COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-11885

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

v.

TOWN OF AQUINNAH, et al.,
Defendants-Appellees

ON APPEAL FROM A JUDGMENT
OF THE LAND COURT

APPELLANTS' REPLY TO NEW BRIEFS OF 1) THE MARTHA'S VINEYARD LAND BANK AND TOWN OF AQUINNAH AND 2) THE COMMONWEALTH OF MASSACHUSETTS

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Explanation of Abbreviations

"MVLB Br." refers to the new brief filed by the Martha's Vineyard Land Bank Commission (the "Land Bank") and the Town of Aquinnah ("the Town").

"Comm. Br." refers to the new brief filed by the Commonwealth.

Add. refers to the Addendum reproduced at the end of Appellants' blue brief.

A. refers to the Appendix of documents reproduced at the end of the blue brief.

E. refers to the separately-bound volume of Exhibits.

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ARGUMENT IN REPLY

I. APPELLANTS HAVE NEVER URGED THAT THE INDIANS' SHARED USE OF THEIR COMMON LAND WAS "THE EQUIVALENT OF A CHAIN OF TITLE" TO AN EXPRESS EASEMENT.

To the extent that the first part of the Appeals Court's analysis can be read as the Land Bank and the Town do, MVLB Br. 21-30, we agree that this analysis is questionable. We have never suggested any such analysis in the trial court or on appeal. Rather, we have relied, and continue to rely, on the well-established law of easements by necessity.

This Court thus need not consider the history surrounding the Wampanoag tribe's 1974 federal lawsuit, offered to refute the admittedly vulnerable part of the Appeals Court's decision. MVLB Br. 25-31.[1] Those events long postdated the partition in issue and are thus irrelevant to the parties' presumed intentions in 1878, the central question here.

II. NEITHER THE APPLICABLE LAW NOR THE FACTUAL RECORD SUPPORTS THE LAND BANK'S AND THE TOWN'S NEW CLAIM THAT THE INDIANS' CUSTOMARY SHARING OF COMMON TRIBAL LAND NEGATED THE ELEMENT OF NECESSITY.

For the first time, the Land Bank and the Town now urge that we failed to establish the element of necessity because members of the Tribe who owned

[1]See also, Brief of Amicus Curiae Aquinnah/Gay Head Community Association, pp. 9-25.

separate, fenced-in lots purportedly "permitted other members free access [over this property] by foot." MVLB Br. 18, 14-21. This argument, adopted from the opinion of the dissenting Appeals Court Justice,[2] is wrong both as a matter of law and fact.

A. Legally, the Element of Necessity Implicates a "Legal Right of Access" And Thus Cannot be Defeated by Prior Unenforceable, Unwritten, Customary Use.

The law of easements by necessity concerns legal, enforceable rights; the element of necessity thus encompasses all "*rights* necessary to reasonable enjoyment of the land. . ." RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.15 (2000), emphasis added. We have found no case law, and Appellees cite none, which holds that access to land by means of a legally unenforceable custom negates the element of necessity.

The focus on legal rights in the RESTATEMENT is in full accord with Massachusetts common law.[3] Notably

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[2] Kitras v. Town of Aquinnah, 87 Mass. App Ct. 10, 28-30 (2015) (Agnes, J., dissenting).

[3]This Court should therefore adopt RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.15 (2000), as it has adopted other sections of this treatise in recent years. Martin v. Simmons Properties, LLC, 467 Mass. 1, 11 (2014) reaffirming M.P.M. Builders, LLC v. Dwyer, 442 Mass. 87, 91 (2004) (adopting § 4.8(3)); Cater v. Bednarek, 462 Mass. 523, 532 (2012) (adopting § 7.6); see also, Bortolotti v. Hayden, 449 Mass. 193, 204 (2007) (citing § 3.3); Patterson v. Paul, 448 Mass. (continued...)

absent from all Appellees' briefs is any response to a central point of our principal brief: that bedrock case law on easements by necessity addresses a grantee's need for a "legal right of access." Kitras Br. 27-31, citing Davis v. Sikes, 254 Mass. 540, 545-546 (1926) and New York & New England Railroad v. Railroad Comm'rs., 162 Mass. 81, 83 (1894); A. 68 (Green, J.). Assuming *arguendo* that there is record support for the "custom and usage" on which Appellees rely, we have shown that any access based on that custom was legally unenforceable. Kitras Br. 36-41. Appellees fail to explain how an unenforceable custom can plausibly be viewed as a proxy for a legal right of access.

The legislators who authorized the 1878 partition demonstrably intended to undo a variety of legal disabilities suffered by the newly-enfranchised Wampanoags, E. 69-78, including the affront that "[t]hey could make no sale of their lands to any except other members of their tribe." E. 127. But with access to their new lots solely by means of a nontransferable "custom," the new owners would be

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[3](...continued)
658, 663 (2007) (citing § 1.2); Stop & Shop Supermarket Co. v. Urstadt Biddle Properties, Inc., 433 Mass. 285, 291 (2001) (citing § 7.15).

permanently bound by the same legal chains, still unable to sell their land outside the tribe. Legally enforceable easements were reasonably necessary to bring the legislators' intent to fruition.

The "custom and usage" proxy for necessity urged by the Land Bank and the Town also lacks common sense from the Indians' perspective. If the Indians who wanted separate ownership of a piece of the common land had been content with the frail protection of Indian custom, they merely had to fence off whatever portion they wanted and it was theirs. E. 38. Their decision to seek partition of the common land instead, with the firm protection of common law ownership in fee simple, shows that they did not feel secure with only unenforceable tribal customs standing between themselves and exploitation.[4] It thus makes no sense to conclude that these same petitioners, while seeking the ownership protections of the common law, nonetheless consciously intended to take these lots without any legal right to set foot on or sell them.

Legally, the "custom and usage" argument does not withstand scrutiny.

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[4]It is noteworthy that by 1870, this area was already "much travelled in summer by people from the main land, pleasure-seeking on the Vineyard." E. 75.

B. Factually, the Record Nowhere Shows That Indian Custom Allowed Access Over Fenced-Off Severalty Lots; Instead, the Record Shows That These Lots Were Treated As Separate Property Upon Which "No One Intrudes."

In any event, the record of "Indian custom and usage" is not what Appellees say it is, nor does the record support the broad findings made by the trial court[5] and the dissenting Appeals Court Justice.[6]

There is no evidence whatsoever that, historically, members of the Tribe who owned separate, fenced-in lots "permitted other members free access [over this property] by foot." MVLB Br. 18.[7] One searches all three Appellees' briefs in vain for a single concrete reference to the record showing any such "custom and usage" with respect to lots held in severalty–i.e., lots which, before partition, the people treated as individually-owned property. That is because there is no such evidence in the record.

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[5]"The prevailing custom among the tribe at the time of the division allowed for access for each member of the tribe as necessary over lands held in common ***and in severalty***." Add. 9, emphasis added.

[6]"At the time the partition deeds were granted, the parties were aware that Gay Head tribal custom was such that all Tribe members enjoyed access over all Tribe properties whether owned ***severally*** or in common." Kitras v. Town of Aquinnah, 87 Mass. App Ct. 10, 28 (2015) (Agnes, J., dissenting), emphasis added.

[7]See also Brief of Vineyard Conservation Society, Inc., pp. 32-39.

On the contrary, the record shows that once a member of the Tribe fenced off a parcel of land from the common land, this lot was treated as "his own," E. 29, 38, and that henceforth "no one intrudes on the spot which [he] has appropriated to his labor." E. 231.[8] In short, the custom was to keep off the severance lots.

Elsewhere in their brief, the Land Bank and the Town acknowledge that the record, at best, shows only that the tribal custom was to allow members "to walk freely *upon any land not fenced off.*" MVLB Br. 21, emphasis added. Indeed, the record shows only the unremarkable fact that the Indians' custom was to treat their common land–i.e., land not individually claimed by fencing–as available to all. For example, anyone who did the work of digging clay or harvesting cranberries from the common land could sell the product and keep the proceeds. E. 28.

Accordingly, nowhere in the record is there proof of any custom that, before partition, members of the tribe allowed each other to cross over their separately-owned lots. There was thus no custom on which the parties to the partition could possibly have relied to

[8]The truth of this observation is undisputed; the Vineyard Conservation Society relies on it in its own brief. VCS Br. 34.

provide access over the new, separately-owned lots.

Nor is there any evidence that the legislators or Commissioners who authorized partition gave any thought to any such purported custom. Nowhere in their thoughtful, eloquent reports of 1870 and 1871 do either the legislative committee or Commissioner Richard Pease allude to any issue of access or to any custom that had any bearing on that issue. E. 69-78, 109-134.

This Court should thus disregard Appellees' unfounded factual claim about "custom and usage" in considering whether we proved the element of necessity, MVLB Br. 14-21, and whether they rebutted the presumption of easement by necessity, VCS Br. 32-36.

III. THE 1849 CHAPPAQUIDDICK TRANSACTIONS HAVE NO BEARING ON THE PARTIES' INTENTIONS IN THIS CASE.

The Land Bank and the Town draw this Court's attention to the fact that in 1849, the Chappaquiddick Indians received express access easements when the Commonwealth returned their land to them, two decades before allowing them to become citizens. MVLB Br. 8-9.

This evidence has no bearing on this case, which concerns the intent of different legislators, different Commissioners, and different tribal grantees, in a different era of expanding civil rights, twenty-nine years after the Chappaquiddick transfers. If those

earlier transfers have any significance here at all, they suggest that the omission of access easements in the Wampanoag deeds[9] was unintentional.

IV. THE CONSTRUCTION OF THE MOSHUP TRAIL IN 1955 HAS NO BEARING ON THE LEGAL ISSUES IN THIS CASE.

The new briefs filed by the Commonwealth and the Land Bank and Town urge that there can be no easement here because the Moshup Trail, the nearest public way, was built long after partition. Comm. Br. 6, MVLB Br. 9, 17-18, 20. There is nothing to these arguments.

Appellants seek easements to State Road, a public way in existence at the time of partition. Toward this end, they have suggested that the least intrusive route from their lots to State Road–a route which would burden just a single lot[10] among the "hundreds of acres" owned by Appellees, MVLB Br. 38-39–is over the Moshup Trail. Kitras v. Town of Aquinnah, 64 Mass. App. Ct. 285, 294-

[9]All deeds in Appellants' chains of title were introduced in the trial court. By agreement of all parties, Mass. R. App. P. 18(b), this bulky material was not reproduced in the Appendix because it is uncontested that Appellants' title is good and that they have no express easement. The deeds are not "curiously absent," as the Land Bank and the Town well know. MVLB Br. 22, quoting Kitras v. Town of Aquinnah, 87 Mass. App Ct. 10, 28 (2015) (Agnes, J., dissenting).

[10]The lot needed for all Appellants' access to the Moshup Trail, and thus to State Road, could be either lot 553 or 556, shown at Add. 20.

295 (2005). When that road was built–indeed, anything about the ultimate location of easements–has no bearing on the question before this Court.

V. THE PARADE OF HORRIBLES CONJURED UP BY THE LAND BANK AND THE TOWN HAS NO BASIS IN THE RECORD AND NO BEARING ON THIS CASE.

The Land Bank and the Town wrap up their brief with dire, speculative warnings of the consequences of a decision favoring Appellants. MVLB Br. 38-41. The purported impact of such a decision on their property and other properties in the Town is a factual matter with no material relevance to any of elements of this Court's legal inquiry. There is thus no record supporting Appellees' contentions, with which we emphatically disagree, and this Court should disregard them as inflammatory, unproven, and irrelevant.

In this vein, the Land Bank and the Town darkly refer to "certain of the plaintiffs" as "developers" who, they suggest, will lay waste to the land and spoil the neighborhood. MVLB, 40-41. None of the plaintiffs are "developers." Maria Kitras and James Decoulos are a non-Wampanoag married couple, who work in the fields of public relations and environmental engineering, respectively. Mark Harding, Sheila Besse and Charles Harding are members of the Wampanoag tribe and

descendants of the 1878 grantees. Sheila Besse and Charles Harding are retired; Mark Harding owns a company specializing in sustainable energy systems for tribal and commercial clients. Appellees' efforts to discredit these small landowners (together they own just 23 acres) as despoilers of nature does not help this Court.

CONCLUSION

For these reasons and for those stated in their principal and first reply briefs, Appellants ask this Court to reverse the Land Court's decision; to order the entry of a judgment declaring that all their lots have access easements by necessity; and to remand the case to the trial court to locate those easements on the ground. With respect to Lot 178, if this Court does not conclude from the record that it was partitioned from the common land, Kitras asks for a trial on this issue.

Respectfully submitted,

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Certificate of Compliance

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

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