and I trust that you will serve Mr. Callanan with what he  
11 needs out of this file.

12 MS. MORSE: Yes, sir.

13 THE COURT: All right. All right.

14 MOTION ON BEHALF OF THOMAS SEEMAN TO DISMISS

15 THE COURT: Next I'd like to turn to the motion filed  
16 by Mr. Lima on behalf of his clients -- the Seemans; is  
17 that correct?

18 MR. LIMA: That is correct.

19 THE COURT: Before you make any long presentation on  
20 it, I see that your clients are listed in Mr. Decoulos's  
21 motion, that those parties should be dismissed. So I would  
22 say that that's in essence what you're seeking by your  
23 motion today; is it not?

24 MR. LIMA: That is correct. I believe there's no  
25 opposition to it.



1 THE COURT: Well, that's what I'm going to ask.

2 Is there any opposition to the motion filed on behalf  
3 of the Seemans by Mr. Lima, that his clients should be  
4 dismissed from this action?

5 MS. ROBERTS: No, Your Honor.

6 MR. RAPPAPORT: No, we don't have any opposition to  
7 that.

8 THE COURT: All right. I've given everybody an  
9 opportunity to speak. No one has any opposition. Your  
10 motion's allowed.

11 MR. LIMA: Thank you.

12 PLAINTIFF'S MOTION TO DISMISS CERTAIN PARTIES

13 THE COURT: All right. Now we'll move on to a couple  
14 of the others, but before I do so, Mr. Decoulos, on your  
15 motion to dismiss on certain parties, there was an earlier  
16 filing dated October 11, 2006, which I think was a  
17 illustration - perhaps I should call it - of what you  
18 intended to file later on. This was unsigned; it was never  
19 docketed; it was only date-stamped.

20 You then filed your actual original copy on October  
21 23rd, 2006, which is your motion to dismiss certain  
22 parties. That's the motion we're dealing with; is that  
23 correct?

24 MR. DECOULOS: That's right, sir.

25 THE COURT: All right. To avoid further confusion,

1 I'm going to return that earlier unsigned version of the  
2 motion, just so again we try to eliminate extraneous papers  
3 when we can.

4 MR. DECOULOS: Heavens knows we've got 'em.

5 CLARIFICATION: MARTHA'S VINEYARD LAND BANK

6 WAS SUBSTITUTED FOR VICTORIA BROWN AND GARDNER BROWN, JR.

7 THE COURT: All right. Let me begin -- actually now  
8 we're down to two motions, I believe. One is the Vineyard  
9 Conservation Society's motion to dismiss. And the Kitras  
10 plaintiffs' motion to dismiss certain parties. Is that  
11 correct?

12 MS. MORSE: Yes.

13 THE COURT: Any other motions?

14 MR. DECOULOS: Nope.

15 MS. ROBERTS: There may be a -- I don't -- I may have  
16 lost track, Judge, but the motion to substitute the Land  
17 Bank? I'm not quite sure whether that --

18 THE COURT: That was acted upon --

19 MS. ROBERTS: -- that that's done? That's...

20 THE COURT: -- last time.

21 MS. ROBERTS: Okay. And if that's done --

22 THE COURT: When Mr. Cohen was here on that second  
23 appearance, I definitely said that that was the time that  
24 the Land Bank had the opportunity to appear if it wished to  
25 be heard on that issue.

1 They did not. And I allowed...

2 MS. ROBERTS: Okay.

3 THE COURT: I treated his motion to dismiss the Browns  
4 as a motion to substitute; and the Martha's Vineyard Land  
5 Bank was substituted -- for the Browns.

6 MS. ROBERTS: So now we just have the last two  
7 motions, Your Honor, just outlined (time is 2:33:14 PM).

8 MOTION OF VINEYARD CONSERVATION SOCIETY TO DISMISS

9 THE COURT: All right. And I'm going to start with  
10 Vineyard Conservation Society, on this. And also with the  
11 various motions that are here.

12 To clarify: You first filed one on October 6th, 2006.  
13 And then I asked that you supplement it with other  
14 materials, and so I take it that you not only submitted a  
15 memorandum on November 3rd but refiled a motion to dismiss.

16 So we're dealing with the same motion; is that  
17 correct?

18 MS. ROBERTS: Correct.

19 THE COURT: All right. At this point I would just  
20 note that Mr. Hall has arrived.

21 (Time is 2:33:58 PM; Attorney Hall now present.)

22 THE COURT: And Mr. Hall, we have acted upon the two  
23 motions filed by Ms. Morse to add a party, being the  
24 Commonwealth of Massachusetts, to substitute Charles D.  
25 Harding, Jr., as a co-trustee for the late Eleanor P.

1 Harding. There was no opposition to Mr. Lima's motion on  
2 behalf of dismissing the Seemans from this action; and I  
3 allowed that.

4 And we are now at the point of dealing with the motion  
5 of the Vineyard Conservation Society and the Kitras  
6 plaintiffs' motion.

7 Do you have any comment on any of those other motions?

8 MR. HALL: Thank you, Your Honor. Yes.

9 GOSSAMER WING REALTY TRUST'S MOTION FOR LEAVE TO FILE  
10 LATE OPPOSITION TO MOTION OF VINEYARD CONSERVATION  
11 SOCIETY'S MOTION TO DISMISS AS TO LOTS 1-188

12 MR. HALL: If I may submit to the court a paper that I  
13 have with me today. It's a request for a few extra days to  
14 prepare opposition papers.

15 THE COURT: Didn't we deal with this before?

16 MR. HALL: That was on substantive -- the substantive  
17 issue of the motion to dismiss that had been filed by the  
18 Vineyard Conservation service (sic), and the Court held  
19 that they needed to go through the full-blown process of  
20 preparing a full packet of -- a full motion pursuant to  
21 Rule 4 of the Land Court.

22 So this is a request for more time -- to file papers.

23 THE COURT: All right. Let me just back up for one --

24 MR. HALL: I'm prepared to argue orally.

25 THE COURT: Heh. All right. Let me just, if I

1 could --

2 Miss Ziter, do you have the...

3 (Discussion off the record, pause.)

4 THE COURT: All right. Let me just say, even without  
5 seeing the earlier filing: We had the issue when the  
6 Conservation Society filed their earlier motion and the  
7 parties appeared, that there was a request at that time for  
8 additional time. And I believe I set a timetable for that.

9 Now I do read in your filing today that you had  
10 requested (reading): "Initially 40 days, but at least 30  
11 days to prepare a opposition, being the normal amount of  
12 time allowed for the preparation of an opposition to motion  
13 for summary judgment, which if (phonetic at 2:38:15 PM,  
14 unclear word) the Court is likely to deem at least the  
15 Seeman motion, but will probably deem the VCS motion as  
16 well."

17 So you recognized that there was the deadline, but you  
18 indicate that for certain reasons you need additional time.  
19 Is that it?

20 MR. HALL: Yes, Your Honor.

21 THE COURT: All right.

22 MR. HALL: But I'm prepared to argue orally today with  
23 respect to Mr. Seeman's motion. We only opposed the facts  
24 that he had presented, and the legal basis on which he  
25 presented, but from a procedural standpoint - I think we

1 discussed this the last time - we were totally in accord  
2 with letting him out of the case. We would have  
3 stipulated.

4 THE COURT: All right. Well, the motion is allowed,  
5 and it's over and done with.

6 MR. HALL: Stipulated.

7 THE COURT: All right. Is there any opposition to  
8 giving Mr. Hall until December 7 to file an opposition?

9 MR. DECOULOS: I have no opposition to that, Judge.

10 MS. MORSE: I have none.

11 MS. ROBERTS: No, Your Honor.

12 THE COURT: All right. Hearing none, your motion for  
13 leave to file a late opposition to the VCS motion, only, is  
14 allowed. I really don't want to see a lot of additional  
15 extraneous verbiage on matters that we've already dealt  
16 with, such as the Seeman motion.

17 All right. Now I will turn to Ms. Roberts on her  
18 motion, and you may proceed.

19 MOTION OF VINEYARD CONSERVATION SOCIETY TO DISMISS

20 MS. ROBERTS: Your Honor, this motion is based on the  
21 prior decisions in this matter of both Judge Green in this  
22 Court and the Appeals Court judgment, which dealt with --  
23 which made certain factual findings, which we would suggest  
24 dictate that lots 1 through 188 now be dismissed from this  
25 proceeding.

1           And the rationale for that is the doctrine of the law  
2 of the case, Your Honor.

3           The facts, as found by Judge Green, as set out in  
4 his --

5           THE COURT: Well, let me stop you there. If it was  
6 summary judgment, a judge does not make findings of fact in  
7 a summary judgment context.

8           MS. ROBERTS: Well, then the undisputed facts --

9           THE COURT: Okay.

10          MS. ROBERTS: -- as discussed by Judge Green and  
11 relied on by Judge Green in his decision --

12          THE COURT: All right. So perhaps you could hone in  
13 on, what were the undisputed facts?

14          MS. ROBERTS: Those facts were - found at pages 10 and  
15 11 of his decision - were that there were three categories  
16 of land in this area of Aquinnah as a result of or during  
17 the course of the set-offs in the 1870s. And he found -  
18 starting at the bottom of page 10 - the first category was  
19 land held in severalty, and determined according to the  
20 commissioners' 1871 report. And those were lots numbered 1  
21 through 173.

22          The next --

23          THE COURT: I'm sorry. You're saying that was where?  
24 In the...

25          MS. ROBERTS: That's at page 10 of Judge Green's

1 decision.

2 THE COURT: Well, but that is really his discussion?

3 MS. ROBERTS: Correct.

4 THE COURT: There were numbered paragraphs which  
5 preceded that, which I would take it would be ending on  
6 page 9.

7 Is there -- the so-called "undisputed facts," the  
8 record that you would say backs up the facts would be those  
9 facts not in dispute 1 through 17.

10 (Pause.)

11 MS. ROBERTS: I would... what I can do, Your Honor,  
12 and I'm not prepared to do it today. But what I can do is  
13 pull out from the summary judgment record the various deeds  
14 on which Judge Green relied.

15 We submitted at the time a stack of documentation from  
16 the registry of deeds on Martha's Vineyard showing the  
17 various entities and the properties and when they had been  
18 deeded out.

19 THE COURT: If I could direct your attention to page  
20 7, paragraph 12. This refers to the 1878 commissioners'  
21 report. Was the commissioners' report part of the record?  
22 The 1878 report?

23 MS. ROBERTS: I believe it was, but I would want to go  
24 back and check, Your Honor. It's been 5 years now, I  
25 think, since we filed that.



1 THE COURT: And perhaps we could...

2 MS. ROBERTS: Your Honor's correct in pointing to  
3 paragraph 12 in Judge Green's decision. Again, the  
4 categorization of Judge Green were lots 1 to 173; and then  
5 lots 174 to 189; and then finally in the third category was  
6 the partition of the common lands.

7 THE COURT: By the way, as far as the terminology  
8 that's used - and I know that's mentioned quite frequently  
9 in this case - they talk about lots 1 through 173 were "run  
10 out and bounded." And then 174 to 189 were "run out and  
11 bounded" afterwards.

12 What's your interpretation as far as what's meant by  
13 that phraseology? Because obviously with something from  
14 the 19th century -- it's probably pertinent to this case.

15 MS. ROBERTS: My understanding is that when the  
16 commissioners were delegated to do this work, they were  
17 asked to go out to the town and describe by metes and  
18 bounds the various parcels of land in Aquinnah that were  
19 then - "owned" is a sort of a loaded word in this case -  
20 but that were held by individual tribe members for their  
21 own use, as distinguished from all of the land that was  
22 held in common by the tribe generally.

23 For example, there were cranberry lands that no  
24 particular tribe member owned but were available and used  
25 by the entire tribe. There were pasture lands that were

1 used by the entire tribe, that were described as being held  
2 in common, with no particular tribe member, as opposed to  
3 any other, having a right of ownership over those common  
4 lands.

5 In contrast to that, there were particular areas  
6 within town where individual tribe members had their home  
7 and their garden, and their -- and which was under Indian  
8 lore theirs for as long as they chose to hold it.

9 So the job of the commissioners was to go and identify  
10 particular land area held by individual tribe members.

11 And that was the start of the set-off proceeding. It  
12 was only --

13 THE COURT: Well, what is there in paragraph 12 or the  
14 other paragraphs that would tell me that lots 1 through 173  
15 were owned in severalty?

16 MS. ROBERTS: Your Honor, you'd have to go back to the  
17 underlying documentation. And I'd be happy to do that.  
18 I'm not prepared to do it today.

19 There were commissioners' reports that were filed -  
20 which were in the record - which were filed with the --  
21 reported back to the general court, that go on at some  
22 length about what was going on during this period. And  
23 they were relied upon by all parties - in the course of the  
24 summary judgment - for the factual basis or the historic  
25 basis of what was going on at the time.

1           Again, I would -- I can't tell you standing here today  
2 what the historic source is, from the summary judgment  
3 record, that Judge Green relied on in saying this in  
4 paragraph 12, but it was there, and he did say it.

5           THE COURT: All right. Why don't you proceed.

6           MS. ROBERTS: Similarly, and relying on the same  
7 materials, the Appeals Court reached a conclusion about the  
8 state of title of these lots 1 through 188 back in the  
9 1870's. And that, as Your Honor will recall from having  
10 read this Appeals Court decision, I'm sure, many times:  
11 The Appeals Court in this case decided that they first  
12 needed to decide whether any easement by necessity could be  
13 implied at all before they got to the question of who was a  
14 necessary party to the proceedings.

15           And so under that, under their view, they needed to  
16 decide first, could an easement be implied.

17           And the Appeals Court determined that it could not be  
18 implied for lots 1 through 188, because there was no unity  
19 of title there, because for those lots they had been  
20 previously held by individual tribe members in severalty.

21           So they were out of the equation by the time the  
22 common lands were divided up in the late 1870's.

23           THE COURT: Let me ask you, for those lots that were  
24 of a higher number, above 189, what did the Appeals Court  
25 say as far as how the fact that there might be some

1 easements that perhaps could be proven, how that would  
2 impact on the Indian lands? What did they say -- I mean,  
3 your premise is that there would be no easements for the  
4 lower -- call it the "lower numbered lots." But there is  
5 an open question for the higher number lots.

6 And if there were easements for these so-called higher  
7 number lots, how did this decision deal with that question  
8 as it relates to the Indian lands?

9 MS. ROBERTS: Well, Your Honor, my understanding of  
10 the law of easements by necessity is that if you don't have  
11 unity of title, you can't be either benefitted by or  
12 burdened by the easement.

13 THE COURT: Yeah, but I'm focusing now on the unity --  
14 what would be the so-called "common lots," the higher  
15 numbered lots.

16 And my point is: Didn't the Appeals Court in essence  
17 say: Well, you know, if it impacts (time is 2:48:58 PM)  
18 the Indian lands, we do not think the United States is an  
19 indispensable party, and you can, frankly, deal with that  
20 problem as the issue arises -- in the future.

21 And my point is: If they made that sort of  
22 determination as it relates to the Indian lands and the  
23 United States not being an indispensable party, did it make  
24 any difference whether they were the lower numbered lots or  
25 the higher number lots...

1           This goes to the question of: Was all of the guidance  
2 being given by the Appeals Court in the central part of the  
3 decision, when there was at least part of the decision  
4 which says that: Yeah, there may be some easements that  
5 would implicate and affect the Indian lands.

6           MS. ROBERTS: The tribal land here, Your Honor,  
7 encompasses lots both below 188 and above 188. And so the  
8 Appeals Court -- it's my understanding what they said was  
9 that lots from 188 and down are gone, because there's no  
10 unity of title --

11           THE COURT: But was that --

12           MS. ROBERTS: For lots --

13           THE COURT: Well, was that --

14           MS. ROBERTS: -- for lots --

15           THE COURT: Was that an essential finding or holding  
16 of the case in reaching its determination as to what the  
17 status would be of the United States or the tribe?

18           MS. ROBERTS: According to the Appeals Court -- and  
19 let me see if I can find the language -- they said that  
20 they wouldn't need to reach...

21           See if I can find it here.

22           On page 291 of their decision they first talk about  
23 the issue of whether the United States is indispensable,  
24 and then say, "Of course we need not reach that question  
25 unless easements by necessity may be implied for some or

1 all of the lots in question."

2 So that's why at least as the Appeals Court saw it,  
3 that was a necessary part of their decision -- foundation  
4 for their next decision: Having found that some easements  
5 could be implied, they could then go on to the issue of  
6 whether you had all the parties before you that you needed.

7 So based on, I think, the plain language of the  
8 Appeals Court, they needed to make that decision.

9 This is not dicta, if that's where Your Honor is  
10 headed.

11 THE COURT: It's certainly being raised in the  
12 opposition.

13 MS. ROBERTS: It clearly is. But I would suggest, in  
14 view of that language that I just quoted to you, that it is  
15 plainly not dicta.

16 So I would respectfully suggest that the Appeals Court  
17 not only did but needed to reach a conclusion with respect  
18 to these lots, and its conclusion was that lots 1 through  
19 188 lack the necessary unity of title.

20 It is worth noting that it was that ruling by the  
21 Appeals Court which was the sole subject of the plaintiffs'  
22 request for further appellate review to the SJC.

23 So it was an issue of which the plaintiffs were very  
24 much aware, that... we have copies of the request for  
25 further appellate review if it was of interest Your Honor.

1 It was a request that was not granted by the SJC.

2 And so as things currently stand, the highest ruling  
3 out of any court on the subject is that of the Appeals  
4 Court.

5 The relevant law is clear here. You have whatever  
6 weight you choose to give to Judge Green and his decision,  
7 and you have the weight of the Appeals Court.

8 In the absence of exceptional circumstance -- and I  
9 would also suggest, Your Honor, that there has been no  
10 final decision in this case, and so there are exceptional  
11 circumstances under which it would be within your power to  
12 come to some different conclusion on the issue of these  
13 lots.

14 But the case law is clear that those are exceptional  
15 circumstances, and that the burden would be on the  
16 plaintiff to show that there's been some change in the  
17 controlling legal authority, some substantially different  
18 factual evidence than what was presented in the record  
19 before Judge Green and the Appeals Court, or that the  
20 earlier decisions of Judge Green and the Appeals Court were  
21 clearly erroneous.

22 THE COURT: Again, there's many different aspects to  
23 this case, what the issues were, how they were presented,  
24 what parts it have were decided and the like.

25 And there was certainly, at the request of the

1 plaintiffs, a partial judgment - I shouldn't even call it  
2 "partial judgment"; the Appeals Court doesn't like that -  
3 but a judgment under Rule 54(b) - which in essence is a  
4 partial judgment - on the questions that were decided by  
5 Judge Green.

6 But the SJC in 2003 recited the established law that  
7 is within the inherent authority of a trial judge to  
8 reconsider decisions made on the road to final judgment.  
9 That's Herbert Sullivan versus Utica Mutual; 439 Mass. 387  
10 is the cite on that particular case.

11 And so then, they don't indicate that it's an  
12 extraordinary matter, but it's within the inherent  
13 authority to reconsider on the road to final judgment.

14 But you're right; I mean, there hasn't been the final  
15 judgment, but there certainly was at least a 54(b)  
16 judgment, at the request of the plaintiffs.

17 Then the question is, what were the issues that were  
18 subject to that judgment, and the record that goes along  
19 with it.

20 MS. ROBERTS: I can give Your Honor a couple of  
21 additional cites on the law of the case doctrine. This  
22 little case that I happen to be looking at is Commonwealth  
23 versus Clayton, 63 Mass. App. 608, which says that, "The  
24 'law of the case' doctrine reflects a reluctance to  
25 reconsider questions decided upon an earlier appeal in the



1 same case. An issue, once decided, should not be reopened  
2 unless the evidence on a subsequent trial was substantially  
3 different, controlling authority has since made a contrary  
4 decision of the law applicable to such issues, or the  
5 decision was clearly erroneous and would work a manifest  
6 injustice."

7 And I have...

8 THE COURT: And that's where it may become relevant to  
9 know what was the record in this case.

10 MS. ROBERTS: I'd be happy, Your Honor, to give you  
11 the record cites and copies of the particular -- for the  
12 particular paragraph in Judge Green's decision, and the  
13 Appeals Court decision, because it's a stack of materials,  
14 and it'd be a lot to wade through it, and I'd be happy to  
15 do that for you, if that would be of assistance to the  
16 Court.

17 THE COURT: Well, again, we can deal with this issue  
18 at the end of today's hearing as far as any  
19 supplementation.

20 As we know, every time we have some supplementation,  
21 it spawns a great deal of additional work by a lot of  
22 parties. So I'm mindful of, certainly, the history here,  
23 and how long you've all been working on this case.

24 But, you know, you're, as you would say, "teeing up"  
25 certain matters for me, and if I'm going to deal with them

1 fully and responsibly, I will probably need to ask you to  
2 give me the necessary supporting documentation from one  
3 side or the other on these questions.

4 MS. ROBERTS: If I could just add one final point,  
5 Your Honor, and then I'd be finished with my prepared  
6 remarks.

7 There's a two-edged sword in this case. The  
8 plaintiffs, I suspect, are pretty unhappy with this  
9 decision about lots 1 through 188. The defendants are  
10 pretty unhappy with the Appeals Court's decision about how  
11 to treat the United States and the tribe in this matter.

12 But we appreciate the fact - or have up until today  
13 appreciated the fact - that we're bound by the Appeals  
14 Court's decision in that, and have not sought -- have not  
15 come in here still arguing, at this level of the court,  
16 that the tribe and/or the United States of America should  
17 be brought in as a party, because we consider the Appeals  
18 Court - or had considered the Appeals Court - to have  
19 resolved that matter -- adversely to us, I might add.

20 But if Your Honor's indicating a different view of  
21 what the Appeals Court decision has accomplished, then we'd  
22 certainly go back and relook at it in that light.

23 THE COURT: And leaving aside all other aspects of the  
24 two decisions - the trial court and the Appeals Court -  
25 certainly I would think we could all agree that as a bare

1 minimum, the Appeals Court said something; and what they  
2 said was pertaining to the status of the United States and  
3 the tribe.

4 And I think that -- if anyone has a different view on  
5 that, certainly they can articulate that. But I think that  
6 that part of it -- that's what the Appeals Court decision  
7 was all about. The question is, how much else goes with  
8 it?, which remains to be decided.

9 Is there anything else you wish to add at this point,  
10 Ms. Roberts?

11 MS. ROBERTS: No, Your Honor. I've just --

12 THE COURT: Would anyone else like to be heard on the  
13 same side of the question as Ms. Roberts?

14 Mr. Rappaport.

15 MR. RAPPAPORT: I would, Your Honor. And I will be  
16 brief.

17 Ms. Roberts alluded to the fact that an application  
18 for further appellate review was filed by Maria Kitras as  
19 trustee of Bear Realty Trust with the SJC on the issue of  
20 lots 1 through 189.

21 And I do have a copy -- I know -- it's a judicial  
22 notice of -- just for the use of the Court's reference, I  
23 do have a copy, if you don't mind.

24 (Pause; handing, apparently, at 2:59:33 PM.)

25 THE COURT: But can much be gleaned from the fact that

1 the SJC didn't grant further appellate review?

2 There may be a number of reasons. They may say, "Oh,  
3 sort it out at the trial court level and we'll look at it  
4 as a whole later on." And they didn't want to engage in  
5 piecemeal further appellate review.

6 MR. RAPPAPORT: That is entirely possible, Your Honor.  
7 It was essentially a one-word denial.

8 But it was a denial of both motions filed by VCS and  
9 the Town on the issue of whether the United States was a  
10 necessary party.

11 And the same order addressed this application for  
12 further appellate review.

13 THE COURT: Right.

14 MR. RAPPAPORT: I would simply say that the position  
15 that's being taken by the filings that are in front of you  
16 today by Bear are directly contrary to the arguments that  
17 were raised to the SJC in regards to the effect of the  
18 Appeals Court's language, particularly on page 293, where  
19 the Appeals Court found that lots 1 through 189 -- or 188  
20 through 189 do not have easements by necessity.

21 And that's on page 293 of that decision.

22 I would just like to point to Your Honor's attention  
23 the language in the request for appellate review, on page  
24 1 - and on two different places - where again it is stated  
25 that: The sole issue of whether the Appeals Court should

1 have determined that certain landlocked severalty lots had  
2 been in common ownership - again that's the first  
3 paragraph - was in error.

4 The second paragraph of that decision asks that that  
5 decision be reviewed by the SJC.

6 The end result on page 16 is they say that (reading):  
7 The result is illogical and unequal, and obviously that it  
8 will vastly complicate the proceedings; and ask that the  
9 SJC take that issue and that issue only for further  
10 appellate review.

11 Your Honor, the parties made choices at an earlier  
12 stage of this proceeding as to what the record was going to  
13 be, and the parties were content with that record.

14 And that's why it went up. That's why it went in  
15 front of Judge Green, and that's why it went to the Appeals  
16 Court: Based on that record.

17 The Appeals Court made a ruling on lots 1 through 189  
18 in explicit terms, so explicit that Bear requested further  
19 appellate review on that question.

20 And I suggest, Your Honor, that they are bound by  
21 that. I am not happy with the Appeals Court decision. But  
22 we have to live with it. And I've said it before. I said  
23 it the last time we had the hearing. And Bear has to live  
24 with it. I mean, that's a finding by the Appeals Court.

25 And frankly, with all due deference, Your Honor, I'm

1 not saying that you don't have the power to get behind it,  
2 but to a certain extent a higher court has spoken on this  
3 question. And I think, in all due deference, Your Honor,  
4 that that is a strong statement by a higher court that  
5 these lots do not get the benefit of easements by  
6 necessity. And again, that --

7 THE COURT: Well, let me -- I understand what you're  
8 saying, Mr. Rappaport. The question, though, is, in your  
9 view and whatever authorities you may have to back it up,  
10 as we parse through the decision: Is it dicta, or is it  
11 essential? What's your view?

12 I mean, I assume you do recognize that sometimes our  
13 appellate courts put in some language which isn't  
14 absolutely essential to consider it dicta; it doesn't have  
15 to be followed at times.

16 How do you characterize what's in this decision?

17 MR. RAPPAPORT: I think, in my view, it's essential.  
18 And it's essential because that's how the Appeals Court got  
19 to the issue of whether the tribe and the United States  
20 were an indispensable party.

21 And they parsed through the steps to get there. And I  
22 think it's essential. And Bear thought it was essential.  
23 Because all you have to do is read their application to the  
24 SJC when they sought to have that reviewed. Now they're  
25 seeking to go in a different direction.

1 I'd like to go in a different direction on the issue  
2 of whether the United States is a necessary party, but I  
3 don't think that, frankly, that's open to me at this point.

4 THE COURT: All right. Anything else at this time?

5 MR. RAPPAPORT: No.

6 THE COURT: All right. On this motion, those who want  
7 to be heard in opposition?

8 MR. DECOULOS: Opposition, yes.

9 Judge, this has finally come to a road, a fork in the  
10 road: No more procedural law; let's talk about substantive  
11 law.

12 Now, what did the Appeals Court say? At page  
13 291, "The question presented by the judgment before us,  
14 then, is whether the United States, as a trustee over the  
15 settlement lands, was an indispensable party in an action  
16 seeking a declaration that certain lots in the general  
17 vicinity of the settlement lands had the benefit of ...  
18 necessity."

19 They said that. Not you. Not Judge Green. That was  
20 the issue.

21 They answered that without any ambiguity: "As we have  
22 concluded ... the United States is not an indispensable  
23 party within the meaning of rule 19, the present claims  
24 were not properly dismissed on that basis."

25 That's what they said. That's the end of the

1 procedural problems that they've created for the last 7 or  
2 8 years by saying that the Indians and the tribe and the  
3 United States was -- is an indispensable parties.

4 Now, the last time we were here, Judge, I made the  
5 maybe not solicited comment about what I thought about the  
6 decision, but I said after Roman numeral number 3, they  
7 could have stopped; we could have got rid of all of the  
8 documents that were created in this procedural morass -  
9 that's what it was - and come to the conclusion that we've  
10 got to start all over again.

11 In fact, we're going to have to file an amended  
12 complaint, but I'm going to wait till after Ms. Morse  
13 serves them with the first amended complaint, then --  
14 because things have changed as a result of this decision.  
15 Things have changed because we found some plans down at the  
16 registry of deeds showing that common land, lots 1  
17 through -- 174 through 189 were common land.

18 And then, as I said in my brief, providentially, hey,  
19 these aren't common lands anymore. You know what? Let's  
20 give some land to somebody that we know.

21 I don't know what they did there, but they said in  
22 their 1871 report, "This is common land." And in 5 or 6  
23 years, they change it from common land to land that  
24 somebody belongs.

25 So that's going to have to be decided by you as a fact



1 as to whether or not in 1871, was it common land? And does  
2 it become land in severalty just because 5 or 6 years  
3 later, maybe somebody had some connections with...

4 Who knows what happened there? But that's going to  
5 have to be decided as a fact by you.

6 Now...

7 THE COURT: Well, in your view, what is the critical  
8 point in time to determine whether land was held in common  
9 or severalty? I mean, what --

10 MR. DECOULOS: It's the substantive part of this case.

11 THE COURT: No, no, no -- I know. But what -- heh.  
12 What would the Court be looking back to? What --

13 MR. DECOULOS: The record.

14 THE COURT: You go back far enough, and I assume we're  
15 dealing with either the first charters or, again, the  
16 Indian tribe that may have owned all of it, but on the name  
17 of one person. If you go back far enough, you're going to  
18 find a claim that it was all owned by one person.

19 There's a point in time you look at and say, this is  
20 the time where we look at the state of the title.

21 MR. DECOULOS: I'm happy to say that great minds think  
22 alike, Judge. I've been preparing all of the documents  
23 that make any mention of how the Indians owned this land.  
24 There's a report on the Mashpee matter that I'm going to  
25 include, and we are going to have documents maybe from

1 about 1850 to 1878. That's the whole case.

2 There's nothing in -- there's some parts of it I think  
3 that we're going to be asking for a change, but that's the  
4 document part of the case. And that's where all the facts  
5 are.

6 THE COURT: Why 1850, not 1910 versus 1880? What's  
7 the magic of one point in time or another?

8 MR. DECOULOS: Well, because we've looked at all these  
9 documents, and we've found that these documents are very,  
10 very important to the decision of this case. And I'm  
11 trying to get -- what I'm trying to do so that it'll be of  
12 assistance to everybody: "These are all of the documents."  
13 Just like we're now saying, "These are all the necessary  
14 parties."

15 If they've got some documents that are different than  
16 the ones that I'm proposing, then I'll submit it to  
17 everybody, a list of them anyway. And somebody might want  
18 to add another document to it. But that's what you're  
19 going to have to decide on, not on what they said in their  
20 dictum. That's dictum if I ever saw a dictum -- or ever  
21 read dictum; I'm sorry.

22 So there's the three parts to the Appeals Court  
23 decision: The issue, the ruling, and then they go on  
24 telling you: Well, these are all a lot of things that you  
25 should be looking at -- the judge or the trier of the

1 facts.

2 But that's not part of the decision. Maybe you don't  
3 want to look at those facts. You've got a right to do  
4 that.

5 Now, I've cited in my brief, Your Honor, the case that  
6 was cited by VCS, and it was decided by Judge Kaplan, and  
7 he quotes the restatement of Better Boating Association  
8 case.

9 And that tells you that we didn't have a shot at  
10 trying to decide whether or not these lands were in  
11 severalty, but we've found out, since then, that they  
12 weren't in severalty, at least in our opinion, because he's  
13 calling them -- in 1871, as I said a few minutes ago, it  
14 was common land.

15 THE COURT: Well, again: Then it goes back to the  
16 issue that the case was decided at that stage on summary  
17 judgment. What was the record? And if the parties were  
18 unhappy with the record, they could have put in contrary  
19 evidence, which would created disputed material fact; it  
20 would not have been decided on summary judgment.

21 So -- I mean, again --

22 MR. DECOULOS: My --

23 THE COURT: -- Ms. Roberts has volunteered to  
24 demonstrate to the Court what was in the record.

25 And then the question is, would you say that that

1 record was in error?

2 MR. DECOULOS: That record is in error. I know what  
3 was in the record, Judge, was an affidavit by James  
4 Decoulos. And he listed a lot of documents and a lot of  
5 plans, but he didn't list the 1871 plan. He maybe listed  
6 the 1871 report; and in the 1871 report they're talking  
7 about: The common lands, and what a wonderful man that the  
8 surveyor was to lay out all of these lots, number 1 to 173,  
9 and the rest of it is common land.

10 No question in 1871 what the lots were: They were  
11 lots 1 through 173. Never 174 to 189. Never heard of  
12 until in 1878. That's the first time that somebody saw a  
13 lot numbered 174.

14 So we've -- in our motion for summary judgment -- or  
15 our counter-motion -- I don't know; I didn't handle it. I  
16 might have but I -- I can't remember.

17 But we have a list in the motion for summary judgment,  
18 the affidavit, a list of all of the documents that were --  
19 there's a table of contents to it. And there isn't in that  
20 table of contents the 1871 plan. The 1878 (sic) plan is  
21 there, and that -- I mean, the 1871 report is there, and it  
22 says: From 1 to 173.

23 And I've attached a copy -- I think it's on page 24 of  
24 my report. I've got it here.

25 THE COURT: And what are you referring to,

1 Mr. Decoulos?

2 MR. DECOULOS: The page 24, there's a --

3 THE COURT: Page 24 of what?

4 MR. DECOULOS: Well, to my appendix, that's number 6.  
5 This is the 1871 report, attached to my memorandum.

6 THE COURT: You're talking about in this case now?  
7 This motion. This motion.

8 MR. DECOULOS: In this case -- in this motion, what I  
9 filed, all right?

10 THE COURT: Okay. Yup.

11 MR. DECOULOS: Here's what it says, the last paragraph  
12 on page 24.

13 "In addition to this report" - which goes on for 25  
14 pages - "in addition to the report of the division, he most  
15 respectfully submits a map of the Gay Head lands and  
16 sectional plans of the same, on a larger scale, for the  
17 accuracy of which he is indebted to the skill of John  
18 Mullin whom we were so fortunate to secure."

19 I've got copies of those plans right here, Judge. I  
20 thought my client had extra copies, but they don't. And  
21 I'm going to make a set and put them in the mail to  
22 everybody, today -- once we find out who the necessary  
23 parties are. I don't want to be making the U.S. Post  
24 Office any richer than they are.

25 So I've got -- there's 20 sheets. I can send you the

1 two sheets that are pertinent, or I can send you all 20  
2 sheets, or I can send you the title page, the date it was  
3 recorded. It was recorded the same day that the deeds from  
4 lots 1 to 173 were recorded in Book 49. It was October  
5 26th, 1871.

6 THE COURT: Let me ask you about your statement of  
7 facts submitted by plaintiffs in support of cross-motion  
8 for summary judgment and in opposition to motions for  
9 summary judgment of VCS et al.

10 Number 42 was (reading): "In 1870, all of the lots  
11 shown on the set-off plan were held in common as a result  
12 of the enactment of Chapter 213 of the Acts of 1870,  
13 although lots 1 through 189 were claimed by individuals."

14 What --

15 MR. DECOULOS: There's an error there, 'cause in 1870,  
16 lots 174 through 189 were not in existence. And I've got  
17 the plan here to show you that it just goes up to 174.

18 In fact, in one of these reports, I'm pretty sure, it  
19 talks about -- and I -- you know, there's so much here.  
20 They talk about just deeding out lots 1 through 174  
21 (sic) --

22 THE COURT: Yeah.

23 MR. DECOULOS: -- 173.

24 What I intend to do, Judge, is to put this little --  
25 this booklet together, is to have - and we've worked on it,

1 and it's almost complete - all of the documents -- and the  
2 documents that are illegible, we've transcribed them to the  
3 best of our ability, and I want to give a copy to the  
4 Court, give a copy to my brother -- my sibling counsel  
5 (chuckles).

6 I learned that from Judge Bennett (chuckles).

7 So that we can have everything together, so that if  
8 there's any documents that are missing, I wait for the VCS  
9 to give me the documents, and we'll insert it in there, and  
10 we can all agree that these are all of the documents in  
11 this case, unless somebody else finds something else.

12 THE COURT: Well, that's the point. It keeps going on  
13 and on and on. And we're getting the dribs and drabs of  
14 filings.

15 I mean, the point is, at what point are we going to  
16 say that -- someone says, "Oh, I want more time to respond  
17 to what someone else filed," and if you're content to have  
18 this go on and on with additional filings, then I suppose  
19 that's all right with me.

20 MR. DECOULOS: Judge, I'm content for the ultimate  
21 truth. And I know you are. And I know everybody else in  
22 this room is. And the ultimate truth lies in all of those  
23 documents that are on record at the registry of probate and  
24 on record at the registry of deeds.

25 And that's what I would be content with. And if I

1 should find something else, I want to call it to your  
2 attention. And I expect to be treated fairly as I've  
3 always been treated fairly here.

4 So there's nothing here that's -- we're not going to  
5 have any testimony by the Indian chiefs of 1870, or by  
6 Richard Pease or his brother. We're not going to have  
7 that. It's all documented.

8 And we were very fortunate. For some reason or other  
9 that sectional plan was not there when we did the title  
10 examination during the procedural part of this case.

11 THE COURT: Well, I think what you're alluding to,  
12 Mr. Decoulos, is you're, you know, suggesting how you  
13 intend to proceed with the trial of this case, if we get to  
14 that stage.

15 MR. DECOULOS: Well --

16 THE COURT: My earlier order still stands: That we're  
17 having bifurcation. The first issue is going to be the  
18 matter of intent, and the second is where the routes would  
19 go, where the access points would be, if it's shown to the  
20 Court and the Court rules that yes, indeed, there was the  
21 intent to create these easements by necessity.

22 MR. DECOULOS: I called that to your attention, Judge,  
23 the last time we were here, and you said that we're going  
24 to do this with a pretrial discovery, or a pretrial  
25 memorandum --



1 THE COURT: Right.

2 MR. DECOULOS: -- and everybody's going to agree as to  
3 what the documents are.

4 THE COURT: Correct. Correct.

5 MR. DECOULOS: So that's going to resolve it right  
6 then and there.

7 THE COURT: All right. But we have the -- before we  
8 get there --

9 MR. DECOULOS: But I'm going to ahead of myself.

10 THE COURT: -- Mr. Decoulos, you know, you say that  
11 we've had this fork in the road, and all the procedural  
12 questions are gone.

13 We have procedural issues that are before me now. And  
14 that is whether VCS's motion is going to be allowed or  
15 denied. So if you want to add anything further to what  
16 you've already said or put in writing on the VCS motion,  
17 you may do so.

18 MR. DECOULOS: If I was to do anything, Judge, the  
19 only thing I would do for your benefit is to make a copy of  
20 the affidavit of James Decoulos, submitting it. But that's  
21 in the motion for summary judgment. You may have it there  
22 right before you.

23 THE COURT: You're talking about this affidavit that  
24 was bound as part of the summary judgment materials; is  
25 that right?

1 MR. DECOULOS: Yes.

2 THE COURT: I mean, well, let's make sure --

3 MR. DECOULOS: There's a table of contents there that  
4 reflects all of the documents that were attached to  
5 support -- that's it (indicating).

6 THE COURT: All right. Anyone else want to --

7 MR. DECOULOS: Judge, excuse me, one last? Do you  
8 mind if I mail you these plans in the...

9 I thought we had an extra set, but we don't. So I'm  
10 going to make a copy. Do you want me to reduce them? Or  
11 leave them at this size?

12 THE COURT: No, just -- well, you can make another set  
13 of copies at that size --

14 MR. DECOULOS: Fine.

15 THE COURT: Don't reduce them. It'll be hard enough  
16 to read some of this --

17 MR. DECOULOS: I'll wait till you act on your motion  
18 for the necessary parties, so that I don't have to kill  
19 more trees.

20 THE COURT: All right. Does anyone else want to be  
21 heard on this motion in opposition to VCS?

22 Mr. Hall.

23 MR. HALL: Thank you, Your Honor.

24 Your Honor, I see the motion of Vineyard Conservation  
25 Society to have basically three factors that one should

1 analyze. There are three essential issues. The first is  
2 the procedural issue.

3 Can they move under 12(b)(6)? 12(b) searches the  
4 pleadings. It does no more than that. They have not  
5 provided any evidence or further facts to be found in order  
6 to have this Court consider the matter to be one under Rule  
7 56, which the Court is free to do. They've simply asked  
8 that the matter be entertained under 12(b)(6).

9 The reporters to the Mass. Rules of Civil Procedure  
10 said quite clearly that it has to be made before responsive  
11 pleadings are done.

12 You can't raise a new defense, which this is, a new  
13 defense, by way of a 12(b)(6) motion. It can't be done.

14 They should have moved to amend their answer, to raise  
15 the motion, and then sought relief by way of Rule 56.  
16 Notwithstanding, the Court's free to consider it under Rule  
17 56.

18 From a procedural standpoint, I think that since they  
19 are asking the Court, under 12(b)(6), to search the  
20 pleadings, and this Court has discussed and the plaintiffs  
21 have said that they're going to be amending the pleadings -  
22 and we're expecting to get an amended pleading from the  
23 Hardings, and we clearly anticipate providing responsive  
24 pleadings to whatever amended plaintiffs pleadings come  
25 in - that it would be premature to decide this matter, at

1 any rate, because the pleadings really aren't yet complete  
2 enough for anyone to search the pleadings.

3 So we're sort of at a stage where the pleadings are  
4 where they were before the Appeals Court even reviewed this  
5 case, and after that point there were several other  
6 substantive decisions that this Court made with respect to  
7 those pleadings.

8 So in one sense, the VCS motion is premature, and it  
9 would be very easy for this Court to deny it, with leave to  
10 renew later on, until the pleadings were complete, and then  
11 search the pleadings to see if there really was an issue,  
12 as a matter of law.

13 And second --

14 THE COURT: But the point, though, Mr. Hall, is that,  
15 as I understand the VCS motion, as far as a matter of law,  
16 the most simple approach to the VCS motion is just that  
17 their argument that the question's now settled by the  
18 Appeals Court in its ruling, and thus you don't have to  
19 look at anything. That -- I've been having colloquy with  
20 counsel about, well, what did the summary judgment record  
21 contain, things of that nature. I think Ms. Roberts or  
22 Mr. Rappaport might say, "Well, frankly, you don't even  
23 have to go there." They might suggest that the Appeals  
24 Court has answered the question definitively, and it's  
25 really inappropriate for me to look at anything, because

1 you have a ruling from the Appeals Court on this.

2 MR. HALL: Well, Your Honor, if the Court is going to  
3 look at this as a Rule 56 motion for summary judgment, the  
4 Court can freely do so. There's abundant case law. And  
5 from a procedural standpoint, they chose to move under  
6 12(b)(6).

7 They could have moved under 56. They chose to move  
8 under 12(b)(6), which leaves the Court with the question:  
9 What pleadings am I searching?

10 You have to search the pleadings. And the pleadings  
11 talk about -- the pleadings are --

12 THE COURT: Well, why do I have to search the  
13 pleadings?

14 MR. HALL: Because that --

15 THE COURT: I mean, I understand one approach, but  
16 there seems to be a lack of acknowledgment of the nature of  
17 the argument raised by the moving parties here: That as a  
18 matter of law -- leave aside all factual issues, as a  
19 matter of law, the Appeals Court has given an answer on  
20 part of this case.

21 MR. HALL: That's my second issue, Your Honor.

22 THE COURT: Okay.

23 MR. HALL: The first issue is, did they move correctly  
24 for the relief that they're seeking? In our opinion they  
25 didn't. They should have moved under Rule 56 --

1 THE COURT: Mm-hmm?

2 MR. HALL: -- and in doing so, they would have had to  
3 comply with Rule 4 in a more complete manner. They chose  
4 to put in the filings that they did in the manner that they  
5 did.

6 I think that by way of that motion, they've locked  
7 themselves into that motion. You search the pleadings.  
8 The pleadings, as this Court knows, are in a sense  
9 inchoate, and remain so as a result of the decisions that  
10 have been made since the time of the last amended pleading,  
11 which I think was back in... well, the last amended  
12 complaint, I believe, was in 1998.

13 So we have 8 years of procedure that have changed  
14 things. There's been decisions made; substantive decisions  
15 have been made. Parties have dropped out. So there's a  
16 lot to look at.

17 And all these proceedings have helped us all to narrow  
18 the focus and to get to where we are today.

19 The second issue is the issue that they've presented,  
20 which is the substantive issue is, what is the substance of  
21 the Appeals Court decision? And what weight and  
22 precedential value does it have?

23 Your Honor, this is a -- as the Court noted directly,  
24 and the Court very keenly honed right in on it: That in a  
25 summary judgment motion, the judge does not make any

1 findings. The judge searches the record - merely searches  
2 the record - for findings, and draws inferences. And there  
3 being be conflicting inferences, and there being be  
4 conflicting interpretations about things that occurred.

5 And those conflicts can only be resolved by a trial.

6 But for purposes of summary judgment, the Court draws  
7 the inferences that are in the light most favorable to the  
8 party that's opposing the motion, so in this particular  
9 case it would be the plaintiffs and -- and Hall.

10 So -- and other parties that opposed.

11 THE COURT: Although there was a cross-motion...

12 MR. HALL: There were cross-motions. But I believe in  
13 the case, the way that the Court rendered his decision -  
14 Judge Green - that essentially he looked at the facts in  
15 the light most favorable to the plaintiffs inasmuch as he  
16 was finding against them.

17 So he was granting the motion of Vineyard Conservation  
18 and others that had moved for summary judgment to dismiss  
19 the case.

20 And that decision essentially came down to finding a  
21 predicate finding, which was that an easement by necessity,  
22 if it did exist, as of the time of the original set-off --  
23 and there were presumptions made, and made all through  
24 Judge Green's decision, where he made presumptions and he  
25 made suppositions, where he indicated that these

1 suppositions were -- and cited conflicting evidence and  
2 conflicting arguments.

3 But he realized that those suppositions didn't matter,  
4 because the way he was drawing his inferences - in the  
5 light supposedly most favorable to the plaintiffs - led him  
6 to a conclusion that didn't require that he actually rely  
7 on those interpretations.

8 So what he did was he said that an easement by  
9 necessity must, as a matter of law, go from the lots that  
10 are claiming the easement by necessity to a road that was  
11 in existence at the time that the lots were created.

12 The Appeals Court, in their review of that, basically  
13 said, "That's bunk; the necessity can change over time."

14 THE COURT: Was that -- was that dicta?

15 Was that dicta?

16 MR. HALL: Well, I would say that that finding is a  
17 predicate essential finding.

18 But I don't think we'd even need to get to the issue  
19 of dicta or anything like that, because you look at the  
20 nature of what the Appeals Court was looking at. The  
21 Appeals Court was reviewing a summary judgment record.

22 And there's case law out there, which I will be citing  
23 for Your Honor, that says essentially that when an Appeals  
24 Court look at a summary judgment record, that they are  
25 doing exactly what the lower court did: They're looking at



1 the record, and they're trying to discern the facts; they  
2 don't find any facts.

3 So any alleged fact-finding that takes place or sounds  
4 like it took place in the decision, is -- are facts that  
5 are found and are interpreted, and the inferences are drawn  
6 in the light most favorable to the plaintiffs.

7 So there's no fact-finding. The Appeals Court did not  
8 find any facts; anything that they said was a mere  
9 recitation of things that they saw from the record.

10 Now, that record - and there's case law - can be  
11 expanded after a remand to the trial court. It can be  
12 expanded in two ways: By way of new evidence that's  
13 presented in new motions for summary judgment on other  
14 issues; it can also be presented at a trial, which the  
15 Court knows and counsel all know: That is where you  
16 resolve the inferences that are in conflict and the  
17 interpretations that are in conflict.

18 And this case is rife with multiple interpretations  
19 and inferences that can be drawn from the record.

20 Now, if you look at the record, what was before the  
21 Court, and I...

22 Did the Court ever get a copy of the record appendix  
23 that was given to the Appeals Court?

24 THE COURT: I don't think we have any sort of bound  
25 copy, but the record is going to be found throughout all

1 these papers; is it not?

2 MR. HALL: Yes, it would, but I think for the Court's  
3 ease in looking at this - and I'll see if I can disassemble  
4 mine and make a copy for the Court - it would be very handy  
5 for the Court to have two nicely bound copies of the record  
6 on appeal, because it contains most of the substantive  
7 documents.

8 And all the questions that the Court has asked this  
9 morning as to what was particularly in the record... well,  
10 there are several things, Your Honor, that were not in the  
11 record; and it's clear, from reading both Judge Green's  
12 decision and the Appeals Court decision, that they could  
13 not have taken heed or discerned the facts that are from  
14 three very important key items that were not presented.

15 The first is the 1871 report of Mr. Pease. That was  
16 based on the 1866 -- and which was also based on the 1863  
17 statutes of the Commonwealth, which basically directed a  
18 commissioner be appointed to go and determine, find fully  
19 and finally and resolve the boundary lines of people that  
20 had claimed individual ownership of lots in Gay Head.

21 Gay Head originally was a plantation, when the  
22 Commonwealth became a state of the United States. And  
23 there's case law that the SJC has decided. The Coombs case  
24 I can cite, and another case called Danzell versus  
25 Webquish. They're quite old cases, but in both of those

1 cases, the courts have ruled that until 1871, the title of  
2 all lands in Gay Head was held by the Commonwealth.

3 And you have to look at the chronology of the events,  
4 Your Honor, and try to understand what we're looking at; in  
5 the 1860's is: We're looking at a situation where the  
6 slaves were being emancipated, and there were great calls  
7 to say, "Hey, we have all these individuals that are  
8 guardians of the state, the native people; and we need to  
9 make them full citizens; they're entitled to be full  
10 citizens; we need to make them full citizens."

11 So a process was undertaken in a variety of ways, and  
12 several statutes occurred that emancipated and basically  
13 made the various tribes citizens of the United States. And  
14 I believe it was in 1869 that the Gay Head Indians were  
15 made citizens, with the full benefit of and subject to the  
16 laws of the Commonwealth.

17 Prior to that, though, in 1866, there were recognition  
18 of -- there were people that went to study what had  
19 happened in Gay Head, and how the natives were doing. And  
20 there were questions about how things were being handled,  
21 and there were a variety of reports.

22 And these will all, I believe, either have been put  
23 into a record before or will be added to the record.

24 And what they found was there were two issues that  
25 needed to be resolved. One was that there are all these

1 people out there that are claiming individual lots of land.  
2 And everybody's living in peace and harmony, and it was  
3 sort of aboriginal law. And this ties into: What is the  
4 nature of Indian title?, which is also kind of an important  
5 issue that plays into the decision that this Court will  
6 have to make.

7 And the decisions of the Appeals Court and Judge Green  
8 is that the aboriginal law - and the Appeals Court I think  
9 agreed with this - is that the Commonwealth, by deciding  
10 that it wanted to determine who all the individual persons  
11 were that occupied and claimed certain separated parcels of  
12 land under the aboriginal law, that the Commonwealth was  
13 then going to grant the fee title under those lots to those  
14 individuals. So there has never been question that the fee  
15 title of this land, up until the time that -- was held in  
16 the Commonwealth.

17 So if you look at this period of time, from 1863 until  
18 1878, that 15-year period, there was sort of an elongated  
19 process of dividing up the entire town, first to those  
20 people that already were living on the land and tenanting  
21 certain portions of the land. But then they were also  
22 using certain other portions in common.

23 So you look at the entirety of the record, and you see  
24 that this 1871 report that followed the petition to  
25 partition under the 1870 statute; and you see that because

1 neither the Appeals Court nor Judge Green had that 1871  
2 report, they were making suppositions and inferences and  
3 drawing inferences about the record that they were looking  
4 at and making and deciding issues that -- that aren't  
5 necessarily so.

6 So they're drawing inferences from a record that they  
7 were looking at at the time. And it was only now that  
8 we've been asked to look at this issue anew by way of this  
9 new defense being raised by Vineyard Conservation service,  
10 essentially for the first time here, that lots 174 to 189  
11 are without the unity of title.

12 So the 1866 statute essentially said we're said we're  
13 going to fully and finally determine the bounds of all  
14 these lots that are going to be owned by individuals.

15 And they appointed a commissioner. And in 1869, the  
16 senate sent a committee down to take a look at what was  
17 going on down in the Vineyard in light of the fact that  
18 these tribal people were going to be confirmed as citizens  
19 now, and they realized that they needed to take of a number  
20 of issues, first being the issue of title to the lands and  
21 establishment of a town; and the second was to look at  
22 issues of descent that had been noted in prior reports by  
23 various other committees.

24 So the 1869 committee, they came down to the island,  
25 and they noted that Mr. Pease, as commissioner under the

1 1866 statute, was "laboring hard and had come a long way"  
2 toward resolving all the questions that needed to be  
3 determined under that 1866 statute.

4 In fact, ironically, the prior commissioner, who had  
5 gotten sick and died, who'd been appointed under the 1863  
6 statute, some of his sectional plans and work were  
7 submitted in the record for the summary judgment.

8 And I think that's where additional confusion came  
9 about, is that the 1863 work, which was a little premature,  
10 essentially was a report of Mr. Marston to the governor,  
11 saying, you know: This is what I've got so far.

12 Mr. Pease was appointed under a new resolve, that  
13 essentially said: Take this work and finish it.

14 So in 1869, they recognized that Mr. Pease, as  
15 commissioner for the Commonwealth, was doing this work.

16 And they designed a new statute that became Chapter  
17 213 of the Acts of 1870. That case essentially established  
18 the Town of Gay Head and set up this procedure for  
19 petitioning -- a petition to partition to the probate  
20 court. And in that section it allowed various tribal  
21 members -- it basically gave -- the statute gave all the  
22 common lands to the town.

23 Now, remember, at that point in time the individual  
24 owners had not yet been determined. So there was no  
25 determination as to who owned all these individual lots.

1           So at the same time as giving all the common lands to  
2 the Town, they also said: Here's a procedure where you can  
3 break up the town; you can petition to partition the  
4 probate court, and they're going to appoint a commissioner  
5 that's going to resolve the issues of partitioning the  
6 common lands; at the same time as you are partitioning the  
7 common lands, you are to also determine the individual  
8 owners of the lots that are sitting on these lands, and run  
9 out those properties and bound them, and give them good  
10 title, essentially.

11           So you look at the procedure. The 1870 statute comes  
12 into effect. In September there's a remonstrance to -- a  
13 petition that's actually filed by some tribal members to  
14 partition the town.

15           In December the Peases are appointed commissioners.  
16 Now, they haven't even finished their work under the 1866  
17 statute. They've been appointed the commissioners to  
18 partition the town and to figure out who owns all these  
19 individual lots.

20           In May 1871, Mr. Pease files this report. That's the  
21 key report. That's never been put into evidence.

22           THE COURT: Let me just say, you obviously can discuss  
23 this at great length, and you have been. And it's helpful  
24 in some respects, but we have to keep this case in  
25 perspective, Mr. Hall: What's before the Court right now.

1 MR. HALL: Yes.

2 THE COURT: And the issue is, frankly, I think, a much  
3 more narrow one, and that is: Is the motion to be allowed  
4 or denied - of the Vineyard Conservation Society - without  
5 trying the case today on every aspect of the history.

6 Was the question settled or not settled by the Appeals  
7 Court? And you're suggesting it was not settled.

8 MR. HALL: It was not settled, Your Honor, because  
9 they were looking at simply a summary judgment record, and  
10 they could not resolve these conflicting inferences.

11 The case law is clear; one has to look. There are a  
12 couple of Massachusetts cases that suggest it. One called  
13 Riley that actually says it. And then you look to the  
14 federal law. Under the Rawlins (phonetic at 3:38:32 PM;  
15 Rollins 321 Mass 586 or Rollins 354 Mass 630 seem wrong?)  
16 case, you look to federal law to resolve any questions --

17 THE COURT: What about the claim that there's the line  
18 of authority dealing with the law of the case doctrine?

19 MR. HALL: Well, they never argued that in their  
20 papers. I didn't see anything about law of the case. They  
21 argued Adamowicz. And Adamowicz was based on a trial.

22 The cases that they cited, Your Honor, that they're  
23 relying on -- in fact, the case that was cited by Ms. Green  
24 (sic at 3:39:03 PM, meaning Roberts) at 63 Mass. Appeals  
25 Court 608, had to do with subsequent to a trial.



1           These are all cases that have to do with coming back  
2 after there's been a trial. We have never had a trial in  
3 this case, Your Honor. These inferences, based on  
4 undisputed facts of an inchoate record, had never been  
5 resolved.

6           And Judge Green, if you look at Judge Green's  
7 decision, you'll see, for instance, the Court noted  
8 paragraph 12, the commissioner's 1878 report.

9           Well, you can see, he never really talked about the  
10 1871 report because he didn't really have it in front of  
11 him.

12           He refers to it, but he never had the 1871 report in  
13 front of him, so he didn't have the benefit of seeing what  
14 was said and how things were handled, that there was a  
15 finality to the determination of who owned all these  
16 individual lots. So.

17           THE COURT: All right. Anything else you want to add,  
18 at this point, Mr. Hall? Because I'm going to turn to the  
19 others, and then, as my usual practice is, give a chance  
20 for rebuttal. So --

21           MR. HALL: Well, we talked about the --

22           THE COURT: In fact, can you hold one second please.

23           MR. HALL: Sure.

24 (Off-the-record discussion to 3:40:29 PM.)

25           THE COURT: All right. Mr. Hall.

1 MR. HALL: The other issue is, Your Honor, that the  
2 two other factors that weren't in the record were that  
3 there weren't the deeds -- the Dukes County registry of  
4 deeds book and pages that showed exactly how lots 174 to  
5 189 were assigned or allotted to the various people that  
6 they were.

7 And the Court has to remember that but for the  
8 petition to partition, lots 174 and above would have  
9 remained common lands, because after 1871, that final  
10 report, all questions of title were resolved on those  
11 individual lots. These people were now full citizens of  
12 Massachusetts, and any attempt for them to try to claim or  
13 grab land between 1871 and 1878 would have had to have been  
14 by way of some sort of record title or adverse possession.

15 They couldn't do it in seven years.

16 So they're full citizens at that point, and all  
17 questions of aboriginal law at that point go away.

18 And I don't think that James v. Watt says that that  
19 isn't the case.

20 So the deeds -- they were missing the deeds; there  
21 were no deeds for lots one-seventy (time is 3:41:33 PM,  
22 might be heard as 171) -- 1 to 173, and there were no deeds  
23 for 175 (time is 3:41:41 PM) to 189.

24 Interestingly enough, Your Honor, lot 188 and 89 were  
25 not run out, even though in the preamble to the report in

1 1878, which was in the record, they that they ran it out  
2 and bounded it.

3 But they didn't run it out and bound it.

4 THE COURT: And again, "ran it out" --

5 MR. HALL: They assigned it.

6 THE COURT: Well, I know what bounding is. What is  
7 "running out"?

8 MR. HALL: Well, my understanding is, Your Honor, that  
9 they had a chain that had links in it, and they would  
10 literally take the chain and run it down the hill.

11 THE COURT: That's one explanation of it.

12 MR. HALL: But that use of that language is not  
13 consistent between 174 and 189. 189 -- 188 and 89 were  
14 actually to Zaccheus Cooper, and it's acknowledged that  
15 only portions of those two lots were actually part of the  
16 land that he was supposed to get before, but he didn't  
17 really get.

18 And another lot was assigned to the heirs of  
19 so-and-so, not -- but run out for the heirs of somebody.

20 And it's interesting, because here were these  
21 commissioners, under new authority of the probate court,  
22 who had already filed a final report as to severalty.

23 So: These issues were never before the Appeals Court.  
24 They didn't look at them. They couldn't find facts. They  
25 couldn't make any -- they couldn't draw any inferences from

1       them. And the trial court, back here, is where all these  
2       inferences that can be drawn have to be resolved.

3               There are many inferences that can be drawn.

4               My discussion of all the facts that are involved in  
5       these various reports and the time line, it's critical to  
6       understand that there are many inferences that can be  
7       drawn, not just the ones that Judge Green drew in his  
8       decision.

9               And he pointed out that even -- in footnote 19 and 20,  
10       he pointed out that there were suggestions as to separate  
11       ownerships, and he talks about: A most likely  
12       interpretation of the historical records.

13               Well, he's making interpretations. There are other  
14       interpretations that could be made. And --

15               THE COURT: All right. Well, Mr. Hall, you've asked  
16       for additional time post-hearing to submit something in  
17       writing. I've given you probably twice as much time as you  
18       would have ever had up in the Appeals Court to argue. And  
19       at this point I'm going to turn to the others. I'll give  
20       you an opportunity for a quick response afterwards. And  
21       I'm sure you'll be putting some comments in writing  
22       post-hearing.

23               All right. Ms. Morse.

24               MS. MORSE: Your Honor, I don't have a horse in this  
25       race. My lots are considerably higher.

1 THE COURT: Fine. Then I think that's enough.

2 Anything else want to be heard on opposition?

3 Then if not, anything from the Vineyard Conservation  
4 Society or the Town?

5 MS. ROBERTS: Just, the only thing I'd add here, Your  
6 Honor, is that we've taken the position from the get-go -  
7 certainly I have on behalf of VCS, the Vineyard  
8 Conservation Society - that it's not fair for the  
9 plaintiffs to name VCS as a defendant and draw a line on a  
10 map that goes over VCS's property to get them to a road,  
11 and not bring in other people in the area over whose  
12 property you could also draw a line on a map and get to the  
13 road.

14 So it's always been, from our point of view, sort of a  
15 fundamental fairness: Why should we be the ones to bear  
16 the burden of litigation and ultimately of an adjudication  
17 of a road over our property? Why aren't other people, who  
18 have properties around here, in that hunt as well?

19 THE COURT: How is that relevant to your motion?

20 MS. ROBERTS: Because the one thing that I think we  
21 can say as of today is that we now have a rationale for  
22 dropping out lots 1 through 188 from this case. We've  
23 taken the position, consistently, from the beginning, that  
24 everybody should be in.

25 But now, based on the Appeals Court decision, it

1 seems - and we've obviously argued - that lots 1 through  
2 188 should no longer be in this case.

3 That being said, should Your Honor choose to deny the  
4 motion, I would just like it to be on the record that that  
5 does impact our view about who necessary parties are.

6 If in fact the Appeals Court didn't decide lots 1  
7 through 188 should be gone from this, then we would -  
8 consistently with the position that we've taken for the  
9 last 8 years or so - say: Then fine, then everybody needs  
10 to be in. I just wanted to make that point to Your Honor.

11 THE COURT: All right. Mr. Decoulos? Anything  
12 further?

13 MR. DECOULOS: I have nothing else to add.

14 THE COURT: All right. But let me -- I failed to ask  
15 you a question, though, when you were on your feet before.

16 Do you have any comment to Mr. Rappaport's argument  
17 concerning the relevance of the application for further  
18 appellate review and the position taken by the plaintiffs  
19 before the SJC?

20 MR. DECOULOS: No, I...

21 I haven't read it, so I can't give you an exact, any  
22 comments. But I will read it, and I'll report back to you,  
23 Judge. In fairness to my client --

24 This is something that they just raised. I mean,  
25 there's a motion to dismiss and now we're getting into

1 appellate review and -- I don't know. Are they bound by an  
2 application for appellate review? Are those admissions on  
3 the part of...

4 Is he trying to say that your application for  
5 appellate review is an admission that lots 174 through 189  
6 are no longer in this case? I haven't read it, so I don't  
7 know what they said.

8 THE COURT: All right.

9 MR. DECOULOS: But will you give me -- I'll take a  
10 look at it, and -- give me 5 -- I can do it, you know,  
11 within 5 or 6 days.

12 THE COURT: All right. Well, I'm not sure if...

13 MR. DECOULOS: Or maybe we can take it up on our  
14 pretrial memorandum. That might be more appropriate.

15 THE COURT: Yeah, I think -- you know, I want to make  
16 sure that we limit to what's the most critical filings  
17 after this hearing, and I don't think that that's going to  
18 be necessary for you to file, or anything in writing on  
19 this particular question.

20 MR. DECOULOS: Thank you, Judge.

21 THE COURT: All right. Mr. Hall?

22 MR. HALL: Three very brief points, Your Honor.

23 First, any representation that the Appeals Court said  
24 that lots 1 through 189 could not benefit by easements by  
25 necessity - or other easements - is simply misstating what

1 the Appeals Court said.

2 They said -- the way I read it is that they could not  
3 be "burdened" by an easement by necessity. That doesn't  
4 mean they couldn't "benefit" from one.

5 So under either -- under that reading of it, a close  
6 reading of their decision, that leaves open the question of  
7 if these lots do benefit from an easement by necessity, or  
8 other type of easement -- there being another type of  
9 easement that has not yet been argued in this case, that  
10 I'm sure we'll be hearing from; it's in the Restatement  
11 (Third), section 2.12, Servitudes Based on Prior Use --  
12 which would clearly apply to all these lots which were  
13 tenanted and occupied by people that eventually became lots  
14 1 through 173.

15 That -- those issues will need to be adjudicated by  
16 the Court. But again, they're not yet in the pleadings,  
17 and so we need to amend the pleadings to clarify that, I  
18 think, as needed.

19 The second issue is FAR.

20 There is an SJC case that says that you cannot put any  
21 weight whatsoever on the fact that FAR was denied. They  
22 denied it. All the arguments that went into it have no  
23 substance whatsoever. There's no -- there potentially  
24 could be some judicial estoppel, but it's not a  
25 fact-finding type of argument.



1           So just because one poses an argument on FAR, the SJC  
2 has ruled that their denial of FAR is to say nothing about  
3 the merits of the case whatsoever. It goes back down to  
4 the Appeals Court.

5           And the last thing I'd like to say, Your Honor, is:  
6 Ms. Roberts made a comment that they feel that they are  
7 being unduly and unfairly burdened by having these roads  
8 run over their properties.

9           Well, if that's the case, why are they trying to get  
10 lots 1 through 189 dismissed out of the case when possibly  
11 the roads could go over those lots?

12           So there's an incongruity there, that I don't  
13 understand.

14           MR. DECOULOS: Just one comment about what he just  
15 said.

16           The sectional plans show roadways going through common  
17 land, through land that was conveyed in 1870. They show  
18 roadways there. And what I'm going to have my client do is  
19 enhance these plans so that they can be looked at and make  
20 some sense out of them.

21           And I'm going to have him place them in an index  
22 something similar to the assessor's maps. So we'll have an  
23 assessor's map, literally, of 1870, showing houses; they  
24 show houses; they show points of beginning for the  
25 surveyors to work from.

1           So that's a very valuable set of plans, Judge, and I  
2           want to put it in a form that's going to make -- almost  
3           makes -- well, not as good as a registration plan, but at  
4           least so that you've got something you can hang your hat on  
5           if you decide which way you're going to decide on this.

6           THE COURT: All right. Well, that's a submission for  
7           later in these proceedings.

8           MR. DECOULOS: I understand. I just want to make the  
9           Court aware that there were roadways that go through common  
10          land and the severalty land. Thank you.

11          PLAINTIFF'S MOTION TO DISMISS CERTAIN PARTIES (again)

12          THE COURT: All right. Mr. Decoulos, while you're on  
13          your feet, I'm going to turn now to your motion, which is  
14          the...

15          MR. DECOULOS: Necessary parties?

16          THE COURT: That's correct. Motion, actually, "to  
17          dismiss certain parties" is the way it's captioned.

18          But I also want to go back to the point in time that  
19          Judge Green issued his decision in 2001 - because I take it  
20          that his decision was based on what the pleadings were at  
21          that time - and identify the plaintiffs and the defendants.

22          And now you've, you know, said certain ones are  
23          necessary. Others are not. And we'll go through those.

24          But I also find in Judge Green's decision here that  
25          certain people are identified and are not addressed in your

1 motion one way or the other.

2 And let me go through them with you. Beginning with  
3 South Shore Beach Incorporated.

4 MR. DECOULOS: They're not -- they don't own the land  
5 anymore, Your Honor.

6 THE COURT: Well, what happened to them as a party? I  
7 mean, the point is, they were a party, so do you put them  
8 on your list of parties to be dismissed?

9 MR. DECOULOS: So -- I'll look that up, Judge.

10 MS. MORSE: Your Honor, I believe Vineyard  
11 Conservation Society bought out that property.

12 THE COURT: Heh. And this is going to be a little bit  
13 more informal for all of you, because, you know, we've got  
14 to have some dialogue here, and -- because otherwise the  
15 rigidity of oral argument on this motion is going to be  
16 become very awkward.

17 All right. South Shore Beach, Inc., Ms. Roberts, is  
18 it your understanding that your client now owns the land  
19 that that entity had title to, and was -- that's the reason  
20 why they were named as a defendant?

21 MS. ROBERTS: It is, Your Honor. And I actually gave  
22 Mr. Decoulos, a month or so ago, a list of all of my  
23 comments on his motion, and his various parties, because  
24 the last version I saw, some of the lot numbers were wrong  
25 and there were some other issues.

1 I didn't bring my handwritten notes of that with me  
2 today, but --

3 THE COURT: All right. But then --

4 MS. ROBERTS: -- VCS does now own that particular  
5 property.

6 THE COURT: But -- all right, just out of my  
7 curiosity, when you're listed - your client is listed -  
8 both as necessary party defendants and parties to be  
9 dismissed, I think, are you -- do you have any land he says  
10 to be dismissed as to you?

11 MS. ROBERTS: (No audible response at 2:23:08 PM.)

12 THE COURT: And the answer is no.

13 So I guess then the South Shore Beach, Inc. lot would  
14 be one of the ones identified under "necessary party  
15 defendants" with the name of Vineyard Conservation Society.

16 Does that sound right?

17 MS. ROBERTS: It should have been, but I don't know  
18 whether it was.

19 THE COURT: All right. So we can delete South Shore  
20 Beach, Inc.

21 Hope Horgan.

22 MR. DECOULOS: Pardon me?

23 THE COURT: Hope E. Horgan, who is listed as a  
24 defendant.

25 MR. DECOULOS: I don't know anything about that. The

1 only thing I've got going on --

2 THE COURT: Helen S. James.

3 MR. DECOULOS: I'll check these out for you. Horigan?

4 THE COURT: Donald Taylor.

5 MR. DECOULOS: Wait a minute. Donald -- I didn't get  
6 the one before Donald Taylor.

7 THE COURT: Helen S. James.

8 MR. DECOULOS: Can I have the lot numbers, Judge?

9 It'd make my j-- --

10 THE COURT: No.

11 MR. DECOULOS: No?

12 THE COURT: Because I don't have them.

13 MR. DECOULOS: Okay. Helen S. --

14 THE COURT: I mean, this is -- look. I made a  
15 photocopy of the first page of Judge Green's decision. I  
16 crossed out those names that you address one way or the  
17 other. There are left a lot of parties who are being  
18 ignored. So if we're going to start to all of a sudden say  
19 that I'm allowing your motion as far as dropping certain  
20 defendants, I'm assuming these people are still in the case  
21 if you haven't moved that they be deleted.

22 MR. DECOULOS: I'd like a copy of that, Judge.

23 (Mirth.)

24 THE COURT: This is my work product, Mr. Decoulos.

25 (Mirth.)

1 MR. DECOULOS: No, but that's -- this isn't discovery.  
2 This is turning-back (phonetic at 3:55:23 PM, unclear;  
3 laughter) -- we've got a dialogue going here.

4 THE COURT: Take good notes, and I'll give you the  
5 names.

6 MR. DECOULOS: Well, so far I've got South Shore, and  
7 the second one was...

8 THE COURT: Hope E. Horgan, H-O-R-G-A-N.

9 MR. DECOULOS: And then I've got Helen S...

10 THE COURT: James.

11 MR. DECOULOS: Janes?

12 THE COURT: James, J-A-M-E-S.

13 MR. DECOULOS: Yep.

14 THE COURT: Next, Donald Taylor.

15 MR. DECOULOS: Donald, pardon me?

16 THE COURT: Taylor.

17 MR. DECOULOS: Taylor.

18 THE COURT: The heirs of Wallace E. Francis.

19 Estate of Edwin D. Vanderhoop. And I understand  
20 there's a lot of Vanderhoops, but they're all Leonard  
21 Vanderhoop that's on your list. So this is Edwin D.  
22 Vanderhoop.

23 Patrick J. Evans. There's a Beverly Evans and a  
24 Lawrence Evans on your list but not Patrick J.

25 Julie B. Hoyle, H-O-Y-L-E.

1           And if someone sees that I'm putting someone on this  
2 list that really is covered by Mr. Decoulos's motion,  
3 please let me know.

4           The next one is Carmella Stephens, trustee of Deer  
5 Meadow Realty Trust.

6           MR. DECOULOS: Carmella Stephens?

7           THE COURT: Yes.

8           MR. DECOULOS: What's the trust?

9           THE COURT: Deer Meadow Realty Trust.

10          MR. DECOULOS: Thank you.

11          THE COURT: Stella Winifred Hopkins, AKA Winifred S.  
12 Hopkins.

13          MR. DECOULOS: I didn't get the name of the first name  
14 of the second party.

15          THE COURT: It's the same person. It's Hopkins. It's  
16 Stella Winifred Hopkins, AKA Winifred S. Hopkins.

17          MR. DECOULOS: Thank you.

18          THE COURT: Heirs of Esther Howwasswee.

19          Heidi B. Stutz.

20          And I know there are a couple of other people with --  
21 I'm sorry. Skip that one. It's on the list.

22          The estate of William Vanderhoop.

23          Wilma Greenberg.

24          Selma and William Greenberg are accounted for, but not  
25 Wilma.

1 Rolph, R-O-L-P-H, Lumley.

2 MR. DECOULOS: Lumley?

3 THE COURT: Lumley, L-U-M-L-E-Y.

4 And lastly, Aurilla Fabio.

5 MR. DECOULOS: Aurilla?

6 THE COURT: Fabio, F-A-B-I-O.

7 MR. DECOULOS: Thank you, Judge.

8 THE COURT: And I'm not making any comments whether  
9 they should be in or out. I'm just saying you need to  
10 account for them, which your motion, you know, go-...

11 I'm assuming, again, with the recitation of when the  
12 complaint was filed, and an amended complaint, that the  
13 amended complaint and the identification of parties is what  
14 was the basis for Judge Green to list the parties in his  
15 decision.

16 Now, let me begin by just asking, is there any  
17 opposition to Mr. Decoulos's motion, keeping in mind that  
18 VCS would like to have all the owners of lots be dismissed  
19 from 1 to 188 or 189?

20 MS. ROBERTS: We just want it clear on the record,  
21 which I'm sure it is, that we reserve the right to argue  
22 that there are necessary parties absent. But with that --  
23 we've been saying that for 7 or 8 years now, so.

24 THE COURT: All right.

25 MR. RAPPAPORT: Your Honor?



1 THE COURT: Yes, Mr. Rappaport.

2 MR. RAPPAPORT: I think the motion is fundamentally  
3 untimely.

4 MR. DECOULOS: I cannot hear you.

5 MR. RAPPAPORT: I'm sorry.

6 MR. DECOULOS: I'm sorry, Judge.

7 MR. RAPPAPORT: I say I think the motion is  
8 fundamentally untimely. It's being brought by a party who  
9 is one of the parties who is sought to be dismissed under  
10 the issue of whether or not the Appeals Court knocked out 1  
11 through 188 or 189.

12 That's number one.

13 And if the Court says yes, they should not be out,  
14 then this has been a motion brought by a party who's --  
15 who's gone from the case.

16 Second, it's -- and we're all in a funny position  
17 here, 'cause some of the parties seeking to be knocked out  
18 are sort of the lots of the towns.

19 So I'm not arguing (chuckles) -- I'll be glad if the  
20 Town will be gone from the whole case.

21 But it seems like we're doing this backwards. I  
22 understand the desire to streamline. But it seems like we  
23 first -- we've bifurcated the case. Is there an easement  
24 by necessity at all? If there is, where's it located?

25 And by knocking out any parties now, they're not

1 around. If it's determined that there is an easement by  
2 necessity to be located on the ground, they're not going to  
3 be around to be subject to where an easement may be  
4 located.

5 THE COURT: Well, but the plaintiffs are giving up  
6 their claim to an easement by necessity over these lots.  
7 Are you suggesting that they should have an easement by  
8 necessity over some of these lots that they seek to  
9 dismiss?

10 MR. RAPPAPORT: No, I'm suggesting they should have...

11 I think they shouldn't be...

12 I think the Court's going to find there aren't going  
13 to be easements by necessity at all.

14 But let's put that aside for a moment.

15 These are where the plaintiffs - if they prevail and  
16 meet their burden that there should be easements by  
17 necessity - would like to see these easements located.

18 But it seems like it's going to be up to all the  
19 remaining parties to say, "We don't think they should be  
20 located there; we think, in fact, they should go north. We  
21 think" -- I mean, and then the Appeals Court has left that  
22 out (phonetic at 4:02:10 PM, could be heard as "open").

23 "We think they should go right out through the tribal  
24 land."

25 And it's left open. If that's what can be shown, that

1 this Court can then deal with the tribal issue at that  
2 time.

3 So we're subtracting before we've even determined  
4 whether phase one - namely, should there be an easement by  
5 necessity at all - we're eliminating.

6 Again, when it comes to the Town, no problem with any  
7 of the town lots being let out (chuckles).

8 But I don't really think that the process is served by  
9 this exercise.

10 THE COURT: Well, the point is that in prior hearings  
11 we discussed this, had some oral argument on it. And it  
12 really came with the motion to bifurcate.

13 I did allow the motion, but Mr. Decoulos, I believe,  
14 was the one who suggested that he could assist by starting  
15 to narrow the scope of who would be still in the case,  
16 since it does not preclude a party, as Ms. Roberts had  
17 suggested, from later on, bringing a further motion to  
18 bring people in on the question of the location of the  
19 easement.

20 If the Court finds that there is no easement at all,  
21 then the whole thing goes away for everybody.

22 If I find there is an easement, then it really becomes  
23 a very live issue whether it's the routes suggested by  
24 Mr. Decoulos or other parties saying that no, we think it  
25 should go in a different area, and thus we need to bring in

1 some additional parties.

2 But it did seem to be worthwhile to perhaps simplify  
3 this matter by not having a lot of extra, extraneous  
4 parties that no one had any desire whatsoever to affect.

5 Let's take the Seemans as an example. I mean, why  
6 keep them in the case when it's all agreed that there's not  
7 going to be any route that goes over their property?

8 MR. RAPPAPORT: Well, I was in agreement of letting  
9 the Seemans out of the case, because frankly, they were 189  
10 and below. So that is a, heh, consistent position.

11 When you get above 189, I really -- I think we're all  
12 struggling here: How do we simplify... how do we simplify  
13 and streamline the case.

14 And I don't want to keep anybody in and force them to  
15 carry the burden, but it seems like the same people are the  
16 ones who choose to show up time after time. No one else  
17 does. And I guess I question whether or not this is an  
18 exercise that we're all going to regret later on.

19 MR. DECOULOS: Judge, can I say something?

20 THE COURT: Yes.

21 MR. DECOULOS: He may be right. The sectional plans  
22 show roadways and houses that we weren't aware of when I  
23 filed this motion.

24 And as I told you, I want to enhance that plan and I  
25 want to see where those roadways are going, and they might

1 be going right through the Town of Aquinnah property for  
2 all I know, but that's an 1870 plan, and I don't want to  
3 give up any rights that we might have had in 1870.

4 THE COURT: Are you withdrawing your motion?

5 MR. DECOULOS: No.

6 (Mirth.)

7 MR. DECOULOS: I want you to wait. Please.

8 THE COURT: Oh, you would like me to wait?

9 (Mirth.)

10 MR. DECOULOS: Yes.

11 THE COURT: That I probably can accommodate you on.

12 (Mirth.)

13 MR. DECOULOS: Thank you.

14 THE COURT: How long would you like me to wait,  
15 Mr. Decoulos?

16 MR. DECOULOS: Well, I'm going to ask my client how  
17 fast we can get an enhanced plan to show a road -- the road  
18 network in 1870 as it relates to the set-off plans of 1871  
19 and the set-off plans of 1878.

20 THE COURT: All right. I will defer action on this  
21 until I receive something in writing from you,  
22 Mr. Decoulos, with service on the other parties, indicating  
23 what your intent is on this.

24 And clearly, if you're going to be submitting new  
25 information, I would give other parties an opportunity to

1 be heard on that, either on paper or, you know, in oral  
2 argument, depending upon what it is you want to submit.

3 I would also say to the other parties who are here  
4 that it would certainly -- it's not required, but it would  
5 certainly be helpful if they could meet to try to identify  
6 whether there's any sort of consensus as to whether there  
7 seems to be some other area that might be implicated in  
8 this exercise, or not.

9 But I do stand by the earlier ruling on the motion  
10 that we are going to first decide the question of whether,  
11 as a matter of law, the easements exist for the benefit of  
12 certain lots at all.

13 And then we can decide, based on your evidence, as far  
14 as whatever that evidence may be, as to where that area  
15 should be, and to see whether the existing parties are in  
16 the case.

17 And so I will defer on this last motion.

18 MOTION OF VINEYARD CONSERVATION SOCIETY TO DISMISS (again)

19 THE COURT: On the matter of the VCS motion, I want to  
20 go back to that as far as what additional filings the  
21 parties may make on this.

22 Ms. Roberts, you said that you would like to -- if I'm  
23 correct; and I don't want to suggest for you, but I think  
24 you suggested that you would like to identify for the Court  
25 what pertinent parts of the summary judgment record were

1 before the Court when Judge Green issued his decision. Is  
2 that correct?

3 MS. ROBERTS: Yes, Your Honor. Let me just clear  
4 something up here.

5 Maybe we should put this all in abeyance, leave  
6 everybody in who's in, have an adjudication whether an  
7 easement was intended or not, and if you find that one was  
8 not intended, then that will end this.

9 My concern is that if you find that an easement was  
10 intended, and at that point there are arguments -- and  
11 we've let out a bunch of people now; and after you  
12 adjudicate that, you're hearing from me and Mr. Rappaport  
13 that, "Well, it isn't fair to run this over our property;  
14 you should bring in this party and this party and this  
15 party," they're going to rightly be saying, "Well, hey, we  
16 didn't have the opportunity to be parties to the  
17 adjudication of whether an easement was intended or not, so  
18 we should be allowed to re- -- essentially relitigate that  
19 before we get to the particular road."

20 So --

21 THE COURT: I think that was Mr. Hall's position.

22 MS. ROBERTS: It was Mr. Hall -- and I was going to  
23 say, it's one of the few times and Mr. Hall and I actually  
24 agree with each other.

25 And as this has played out, I've become --

1 MR. HALL: This is what I've argued in opposition to  
2 the bifurcation all along, was that --

3 MS. ROBERTS: Well, it's --

4 MR. HALL: -- why don't we determine who the parties  
5 are first, figure out where the roads could possibly go,  
6 determine who the parties are, and then --

7 MS. ROBERTS: Well, that's not what I'm suggesting.  
8 What I'm suggesting is, let's figure out whether an  
9 easement was intended or not. And once we get over the  
10 intent issue -- if there was no intent, we can all go home.  
11 And if you find that there is an intent, then we get into,  
12 where is it going to be.

13 THE COURT: But aren't you just saying that if you --  
14 if the Court determines there was an intent, then you're  
15 going to find potential routes, and thus you may need to  
16 bring people in who want to argue whether there was intent  
17 or not.

18 MS. ROBERTS: What I'm saying is that if we let people  
19 out now --

20 THE COURT: Mm-hmm?

21 MS. ROBERTS: -- and then the Court finds that there  
22 was an intent for an easement and we then go to the issue  
23 of where the routes are, Mr. Rappaport and I may well be  
24 arguing that people who are let out today should be back  
25 in, because the route should go over their property.



1           And they will then be saying, "Hey, but it wasn't fair  
2 to us because we didn't get to be part of the adjudication  
3 of whether an easement was intended or not."

4           So maybe the thing to do here is leave everybody in,  
5 adjudicate that issue of intent. If there was no intent,  
6 then we all go home. And if there is intent, then we can  
7 all start fighting over who should be in and who should be  
8 out based on both where the plaintiffs say the route should  
9 be and what the defendants say the alternate route should  
10 be -- which is also the long way of saying maybe we should  
11 put both my motion and Mr. Decoulos's motion on hold until  
12 that issue's been resolved, the issue of the intent.

13           THE COURT: Well, on May 20th of next year is the  
14 tenth anniversary of this case, and I would certainly hope  
15 that the parties can get together and come up with a  
16 uniform roadmap as far as how you want to proceed with this  
17 case in this court, because I'm constantly getting these  
18 alternative ideas of procedure, and then it keeps evolving  
19 as we talk about it, that I see shifting positions on this.

20           I'm going to give you an opportunity after this  
21 hearing to see if you can come up with a consensus on how  
22 you want to proceed. You have articulated one approach,  
23 and I'm sure some other parties have a different idea, but  
24 at least to talk about it to see if you can come up with an  
25 idea.

1           But failing an agreement, then, you know, I'm going to  
2 deal with the matters that are before me, which, obviously,  
3 are these motions that are here today.

4           But keep in mind that whoever's going to be the moving  
5 party on this question of intent, so to speak, can get  
6 going and file papers. I mean, we haven't had any filing  
7 yet as far as who's the moving party going to be on this  
8 bifurcated question.

9           But in between we've had all the other discussions  
10 about parties.

11           I will say one thing: That if I do go forward on the  
12 VCS motion and the Kitras motion on the question of  
13 parties, I'm not foreclosing the idea of bringing other  
14 parties in if that's necessary.

15           I would look quite askance though at a request to  
16 bring someone in in the future who's being dismissed by  
17 these motions. I guess the point is, speak up now or  
18 forever hold your peace. As far as if you think that  
19 there's a reason why you wouldn't want someone dismissed  
20 because of a potential implication, you know, now's the  
21 time to say, "Okay, we agree to twelve of them but we  
22 object to these three because it's a possibility that they  
23 might be right in the path of a route," whatever it may be.

24           So let me go back to what I said before about filing.

25           If you want to file some...

1           Unless I hear that you've all agreed that the matter  
2 should be stayed for a period of time - if I don't have  
3 that by the end of the week, Friday, an agreement on  
4 staying the matter - then I would say that, Ms. Roberts,  
5 you can submit to the Court an identification or copies  
6 of -- I hate to say copies of the record, but I think  
7 Mr. Hall's point was well taken that he has altogether  
8 there the record, and --

9           MS. ROBERTS: We all do, Judge.

10           We all have the appendix. So what I can do is make a  
11 copy of the appendix for you, and give you designations of  
12 where it's found in the appendix.

13           THE COURT: All right. All right. And you're  
14 comfortable that the record appendix for the Appeals Court  
15 is as far as I would have to look, as opposed to going back  
16 to any other summary judgment materials?

17           MS. ROBERTS: If it's not, then -- I'll have to look.  
18 I'd be surprised if it wasn't.

19           MR. DECOULOS: And --

20           MR. HALL: It would be all that the Appeals Court  
21 looked at, Your Honor, so.

22           THE COURT: Right.

23           MS. ROBERTS: No --

24           THE COURT: No, I understand. I understand. And  
25 then, Mr. Hall, if in your response to the VCS motion, if

1 you want to comment on what you think are omissions, fine,  
2 but I don't expect you to submit all the paperwork now, on  
3 this. I don't want to see reports and plans and a whole  
4 new set of filings.

5 The point is: What was the record? And you can  
6 say, "Well, the 1871 report wasn't there," whatever. You  
7 can identify what wasn't there, but I don't want you to  
8 submit it at the present time. Do you understand?

9 MR. HALL: I do, Your Honor, except you're kind of  
10 boxing me in now, because now I'm not able to show the  
11 inferences, the multiple inferences that can be - could  
12 be - drawn. That would --

13 THE COURT: That isn't the nature of what's before me  
14 right now --

15 MR. HALL: But I think it -- it has --

16 THE COURT: -- and I don't intend to turn this into a  
17 trial right now. I'm dealing with this motion, which  
18 should be fairly straightforward, and either you have, you  
19 know, good grounds that can be articulated in a  
20 straightforward fashion, or you don't.

21 And I'm not going to be trying the whole case by  
22 virtue of a response to this motion.

23 I'm also going -- because if we are going to look at  
24 this in sort of a summary judgment fashion: Moving party  
25 files first; you have an opposition, and then a reply to

1 the opposition.

2 Because you (indicating) didn't file on time, I'm  
3 going to give the moving party the opportunity to file a  
4 response if they wish to your filing. And that's it. No  
5 more sur-replies or anything beyond that, to the filings by  
6 VCS.

7 And so, I'm going to say, Ms. Roberts, you can submit  
8 your materials by a certain date. When could you get it  
9 in?

10 MS. ROBERTS: Ah...

11 THE COURT: Assuming there's no agreement that you're  
12 all going to stay matters for whatever reason.

13 MS. ROBERTS: Is two weeks too long, Your Honor? If  
14 you're looking for... what works for -- what would you  
15 like, Judge? What would you like?

16 THE COURT: Yeah, well, no -- I mean, two weeks is  
17 fine, but I just want to make it clear that I'm going to  
18 extend the time for Mr. Hall to file an opposition, so that  
19 he can respond to what it is you've filed.

20 I want you to present to the Court a complete package.  
21 You've given me what you have now, as of today. And you're  
22 going to supplement it.

23 Then I'm going to give Mr. Hall an opportunity to file  
24 a response to that.

25 And then I'll give you an opportunity to file a reply

1 to what Mr. Hall has sent in by way of an opposition.

2 MS. ROBERTS: All I'm going to be doing, Your Honor,  
3 is giving you copies of the records from the summary --  
4 from the appendix. So that's...

5 MR. DECOULOS: She doesn't need two weeks for that,  
6 Judge.

7 THE COURT: All right.

8 MS. ROBERTS: Well, as I understand it, we're waiting  
9 till Friday to see what we work out among ourselves, and  
10 then -- so I'm get --

11 MR. DECOULOS: Work out what? The names of the  
12 parties?

13 THE COURT: No, it's more than that. It's an overall  
14 strategy of whether you want to come to an agreement that  
15 yes, it makes sense, leave everything in the status quo by  
16 way of parties, and go forward and settle this question up  
17 or down on the question of intent.

18 And if you want to do that, fine. All the issue about  
19 adding and deleting parties is put in abeyance.

20 MR. DECOULOS: I have no problem staying that, Judge.  
21 What I'm concerned about is if she's waiting two weeks to  
22 file just the appendix, there's no need for that.

23 You have it in front of you anyway. You've got the  
24 motion for summary judgment. But be that as it may, the  
25 appendix is ready to be mailed in to you tomorrow. I've

1 got copies of that.

2 THE COURT: All right.

3 [MS. MORSE]: Okay. Do you have any problem staying  
4 on these motions?

5 MR. DECOULOS: I have no problem staying this, Judge.

6 THE COURT: All right. I'm going to let you -- you're  
7 going to discuss that. Assuming that there's no stay  
8 agreed to by the end of the week, then let's say Wednesday  
9 the 13th, get your appendix in, all right?, what it is you  
10 want to submit.

11 And Mr. Hall, I'll give you one week until the 20th to  
12 file an opposition.

13 And Ms. Roberts, if you so choose or anyone else wants  
14 to file a response to that: By the 27th of December. All  
15 right?

16 Counsel.

17 MR. MARGULIS: May I speak on behalf of my client?

18 Richard Sullivan owns a very tiny lot. He's been in  
19 the case for 10 years. And year one I said to, I don't  
20 believe it was you but your partner? I said to  
21 him, "Here's my client's lot; here's where you are; what  
22 could you possibly want? We'll give it to you."

23 He said, "No, we don't want anything."

24 "Good," I said, "Let's dismiss it."

25 He said, "Sure, we'll get to that."

1 I don't want this matter stayed. I came here today  
2 because I finally saw a motion which said clearly that this  
3 lot can't possibly impact the Kitras land, and I was  
4 delighted to see that some sense was coming about and we  
5 were going to dismiss my client. And now you're saying,  
6 well --

7 THE COURT: Is he on the -- is your client on the  
8 list?

9 MR. MARGULIS: Richard F. Sullivan. I just don't know  
10 the lot number, but it is as remote from the Kitras land as  
11 you can get. And I was hoping to come home and tell them,  
12 call them up, charge them some outrageous fee -- I'm  
13 actually doing this for nothing because he's a friend of  
14 mine --

15 (Laughter.)

16 THE COURT: Lot 329.

17 MR. MARGULIS: -- and tell him, "Guess what, you're  
18 dismissed; we don't have to"...

19 We have a pile of paper just like you do, that he's  
20 trying to keep.

21 So I would not agree to a stay on this. I'd like this  
22 motion to dismiss my clients acted on.

23 THE COURT: Lot 329, according to Mr. Decoulos's  
24 submission...

25 MR. MARGULIS: Lot 329 is down-this-way (phonetic at



1 4:20:02 PM, sounds of map rustling).

2 (Pause.)

3 THE COURT: Is there any agreement -- I mean, we just  
4 had, basically by agreement, to release the Seemans from  
5 this litigation. Any comment regarding the Sullivan  
6 parcel?

7 (Discussion off the record.)

8 MS. ROBERTS: I don't even know where it is, Your  
9 Honor. I mean, we'll certainly look at it.

10 THE COURT: Well, I think I've just located it.

11 (Pause.)

12 THE COURT: Why don't the interested attorneys come to  
13 sidebar?

14 (On the record discussion at sidebar at 4:21:18 PM.)

15 MR. MARGULIS: So I'm here. And where's Kitras et  
16 cetera?

17 THE COURT: Well, on this map...

18 Here, as I understand it, is Bear Realty Trust; Brian  
19 Hall, trustee, Baron Land Trust. These were many of the  
20 lots on your plan that you submitted --

21 MR. DECOULOS: Yes.

22 THE COURT: -- saying that these were necessary  
23 parties, defendant and plaintiffs.

24 And now Ochs, Fruchtman, and Fruchtman are right over  
25 here. So as I'm looking at it, this whole thing is a

1 subset of this area down here (indicating).

2 Mr. Sullivan's up there (indicating).

3 Again, the-involved-is (phonetic at 4:22:02 PM,  
4 unclear), here's Ochs --

5 [MR. DECOULOS]: I-didn-t (phonetic at 4:22:01 PM;  
6 could be heard as "I can" or something else) see that  
7 at-all (phonetic).

8 THE COURT: Well, I know you can.

9 [MR. DECOULOS]: (Indiscernible at 4:22:11:PM), I  
10 mean, (indiscernible) things (indiscernible).

11 MS. ROBERTS: Our position at the Appeals Court was  
12 always that the only road in the area the-ten (phonetic at  
13 4:22:16 PM) set-off was State Road, which runs to the north  
14 of all these properties, so the most logical way to the  
15 north.

16 THE COURT: Mm-hmm.

17 MS. ROBERTS: So to the extent that the (indiscernible  
18 at 4:22:32:PM, paper rustling) is telling me that  
19 (indiscernible) extend the road for Old South Road, which  
20 is where (indiscernible at 4:22:44 PM) this properties  
21 borders.

22 [MR. DECOULOS]: (Indiscernible, muffled at 4:22:43  
23 PM.)

24 THE COURT: Don't cover the microphone.

25 UNIDENTIFIED LAWYER: No, I'm not.

1 THE COURT: This one, by the way, is a little easier  
2 to read. It's not quite as dark.

3 UNIDENTIFIED LAWYER (aside?): (Indiscernible at  
4 4:22:57 PM.)

5 THE COURT: So what are you saying, Ms. Roberts?

6 MS. ROBERTS: I guess I'm saying that at the end of  
7 the day, if you find that there's a -- that there was an  
8 intent to create an easement, then I can pretty much  
9 guarantee that VCS will be arguing that the way goes north,  
10 and on whether it goes over the tribe land and/or hooks up  
11 to Old South Road or State Road, that will be where it will  
12 be headed.

13 THE COURT: Mr. Decoulos.

14 MR. DECOULOS: This is -- I never describe (phonetic  
15 at 4:23:28 PM). I don't know if that's going to be the  
16 ultimate (indiscernible at 4:23:33 PM).

17 There's roads going all the way through all over the  
18 place here. I don't know if it's going through his land or  
19 not now. I just don't know.

20 That's just one plan.

21 THE COURT: Mmm?

22 MR. DECOULOS: So. In order to properly put it before  
23 you, we had to show this, you know, plan, which, I guess,  
24 as it related to the set-off. If you can just be a little  
25 bit patient.

1 [MR. MARGULIS]: Oh, we've been patient.

2 MR. DECOULOS: I know you have. A little bit more.  
3 (Mirth.)

4 MR. MARGULIS: I would simply ask then that you take  
5 it under advisement, and not -- I would not be wanting to  
6 be a party to any agreement at this stage (phonetic at  
7 4:24:10 PM).

8 MR. DECOULOS: Well, we don't -- we don't want you in  
9 there. But I just found these plans just recently, so  
10 that's changed my outlook on the case.

11 (The lawyers and judge leave the table where the map was  
12 spread out and return to their microphones.)

13

14 THE COURT: All right. Thank you. And I'll certainly  
15 agree that the matter is under advisement at the present  
16 time.

17 And I will either rule on the motion regarding the  
18 Sullivan lot or continue to defer until I hear from  
19 Mr. Decoulos as to his intent there.

20 Also I'll be waiting to receive the papers regarding  
21 the VCS motion. And I do hope, in the interests of your  
22 economy, your clients' wallets, as well as the Court's  
23 time, that you can come to some agreement as to how best to  
24 proceed.

25 You know, I think that, you know, it's been a

1 situation for a decade now of running in circles about this  
2 case, and I mean, the time has come to let's figure out the  
3 best way to resolve this case. And I know, no matter which  
4 way I rule, it's going to go back up again. So we'd better  
5 keep that in mind too.

6 MR. HALL: Your Honor, may I address a point about the  
7 parties?

8 You asked a question about the heirs of Esther  
9 Howasswee?

10 THE COURT: No, I didn't ask. I just said that it was  
11 listed --

12 MR. HALL: You said that they were not addressed.

13 THE COURT: -- and Mr. Decoulos had not addressed it.

14 Is it your suggestion that that lot is now owned by  
15 your clients, who are already parties?

16 MR. HALL: Well, Baron Land -- we moved for  
17 substitution and are mentioned (phonetic at 4:25:55 PM;  
18 could be heard as "in our mention") for lots 242 and 177.

19 THE COURT: Right, the land that you purchased after  
20 the time of decision of Judge Green.

21 MR. HALL: That's right.

22 THE COURT: Yeah.

23 MR. HALL: So what we -- we asked to be intervened and  
24 substitute. The Court denied it based on the status of the  
25 case at the time.

1           Would the Court entertain renewing that motion and  
2 allowing it so that we can have parties for those lots,  
3 because it -- otherwise it's still the heirs of Esther  
4 Howwasswee. And they -- a citation was published, and  
5 obvi- -- nobody came forward.

6           THE COURT: At this point, Mr. Hall, all I can say is  
7 you can file it --

8           MR. HALL: Okay.

9           THE COURT: -- and see what sort of response you get  
10 from your fellow "siblings."

11          MR. HALL: Okay.

12          THE COURT: The --

13          MR. DECOULOS: You like that, huh?

14 (Mirth.)

15          THE COURT: One... the one...

16          Oh, I know what it was. Martha's Vineyard Land Bank  
17 Commission was - you say - it's listed as a necessary party  
18 defendant, Mr. Decoulos, as the owner of lot 238.

19          MR. DECOULOS: That's the one --

20          THE COURT: And also 569.

21          They were never on the docket of this case --

22          MR. DECOULOS: Yup.

23          THE COURT: -- at the time of Judge Green's decision.  
24 Nor do they even appear on my radar screen until the Browns  
25 sold their lot to the Land Bank Commission. And that was

1 lot 238.

2 So I don't know whether, in a sense, they've ever --  
3 except for getting notice of the motion to substitute, I  
4 don't know if they've ever been served or were really  
5 parties to this case.

6 MR. DECOULOS: Their lawyer is right here, Judge  
7 (indicating).

8 THE COURT: Well, he has no appearance for the Land  
9 Bank Commission.

10 MR. RAPPAPORT: I'm not representing the Land Bank on  
11 it. I know that they were given notice of the motion to  
12 add. I do not know whether or not they were ever served  
13 with any complaints. I don't know.

14 THE COURT: Yeah. I mean, because as necessary party  
15 defendants, if I were to allow this motion, and say they're  
16 a party defendant because of their ownership of 238 and  
17 569, I think that may be news to them because they've never  
18 been served in that capacity.

19 MR. HALL: Your Honor, I think that was -- that was my  
20 point when I opposed the Browns being let out of the case,  
21 because now you are substantively letting the lot outside  
22 of the jurisdiction of the Court.

23 And I didn't think that serving the motion on them was  
24 going to effectuate a safe (phonetic at 4:28:36 PM)  
25 effective service of process for purposes of an

1 international-case (phonetic at 4:28:38 PM).

2 THE COURT: They were substituted for the Browns.  
3 They were -- they're in the case as the owner of lot 238.  
4 And in effect now, they're in the case --

5 MR. HALL: In rem.

6 THE COURT: You know, and then you have those other  
7 lots.

8 But look, if the Vineyard Land Bank Commission wants  
9 to raise some sort of objection, they can do so.

10 But I'm just alerting you, Mr. Decoulos, that on your  
11 list, you're assuming that certain parties are in the case  
12 and are not being newly added, and I'm saying that they may  
13 be in a sense newly added by that.

14 All right. Thank you all.

(Matter adjourned at 4:29:19 PM.)



## C E R T I F I C A T I O N

I, Ellen H. Dibble, an Approved Court Transcriber, do hereby certify that the foregoing is a true and accurate transcript, from the audio recording provided to me by Attorney Wendy Sibbison of the Land Court proceedings in the above entitled matter.

I, Ellen H. Dibble, further certify that the foregoing is in compliance with the Administrative Office of the Trial Court Directive on Transcript Format.

I, Ellen H. Dibble, further certify that I neither am counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

*Ellen H. Dibble*

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11/16/11

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Volume: I of II  
Day 4 of 11  
Pages: 209 - 222  
Exhibits: None

COMMONWEALTH OF MASSACHUSETTS  
DUKES, SS. DEPARTMENT OF THE TRIAL COURT  
LAND COURT DEPARTMENT

\* \* \* \* \* \*  
\*  
MARIA A. KITRAS, as Trustee of \*  
BEAR REALTY TRUST et al., \*  
Plaintiffs \*  
\* No. 97-MISC-238738  
v. \*  
\*  
TOWN OF AQUINNAH et al., \*  
Defendants \*  
\* \* \* \* \* \*

MOTION TO ESTABLISH SUMMARY JUDGMENT SCHEDULE  
(by Attorney Morse, on behalf of Harding clients)  
NOTICE OF MOTION TO AMEND, IN PREPARATION  
(by Attorney Decoulos for Kitras clients);  
COURT DATE SCHEDULED 2/12/07

BEFORE JUDGE LEON J. LOMBARDI

APPEARANCES (see next page):

Boston, Massachusetts  
Room 1  
January 16, 2007

Ellen H. Dibble  
Approved Court Transcriber

APPEARANCES:

Nicholas J. Decoulos, Esq.  
39 Cross Street  
Peabody, MA 01960

For: Maria A. Kitras, as she is trustee of the Bear.  
Realty Trust, Bear II Realty Trust and Gorda Realty  
Trust, and James Decoulos, as he is trustee of the  
Bear II Realty Trust and Gorda Realty Trust

Leslie-Ann Morse, Esq.  
477 Route 6A  
Yarmouthport, MA 02675

For: Mark Harding and Sheila S. Besse, and Charles D.  
Harding, as they are co-trustees of the Eleanor.  
P. Harding Realty Trust

Jennifer S. D. Roberts, Esq.  
La Tanzi, Spaulding & Landreth, PC  
8 Cardinal Lane  
PO Box 2300  
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For: Vineyard Conservation Society, Inc.

(Present by phone):

Ronald Rappaport, Esq. (Present by phone, 1/16/07)  
Reynolds Rappaport Kaplan & Hackney, LLC  
106 Cooke Street  
PO Box 2540  
Edgartown, MA 02539  
For: The Town of Aquinnah

Benjamin L. Hall, Jr., Esq. (Present by phone, 1/16/07)  
45 Main Street  
PO Box 5155  
Edgartown, MA 02539-5155  
For: Gossamer Wing Realty Trust and Barons Land Trust

Also present, appearing as an observer:

John M. Donnelly, Assistant Attorney General  
Office of the Attorney General  
One Ashburton Place  
18th Floor  
Boston, MA 02108  
For: The Commonwealth of Massachusetts

1 (Time is 11:30:18 AM.)

2 MR. HALL: (Answering his phone): Hello?

3 THE CLERK: (On the phone): Mr. Hall?

4 MR. HALL: Yeah?

5 THE CLERK: Hi. It's Christie Ziter with the Land  
6 Court.

7 MR. HALL: Hi, Christie.

8 THE CLERK: Hi. I have Mr. Rappaport. If you can  
9 hold, I'll see if you're both on here.

10 MR. HALL: Okay.

11 (The clerk contacting Mr. Hall and Mr. Rappaport by phone  
12 and linking them to the courtroom by phone.)

13 THE CLERK: Mr. Rappaport?

14 MR. RAPPAPORT: Yes.

15 THE CLERK: Mr. Hall?

16 MR. HALL: Yes.

17 THE CLERK: Just one moment. I'll call the case here.

18 Land Court miscellaneous case 238738, Kitras versus  
19 Town of Gay Head.

20 THE COURT: Good morning, Counsel. If you would,  
21 first let's start with those who are in the courtroom.

22 If you would please identify yourself for the record,  
23 which is being recorded.

24 MR. DECOULOS: Nicholas Decoulos, representing Maria  
25 A. Kitras et al., the plaintiffs, Your Honor -- some of the

1 plaintiffs.

2 MS. MORSE: Leslie-Ann Morse, representing Mark  
3 Harding and Sheila S. (Sic) Besse, and Charles D. Harding  
4 as they are co-trustees of the Eleanor P. Harding Realty  
5 Trust.

6 MR. DONNELLY: I'm John Donnelly. I'm representing  
7 the Commonwealth of Massachusetts.

8 MS. ROBERTS: Jennifer Roberts for the defendant  
9 Vineyard Conservation Society, Inc.

10 THE COURT: All right. For those on the telephone, if  
11 you would, please.

12 MR. RAPPAPORT: Ronald Rappaport representing the Town  
13 of Aquinnah, Your Honor.

14 MR. HALL: I'm Benjamin Hall, Jr., representing  
15 Gossamer Wing Realty Trust and Baron's Land Trust.

16 THE COURT: All right. Let me first ask counsel for  
17 the Commonwealth: Have you filed an appearance before?  
18 I'm trying to recall. We had some recent developments of  
19 new parties. And has the Commonwealth been a participant  
20 in this case?

21 MR. DONNELLY: We're actually -- no. We received a  
22 summons, but we have not -- there was discussion about  
23 accepting service on behalf of the Commonwealth. The only  
24 problem is they have not cleared it with the interests of  
25 the Commonwealth, as -- in order to sign that.

1           Once that's made clear to me, then I can go ahead and  
2 execute that. So -- I guess at this point I'm sort of an  
3 observer since we're not officially a party.

4           THE COURT: All right. Well, we'll note your  
5 appearance as an observer this morning.

6           MR. DONNELLY: (Chuckles.)

7           THE COURT: And for the record, we just had another  
8 case where the Commonwealth was represented by an assistant  
9 attorney general who indicates that he will be leaving that  
10 particular bureau, and there's going to be a change.

11           I don't know, again, what's going on. There will  
12 certainly be some changes, as of tomorrow, in the Attorney  
13 General's Office. There's a new attorney general as of  
14 tomorrow. And so I don't know if that has any impact as  
15 far as going forward.

16           MR. DONNELLY: I... I would think not. I believe this  
17 case -- it's not contingent on one of the state agencies'  
18 involvement?, from what I've been told. It's a matter of  
19 our office just clearing up what the interests of this  
20 Commonwealth is.

21           THE COURT: All right.

22           MR. DONNELLY: And I think we'll go forward with that.

23           THE COURT: All right. Well, we'll give you,  
24 certainly, time for that.

25           What brings us here today is the motion filed by

1 Ms. Morse on behalf of her clients to establish a summary  
2 judgment schedule.

3 And let me just say that in the course of our last  
4 hearing, we had - and maybe it was even the last couple of  
5 hearings - lengthy discussion on a variety of procedural  
6 matters.

7 And I do recall that the words slipped out of my  
8 mouth, "Summary judgment," where, leading up to that - and  
9 we had had discussions before that - that this case isn't  
10 going to be resolved on summary judgment.

11 And the fact is that the parties -- and I think  
12 Mr. Decoulos in his letter of response - which, I assume  
13 people received, the others - that he made reference  
14 to, "The parties may be able to file an agreed statement of  
15 facts or a case-stated."

16 The point is that a case can be resolved in a variety  
17 of ways. I mean, if it's ripe for dispositive motion, so  
18 be it. A motion to dismiss, motion for summary judgment.  
19 But if there's going to be disputed evidence or disputed  
20 facts, then a dispositive motion isn't going to necessarily  
21 work very well.

22 Then there are three other ways that a case can be  
23 resolved: Trial; there is the case-stated, or an agreed  
24 statement of material facts, where the parties agree that  
25 these are the only facts and the only ultimate facts upon

1 which the rights of the parties depend.

2 But there's also the third approach, where is the  
3 submission of agreed evidence to the trier of fact per  
4 decision thereon. And in that third instance, where  
5 there's agreement as to the evidence, it takes the place of  
6 evidence which would otherwise be introduced in the usual  
7 way. And the fact-finding tribunal must find the facts  
8 upon the agreed evidence as it does in the usual case. And  
9 the fact-finder may reach whatever decision is warranted by  
10 the evidence -- which means drawing whatever inferences  
11 that may flow.

12 Summary judgment, you know, obviously the inferences  
13 are to be drawn against the moving party.

14 And I think at this stage, in the history of this  
15 case, I think the parties are looking for a way of having a  
16 disposition of the case, finally, on these issues.

17 So I think you have to decide, if it's not going to be  
18 trial - and we've talked before about who the witnesses  
19 would be, or the lack of witnesses - then it may be the  
20 submission of agreed evidence to the Court.

21 And I don't know whether you might have certain  
22 persons - expert witnesses - that would be called to  
23 testify in certain discrete areas, or not; whether you want  
24 to have prefiled evidence, direct evidence, from your  
25 witnesses, whoever they may be, and have it open for cross.



1           There's a variety of different ways we can deal with  
2 this, but the point is, we will use your motion, Ms. Morse,  
3 as the vehicle to talk about this, about how best to go  
4 forward, but this Court had already ruled: We're having  
5 the first portion - the bifurcation - to settle the issue  
6 of was there the requisite intent, or not. If there was  
7 the requisite intent, we move on to then have all the  
8 necessary evidence on the question of where that easement  
9 area should be located.

10           And before we go any further about talking about  
11 scheduling, I'm still troubled about the issue of parties.

12           And when we were here last, I went through a rather  
13 detailed discussion with Mr. Decoulos about saying that his  
14 motion, which talked about adding and dropping certain  
15 parties, did not address other parties who were still in  
16 the pleadings.

17           And before I schedule this at all, I want to be  
18 satisfied we have all the necessary people on each side of  
19 the V.

20           So let me first start with Mr. Decoulos on the  
21 question: Since we last met, when we were last together,  
22 and I gave you all the names of the people that weren't  
23 addressed in your motion, what's happened in that regard?

24           MR. DECOULOS: I've gone ahead, Your Honor, and drawn  
25 up a motion to amend that complaint, and listed, believe it

1 or not, only 28 defendants. So that I think that we're  
2 getting to -- and I distributed it amongst my fellow  
3 counsel here, and I will send one down to Mr. Rappaport and  
4 Mr. Hall.

5 And I will file that motion to amend the complaint so  
6 that we can have it heard or they can assent to it. I  
7 don't think we can get an assent -- well, maybe they can  
8 assent to it, save some time.

9 But I wholeheartedly believe in what Ms. Morse said  
10 about getting this thing moving. And I think that the  
11 first place to start is with an amended complaint.

12 We've got a drainage problem that we're addressing as  
13 well. When they built Moshup Trail, they dammed up the  
14 water on the -- not the ocean side, obviously, but on the  
15 other side of the road.

16 So we've got that. We're addressing that as well. So  
17 I think we're going to have a very comprehensive  
18 complaint --

19 THE COURT: Let me ask you --

20 MR. DECOULOS: -- in less than 20 pages.

21 THE COURT: All right. Let me ask you, when you say  
22 you're addressing that issue about drainage, are you saying  
23 in this complaint?

24 MR. DECOULOS: Yes.

25 THE COURT: And is it within the subject matter

1 jurisdiction of this court? I mean, what's the nature of  
2 the claim that you're asserting that deals with the...

3 First of all, who is the actor who did it, and  
4 secondly, what is the cause of action?

5 MR. DECOULOS: It's a private nuisance, and we're  
6 following a law that's found in the Triangle case, which  
7 says that if they want to dam up water on your property,  
8 they've got a right to take it by eminent domain, or cause  
9 it to be drained properly.

10 THE COURT: And who do you say is the actor?

11 MR. DECOULOS: The Town. They own the road. So what  
12 we need is a conduit under the road in maybe one or two  
13 places to dry up the...

14 You know, what they've caused is nothing but a --  
15 they've created wetlands by damming up the property. It  
16 was never there before.

17 THE COURT: All right. So you're going to serve and  
18 file your motion and mark the motion for hearing if there  
19 is no assent to your motion to amend.

20 MR. DECOULOS: I was told by Ms. Morse that the next  
21 time that we can meet is February 16? So I'll mark it up  
22 for February 16th, and if the assents come flowing in...

23 THE COURT: You can mark it up for February 12th, if  
24 you want.

25 MR. DECOULOS: All right.

1 THE COURT: The 12th or the 15th.

2 MR. DECOULOS: 12th or the 15th. I've got a choice.  
3 Thank you.

4 THE COURT: All right. Ms. Morse, what is your view  
5 as far as a schedule? In other words -- well, let me ask  
6 one other question, Mr. Decoulos.

7 Does your motion to amend, does it add any new parties  
8 to this case?

9 MR. DECOULOS: The Commonwealth. I think Martha's  
10 Vineyard Land commission or land --

11 THE COURT: Land Bank?

12 MR. DECOULOS: Land Bank. That's about the only  
13 parties that we have, Your Honor. And we're omitting a lot  
14 of them.

15 THE COURT: No, I understand that that probably is the  
16 effect of that.

17 And Ms. Morse, when we talked in the past about your  
18 obligation to serve, it was to serve the Commonwealth? Is  
19 that who you had to involve?

20 MS. MORSE: Yes, Your Honor. I had talked to the  
21 soon-to-be former assistant attorney general, and he said  
22 just send it to him and he would accept service.

23 And I gather they have a question as to where their  
24 interest actually lies, and I'll be happy to talk to them  
25 about it.

1           And as for my motion, I just want to get this case  
2 moving. I have one client that's already died, and one of  
3 her heirs that's already died while this case is pending.

4           So I mean, I have no problem with amending the  
5 complaint; whatever we need to do to get the case moving --

6           THE COURT: Right.

7           MS. MORSE: -- and get it to some resolution.

8           THE COURT: I hear you, Counsel. But as we sit here  
9 today, we see evolving pleadings, and we've had decisions  
10 of the Appeals Court; it's come back; we've had a number of  
11 hearings after the Appeals Court decision, and I think we  
12 are moving in that direction.

13           Ms. Roberts, do you wish to be heard?

14           MS. ROBERTS: We assented to Ms. Morse's motion just  
15 to get a schedule in place, but I hear you on the issue of  
16 whether it's a summary judgment or exactly how we frame it.

17           But we'll work, I think, again, to present another  
18 schedule once the amended complaint has been addressed.

19           I would just note, having seen it for the first time  
20 about half an hour ago, that I know that VCS will be  
21 opposing that. They're adding new claims 10 years after  
22 this case was filed, which would strike me as being too  
23 late. And at least one, and possibly two, of the claims I  
24 think are futile.

25           So once we get served with the motion, we will be

1 filing an opposition, and have it in February for Your  
2 Honor's consideration.

3 And then I would think once that's been resolved,  
4 we'll know who the parties are, and can move forward with a  
5 schedule, I would hope.

6 And I think we've been working cooperatively to try to  
7 accomplish the scheduling, so.

8 THE COURT: All right. Well, in less than a month I'm  
9 going to see you again on the motion to amend. And at that  
10 time we can take up your motion again, Ms. Morse. I'm  
11 going to continue your motion for one month until the next  
12 hearing, until we get a better sense of the parties.

13 MS. MORSE: That's fine, Your Honor.

14 THE COURT: All right.

15 MS. MORSE: As I said, my only thing was to move  
16 people.

17 THE COURT: And it is slowly moving. All right?

18 So no further action is being taken today, and I'll  
19 wait to hear you next time on this motion to amend.

20 Thank you.

(Matter adjourned at 11:44:56 AM.)

## C E R T I F I C A T I O N

I, Ellen H. Dibble, an Approved Court Transcriber, do hereby certify that the foregoing is a true and accurate transcript, from the audio recording provided to me by Attorney Wendy Sibbison of the Land Court proceedings in the above entitled matter.

I, Ellen H. Dibble, further certify that the foregoing is in compliance with the Administrative Office of the Trial Court Directive on Transcript Format.

I, Ellen H. Dibble, further certify that I neither am counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

*Ellen H. Dibble*

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COMMONWEALTH OF MASSACHUSETTS

DUKES, SS. DEPARTMENT OF THE TRIAL COURT  
LAND COURT DEPARTMENT

* * * * *	*
	*
MARIA A. KITRAS, as Trustee of	*
BEAR REALTY TRUST et al.,	*
Plaintiffs	*
	*
	No. 97-MISC-238738
v.	*
	*
TOWN OF AQUINNAH et al.,	*
Defendants	*
* * * * *	*

STATUS CONFERENCE

MOTION FOR ADDITIONAL TIME TO FILE RESPONSE (by Martha's Vineyard Land Bank, Attorney Tillotson)

SCHEDULING AS TO MOTIONS TO DISMISS FILED ON BEHALF OF GOSSAMER WING REALTY TRUST AND BARON LAND BANK (Attorney Hall)

STATUS CONFERENCE, AS REQUESTED ON BEHALF OF THE KITRAS PLAINTIFFS, THE THIRD AMENDED COMPLAINT HAVING BEEN FILED

DISCOVERY ISSUES RAISED; PRESUMPTIVE DATE FOR CONCLUSION OF DISCOVERY SET FOR SEPTEMBER 30, 2007

STATUS CONFERENCE SCHEDULED FOR OCTOBER 12, 2007

COMMONWEALTH'S MOTION TO SUBSTITUTE PARTY, EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS

BEFORE JUDGE LEON J. LOMBARDI

APPEARANCES (see next page):

Boston, Massachusetts  
Room 2  
July 10, 2007

Ellen H. Dibble  
Approved Court Transcriber



APPEARANCES:

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For: Maria A. Kitras, as she is trustee of the Bear Realty Trust, Bear II Realty Trust and Gorda Realty Trust, and James Decoulos, as he is trustee of the Bear II Realty Trust and Gorda Realty Trust

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(by phone at first; in the courtroom from 10:22 AM)

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1 (Time is 10:07:26 AM.)

2 COURT OFFICER: Court now is in session. Judge  
3 Lombardi's presiding. Please be seated.

4 THE CLERK: Tuesday, July 10th, 2007, Judge Lombardi,  
5 now hearing Miscellaneous Case 238738, Kitras v. Town of  
6 Gay Head.

7 THE COURT: Good morning, Counsel. If you would  
8 please approach, those who are in the courtroom, and we  
9 will also determine who's on the telephone.

10 All right. Beginning with the plaintiff.

11 Mr. Decoulos, if you would please identify yourself  
12 for the record?

13 MR. DECOULOS: Nicholas Decoulos representing the  
14 plaintiffs Kitras and Decoulos.

15 THE COURT: All right. Counsel.

16 MS. DANIELS: Your Honor, in the Kitras matter, I'm  
17 here representing Caroline Kennedy, individually, and as  
18 guardian.

19 THE COURT: And your name?

20 MS. DANIELS: Cara Daniels.

21 THE COURT: All right, Ms. Daniels.

22 MS. TILLOTSON: Good morning, Your Honor. Diane  
23 Tillotson representing, in the Kitras matter, the Martha's  
24 Vineyard Land Bank.

25 MR. DONNELLY: John Donnelly, assistant attorney

1 general, representing the Commonwealth in both cases.

2 THE COURT: And with you?

3 MR. DONNELLY: This is my intern. He's 303-certified.

4 THE COURT: All right. That's fine. Just didn't know  
5 if we had another party being represented here separately.

6 All right. On the telephone?

7 MS. MORSE: Attorney Leslie-Ann Morse representing the  
8 Eleanor P. Harding Realty Trust and Mark Harding.

9 MS. ROBERTS: Jennifer Roberts representing the  
10 Vineyard Conservation Society.

11 MR. WICE: David Wice, representing David and Betsy  
12 Wice.

13 MR. RAPPAPORT: I'm Ronald Rappaport, representing the  
14 Town of Aquinnah.

15 MR. HALL: Benjamin Hall, Jr., representing Gossamer  
16 Wing Realty Trust and Baron's Land Trust.

17 THE COURT: All right. Let's proceed then with what's  
18 before us, which is a request by Mr. Decoulos for a status  
19 conference in this matter.

20 As you know, a few weeks back, Mr. Decoulos filed a  
21 Third Amended Complaint, which was actually very helpful,  
22 because I think we have many files that are quite full here  
23 relating to earlier aspects of this case which are perhaps  
24 now of marginal relevance as we go forward.

25 But we do have the filing of the complaint, the

1 service by Mr. Decoulos, the returns of service on a number  
2 of parties, and a request for default as to some.

3 MOTION TO FILE RESPONSIVE PLEADING,

4 BY MARTHA'S VINEYARD LAND BANK

5 THE COURT: And let me just mention that I'm aware  
6 that we have a pending motion to file responsive pleading  
7 that was submitted by the Martha's Vineyard Land Bank. And  
8 that particular motion was filed -- there was no assent to  
9 it. Thus at some point we would have to have this marked  
10 for hearing, or I could put out an order under Rule 6,  
11 which says that if anyone wants to submit written comment,  
12 they may do so, and I will deal with it on the papers of  
13 particularly Mr. Decoulos representing the plaintiffs, and  
14 also we do have other, I guess -- Ms. Morse, you also  
15 represent some plaintiffs too?

16 MS. MORSE: Yes, Your Honor.

17 THE COURT: Is there any objection to the motion  
18 today, or shall we take some other route to that? In other  
19 words, shall we hold a separate hearing at another time on  
20 this motion?

21 Let me begin with Mr. Decoulos.

22 MR. DECOULOS: I think an order would be in... I think  
23 you should file an order, Judge; give them the 10 days or  
24 20 days, as you did to all of the other defendants, and  
25 they either come in or come out. This motion is just

1 nothing but a motion to stall.

2 So let's get it over with. If they want to file an  
3 answer -- they've been served; they haven't done anything  
4 except file a motion to dissent (phonetic at 10:11:35 AM,  
5 simultaneous, could be heard as "consent" or something  
6 else).

7 THE COURT: Mr. Decoulos, I don't understand. Are you  
8 saying that you want the Court to just issue an order  
9 saying: You've got 10 days to file an answer?

10 MR. DECOULOS: That's right. Just like you did for  
11 everybody else.

12 THE COURT: In other words, you're in a sense  
13 assenting to their request for some additional time.

14 MR. DECOULOS: I want to get away from the adjective  
15 part of this case as fast as I can, Judge.

16 And I think that would be the fastest way to do it.  
17 Just a ten-day order: Either file it or don't file it.

18 THE COURT: All right. Does anyone else want to be  
19 heard on this matter?

20 MR. HALL: Yes, Your Honor.

21 THE COURT: Mr. Hall?

22 MR. HALL: Benjamin Hall. I had not seen the motion,  
23 so I would like an opportunity to take a look at it and  
24 file a response if I could, Your Honor.

25 THE COURT: All right.

1 I will issue an order under Rule 6, which is that, you  
2 know, I will deal with this matter on the papers; I will  
3 give any interested party an opportunity to file a response  
4 to the motion, and after the papers have come in, I will  
5 rule on the motion. All right?

6 MR. HALL: Thank you, Your Honor.

7 THE COURT: All right.

8 AS TO MOTIONS FILED ON BEHALF OF GOSSAMER WING REALTY

9 TRUST AND BARON LAND BANK (Attorney Hall)

10 THE COURT: Now, another preliminary matter is the  
11 fact that I'm aware that there are a number of motions that  
12 have been filed pertaining to I believe it's a cross-claim  
13 and counterclaim by Mr. Hall, on behalf of his client.

14 I have under Rule 4 scheduled that for hearing in  
15 August. There has to be, under Rule 4, sufficient time for  
16 a party who is on the receiving end of a dispositive motion  
17 to file an opposition, and then time for the original  
18 moving party to file a reply.

19 And so under normal court proceedings, that is  
20 scheduled down the road, so to speak -- and speaking about  
21 "down the road," I'm scheduling it for Fall River. And  
22 that would be one of the times that the Court is sitting  
23 outside of Boston. It will also accommodate the interests  
24 of those parties from the Cape and the islands.

25 Now, I'm aware that the essence of the motion is that

1 the cross-claim and counterclaims have no text; thus it  
2 fails to state a cause of action. I don't know whether  
3 Mr. Hall, between now and the time the motion to dismiss  
4 would be heard, intends to file any motion to amend.

5 Mr. Hall, can you illuminate us?

6 MR. HALL: Well, Your Honor, I've been preparing some  
7 opposition to the motion, and a cross-motion to amend.

8 THE COURT: All right. All right. We won't go into  
9 the merits, obviously, today.

10 So Mr. Decoulos, you probably were on the receiving  
11 end of the papers on this, and you know that this is  
12 scheduled for August now. So that's the next event which  
13 is going to be take place.

14 MR. DECOULOS: You can rest assured I won't be down  
15 there, Judge.

16 THE COURT: Okay. We will note your absence.

17 STATUS CONFERENCE, AS REQUESTED ON BEHALF OF THE KITRAS  
18 PLAINTIFFS, THE THIRD AMENDED COMPLAINT HAVING BEEN FILED

19 THE COURT: Having said that, I think we're now just  
20 talking about logistics in this case to move it forward.

21 And once we get through these last motions, unless  
22 someone else has something to raise with me, I think that  
23 we are back to the point where we said we're going to  
24 proceed with this case on a bifurcated basis, after the  
25 decision of the Appeals Court on -- the first question was



1 whether there was an intent - in the creation or the  
2 set-off of these lots - to create certain easements.

3 And if the answer is in the affirmative, then to  
4 determine the route that the easement would take, whether  
5 it be one or more routes.

6 Now, Mr. Decoulos, you have in your most recent  
7 amended complaint -- and correct me if I'm misstating this:  
8 You have identified various options; is that correct?

9 MR. DECOULOS: That's right.

10 THE COURT: All right. So the thing is that before  
11 you filed that third amended complaint, it was an open  
12 issue as to where the easements may go. Or it certainly  
13 wasn't settled where the easements may go.

14 What is the position -- and I'll ask Ms. Morse this as  
15 well, who's representing the plaintiffs: Is it your  
16 contention that it is one or more of these routes, or all  
17 of these routes, that would be the outcome of the case as  
18 you see it?

19 MR. DECOULOS: I think that that should be decided  
20 after the bifurcation is ruled, if we have a favorable  
21 judgment or not.

22 That -- that should be settled by civil engineers,  
23 taking into consideration the wetlands that are there --

24 THE COURT: Mm-hmm?

25 MR. DECOULOS: Taking into consideration the Moshup

1 Trail that was put in -- created in 1954.

2 And we've also found an 1897 U.S. Coast geodetic plan  
3 that shows roadways in the affected area. So we would  
4 bring that to the Court's attention.

5 So it's not just one road that's going to service all  
6 of the lots. And we want to take, like I said,  
7 consideration. We're not going to go through the wetlands.

8 I had an old friend of mine, Judge, and he always said  
9 even the Indians didn't want to get their feet wet.

10 So I'm going to take that into consideration, and that  
11 would be one of my guiding principles.

12 Thank you.

13 THE COURT: All right. Ms. Morse, do you have a  
14 different view, or do you concur with Mr. Decoulos?

15 Ms. Morse?

16 (Attorney Morse no longer in contact by phone at this  
17 time.)

18 THE COURT: Do we have anyone on the telephone?

19 MS. ROBERTS: Just me, Your Honor, Jennifer Roberts.

20 MR. WICE: David Wice is still here.

21 MR. RAPPAPORT: Rappaport and Hall.

22 MS. ROBERTS: I know Ms. Morse was attending by car  
23 phone because she's stuck on the Southeast Expressway, so  
24 she may have had technical problems.

25 THE COURT: Okay. Well, if she comes out of a tunnel,

1 we can patch her in again, or she can have -- resume, you  
2 know, if her connection works again.

3 But the point is that that, as Mr. Decoulos  
4 articulated it, was the consensus that we had previously,  
5 how we're going to proceed with this case. And unless  
6 someone wants to be heard on that, I assume that consensus  
7 is going to be maintained.

8 DISCOVERY ISSUE RAISED

9 MR. HALL: Your Honor, Benjamin Hall.

10 THE COURT: Yes.

11 MR. HALL: My prior concerns and objections that the  
12 Court is aware of remain.

13 But I would also like the opportunity to engage in a  
14 very brief discovery, perhaps one deposition.

15 THE COURT: All right. Well, there's been no formal  
16 order closing discovery in this matter. So that I would  
17 say as this case proceeds, you can get onto it, Mr. Hall,  
18 and complete that.

19 I think we should talk about whether there should be  
20 an absolute deadline now, so you can then do your pretrial  
21 memorandum, and we can talk about is this going to be on a  
22 case-stated basis? Is it going to be a trial, we're  
23 dealing with events and individuals and documents that go  
24 back to the mid-19th century, if not late 19th century.

25 And so I think we've all said, there's no live

1 witnesses to come forth. But it's certainly a matter of  
2 procedure, as far as which vehicle to use, whether it be  
3 case-stated or some other mechanism.

4 I think that there is a major distinction, however,  
5 between saying just doing it as summary judgment and  
6 case-stated, or an agreed upon set of facts, as far as  
7 inferences and the like. There should be a level playing  
8 field without the issue of who is the moving party, and to  
9 whom the inferences flow - or flow against - in this  
10 matter.

11 So let's take up the matter of discovery.

12 What is the proposal by those who are participating  
13 here for an outside date for discovery?

14 MR. DECOULOS: Your Honor, we've assembled  
15 approximately 20 documents starting from 1863 to about  
16 1878. We're going to assemble a few more to get us up to  
17 the Moshup Trail.

18 And I will make those available in August, 'cause I'm  
19 going away for a couple of weeks, starting tomorrow.

20 And I'll make those all available to my fellow  
21 attorneys here - my siblings - and we'll go from there.

22 And I would think that discovery could end by  
23 September 30. I'm putting all these documents out there,  
24 so there's not going to be much...

25 And as you've just stated, you know, there's

1 nothing -- there isn't any live testimony coming in from  
2 1870.

3 THE COURT: All right. Does anyone else --  
4 Mr. Decoulos is suggesting the end of September to complete  
5 all discovery.

6 Is there any other viewpoint on that?

7 MS. ROBERTS: I would just -- Your Honor, this is  
8 Jennifer Roberts.

9 I would just like to reserve the right to come back to  
10 the Court if it turns out that there's something unexpected  
11 in these 20 documents or so that Mr. Decoulos is going to  
12 provide in August which would necessitate a longer time  
13 frame. I just want to reserve the right to ask for that.

14 But assuming it's the same stuff we've been looking at  
15 for a number of years now, I would think the end of  
16 September would be fine.

17 THE COURT: I think this is now the first time we've  
18 been together after the 10th anniversary of this case, so I  
19 hope there isn't going to be a great deal of new  
20 information.

21 So again, Mr. Decoulos, from your standpoint, do you  
22 believe these documents have been previously shown to these  
23 parties, or are these somewhat new bits of evidence?

24 MR. DECOULOS: Most of them were in the motion for  
25 summary judgment, Your Honor.

1 THE COURT: All right. Well, the goal, the target, is  
2 the end of September. But I will, you know, give some  
3 latitude if there's some good cause - good cause - to have  
4 an extension of time.

5 MR. DECOULOS: I will put these documents all together  
6 by August 20 --

7 THE COURT: All right.

8 MR. DECOULOS: -- and submit -- I'll mail them out  
9 August 20th.

10 THE COURT: All right. And for the record, Ms. Morse  
11 has arrived in person.

12 (Attorney Leslie-Ann Morse now present in the courtroom at  
13 10:22:05 AM.)

14 THE COURT: Ms. Morse, we were just talking about,  
15 again, how we're going to proceed.

16 In the prior agreement there was going to be a  
17 bifurcation, and we were going to deal with the matter of  
18 the intent to create easements, and then the location  
19 later.

20 We were also talking about discovery. And the --  
21 shall we say, the presumptive date for the closing of  
22 discovery is September 30, the end of the month, whatever  
23 day of the week that may be, business day.

24 But Ms. Roberts wanted to reserve her rights in case  
25 there was something that was, you know, a surprise among

1 those documents that Mr. Decoulos is going to be sending  
2 out sometime fairly soon on this.

3 So, again, there would have to be some good cause  
4 shown to me to extend the date beyond September 30 for  
5 discovery.

6 So, Mr. Hall, between now and then I assume you're  
7 going to be getting your deposition done.

8 MR. HALL: Yeah -- I'll discuss it with other counsel.  
9 Perhaps we can do it in a simplified fashion rather than a  
10 deposition -- yes.

11 SCHEDULING OF NEXT STEP:

12 THE COURT: Okay. All right. Assume for a moment  
13 that everything is completed by September 30. Then are the  
14 parties prepared now to talk about what next step would be  
15 taken, and when and how it's going to be done?

16 MS. ROBERTS: Jennifer Roberts, Your Honor. I need to  
17 sort of wrap my arms around the concept of the case-stated.  
18 That's not something that I've been involved with before,  
19 but it would seem to me in this case that once everyone  
20 exchanged all the relevant historical materials, then if  
21 there are any disputes over the admissibility of any of it,  
22 we can determine that.

23 THE COURT: Yeah. A motion in limine would certainly  
24 still be a viable vehicle to use.

25 By the way, there's a couple of volumes in the -- two

1 or three volumes in the Mass. Practice series -- series by  
2 Nolan and Henry on civil practice; and I might suggest  
3 there's some good material in that talking about how to use  
4 case-stated and agreed statement of facts or agreed set of  
5 facts. And judges of this court have utilized that vehicle  
6 in the past.

7 MR. DECOULOS: Once all those documents have been  
8 furnished, I think we'd want to get an agreed statement of  
9 facts, Your Honor, in the next 45 days -- so that we could  
10 be into November 15.

11 We could file a request for admissions, but I -- we  
12 have to have -- get together. We have to have an assembly  
13 of all of the attorneys in order to get that done, and I  
14 don't know if you want to do that with a pretrial  
15 conference, or we can do it without you.

16 THE COURT: Well, there's still -- and again, I know  
17 there's a desire on the part of just about everyone to move  
18 this case along, and I too would like to do it, but it's  
19 hard to set firm deadlines and targets and steps to be  
20 taken until some of this falls into place.

21 As I said, we have some earlier motions that have to  
22 be acted upon; we have the completion of discovery. And  
23 perhaps the best thing is to have another gathering such as  
24 this one, early in October, when that -- all those  
25 materials have been shared and discovery is complete, and



1 then actually figure out how we're going to move on.

2 MR. DECOULOS: That's fine. You want to set the date  
3 now?

4 THE COURT: Sure. All right. Is there any other view  
5 on that? Does anyone want to be heard about this approach?

6 Ms. Tillotson?

7 MS. TILLOTSON: Thank you, Your Honor. If the case is  
8 10 years old, I obviously have a lot of catching up to do.  
9 I just filed my appearance a couple of weeks ago.

10 But one thing that struck me - reading through the  
11 pleadings and listening to the conversation today - is that  
12 almost more important than a statement of agreed-upon facts  
13 would seem to be an agreed-upon record appendix that would  
14 contain one set of all the documents that the Court needs  
15 to look at, because again, I'm not -- again, from what I've  
16 seen of the pleadings, I'm not certain that it's going to  
17 be easy to agree upon the facts, at least the facts that  
18 the Court needs to find with respect to whatever inferences  
19 or whatever the intent was.

20 But it would seem to me that we could agree upon an  
21 appendix of documents.

22 So in addition to circulating the 20 documents, it  
23 might be helpful if counsel who've been involved in the  
24 case would also circulate a list of the documents that they  
25 feel are necessary for adjudication of this case on the

1 merits.

2 And again that's just a suggestion.

3 THE COURT: Well, again, that's consistent with this  
4 approach of an agreed record or a case-stated.

5 It isn't necessarily that it's an agreed statement of  
6 facts, but: Here's the agreed record.

7 And if you can agree on certain facts, that's  
8 wonderful. But ultimately, the parties say, "This is the  
9 record that the Court is to review and decide."

10 Let me turn now to this matter of a date in October.

11 I could give you the 2nd, 3rd, 4th, or 12th of  
12 October.

13 MR. DECOULOS: How about the 4th, Your Honor?

14 MR. RAPPAPORT: Your Honor, it's Ronald Rappaport.  
15 I'm going to be away the first week -- out of the country,  
16 the first week in October. I can definitely do the 12th.

17 THE COURT: All right. How's the 12th? It's Friday  
18 the 12th.

19 MS. ROBERTS: Fine with me, Your Honor. Jennifer  
20 Roberts.

21 MS. TILLOTSON: Fine with me, Your Honor.

22 MS. DANIELS: It's fine with me as well.

23 MR. HALL: Your Honor, would that be AM or PM?

24 THE COURT: Well, we haven't yet determined that part  
25 of it. I have a -- under our new sitting schedule, I

1 actually have more flexibility. I have a courtroom  
2 assigned to me the entire day.

3 So is it easier for the parties to do the afternoon,  
4 particularly those who have to travel some distance?

5 [MR. HALL]: Well, since it's a Friday, I would  
6 suggest perhaps later morning, around 11:00, might be  
7 better for us coming from the Cape and the islands.

8 THE COURT: Eleven o'clock?

9 MR. DECOULOS: Fine.

10 MS. DANIELS: That's fine.

11 THE COURT: All right. Fine.

12 All right. One other thing on this case, and this has  
13 been, heh, an issue for years. And that is ferreting  
14 through these files, and there's four full folders, and now  
15 we're starting a new one sort of fresh, is: Who are the  
16 parties, and what is the service list?

17 And I know the temptation is to pull out some past  
18 service list and use it, but I do want to point out that we  
19 have a new group of defendants. There's a lot of overlap;  
20 there's been a lot of elimination.

21 So Ms. Daniels, not to pick on you specifically, but  
22 it's the easiest one I had here. Looking at your service  
23 list, for instance, there are names on here that are  
24 defendants from the earlier pleadings who are no longer in  
25 this case.

1 MS. DANIELS: Mm-hmm?

2 THE COURT: And so that there's actually, in this  
3 caption, I think fewer parties than there used to be, so I  
4 think that it's absolutely essential that we all work from  
5 the same list, and make sure that we have current addresses  
6 for these parties.

7 Mr. Decoulos, and Ms. Morse, as plaintiffs, do you  
8 happen to have -- have you prepared a list of all these  
9 defendants and their addresses?

10 MR. DECOULOS: I'm awaiting your order to default  
11 them, Judge. And once you can do that, it'll be very easy.

12 THE COURT: Well, the order is entered.

13 MR. DECOULOS: Oh, I didn't know that.

14 THE COURT: Under 55A, those who you have sent proper  
15 notices of returns of service -- and you can talk to the  
16 sessions clerk --

17 MR. DECOULOS: Fine.

18 THE COURT: -- later on this.

19 MR. DECOULOS: Yes.

20 THE COURT: There were --

21 MR. DECOULOS: Once I get that, I can give you a  
22 service list that I think is appropriate.

23 THE COURT: All right.

24 MR. DECOULOS: And have we als-...

25 THE COURT: Now, is there anything else to discuss on

1 this case, the Kitras case? And we need to turn our  
2 attentions --

3 COMMONWEALTH'S MOTION TO SUBSTITUTE PARTY, EXECUTIVE  
4 OFFICE OF ENVIRONMENTAL AFFAIRS

5 THE COURT: Yes, Mr. Donnelly.

6 MR. DONNELLY: On that same issue, I do have a motion  
7 to substitute party, since the Executive Office of  
8 Environmental Affairs has changed names, and also the  
9 secretary has changed with the new administration. So.

10 THE COURT: All right. Has that motion been filed, or  
11 you're filing it now?

12 MR. DONNELLY: I'm filing it now.

13 THE COURT: All right. I'll accept it. It'll be part  
14 of the same Rule 6 order I put out for anyone to submit a  
15 response if they wish to.

16 MR. DECOULOS: How about the Brutus case, Judge?

17 THE COURT: Frangos?

18 MR. DECOULOS: Yes.

19 THE COURT: All right. I'm -- well, let me first  
20 establish, does anyone else want to say anything regarding  
21 the Kitras case?

22 MS. ROBERTS: Jennifer Roberts, Your Honor. Fren  
23 (phonetic at 10:31:05 AM, unclear) hadn't seen any date  
24 scheduled for those motions to dismiss on the Hall matter?  
25 Has the Court sent out a date? Such as August in Fall

1 River?

2 THE COURT: Yeah, hold on one second.

3 (On the record discussion at sidebar at 10:31:22 AM.)

4 THE COURT: I understand the notice has gone out.  
5 We'll double-check to make sure it went to everyone, that  
6 we used the right service list.

7 But is Fall River Superior Court on August 30, at  
8 11:30.

9 (Pause.)

10 THE COURT: Anything else on the Kitras case?

11 All right. Hearing none --

12 MR. HALL: Your Honor?

13 THE COURT: Yes, Mr. Hall.

14 MR. HALL: I believe my brother Mr. Rappaport and I  
15 have-all-back-from (phonetic at 10:31:57 AM).

16 On the service list, if we could address something  
17 about that, just for jurisdictional clarity?

18 I'm concerned about people that had been served  
19 originally, and they have appeared in the case, even though  
20 they're not -- they do not continue to be named defendants?  
21 Could the Court perhaps issue an order dismissing as to all  
22 those people who have appeared, just for -- so we have a  
23 clean line of break, so we don't have to serve 15 people  
24 who technically have appeared in the case but are no longer  
25 really in the case?

1 THE COURT: Well, I would be willing to entertain such  
2 an order, because I believe the clear intent of the  
3 plaintiffs in submitting the third amended complaint was to  
4 supersede the prior pleadings and to limit it to those  
5 parties.

6 But I would ask that you, Mr. Hall, and perhaps in  
7 consultation with attorneys for the plaintiffs, provide me  
8 a list of who you think those parties are. And I would be  
9 happy to issue an order.

10 But again, at this point, you know, many changes have  
11 happened over the years, as far as parties in and out, so  
12 you need to perhaps provide me those who you believe would  
13 be subject to such an order.

14 So once received, I will, you know, entertain that  
15 request and issue something.

16 All right. Any -- Mr. --

17 MR. RAPPAPORT: Your Honor, I'm Ronald Rappaport.

18 THE COURT: Yes.

19 MR. RAPPAPORT: I believe I'm stating the obvious, but  
20 that the plaintiffs have chosen in their complaint various  
21 routes that they would like to see, and my understanding is  
22 all that is the second part of the case.

23 THE COURT: That's correct.

24 MR. RAPPAPORT: It's still open to the remaining  
25 parties to say no, it should not be those routes; it should

1 be a totally separate route.

2 THE COURT: That's correct. Correct.

3 MR. RAPPAPORT: Okay. Thank you.

4 THE COURT: All right. All right. Then is there  
5 anything else?

6 All right. This matter then is closed. Those parties  
7 who wish may terminate their telephone conversation, or  
8 their connection with the court.

9 We're now going to call the second case.

(Matter adjourned at 10:34:03 AM.)



C E R T I F I C A T I O N

I, Ellen H. Dibble, an Approved Court Transcriber, do hereby certify that the foregoing is a true and accurate transcript, from the audio recording provided to me by Attorney Wendy Sibbison of the Land Court proceedings in the above entitled matter.

I, Ellen H. Dibble, further certify that the foregoing is in compliance with the Administrative Office of the Trial Court Directive on Transcript Format.

I, Ellen H. Dibble, further certify that I neither am counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

*Ellen H. Dibble*

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Volume: I of II  
Day 6 of 11  
Pages: 249 - 276  
Exhibits: None

COMMONWEALTH OF MASSACHUSETTS  
DUKES, SS. DEPARTMENT OF THE TRIAL COURT  
LAND COURT DEPARTMENT

\* \* \* \* \*  
\*  
MARIA A. KITRAS, as Trustee of \*  
BEAR REALTY TRUST et al., \*  
Plaintiffs \* No. 97-MISC-238738  
v. \*  
\*  
TOWN OF AQUINNAH et al., \*  
Defendants \*  
\* \* \* \* \*

MOTIONS

MOTION OF VINEYARD CONSERVATION SOCIETY TO STRIKE THREE  
INTERLOCUTORY NOTICES OF APPEAL BY PLAINTIFF KITRAS ET AL;  
BRIAN M. HALL, TRUSTEE OF BARON'S LAND TRUST AND BENJAMIN  
L. HALL, JR., TRUSTEE OF GOSSAMER WING REALTY TRUST

CROSS-MOTION TO CORRECT THE ORDER DATED SEPTEMBER 14, 2007  
TO NOW ORDER AMENDMENT OF THE CROSS-CLAIMS, TO ALLOW THE  
PRIOR CROSS-MOTION OF GOSSAMER WING REALTY TRUST AND  
BARON'S 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  
AND BARON'S LAND TRUST PURSUANT TO THE SEPTEMBER 14, 2007  
ORDER TAKEN UNDER ADVISEMENT (By Attorney Hall on behalf of  
his clients)

BEFORE JUDGE LEON J. LOMBARDI

APPEARANCES (see next page):

Boston, Massachusetts  
Room 3  
June 13, 2008

Ellen H. Dibble  
Approved Court Transcriber

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1 (Time is 10:34:21 AM.)

2 THE CLERK: Friday, June 13th, miscellaneous case  
3 number 238738, Kitras versus Town of Gay Head.

4 THE COURT: Good morning, Counsel. If you would,  
5 please identify yourselves for the record, which is being  
6 recorded.

7 (Next file from 10:34:44 AM, with overlap.)

8 THE COURT: We'll start with those who are in the  
9 courtroom.

10 MR. DONNELLY: John Donnelly for the Commonwealth of  
11 Massachusetts.

12 MS. ROBERTS: Jennifer Roberts for the defendant  
13 Vineyard Conservation Society.

14 MS. TILLOTSON: Diane Tillotson for the defendant  
15 Martha's Vineyard Land Bank.

16 THE COURT: All right. And by telephone?

17 MR. HALL: Benjamin Hall, Jr., for Gossamer Wing  
18 Realty Trust and Baron's Land Trust.

19 MR. RAPPAPORT: Ronald Rappaport for the Town of  
20 Aquinnah.

21 MR. WICE: David Wice for David Wice and Betsy Wice.

22 THE COURT: All right. We have before me today the  
23 motion filed by the Vineyard Conservation Society.

24 And we have an opposition filed by Gossamer Wing and a  
25 cross-motion.

1           And I do have the opposition as well of the  
2 Commonwealth, joining with the Vineyard Conservation  
3 Society.

4           Are there any other filings that have been made that  
5 I'm not aware of?

6           MS. ROBERTS: Not that I know of, Your Honor.

7           THE COURT: All right.

8           MR. DONNELLY: I received a counter-motion yesterday?

9           THE COURT: No, I -- I said a cross-motion.

10          MR. DONNELLY: Oh, I'm sorry.

11          THE COURT: And that was -- you may have received it  
12 yesterday. The Court received it on the 11th.

13          And that -- you know, we'll certainly discuss that as  
14 well, but let's begin with Ms. Roberts and her motion.

15                   MOTION OF VINEYARD CONSERVATION SOCIETY TO STRIKE  
16 THREE INTERLOCUTORY NOTICES OF APPEAL BY PLAINTIFF KITRAS  
17 ET AL., AND BY ATTORNEY HALL ON BEHALF OF BARON'S LAND  
18 TRUST AND GOSSAMER WING REALTY TRUST:

19          MS. ROBERTS: This is a motion to strike, I think,  
20 three notices of appeal filed by the Kitras plaintiffs and  
21 Mr. Hall. I've seen no opposition from the Kitras  
22 plaintiffs, so I assume, without the opposition, that at  
23 least with respect to those notices of appeal, that those  
24 would be struck.

25          Which leaves us with Mr. Hall and his notice of

1 appeal.

2 As Your Honor knows, the doctrine of present execution  
3 allows interlocutory appeals - such as the one Mr. Hall is  
4 attempting to take here - only in very limited  
5 circumstances. The matter being appealed from needs to  
6 interfere with rights in a way that can't be remedied on  
7 appeal later, and the right at issue needs to be with  
8 respect to a matter that is collateral to the issue in  
9 controversy.

10 This doctrine of present execution has been applied to  
11 the dismissal of claims of sovereign immunity, to the  
12 denial of special motions to dismiss under the anti-SLAPP  
13 statute, and to the disqualification of counsel, which has  
14 been seen as decisions that couldn't be rectified on appeal  
15 if the party was forced to go through the entire proceeding  
16 in the trial court before being able to address the issue  
17 on appeal.

18 The weight of authority is that motions to amend like  
19 Mr. Hall's are not immediately appealable, and are not  
20 subject to the doctrine of present execution. And  
21 furthermore...

22 THE COURT: But you say in your papers that the matter  
23 is "less than clear"? I think? Is that your phrase?

24 MS. ROBERTS: -- it's ...

25 The weight of authority appears to be that motions to

1 amend are not immediately appealable, but there is no --  
2 and that, I think, is a Judge Van Gessel (phonetic at  
3 10:38:03 AM) analysis of the law from the superior court  
4 citing to an Appeals Court decision.

5 There is no Supreme Judicial Court decision that  
6 decides the matter definitively. The Appeals Court cites  
7 to federal precedent, which is to the effect that motions  
8 to amend are not immediately appealable -- the denial of a  
9 motion to amend.

10 So what I can say today is that the weight of  
11 authority is to the effect that motions to amend - the  
12 denial of a motion to amend - is not immediately  
13 appealable, but there is no decisive decision from the SJC  
14 on that.

15 So that's --

16 THE COURT: So are you suggesting the weight, such as  
17 it is, is from foreign jurisdictions?

18 MS. ROBERTS: No, it's -- it is the Van Gessel  
19 superior court decision relying on the Bateman v.  
20 Consolidated Rail Corporation Appeals Court decision.

21 Mr. Hall has a different --

22 THE COURT: But again -- again, I understand what  
23 you're saying as far as the Appeals Court, but there it's  
24 the Appeals Court looking to federal precedent.

25 MS. ROBERTS: Correct.

1 THE COURT: Yep.

2 By the way, let me just step back for one moment to --  
3 and I hope the parties are all aware of some correspondence  
4 that occurred earlier, which is in the file here, that  
5 Mr. Decoulos had filed an earlier notice of appeal, and on  
6 January 11, 2008 -- his letter says 7, but I think there's  
7 a problem with probably dup'ing and copying correspondence.  
8 But we received this on January 25, 2008, and his letter  
9 says, "On January 11, 2007," and I believe that is to be  
10 read as "2008."

11 "I received your notice from the Court that the  
12 record on appeal had been assembled. Please be advised  
13 that the matter appealed was an interlocutory order, and  
14 not a found judgment. Accordingly, the assembly of the  
15 record is premature."

16 Then, on February 8, 2008, Mr. Decoulos filed: "I  
17 enclose a notice of interlocutory appeal of the plaintiffs,  
18 Maria Kitras," um, and Decoulos. "Please make the  
19 appropriate entry on the docket."

20 So Mr. Decoulos has filed notices of appeal in the  
21 past, and views that they are interlocutory and not -- and  
22 are premature.

23 At the same time, let me now raise the issue of a more  
24 recent decision, and that is the Supreme Judicial Court  
25 case of Ellis. And both sides do cite to it. This was the



1 February 15, 2008 decision dealing with matters arising out  
2 of the Land Court, where a judge struck a notice of appeal,  
3 and then the party who had filed the notice filed a second  
4 notice of appeal. The judge struck that one.

5 And the Court said - and this is the Supreme Judicial  
6 Court - "We need not decide the propriety of the order  
7 striking the first notice of appeal, because we find that  
8 in any event, the order striking the second notice of  
9 appeal was in error. The Land Court judge should not have  
10 struck plaintiff's second notice of appeal, because the  
11 plaintiffs properly were seeking appellate review of the  
12 judge's earlier conclusion, that the doctrine of present  
13 execution does not apply in this case."

14 Now, you can substitute whatever words you want for  
15 either "present execution" or "motion to amend," or  
16 "interlocutory matter," but if I were to follow the route  
17 suggested by the Vineyard Conservation Society, would we  
18 not have the situation where - again, if I were to agree  
19 with VCS - that I would allow your motion, strike the  
20 notice of appeal; there could very well be a notice of  
21 appeal from the action of striking the first notice on your  
22 way to the appellate courts, because the Court made it very  
23 clear that the trial court should not be in the business of  
24 striking the second notice of appeal. And they didn't  
25 answer the question whether I should strike - or any trial

1 court judge should strike - the first notice of appeal.

2 Are they saying: This is a matter for the appellate  
3 court to decide whether it's a proper appeal or not?

4 MS. ROBERTS: If the issue on appeal is whether the  
5 doctrine of present execution applies or not, then I think  
6 you're right, that we'll end up going up on that now, not  
7 later.

8 If the issue on appeal is whether you properly denied  
9 the Hall motion to dismiss because it was futile and unduly  
10 delayed and prejudicial to the parties, then that's plainly  
11 something that shouldn't be going up now.

12 And that's what...

13 THE COURT: But let me stop you there.

14 But see that's where I would say that, you know,  
15 substitute whatever words you want for "present execution."  
16 Now you said if it's on the question of whether present  
17 execution applies, then it may fall the exact same route as  
18 Ellis. But for any other grounds, if I were to strike the  
19 notice of appeal, and then there's a notice of appeal of  
20 the action striking the first one, are you saying that the  
21 Court would be within its rights to strike the second  
22 notice of appeal in a context other than present execution?

23 MS. ROBERTS: I don't know the answer to that. I  
24 mean, it seems to me from the decision, that if the issue  
25 is, "was it properly struck the first time," because of the

1 doctrine of present execution, then according to this  
2 decision you're going to get to go up on that now.

3 Frankly, I think once the appellate courts see what  
4 they've done here and see that everyone is now going to be  
5 arguing that everything is subject to the doctrine of  
6 present execution, they may decide to retrench on this, but  
7 that's the way the law stands right now.

8 THE COURT: All right. Anything else you want to add,  
9 Ms. Roberts?

10 MS. ROBERTS: Not on -- no, not on this point, Judge.

11 THE COURT: All right. Let me ask anyone else who  
12 would like to speak on the same side as Ms. Roberts if they  
13 would like to be recognized.

14 Mr. Donnelly's shaking his head no.

15 MR. DONNELLY: No, Your Honor.

16 THE COURT: Ms. Tillotson?

17 MS. TILLOTSON: No.

18 THE COURT: No.

19 All right. Mr. Rappaport?

20 MR. RAPPAPORT: I don't have anything further to add  
21 from what Ms. Roberts said, Your Honor.

22 THE COURT: All right. And Mr. Wice?

23 MR. WICE: I agree with the position taken by  
24 Ms. Roberts.

25 THE COURT: All right.

1 All right, Mr. Hall.

2 MR. HALL: Yes, Your Honor.

3 THE COURT: I assume we've gone through everyone who  
4 might be speaking on the same side as Ms. Roberts, so  
5 you've filed an opposition, and this is your opportunity to  
6 be heard.

7 MR. HALL: Thank you, Your Honor.

8 This is -- what the Court is looking at today is the  
9 issue of the finality of the denial of motion to amend a  
10 cross-claim, which is a permissive matter under Rule 13.

11 I think that we -- the Court has clearly read my  
12 opposition papers, and sees the Rudders case for what it  
13 is. It's a bar to a trial court entering decisions that  
14 are clearly within the purview of the Appeals Court.

15 I apologize, Your Honor; we're on a telephone here  
16 that while we're speaking, we can't hear what's going on in  
17 the courtroom. So if any papers get shuffled in our side,  
18 all of a sudden there's a dead zone.

19 So I haven't heard entirely everything that  
20 Ms. Roberts said, but I think I understand what the Court  
21 was saying, and I believe I understand what she was saying,  
22 because I think she didn't go beyond what she had already  
23 argued in her papers.

24 Is that correct?

25 THE COURT: I think that's a fair characterization.

1 MR. HALL: So the Rudders case we believe is a bar,  
2 that the trial court should not be entering into an area  
3 dealing with the issue of whether or not there is  
4 sufficient finality of the matter.

5 Whether under the doctrine of present execution or  
6 otherwise, we've cited sufficient authority to show that  
7 there is sufficient finality, under several other readings  
8 of the law, with respect to denying a motion to amend a  
9 permissive pleading.

10 We stand in sufficiently different status from the  
11 Decoulos and the plaintiffs in their notice of appeal,  
12 because ours is not a simple motion to amend the complaint,  
13 but it's part of a responsive pleading where we may or may  
14 not be allowed to -- we may or may not, on our option,  
15 raise the cross-claims.

16 But it just seems to make sense that since the  
17 cross-claims clearly arise out of the same transaction that  
18 we're all talking about, that all the parties should have  
19 all their rights adjudicated in one matter. By  
20 dismissing -- or by initially dismissing the cross-claims,  
21 and then not allowing us to amend our responsive pleading  
22 to insert proper cross-claims, and finding our  
23 cross-claims - on essentially all bases, according to the  
24 Court's order, as I read it, the order of February 8th, I  
25 believe it was - that now by raising the issue of futility,

1 that clearly makes it a final order that we will not be  
2 allowed to amend to add cross-claims.

3 (Time is 10:34:44 AM.)

4 MR. HALL: So we believe that under that specific  
5 special circumstance or scenario, that there's sufficient  
6 finality on which we can base our appeal.

7 But we believe that that's a decision for the Appeals  
8 Court and not for this lower court. And the Court has  
9 correctly found that if the Court did strike our notice of  
10 appeal, we would be left with no choice but to follow up  
11 with a second notice of appeal. And the Rudders case would  
12 apply anyway.

13 So whether the Appeals Court gets it in round one or  
14 round two, it's just going to be imposing additional  
15 tremendous burdens on my parties, to get to the Appeals  
16 Court.

17 So we ask that the Court deny the motion of the  
18 Vineyard Conservation Society. It's just contrary to the  
19 law, we believe.

20 And if the Court would allow me an opportunity later,  
21 perhaps, to address my cross-motions, when the time is  
22 appropriate, I would appreciate it.

23 CROSS-MOTIONS OF GOSSAMER WING REALTY TRUST

24 AND BARON LAND TRUST

25 THE COURT: Well, the time is now, Mr. Hall. You may

1 continue and address your cross-motion.

2 MR. HALL: Thank you. We cross-moved under Rule 5 of  
3 the Land Court, and we'd ask the Court to correct the order  
4 of September 14th, 2007, which dismissed our cross-claims  
5 from our initial responsive pleadings to the Third Amended  
6 Complaint, which itself had to be slightly adjusted  
7 pursuant to a court order.

8 The Court's decision on September 14th dismissed the  
9 cross-claims by allowing the Vineyard Conservation Society  
10 and other movants' motion to dismiss on the basis of Rule  
11 12(b)(6).

12 But the Court cited, and the other parties had cited,  
13 the Malone case - if I've pronounced that correctly - which  
14 had determined, actually, the decision should have been  
15 under Rule 41(b) of the Rules of Civil Procedure.

16 And we had at that time cross-moved for leave to  
17 amend, under Rule 5.

18 (Time is 10:50:29 AM)

19 MR. HALL: The Court had allowed us to late file our  
20 papers, And then allowed the other parties time to respond,  
21 but specifically said that the cross-motion to amend at  
22 that time, on August 30th, would have to be marked for a  
23 later motion.

24 As such, the dismissal -- it's our position that the  
25 dismissal should have been actually an order ordering us to

1 amend our pleadings to conform to the Rule 8 requisites  
2 that the Court had found.

3       Regardless, we believe and ask the Court to reconsider  
4 that motion entirely, in light of Rule 10(c), which the  
5 Court did not address in its order of September 14th, which  
6 allowed pleadings to incorporate by reference other  
7 pleadings, or other portions of pleadings. And we believe  
8 we did so in our cross-motion that was filed August 30th.

9       As an alternative, we've asked the Court to allow  
10 those, the cross-motion to amend of August 30th.

11       Finally, alternatively, in order for us to quickly  
12 process an appeal of that order, which struck our  
13 cross-claims, we've asked the Court to enter a separate  
14 judgment under Rule 54(b) on that order, so that we may  
15 then prosecute an appeal, because we did not believe that  
16 there was sufficient finality in the dismissal, that left  
17 open the possibility that the Court would later address our  
18 cross-motion to amend, which would have been the  
19 appropriate relief.

20       So we believe that there was still relief kind of left  
21 open in that order. But given the futility reading of the  
22 Court in their February order that denied our motion to  
23 amend, we believe that Rule 54(b) separate judgments should  
24 enter under the earlier order of September 14th.

25       THE COURT: All right. Anything else, Mr. Hall, on



1 that?

2 MR. HALL: No. I stand on my papers for the legal  
3 arguments, Your Honor.

4 THE COURT: All right. Thank you.

5 Would anyone like to be heard either in response to  
6 Mr. Hall's --

7 MR. RAPPAPORT: Your Honor, may I respond to that?

8 THE COURT: -- comments on --

9 Yes, Mr. --

10 MR. RAPPAPORT: This is Ronald Rappaport.

11 THE COURT: Go ahead, Mr. Rappaport.

12 MR. RAPPAPORT: I'd just like to briefly respond.

13 Rule 5 of the Land Court rules does talk about  
14 cross-motions, but what Mr. Hall is attempting to do is to  
15 have the orders revisited -- the court orders of September  
16 and November. And that would seem to me plainly to fall  
17 under Rule 9, which is a motion for reconsideration.

18 And there are specific rules, obviously, in Rule 9  
19 about procedures to be followed for such a motion. And  
20 none of what was done here falls within that. And I don't  
21 see how Rule 5 - which is supposed to be directed to the  
22 motion of striking an appeal - can be used as a vehicle to  
23 circumvent the requirements of Rule 9, which is a motion  
24 for reconsideration.

25 So I just think that that request is procedurally

1 defective.

2 I also think that the motion or the request that a  
3 separate judgment enter falls within the same procedural  
4 defect. I don't think that that can be done under Rule 5.  
5 I think that has to be a separate motion marked up and  
6 heard. I never have seen rule 5 being used to get sort of  
7 substantive motions, that should be done under other rules.

8 So I have procedural problems with those two requests,  
9 Your Honor, particularly the motion for reconsideration.

10 THE COURT: All right. Thank you, Mr. Rappaport.

11 Anyone else wish to be heard?

12 Ms. Roberts?

13 MS. ROBERTS: I have the same points with respect to  
14 this being a motion for reconsideration in large measure,  
15 and that it's a wholesale failure to comply with Rule 9 of  
16 the Land Court rules.

17 THE COURT: And I would suggest for those of you here,  
18 keep your voice up so your voice will come through loudly  
19 on the telephone.

20 MS. ROBERTS: Okay.

21 So we agree with respect to what Mr. Rappaport has  
22 said with respect to Rule 9.

23 With respect to Rule 54(b), I'm sure Your Honor is  
24 well familiar with the Long v. Wickett decision, which came  
25 out --

1 THE COURT: All 24 pages of it.

2 MS. ROBERTS: (Chuckles.) -- where they say such  
3 things as that the Rule 54(b) is to be used only for narrow  
4 exceptions; it should not be routinely granted. It is a,  
5 quote, "special dispensation," unquote, "used only in the  
6 infrequent harsh case"; if there's a counterclaim that will  
7 remain in the proceeding, then that weighs very heavily  
8 against granting it.

9 And obviously there are many claims and counterclaims  
10 that continue on, here. So this is plainly not a case for  
11 54(b) certification. And it's not an opportunity to  
12 revisit the decision that Your Honor made earlier in the  
13 matter.

14 MOTION OF VINEYARD CONSERVATION SOCIETY TO STRIKE  
15 INTERLOCUTORY NOTICES OF APPEAL (again)

16 MS. ROBERTS: Back to our motion, I would just  
17 suggest - and it is sort of a conundrum here - that if Your  
18 Honor denies our motion to strike, then the matter's going  
19 to go up on appeal on the issue of whether you correctly  
20 denied Mr. Hall's motion to amend.

21 If you grant our motion to strike, and Mr. Hall  
22 appeals that, then the matter's going to go up on the issue  
23 of whether Mr. Hall's motion is subject to the doctrine of  
24 present execution.

25 That it's going up seems almost inevitable at this

1 point, but I would suggest that if it does go up, really  
2 the issue on which it should go up is whether the doctrine  
3 of present execution applies, at which we would, I think,  
4 have the weight of authority in support of our position on  
5 that.

6 So, while it's --

7 THE COURT: But don't you make that same argument  
8 either way?

9 MS. ROBERTS: I don't... no, I -- I will think about  
10 this some more, but my initial reaction to it is: Probably  
11 not.

12 If you deny the motion to strike, then that's  
13 essentially upholding Mr. Hall's appeal, and the appeal is  
14 of your order denying his motion to amend. So don't --

15 THE COURT: But you would then perhaps say that, well,  
16 this whole appeal that's before the Appeals Court is not  
17 properly before the Court, because it's a matter of present  
18 execution.

19 I'm just thinking of the way you're raising your  
20 argument here --

21 MS. ROBERTS: Yeah. I -- yeah, mm-hmm?

22 THE COURT: -- that you would seem to say that, well,  
23 you think it doesn't fall within present execution.

24 So I would think that either on the question of  
25 striking a second notice of appeal or, really, on the

1 merits of the first, to say that this matter isn't properly  
2 before the appellate court.

3 MS. ROBERTS: Well, I guess what'll happen - and I'm  
4 not quite sure, 'cause again, I'll have to see how this  
5 plays out - but if you deny our motion to strike, then I  
6 would probably be taking an interlocutory appeal of that  
7 (chuckling) on the issue of whether the present execution  
8 doctrine applies here.

9 It is a hairball. (Laughs.)

10 THE COURT: Well, as you indicate, something that the  
11 appellate courts need to straighten out.

12 MS. ROBERTS: Yup. Yup.

13 THE COURT: I mean, because the whole Long v. Wickett  
14 lengthy dissertation was them being very upset with the  
15 caseload, the number of appeals, the piecemeal appeals in a  
16 single action, perhaps.

17 And the Ellis case has not clarified the situation  
18 from, I think, the perspective of many.

19 MS. ROBERTS: Yup.

20 THE COURT: Anything else?

21 MS. ROBERTS: No, Your Honor. Thank you for the time.

22 THE COURT: All right. Mr. Donnelly?

23 CROSS-MOTIONS OF GOSSAMER WING REALTY TRUST

24 AND BARON LAND TRUST (again)

25 MR. DONNELLY: I'd only like to add that we were only

1 served with this cross-motion as of yesterday. Service is  
2 not -- there's not proper service with a fax sent to my  
3 office.

4 And I would just like the Court to note that we have  
5 rules so that allows us to respond in a proper manner, with  
6 the proper amount of time, to a cross-motion.

7 And that's all I would add to that.

8 THE COURT: All right. Thank you. Your comment is  
9 duly noted.

10 Ms. Tillotson?

11 MS. TILLOTSON: I have nothing to add, Your Honor.

12 THE COURT: All right.

13 And Mr. Wice, do you have anything to add?

14 MR. WICE: I haven't received anything. My mailings  
15 come sometimes a week or 10 days after the dates in them.  
16 And whatever it is you're talking about I haven't seen, so  
17 I can't comment on that.

18 THE COURT: All right. I will keep that in mind as  
19 well.

20 Mr. Hall, last word, so I'll give you a chance to  
21 respond to what your brothers and sisters have said  
22 regarding your cross-motion.

23 MR. HALL: Yes, Your Honor.

24 Rule 5 does not limit cross-motions to those that  
25 specifically arise out of the motion, and Rule -- Land

1 Court Rule 5 I'm referring to.

2 And Land Court Rule 5 -- at any rate, I believe that  
3 the Rule 54 motion would be additionally counter to and  
4 arises out of the fact that the Vineyard Conservation  
5 Society is seeking to have the Court try to bar us from  
6 getting to the Appeals Court on whether or not we can have  
7 cross-claims that arise out of the same series of  
8 transactions, assuming that the decisions come down in a  
9 manner that do bar us from the Appeals Court.

10 Then what relief would we have to having our rights  
11 adjudicated with respect to cross-claims that arise out of  
12 exactly the same transactions.

13 It just seems to put the procedure, form...

14 You know, the form over the substance, to tie us up in  
15 getting us all bogged down in all these procedural details  
16 just seems to be forgetting the bigger picture that we're  
17 looking to have all these rights adjudicated in one  
18 hearing, in one matter, rather than trying to break it up,  
19 have separate actions filed, and then move to consolidate  
20 with all the potential procedural hurdles of finality that  
21 come in with respect to Rule 12(b)(9) for pending actions,  
22 and all the problems that have been noted, even in the  
23 superior court case that Ms. Roberts had cited in the  
24 Vineyard Conservation Society papers.

25 So we ask the Court to review the totality of what

1 we're trying to do here, and the case law -- deny the VCS  
2 motion to strike our notice of appeal, grant our  
3 cross-motion, in some form, to either...

4 If the Court were to grant our cross-motion to give us  
5 leave to amend, ordering us to amend, and would address the  
6 issue that futility would not apply to every single  
7 cross-claim that might be made, and to look at the  
8 decisional law, based on Rule 12(b)(6), which means that  
9 you can't just strike or dismiss the entirety of a  
10 cross-claim if, under any reading of the cross-claim, that  
11 there might be one way under which the party so pleading  
12 would have a right to some form of relief. Rather, the  
13 Court, in its stead, struck the entirety of the  
14 cross-pleading.

15 And moreover, it's under the Court's plenary powers in  
16 general, or under Rule 60(b), to go back any time, before a  
17 final order is entered, and to make a correction or  
18 modification to an order, as long as a request is made.

19 So we believe that our cross-motion is fully within  
20 the context of the bigger picture here, is trying to be  
21 allowed (time is 11:02:53 AM)... to have the entirety of  
22 the rights declared in this action, rather than having to  
23 have it broken up, have some rights determined, have the  
24 Appeals Court have to decide later on, and then have to  
25 have the whole matter come back just simply to adjudicate



1 the rights of my clients with respect to these  
2 cross-claims, just doesn't make any sense, Your Honor.

3 Thank you.

4 THE COURT: All right. Ms. Roberts?

5 STATUS, SCHEDULING, ASSEMBLY OF THE RECORD

6 MS. ROBERTS: Just this is on an unrelated matter.

7 But what I'd like to see, hopefully, before we leave today,  
8 is a status conference, so that -- I know Your Honor's got  
9 other plans as of July 3rd or so. But if we're going to  
10 move the case forward, particularly since Mr. Decoulos is  
11 not opposing what we've asked for here, we'd like to -- I  
12 don't know who's going to be assigned this case, but --

13 THE COURT: Well, I can tell you that Chief Justice  
14 Scheier has decided that Judge Trombly will be handling  
15 this matter. And I would say that you could make a written  
16 request to Judge Trombly for a status conference, and then  
17 he can schedule it.

18 I am aware that when we last met on the issue of  
19 scheduling, I think it was to be triggered with the idea  
20 that once the record was fully complete and shared with all  
21 the other parties, at that point we would be ready to go.

22 I've never heard from anyone that that record has been  
23 fully --

24 MS. ROBERTS: It has not --

25 THE COURT: -- assembled or complete.

1 MS. ROBERTS: It has not been.

2 THE COURT: And so that that's why it hasn't been  
3 scheduled. So perhaps status conference would be  
4 appropriate, and also at that time, Judge Trombly can  
5 assess the situation with what appeals, if any, are being  
6 filed, on whatever grounds there may be.

7 Unless someone else wants to be heard --  
8 Ms. Tillotson?

9 MS. TILLOTSON: Your Honor, I would just ask that --  
10 and again -- that there be some consideration given to an  
11 order requiring the assembly of that record within a  
12 certain amount of time.

13 I mean, it's been, I think, a year since I've been  
14 involved in the case, and I think we've been waiting for  
15 that record to be assembled for approximately a year.

16 And I would point out that despite -- regardless of  
17 how the present motions pan out, that essentially what's  
18 being debated is whether or not the plaintiffs will be  
19 permitted - plaintiffs or certain defendants will be  
20 permitted - to assert additional legal claims.

21 I don't think it's going to make a difference in terms  
22 of the factual record and the documents that get assembled  
23 whether or not they are able to assert, for example, an  
24 implied easement, based on an instrument of record.

25 The instrument of record, presumably, is going to be

1 in that record that's going to be assembled, whatever it is  
2 they're relying on.

3 So again I would respectfully ask that some  
4 consideration be given to giving a date certain for that  
5 record to be assembled, so that we can then respond and  
6 move on with it, because I don't think that the record  
7 should be impacted by whether or not decision is made  
8 either on these motions or frankly at the appellate level.

9 THE COURT: All right. Well, I understand what you're  
10 saying. I do think, however, that that is something that  
11 Judge Trombly at a status conference, when Mr. Decoulos and  
12 other parties are all present.

13 I mean, clearly I don't think it's proper -- although  
14 I understand what you're saying about the amount of time  
15 that's transpired, but I don't intend to issue an order  
16 today, directed to Mr. Decoulos, without him at least being  
17 given a chance to be heard on that.

18 So I think that that certainly would be an appropriate  
19 matter at the next status conference.

20 I would say in conclusion here, as I take this matter  
21 under advisement, that for late-filed motions -- and I know  
22 that there's an argument of whether the rule here, Rule 5,  
23 authorizes a cross-motion to be filed as late as one day  
24 before the hearing. But if it's found that a party has  
25 been given insufficient time to respond to a motion, the

1 Court very often will give the parties an opportunity to  
2 submit a memorandum post hearing.

3 I think, as I take this matter under advisement, that  
4 no additional memoranda would be required. But if I find  
5 that it would be helpful to have additional filings, I will  
6 let you know prior to ruling.

7 But I will look at the papers as filed at the present  
8 time, and decide whether it's appropriate for me to issue  
9 rulings on what I have.

10 Thank you very much.

11 MS. ROBERTS: Thank you, Judge.

12 [MR. RAPPAPORT]: Thank you.

13 COURT OFFICER: All rise, please.

(Matter adjourned at 11:07:45 AM.)

## C E R T I F I C A T I O N

I, Ellen H. Dibble, an Approved Court Transcriber, do hereby certify that the foregoing is a true and accurate transcript, from the audio recording provided to me by Attorney Wendy Sibbison of the Land Court proceedings in the above entitled matter.

I, Ellen H. Dibble, further certify that the foregoing is in compliance with the Administrative Office of the Trial Court Directive on Transcript Format.

I, Ellen H. Dibble, further certify that I neither am counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

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CASE NAME: Maria Kitras et al v Town of Aquinnah et al
DOCKET NO.: 97-MISC-238738
JUDGE: Leon Lombardi (all dates in this volume) RECORDING DATES: 4/25/06, 9/12/06, 12/4/06, 1/16/07, 7/10/07, 6/13/08
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Volume: II of II  
Days 7 through 11  
Pages: 1-212  
Exhibits: None

COMMONWEALTH OF MASSACHUSETTS  
DUKES, SS. DEPARTMENT OF THE TRIAL COURT  
LAND COURT DEPARTMENT

\* \* \* \* \* \*  
\*  
MARIA A. KITRAS, as Trustee of \*  
BEAR REALTY TRUST et al., \*  
Plaintiffs \*  
\* No. 97-MISC-238738  
v. \*  
\*  
TOWN OF AQUINNAH et al., \*  
Defendants \*  
\* \* \* \* \* \*

STATUS CONFERENCES, MOTIONS  
BEFORE JUDGE CHARLES W. TROMBLY, JR.

APPEARANCES (see page following caption page for each date,  
for complete information):

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Ellen H. Dibble  
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COMMONWEALTH OF MASSACHUSETTS  
DUKES, SS. DEPARTMENT OF THE TRIAL COURT  
LAND COURT DEPARTMENT

* * * * *	*
	*
MARIA A. KITRAS, as Trustee of	*
BEAR REALTY TRUST et al.,	*
Plaintiffs	*
	* No. 97-MISC-238738
v.	*
	*
TOWN OF AQUINNAH et al.,	*
Defendants	*
* * * * *	*

STATUS CONFERENCE, MOTION  
BEFORE JUDGE CHARLES W. TROMBLY, JR.

APPEARANCES (see next page):

Boston, Massachusetts  
BKRoom 3  
September 9, 2008

Ellen H. Dibble  
Approved Court Transcriber



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For: David Wice and Betsy Wice

1 (Time is 10:19:05 AM.)

2 COURT OFFICER: Hear ye, hear ye, hear ye, all parties  
3 having anything to do with the Honorable Justices of the  
4 Land Court, draw near, and you shall be heard. God save  
5 the Commonwealth of Massachusetts and this Court. You may  
6 be seated. Court is in session. If you have any cell  
7 phones, kindly turn them off at this time. Thank you.

8 THE CLERK: Miscellaneous case 238738, Maria Kitras  
9 versus the Town of Aquinnah. And miscellaneous case  
10 299511; Anthony Frangos v. Town of Aquinnah.

11 THE COURT: Okay. Good morning, everyone.

12 ALL: Good morning, Your Honor.

13 THE COURT: Before we start, I'm going to try -- we're  
14 having a little trouble with our sound system, so please  
15 speak up. Okay? That's the main thing.

16 All right. Can we start off by identifying ourselves?

17 We'll start over here with Mr. Decoulos.

18 MR. DECOULOS: Nicholas Decoulos, representing the  
19 plaintiffs Kitras and Decoulos.

20 MS. MORSE: Leslie-Ann Morse representing the Eleanor  
21 P. Realty Trust and Mark D. Harding.

22 MR. HALL: Good morning, Your Honor. Defendant  
23 Gossamer Wing Realty Trust and Baron's Land Trust. I am  
24 Benjamin Hall, Jr.

25 THE COURT: Okay.

1 MR. ABAIR: Good morning, Your Honor. Jesse Abair, on  
2 behalf of defendant Caroline Kennedy individually, and  
3 Caroline Kennedy and Edwin (phonetic, pronounces this  
4 Edward) Schlossberg as guardians of their minor children.

5 THE COURT: Okay.

6 MR. DECOULOS: I am -- oh, sorry.

7 MR. DONNELLY: John Donnelly, representing the  
8 Commonwealth.

9 MS. ROBERTS: Jennifer Roberts for the Vineyard  
10 Conservation Society.

11 MS. TILLOTSON: Diane Tillotson for the Martha's  
12 Vineyard Land Bank.

13 MR. RAPPAPORT: Ronald Rappaport for the Town of  
14 Aquinnah.

15 THE COURT: Okay. And Mr. Decoulos wanted to add  
16 something.

17 MR. DECOULOS: Yes. The Decoulos Realty Trust case  
18 that's across the street on a motion for...

19 THE COURT: That's Frangos?

20 MR. DECOULOS: Frangos, yes.

21 THE COURT: Okay. All right. And this is a status  
22 conference. We scheduled it, as you all know -- I'm the  
23 lucky guy --

24 (Laughter.)

25 THE COURT: who took this over from Judge Lombardi,

1 compliments of Judge Brown, I guess, I guess.

2 And I've read the Brown decision.

3 I guess the question is: Where are we going. I think  
4 that's what everybody wants to know.

5 Yes?

6 MS. ROBERTS: I actually asked for the status  
7 conference, Your Honor, so maybe that's the step  
8 (indiscernible at 10:20:42 AM, simultaneous) --

9 THE COURT: Well, you go ahead. Then I'll talk.  
10 Then I'll listen and -- go ahead.

11 MS. ROBERTS: Judge Lombardi had set several things in  
12 process over the last year, and the way the case was  
13 headed, he... if you've read the decision --

14 THE COURT: Yep.

15 MS. ROBERTS: -- you know there's an issue about  
16 whether there's an easement for some landlocked parcels or  
17 not.

18 If there's an easement, there's an issue about where  
19 it should be located on the ground.

20 Judge Lombardi bifurcated the case so that the first  
21 part deals only with is there an easement or not. And if  
22 we get past that and the Court concludes that there is an  
23 easement, then the next part of the process will be: Where  
24 is it to be located? Because there will be a lot of  
25 engineering and a wetlands --

1 THE COURT: Right.

2 MS. ROBERTS: -- and endangered species stuff that we  
3 may never have to reach.

4 So with that in mind, we're focused on the issue of  
5 whether there was an easement. It all revolves around what  
6 was going on in the 1870's, so we have, until now, been  
7 operating on the assumption that there would be no live  
8 testimony.

9 And Judge Lombardi had ordered the plaintiffs to put  
10 together a package of the documentation on which they would  
11 rely for their claim of an easement.

12 The defendants would have 30 days in which to take any  
13 discovery that might be necessary. And Judge Lombardi  
14 said, "If you need more time, come back."

15 And then, defendants would put together whatever  
16 additional documentation that they thought was relevant to  
17 the point.

18 There would then be some process by which the Court  
19 would decide objections on both sides as to whether the  
20 evidence was admissible or not. Then the parties would  
21 brief it, and the Court would decide it.

22 The first step in that process was for the plaintiffs  
23 to pull together their set of documents. That was ordered  
24 by Judge Lombardi back in 2007.

25 I asked for the status conference several months ago,

1 because as of that point we still hadn't received that set  
2 of documents. They were served on everybody at the end of  
3 July.

4 And so that kicked -- I think it was July 28th. So  
5 that kicked off the defendant's 30 days of discovery.

6 So in that 30 days we've taken the deposition of a  
7 surveyor. We've served some interrogatories which we are  
8 awaiting answers to.

9 And depending upon -- at the deposition of the  
10 surveyor a week or so ago, I learned for the first time  
11 from Mr. Decoulos that he may be calling as a witness one  
12 of the plaintiffs.

13 So we would obviously want the opportunity to depose  
14 that person, and to depose -- if there's anyone else that  
15 the plaintiffs are intending to call as a witness, we'd  
16 like the opportunity to depose them.

17 So originally, I ask for this to try to get the ball  
18 moving.

19 But the ball has started moving. I'm here today to  
20 ask the Court for an additional, I would suspect, 45 days  
21 of discovery. I need to receive the interrogatory answers  
22 and take whatever depositions are left, and, once discovery  
23 is done, respond to the package of materials that have been  
24 provided by the plaintiff, and which I would assume would  
25 be due in about 30 days.

1           So I'm looking for a schedule, finish discovery,  
2 provide whatever other documentation we think is relevant,  
3 and then have some kind of proceeding before the Court to  
4 determine what of this is ultimately going to be admissible  
5 so that the parties can then go, do the briefing.

6           Mr. Decoulos has sent around to everybody a fairly  
7 extensive proposed agenda which we in large measure don't  
8 agree with.

9           THE COURT: Heh.

10          MS. ROBERTS: I'll let him speak to that, and then  
11 would ask for permission to respond.

12          [MR. DECOULOS]: Thank you.

13          THE COURT: Okay. Mr. Decoulos.

14          MR. DECOULOS: Sure. Judge, I went ahead and drew up  
15 this agenda, and I sent a copy to all my fellow brother and  
16 sister attorneys. And the first thing that I have on my  
17 agenda, number one, is that -- was (phonetic 10:25:17 AM)  
18 was submitted to the Court containing all the documents --

19          THE COURT: Right.

20          MR. DECOULOS: -- that are on record at the registry  
21 of deeds down in Dukes County. And also some plans that  
22 are not there, that show various rights of ways through the  
23 property, which was subdivided by the commission -  
24 commissioners - in 1878.

25          And the second question is, are there any other



1 documents which would be forthcoming from the defendants.

2 And I set this up quite some time -- not quite some  
3 time ago. I've got a letter here: August 29.

4 And so we're looking for more documents to come --  
5 come from them (phonetic at 10:26:06 AM), if there are any.  
6 And if there are any additional faxes (phonetic at 10:26:13  
7 AM) - number three - or otherwise.

8 And so, wait to see if we can come to some kind of  
9 agreed statement of facts, which I doubt very much, but  
10 frang-would-do-it (phonetic at 10:26:29 AM, unclear),  
11 because nobody's going to change the facts from 1870.  
12 We're in 2008 now, you know.

13 THE COURT: Could I interrupt for one sec? Leslie had  
14 something she wanted to add, I guess.

15 MS. MORSE: One thing I wanted to make clear is,  
16 Mr. Decoulos sent out that book of documents. I may  
17 represent some of the plaintiffs, but I had no input in it  
18 whatsoever.

19 THE COURT: Okay.

20 MS. MORSE: So I would like also the opportunity to  
21 file any necessary documents that I see as necessary.

22 THE COURT: Okay.

23 MS. MORSE: I think the only thing in my file is the  
24 title for one of the lots, but that's...

25 THE COURT: Thank you.

1 MR. DECOULOS: So we're at -- number four is a request  
2 to enter upon the land. And we filed a request from -- for  
3 all of the defendants. All of the defendants said, "You  
4 can't go on the land."

5 The reason that we want to go on the land is two  
6 reasons: One is to find out exactly where the wetlands  
7 are, so that we can avoid them; and secondly, file a notice  
8 of intent with the commission -- the conservation  
9 commission.

10 Now, the reason that they said no is because they just  
11 don't want us to go on their property. But there's no harm  
12 being done to their property, and it's not taking any of  
13 their resources. It's not taking any of the Court's  
14 resources. We just want to get on there and make our  
15 measurements and get out of there.

16 And there's another -- another matter that will be  
17 coming up thanks to Ms. Diane Tillotson, for in that case  
18 of the -- the lanwater (phonetic at 10:28:05 AM,  
19 unclear) -- wait a minute.

20 (Pause.)

21 MR. DECOULOS: So we need to be able to get on the  
22 land, and I'll be filing a motion too with the Court asking  
23 you to allow us to go onto the property so that we can  
24 conduct various surveys, which will involve, number seven:  
25 When they built the Moshup Trail, they installed a drain

1 (phonetic at 10:28:27 AM, slightly unclear) line under  
2 the -- in the Moshup Trail, or under the roadway. And we'd  
3 want to find out whether or not that is at its lowest  
4 point, because they created wetlands as a result of it.

5 This used to flow right to the ocean. And as a result  
6 of the road being there, they've taken all the water and  
7 channeled it into this pipe. And the pipe may be too high;  
8 the-number-of (phonetic at 10:29:58 AM, unclear) the pipe  
9 might be two or three...

10 But we don't know until we can get on there and find  
11 out about it.

12 So that's the -- that would set up a nuisance claim  
13 that I have in -- number seven.

14 We can go back a couple now.

15 The number five: The possible amended complaint.

16 There's another case with one of the defendants in this  
17 matter that involves a right of way, and I've been told  
18 it's going to be settled so that that right of way will be  
19 in existence over some of these lots.

20 The next matter would be Barbara Vanderhoop. She's  
21 out in California someplace. I keep on sending her things.  
22 I sent her this book, and it came back in the mail. I  
23 talked with Eric Rothenberg (sic), who's her lawyer, a half  
24 a dozen times. I finally sent them a letter telling them  
25 that I was going to default her unless he started to accept

1 service. Mr. Rottenberg (sic) has told me that he  
2 has-started (phonetic at 10:29:52 AM, might be heard as "is  
3 not") accepting service of any documents that are generated  
4 in this case, just so he can keep an eye on what's going  
5 on. He doesn't want to get involved in it, because his  
6 position is that if the Court findings an easement by  
7 necessity, or whatever other reasons we've been asking for,  
8 that he'll be a beneficiary of the Court's action.

9 And then I went ahead and got -- took a look at the  
10 rules of the Land Court on 8, 9, 10, and 11. And I'd like  
11 to set up some kind of a schedule. It took about 8 or 9  
12 years to find out that this court had jurisdiction over  
13 this case, and I don't want to go another 8 or 9 years.

14 And I think that if everybody cooperated, we could get  
15 here very, very quickly, provided we have some real  
16 meaningful dates on this discovery, and whatever they  
17 want -- whatever else they're asking for.

18 I don't think -- but that's beside what --

19 THE COURT: But -- heh --

20 MR. DECOULOS: -- what -- what I think.

21 THE COURT: But just, you're talking about a pretrial  
22 conference in a month.

23 MR. DECOULOS: That's right.

24 THE COURT: That's awful soon.

25 Yeah, wait a minute. Frank. Sorry.

1 (Discussion off the record.)

2 THE COURT: Okay. Is there a Mr. Wice who's a party  
3 to this case? He was calling from Pennsylvania. If he --  
4 if he does, we may just put him on a speaker phone and let  
5 him listen to what's going on.

6 (Discussion off the record; a clerk or court officer is  
7 talking, aside, while proceedings continue.)

8 MR. DECOULOS: I understand it's very soon, but I'm of  
9 the opinion - and I could be very wrong - that there aren't  
10 any other things to discover in this matter. She took the  
11 deposition of a surveyor, of 3-1/2 hours. Didn't change  
12 anything. This is -- we want to get it over with for  
13 very -- for many -- very simple reasons. We've waited 8 or  
14 9 years to get to the -- back to where we are now.

15 THE COURT: All right.

16 [CLERK OR COURT OFFICER, ASIDE]: Put him on a cell  
17 phone.

18 THE COURT: Yep.

19 (Mr. Wice being patched in by phone at 10:31:52 AM.)

20 MR. DECOULOS: She's served interrogatories on him. I  
21 don't remember telling her that one of the plaintiffs is  
22 going to testify.

23 I don't think it's going to be in our answers to  
24 interrogatories, but if it is, then let's get a hurry-up  
25 date on our depositions. We don't want to go on for 90

1 days. Everything should be done on a 10-day basis. Let's  
2 move it along and get it done with.

3 THE COURT: But why start moving it that fast now when  
4 it's been...

5 I realize it's been -- I really -- even Judge Brown's  
6 decision was 3 years ago. So, heh, it moves with the speed  
7 of a growing oak (phonetic at 10:32:18 AM, could be heard  
8 as "our growing old").

9 (Mirth.)

10 MR. DECOULOS: Well, that's the problem. We're all  
11 getting old. And I just want to get it over with, as  
12 quickly as possible.

13 THE COURT: Okay. All right.

14 MR. DECOULOS: It's our position, the faster the  
15 better, Judge.

16 THE COURT: Okay. Thanks. Jennifer or anybody at  
17 your table?

18 MS. ROBERTS: We don't disagree with the notion of  
19 getting it done really promptly. We're all for that.

20 I would suggest with respect to his first three items,  
21 we agree, we just want to get through discovery, and then  
22 let's put a deadline for us to produce anything else we  
23 think is relevant, and a deadline for both sides to object  
24 to whatever the other side has proposed.

25 So that's fine. It's just a timing issue there.

1           On number four, unless and until we get past this  
2 first phase of this case, and there's an adjudication that  
3 they that they actually have an easement, then the  
4 existence of wetlands is absolutely irrelevant to anything  
5 that this Court has to decide at this phase of the game.

6           I don't know why they want to go on. They have a  
7 number of other cases here. I suspect they're looking to  
8 go on for reasons that have to do with other proceedings.  
9 But certainly with respect to this proceeding, it is  
10 irrelevant where wetlands are until there's been an  
11 adjudication that they actually have an easement.

12           That all being said, the Rules of Civil Procedure say  
13 that if you get an objection to your Rule 34 request, you  
14 should file a motion to compel, which has not yet happened.  
15 And if he wants to go down that path, we'll happily respond  
16 to it, but I'm giving him a preview of what our response is  
17 going to be.

18           So I think it'll be futile in the end, but if he wants  
19 to pursue this Rule 34 entry, let him do it using the  
20 proper rules.

21           With respect to number 5, Judge Lombardi gave -- after  
22 the matter was remanded from the Appeals Court, Judge  
23 Lombardi handled at least two series of motions to amend.  
24 And the last time around, he said to everybody, "This is  
25 it." You know, "I'm going to give you a deadline; any

1 motions to amend you have, you bring them, and you bring  
2 them by December" -- I think it was 7th, 2007.

3 So I would respectfully suggest that the time for  
4 bringing amendments, if it hadn't passed in the preceding  
5 10 years, it certainly passed by December of 2007.

6 We take no position on the Barbara Vanderhoop issue.

7 With respect to number seven, the nuisance claim was a  
8 claim that the plaintiffs previously sought to bring, I  
9 think in their March 2007 complaint. And at that point,  
10 Judge Lombardi ruled that the Land Court didn't have  
11 jurisdiction over the nuisance claim. And so he has  
12 already ruled on that and told them to delete it from their  
13 complaint.

14 Nothing in this Ritter versus Bergmann decision, I  
15 would suggest, changes that result. But once again, if  
16 they want to do that, the proper procedure is to file a  
17 motion to which we'll respond, not to put it on an agenda  
18 for a status conference.

19 And then, with respect to 8, 9, 10, and 11, as I say,  
20 we're happy to move this case forward. As I said, as soon  
21 as we get interrogatory answers and see whether there are  
22 going to be any witnesses here, we'll know whether we need  
23 any further discovery or not.

24 So that's in the plaintiffs' ballpark. If they can  
25 get me that information, as soon as we get it, we'll know



1 whether we need more time or not.

2 So I would say 15 days? If he can get his answers to  
3 me. If he's actually going to call witnesses, I would say  
4 give us 30 days? If he's not going to call witnesses, I  
5 wouldn't expect that we'd need that amount of time.

6 And then, once that deadline goes by, I think that the  
7 next deadline would be for us to propose whatever additions  
8 we want to the booklet he provided. I know that I have  
9 some things that I might want to add. Ms. Morse just  
10 expressed that she may have some things she wants to add.  
11 So I would suggest that the next deadline would be for all  
12 parties to add whatever they want.

13 And then the deadline after that would be for all  
14 parties to object to whatever anyone else has put in there.

15 And then the Court can rule on those.

16 And then once that process is done, I think it's just  
17 a briefing schedule, assuming Mr. Decoulos isn't going to  
18 call any witnesses. Then it's just, have them brief the  
19 case, and then we'll respond.

20 THE COURT: What's wrong with that? Move it along.

21 We were at warp speed here. That's...

22 MR. DECOULOS: Well, she's going to be getting the  
23 answers to the interrogatories within a couple of days,  
24 Judge.

25 THE COURT: Okay.

1 MR. DECOULOS: And I don't think there's going to be  
2 any witnesses. I'm going to try my best not to find any  
3 witnesses. That's for sure.

4 And she can -- then we can, you know, step this up for  
5 the next...

6 THE COURT: Yeah, you know, 'cause I'm all in favor of  
7 moving it along. I think this is, quite frankly, too fast.

8 MS. ROBERTS: Yep, but I would --

9 THE COURT: It's been here for a long time. I'm not  
10 going to do anything to drag it out. Let's get the thing  
11 decided before I retire.

12 (Mirth.)

13 THE COURT: We're not that far away, you know. In a  
14 couple of years, I'll be out of here.

15 UNIDENTIFIED SPEAKER: Uh-oh.

16 THE COURT: So let's not let happen. Or some poor  
17 bugger will be the next one.

18 So let's -- so you can have discovery within what, a  
19 couple of -- what did you say? A couple of?

20 MR. DECOULOS: I should have it in a couple of days.  
21 So she should be able to tell us whether she's going to  
22 conduct any depositions of these witnesses that we may or  
23 may not include. If there's no witnesses, then we can just  
24 skip right over that, and just keep moving along on it.

25 But...

1 MS. ROBERTS: Why don't we just -- if we say 15 days  
2 to finish up whatever's out there after I get the answers  
3 to his interrogatories. Unless he -- you know, if he comes  
4 up with some -- I don't expect, based on everything  
5 Mr. Decoulos has said today. I mean, if he suddenly comes  
6 up with a list of 10 witnesses, maybe we'd ask for 30. But  
7 let's say 15 for now --

8 THE COURT: Okay.

9 MS. ROBERTS: -- from the time I get his answers?

10 THE COURT: Okay. And you'll have your answers --

11 MR. DECOULOS: That's fine.

12 THE COURT: For -- okay.

13 MS. ROBERTS: Right.

14 MR. DECOULOS: Fifteen days.

15 MS. ROBERTS: And then I would say 30 days for all  
16 parties to supplement the record that's been pulled  
17 together by --

18 MR. DECOULOS: I -- why 30 days?

19 MS. ROBERTS: Because I at-least (phonetic at 10:38:50  
20 AM; could be heard as "-- he's") provided survey  
21 information. I just took the surveyor's deposition. I  
22 have gotten my own surveyor. We've got to go out in the  
23 field.

24 THE COURT: Yeah. At this point, a couple of weeks  
25 doesn't hurt, Nick. Thirty days is no -- that's not too

1 far out.

2 One thing you should all know, we're building four new  
3 courtrooms here. So hopefully they'll be done in December.  
4 So we'll each have our own room.

5 MR. DECOULOS: Hopefully --

6 THE COURT: So we'll each have our own room.

7 MR. DECOULOS: -- there won't be any lallycoak  
8 (phonetic at 10:39:10 AM, simultaneous). I mean.

9 THE COURT: At least one in every one. Heh. But one  
10 of them had four. So I'm staying away from that one.

11 But hopefully by the end of the year we're going to  
12 have at least three new courtrooms, possibly four. They're  
13 working on it now. So. We are staying here.

14 All right. So 30 days. So 15 days for the answers to  
15 int's, 30 days to supplement.

16 Okay, Nick, you want to say something?

17 MR. DECOULOS: I'm going to file those, Rule 34. I  
18 said it in the agenda --

19 THE COURT: Okay. Yeah.

20 MR. DECOULOS: I'm going to file a Rule 34 --

21 THE COURT: Make it in the form of a motion.

22 MR. DECOULOS: Yes, I will. I'll -- they'll be --

23 THE COURT: I've looked at them. I've read your  
24 motion. I've read the oppositions from all the parties.

25 MR. DECOULOS: Yeah, fine.

1 THE COURT: I will consider it.

2 MR. DECOULOS: All right.

3 THE COURT: And you can find out --

4 MR. DECOULOS: You can skip over the 8 and 9 and 10  
5 and 11, when we find out exactly where we're at in a couple  
6 of months.

7 THE COURT: Yeah. September 19th is kind of soon, but  
8 sometime in October, early November?

9 MS. ROBERTS: Your Honor, I would suggest, because  
10 we've been through this a few times now, if we -- everyone  
11 submits their documents, and then we have another deadline  
12 for everyone to submit whatever objections they have, and  
13 then we could set a hearing date on that, and at that  
14 point, talk about, you know, pretrial issues, what this is  
15 going to look like. So we could sort of combine those two  
16 things.

17 I don't know that this is the kind of case, in view of  
18 the fact that there aren't going to be witnesses  
19 who-are-really (phonetic at 10:40:43 AM, unclear) at trial.  
20 I'm not sure this is the kind of case where you really need  
21 like a pretrial memo and that kind of thing.

22 THE COURT: No, probably not.

23 MS. ROBERTS: Yeah. So.

24 THE COURT: No, as long as it's all on the papers.

25 MS. ROBERTS: Yeah. So I think it's sort of like a

1 summary judgment, but --

2 THE COURT: You're going to brief it anyway, so.

3 MS. ROBERTS: Yeah.

4 THE COURT: Yeah.

5 MS. ROBERTS: So I'm not sure that the joint pretrial  
6 memorandum or the pretrial conference is crucial (phonetic  
7 at 10:41:00 AM, simultaneous).

8 THE COURT: No, the main thing is we just want to keep  
9 it moving.

10 MS. ROBERTS: Right. Right.

11 THE COURT: That's the -- we're all in favor of that.

12 MS. ROBERTS: So if we get a hearing date on the  
13 evidentiary issues, we can, at that point, as I say, talk  
14 about if there are any further...

15 MR. DECOULOS: One of the interrogatories that she  
16 presented with, "Do you know anybody that knows any of  
17 these facts." And that's the only answers that we will be  
18 naming people. And that I might exclude as well, because  
19 the facts are all in the documents.

20 THE COURT: Okay. So that's -- we'll see that later.

21 So 15 days for answers to int's, right?

22 MS. ROBERTS: And I got --

23 THE COURT: Is that what I got? 30 days to  
24 supplement?

25 MS. ROBERTS: Well, we'd like -- he's going to try to

1 answer his interrogatories in a couple of days.

2 THE COURT: Okay.

3 MS. ROBERTS: And give me 15 days from that point --

4 THE COURT: Okay.

5 MS. ROBERTS: -- to do whatever discovery needs to be  
6 done.

7 THE COURT: Okay.

8 MS. ROBERTS: It may be none.

9 THE COURT: All right. And then objections? Okay?

10 And --

11 MS. ROBERTS: And then 30 days that we'd submit -- the  
12 other parties would submit their own proposed documents --

13 THE COURT: Right.

14 MS. ROBERTS: -- if they have additions to make.

15 THE COURT: Right.

16 MR. WICE: Your Honor, may I state?

17 THE COURT: Go ahead.

18 MR. WICE: This is David Wice in Philadelphia.

19 THE COURT: Hi, Mr. Wice.

20 MR. WICE: Hello. I'm sorry I'm not there in person.  
21 I think I'm in the process of obtaining counsel so that I  
22 can be there, at least represented.

23 Have we passed over item one, the documents in the  
24 book that was prepared by Mr. Decoulos? I (indiscernible  
25 at 10:42:25 AM, simultaneous) --

1 THE COURT: Well, just the fact that --

2 MR. WICE: -- (indiscernible) connected by telephone.

3 THE COURT: Okay. But just the fact that everybody  
4 got though; did you get one?

5 MR. WICE: I got that, and I have some questions and  
6 objections.

7 And if there's...

8 And your ruling is now, is there time for us to make  
9 those objections?

10 THE COURT: Yes.

11 MR. WICE: Or do I have to do that today?

12 THE COURT: Not -- not today, heh.

13 But what did we say? What were we...

14 MS. ROBERTS: We're going to do: Finish the  
15 discovery, and then everyone else gets to supplement that  
16 package in 30 days. And then I would suggest in another 30  
17 days that everybody file whatever objections they have to  
18 everybody else's proposed evidence.

19 So Mr. Wice, that would be when that opportunity would  
20 arise. So it would be about --

21 MR. WICE: It's presuming that, that's already  
22 submitted.

23 MS. ROBERTS: Yes. Yeah, every -- everything.

24 MR. WICE: That's fine.

25 MS. ROBERTS: Yeah, everything. So that would be



1 about two months out.

2 MR. WICE: Thank you.

3 THE COURT: So the main thing -- what we've decided so  
4 far, we're going to get this case rolling. It's been here  
5 too long anyway, but, you know, some of us want to move it  
6 more quickly than others. And there are some limits.

7 But we are going to get things rolling. And I'll be  
8 issuing an order, I guess.

9 So there are some interrogatories waiting to be  
10 answered. They're going to be answered within a few days.

11 Parties have 30 days to supplement the documents.

12 And then we're going to have a hearing eventually on  
13 what should be or should not be included in that booklet.

14 So you have some time to put something together and  
15 send it up to us, with copies to everybody else.

16 And if you get counsel -- and I recommend it; I can't  
17 command it, but I recommend it strongly.

18 MR. WICE: Okay, thank you.

19 MS. ROBERTS: It looks -- it looks --

20 MR. WICE: I had counsel. One retired and one died.

21 (Mirth.)

22 THE COURT: Oops. I don't want to be on that list.

23 MS. ROBERTS: Right.

24 (Laughter.)

25 THE COURT: Okay. Go ahead.

1 MS. ROBERTS: It looks like sometime -- depending upon  
2 the Court's schedule, sometime in the first half of  
3 December would get us through all of this and to a hearing  
4 on the evidentiary issues.

5 MR. DECOULOS: We'll be back very quickly --

6 THE COURT: Go ahead.

7 MR. DECOULOS: -- with two motions, Judge, the motion  
8 to amend and a motion on Rule 34. So we'll be before you  
9 within the month.

10 THE COURT: Yeah. Yeah. You can do that. But find  
11 out when I'm sitting.

12 MR. DECOULOS: Sure.

13 THE COURT: And that sort of...

14 But I think what Jennifer was talking about, a hearing  
15 in early December?

16 MS. ROBERTS: Yeah, on the evidentiary issues. If  
17 everyone has got their objections to any other -- we can  
18 resolve it.

19 THE COURT: Well, December 4th. Can everybody check  
20 their books? Is anybody going to traveling or anything?

21 MR. DONNELLY: Will this be a status conference  
22 (indiscernible at 10:44:58 AM, simultaneous)?

23 THE COURT: No, it'll be a hearing on -- a motion  
24 hearing -- make your respective motions on the booklet.

25 Leslie?

1 MS. MORSE: What time?

2 THE COURT: What time would be good for you folks?  
3 Ten or eleven o'clock?

4 MS. MORSE: I'd rather do it at 11:00. Traffic is a  
5 whole lot better --

6 THE COURT: Yeah.

7 MS. MORSE: -- at 11:00.

8 THE COURT: That's fine. Okay. That's fine.

9 All right. December 4, eleven o'clock, we'll have a  
10 hearing on that point, and if there's something else we can  
11 do that day, we'll -- looking-at (phonetic at 10:45:22 AM)  
12 the whole day, mark it up at the same time.

13 MR. DECOULOS: I might put those two motions on during  
14 the same date, Judge.

15 THE COURT: Okay.

16 MR. DECOULOS: Save some time.

17 THE COURT: All right. We can do that.

18 UNIDENTIFIED MALE [CLERK?]: When you send the motions  
19 in, on your markings, indicate that date and time.

20 THE COURT: Yeah.

21 UNIDENTIFIED MALE [CLERK?]: Or the date and time that  
22 you really choose, (indiscernible at 10:45:39 AM).

23 THE COURT: Okay. No, it's a full...

24 No, December 4 -- let me write it down before I  
25 forget.

1 MR. WICE: Can you tell me which motions are on that  
2 date?

3 MS. ROBERTS: It will be the evidentiary motions to  
4 strike. If anyone is unhappy with anybody else's proposed  
5 documents.

6 MR. WICE: Okay.

7 MR. DECOULOS: Also the motion to amend, to include a  
8 nuisance and a Rule 34 motion to enter upon the land.

9 MR. WICE: Thank you.

10 MR. HALL: Your Honor, may I be heard?

11 THE COURT: Yeah, sure. Go ahead.

12 MR. HALL: Benjamin Hall, Your Honor.

13 Ms. Roberts summarized the case in a different way  
14 than I think had ever been sort of laid out before the  
15 Court before, and I didn't want you, as a new judge in the  
16 case, to get a sense that this is a little bit less of a  
17 complicated case in any respect.

18 The issues that Judge Lombardi decided to bifurcate  
19 were not simply whether or not there was an easement.

20 What he bifurcated and had the Court -- what the Court  
21 was going to decide first and foremost was whether or not  
22 there was evidence to overcome the presumed intent of this  
23 easement by necessity that the Appeals Court looked at.

24 And in Judge Brown's decision there was some  
25 suggestion that there might be evidence to show that there

1 was not an intent that every lot had some sort of access  
2 easement to it.

3 And that issue is the issue that was bifurcated, the  
4 issue of intent. Not whether or not there was an easement  
5 whatsoever.

6 There were two counterbalancing issues that came up  
7 before the Court that have quite a bit of technical and  
8 rules-based argument.

9 One was whether or not all the necessary parties have  
10 been before the Court.

11 That one, the Appeals Court looked at it, and it came  
12 back here, and that issue is still not to be -- not decided  
13 (time is 10:47:38 AM).

14 There were some motions that the Court heard, and then  
15 they were withdrawn. The issue of necessary parties was  
16 then subjugated to the issue of whether or not this issue  
17 of intent was present.

18 The other defendants have framed the case to the sense  
19 that it seems like they need -- they are trying to have  
20 this Court re-rule that the issue of intent is a burden  
21 that needs to be shown by the plaintiffs.

22 My parties are counter-claimants. We tried to put in  
23 cross-claims. They were struck by the Court based on Rule  
24 8, failure to plead correctly.

25 We tried to plead -- re-plead the issue. The judge

1 found that our pleadings again did not meet the technical  
2 requirements of Rule 8, and then further ruled that our  
3 cross-claims were futile.

4 Ironically, the cross-claims were the same as the  
5 counterclaims, and yet the counterclaims remain in this  
6 case.

7 So my parties are in a strange kind of position here  
8 in that we weren't allowed to assert our cross-claims; they  
9 were struck. But our counterclaims for easements by  
10 necessity and prescription remain.

11 So we would like an opportunity to amend our  
12 complaint - our answer - to try to address the technicality  
13 issue that the Court had ruled we had failed and failed  
14 again to meet, at the same time as Mr. Decoulos would be  
15 serving his motion to amend.

16 It's simply -- I think it's a matter of artful  
17 drafting, in the way that we had drafted the complaint. We  
18 were referring to other parts of the complaint. We thought  
19 we had met the technical pleading requirements. Judge  
20 Lombardi didn't feel so. And then he ruled that our  
21 cross-claims were futile anyway.

22 And so we've appealed that. That's at the Appeals  
23 Court at this point.

24 But I don't think there's anything that says that we  
25 couldn't apply to amend our pleadings one more time, other

1 than the fact that Judge Lombardi had shut that door, at  
2 least at that time.

3 THE COURT: Do you say it's on appeal?

4 MR. HALL: It's currently on appeal, but it would moot  
5 the appeal if the Court were to allow our cross-claims, you  
6 know, if we were to try to amend to meet the technical  
7 requirements.

8 THE COURT: Okay. Where's -- okay.

9 Mr. Rappaport, let's get a different voice here. Go  
10 ahead.

11 MR. RAPPAPORT: Mr. Hall's motion to amend has been  
12 brought, argued, and denied twice by Judge Lombardi. And  
13 it's on appeal.

14 There's --

15 THE COURT: Yeah. Yeah, I know you --

16 MR. RAPPAPORT: I believe there's no two-ways-to-push  
17 (phonetic at 10:50:22 AM, simultaneous) --

18 THE COURT: Yeah. Yeah, no, I know you -- I was going  
19 to ask Mr. Hall a question too.

20 You filed an appeal fairly recently or...

21 MR. HALL: Yes. We have two, two different appeals.

22 THE COURT: They're not -- the record hasn't been  
23 assembled on at least one of 'em.

24 MR. HALL: No, it has not.

25 THE COURT: So we're waiting for a transcript, as --

1 MR. HALL: Yes, we are.

2 THE COURT: -- I recall --

3 MR. HALL: Yes.

4 THE COURT: -- as I understand it.

5 MR. HALL: Those are -- those are out. That's right.

6 THE COURT: Do you have any idea when she's going to  
7 file it?

8 MR. HALL: I believe...

9 THE COURT: Can you kind of sort of light a fire, for  
10 one thing.

11 MR. HALL: I will. Yes, Your Honor. Yes.

12 THE COURT: 'Cause I know I did some checking  
13 yesterday, and I saw that the -- Ellen still has it to  
14 assemble the record. But we're kind of waiting for the  
15 transcript.

16 MR. HALL: Yes.

17 THE COURT: And it was the one that was recorded, not  
18 transcribed.

19 MR. HALL: Correct.

20 THE COURT: You sent it out to somebody down on the  
21 Cape.

22 MR. HALL: That's correct.

23 THE COURT: So we're still waiting for her to get  
24 back.

25 MR. HALL: Yes.



1 THE COURT: So at the very least, can you just give  
2 her a call?

3 MR. HALL: I will, Your Honor.

4 THE COURT: Okay. But --

5 MR. HALL: However, Mr. Rappaport said that we moved  
6 to amend twice. No, we moved -- we had a cross-claim to  
7 amend, which the Court refused to address.

8 Even though it was filed under Rule 5, the Court said  
9 it was not filed in a proper fashion. So then, when he set  
10 the deadline for all amendments, we filed and moved to  
11 amend.

12 So technically we've only had one hearing on our  
13 motion to amend, even though he had struck our responsive  
14 answer to the Third Amended Complaint -- from last year.

15 So he had struck our cross-claims, did not strike our  
16 counterclaim. Our counterclaim is tantamount to the same  
17 exact claims.

18 So we're kind of in a funny situation, and the Court  
19 has ample power to say, "No, I'm going to look at it again,  
20 and look at your pleadings and see if they meet the  
21 technical requirements."

22 The futility issue that Judge Lombardi addressed is  
23 the issue that we're going to probably have to ask the  
24 Appeals Court, if this Court does not allow some sort of  
25 addressing of our cross-claims.

1           We asked Judge Lombardi for a Rule 54 judgment, a  
2 separate judgment, saying, "No, that's it, you're out on  
3 your cross-claims"; he refused to do that.

4           So that leaves the issue still before this Court for  
5 the possibility that we could have an amendment.

6           After all, we're going to be hearing everybody's  
7 claims on this issue of easement by necessity; why  
8 shouldn't all the parties' rights be adjudicated in one  
9 forum?

10           It's not going to take a lot of extra time for the  
11 Court to review the couple-of-extra-ports (phonetic at  
12 10:52:37 AM, simultaneous).

13           THE COURT: Okay. Could I ask if Mr. Rappaport spoke  
14 for everybody at that table?

15           MS. ROBERTS: Yes. Yes.

16           THE COURT: How about the people at this table?

17           MR. DECOULOS: I don't have anything to say about his  
18 motion.

19           THE COURT: You don't. Okay.

20           So plaintiffs say nothing. The defendants disagree  
21 with you, Mr. Hall. Okay. My inclination is, he's already  
22 decided it; it's on appeal. Let's let it -- let's see what  
23 happens on appeal.

24           And if -- but let's get the transcript in anyway. All  
25 right? Okay.

1 MR. HALL: Yes. So then we would not be allowed to  
2 file another motion to amend?

3 THE COURT: No. No. If you did, I'd deny it.

4 MR. HALL: (Indiscernible at 10:53:05 PM,  
5 simultaneous.)

6 MR. DECOULOS: Judge?

7 THE COURT: Mr. Decoulos.

8 MR. DECOULOS: Judge, on that Rule 34 motion, I'm  
9 going to file that immediately because of the weather  
10 conditions --

11 THE COURT: Okay.

12 MR. DECOULOS: -- will-happen-down (phonetic at  
13 10:53:15 AM, simultaneous, indiscernible).

14 THE COURT: Okay. That's fine. I'm sitting -- every  
15 couple of weeks I'm sitting. That's fine. No problem,  
16 even though it is --

17 MR. DECOULOS: (Indiscernible at 10:53:18 AM,  
18 simultaneous) or-I-D (indiscernible) --

19 THE COURT: So we go from there.

20 MR. HALL: One other matter, Your Honor.

21 THE COURT: Yeah, go ahead.

22 MR. HALL: And this has to do with, we were talking  
23 about evidence that's going to come into the case.

24 We've recently become aware of another matter that was  
25 adjudicated partly and then settled, I believe, in the

1 superior court, a case by the name of Broscheit. And it's  
2 in this vicinity.

3 There was testimony given by various parties. The  
4 Vineyard Conservation Society was a party to that case.  
5 Certain admissions were made. And so we'd like to be able  
6 to put the transcript that we can get our hands on, from  
7 that trial, or at least portions of the transcript, and put  
8 those before this Court, because there's some fairly  
9 serious evidence of spoliation of some of the evidence on  
10 the ground that the Court could take heed of if the Court  
11 were inclined at some point to go down and take a view of  
12 this area.

13 Some of the old road beds were graded up and torn up  
14 by Vineyard Conservation Society at the time that this  
15 case, I believe, had been pending -- for a bit of time.

16 So I think that we've become aware of this case. We'd  
17 like to have an opportunity to kind of get into that record  
18 and present that record to the Court as well, 'cause I  
19 think there's some possibility that...

20 Well, I think I've said enough on that one matter.

21 THE COURT: Okay. Ms. Roberts? Go ahead.

22 MS. ROBERTS: I was trial counsel in the Broscheit  
23 matter, Judge, and it settled during trial.

24 The access issue there doesn't even abut Mr. Hall's  
25 property, so why he would want to be talking about a

1 roadway that doesn't give him any access I couldn't begin  
2 to tell you. But if he wants to pull together the record  
3 of that, we'll respond to it.

4 THE COURT: Okay. All right. Okay.

5 Mr. -- you're traveling, I understand?

6 MR. ABAIR: Yeah, I'm off to Barcelona, so.

7 THE COURT: Good for you.

8 (Mirth.)

9 THE COURT: Okay. Tell you what. Just to make sure I  
10 got it right. Does somebody want to -- either Ms. Roberts  
11 or Mr. Decoulos -- Ms. Roberts, want to put together  
12 something, what we did this morning?

13 MS. ROBERTS: Sure. And we can all share it around  
14 and --

15 THE COURT: And circulate it with everybody.

16 MS. ROBERTS: -- I'll share it around and make sure  
17 everybody's got it.

18 THE COURT: And then I'll adopt it if it meets with my  
19 mind.

20 MS. ROBERTS: Yes.

21 THE COURT: And we'll go from there. And on December  
22 4th, at eleven o'clock, we're here. All right. Thank you,  
23 all.

24 MS. ROBERTS: Thank you, Judge. My apologies for  
25 being late.

1 THE COURT: No. Not a problem. And Leslie's right;  
2 eleven o'clock's better. Here. Okay.

3 Thank you, Mr. Wice.

4 MR. WICE: Thank you, Your Honor. Appreciate it.

5 THE COURT: Okay.

6 MR. WICE: Bye.

7 (Discussion basically off the record follows, included  
8 FYI.)

9  
10 THE COURT: Anybody need any copies of this? These  
11 are the plans -- a blow-up of the plan that was in the  
12 Appeals Court reporter.

13 MS. ROBERTS: Oh. Yeah.

14 THE COURT: If anybody wants them...

15 ALL: Oh. Well. Yeah.

16 THE COURT: It's the same thing that was in the  
17 Appeals Court.

18 UNIDENTIFIED MALE SPEAKER: Nothing new.

19 (Discussion off the record.)

20 THE COURT: Is there enough here? I think I have one  
21 of 'em left, and we're just -- or there's the printer for  
22 you, if you want. Who didn't get --

23 (Discussion continues off the record.)

24 (Matter adjourned at 10:56:35 AM, to resume December 4,  
2008, at 11:00 AM.)

## C E R T I F I C A T I O N

I, Ellen H. Dibble, an Approved Court Transcriber, do hereby certify that the foregoing is a true and accurate transcript, from the audio recording provided to me by Attorney Wendy Sibbison of the Land Court proceedings in the above entitled matter.

I, Ellen H. Dibble, further certify that the foregoing is in compliance with the Administrative Office of the Trial Court Directive on Transcript Format.

I, Ellen H. Dibble, further certify that I neither am counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

*Ellen H. Dibble*

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COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF THE TRIAL COURT  
LAND COURT DEPARTMENT

DUKES, SS.

\* \* \* \* \* \*  
\*  
MARIA A. KITRAS, as Trustee of \*  
BEAR REALTY TRUST et al., \*  
Plaintiffs \*  
\* No. 97-MISC-238738  
v. \*  
\*  
TOWN OF AQUINNAH et al., \*  
Defendants \*  
\* \* \* \* \* \*

MOTION TO COMPEL INTERROGATORIES, BY VCS  
BEFORE JUDGE CHARLES W. TROMBLY, JR.

APPEARANCES (see next page):

Boston, Massachusetts  
Room 4  
September 30, 2008

Ellen H. Dibble  
Approved Court Transcriber



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1 (Time is 10:08:06 AM.)

2 THE COURT: Let them all introduce themselves, make  
3 sure you can hear them.

4 Start with Mr. Decoulos. You're the plaintiff.

5 MR. DECOULOS: Good morning. Nick Decoulos.

6 MS. MORSE: Leslie Morse.

7 MS. ROBERTS: Jennifer Roberts for the defendant,  
8 Vineyard Conservation Society.

9 THE COURT: Okay. And so you three, plus Ron  
10 Rappaport?

11 Could you hear that, Ron?

12 MR. RAPPAPORT: I could. Thank you, Judge.

13 THE COURT: Okay. All right. So we're here this  
14 morning on Ms. Roberts' motion to compel answer to  
15 interrogatories.

16 MS. ROBERTS: Have you had a chance to read --

17 THE COURT: I've read the motion, and I've --  
18 unfortunately I don't have the booklet with me. It's  
19 downstairs on Frank's desk, so we're all in trouble. But  
20 I've seen it before.

21 Do you have a copy? That would be helpful.

22 MR. DECOULOS: I've got two copies.

23 THE COURT: Okay. Just --

24 MR. DECOULOS: A copy of that and also a copy of the  
25 documents that were introduced -- I mean, produced, in

1 2006, I think.

2 THE COURT: Do you have a copy of that, Mr. Rappaport?

3 MR. DECOULOS: -- two thousand and six.

4 MR. RAPPAPORT: I have a copy of the motion. Yes, I  
5 do.

6 THE COURT: And of the booklet that Mr. Decoulos filed  
7 earlier?

8 MS. ROBERTS: 393-page --

9 THE COURT: 390-some-odd pages?

10 MR. RAPPAPORT: Oh, the booklet?

11 THE COURT: Yeah.

12 MR. RAPPAPORT: Yes. I don't have it in front of me,  
13 but --

14 THE COURT: Okay. Well --

15 MR. RAPPAPORT: -- I do have that document.

16 THE COURT: Okay. All right. Go ahead. Go ahead,  
17 Ms. Roberts.

18 MS. ROBERTS: Well, essentially, the complaint at this  
19 point consists of three counts: Count 1, for an easement  
20 by necessity; count 2, for an easement by prescription over  
21 Zack's Cliff Road; which if Your Honor recalls the map,  
22 that's set out on the map; and the count 3 is an easement  
23 by prescription over what we've been calling the Radio  
24 Tower Road.

25 The plaintiffs appear in several different capacities

1 as the trustees of realty trusts which own different  
2 trusts.

3 I served a set of interrogatories to them in their  
4 separate capacities, because I wanted to get from them the  
5 facts on which they relied with respect to particular lots,  
6 since the lots are in different areas; and I assume,  
7 certainly with respect to the easement by prescription,  
8 that there would be different evidence with respect to  
9 that.

10 The answer that I got back was essentially for all  
11 of -- for all of my interrogatories, was a reference to  
12 this 393-page document. And that was it.

13 So the basis for the motion is that that is an  
14 inadequate response.

15 With respect to the easement by necessity, the Appeals  
16 Court, when it had this case, has already said that that's  
17 a very fact-intensive exercise, to determine the intent  
18 with respect to the easement by necessity.

19 I would respectfully suggest that the time has now  
20 come for the plaintiffs to list what facts they rely on to  
21 support their contention that the easement by necessity  
22 exists.

23 The problem becomes even more severe with respect to  
24 interrogatories addressed to the easements by prescription.

25 As Your Honor knows, an easement by prescription

1 requires that you show 20 years of adverse use by you and  
2 your predecessors in title. And so my interrogatories were  
3 directed towards getting from the plaintiffs the facts that  
4 support that claim. I would be expecting them to come back  
5 and say, "Well, we've used this road to do X, Y, and Z on  
6 it to benefit this particular lot; and the predecessor in  
7 title with respect to this particular lot used it to do  
8 whatever," as factual support for the claim.

9 Again, all that they did --

10 Well, I would also note for the Court that some of  
11 these lots don't even abut the particular ways that the  
12 plaintiffs are claiming an easement by prescription over.

13 So what we got instead was the same reference to this  
14 393-page document, which has something to do with what was  
15 going on in the 1870s. But I would respectfully suggest  
16 there's nothing in there that gives you - at least that I  
17 could find - that would give you a description of the 20  
18 years of use by the record owners of these various lots.

19 So we would suggest that the interrogatory answers are  
20 completely inadequate.

21 I would note that Mr. Decoulos contacted me yesterday  
22 to refer me to some interrogatory answers that the  
23 plaintiffs had filed back in 2000.

24 And when I looked those up, I called Mr. Decoulos back  
25 and said that these interrogatory answers had been so

1 inadequate that I had brought a motion to compel back in  
2 2000, which was granted by Judge Green at that time, with  
3 an order dated August 8th, 2000, in which he ordered that  
4 the plaintiffs provide further answers to interrogatories,  
5 and in fact even invited me to seek my costs, which was  
6 something that I declined to do.

7 So -- so these answers from back in 2000 are  
8 completely inadequate -- the response. And unfortunately I  
9 didn't bring a copy.

10 The plaintiffs did file a subsequent answer, pursuant  
11 to Judge Green's order, in which they waived their claims  
12 to prescriptive easements at that phase of the proceedings.

13 So, as I said to Mr. Decoulos yesterday, if you want  
14 to waive your claims under counts 2 and 3, we don't have to  
15 come today. But if you still intend to pursue those  
16 claims, we're entitled to know the facts on which you rely  
17 that support them.

18 THE COURT: Okay. Thank you.

19 Mr. Decoulos.

20 MR. DECOULOS: Judge, there are several cases that are  
21 in the decisions of the Supreme Judicial Court that talk  
22 about ancient ways. In particular there's a recent one in  
23 345 Mass., Puffer against the City of Beverly, that shows  
24 an ancient way along the coastline of Beverly, where  
25 it's -- with the Atlantic Ocean.

1           And this is an 1870 way; it was in existence in 1870,  
2 and has been continued to date. It's called Zack's Cliffs  
3 Road. And we don't have any evidence that would say  
4 that -- we've walked (phonetic at 10:14:35 AM, could be  
5 heard as "walk") the property. We're relying on rights  
6 that were created in 1870 as a result of Zack's Cliffs  
7 Road, which went from the center of -- from State Road, I  
8 think it is, all the way to the Atlantic Ocean.

9           It's there now. Recently we had a survey made of a  
10 particular lot, 178, and they found, on the ground, they  
11 could locate Zack's Cliffs Road.

12           So what we're relying on is not our own -- our rights  
13 to travel over it, but on -- since they've owned it, but  
14 relying on the rights of since 1870, that this is what the  
15 Indians used to get down to the ocean.

16           And on one side of Moshup Trail, the Kennedy holdings  
17 shut -- have placed a barrier across it. But on the other  
18 side of Moshup Trail, which travels to where all the lots  
19 are, that's open and still in existence.

20           So that's what we're relying on, and we've got a  
21 booklet of -- the book there, of 300-some-odd pages, that  
22 show the roads.

23           Go downstairs into the atlas room; it's shown there.  
24 I don't know what else she wants. But we did tell her if  
25 she wanted persons, and we did tell her that there's a

1 William Vanderhoop that lives in Aquinnah who says that he  
2 traveled it all the way down.

3 And not only is it in that booklet, but there's a  
4 second booklet that we have given you, Judge, that was  
5 produced in the -- a long time ago, when there was a  
6 production of documents.

7 So we've laid out all of the documentary evidence that  
8 we have. It's impossible for us to say that in 1870  
9 Vanderhoop was there and did the walking.

10 So we're relying exactly on what was there in 1870.  
11 They used it to travel from the State Road all the way down  
12 to the Atlantic Ocean. And we have no other documentation.

13 We have no oral testimony except Vanderhoop's. That's  
14 all.

15 THE COURT: How old is he, if I might ask?

16 MR. DECOULOS: Oh, it's great. He's up and about. As  
17 I understand it, he runs an operation down there. My  
18 client gave me a picture of him with Professor Ogletree  
19 from Harvard, fishing for bass down there last month. So  
20 there's some -- he's up and about.

21 MS. ROBERTS: He's about my age, Judge. Somewhere in  
22 his 50s (chuckles).

23 THE COURT: Okay. I'm not going to say a word.

24 MS. ROBERTS: Okay. (Chuckles.)

25 THE COURT: He could be about my age. (Chuckling.)



1           So you have no -- or you have one -- no oral testimony  
2 except perhaps Mr. Vanderhoop.

3           MR. DECOULOS: Yeah.

4           THE COURT: So what do you rely on, if (phonetic at  
5 10:17:27 AM, unclear word) the prescription is use?

6           MS. ROBERTS: He just needs -- he needs to file an  
7 interrogatory answer which says that. If he says, "All I'm  
8 relying on is the existence of Zack's Cliffs Road since  
9 1870," then he needs to give me an interrogatory answer  
10 that says that.

11           And then I'm going to file a motion for summary  
12 judgment, because that doesn't cut the mustard for an  
13 easement by prescription.

14           If he -- you know, I can't -- whatever his theory is  
15 here, he's pleaded an easement by prescription.

16           There's no such thing as an ancient way by  
17 prescription, that I know of. So --

18           MR. DECOULOS: Oh, there isn't? Then you ought to  
19 read the cases --

20           MS. ROBERTS: So. So. So --

21           THE COURT: Okay. All right.

22           MS. ROBERTS: So he needs to identify the facts on  
23 which he relies to support his claim.

24           And referring me to one stack of booklet or two  
25 booklets is not going to cut the mustard.

1 THE COURT: Yeah. No, you've got to be more specific,  
2 definitely.

3 I'll issue an order. But you've got to be more  
4 specific than saying, "Look at the book."

5 It's -- I have read it. Sorry I can't put my fingers  
6 on mine this morning, but I have -- and I haven't read it  
7 word for word, but I have read it when it came in.

8 But you've got to be more specific.

9 And just -- as she said, maybe just say what you said,  
10 that there's no -- hardly a man is now alive, except  
11 Mr. Vanderhoop. He can -- if you're saying he can go back  
12 50 or 60 years, then he probably can say that.

13 But prescription. Necessity's another thing. But  
14 this is -- we're talking prescription, though.

15 MR. DECOULOS: I understand. I understand. That's  
16 all we've got, is what I told you. We don't have anything  
17 else. And that's what we're going to rely on.

18 THE COURT: Okay. Well, give her an answer. Then  
19 she'll do whatever she's going to do. If you make a  
20 motion, fine. Then I'll deal with it, and we'll be going  
21 on with this thing.

22 But be specific. Don't just say --

23 MR. DECOULOS: I am --

24 THE COURT: -- "Look at the book."

25 Where do we go from here now? I saved December 4th

1 for you folks.

2 MS. ROBERTS: We had them -- if he could -- it's sort  
3 of up to Mr. Decoulos how quickly he could now answer these  
4 interrogatories.

5 MR. DECOULOS: I'm not going to give you...

6 THE COURT: Just give us an answer similar to what you  
7 just said.

8 MR. DECOULOS: What do you want me to do, just itemize  
9 the pages for you?

10 MS. ROBERTS: I want you to say that: The fact on  
11 which I rely for the claim of an easement by prescription  
12 is the existence of Zack's Cliff Road from 1870 to the  
13 present, used by -- whoever you say used it, to benefit  
14 whatever particular lots your plaintiff owns.

15 If that's what you rely on, that's what we need.

16 THE COURT: Yeah, that's fair.

17 MR. DECOULOS: And we'll give you page numbers. We'll  
18 refer to the pages.

19 THE COURT: Okay. And give us page numbers.

20 MR. DECOULOS: Yeah.

21 THE COURT: Say what you said, and give us -- if you  
22 can say pages 1, 3, 5, 7, and 9, fine, say that.

23 MR. DECOULOS: No problem.

24 MS. ROBERTS: But the basic fact is, the existence of  
25 that Zack's Cliffs Road, that's what you need in your

1 interrogatory answer.

2 MR. DECOULOS: All right.

3 THE COURT: All right. And then, the next point, of  
4 course, is going to be your motion, I would imagine, about  
5 the entry --

6 MR. DECOULOS: For the view, yeah.

7 THE COURT: We'll deal with that when it comes out.  
8 I'm not going to deal with it today.

9 MS. ROBERTS: And I guess the other point. We've  
10 addressed ourselves mostly here to the easement by  
11 prescription claims.

12 But the easement by necessity I would --

13 THE COURT: Same thing.

14 MS. ROBERTS: -- respectfully suggest --

15 THE COURT: Just --

16 MS. ROBERTS: -- he needs to list what the facts are  
17 that he relies on for that claim.

18 THE COURT: Yep, and I agree.

19 MR. DECOULOS: Okay.

20 THE COURT: You've got to be more specific.

21 MR. DECOULOS: Fine.

22 THE COURT: And then we'll go. All right?

23 MR. DECOULOS: Yep.

24 THE COURT: Okay. Thank you, all.

25 Okay, Ron?

1           MR. RAPPAPORT: Thank you. Thank you very much for  
2 letting me participate.

3           THE COURT: Okay. Good. Glad to do it. Bye-bye.

4 (Matter adjourned at 10:20:43 AM.)

## C E R T I F I C A T I O N

I, Ellen H. Dibble, an Approved Court Transcriber, do hereby certify that the foregoing is a true and accurate transcript, from the audio recording provided to me by Attorney Wendy Sibbison of the Land Court proceedings in the above entitled matter.

I, Ellen H. Dibble, further certify that the foregoing is in compliance with the Administrative Office of the Trial Court Directive on Transcript Format.

I, Ellen H. Dibble, further certify that I neither am counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

*Ellen H. Dibble*

Name of the Approved Court Transcriber

November 16, 2011

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COMMONWEALTH OF MASSACHUSETTS  
DUKES, SS. DEPARTMENT OF THE TRIAL COURT  
LAND COURT DEPARTMENT

\* \* \* \* \*

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

v.

TOWN OF AQUINNAH et al.,  
Defendants

\* \* \* \* \*

ANTHONY FRANGOS et al.,  
Plaintiffs

v.

TOWN OF AQUINNAH et al.,  
Defendants

\* \* \* \* \*

No. 97-MISC-238738

MISC. No. 299511

MOTIONS TO STRIKE; STATUS CONFERENCE  
BEFORE JUDGE CHARLES W. TROMBLY, JR.

APPEARANCES (see next page):

Boston, Massachusetts  
Room 6  
February 4, 2009.

Ellen H. Dibble  
Approved Court Transcriber

## APPEARANCES:

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APPEARANCES (continued):

By phone (patched in by phone from 11:09:03 AM):

Ronald Rappaport, Esq.  
Reynolds Rappaport Kaplan & Hackney, LLC  
106 Cooke Street  
PO Box 2540  
Edgartown, MA 02539  
For: The Town of Aquinnah

1 (Time is 11:04:31 AM.)

2 THE CLERK: Case number 238738, Maria Kitras et al.  
3 versus the Town of Aquinnah et al.

4 Case number 299511, Anthony Frangos et al. versus the  
5 Town of Aquinnah et al.

6 THE COURT: Okay. Hi. Good morning, folks. For the  
7 record, let's introduce ourselves as if we don't know each  
8 other. We'll start with you.

9 MR. DECOULOS: Nicholas Decoulos representing the  
10 plaintiff, Maria Kitras et al.

11 MS. MORSE: Leslie-Ann Morse representing Mark D.  
12 Harding and Charles Harding and Sheila Besse as they are  
13 the trustees of Eleanor P. Harding Realty Trust.

14 MR. HALL: Good morning, Judge. Benjamin Hall, Jr.,  
15 representing Gossamer Wing Realty Trust and Baron's Land  
16 Trust.

17 THE COURT: Okay.

18 MS. ROBERTS: Jennifer Roberts for the Vineyard  
19 Conservation Society.

20 And Judge, I just would note that I think we're  
21 supposed to be conference-calling Mr. Rappaport.

22 THE COURT: Are you going to call him? I thought he  
23 was going to call us.

24 MS. ROBERTS: I don't know where it was left with the  
25 Court.

1 THE COURT: No, it was left with us that he was going  
2 to call us at five minutes past 11:00.

3 MS. ROBERTS: Okay. Great.

4 THE COURT: So if he doesn't call, then we'll call  
5 him.

6 MS. ROBERTS: Okay.

7 THE COURT: Okay.

8 MS. TILLOTSON: Good morning, Your Honor. Diane  
9 Tillotson for the Martha's Vineyard Land Bank.

10 THE COURT: Okay.

11 MS. DANIELS: Good morning, Your Honor. Cara Daniels,  
12 for Caroline Kennedy and Edwin Schlossberg.

13 MR. DONNELLY: John Donnelly for the Commonwealth of  
14 Massachusetts.

15 THE COURT: Okay. Good morning.

16 MS. LEWIS: Good morning, Your Honor. Christina Lewis  
17 here for David and Betsy Wice.

18 THE COURT: Okay. No room at the table? Or...  
19 (Mirth.)

20 MS. TILLOTSON: There actually is.

21 MS. LEWIS: I could squeeze in there. I wanted to  
22 give counsel a (indiscernible at 11:05:56 AM).

23 THE COURT: Okay.

24 MS. TILLOTSON: All right.

25 THE COURT: As I said, Mr. Hall was able to get off

1 the island, I guess, one way or the other. How did you  
2 come up? By boat?

3 [MS. TILLOTSON]: He swam.

4 MR. HALL: Yes, Your Honor. I took the first ferry  
5 and then the first bus.

6 THE COURT: Okay. And Ron Rappaport was at the  
7 airport, and he called us about 9:30, quarter of 10:00, and  
8 he said, "I'm not sure I'm going to make it."

9 And then he called back and he said, "I'm not going to  
10 make it; they haven't plowed the runways yet."

11 MR. HALL: That's why I don't take the plane whenever  
12 there's a snow.

13 THE COURT: So we told him to call back a little bit  
14 after 11:00. So we're kind of... we'll sit here and wait  
15 for him. It should be any minute.

16 Is everybody else here other than that? Okay.

17 (Pause.)

18 THE COURT: The boats were running, I gather, huh?

19 MR. HALL: Oh, yeah. Right on time. There's no wind  
20 or anything, so, typically --

21 THE COURT: Were they running yesterday? In the  
22 morning?

23 MR. HALL: Well, I wasn't on them, so I...

24 THE COURT: No, 'cause I had a motion yesterday, and  
25 by prearrangement it was by telephone 'cause it was

1 somebody on the Vineyard.

2 MR. HALL: Well, they may not...

3 THE COURT: I forget who it was. He said there wasn't  
4 anybody in that office, and he said, "I'm not sure I could  
5 have got off this morning anyway."

6 MR. HALL: Well, I don't know if -- a lot of people  
7 didn't go in to work because the roads were icy, and they  
8 canceled school. So.

9 THE COURT: Mmm.

10 MR. HALL: Doing it by boat is the wise thing to do.

11 THE COURT: Even in God's country, huh?

12 MR. HALL: Oh, yeah. Moshup's country. Heh.

13 THE COURT: Okay. So we'll wait just a minute for  
14 Mr. Rappaport.

15 (Pause.)

16 (Attorney Rappaport patched in at 11:09:03 AM.)

17 THE COURT: Ron?

18 MR. RAPPAPORT: Yes.

19 THE COURT: You're there. Okay.

20 This is Judge Trombly. Present are the usual cast of  
21 characters. I'll just remind everybody to keep their voice  
22 up while we talk so you can hear it and so we can hear you.

23 All right. So we're here this morning on -- it's  
24 motions to strike the evidence and what not, as I read the  
25 order? How many sides --

1 Who submitted packages of what deeds they want to put  
2 in? I know Nick did.

3 MR. DECOULOS: Yes.

4 THE COURT: I noticed Leslie did.

5 MS. MORSE: Yes.

6 THE COURT: And...

7 MR. HALL: Baron's Land Trust and Gossamer Wing Realty  
8 Trust submitted documents.

9 THE COURT: Okay. How about you?

10 [MS. TILLOTSON]: Yes. And the defendants.

11 THE COURT: Oh, you all did too.

12 MS. ROBERTS: I don't know that we've actually...

13 THE COURT: One volume with everybody?

14 MS. ROBERTS: I don't know that we've actually  
15 submitted the documents themselves. I -- it would...

16 We certainly gave them to the opposing party. But I  
17 present on behalf of Vineyard Conservation Society, I don't  
18 think I actually filed copies of the documents, on the  
19 theory that we wouldn't be relevant until the Court ruled  
20 on it.

21 THE COURT: Till we do the -- set up the briefing  
22 schedule and go from there? Okay.

23 MS. ROBERTS: Yeah. Yeah.

24 THE COURT: Okay. And what we've got motions today by  
25 various parties to strike things from various people's --

1 this is kind of unwieldy, but I want to -- how to do it,  
2 how we should do it.

3 We'll start with -- Nick's the plaintiff. Go ahead.

4 MR. DECOULOS: Well, Your Honor, this is a two-count  
5 complaint: One for prescription on certain ways that are  
6 located -- were located on the property and that have been  
7 continued in use since that time; at least that's what  
8 we're alleging.

9 And a second count is for easement by necessity.

10 And yesterday I received this - I don't know - a  
11 complete 14-page objection to the documents that we  
12 submitted, from day one to the other day -- not to the  
13 other day.

14 And I think that to burden you with a motion to strike  
15 at this time is not practical to do. What we should do is  
16 file our briefs, and in our briefs set forth our objections  
17 to their -- or our memorandums as it relates to all of  
18 these documents that they've objected to.

19 And before we even do that, I think that we should be  
20 able to have a meeting of all of the attorneys and go over  
21 all of this, because I don't understand some of their  
22 objections. We've put in five or six titles to some of the  
23 lots, and they said "it's not relevant," but they don't  
24 dispute the back (phonetic at 11:11:45 AM, could be heard  
25 as "bank") title.

1 I don't understand what that means, but I think that a  
2 meeting with all of the lawyers, we can narrow the issues  
3 down and narrow the documents down to something, submit an  
4 agreed statement of facts on all of the documents that they  
5 have no objection to, and possibly after the conference  
6 they wouldn't have any more objections, and maybe we  
7 wouldn't have any objection.

8 But to try and burden you with going over some - I  
9 don't know; we submitted at least - it must be over 100  
10 documents here. And I don't think that we should be  
11 burdened with that without memorandums, without meetings of  
12 the parties, so that we could then report back to you and  
13 say that these documents are agreeable, on agreed statement  
14 of facts.

15 And this is all a statement -- this is a case that  
16 there isn't going to be any evidence introduced.

17 And put it down into one neat package for you so that  
18 you can then decide whether or not their objections and our  
19 objections are relevant, or meaningful, and then go on from  
20 there.

21 THE COURT: Aren't there always going to be deeds and  
22 things that are put in to -- submitted to the Court which  
23 may or may not be relevant?

24 I took a look at some of the objections, and I didn't  
25 go into detail. But the objection was relevancy, 'cause it



1 didn't pertain to a certain lot, that may or may not still  
2 be involved?

3 MR. DECOULOS: Well, we would agree to that. You  
4 know, like lot 79; I don't know why it's in there, but it's  
5 there. It's got no relevance at this particular moment.  
6 But I think at a conference - a two or three-hour  
7 conference amongst the attorneys - we could come to a lot  
8 of agreed statements or agreed facts for the Court to  
9 consider.

10 THE COURT: Okay. Anybody -- you? Diane?

11 MS. TILLOTSON: Your Honor, I'm all for not  
12 burdening - overburdening - the Court.

13 THE COURT: Thank you, heh.

14 MS. TILLOTSON: -- but I think... (chuckles.)

15 I think that on the present record, at least given the  
16 documents, the number of documents that have been  
17 submitted, I do think that there are a number that are just  
18 not relevant to the issue before the Court.

19 And rather than... I think we need -- everybody, the  
20 Court and all the parties to the case need to understand,  
21 before we submit our briefs, what our playing field is,  
22 what the Court is going to accept into evidence, assuming  
23 that we're going forward on a case-stated -- which I think  
24 is everybody's intention here: That there will be no live  
25 evidence offered.

1           And essentially, the issue before the Court is the one  
2 that was remanded to this Court by the Appeals Court.

3           I think that perhaps what might make sense, in the  
4 interests of if Mr. Decoulos believes that we can reach  
5 agreement and is willing to concede that certain things, in  
6 his record, are not relevant, perhaps we could argue the  
7 motions this morning and then set a date for, you know, not  
8 terribly far from here, you know three or four days or by  
9 the end of next week, for advising the Court as to whether  
10 we're able to reach agreement on any of the objections that  
11 have been made.

12           But I think we should move ahead and argue the  
13 objections. And then I think you need to make a ruling as  
14 to what's in and what's out, and then the parties need to  
15 set a briefing schedule.

16           THE COURT: Then we can do the briefing.

17           MS. TILLOTSON: And I'm happy --

18           THE COURT: Jennifer? Leslie? Or Ben. Go ahead.  
19 Can you hear us, Ron, by the way?

20           MR. RAPPAPORT: I can hear about three quarters of it,  
21 but I've heard -- I've followed what everybody's saying.

22           THE COURT: Okay. All right. Mr. Hall's going to  
23 speak. Go ahead.

24           MR. HALL: Thank you, Your Honor.

25           Several matters. First, I'm a little confused exactly

1 what it is that we're doing here today because, the nature  
2 of the motions to strike.

3 First of all, I did not receive any motions to strike  
4 until I was -- one of the plaintiffs, actually, was kind  
5 enough to e-mail me a copy of the objections after five  
6 o'clock last night. So I was coming up here assuming that  
7 there were no objections and everything was coming in.

8 I was a little surprised to find out that there were  
9 objections, and I did not have any opportunity to really  
10 prepare very well, and look at all the documents in the  
11 case.

12 The second issue is, the motions that were filed with  
13 the Court I think are in a vacuum. And I think there's  
14 going to be a problem with Your Honor even beginning to  
15 review these, because the documents that they're objecting  
16 to were not provided to the Court.

17 So the Court's going to look at a bunch of objections  
18 on relevance but not be able to actually look at the  
19 documents themselves to determine whether they're relevant  
20 or not.

21 THE COURT: Well, a lot of them were. Mr. Decoulos  
22 submitted two binder - and Leslie did too - binders with  
23 things in them. Maybe you didn't get them, but we have  
24 them.

25 MR. HALL: No. No, I got them, but the instructions

1 of the order were not to submit them to the Court. And I  
2 think we didn't want to be submitting what were supposedly,  
3 in my mind, were essentially discovery-type materials that  
4 we were proposing and exchanging back and forth.

5 So Jennifer is quite right; I think there are a lot of  
6 documents that the Court doesn't have before it that need  
7 to be kind of looked at in the context of the relevance  
8 issue.

9 So I mean, I would like to be able to submit at least  
10 the ones that the Town has objected to, and also have an  
11 opportunity to really respond to some of the stuff that's  
12 said.

13 I mean, that being said, I can -- I'm prepared to sort  
14 of argue the motion to strike some of my evidence, today,  
15 but would like the opportunity to actually put it in  
16 writing and provide a memorandum of law in response.

17 I think that having the status conference, the motions  
18 to strike, heard in such a quick fashion after they were  
19 sent doesn't really give anybody the opportunity to prepare  
20 an opposition, because they were sent out -- it looks like  
21 the Town sent theirs on the 30th, but as of yesterday, with  
22 the snowstorm on the island, I don't know what happened to  
23 the mail, but I didn't get anything.

24 And then to find out that the Land Bank, Town of  
25 Aquinnah, the Kennedys, the Wices, the Commonwealth, the

1 VCS provided a joint opposition to documents that the  
2 plaintiffs had proposed: Was submitted late. I mean, this  
3 wasn't filed on January 31st or the 30th, but was submitted  
4 on February 2nd. So albeit, that is a weekend day, and it  
5 would necessarily roll over to Monday.

6 But now to have a hearing two days later on it, it's a  
7 little quick -- quick draw.

8 So that was some of my concerns about where we are.

9 And I was under the impression that we were sort of  
10 heading toward a case-stated basis. And in that respect, I  
11 wasn't quite sure what objections to anticipate from an  
12 evidentiary basis. I was considering a lot of the  
13 documentation to be under the rubric of a summary judgment  
14 type application. And I anticipated, as we had before,  
15 motions to strike based on hearsay and affidavit hearsay  
16 and so on and so forth, much as before, and earlier in the  
17 case, where some of the statements in some affidavits were  
18 struck by the Court, by Judge Green originally.

19 So here we are today, and I think the issue is - that  
20 we're looking at, at the trial that we're looking at, or  
21 whatever fact-finding procedure we're following - is going  
22 to be under the issue of intent, and the intent to landlock  
23 the property -- whether there was an intent to landlock the  
24 property.

25 Not whether there's an intent to create an easement by

1 necessity, because the law is quite clear -- and Judge  
2 Green recited that; it's part of the law of the case. It's  
3 Davis v. Sikes. It's all the cases that that Judge Green  
4 himself went into under the very first order in this case,  
5 much of which remains the law of this case, that was not  
6 reversed in the Appeals Court.

7 And essentially that says that there's a  
8 presumption -- once you sever property into a multiple of  
9 lots, if there's a unity of title, that there's a  
10 presumption that there's access to those lots.

11 Now, that presumption can be overcome, because that  
12 shifts the burden of proof over to the parties that are  
13 saying that no, there was an intent to landlock.

14 And I think the Court has been acting as if no, the  
15 burden of proof on intent is actually on the plaintiffs, or  
16 the parties that are claiming it.

17 And that isn't actually the way the law reads. It's  
18 that -- the law is that you merely show that there's a  
19 division of the property in 1878 -- I think that's almost a  
20 fact that everybody can agree on. Whether it's 1871 or  
21 1878: There was a division of property.

22 And at that point that creates the presumption of an  
23 intent to create an easement by necessity.

24 Now, that can be overcome. And it's up to the  
25 defendants to prove that it has been overcome.

1           And in several documents that we've proposed, there's  
2 a judicial admission - virtual judicial admission - that in  
3 fact there is no evidence of intent to landlock.

4           So I'm a little confused about where we're going and  
5 why there's a need to actually provide a whole case and all  
6 these documents, because the Court could simply hone in on  
7 a couple of judicial admissions, and say, "Why are we here?  
8 There's clearly -- that this presumption cannot be  
9 overcome; you've admitted it, defendants" - the Town in  
10 particular, in one devastating interrogatory answer, where  
11 they're asked specifically, "Provide all evidence that  
12 shows that there's an intent to landlock," and they provide  
13 nothing.

14           So I think the Court could almost cut through all  
15 these documents, hone in on a couple of judicial  
16 admissions; and now we're to the next level of the case,  
17 which is: What parties are supposed to be before the  
18 Court.

19           THE COURT: Mr. Rappaport, you want to be heard on  
20 that?

21           MR. RAPPAPORT: It's -- I'm just looking at the  
22 Appeals Court decision, at page 354, Mass. Appeals Court at  
23 300, where the decision explicitly says that -- and I'm  
24 reading, "Remain mindful that it is the proponent's burden  
25 to prove the existence of an implied easement,"

1 quote-unquote. And there's a cite to another case.

2 So this really is, in large part, a burden of proof  
3 question. And the Appeals Court has said that the burden  
4 rests with the proponent seeking to establish an easement  
5 by necessity.

6 That's an issue that's already been adjudicated by the  
7 Appeals Court.

8 THE COURT: Okay. Anybody else? Jennifer?

9 MS. ROBERTS: Just really quickly, Judge. You've got  
10 eight lawyers in front of you today, and at least the  
11 lawyers on this side of the courtroom understood we were  
12 here on motions to strike evidence.

13 THE COURT: Right.

14 MS. ROBERTS: And we have sort of yet to get to the  
15 meat of that.

16 And I would also point out that while I'm sympathetic  
17 with Mr. Hall's position, it was because of Mr. Hall's  
18 schedule that we rejiggered all of this briefing schedule,  
19 to meet his vacation schedule. So we did that back in  
20 early December, and everybody's had plenty of time to  
21 address this.

22 So I would respectfully suggest that let's hear the  
23 motions to strike.

24 I have no objection to going out in the Hall  
25 afterwards with Mr. Decoulos to see if we can report



1 something to the Court on some of these issues, but I'd  
2 like to get the motions heard, get a schedule for Your  
3 Honor to make a decision, and then get a briefing schedule  
4 so that we can get this case behind us.

5 THE COURT: Okay. I agree. I do. Yeah.

6 MS. MORSE: Your Honor, can I make...

7 THE COURT: Yeah. Leslie, go ahead.

8 MS. MORSE: Your Honor, I guess my big problem with  
9 this is: I never got this. I mean, you're asking us to  
10 argue motion I have glanced at. This was sent out February  
11 2nd. I don't have it. This is the one from the Kennedys,  
12 the Land Bank, Town of Aquinnah.

13 I mean, that's grossly unfair, to send it out on --  
14 this is dated the 2nd, which was Monday, and we're here  
15 today.

16 I mean, I think that raises --

17 THE COURT: It is late, but everybody's here. I don't  
18 want to make everybody come back. It's hard enough getting  
19 everybody together.

20 But let's do it, argue it generically, then.  
21 Motions -- safe (phonetic at 11:24:09 AM, could be heard as  
22 "seem") to say that -- are relevance.

23 Let's not go through it one at a time. Let's just  
24 say, what's the basic arguments.

25 MS. ROBERTS: Your Honor, the way we divvied this up,

1 Ms. Tillotson handled the Kitras exhibits, and  
2 Mr. Rappaport handled the Mr. Hall exhibits. So they'd be  
3 principally arguing --

4 THE COURT: Let's go through it. I'll give everybody  
5 a chance to reply if we get there.

6 Go ahead.

7 MS. TILLOTSON: Your Honor, most respectfully, I don't  
8 think that anything that I'm going to say is going to be a  
9 surprise to anybody sitting on the other side of the room.  
10 Nor do I think that it's anything that is not capable of a  
11 response, because what we submitted, although we went  
12 through item by item, frankly, so the Court would have the  
13 benefit of having a list of all the proposed exhibits that  
14 we were objecting to.

15 And then the basis for the objection, for the most  
16 part, the memorandum that we submitted, with the  
17 objections, was generic in nature, and basically broke  
18 up... the primary -- our primary objection to many of  
19 these proposed exhibits is relevance.

20 And I would just start, again, with the fact -- I know  
21 when Mr. Decoulos got up he talked about a two-count  
22 complaint, and the first count being one for prescription.

23 From my perspective, what we're trying, and what the  
24 Court - Judge Lombardi - focused on in the motion to  
25 bifurcate, was the issue that was remanded by the Appeals

1 Court in 2005.

2 And the essential question for the Court to determine,  
3 in accordance with the Appeals Court's decision, is whether  
4 or not there being be an easement implied for lots above  
5 189 or 190, depending on whether you include lot 189 as  
6 previously owned individually, or as part of the common  
7 lands.

8 In any event, I don't think that there's any question,  
9 if you read the Appeals Court decision carefully, that lots  
10 before -- that the lots from 1 to 188 are... The Appeals  
11 Court ruled conclusively with respect to those lots, so I  
12 don't think there's any question that any material  
13 submitted with respect to those lots is not relevant to  
14 this Court's inquiry.

15 With respect the lots above those, I think it is also  
16 clear, as Mr. Rappaport indicated, that both the Appeals  
17 Court and Judge Lombardi, when he bifurcated - when he  
18 acted on the motion to bifurcate - clearly stated that the  
19 burden of proof is on the proponents, i.e., the plaintiffs,  
20 to prove that there is an easement by implication.

21 And the Appeals Court went on to say what would be  
22 relevant and what the standard was in looking at that  
23 issue.

24 And the issue is really, if you went back to 1878,  
25 which is the year that the commissioners acted, what was in

1 the minds of the commissioners when they severed that  
2 lot -- when they severed those lots? And can you make a  
3 determination, as of 1878, that if you, the finder of  
4 fact, put yourself in the position of those commissioners,  
5 would you have intended to create an easement?

6 So what is really relevant is what it can properly  
7 said to have been in the minds of those commissioners back  
8 in 1878.

9 And I think, on this side of the room, essentially  
10 we're saying that all of the information that has been  
11 submitted to you from 1920, 1940, 1960, 1980 - and there's  
12 a lot of it even post-1980 - is simply not relevant,  
13 because how can plans and correspondence and statements  
14 that were made 125 years after the fact possibly shed light  
15 on what those commissioners had in their mind back in 1878,  
16 and prior to 1878.

17 And again, what the Appeals Court said, and what Judge  
18 Lombardi...

19 This case is very difficult. And one of the reasons  
20 that I think it is going to be submitted on a case-stated,  
21 is that there is no person who is live today who could  
22 possibly testify - who is possibly competent to testify -  
23 as to what those commissioners had in their minds back  
24 then.

25 What the Appeals Court stated in the Kitras decision

1 was that they considered relevant historical sources of  
2 information on tribal use, common custom applicable at the  
3 time.

4 And with respect to those exhibits, the ones that  
5 suggest tribal use and custom, or the actual documents that  
6 divided up the land in question, I think that the  
7 defendants have no objection to those documents. And we've  
8 indicated that in our filing.

9 But with respect to all of the information that  
10 post-dates that, I think it's very difficult for the Court  
11 to make a determination. And I don't think that that  
12 information is probative as... you know, for example, an  
13 1848 plan showing, or an aerial photograph showing what the  
14 land looked like in 18- -- excuse me, in 1948, or 1950, how  
15 can that possibly be probative of what the commissioners  
16 had in their minds in 1878?

17 On the other hand - and this goes to address one of  
18 Mr. Decoulos's objections to our proposed exhibits - and  
19 Your Honor, I don't know that you actually need physical  
20 copies of the exhibits to make these rulings, but I think  
21 that if you'd like to have them, I think we can all provide  
22 you with a set.

23 We've certainly provided them -- we've circulated them  
24 amongst counsel. But I think it's true that you haven't  
25 received the ones that we submitted, the Land Bank

1 submitted, or that Ms. Roberts submitted. And again, it's  
2 not -- there are not that many documents. We can certainly  
3 provide the Court with a copy.

4 In any event, I do think it's relevant, because  
5 anything that predated - particularly by a relatively short  
6 period of time - the 1878 time period can be said to be  
7 probative of what the commissioners had in their minds in  
8 1878, for the simple reason that they would have known  
9 about it.

10 Obviously the commissioners can't know about something  
11 that happened in 1920 or 1930, but they can certainly know  
12 about something that happened in 1860 or 1850, because they  
13 were -- obviously, that was part of the history that they  
14 were aware of at the time that they made the set-off of  
15 1878.

16 And with respect to particularly the Chappaquiddick  
17 set-off that Mr. Decoulos objects to, it's the defendants'  
18 position that that set-off very specifically articulated  
19 that there were certain easements granted or reserved in  
20 setting off the lots for the Chappaquiddick set-off.

21 Again, the commissioners who did the Gay Head set-off  
22 would have been aware of that Chappaquiddick set-off when  
23 they were doing the later set-off, and we submit that the  
24 fact that they did not include any reference to any  
25 easements in their set-off is pertinent and significant in

1 defending the plaintiffs' case here.

2 And the Appeals Court likewise found that to be the  
3 case. The Appeals Court stated, at page 299 of the Appeals  
4 Court decision: "Particularly noteworthy in our estimation  
5 is the commissioners' silence on this issue, as is the fact  
6 that even the most cursory glance at a contemporaneous plot  
7 map shows that the vast majority of the set-off lots had no  
8 frontage or obvious access."

9 So the Appeals Court found the fact that there was no  
10 mention made of easements particularly significant.

11 The defendants believe that in light of that notation,  
12 it is relevant and probative to point out the fact that in  
13 another set-off that was done relatively contemporaneously  
14 and prior to this one - that the commissioners would have  
15 known about at the time - that that is probative, where in  
16 fact easements were noted in the set-off document.

17 The fact that there is that particular set-off, when  
18 compared to this one, is relevant and probative of the  
19 commissioners' intent.

20 I think that that essentially sums up my argument.  
21 I'm happy to, you know, have anybody else on our side of  
22 the table chime in, or to answer any of the questions that  
23 the Court might have. And again, that's without going item  
24 by item.

25 The other thing I would note is that no one -- there

1 have been several documents submitted that are the complete  
2 titles of various lots, both lots before lot numbered 189  
3 and lots after 189.

4 I don't think the record title is in dispute here. I  
5 mean, obviously those documents are... you know, we don't  
6 have an objection on the basis of authenticity on with  
7 respect to those documents. But no one is disputing the  
8 title.

9 And there's nothing in any of those documents - I  
10 think the parties can agree - that suggests what the intent  
11 of the commissioners in 1878 might have been.

12 So again, I can't possibly see the relevance of those  
13 documents to what's relatively a fairly narrow issue that's  
14 facing the Court.

15 And the only other real objection - or the only other  
16 objection we make - is to the composite plans that were  
17 presented to the Court showing the ownership.

18 And we would object to those on a number of bases  
19 which are included in the motion.

20 But we don't have any objection to their use as a  
21 chalk. In fact, we find that they may be useful as a  
22 chalk, so to the extent that the Court wants to look at  
23 those plans that have been submitted...

24 But there's no real basis or foundation for  
25 establishing them as actual evidence in the case.



1 THE COURT: Thank you.

2 Do you want to reply, Mr. Decoulos?

3 MR. DECOULOS: I heard nothing about prescription,  
4 Your Honor, in their argument. And that's one of the  
5 counts.

6 And the reason that any of the evidence after 1878 was  
7 introduced was to show where the location of all of the  
8 roads were.

9 And we used aerials; we used everything else possible.

10 And that's why we wanted to include those in the case.

11 Now, the Appeals Court had -- there's two parts to the  
12 Appeals Court decision.

13 There's a part that they go on and talk about all of  
14 the intent. And then they get involved in the facts.

15 And they're mistaken as to the facts. And that's the  
16 second part of the decision. And it's really dicta,  
17 because that wasn't what the issue was before the Court.

18 For example, you take lot 178: Lot 178 -- the first  
19 time there was ever a lot 178 was in 1878. It wasn't in  
20 existence prior to that. And that's between that 174 and  
21 189.

22 There's no 178.

23 The only time we found out that there was a lot 178  
24 was because of the set-off plans that were found just last  
25 year down at the -- last year or the last couple of years.

1           So those are in dispute. And that's why we needed all  
2 of those documents that we're putting in there.

3           It's -- nobody -- it just never was in existence prior  
4 to that, so how do they know 178... how can they  
5 realistically say that 178 is excluded when the first time  
6 it ever shows up is in the set-off plan?

7           Now, our contention is that we want to show every  
8 piece of common -- every...

9           Our contention is that the common land should be  
10 specifically identified, and that's the reason for the  
11 plans before 1878.

12           And there's a presumption, as Mr. Hall stated, that  
13 the subdividing of the land, without any easements or  
14 access to get to the other lots held in common, there's a  
15 presumption.

16           Presumptions are rebuttable, but we've got a step-up  
17 (time is 11:37:47 AM) on that.

18           When I think that we've got a presumption that there  
19 was an intent, let them rebut the presumption.

20           That's the way I understand the rules of evidence, is  
21 that it's there; it's not prima facie, but it's there,  
22 according to all of the cases that I've read. And they've  
23 got to rebut that presumption.

24           So having said that, I still suggest, Your Honor, that  
25 we ought to have a meeting, whether it be this afternoon or

1 some other day next week, so that we can give you a  
2 package, that will then, you'll be able to say, "All right,  
3 they're agreeable to all of these things; they're not  
4 agreeable to these," and then you can take a look at them.

5 But keep in mind that there's several parts in this  
6 case. And I don't want to repeat myself. There's the  
7 presumption count, and then there's the necessity count.

8 And if we've got a presumption, the rules of evidence  
9 say that they've got to rebut it. That's the way I  
10 understand it.

11 THE COURT: Okay. Thank you.

12 MS. ROBERTS: Just want to point out --

13 THE COURT: Ms. Roberts.

14 MS. ROBERTS: -- to the Court, this is Judge  
15 Lombardi's order allowing the motion to bifurcate, in which  
16 he says -- this is with respect to the Appeals Court: "In  
17 issuing its decision, the Appeals Court assumed, for lots  
18 number 189 or 190 and above, the intent to create  
19 easements. The assumption may ultimately be found to be  
20 factually correct, but this is not inevitable. The first  
21 task for this Court, therefore, is to decide whether there  
22 is a factual or legal base for that assumption."

23 So we've all been assuming, heh, based on Judge  
24 Lombardi's order --

25 THE COURT: What's the date of the order?

1 MS. ROBERTS: That is August 14, 2006.

2 THE COURT: Mm-hmm?

3 MS. ROBERTS: -- that we were focusing here on the  
4 easement by necessity and whether there's an intent to  
5 create that easement.

6 That's what we thought the exercise was. I now hear  
7 from Mr. Decoulos that he thinks we're also going down the  
8 prescription path.

9 THE COURT: I'll be honest with you, I'm -- as a --  
10 I'll have to read it again myself.

11 I was on the assumption, like you, that we were  
12 talking the implication and necessity argument right now.

13 MS. ROBERTS: Yeah. We can regroup on that.

14 Frankly, there is no evidence of 20 years of adverse  
15 use benefitting any of the plaintiffs' lots. We deposed  
16 Mr. Decoulos, and that doesn't exist. So I'm not -- we'll  
17 talk afterwards, but --

18 THE COURT: We'll talk about that, but...

19 MS. ROBERTS: But -- and that would, I would suspect,  
20 be open to summary judgment brief.

21 But for the present purposes, our exercise, and the  
22 evidence we've designated, is on the issue of intent with  
23 respect to the easement by necessity.

24 THE COURT: Yeah. Go ahead, Nick.

25 'Cause I was thinking the same thing they were.

1 MR. DECOULOS: All right. But that's not fact. The  
2 fact is that we've got a prescription claim, and we've also  
3 got that claim.

4 THE COURT: But is it on the table right now, I guess,  
5 that's the question.

6 MR. DECOULOS: I think it is. I mean, it's count  
7 number 2 in our complaint. If they all want to overlook  
8 come if they all want to overlook it, that's perfectly all  
9 right by me, and agree that there is a roadway network  
10 that's in existence down there, since 1878 and forward.

11 THE COURT: I don't think they're going to admit to  
12 that.

13 MR. DECOULOS: They're not -- I know they won't agree  
14 to that.

15 MS. TILLOTSON and others: Well -- well, I think --  
16 (everybody speaking up) --

17 THE COURT: But that's not the question, now. The  
18 question is, are we --

19 MR. DECOULOS: Can I just say one thing about the  
20 Appeals Court decision?

21 THE COURT: Yes.

22 MR. DECOULOS: -- that I...

23 Judge Lombardi asked me - and I can remember it  
24 distinctly - "Do you think the Appeals Court was wrong in  
25 saying 174 and 189."

1           Those things were not in existence.

2           And I told him I think they were wrong, and they  
3 should never have delved into that part of the case in  
4 their decision.

5           You read the decision, and it stops right there, and  
6 they say, "Well, wait a minute; we want to talk about the  
7 facts."

8           And that wasn't before them.

9           Thank you, Judge.

10          THE COURT: Okay.

11          MS. ROBERTS: Judge, I would just say, if we're going  
12 to include the prescription issue now, then we need to  
13 designate evidence for that, 'cause we haven't done that.

14          THE COURT: No, as I say, the way I read it, that's  
15 not on the table right now. It may be someday, but it  
16 isn't now. Okay.

17          Mr. Donnelly?

18          MR. DONNELLY: I was just going to...

19          There's specific evidence, for example, orders of  
20 taking some of the lots.

21          THE COURT: All right.

22          MR. DONNELLY: That would be relevant in a  
23 prescriptive argument. And obviously they weren't  
24 included, because that we were under Judge Lombardi's  
25 order, so I just add that.

1 THE COURT: Mr. Rappaport, I don't want to forget  
2 about you.

3 MR. RAPPAPORT: No, I'm listening, and I must say I  
4 agree with what Attorney Tillotson and Attorney Roberts  
5 have said.

6 And again, I go back to that explicit language in the  
7 Appeals Court that it is really in part is coming down to a  
8 burden of proof claim, but it rests with the proponents.

9 THE COURT: Okay. Mr. Hall.

10 MR. HALL: Yes, Your Honor. First of all, there's  
11 nothing inconsistent with the Appeals Court decision and  
12 Judge Lombardi's bifurcation order with respect to shifting  
13 the burden of proof, because, as the Appeals Court said -  
14 and as Judge Lombardi said in his bifurcation order,  
15 quoting from the Appeals Court - that "the assumption" with  
16 respect to intent to create easements for lots 189 or 190  
17 and above "may ultimately be found to be factually correct,  
18 but this is not inevitable."

19 But the Court says: "Factually correct."

20 And so in the fact-finding, the first fact that the  
21 Court needs to look at, under the law not only of this case  
22 but under over a hundred years of jurisprudence, going back  
23 to 1817, the Gayetty versus Bethune case, which was cited  
24 by Judge Green, and is the law - has not been overruled in  
25 any respect; it's 14 Mass. at 49, page 56; it's an 1817

1 case - is that once you show a division of the property -  
2 and again, this goes back to the Appeals Court - is that  
3 the fact of the division, while Judge Green found it,  
4 they -- they wanted to send it back to find out what the  
5 facts were with respect to that.

6 So once the Court finds that there was a division -  
7 and I think there's pretty much a concession here that  
8 there was a division in 1878, at least as to that one  
9 minute but important fact - once the Court findings that  
10 fact, automatically, if anybody is landlocked, the burden  
11 then shifts to the other side, under the presumption that's  
12 noted in Davis v. Sikes, the Gayetty versus Bethune, all  
13 the ca- -- Flax versus Smith; these are all cases that  
14 Judge Green cited in his June 2001 decision, that were  
15 never overruled, and not addressed in the Appeals Court  
16 decision.

17 So yes, we have -- the burden of proof initially is on  
18 the proponents to show that there is an intent. However,  
19 once you show that there's a division of the property, that  
20 intent automatically becomes a presumption that the  
21 landlocked parcels should not have been landlocked and that  
22 there was an easement by necessity. And the burden shifts  
23 to the other side, to show that there was an intent to  
24 leave them landlocked.

25 And I think that the other side is trying to take



1 almost 200 years worth of jurisprudence, and chuck it, and  
2 say, "Oh, no, no, no; the Appeals Court said specifically  
3 the intent is on them."

4 Well, they said that, but I think they said it from a  
5 fact-finding point of view.

6 And once we established this division and landlocked  
7 properties, boom, the burden shifts to the other side, and  
8 they've already admitted that there is no evidence of an  
9 intent to landlock.

10 So if the Court will focus in on that simple issue,  
11 all these other documents go out the window, and I don't  
12 think there's anything inconsistent with the shifting of  
13 the burden after the Court finds that initial fact and the  
14 intent issue, because what they're trying to do is trying  
15 to unfairly shift of the burden onto us.

16 And I just want to point out something that, it sounds  
17 so crazy that I don't think anybody in this day and age in  
18 Massachusetts would even suggest or breathe a word that the  
19 Massachusetts government authorities, the commissioners  
20 appointed by the probate court, would go ahead and landlock  
21 newly enfranchised members, citizens of our state.

22 Remember, in 1869 the legislature gave citizenship to  
23 all tribal members in the state. It took them several  
24 years after Lincoln had proclaimed all the slaves - in the  
25 South at least - to be emancipated. But these folks were

1 wards of the State. And they wanted to be enfranchised.  
2 They wanted to be equal citizens.

3 In 1869 the State said yes; and in 1870, they passed  
4 law and said, "And here's how you do it in Gay Head."

5 And so all these people began the process of being  
6 enfranchised.

7 And to suggest that the courts of this state - in  
8 enfranchising these people as equal partners and owners of  
9 land in this state - would give them land that they can't  
10 even get to, is absolutely and utterly insane.

11 THE COURT: We're getting into argument now.

12 MR. HALL: Well, but it is -- it goes to the relevance  
13 argument, because what they're saying is that the burden is  
14 on the proponents to prove conclusively, essentially, that  
15 there was an intent to provide an easement.

16 And what we're saying is that the law already says  
17 that they get the easement, and the burden's on the other  
18 side, and it's shifted to the other side, under the case  
19 law, that's been established not only in this case but for  
20 almost 200 years: That the other side has to prove the  
21 landlocked part of it; and they can't do it.

22 The second part of it is, what the Chappaquiddick  
23 commissioners did was a different case, under different  
24 sets of rules. They were not the Gay Head set-off. They  
25 were not governed by the 1870 statute. Though what the

1 commissioners did in that case has nothing to do with what  
2 happened in Gay Head. Nothing whatsoever. The fact that  
3 they articulated easements over there, good for them; they  
4 were lucky.

5 In Gay Head, there it's silent. Absolutely silent.

6 So I think the Court has to find that with the  
7 division in 1878, at least, that there is this shift of the  
8 burden, and that there was an intent to actually -- there's  
9 a presumption of an intent to give them property that they  
10 could get to and use and till and use for whatsoever  
11 productive purpose that any other nontribal member would  
12 have had at the time.

13 And the other question that keeps coming up and keeps  
14 getting pointed to - and it's not accurate - is that I  
15 don't believe that the Land Court ruled conclusively that  
16 lots 1 to 188 or 189 are not subject to further findings of  
17 fact. They remanded the case for further findings.

18 I think what they ruled was that because there was a  
19 question as to the unity of title that is required to  
20 provide for these easements by necessity --

21 THE COURT: You're talking about the Appeals Court  
22 decision.

23 MR. HALL: The Appeals Court decision.

24 THE COURT: Judge Brown. All right.

25 MR. HALL: Right. That Judge Brown said that you

1 can't burden those lots, because they were severalty lots.

2 But I think it was left open to a question as to  
3 whether or not they really were severalty lots, because I  
4 think there's a little bit of unsureness in the decision.

5 Moreover, I think that the issue that they were out of  
6 actually benefitting from an easement by necessity since  
7 they were severalty lots, and they were given out by these  
8 commissioners and recognized, from their possessory  
9 interests -- I think there's many questions with respect to  
10 possessory interests at the time, whether people were alive  
11 at the time, whether they were entitled to it; there's many  
12 factual questions that govern lots 1 to 189. But in  
13 particular lots 174 to 188 or 189, because there's --  
14 again, in the commissioner's 1878 report, which is the  
15 first time these are even mentioned, is that these were run  
16 out and given to other people, as part of that whole  
17 statutory process.

18 But it didn't take place until 1878, when admittedly,  
19 the report, the final report of Richard Pease, under the  
20 severalty designations, occurred in 1871, much earlier.

21 So for them to try to append something under that  
22 report -- these clearly came down through the 1870 statute,  
23 and therefore there are many factual questions that remain,  
24 with respect to lots at least 173 to 189, because they were  
25 part of that 1878 set-off.

1           So I think for their to say that they are out is just  
2 not true.

3           If the Court would go back and look at that decision,  
4 I think you'll find that it's not clear that it's true.  
5 And I think what they say is, you can't burden those  
6 severalty lots with an easement by necessity. But they  
7 still could benefit from one from the earlier division.

8           And lastly, later evidence -- it was stated that later  
9 evidence is not relevant to the findings on intent.

10          Argue -- establish...

11          If the Court were to decide that the burden was wholly  
12 on the proponents to prove this intent and that there was  
13 no rebuttable presumption of an intent to provide an  
14 easement, the extrinsic evidence is clearly available for  
15 the proponents to put in on the issue of intent, because  
16 you look at the four corners of the deeds, essentially -  
17 the set-off deeds - and you look at that, and then you can  
18 look at later evidence to imply that there's a great  
19 exception...

20          And you look at the four corners of the deed, and  
21 that's all you get, in theory. Those all the interests you  
22 get.

23          But there's an exception, is that: You can provide  
24 extrinsic evidence on the issue of an easement by  
25 necessity. And I can cite several cases for the Court. I

1 don't have them with me at the moment. But that's clearly  
2 allowed under the case law of the State. You can put in  
3 all kinds of extrinsic evidence to show intent that  
4 occurred years before.

5 So all this additional evidence that they're moving to  
6 object to on the basis of relevance is clearly relevant and  
7 probative of information that people acted upon, when they  
8 received their land and so forth, to show what the intent  
9 was.

10 And the fact that there have been very few instances,  
11 and many -- very few instances where people have actually  
12 sought to block people from getting to their property, and  
13 many instances where the Land Court itself, in registering  
14 lots in Gay Head, has come forward and said, "Subject to  
15 the rights that may exist over these lands," presumably  
16 because of an easement by necessity.

17 THE COURT: Subject to the rights that "may" exist.

18 MR. HALL: Right. But they didn't adjudicate what  
19 those interests were, but they -- in the registry --

20 THE COURT: I've-seen (phonetic at 11:52:09 AM,  
21 simultaneous) that over the years.

22 We're not saying that there are any. We're saying  
23 that there might be.

24 MR. HALL: Right. So they left it open for later  
25 adjudication, that there may be ways that could be placed

1 over these particular lots. So they did not foreclose that  
2 possibility. They left it open. So that possibility has  
3 been left open.

4 THE COURT: Okay. Anybody at this table? Go ahead.  
5 Diane.

6 MS. TILLOTSON: Your Honor, you know, most  
7 respectfully to Mr. Hall, I think he is not correct in  
8 terms of his statement that the Appeals Court left open any  
9 possibility as to lots prior to 188 or 189.

10 On page 293 of the Appeals Court decision, the Court  
11 states unequivocally that -- they go through the fact of  
12 the -- the way the title was divided, and then come to the  
13 conclusion: "However title is described" - and that's  
14 after they've given the benefit to the complainants, or to  
15 the plaintiffs in this case - "However title is described,  
16 each lot was owned by a different individual, and the unity  
17 of title required to imply an easement by necessity fails."

18 And you know, it can't be any clearer than that.

19 Now, you know, the question as to whether or not the  
20 Appeals Court made a mistake...

21 I mean, I think everybody in this courtroom probably  
22 has a view that the Appeals Court has made a mistake on one  
23 or more occasion. But I think we are -- you know, for want  
24 of better word, we're stuck, all of us, with what the  
25 Appeals Court decided.

1           This case was -- I think all sides, as I understand  
2 it, looked for further appellate review. The Supreme  
3 Judicial Court denied further appellate review.

4           So we are -- talk about law of the case: We are left  
5 with what the Appeals Court remanded back to this court.  
6 And I don't think there's any ambiguity at all with respect  
7 to those lots, prior to 188 or 189.

8           I think most of the rest of what Mr. Hall stated is  
9 really argument, which presumably is going to be briefed by  
10 both sides, as -- you know, there's no question but there's  
11 a presumption. I would challenge Mr. Hall that the  
12 presumption isn't -- that the burden isn't on us to show  
13 that there was an intent to landlock.

14           Although there is a presumption that does benefit, I  
15 think there that there is evidence in the record already  
16 that rebuts that presumption.

17           But that's all material that you're going to have to  
18 sort through, for better or worse, when we make our  
19 arguments.

20           What I don't think it changes is the universe of  
21 documents that are relevant in the inquiry, and I don't  
22 disagree that if you can establish contemporaneous use and  
23 evidence of contemporaneous use of a particular roadway  
24 that may be the subject of a claim of easement by necessity  
25 or easement by implication, that that would be relevant.



1           And for that reason, we haven't challenged the  
2 evidence that they seek to admit of contemporaneous use, or  
3 use shortly after the 1878 time period. But I don't think  
4 that that extends to use in the 1940s and the 1950s,  
5 because again, contemporaneous use, it all goes back to, is  
6 it probative of the intent of the commissioners?

7           And that -- you know, contemporaneous use - or use  
8 shortly thereafter - the courts have determined can be  
9 probative, because presumably the commissioners would have  
10 known, recognized, seen that.

11           But in sum, I don't think that there's... other than  
12 the Chappaquiddick question, which I've already addressed,  
13 I don't think there's a great deal of question as to the  
14 relevant time period of inquiry and what would be relevant  
15 or not to the issue of the easement by implication or  
16 necessity.

17           I think when you get to the prescriptive claim that  
18 Mr. Decoulos raised, I would suggest that that - at least  
19 it was my understanding - is not part of the case and not  
20 part of the present inquiry before the Court.

21           So at least for purposes of this argument, I would  
22 suggest that all of those later documents are not relevant.

23           And again, I think -- again, the notion that somehow  
24 the plaintiffs could establish 20 years of continuous use  
25 that benefits a particular lot...

1           And we haven't even gotten into the sort of the second  
2 phase of the Appeals Court inquiry, which is -- they make  
3 it -- you know, assuming -- the Appeals Court goes on to  
4 say at the very end of the decision that: If the intent  
5 can be established...

6           No question that the burden of proof is on the  
7 plaintiffs. There is a presumption. If somehow they get  
8 to the fact that they can establish their intent, then you  
9 go on to the question of whether or not any of these  
10 easements have been lost through merger, the eminent domain  
11 proceedings and so forth that have happened.

12           Then, I think, at that point, some of the other  
13 documents, some of the latter title documents, do become  
14 relevant when you look at those issues.

15           But again, for purposes of what we're briefing before  
16 the Court, hopefully in the next couple of months, what  
17 we're looking to is whether or not there can be or has been  
18 established an easement by implication or necessity.

19           THE COURT: All right. Thank you.

20           MR. DECOULOS: Judge?

21           THE COURT: Mr. Decoulos.

22           MR. DECOULOS: Just a couple of other observations.

23           To listen to the defendants talk, the only critical  
24 time in this case was 1878.

25           If it wasn't for the Moshup Trail, they wouldn't be

1 sitting there.

2 And the Moshup Trail was put up -- it was created in  
3 1954. That's the only way they got access to the  
4 properties.

5 And it's NIMBY of the highest order. That's what it  
6 is. They're there. And I'm not attacking them. It's just  
7 a fact. But they're there because of the Moshup Trail.  
8 They're not there because of any other reason.

9 And they would be subjected to the same proofs that  
10 they're trying to place on us.

11 There's no vacuum here. This is a -- it's -- the  
12 vacuum started, maybe, in 1878, but it ended that date too,  
13 because there's been continuous use of all of these  
14 properties.

15 There's ancient way law, with our prescriptive claim.

16 And it's just unbelievable that they think that we  
17 should only stay in 1878 and not go forward. Things have  
18 changed down there. The Moshup Trail is the most evident  
19 change, and as I just stated, that's the reason that we're  
20 all here: Because the Moshup Trail is there.

21 Because certainly nobody would be able to develop that  
22 property down there without the benefit of the Moshup  
23 Trail.

24 So you've got to take that into consideration. And  
25 the Moshup Trail -- Zack's way goes right through the

1 Moshup -- you know, is located where the Moshup Trail is.  
2 The Moshup Trail put a culvert there. They created  
3 wetlands. All kinds of things have happened down there as  
4 a result of the Moshup Trail.

5 Thank you very much, Your Honor.

6 THE COURT: Okay. Thank you.

7 Jennifer?

8 MS. ROBERTS: The Vineyard Conservation Society,  
9 Martha's Vineyard Land Bank, we'd be perfectly happy if  
10 there was no Moshup Trail, 'cause we want to leave it  
11 undeveloped.

12 (Mirth.)

13 MS. ROBERTS: That being said --

14 MR. DECOULOS: Oh, yeah. Then we wouldn't be here.

15 THE COURT: Like that's going to happen, heh?

16 MS. ROBERTS: Yeah.

17 Well, you know, between the two entities, we've  
18 acquired a fair amount of that property.

19 THE COURT: Right.

20 MS. ROBERTS: Unfortunately, we still have  
21 Mr. Rappaport's motion with respect to Mr. Hall's exhibits  
22 to be addressed. And I think we had left it to  
23 Mr. Rappaport to do that. So that -- I just want to point  
24 out to the Court --

25 THE COURT: Okay.

1 MS. ROBERTS: -- we still haven't hit that target.

2 THE COURT: All right. Mr. Rappaport?

3 MR. RAPPAPORT: Just on that, Your Honor --

4 THE COURT: I wouldn't want to be paying your phone  
5 bill.

6 (Mirth.)

7 MR. RAPPAPORT: -- we set-it (phonetic at 12:00:15 PM,  
8 simultaneous)forth in our motion which was filed up on  
9 behalf of various of the other parties as well. And  
10 essentially Mr. Hall designated two different steps. The  
11 first step purports to admit - so we're moving to strike -  
12 five different pleadings or discovery; and four of them are  
13 by the Vineyard Conservation Society, and one of them is by  
14 the Town.

15 We cite the applicable statute, 231, section 87, and  
16 pleadings are in evidence. And we also cite various cases.  
17 And least-recently-Arcose (phonetic at 12:00:51 PM,  
18 unclear): That you can't designate discovery on that. If  
19 there's something in particular that you want to draw the  
20 Court's attention to, you have to do that.

21 So in any event, they don't -- we don't see how  
22 they're relevant. We don't understand why they're being  
23 designated, and they're not entitled to come in en masse.

24 The second part of what Mr. Hall filed dealt with a  
25 page of a certification by a stenographer, and we don't

1 understand why that's being offered, or why that's  
2 relevant. It relates to a proceeding that occurred fairly  
3 recently.

4 And let's see...

5 Oh, yeah. He sought to designate an opposition to a  
6 motion to amend an answer in (phonetic at 12:01:38 PM)  
7 cross-claims.

8 And again, as we cite, pleadings are in evidence. We  
9 don't understand why it's being designated. He hasn't  
10 pointed to anything, and we don't know why it's relevant,  
11 so that's why we move to strike.

12 THE COURT: Okay. Mr. Hall?

13 MR. RAPPAPORT: And I would also say, we also have  
14 addressed the issues of the title of Harding.

15 And I know this has been spoken to by other counsel,  
16 but the motion does address that, that there's no dispute  
17 here as to title, that the-neat-outcome-of-the-set-off  
18 (phonetic at 12:02:03 PM) is fine, but everything else  
19 really is irrelevant, because no one's making a dispute as  
20 to title.

21 THE COURT: Okay. Mr. Hall.

22 MR. HALL: Well, I gather, then, there that all the  
23 opponents, the defendants, are waiving all questions with  
24 respect to the title for purposes of why we're here today.  
25 It seems like everybody's said that that title is not an

1 issue.

2 Is that agreed?

3 MS. ROBERTS: Well, with respect to Mr. --

4 MR. RAPPAPORT: It -- it's agreed as to Harding.

5 MS. ROBERTS: With respect to Mr. Hall, he doesn't  
6 have any cross-claims or claims in this case anymore, so.

7 And there's major questions about Mr. Hall's title, but  
8 they're not part of this case.

9 MR. RAPPAPORT: And they're not being offered -- and  
10 they haven't been offered.

11 I'm sorry to interrupt.

12 THE COURT: The... quick response.

13 MR. HALL: Judge, we are in this case. There seems to  
14 be this decision that's nowhere in the record that  
15 controverted by Judge Lombardi's decision that dismissed my  
16 cross-claims -- that dismissed my clients' cross-claims.

17 The judge specifically retained counterclaims.

18 So the claims going over the plaintiffs' properties  
19 remain in this case. And I know the judge in a December  
20 order did say that our cross-claims sought to maintain  
21 easements by necessity over the plaintiffs'. But that  
22 isn't entirely correct, because our cross-claims really are  
23 against the co-defendants.

24 And our counterclaims, which Judge Lombardi  
25 specifically retained, in his order that's dated September

1 14th of 2007, and it's at page 5: "The motions to dismiss  
2 brought by" Martha's Vineyard Commission -- MVC -- must be  
3 the Land Bank, I guess. I don't know if -- the Land Bank  
4 wasn't in it then. I'm not sure who MVC is, but by --

5 THE COURT: Commission, I would imagine.

6 (Time is 12:04:01 PM; document not found to verify.)

7  
8 MR. HALL: -- Aquinnah --

9 He meant, maybe, the Vineyard Conservation Society.

10 -- "Aquinnah and the Kennedys are allowed. As noted  
11 above, those motions do not relate to the counterclaims  
12 asserted against plaintiffs.... The Court has no motion,  
13 and finds no basis to act sua sponte."

14 So the Court specifically said our counterclaims  
15 remain in this case. Therefore we were entitled -- without  
16 going into too much reconsideration, we were entitled to  
17 take some discovery in this case, but the Court did not  
18 allow us to go forward on that basis.

19 But I just want to make it clear, we have  
20 counterclaims; they are still in the case; we have  
21 arguments on those counterclaims. We're entitled to  
22 provide evidence that deals with those counterclaims,  
23 wherever that evidence comes from.

24 And in the case of many of the documents that the  
25 other parties are seeking to strike of ours -- and again, I



1 only got this document at five o'clock last night. But  
2 they are trying to say that they are irrelevant because we  
3 have no claims in the case.

4 Well, we have counterclaims in the case. So clearly,  
5 documents that relate to our counterclaims and having the  
6 easement across the lands of the plaintiffs do remain in  
7 the case.

8 So we've submitted a number of documents from -- of  
9 discovery in other litigation that are directly related to  
10 the issues in this case. And the questions that were  
11 raised have to do with the issue of intent.

12 And while it's true that under normal circumstances,  
13 one would - in the course of proffering evidence to the  
14 Court - that one would designate why one was proffering it,  
15 and show what parts of the document are relevant to that  
16 question, when we are in the process of producing documents  
17 to each other, under the Court's order, there was nothing  
18 about why we are proffering the evidence; there was nothing  
19 about limiting the documentation to specifically those  
20 areas; and there was nothing about designating exactly why  
21 you were offering the document in any of the order.

22 So these documents were produced, in total, because  
23 the rule is: In discovery, that you don't excise  
24 documents; you produce the entire document.

25 So we were following essentially the spirit of

1 discovery, and producing documents to them that we intended  
2 to provide as evidence in this case that were relevant to  
3 issues. And many of those issues were judicial admissions  
4 that were made in those documents.

5 So for them to say that they aren't relevant, when we  
6 have counterclaims, and that they cannot be put in en  
7 masse, is simply a smoke screen, because you're required to  
8 produce the entire document so that they know exactly what  
9 the context is of what you're offering, so that they have  
10 fair notice of it.

11 And arguably, in our briefing schedule, when we were  
12 going to brief these issues, had I had this before - I  
13 would have had a better opportunity to brief it - I would  
14 have pointed out those particular aspects of each of the  
15 documents that we intended to show were relevant because of  
16 judicial admission.

17 So an opposition paper that Mr. Rappaport has sought  
18 to strike, in that opposition paper, they clearly say that  
19 this road, Zack's Cliffs Road, was clearly on the ground at  
20 the time.

21 So they've admitted that that was on the ground, and  
22 that it crosses over some of the lots that are before the  
23 Court; that it crosses over 177 and 242.

24 And so these are before the Court.

25 And even if the Court were to accept the argument that

1 we're not looking at up to 189 -- or 188 or 189, that 242  
2 is still in the case. So the fact that Zack's Cliffs Road  
3 goes over that way is critically important, because they've  
4 admitted that it was there.

5 And lastly, the issue of a transcript. Now, I  
6 don't -- I didn't understand that Mr. Rappaport received a  
7 transcript. It sounds like he just received a  
8 certification, but he was also sent the transcript in the  
9 Broscheit case, where the parties, the Vineyard  
10 Conservation Society, and several witnesses as to things  
11 that occurred in the 1990s, there was a great deal of  
12 testimony that comes in, as judicial admissions against them.  
13 They were made under oath. These were statements made to a  
14 Court in a court of law.

15 And these issues, some of the issues in that case,  
16 relate directly to whether or not the conditions on the  
17 ground - at the time that they looked at it in 1997 - were  
18 such that the Court could draw an inference that the use of  
19 those ways, particularly Zack's Cliffs Road and other roads  
20 in the vicinity, were in use for a great deal of time, from  
21 the beginning, from 1878, and forward.

22 So I think there are a lot of inferences that the  
23 Court can draw from those documents.

24 And I think it would be exceedingly unfair. Since we  
25 had been barred from the discovery that we sought, to now

1 say that discovery that's already been produced in other  
2 cases that bears directly on the questions before the Court  
3 here, that we can't use that would basically be to shove us  
4 aside when we still have counterclaims in the case, and  
5 say, "Well, you're not really participating in the case,"  
6 and yet we are. We still have a footing in the case, and  
7 we intend to pursue that.

8 THE COURT: Okay. Mr. Rappaport?

9 MR. RAPPAPORT: There's nothing that I say other than  
10 what I said before. And I think that this stunt -- what  
11 has been designated as not discovery...

12 Well, I've... Let me say that twice.

13 He's designated documents that are discovery  
14 documents, but they're not desig- -- but we're not in the  
15 midst of discovery here. We're responding to the order,  
16 which all parties agreed to, to designate documents they  
17 intend to offer into evidence. And the rules are clear,  
18 you can't just designate blanket designation of discovery  
19 en masse. You have to specifically identify what it is  
20 that you wish to have, and that has not been done, and for  
21 all the other reasons that we have put forward, which I've  
22 argued earlier, we think they should all be stricken.

23 THE COURT: Okay. Anybody else have anything to add?  
24 Have we said enough? Okay.

25 One last thing. Got to be quick. Go on.

1 MR. HALL: Ms. Tillotson read an excerpt from the  
2 Appeals Court decision. And I just -- I think that the  
3 Court ought to look at it and hone in on it again, 'cause  
4 that -- she quoted that, and she stated, "However title is  
5 described, each lot was" - I think 1 to 189; I'm not sure  
6 quite sure exactly what she said because I don't have the  
7 case directly in front of me - "was owned by a different  
8 person, so unity of title to imply an easement by necessity  
9 fails."

10 I think that sentence is taken out of context. When  
11 you read the body of the decision and how they got to that  
12 statement, I think what they're saying is that the unity of  
13 title to imply an easement by necessity over those lots --  
14 because they were not owned by the Commonwealth, arguably,  
15 in 1878, so they couldn't imply an easement over them.

16 But that does not say that those lots do not have  
17 their own easement by necessity, from their prior  
18 conveyances.

19 It does not say that they don't have easements,  
20 because they -- Judge Green himself had even found - and  
21 was never overruled - that those lots had an easement over  
22 the common land that remained at the time, because they  
23 were inasmuch as co-owners of the common land that  
24 remained. When these severalty lots were taken out of the  
25 lands, essentially, the rest of the property was common

1 lands held in the Commonwealth.

2 And so these common lands, arguably, all these people,  
3 that's how they got to their property.

4 So I think that to say that there's no easement by  
5 necessity, it fails in one respect, but it does not fail in  
6 another respect.

7 So I think the Court should look at the Appeals Court  
8 decision, clearly. And I think you will conclude that what  
9 they were saying was, that you can't put an easement by  
10 necessity over those lots, but never addressed the question  
11 of whether they didn't, on their own, have a different type  
12 of easement by necessity.

13 They were trying to deal with specifically 188 or 189  
14 and above, to focus their decision.

15 But I think that this was all remanded back to the  
16 Court for further fact-finding. And I think now, once that  
17 remand occurred, that there was never discovery, new  
18 complaints filed, amended complaints.

19 So it was almost like we were starting anew with  
20 certain sets of facts that could yet be proven, newly  
21 discovered evidence, sectional plans at the registry of  
22 deeds that were never considered to be public record until  
23 the register of deeds recognized that these sectional  
24 plans - that had been a book floating around the registry  
25 of deeds for many decades - were actually part of the

1 original 1878 -- the 1878 decision by the commissioners.  
2 He refers right to it.

3 So anyway, I think that the Court should look back at  
4 that.

5 THE COURT: Thank you.

6 Are we done? Heh. All right. I'll take it under  
7 advisement. Thank you. And I will try to --

8 I'm sorry. Diane Tillotson, what about it?

9 MS. TILLOTSON: All right. And this is not argument  
10 at all. I just wanted to get back -- I think there's a  
11 couple of questions that we just need to answer  
12 scheduling-wise that would be helpful to all of us.

13 I think the first thing on my list was to get back to  
14 you by a date certain as to any agreement that we've been  
15 able to come up with, on any of these motions.

16 And I would suggest a week from Friday on that?

17 I don't know. Does that...

18 THE COURT: Nick?

19 MR. DECOULOS: Wait a minute. Next week I'm very  
20 busy.

21 THE COURT: You can stay here for a while if you want.  
22 (Everyone mutters at once.)

23

24 MS. TILLOTSON: I mean, I think we --

25 MR. DECOULOS: If we could do it on February --

1           If we could meet any day during the week of the  
2 16th --

3           MS. TILLOTSON: I don't think we need to meet. I  
4 mean, I think we need to -- we can meet now --

5           MR. DECOULOS: Oh, you'd be surprised.

6           MS. TILLOTSON: -- or just talk.

7           THE COURT: Well, you can stay here for a little  
8 while, if you want.

9           MR. DECOULOS: That's -- I'm glad to --

10          THE COURT: Got to get her permission, but I think  
11 it's going to be all right for half an hour.

12          MR. DECOULOS: I'm glad to do that, but I think that a  
13 meeting is very important.

14          THE COURT: Okay. Well, at least --

15          MR. DECOULOS: You know --

16          THE COURT: Well, maybe kind of reduce the controversy  
17 before you meet, so that when you do, it'll be quicker.

18          MR. DECOULOS: Well, possibly.

19           But I think a meeting is very important. That is that  
20 everybody gets their views out there. It's not voice-mail  
21 and e-mail and mail, and all the other malarkeys that we  
22 now deal with in the modern age.

23           So I think that if we sat down around a table and went  
24 over each one of them, and let us all express what the  
25 reasons are that we want it in there, and they might decide



1 that their reasons aren't valid, or they might decide that  
2 they are valid.

3 But this is a case that certainly can be -- although  
4 it seems complicated, it's not that complicated if  
5 everybody wants to agree as to what the facts are.

6 MS. TILLOTSON: I don't -- I mean, I don't think we  
7 need to set another time to meet. I think we're all of a  
8 view that we need to move ahead with this, but I do  
9 think -- I can't stay very long after, today.

10 But Ms. Roberts and I generally are on the same page  
11 with all of these. We represent clients with very similar  
12 interests.

13 So I think if we can sit and go through some of this  
14 right afterwards; but I wouldn't want to hold out, you  
15 know, much beyond...

16 I mean, I would even propose if next week is undoable,  
17 maybe getting back to the Court by Friday of this week to  
18 let you know whether or not there's any possibility of  
19 agreement on some of this.

20 But I think once we get beyond that, I think it's then  
21 important - I think the next question, a very mundane  
22 question for you - it was raised as to whether or not you  
23 feel it would be helpful in ruling on these motions to have  
24 a complete set of the documents, because you don't now, but  
25 we can certainly provide you with that.

1 THE COURT: It probably would be.

2 MS. TILLOTSON: Okay. So we'll provide you with that  
3 by Friday.

4 THE COURT: Okay.

5 MS. TILLOTSON: So that you'll have those.

6 And then I also think it's important to just, you  
7 know, giving you whatever adequate time you feel you need  
8 to rule on these motions to strike. I think it would be  
9 helpful to us to start, you know, setting the schedule for  
10 actually briefing in this case.

11 And we would ask, you know, whether you want to do it  
12 today or as part of -- you know, part of an order that  
13 comes out when you rule on the motions to strike, or  
14 whether you want suggestions from the parties.

15 THE COURT: I'll take suggestions. I'll can do  
16 this -- I'll try to get this order out within a couple of  
17 weeks, but in the meantime, if you can agree on anything,  
18 fine. If you can't --

19 MR. DECOULOS: Judge, can I just call to the  
20 attention: I can meet tomorrow, Friday, or Monday.

21 MS. ROBERTS: Judge, it's that the billing rate on  
22 this side of the room is staggering, so we're here today --

23 THE COURT: I know.

24 ALL: (Everyone commenting, chuckling.)

25 THE COURT: Nick -- Nick does pretty well too, I

1 think.

2 MS. ROBERTS: We're here today. I'm happy to meet  
3 with him.

4 MR. DECOULOS: I'll meet with you now.

5 THE COURT: Why don't you meet now for...

6 I'll -- I'll -- can they stay for half an hour or so?

7 Just try to limit it for half an hour or so, 'cause  
8 she -- 'cause then we'll have union problems. Heh.

9 MS. ROBERTS: Or we'll go to a conference room so we  
10 don't need to tie her up.

11 MR. DECOULOS: It's much easier in here.

12 THE COURT: All right. Do it here if you want. Till  
13 quarter of 1:00, all right? Half an hour?

14 MS. ROBERTS: Great.

15 THE COURT: See what you can come up with. All right.

16 MR. HALL: Your Honor, I think that's fine with  
17 respect to the plaintiffs and their opponents. But with  
18 respect to Gossamer Wing and Baron Land, Mr. Rappaport's on  
19 the Vineyard.

20 THE COURT: Oh.

21 MR. HALL: I didn't receive his motion until five  
22 o'clock last night, so I have my --

23 THE COURT: Okay. Well, just do what you can. That's  
24 all right. If you can't, you can't.

25 MR. HALL: Well, I'd have to --

1 THE COURT: Ron, you don't have to be here. You don't  
2 even have to stay on the line if you want.

3 MR. RAPPAPORT: I -- I --

4 THE COURT: Can you give your proxy to...

5 MR. RAPPAPORT: I don't have much (indiscernible at  
6 12:17:32 PM)to that. I doubt if (indiscernible) could.  
7 But...

8 THE COURT: Can you give your proxy Ms. Roberts? Or  
9 to Ms. Tillotson?

10 MR. DECOULOS: He's done it before.

11 THE COURT: It's up to you. I'm not making you.

12 MR. RAPPAPORT: Right. So you're just simply saying  
13 that you guys are going to meet, and somebody will tell me  
14 later what happened.

15 MS. ROBERTS: Yeah. We'll meet, and we'll get back to  
16 the Court by Friday.

17 THE COURT: That's fine. Friday or Monday, that's  
18 fine.

19 MS. ROBERTS: I don't -- you're mad -- I mean, if Ron  
20 or Diane thinks what I've done is completely terrible,  
21 they'll have an opportunity to...  
22 (Mirth.)

23 THE COURT: No, no. If you can agree on something,  
24 fine. If you can't, just let me know. We'll go from  
25 there.

1 MS. ROBERTS: All right.

2 MR. HALL: Would I be able to provide -- well, two  
3 things. Would I be able to provide a response to this  
4 motion to strike so that I can put something --

5 THE COURT: Yeah, by Monday, all right?

6 MR. HALL: By Monday.

7 THE COURT: Yep.

8 MR. HALL: And secondly...

9 THE COURT: By the end of business Monday.

10 MR. HALL: So that we're providing the Court with a  
11 complete set of documents or the documents that they're  
12 asking to strike?

13 THE COURT: Do I have -- don't I have them? Aren't  
14 they in -- are they in anybody else's package?

15 MS. TILLOTSON: Yeah -- no --

16 THE COURT: If I already have them --

17 MS. TILLOTSON: -- they don't have yours. And they  
18 don't have ours.

19 MR. HALL: No, they wouldn't have mine that they're  
20 moving to strike, so I'll provide the ones that they're  
21 moving to strike.

22 THE COURT: Yeah, do that. Yeah, same thing, Monday.

23 MR. DECOULOS: I'd like till the 23rd to respond to  
24 their memorandum -- you know, their objections.

25 MS. TILLOTSON: Your Honor, it's a five-page memo.

1 And it was -- I argued it today.

2 THE COURT: Are you going away?

3 MR. DECOULOS: No, but I have a -- well, I --

4 THE COURT: Well, you'll have a week to do it.

5 MR. DECOULOS: I did it -- I'll get it done next week,  
6 but I just want to be able to mail it to you for the 23rd,  
7 yeah.

8 THE COURT: All right. 23rd with that; that's it.  
9 Then I'll rule. I'll be working on it in the meantime,  
10 anyway. All right. Thank you, all.

11 ALL: Thank you. Thank you, Your Honor.

(Matter adjourned at 12:19:12 PM.)

## C E R T I F I C A T I O N

I, Ellen H. Dibble, an Approved Court Transcriber, do hereby certify that the foregoing is a true and accurate transcript, from the audio recording provided to me by Attorney Wendy Sibbison of the Land Court proceedings in the above entitled matter.

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*Ellen H. Dibble*

Name of the Approved Court Transcriber

November 16, 2011

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COMMONWEALTH OF MASSACHUSETTS  
DUKES, SS. DEPARTMENT OF THE TRIAL COURT  
LAND COURT DEPARTMENT

\* \* \* \* \* \*  
\*  
MARIA A. KITRAS, as Trustee of \*  
BEAR REALTY TRUST et al., \*  
Plaintiffs \*  
\* No. 97-MISC-238738  
v. \*  
\*  
TOWN OF AQUINNAH et al., \*  
Defendants \*  
\* \* \* \* \* \*

MOTIONS TO STRIKE  
BEFORE JUDGE CHARLES W. TROMBLY, JR.

APPEARANCES (see next page):

Boston, Massachusetts  
Room 4  
June 21, 2010

Ellen H. Dibble  
Approved Court Transcriber



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1 (Time is 11:42:10 AM.)

2 COURT OFFICER: Hear ye, hear ye, hear ye, all parties  
3 having anything to do with the honorable justices of the  
4 Land Court draw near, give your attendance, and you shall  
5 be heard. God save the Commonwealth of Massachusetts and  
6 this Court. You may be seated, ladies and gentlemen. If  
7 you have cell phones, kindly shut them off.

8 THE CLERK: Good morning, today is Monday, June 21st,  
9 2010. Judge Trombly, hearing miscellaneous case number  
10 238738, Kitras v. Town of Aquinnah.

11 THE COURT: Okay. Et al.

12 THE CLERK: Et al.

13 THE COURT: There are many et al.'s.

14 Okay. Morning, folks. For the record, you want to  
15 introduce yourselves? Is Mr. Decoulos here? No?

16 MS. ROBERTS: He's not.

17 THE COURT: Okay. Go ahead. You go ahead.

18 MR. HALL: Yes. Benjamin Hall for Gossamer Wing  
19 Realty Trust and Baron's Land Trust.

20 MS. MORSE: Leslie-Ann Morse for Mark Harding and  
21 Sheila Harding, as she is trustee of the Eleanor P. Harding  
22 Realty Trust.

23 THE COURT: Okay.

24 MS. ROBERTS: Jennifer Roberts for the Vineyard  
25 Conservation Society.

1 MR. RAPPAPORT: Ronald Rappaport for the Town of  
2 Aquinnah.

3 MS. JORDAN-PRICE: Good morning, Your Honor. Kelley  
4 Jordan-Price for defendants Betsy and David Wice.

5 THE COURT: Okay. Where do we begin?

6 MS. ROBERTS: As I understand it, Judge, we have two  
7 motions before you this morning, and I'm going to make  
8 short work of mine by withdrawing it. .

9 THE COURT: Okay.

10 MS. ROBERTS: I had a motion to strike three exhibits  
11 that Mr. Hall had attached to his serve (time is 11:42:10  
12 AM) reply, which were not part of the procedure we've been  
13 engaged in over the last year and a half about designating  
14 evidence.

15 The problem was that he hadn't designated them before,  
16 including them. And the copies that he'd served around  
17 were really of such poor quality that you couldn't read  
18 them.

19 Since I filed the motion to strike, he's shipped  
20 around legible copies, and having viewed those copies, I  
21 don't see that admitting them would be prejudicial to us.

22 So while I object to the process by which they came  
23 before the Court, I'm not going to pursue that objection.

24 THE COURT: Well, those are the copies of -- what do  
25 they call them, partition plans? Or...

1 MS. ROBERTS: There's an 1828 -- the act of 1828, a  
2 statute.

3 THE COURT: Right.

4 MS. ROBERTS: And a report, the so-called Child (time  
5 is 11:42:10 AM) report --

6 THE COURT: Right.

7 MS. ROBERTS: -- which was also submitted to the  
8 legislature, and it's about a two-page largely handwritten  
9 petition to, I believe, the probate court regarding the  
10 Chappaquiddick set-off.

11 THE COURT: Okay. When was it? 1827/1828?

12 MR. HALL: Yes. The House report, 1827; the statute  
13 1828. Those involve --

14 THE COURT: Right.

15 MR. HALL: -- the Chappaquiddick set-off that the  
16 Court already had in the record, which was 1850.

17 And then there's an 1869 partition of Chappaquiddick,  
18 that we submitted two pages, what was in the record at the  
19 probate court in Edgartown.

20 THE COURT: Well, some of those plans -- and I did  
21 look at this. Some of these plans were the ones that Diane  
22 Powers -- all of a sudden they appeared?

23 MR. HALL: That's right, Your Honor.

24 MS. ROBERTS: That's -- that's -- that's a separate  
25 thing.

1 THE COURT: That's a separate issue?

2 MS. ROBERTS: Separate thing, right.

3 THE COURT: Okay. All right.

4 MS. ROBERTS: Yup.

5 THE COURT: All right. So that leaves us with you,  
6 Mr. Hall. Go ahead.

7 MR. HALL: Yes, Your Honor. I filed -- with all due  
8 respect, I filed a motion to try to clarify some of the  
9 issues that I was finding as we proceeded down the road  
10 toward fact-finding in this case.

11 So I filed, in April, a motion to clarify.

12 I haven't received any opposition papers, so -- I was  
13 kind of surprised that I didn't get any opposition, but  
14 there was no opposition submitted. So I don't know if  
15 there is any opposition.

16 But let me lay out a few of the questions that came  
17 up.

18 First was: We're going through a process. The Court  
19 asked us to designate some documents for inclusion in a  
20 record. The Court made some rulings on that, and one of  
21 the rulings that the Court made, in particular with respect  
22 to the 1850 Chappaquiddick set-off that the Court allowed  
23 to stay in the record, the plaintiffs had moved to strike  
24 that 1850 set-off.

25 The Court in ruling that way said that it "could be"

1 relevant, but it didn't say whether it "was" relevant.

2 So there's sort of this question of okay, so if we're  
3 going to through a process of designating documents in a  
4 record, when are we actually going to determine the  
5 relevance?

6 So in looking further into that, those questions, it  
7 became apparent -- there's a case called the Fрати case.  
8 And I've cited it in the brief, and it lays out three  
9 particular ways that you can resolve disputes of fact. And  
10 two of the ways involve an agreement as to the essential  
11 facts, and agreement as to the documentation, neither of  
12 which we have in this case. We've both argued about  
13 documents; documents have been submitted over objection,  
14 and documents have been allowed in over those objections.

15 It appears that nobody agrees on many of the  
16 inferences that can be drawn from the facts.

17 So that leaves us with a trial. And it appears, from  
18 the way that we've sort of been going down this road with a  
19 briefing schedule, I'm not sure what those briefs are, what  
20 they're intended to do, and what the questions that are to  
21 be resolved; are they sort of pretrial briefs?

22 So I asked the Court if the Court could clarify what  
23 is exactly the procedure that we're going through, and  
24 where are we headed.

25 Judge Lombardi anticipated a trial at one point, but

1 he did discuss with us at length. At various oral -- at  
2 various hearings that we had before him, he discussed this  
3 other avenue of documents and stuff. But I think once it  
4 became clear that there was no real agreement as to those,  
5 I think the case law prohibits us from having any  
6 fact-finding without a trial.

7 So. And then also the Appeals Court itself, in their  
8 decision, at page 300, talked about what's to be resolved  
9 by trial.

10 So I think we have certain aspects that need to be  
11 resolved, and one of them in particular is: What is the  
12 evidentiary weight; and what is the admissibility of some  
13 of the documents.

14 So that's the first question that I thought needed to  
15 be clarified.

16 The second was the issue of intent, and where we are  
17 with respect to that, and - while Judge Lombardi did order  
18 bifurcation in this issue of intent - sort of what exactly  
19 is the question that we're trying to resolve? And that  
20 question comes down to: What the Appeals Court ordered on  
21 remand.

22 And what the Appeals Court said - again at page 300 of  
23 the decision - was that it wanted the Court to determine  
24 whether there was an intent for an "easement by necessity"  
25 with respect to all lots "carved" from the common lands.

1           And the Court has made some rulings about what those  
2 lots include.

3           However, even the defendants themselves have submitted  
4 documentary evidence, which is the plans that they  
5 submitted with their brief. It was a two-page set of  
6 plans, which I actually annexed to my opposition to their  
7 motion to strike.

8           It's the plan of Gay Head showing the partition of the  
9 common lands. And I guess it's a copy of exhibit -- I  
10 believe it's 68. And it shows all the plans in Gay Head.  
11 It's a two-page plan, Your Honor.

12           But it actually shows lots 177 and 178. And I know  
13 the Court has ruled that the Appeals Court had made a  
14 decision that prohibited lots 174 and above from having an  
15 easement by necessity.

16           But if the Appeals Court has already ordered that:  
17 All lots carved from the common lands are to be looked at  
18 by this Court in a trial; then the proof is this plan,  
19 among other documents that have been submitted, that in  
20 fact lots 174 and above -- or excuse me, lots...

21           The Court had ruled that lots 1 through 189 -- 88 or  
22 89 --

23           THE COURT: 88 or 89.

24           MR. HALL: -- had been subject to the Appeals Court  
25 ruling, seeing that there wasn't unity of title sufficient.



1 But there's new evidence that's come in.

2 Remember, the Appeals Court was looking at a summary  
3 judgment record. And a trial record in a trial or any  
4 other proceeding beyond a summary judgment, particularly on  
5 a remand, there's case law - ample case law - that suggests  
6 that you can put in all kinds of additional evidence.

7 Now, there's certain documents that weren't before the  
8 Court: This plan; there's sectional plans; even the Pease  
9 report, which is the key item, which was written in 1871,  
10 that fully and finally determined the boundaries of the  
11 common lands. And that included the homestead lots and  
12 only lots 1 through 173.

13 But for the petition to partition under the 1870  
14 statute - which is evidenced by this map, which eventually  
15 occurred in 1879 - lots 174 and above would never have been  
16 created, because Pease himself said, "I've fully and  
17 finally determined the boundaries of the common lands."

18 So the common lands are everything, 173 and below, and  
19 the homestead lots.

20 So what we're suggesting is that the question has been  
21 squarely put before the Court that part of the fact-finding  
22 expressed by the Appeals Court is to look at what was  
23 carved from the common lands; there's new evidence to show  
24 that the common lands included 174 through 189.

25 So that includes the two lots that are in issue before

1 the Court, which is 177 and 178.

2 Then we have to look at the intent of the legislature  
3 in 1870. And the legislature is talking in their 1869  
4 report about settling the ownership of the common lands and  
5 giving the right to each of the new citizens their  
6 opportunity to do so as the new landed citizens of the  
7 Commonwealth.

8 So if these people -- the intention of the legislature  
9 is to have the common lands -- if they decide to break up  
10 the common lands, that each of them be given land,  
11 obviously, I think, that they could use, and not land that  
12 they could never access and could never use. Clearly the  
13 legislative intent was that they be given land that they  
14 could use, and therefore that there has to be an implied  
15 easement, or an easement by necessity, to that.

16 I don't want to get too far into the substance of the  
17 briefs or the substance of the case. But just from a  
18 question point of view: What is the question that we're  
19 looking at?

20 And we have the new documents that come in.

21 And so what's the intent that the legislature has set  
22 forth, is one of the main areas.

23 I've proposed an order, at the back of my motion to  
24 clarify, that expresses some language and some potential  
25 findings for the Court. And essentially we're asking that

1 the Court determine whether under the 1870 statute, when  
2 the final division of the common lands occurred in 1878,  
3 was it then intended to landlock, by the legislature, the  
4 probate court, or the commissioners appointed -- was that  
5 the intention: To landlock any of those individual lots,  
6 thereby created, intentionally withholding an access  
7 easement, barring any use of the properties?

8 That, I believe, is one of the main questions that we  
9 have to resolve. And I think that's the question on intent  
10 that has to be determined here, given the case law and the  
11 facts that are before the Court.

12 Then lastly, there's this issue of the burden  
13 shifting.

14 The case law on easements by necessity, I think the  
15 Court could virtually, at this point, take notice of the  
16 prior decisions that have shown that we have this 1878  
17 partition that occurred. The property was owned --  
18 according to the 1870 statute and the Pease report itself,  
19 the property was then owned - and had to be owned - by the  
20 Town of Gay Head, because all the common lands -- after  
21 Mr. Pease determined what the common land bounds were,  
22 everything but lots 173 and below and the homestead lots,  
23 that that land was owned by the Town.

24 And but for the 1870 statute that provided for a  
25 petition to partition, which then was undertaken, through

1 the probate court, we have the necessary finding of a  
2 breaking up of a unity of title of one parcel of land,  
3 effectively "the common lands," that has been broken up.

4 That meets the prima facie burden of shifting the  
5 burden of production from the plaintiffs - which initially  
6 it's with - or the proponent of the fact. And it shifts,  
7 under section 301 of the evidence guide, over to the other  
8 defendants, who are opposing this.

9 And they have to provide ample evidence to shift -- to  
10 overcome that burden.

11 Now, there's been several cases that have decided --  
12 even Judge Green, on the prior record, had found that there  
13 was no evidence to suggest that there was an intent to  
14 landlock; in the Black case, no evidence of an intent to  
15 landlock. And you know, in this case, I would suggest that  
16 there's barely any evidence at all - I mean, none of it  
17 relevant evidence - of an intent to landlock.

18 So given the fact that the burden of production under  
19 the case law has shifted to the other defendants, I think  
20 that we need to have some sort of ruling and guidance on  
21 that. But that's sort of the jumping-off point that we're  
22 getting into here, and what a trial is to resolve.

23 THE COURT: Okay.

24 MR. HALL: Thank you, Your Honor.

25 THE COURT: Ms. Roberts?

1 MS. ROBERTS: Respectfully, there's no need to clarify  
2 what's going on here, Judge. I will take each of  
3 Mr. Hall's points in turn.

4 He first asserts that he doesn't -- that the process  
5 that we've been undertaking for the last year and a half  
6 needs to be clarified. Respectfully, I think everyone else  
7 has fully understood, for the last year and a half, what  
8 the process was, which was that both sides would designate  
9 evidence and then have a chomp on whether they agreed that  
10 the other parties' evidence was admissible or not, and  
11 would also, at that time, submit whatever they felt they  
12 needed for rebuttal evidence.

13 We all have agreed from the get-go that there aren't  
14 going to be any witnesses testifying here, because no one's  
15 alive from 1878 to testify.

16 So in effect, we're having what -- Mr. Hall cites to  
17 the Fрати case. Fрати essentially says the first way of  
18 adjudicating a matter is to have a trial. In this case  
19 there's no need for us all to show up here, because we're  
20 not going to have any witnesses. So in effect we're having  
21 the trial, but we're doing it by agreeing to submit the  
22 evidence to the Court, the Court is issuing rulings on that  
23 evidence, and then we've gone and briefed the case based on  
24 that evidence.

25 So respectfully, I don't see any need to clarify

1 what's gone on, and it falls well within option number one  
2 of the Fрати decision.

3 So there's no need to clarify that issue.

4 Next -- and this has been a continuous refrain from  
5 Mr. Decoulos and Mr. Hall, about what lots are covered  
6 by -- what lots are part of the original set-off.

7 The Appeals Court has already ruled that those lots go  
8 to lot 18- -- from 1 to 188 or 189, and those lots cannot  
9 be lumped with the higher numbered lots for purposes of an  
10 easement by necessity, because there's no unity of title  
11 there.

12 The Appeals Court has spoken on it. Your Honor issued  
13 a decision -- has also weighed in on that. And I would  
14 point to Your Honor's order of January 21, 2010, in which  
15 you said that (reading), "It's clear from the 2005 Appeals  
16 Court decision in this case that the Court properly  
17 considered and foreclosed the issue of which lots were held  
18 separately and which lots were held in common ownership."

19 So that -- the plaintiff and Mr. Hall keep going back  
20 to it. But I would respectfully suggest that the Appeals  
21 Court and this Court have determined multiple times now  
22 that the lots below 188 or 189 are not available for this  
23 case any longer.

24 The third point, Mr. Hall has asked for clarification  
25 on what the issue is here. And again, I would respectfully

1 suggest that everyone else understands the issue to be  
2 whether there was an intent to create an easement.

3 That's what the case law says. That's what the  
4 parties to this proceeding have been aiming for over the  
5 last several years.

6 Mr. Hall has attempted to phrase it in terms of  
7 whether there was an intent to landlock or not. There's no  
8 case law -- he cites no case law for that proposition. And  
9 I'm not aware of any. So I would again suggest there's no  
10 need to clarify. I think everyone else understands that  
11 the issue here is whether there's an intent to create an  
12 easement or not.

13 Mr. Hall has also referenced as new evidence, to the  
14 extent it's relevant here, the sectional plans. And  
15 that -- there is an affidavit from the register of deeds  
16 attached to my motion to strike, in which Ms. Powers says  
17 she -- prior to being register of deeds, she was title  
18 examiner on the Vineyard since I believe the 1970's.

19 And she was always aware and believed that these  
20 sectional plans -- all of the title examiners were  
21 generally aware of these plans. And I believe they're  
22 still in the same place in the registry, although  
23 Mr. Rappaport may be able to speak to that.

24 So there's no -- and I in fact can represent to the  
25 Court that I had a set of these plans in my possession in

1 the 1990's when I got involved in this matter. So they've  
2 plainly been available.

3 So there is no new evidence here.

4 And finally, Mr. Hall has asked the Court to clarify  
5 issues related to the presumption in this case. We've  
6 already briefed that issue in our main briefs. I would  
7 respectfully suggest, once again, that there's no need for  
8 clarification here.

9 The issue's squarely before the Court now to decide  
10 whether the presumption applies at all in this kind of  
11 case. We would assert that it does not, and have in our  
12 briefs.

13 And if the Court does find that it applies, whether in  
14 fact it has dropped out because of the evidence submitted  
15 by the defendants (time is 11:42:10 AM).

16 Again, that's a matter that's before the Court. It's  
17 been briefed by the parties. There I don't see any need  
18 for clarification on what the issues are. They've been  
19 briefed.

20 So respectfully, we believe that Mr. Hall's motion for  
21 clarification should be denied in all respects.

22 THE COURT: Thank you.

23 Ms. Morse, would you like to...

24 MS. MORSE: I don't want to weigh in at this point,  
25 Your Honor.



1 THE COURT: All right.

2 Mr. Rappaport?

3 MR. RAPPAPORT: Your Honor, we've all had to grapple  
4 with the decision from the Appeals Court, which we've all  
5 done, including Your Honor, the best we can with it.

6 Since the bifurcation order, Your Honor has issued six  
7 different orders, all of which dealt with the time to  
8 submit documents, the time to object, a briefing  
9 schedule --

10 THE COURT: For everything there is a season --

11 MR. RAPPAPORT: Yes.

12 THE COURT: -- it sounds like.

13 MR. RAPPAPORT: Yes.

14 THE COURT: Yeah.

15 MR. RAPPAPORT: And there've been objections to  
16 documents. You've ruled on those. There've been issues  
17 about admissions. You've ruled on those.

18 The one constant here is that everyone agreed there  
19 was going to be no trial. And that is reflected in your  
20 six different orders. It was, "Here are the documents;  
21 write your briefs." And Your Honor will decide it.

22 Everyone's written their briefs. Everyone's submitted  
23 the documents. Everyone has had a chance to move to strike  
24 whatever they didn't like, to offer rebuttal documents if  
25 they thought they were necessary.

1 This case could not be more ripe for adjudication.

2 And there is nothing to be clarified. I mean, the  
3 issues are clear as could be. No party had any difficulty  
4 writing briefs, reply briefs, all consistent with your  
5 orders where a briefing schedule was set up. There's  
6 absolutely nothing to do clarified.

7 And I think if you'll just take a brief look, Your  
8 Honor, at the filing that the various defendants made on  
9 May 24, where we respond to some issues raised by Mr. Hall.  
10 It's entitled -- I'm sorry. It's entitled, "A response to  
11 certain issues raised by the defendants Gossamer Wing and  
12 Baron's Land Trust."

13 That's the response as to why there's no need for Your  
14 Honor to do anything further in terms of clarification.

15 The burden of proof issue has been there since day  
16 one. It's been fully briefed.

17 All that's left is for Your Honor to rule. I'm not  
18 saying that's a small matter. (Laughs.)

19 THE COURT: No, no, I know. No.

20 MR. RAPPAPORT: That's all that's left.

21 THE COURT: Okay. Now, the briefs were due May 21st.

22 MR. RAPPAPORT: Yes. And we have -- Your Honor has  
23 been very accommodating about extensions and schedules.  
24 It's been out there. The briefs are all in. This case is  
25 ripe to be decided, based on what's been submitted.

1 THE COURT: Okay. Thank you.

2 MS. JORDAN-PRICE: I have nothing further to add.

3 THE COURT: Okay. Mr. Hall, do you want to reply, or  
4 Ms. Morse?

5 MR. HALL: Yes, Your Honor. Just a couple of points.

6 There was an effort to incorporate in the record some  
7 deposition testimony that did not make its way in.

8 There are witnesses that were offered. Mr. Decoulos's  
9 brother was a -- who's a surveyor, who had gone down to the  
10 Vineyard and made certain findings about the possibility of  
11 enclosure, which is one of the methods by which the tribal  
12 custom indicated whether property could be owned in  
13 severalty or not.

14 These are issues that were raised, and the Court would  
15 not incorporate those. So there are witnesses with respect  
16 to the case.

17 Since there is --

18 And Mr. Rappaport himself said yes, there had been  
19 objections to the evidence.

20 Well, if the evidence is not in agreement, then under  
21 the Fрати case, the Court has to have some sort of trial.

22 Now, the trial could incorporate much of what has been  
23 agreed as evidence, to come before the Court as a simple  
24 single-almost document submission. The briefs could almost  
25 be pretrial briefs.

1           But there are other issues, such as this issue about  
2 the 1850 Chappaquiddick set-off. The Court said  
3 specifically it could be relevant, but it didn't rule yet.

4           So obviously there are some issues that rulings have  
5 not yet been made.

6           And Judge Lombardi, who wrote the bifurcation order  
7 himself, suggested that a trial would be necessary, at  
8 least to comply -- he didn't suggest the Fрати case. But  
9 at least to comply with Fрати.

10           My concern is, I'd hate to have to go through a full  
11 appeal on this, which I anticipate. Nobody's going to be  
12 happy with the decision. I figure, you know, no matter how  
13 wonderfully Your Honor rules for one side or the other, the  
14 other side's going to be unhappy, and I anticipate there'll  
15 be an appeal.

16           And I'd hate to have to go through the whole process,  
17 and have the Appeals Court turn around, and say, "Oop  
18 (claps), you didn't comply with Fрати; you've got to go  
19 through the whole thing all over again."

20           Rather than let the Appeals Court deal with the  
21 substance -- the substantive matters.

22           I don't want to get sidetracked at the appellate level  
23 on some other issue which -- those guys are as busy as  
24 anybody over here, and they want to kick cases back down as  
25 fast as they possibly could.

1           And the Fрати case is just one of those cases that is  
2 an impediment, and is going to be a problem for everybody  
3 here. We're just going to waste an enormous amount of  
4 judicial and legal resources in that.

5           So at least maybe we could fashion something that  
6 makes it appear so that there is a trial in some sort of  
7 shortened fashion.

8           But I think the Court - if we think about it a little  
9 bit - could come up with machination of a trial that would  
10 work for everybody, so that there'd be offers of proof, and  
11 stuff, so that there'd be a full and complete record of a  
12 trial for the Appeals Court.

13           The other thing that Ms. Roberts pointed out: She  
14 said that an intent to create an easement -- that I'm  
15 trying to reframe the issue into an intent to landlock.

16           Well -- and she said I cited no case law.

17           Judge Green - the law of this case, heh - found that  
18 there was no evidence of an intent to landlock. He's the  
19 one that framed the case as one of whether there should  
20 be -- the decision on intent should be an intent to  
21 landlock.

22           The Appeals Court turned around and said: Yes, it's  
23 the plaintiff's initial burden of proof, to prove that  
24 there's an intent to create an easement.

25           But all we need to show under the presumption of law -

1 which is section 301 of the evidence guide, and is the  
2 presumption of law cited in Buss versus Dyer and Davis  
3 versus Sikes, which are in my papers, and throughout the  
4 record: Judge Green's decision, the Appeals Court  
5 decision - that once that presumption is raised, which it  
6 is, by the fact that we have broken up unity of title...  
7 Whether it includes lots 174 and above or 188 or 189 and  
8 above, there was a unity of title in the town; it got  
9 busted up.

10 I think that could almost be judicially noticed at  
11 this point as the law of the case.

12 The presumption then shifts. And we've shown ample,  
13 ample basis for that.

14 As for the sectional plans, heh, in Exhibit 20 of the  
15 packet, and starting in 2006, when this book, that I had  
16 never seen before, and I had been indexing Aquinnah titles  
17 and Gay Head titles before that for many years -- there was  
18 never an annotation or marginal reference anywhere in the  
19 official records to indicate that these sectional plans  
20 were part of the official record.

21 And on May 22nd, 2007, Ms. Powers herself said she had  
22 decided that this was now part of the official record, and  
23 she was going to make sure that there was going to be  
24 marginal -- indexed -- marginal index notes on the proper  
25 pages in the record.

1           So before that date, the sectional plans, while they  
2 may have been in there somewhere, and while people may have  
3 had access to them, they were never directed, by way of  
4 title research, to those records in any fashion whatsoever.

5           So they were not official records in any way until  
6 2007. And they were not apparent that they were available  
7 as official records until May of 2007.

8           So these are clearly new documents. Whether they're  
9 new documents, new records, for the purposes of this case,  
10 I think is borne out by the fact that if you look at the  
11 record on appeal, and the record of the summary judgment  
12 motion before you, you will find that those sectional plans  
13 were never brought to the attention of the Court by either  
14 party.

15           So inasmuch as the case law allows you to put in all  
16 kinds of additional evidence, particularly after a remand,  
17 which only dealt with a summary judgment record at the  
18 appellate level, you can certainly supplement that with  
19 additional documentation.

20           And the sectional plans are one of the key elements  
21 that show in fact that a different framework with respect  
22 to what lots are to be looked at and were carved out of the  
23 common land, which was the directive of the Appeals Court  
24 in terms of making a determination.

25           They had one point of view on their limited record.

1 Now there's new evidence to show that in fact, "Oh, geez,  
2 maybe 174 to 189 are in fact part of the common lands that  
3 were carved out and are part of the remand."

4 Thank you, Your Honor.

5 THE COURT: Anything? Go ahead.

6 MS. ROBERTS: Just very briefly, 'cause I really don't  
7 want to come back after an appeal: To the extent that --  
8 and this is something that the plaintiffs have already done  
9 as a part of the process of submitting evidence and having  
10 Your Honor rule on it.

11 To the extent that the plaintiffs had some evidence  
12 that Your Honor ruled was not admissible, Mr. Decoulos  
13 filed an offer of proof on that.

14 And I would urge Mr. Hall - so that we don't have any  
15 issues like that - if he feels that some evidence has been  
16 excluded by Your Honor, that really the burden is on him to  
17 file an offer of proof, and he should do so promptly.

18 THE COURT: I do want to get going on this. So I'm  
19 not waiting for anything from you guys now, right?

20 MS. ROBERTS: Correct.

21 UNIDENTIFIED SPEAKER: Yep.

22 UNIDENTIFIED SPEAKER: Correct.

23 THE COURT: The last briefs were due on May 21 with --

24 MS. ROBERTS: Correct. It's all been briefed and it's  
25 waiting for you. Yep.



1           THE COURT: Everything's briefed. I've got 'em all.  
2 Right. Okay. Thank you.

3           ALL: Thank you. Thank you, Your Honor.

(Matter concluded at 12:13:36 PM.)

## C E R T I F I C A T I O N

I, Ellen H. Dibble, an Approved Court Transcriber, do hereby certify that the foregoing is a true and accurate transcript, from the audio recording provided to me by Attorney Wendy Sibbison of the Land Court proceedings in the above entitled matter.

I, Ellen H. Dibble, further certify that the foregoing is in compliance with the Administrative Office of the Trial Court Directive on Transcript Format.

I, Ellen H. Dibble, further certify that I neither am counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

*Ellen H. Dibble*

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COMMONWEALTH OF MASSACHUSETTS  
DUKES, SS. DEPARTMENT OF THE TRIAL COURT  
LAND COURT DEPARTMENT

\* \* \* \* \*

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

v.

TOWN OF AQUINNAH et al.,  
Defendants

\* \* \* \* \*

ANTHONY C. FRANGOS, and JAMES J.  
DECOULOS as they are the  
TRUSTEES OF BRUTUS REALTY TRUST

v.

TOWN OF AQUINNAH, ELLEN ROY  
HERZFELDER as she is SECRETARY  
OF THE MASSACHUSETTS EXECUTIVE  
OFFICE OF ENVIRONMENTAL AFFAIRS,  
ELIZABETH O'KEEFE, SOUTH SHORE  
BEACH, INC., DAVID H. SMITH  
FOUNDATION and VINEYARD  
CONSERVATION SOCIETY, INC.,  
Defendants

\* \* \* \* \*

No. 97-MISC-238738

Land Court Misc. Case  
No. 299511

ON 238738, STATUS CONFERENCE, and MOTION  
ON BEHALF OF GOSSAMER WING AND BARON'S;  
STATUS CONFERENCE ON 299511, FRANGOS

BEFORE JUDGE CHARLES W. TROMBLY, JR.  
APPEARANCES (see next page):

Boston, Massachusetts  
BKRoom 6  
September 8, 2010

Ellen H. Dibble  
Approved Court Transcriber

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1 (Time is 11:04:50 AM.)

2 THE CLERK: Miscellaneous case number 238738, Kitras  
3 v. Aquinnah. And miscellaneous 299511, Frangos v.  
4 Aquinnah.

5 THE COURT: Okay. Good morning, folks.

6 ALL: Good morning. Good morning, Judge.

7 THE COURT: We get the full complement, I see. You  
8 want to introduce yourselves for the record, just -- go  
9 ahead.

10 MR. DECOULOS: Nicholas Decoulos, representing --

11 THE COURT: Don't stand up. Sorry. Go ahead.

12 MR. DECOULOS: Nicholas Decoulos representing the  
13 plaintiff Maria Kitras in the case against Aquinnah, and  
14 Decoulos versus the Commonwealth of Massachusetts -- the  
15 other matter, Frangos case.

16 THE COURT: Frangos, right.

17 MS. MORSE: Leslie-Ann Morse representing Mark D.  
18 Harding and Sheila Besse and Charles Harding as they are  
19 trustees of the Eleanor P. Harding Realty Trust.

20 THE COURT: This is not a test.

21 (Laughter.)

22 THE COURT: Just state who you are.

23 Okay. Go ahead.

24 MS. TILLOTSON: Diane Tillotson, representing the  
25 Martha's Vineyard Land Bank in the Kitras matter only.

1 MS. ROBERTS: Jennifer Roberts representing the  
2 Vineyard Conservation Society in the Kitras matter and  
3 representing the Vineyard Conservation Society and the  
4 Cedar Tree Foundation in the Frangos matter.

5 THE COURT: Okay.

6 MR. RAPPAPORT: I'm Ronald Rappaport representing the  
7 Town of Aquinnah in both matters.

8 THE COURT: Okay. And you've got a cheering section  
9 behind you there. Go ahead.

10 [MR. ABAIR]: I-know (phonetic at 11:16:06 AM), Your  
11 Honor, representing Caroline Kennedy and Ed Schlossberg in  
12 the main matter, the Kitras matter, and South Shore Beach  
13 in the Frangos matter.

14 THE COURT: Okay.

15 MS. JORDAN-PRICE: Good morning, Your Honor. Kelley  
16 Jordan-Price representing defendants David and Betsy Wice  
17 in the Kitras matter only.

18 MR. DONNELLY: I'm John Donnelly representing the  
19 Commonwealth of Massachusetts.

20 THE COURT: Commonwealth, okay.

21 And Ben Hall, are you on board?

22 MR. HALL: (By phone): Yes, I am. Thank you, Your  
23 Honor. Benjamin Hall for Gossamer Wing Realty Trust and  
24 Baron's Land Trust.

25 THE COURT: Okay. Give us a second to adjust the

1 sound, okay?

2 What are we here for? It sounds like a biblical  
3 thing. We're here for a status conference on  
4 Frangos, 'cause that just popped on my "under advisement"  
5 list.

6 I've a kind of a status conference on Kitras, and  
7 we're got a motion from Mr. Hall on Kitras. Motion for --  
8 I take it like a motion to reconsideration or a motion to  
9 alter or amend, Mr. Hall?

10 (Pause.)

11 THE COURT: Oops?

12 MR. HALL: I'm sorry, Your Honor. Were you speaking  
13 to me? I could barely hear you.

14 THE COURT: Okay. We have status conferences on two  
15 cases, the Frangos case and the Kitras case. And we have a  
16 motion from you to alter or amend, or to reconsider,  
17 however we characterize it. That's how I understand it.

18 MR. HALL: That's right, Your Honor.

19 THE COURT: Okay. All right. Who wants to speak  
20 first -- where are we going on...

21 Let's hear Kitras.

22 Do you want to go, Diane? Go ahead.

23 MS. TILLOTSON: Well, it's Mr. Hall's motion. I'm  
24 happy to --

25 THE COURT: Okay. Yeah, we'll start -- okay.



1 MS. TILLOTSON: -- respond to it, but --

2 THE COURT: All right.

3 MS. TILLOTSON: -- perhaps he should start.

4 THE COURT: All right, yeah. Ben, you go ahead.

5 MR. HALL: Okay. Thank you, Your Honor.

6 The first thing that we received a few weeks ago, with  
7 all due respect, Your Honor, I think may have picked up  
8 some of the facts that have been presented on the prior  
9 record by the Court, used as a model for its -- for its  
10 fact-finding, a lot of the findings that Judge Green had  
11 entered back in 2001.

12 But subsequent to that Judge Green decision, there  
13 were some other factors that came into play, and some other  
14 information, that came before the Court. And eventually we  
15 came down to the Third Amended Complaint, that listed --  
16 which was actually an attempt to try to narrow the parties  
17 down to only those that were essential to resolve the  
18 issues at hand that were sort of under Judge Lombardi's  
19 tutelage, and with the Third Amended Complaint, there were  
20 a more limited number of parties that were involved.

21 And in that numbers that were described in that Third  
22 Amended Complaint as being owned by various parties, were  
23 adjusted from the time that Judge Green had rendered his  
24 decision.

25 So one of the main factors that Gossamer Wing found to

1 be a problem was that Gossamer Wing is listed in your  
2 decision, Your Honor, as a plaintiff. And Gossamer Wing  
3 Realty Trust has always been a defendant. Following Judge  
4 Green's decision, he -- he moved up to the Appeals Court;  
5 and then Judge Lombardi took over the case and we moved to  
6 have Gossamer Wing Realty Trust corrected to be stated as a  
7 defendant in the matter, which Judge Lombardi did.

8 So Gossamer Wing Realty Trust is a defendant in the  
9 matter. And the decision indicates that it is a plaintiff.  
10 That's the first point.

11 The second point is that the lot numbers for Gossamer  
12 Wing Realty Trust set forth in the Third Amended Complaint  
13 declared or sought declaration of right only over lot 710  
14 and 242.

15 The Third Amended Complaint, Your Honor, has some maps  
16 attached to it that are kind of handy to kind of look at.

17 The original matter, going way back, included lot 302,  
18 which was way to the north along Moshup Trail, and sort of  
19 disconnected from the locus of the area that's that is in  
20 the Third Amended Complaint.

21 So in the Third Amended Complaint, the lot number 302,  
22 owned by Gossamer Wing Realty Trust, it even -- the  
23 declaration of right had not been sought with respect to  
24 that, either by the plaintiffs or by Gossamer Wing in its  
25 counterclaims -- remembering that the cross-claims of

1 Gossamer Wing Trust were dismissed by Judge Lombardi, on  
2 which we reserve our rights.

3 So the two points so far: Gossamer Wing's a  
4 defendant; and it has lots 710 and 242. Even though it  
5 does own lot 302, lot 302 is not within the context of the  
6 controversy as stated in the Third Amended Complaint.

7 The third point is Baron's Land Trust is a defendant  
8 and is not mentioned in the decision, so how the facts  
9 apply to Baron's Land Trust are undecided.

10 And Baron's Land Trust - according to Third Amended  
11 Complaint, paragraph 7, sort of lists who owns what - owns  
12 lot 177.

13 So now we have, Baron's Land Trust has not had its  
14 rights adjudicated at all, according to the decision or the  
15 judgment.

16 My next point is - and it's probably one, I think,  
17 that most of the other parties, according to my  
18 information, seem to agree - is the declaration of rights  
19 under the claim (phonetic at 11:12:09 AM) for prescriptive  
20 easement were not part of or incorporated within Judge  
21 Lombardi's bifurcation order which got us to the last round  
22 of briefing.

23 The briefs, according to Judge Lombardi's order, were  
24 to deal with the issue of intent on the easement by  
25 necessity alone, and had no bearing whatsoever with respect

1 onto prescriptive claims.

2 So the Court, in a footnote in its decision, did  
3 decide that there was no evidence of prescriptive easement  
4 presented in the papers, but that was an issue that was not  
5 to be adjudicated within the context of the decision.

6 So I think all the parties are going to agree with me  
7 that this prescriptive easement claim issue needs to be  
8 corrected and needs to be adjudicated in some sort of other  
9 fashion. And I guess we'll take that up during the status  
10 conference.

11 And finally, the last point - and I know there'll be  
12 some argument that they're asking for some sort of  
13 reconsideration on some of these other fact findings - but  
14 the Town was the grantor in the 1871 set-off -- excuse me,  
15 in the 1878 set-off, because by virtue of the 1870 statute  
16 that forms Gay Head, when Mr. Pease filed his report in  
17 1871, he finally, fully and finally, established the  
18 boundaries of the common lands. And those common lands  
19 were the lands that were to be set off under the 1870  
20 statute, and that was what was done in 1878.

21 So all of those lots, 174 and above, were part of the  
22 common lands that had been given to the Town under the 1870  
23 statute, and then - by virtue solely of the petition to  
24 partition in the probate court under that 1870 statute -  
25 did those lots get broken up - did the common lands get

1 broken up - and create lots 174 and above, all at the same  
2 time.

3 We have to remember that after 1869 all the tribal  
4 members were made full citizens. As of mid June of 1869,  
5 they were full citizens of Massachusetts with the benefit  
6 of and subject to all the laws of the Commonwealth, which  
7 meant that their new citizenship overwhelmed any right to  
8 come in and start enclosing land and taking new possessory  
9 interests, especially against the Town, which then, in  
10 1870, was given these common lands, which then, a year  
11 later, were defined by Mr. Pease.

12 So all of a sudden you have the Town creating, albeit  
13 broken-up, as it were, the common lands -- the Town's lands  
14 being broken up into these lots, 174 and above.

15 And but for that petition action, all of that land  
16 would still be Town land.

17 So there could be no new severalty lots created after  
18 Mr. Pease filed his report in 1871 (sic at 11:15:44 AM).

19 So no matter how you read it, all the lots were  
20 created from the common lands that were then given to the  
21 Town, and the Town was the grantor, under that -- as  
22 such, under the 1878 set-off.

23 And the last point I want to reach, for oral purposes,  
24 is that the burden of production, the Court ruled, had been  
25 overcome, essentially, by these profits a prendre that the

1 other defendants had identified in the materials: Some  
2 fishing rights and some peat rights.

3 But if the Court were to look at those, actually, the  
4 Court would find that while they are profits a prendre,  
5 even those rights, the fishing rights and the peat rights,  
6 do not describe any access rights to get to the lots so  
7 they might be able to exercise those very rights.

8 So there was left an easement by implication even as  
9 to those rights -- a silent easement by implication that  
10 had to be determined and set forth at some later date, by  
11 which one could even exercise those rights.

12 So as such, all of those common lands that were broken  
13 up in 1878 were left without any access easements at all.

14 And I know the Court found that this burden of  
15 presumption was overcome, and that the presumption was  
16 overcome, but I just wanted to point that out, because I  
17 think that the Court may have miscomprehended and not  
18 recognized that those very lots did not have an easement to  
19 get through them so that one could exercise the profits  
20 that were granted by the commissioners and the Town.

21 Thank you, Your Honor.

22 THE COURT: Thank you.

23 Ms. Tillotson wants to reply?

24 MS. TILLOTSON: Certainly. Thank you, Your Honor.

25 Again, Diane Tillotson for the Martha's Vineyard Land

1 Bank. And we did file a response, or a reply, on behalf of  
2 several of the defendants. And I understand that at least  
3 one of the other defendants joined or added a joinder to  
4 that reply.

5 I want to work backwards through Mr. Hall's arguments,  
6 and start first with the issue, the Joyce versus Devaney  
7 issue, that he raised in terms of the profits a prendre.

8 First of all, I would assume -- and I think the  
9 decision clearly bespeaks the fact that the Court did go  
10 very carefully through the exhibits that were submitted by  
11 the parties and all of the deeds and all of the documentary  
12 evidence that was submitted. And that is reflected in the  
13 decision.

14 What Mr. Hall neglects to say is that the access  
15 rights with respect to certain of the fishing rights that  
16 were granted in the profits a prendre did contain a  
17 specific reference to the right of access, in order to get  
18 to the stream to do the fishing.

19 So, again, I think that his statement that there was  
20 no access right included in the evidence that was presented  
21 by the defendants in the case is just wrong. And I'm  
22 assuming that the Court found those same references when  
23 the Court examined the evidence prior to ruling in this  
24 case.

25 Secondly, just as a quick note, I think that Joyce

1 versus Devaney shouldn't be as narrowly construed as  
2 Mr. Hall suggests.

3       So again, I don't want to go into too much detail on  
4 either that or the argument with respect to the merits of  
5 the case, because again, I think the Court -- the record  
6 demonstrates and the decision demonstrates, that the Court  
7 went through the evidence very carefully, probably document  
8 by document, and rejected, essentially, arguments that  
9 Mr. Hall made, as persuasively as he could have, in the  
10 earlier submissions, and which we responded to.

11       So again, I don't think that there is a basis for any  
12 review of this decision on the merits or any  
13 reconsideration.

14       Mr. Hall cites no new cases that have come down since  
15 the time of the Court's decision in August. Nor has he  
16 cited to any change of facts that would be the basis of  
17 appropriately a motion for reconsideration in this case.

18       With respect to the other issues that are raised by  
19 Mr. Hall, I think that we are in agreement that the  
20 inadvertent reference to Mr. Hall or Gossamer Wing Realty  
21 Trust was an error, that Gossamer Wing Realty Trust is and  
22 should be listed as a defendant rather than a plaintiff.

23       We are also in agreement that the cross -- excuse me,  
24 the counterclaims and the plaintiffs' claims for  
25 prescriptive rights should not have been adjudicated.



1           And the reason for that is twofold.

2           I think the parties tend to agree that Judge  
3 Lombardi's order originally determined that the case should  
4 be bifurcated in such a way that the Court would determine  
5 first whether the plaintiffs had met their burden of proof  
6 in establishing that there was an intention to create an  
7 easement by necessity.

8           I think that the Court, while not specifically  
9 reserving the prescriptive counterclaims, focused on the  
10 adjudication of that one question that was remanded by the  
11 Appeals Court.

12           Secondly, it is true, and I think the parties agree,  
13 that when the parties were assembling the evidence, the  
14 documentary evidence, to submit to the Court, certainly  
15 many of the defendants, including my client, objected to  
16 certain evidence that Mr. Decoulos proposed on the basis  
17 that it was part of the prescriptive claim argument, and  
18 that the Court was not going to be adjudicating that  
19 prescriptive claim argument.

20           And we included a very brief excerpt from one of the  
21 pleadings that was submitted to just demonstrate that,  
22 again, that particular issue was at least on the minds of  
23 all the parties, and I think, at least, in Judge Lombardi's  
24 mind, reserved for later adjudication.

25           I would note, however, that those are principally

1 claims of the plaintiffs in this action and not a claim of  
2 the Gossamer Wing Realty Trust.

3 The Gossamer Wing Realty Trust's cross-claims, to the  
4 extent that they included prescriptive claims, were all  
5 dismissed by Judge Lombardi.

6 In the order that dismissed those claims, Judge  
7 Lombardi also indicated that he believed that the  
8 counterclaims that Gossamer Wing submitted on the  
9 prescriptive basis against the plaintiffs were similarly  
10 flawed and should likely also be dismissed.

11 But because there wasn't a motion in front of him at  
12 the time, he declined to act on that.

13 So although technically they are still out there, the  
14 counterclaims by Gossamer Wing against the plaintiff, Judge  
15 Lombardi has already indicated that he believes that those  
16 claims are without merit.

17 It may be that the plaintiffs may wish to have those  
18 claims dismissed.

19 Again, it appears that Judge Lombardi gave that some  
20 careful thought.

21 With respect to the remaining claims for prescriptive  
22 rights that the plaintiffs have in this case, again, that  
23 is the subject that we were requesting a status conference  
24 on. To the extent that those need to be adjudicated, we  
25 would suggest that they be adjudicated in the relatively

1 near future.

2 We don't see that there would be any, certainly any  
3 testimonial evidence that would come in on that. But if  
4 there is, so be it. And we would respectfully ask that the  
5 Court set a trial date - we wouldn't expect that it would  
6 be more than a one-day trial - to adjudicate finally those  
7 claims, prescriptive easement claims, to the extent that  
8 they exist.

9 And I know that the Court will take that up further.

10 With respect to the claims regarding Baron's Land  
11 Trust: Baron's Land Trust is listed in the Third Amended  
12 Complaint as the owner of lot 177. And this Court has  
13 previously ruled, on numerous occasions, lot 177 was  
14 determined by the Appeals Court not to have any rights of  
15 easement by necessity.

16 The Appeals Court made that determination.

17 The Baron's Land Trust has tried repeatedly to bring  
18 lot 177 back into the case. The Court did not adjudicate  
19 lot 177 for the simple reason that lot 177 has already been  
20 adjudicated by the Appeals Court; it was not part of remand  
21 order. And so the Court, quite appropriately, did not  
22 adjudicate the rights of Baron's Land Trust or lot 177.

23 So we do not believe that there is any issue there.

24 With respect to the other lots that were owned by  
25 Gossamer Wing Realty Trust: Gossamer Wing owned four lots,

1 lots 242, 302, 707, and 710. The decision determined that  
2 lots 707, 710, and 302 did not have the benefit of an  
3 easement by necessity.

4 Mr. Hall is correct that lot 302 was not included as a  
5 lot owned by Gossamer Wing in the Third Amended Complaint.  
6 However, in the counterclaims and cross-claims, Hall refers  
7 to quote, "Hall's land," which did include all four lots.

8 This is not a major issue for the defendants, whether  
9 or not the Court includes lot 302 or not. However, I would  
10 respectfully suggest that the evidence and arguments  
11 submitted by the trust and by Mr. Hall in regard to lots  
12 242 and lot 710, which have been fully adjudicated, apply  
13 equally to lots 302 and 707, and that therefore, we would  
14 respectfully suggest that they are appropriately part of  
15 the judgment.

16 Again, lot 302 stands on a slightly different footing,  
17 because it is not part of the Court's -- it was not part of  
18 the Third Amended, ah, counterclaim.

19 We would respectfully ask that the Court amend the  
20 complaint and the judgment to conform to the evidence  
21 presented, pursuant to Rule 15(a), which permits the Court  
22 to amend, to conform to the evidence, even where a specific  
23 issue was not raised by the pleading.

24 And we would respectfully suggest that both lots 302  
25 and lot 707 - particularly lot 707 - falls into that

1 category.

2 Finally, I'd just like to comment briefly on the  
3 notion that Gossamer Wing raises, that the issues involved  
4 in this case were not properly adjudicated on the basis of  
5 the documentary evidence that was submitted by all parties  
6 to the Court.

7 And I think those of us, certainly on the defendants'  
8 side of the table, other than Mr. Hall, find that argument  
9 somewhat ludicrous.

10 Although this perhaps may not be technically a  
11 case-stated, because the parties did not agree on all the  
12 evidence, what the parties did agree on was that there  
13 would be absolutely no testimony involved by any live  
14 witness in this case.

15 The Court set a briefing schedule, after numerous  
16 hearings, and, after input from all the parties, including  
17 Mr. Hall, heard arguments on various evidentiary issues  
18 that were submitted. The parties worked long and hard to  
19 come up with a list of exhibits that were agreed to -- and  
20 many of the exhibits were agreed to. And with respect to  
21 the ones that weren't agreed to, there was extensive  
22 briefing on both sides of the table: Motions to strike,  
23 motions to reconsider -- all of which the Court ruled on  
24 before finally adjudicating this case this past summer.

25 So we would respectfully suggest that there is

1 absolutely no basis in the record for an evidentiary  
2 hearing or a trial on any of the matters that are covered  
3 in the Court's August 12th decision.

4 Did I leave anything out?

5 THE COURT: Doesn't...

6 MS. TILLOTSON: I think that's it.

7 THE COURT: Okay. Thank you.

8 Okay, Mr. Decoulos?

9 MR. DECOULOS: Thank you, Your Honor.

10 On August 14th, 2006, Judge Lombardi issued an order  
11 that the matter be bifurcated, and it was supported by all  
12 of the defendants. And we believe that that was done; we  
13 got our evidence in, and we got a judgment, and we don't  
14 want to have to come in here on a second time for a second  
15 issue. There is nothing in the order by Judge Lombardi  
16 that said that the claim for prescriptive rights should  
17 also be heard.

18 So we set aside everything. His order is the  
19 foundation for why we were here. He said that we're going  
20 to find out whether or not we can prove the existence of an  
21 implied easement in the last page of his order.

22 According to your judgment, we failed to prove that,  
23 and we want to go on with an appeal as we did with -- we  
24 filed an appeal on your judgment, and we just want to  
25 progress with the matter.

1           We don't have to go back to find out about  
2 prescriptive rights until we find out whether or not there  
3 is an implied easement. And if we find out that there is  
4 an implied easement, then we don't have to worry about any  
5 prescriptive rights.

6           So the orderly way to handle this is to adopt what the  
7 defendants wanted. They got it. They got their  
8 bifurcation order. And we're there. So let's just move  
9 on. Let's see whether or not your rationale is proper or  
10 not. And if the Court finds otherwise, then we can -- if  
11 the Court sustains what you did, then we'll come back here  
12 and try the prescriptive rights.

13           This case was filed in 1997. Besides the plaintiffs  
14 and Mr. Hall's clients, there are people that own lots down  
15 there that were not included in this case, and they are  
16 also affected by it. We're not going to bring that up  
17 anyplace, but I'll just let you know that not only --  
18 there's a vast amount of people that would be interested in  
19 the outcome of this case as it relates to whether or not  
20 all of us have a easement to (indiscernible at 11:32:36 AM,  
21 simultaneous).

22           THE COURT: So your idea is go ahead with it, appeal  
23 what I've just done, see what Justice Brown or whoever does  
24 in the Appeals Court. And then if he comes down one way,  
25 case is over. If he comes down the other way, then we do

1 step three, or four or five or whatever it is.

2 MR. DECOULOS: This is a great foundation for your  
3 reason to deny any request to have another trial. We don't  
4 want another trial. We want to find out whether or not we  
5 have an implied easement or not, and we didn't find -- we  
6 found out what your thoughts were, that we didn't have --

7 THE COURT: In my opinion, you don't. Okay.

8 MR. DECOULOS: We just want to take an appeal on that  
9 and move right along.

10 THE COURT: Okay. Go ahead.

11 And then -- I'll get -- I'll give it to you in a  
12 minute, if you want.

13 Go ahead.

14 MS. MORSE: We do.

15 MS. ROBERTS: We haven't had much opportunity to  
16 discuss this before, but it would be my view that the case  
17 has been around for a long time. I want to get it done as  
18 efficiently, cost-effectively, as I can.

19 As things stand right now, if essentially Mr. Decoulos  
20 is asking for a 54(b) certification out of this court,  
21 because it's -- we all agreed that the record would show  
22 that the adverse possession claim, while the Court  
23 addressed it, we all agree that it hasn't been properly  
24 brought before the Court.

25 So the worst possible outcome here is that it goes up



1 to the Appeals Court, and then it gets shipped back down  
2 here to deal with the adverse possession claim.

3 So in terms of efficiency, I would be asking the  
4 Court, as Ms. Tillotson has, to set down a quick trial date  
5 for the adverse possession claims.

6 I say that, Your Honor, is the full expectation that  
7 you will not change your decision, because there isn't  
8 going to be any evidence of adverse possession.

9 So -- but that will clean this up, and it will get  
10 sent to the Appeals Court on a clean record, and we won't  
11 have these procedural problems.

12 So I think that the time is now for them to either  
13 waive those claims or come forward with the evidence that  
14 supports them. We've done discovery. There is no evidence  
15 to support the adverse possession claim. But -- but that's  
16 procedurally defective right now.

17 So we'd ask to get that taken care of, and then ship  
18 the whole case up.

19 THE COURT: Mr. -- Nick? Mr. Decoulos?

20 MR. DECOULOS: Yes.

21 THE COURT: Pardon me. I'll ask you a quick question.  
22 Then (indiscernible at 11:35:02 AM, unclear).

23 What evidence would there be on a prescriptive -- on  
24 an easement or adverse possession or prescriptive?

25 MR. DECOULOS: Not with my tongue in my cheek.

1 THE COURT: No.

2 MR. DECOULOS: But she testified, in the deposition  
3 that we conducted, that that she walked those roads; I'm  
4 talking about Jennifer.

5 And then we've got all kinds of old plans and old maps  
6 that show the roads in existence. So that there would be  
7 some evidence. And there would be evidence that people  
8 have blocked it off, with no right to...

9 It's just a -- it's just something that's -- they were  
10 in favor of the bifurcation. Now they're not in favor of  
11 the bifurcation. I think they ought to be consistent in  
12 their argument.

13 THE COURT: Okay. Attorney Morse.

14 MS. MORSE: Thank you, Your Honor.

15 Your Honor, my clients are the Hardings. My clients  
16 don't claim any prescriptive easements. So if this thing  
17 gets tried -- and I know they say "quick trial," but let's  
18 be honest, we're going to be stuck here for another 2  
19 years, at a minimum, while my clients twiddle their thumbs.  
20 I would like the 54(b) certification so that we can take  
21 this, now, to the Appeals Court.

22 Because it's unfair to my clients to get tied up for a  
23 couple of years.

24 THE COURT: Okay. Anybody who hasn't spoken yet, that  
25 wants...

1 Mr. Donnelly, go ahead.

2 MR. DONNELLY: I'm only adding that we did not -- the  
3 Commonwealth did not sign on with defendants' motion, but  
4 we do agree with the -- the infeasible (time is 11:36:33  
5 AM) fee holders, being the Town and the Vineyard  
6 Conservation Society, and that we would adopt and agree  
7 with their outcome (time at 11:36:43 AM, away from  
8 microphone).

9 THE COURT: Anybody else? Mr. Hall?

10 MR. HALL: Yes, Your Honor?

11 THE COURT: You've been listening to this?

12 MR. HALL: I could barely -- I couldn't really hear  
13 Mr. Donnelly --

14 THE COURT: Okay. Mr. Donnelly's saying --

15 MR. HALL: -- but I don't really think it matters.

16 THE COURT: That's not a nice thing to say.

17 (Laughter.)

18 THE COURT: I know you didn't mean it that way.

19 MR. HALL: No.

20 (Mirth.)

21 MR. HALL: Your Honor, it's different matters --

22 THE COURT: Okay. No, no, but he was just saying  
23 he --

24 MR. HALL: -- (indiscernible, simultaneous) record  
25 in --

1 THE COURT: Okay.

2 MR. HALL: -- but I would like to respond to some of  
3 Ms. Tillotson's comments.

4 THE COURT: Go ahead. Very briefly if you can. I  
5 have another -- people come in from Pittsfield are here  
6 waiting for us to finish. So.

7 MR. HALL: Okay.

8 THE COURT: Go ahead.

9 MR. HALL: Ms. Tillotson tried to paint Judge  
10 Lombardi's order dismissing the cross-claims of Baron's  
11 Land Trust in a particular fashion, as if they were not  
12 favored; and that may be the case.

13 Regardless, those counterclaims with respect to  
14 easement by prescription and easements by necessity did  
15 remain in the case.

16 And so if the Court were simply to - in an amended  
17 judgment - indicate that Baron's Land Trust owned lot 177,  
18 but that the Court had ruled that the Appeals Court -- had  
19 previously ruled that the Appeals Court had drawn the line  
20 at unity of title at a point that included 177; therefore  
21 177 was not able to have an easement by necessity, I think  
22 that would address my concerns in respect to the easement  
23 by necessity counterclaim.

24 However, the prescriptive counterclaim does remain for  
25 Baron's Land Trust, and in fact Zack's Cliffs Road does

1 cross along the boundary of lot 177.

2 And Zack's Cliffs Road -- Judge Green, in fact, in his  
3 decision did find that Zack's Cliffs Road did provide,  
4 apparently, a convenient way for some sort of easement to  
5 this general vicinity and general area.

6 So that was, I believe -- I'm not sure exactly if the  
7 record of the prior case was totally included in this case,  
8 but I would venture to guess that it probably is.

9 As for lot 302, and Ms. Tillotson's request that the  
10 Court amend the pleadings to show that lot 302 should have  
11 been adjudicated, and lot 707, neither of which  
12 actually -- lot 707 was not in the Third Amended Complaint  
13 either.

14 So 707 and 302 were not sought to have any declaration  
15 of right. And there was no notice to the parties, to  
16 Gossamer Wing Trust or Barons Land Trust, that either of  
17 those lots were going to be part of the declaration of  
18 rights. And it's completely unfair to all of a sudden try  
19 to conform pleadings to include a declaration of right on  
20 lots that were never before the Court in the current  
21 proceedings.

22 Moreover, how can a defendant seek to have the  
23 complaint amended? I don't think they have standing to do  
24 so.

25 And lastly, the Frati issue, which gets down to

1 whether we were technically a case-stated or not. And she  
2 claimed that all parties knew that there would be no  
3 testimony.

4 Well, that isn't quite true, because the plaintiffs  
5 wanted to put in some deposition testimony that was  
6 excluded, in lieu of oral testimony, because the Court had  
7 requested that everything be put in, in a documentary  
8 fashion.

9 So there is some oral testimony to be had.

10 And lastly, on the easement by prescription issue, if  
11 this were to be set aside for a trial, I believe that  
12 there's a new discovery period required, because the  
13 discovery order that was issued, the time for the  
14 discovery, related solely to this bifurcated issue on the  
15 issue of intent on an easement by necessity.

16 And there was never any indication that the discovery  
17 period provided was supposed to be on all claims. It was  
18 limited to the easement by necessity claims and the issue  
19 of whether or not there was intent. And the other parties  
20 argued that discovery on issues beyond that were irrelevant  
21 at that time and could not go forward.

22 So I ask the Court to -- if we are going to be getting  
23 into a status conference about setting a trial date, and  
24 the Court does decide that we're going to take this  
25 easement by necessity claim and put it back on the burner,

1 that we go down that road again, in a proper format and  
2 fashion, so to enable people to collect what discovery they  
3 need.

4 I'm not anticipating there's much, but I would like to  
5 at least see what kind of documents that my adversaries  
6 have with respect to that.

7 THE COURT: This case has been before the Court for a  
8 long time, Mr. Hall. 1997? How much discovery do we need?

9 Ms. Roberts, go ahead.

10 MS. ROBERTS: We did do discovery on the issue of  
11 adverse possession. And we didn't do any discovery with  
12 Mr. Hall because his claims were dismissed against the  
13 defendants. But we've done the discovery. We took  
14 Mr. Decoulos's deposition and the surveyor's deposition and  
15 asked for documents.

16 And it was our understanding that all discovery in the  
17 case was to be completed. And we did it.

18 So there's nothing standing between us and a prompt  
19 trial date.

20 THE COURT: Okay. Mr. Decoulos.

21 MR. DECOULOS: I've just got to say, we relied on  
22 Judge Lombardi's bifurcation order; that was requested by  
23 the defendants. And we got a decision on the bifurcation  
24 order. Let's go on with the appeal.

25 THE COURT: Okay. Anybody else?

1           Then we have to do the Frangos case quickly, where we  
2 stand with that.

3           Jennifer Roberts, go ahead.

4           MS. ROBERTS: I've been deputized on that.

5           The Frangos matter involves --

6           THE COURT: Ben? Ben, you're not involved in this  
7 one?

8           MS. ROBERTS: Mr. Hall is not.

9           MR. HALL: No, I'm not, Your Honor.

10          (The Kitras matter is only referred to tangentially from  
11 this point at 11:42:44 AM, forward.)

12          THE COURT: Okay. All right. Go ahead. Jennifer, go  
13 ahead.

14          MS. ROBERTS: This involves lots that are the other  
15 side of Moshup Trail, between Moshup Trail and the Atlantic  
16 Ocean. The complaint asserts three claims, an easement by  
17 necessity, and then two counts for takings, under the state  
18 and federal constitutions.

19          There was an attempt by the plaintiffs to consolidate  
20 the actions, which was denied by Judge Lombardi, but  
21 they've been on the same track.

22          And in fact, where this case left off was at the same  
23 point as in the Kitras case, where we were supposed to  
24 finish discovery and then pull together a set of documents,  
25 which were going to be the basis for a ruling on the



1 easement by necessity claim.

2           There's an order in the Frangos case which is  
3 comparable to the order in the Kitras case saying: Pull  
4 together a set of trial exhibits.

5           And in fact in Judge Lombardi's order, he notes that  
6 the Kitras plaintiffs said that they would be using the  
7 same documents in the Frangos case that they were using in  
8 the Kitras case.

9           And they in fact - in discovery, interrogatory  
10 answers - provided a list of documents that were similar.

11           Technically, I guess, we need to file the identical  
12 motion in this case that was filed in the Kitras case, and  
13 have the plaintiff respond to that.

14           But we're not going to be saying anything different.  
15 It's all lots that are above the 178 number.

16           It's going to be the same issue. So we would expect  
17 the same result.

18           So procedure, we just need to decide, do we need to  
19 jump through those hoops, or is the plaintiff going to  
20 agree that the same thing's going to happen here?

21           And then of course the other issue is, do they want to  
22 pursue their takings claims. I don't see any state action  
23 that's going to support any of that; certainly there's no  
24 takings of claims against my private clients.

25           THE COURT: What do you think, Nick?

1 I just want to get it back on track. It's one of my  
2 pending cases.

3 MR. DECOULOS: Well, you would apply the same  
4 reasoning that you applied on the Kitras matter.

5 THE COURT: Right.

6 MR. DECOULOS: But there's still a takings claim there  
7 in the wings. So if we don't have access, then we've lost  
8 a lot that is right on the Atlantic Ocean, so we're talking  
9 a sizeable damage claim as a result of our inability to...

10 What's happened here is that the Commonwealth set up a  
11 kind of a restriction to use the property that abuts Moshup  
12 Trail, but they didn't make a taking of that particular  
13 lot.

14 THE COURT: Right.

15 MR. DECOULOS: So their action has deprived us of  
16 access to our lot and the Atlantic Ocean, so to speak.

17 THE COURT: So do we bifurcate it? Do we want to  
18 separate the takings claim from the merits, so to speak?

19 MR. DECOULOS: I would think that would be the proper  
20 way to go.

21 THE COURT: How does anybody else feel about that?

22 MS. ROBERTS: Well, with respect to the takings claim,  
23 and certainly with respect to my clients, they're private  
24 entities; I can't imagine that there's a valid claim there.  
25 So I would like my clients to be out of this. Heh.

1 THE COURT: All right. But the Commonwealth --

2 MR. DECOULOS: Well, it wasn't a taking by eminent  
3 domain. But they participated in depriving us of access to  
4 the property.

5 THE COURT: Mr. Donnelly?

6 MR. DONNELLY: I believe -- and Mr. Rappaport can  
7 correct me on this, if you think it's incorrect, Judge  
8 (time is 11:46:38 PM, away from microphone): The town  
9 parcel was taken by eminent domain, and it would be an  
10 eminent domain claim, which actually this Court has no  
11 jurisdiction over.

12 THE COURT: Right.

13 MR. DONNELLY: So.

14 THE COURT: Yeah. Mr. Rappaport? Do you concur?

15 MR. RAPPAPORT: I do.

16 That's my memory, sitting here today.

17 THE COURT: All right. No, the case was here a long  
18 time.

19 MR. RAPPAPORT: That's right.

20 THE COURT: It just got put aside while this other one  
21 was going through. And it shows up on my tickler list, so  
22 I thought, we're going to -- can't leave it here. Got to  
23 do something with it. So whether we -- I separate it, and  
24 if there is an issue about description or implication or  
25 whatever, do that part.

1 But is your main theme, the taking theme, Nick?

2 MR. DECOULOS: We'd like to have the lot.

3 THE COURT: All right. All right. Well, let me --

4 MR. DONNELLY: Well, then I have -- I also have an  
5 eminent domain taking. The only damage -- they can only  
6 have damages and can only get (phonetic at 11:47:31 AM,  
7 away from microphone) monetary damages, so that-take-once  
8 (phonetic).

9 MR. DECOULOS: I cannot hear you, Mr. Donnelly.

10 THE COURT: Okay.

11 MR. DECOULOS: I didn't hear you.

12 MR. DONNELLY: In an eminent taking, you can only get  
13 monetary damages, so I don't know if that's what you're  
14 asking for.

15 MR. DECOULOS: Well, we want access, and if we don't  
16 get access, we want money.

17 THE COURT: You want access. But if you don't get  
18 access, you want money.

19 MR. DECOULOS: Right.

20 THE COURT: Okay.

21 MR. DECOULOS: It's as simple as that.

22 MS. TILLOTSON: Your Honor, aren't they in the wrong  
23 court?

24 THE COURT: Well, that's what the issue is. If  
25 it's -- they're fighting over eminent domain, yeah, they

1 are.

2 MS. TILLOTSON: You're in the wrong court and  
3 you're --

4 THE COURT: But if he wants to push the fact that he's  
5 got a easement by implication or whatever we've already  
6 discussing, then he's probably in the right court.

7 MR. DONNELLY: The superior court has exclusive  
8 jurisdiction.

9 THE COURT: On the eminent domain.

10 MR. DONNELLY: On eminent domain.

11 THE COURT: But on the easement by implication or  
12 prescription or whatever, we can do that.

13 MS. ROBERTS: So how should we tee that up for you, I  
14 guess is the question. You have the easement by necessity  
15 issue.

16 THE COURT: Do you want to me to...

17 MS. ROBERTS: Do I deal with (indiscernible) -- just  
18 ask him that (indiscernible at 11:48:30 AM) --

19 THE COURT: Bifurcate it again?

20 MS. ROBERTS: Just on the same facts  
21 (indiscernible) --

22 THE COURT: Do it on the same -- could we do it on the  
23 facts?

24 MS. ROBERTS: -- (indiscernible) that we would ask  
25 that the Court issue an order in this case --

1 THE COURT: Yeah.

2 MS. ROBERTS: -- on the (indiscernible at 11:48:39  
3 AM) --

4 THE COURT: That will be the quickest way.

5 MS. ROBERTS: -- Mr. Decoulos the opportunity to  
6 respond to that.

7 THE COURT: That would be the quickest way.

8 MR. DECOULOS: I have no problem --

9 THE COURT: Tee it up and get it moving.

10 MS. ROBERTS: Okay. And I'll do that.

11 THE COURT: And give notice to everybody and we'll go  
12 from there.

13 MS. ROBERTS: Yep, will do that.

14 THE COURT: Okay. Anything else?

15 MR. DECOULOS: Nope. Thank you very much.

16 THE COURT: All right. Thank you all.

17 Thanks, Mr. Hall.

18 MR. HALL: Thank you, Your Honor.

19 THE COURT: Talk to you soon.

20 MR. HALL: Okay.

21 (Matter concluded at 11:49:04 AM.)

## C E R T I F I C A T I O N

I, Ellen H. Dibble, an Approved Court Transcriber, do hereby certify that the foregoing is a true and accurate transcript, from the audio recording provided to me by Attorney Wendy Sibbison of the Land Court proceedings in the above entitled matter.

I, Ellen H. Dibble, further certify that the foregoing is in compliance with the Administrative Office of the Trial Court Directive on Transcript Format.

I, Ellen H. Dibble, further certify that I neither am counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

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COMMENTS: Those dates where four channels were used were much easier and quicker to transcribe, and allowed people speaking over the phone to be isolated and heard, or people on the plaintiff side to be isolated and heard, or people on the defendant side to be heard; if no one was on the phone. With multiple speakers, this was a huge advantage, even when they were speaking one at a time.

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