COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-11855

MARIA KITRAS, TRUSTEE, & others,
Plaintiffs-Appellants,

v.

TOWN OF ACQUINNAH, & others,
Defendants-Appellees,

ON APPEAL FROM A JUDGMENT OF THE LAND COURT

BRIEF FOR AMICUS CURIAE MICHAEL PILL, ESQ., CO-AUTHOR OF VOLUMES 28, 28A & 28B MASSACHUSETTS PRACTICE: REAL ESTATE LAW WITH FORMS IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Dated November 9, 2015

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[1] Quotation is from this court's 7/28/2015 announcement soliciting amicus briefs.

[2] James W. Simonton, Ways By Necessity, 25 Colum. L. Rev. 571, 572-573 & n. 5 (1925), citing *inter alia, Lord Darcy v Askwith,* (K.B. 1618) Hobart 234, 80 Eng. Rep. 380 and *Liford's Case*, (K.B. 1614) 11 Co. Rep. 46b, 77 Eng. Rep. 1206.

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[3] *Pernam v. Wead,* 2 Mass. 203, 206, (1806) This court relied on, among other cases cited by plaintiff's counsel, *Clark v Cogge,* (1606) Cro. Jac. 170, 79 Eng. Rep. 149. *Id.*

[4] *Bowen v. Conner*, 60 Mass. (6 Cush.) 132, 135 (1850) (Shaw, C.J.)

[5] *Kitras v. Town of Aquinnah,* 64 Mass. App. Ct. 285, 292 n. 5 (2005) (Adopting Restatement (Third) of Property (Servitudes) §2.15, comment c).

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Cases

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INTEREST OF AMICUS MICHAEL PILL, ESQ.

As a long-time member of REBA (Real Estate Bar Association of Massachusetts), and a former member of REBA's Practice Standards Committee, your amicus is concerned that REBA'S amicus brief filed October 20, 2015, seeks to jettison sound common law principles dating back centuries for the convenience of title examiners.

For the past thirty years your amicus has specialized in land litigation, teaching seminars (itemized list available on request) on real property and land use law to attorneys, planners and other public officials, and surveyors. Your amicus is co-author of legal seminar materials on the law of easements. Devra G. Bailin, William V. Hovey & Michael Pill, Massachusetts Conveyancers and Litigators Guide to Easements and Land Use Restrictions (3rd ed. 2004), which have been cited in at least three published Appeals Court decisions and six trial court cases.[6] Those seminar materials formed the basis for much of

[6] *World Species List-Natural Features Registry Institute v. Reading,* 75 Mass. App. Ct. 302, 306 (2009); *Lane v. Zoning Board of Appeals of Falmouth,* 65 Mass. App. Ct. 434, 439 (2006); *Southwick v. Planning Board of Plymouth,* 65 Mass. App. Ct. 315, 319 n. 12 (2005); *Waldron v. Tofino Associates, Inc.,* 20 Land Ct. Rptr. 480, 483, 2012 WL 5193424 at *5 (2012) (Scheier, C.J.); *Sova v. Randazza,* 15 Land Ct. Rptr. 415, 419 n. 27, 2007 WL 2317458 at *7 n. 27 (2007) (Sands, J.); *Jenkins v. Johnson,* 14 Land Ct. Rptr. 521, 526, 2006 WL 2596778 at *9 (2006) (Scheier, C.J.); *Clarke v. Town of Hingham,* 14 Land Ct. Rptr. 465, 466, 2006 WL 2350018 at *3 (2006) (Scheier, C.J.); *Dean v. Blain,* 2003 WL 25436640 (Super. Ct. 2003) (Lombardi, J.). *Feltman v. Cerasuolo,* 11 Land Ct. Rptr. 151, 155, 2003 WL 25437126 (2002) (Scheier, C.J.).

Chapter 8 “Easements” in Arthur L. Eno, Jr., William V. Hovey & Michael Pill, 28 Mass. Practice: Real Estate Law with Forms, (4th ed. 2004 & Supp. 2014).

Your amicus co-authors a regular column on land law and litigation for Massachusetts Lawyers Weekly. That column is successor to the Avuncular Advisor column authored by the late William V. Hovey.

In addition to being a practicing lawyer, your amicus holds an M.A. degree in Urban & Regional Planning and a Ph.D. in Economics. He was author of the 2011-2014 supplements, and co-author of the 2005-2010 supplements, and, to 28, 28A & 28B Massachusetts Practice: Real Estate Law with Forms (4th ed. 2004 & Supp. 2014). He is working on a new edition of Volume 28, scheduled to be published in late 2016.

ISSUE PRESENTED

> Do “easements by necessity exist over certain property in the town of Aquinnah in order to provide access to the plaintiffs' landlocked lots, where the property was conveyed by the Legislature to the members of the Wampanoag Tribe of Gay Head, the plaintiffs are subsequent grantees in a chain of conveyances from the tribe members, the tribe's ancient custom and practice was to permit common access across lands held or

> occupied by the tribe, and nothing in the language or circumstances of the conveyances clearly indicates that the parties intended to deprive the property of access rights; and whether Massachusetts law concerning easements by necessity follows the Restatement (Third) of Property (Servitudes) § 2.15 (2000)"?[7]

ARGUMENT

I. English common law easements by necessity date to the reign of Edward I (1272-1307), based on the maxim that "anyone who grants a thing to someone is understood to grant that without which the thing cannot exist."[8]

The REBA amicus brief (at page 6) asserts that an easement by necessity in the case *sub judice* somehow constitutes "Broadening the doctrine … ."[9] REBA fails to acknowledge that the doctrine was established over

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[7] Quotation is from this court's 7/28/2015 announcement soliciting amicus briefs.

[8] James W. Simonton, Ways By Necessity, 25 Colum. L. Rev. 571, 572-573 & n. 5 (1925), citing *inter alia, Lord Darcy v Askwith,* (K.B. 1618) Hobart 234, 80 Eng. Rep. 380 and *Liford's Case*, (K.B. 1614) 11 Co. Rep. 46b, 77 Eng. Rep. 1206.

[9] The complete sentence in the REBA amicus brief (at page 6) from which the quoted phrase is taken states

> Broadening the doctrine of easements by necessity to encompass the implied easements by necessity this Court is considering in this matter would be disruptive to title examination in the Commonwealth, would cloud title to a substantial number of properties within the Commonwealth, and would reward parties for failing to codify their own rights.

700 years ago in the English common law (discussed in this section) and 200 years ago in Massachusetts common law (reviewed below in the next two sections of this amicus brief).

Liford's Case, (K.B. 1614) 11 Co. Rep. 46b, 52[a], 77 Eng. Rep. 1206, 1217 documents the origin of easement by necessity in the thirteenth century reign of Edward I, with these words:

> If I grant you my trees in my wood, you may come with carts over my land to carry the wood, *temp.* Ed. 1. Grants 41. *Lex est cuicumque aliquis. quid concedit, eoncedere videtur, et id sine quo resipsa esse non potuit,* and this is a maxim in law [Citations omitted.]

James W. Simonton, Ways By Necessity, 25 Colum. L. Rev. 571, 572-573 & n. 5 (1925), translates the above-quoted Latin as "Note that the law is that anyone who grants a thing to someone is understood to grant that without which the thing cannot be or exist."[10] This is

[10] According to the scholarly law librarians in the Hampshire County (Northampton) branch of the Massachusetts Trial Court Law Libraries, one Fitzherbert whom Simonton identifies (25 Colum. L. Rev. at 573 & n. 5) as the author of “Grants, 41” is Sir Anthony Fitzherbert (1470-1538). “Grants” is most likely a reference to Fitzherbert’s seminal work La

consistent with *Lord Darcy v Askwith,* (K.B. 1618) Hobart 234, 234, 80 Eng. Rep. 380, 380, where the doctrine was stated in these words: “For the grounds was agreed tempore E. 1 F. Grants 41. that the grant of a thing did carry all things included, without which the thing granted cannot be had.”

An example of facts giving rise to an easement by necessity was set forth this way in *Clark v Cogge,* (1606) Cro. Jac. 171, 171, 79 Eng. Rep. 149, 149:

> Upon demurrer, the case was, the one sells land, and afterwards the vendee, by reason thereof, claims a away over part of the plaintiff’s land, there being no other convenient way adjoining: and, whether this were a lawful claims was the question.
>
> And it was resolved without argument, that the way remained, and that he might well justify the using thereof, because it is a thing of necessity; for otherwise he could not have any profit of his land: *et e converso,* if a man hath four closes lying together, and sells three of them, reserving the middle close, and hath not any way thereto but through one of those which he sold, although he reserved not any way, yet he

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Graunde Abridgement (1514), which compiled thousands of cases from the Year Books that were the first published case reports of English common law, beginning in the year 1268 during the reign of King Edward I. *See, Lord Darcy v Askwith,* (K.B. 1618) Hobart 234, 234, 80 Eng. Rep. 380, 380 (“For the grounds was agreed tempore E. 1 F. Grants 41. that the grant of a thing did carry all things included, without which the thing granted cannot be had.”)

> shall have it, as reserved unto him by the law; and there is not any extinguishment of a way by having both lands. Wherefore it was adjudged accordingly for the defendant.

The present case, seeking to establish an easement by necessity to property rendered landlocked by severance of common ownership, is an application of this long established doctrine, not a broadening of it as asserted by the REBA amicus brief (at page 6).

II. It was settled law in 19th century Massachusetts that one when one "grants land, having other land in the rear, he be entitled to this way of necessity, although he might have secured it by reservation in his grant … ."[11]

The quoted phrase in the topic heading above is from *Pernam v. Wead,* 2 Mass. 203, 206, (1806), where the court relied on, among other cases cited by plaintiff's counsel, *Clark v Cogge,* (1606) Cro. Jac. 170, 79 Eng. Rep. 149, quoted above in the preceding section of this amicus brief.

[11] *Pernam v. Wead,* 2 Mass. 203, 206, (1806) (The court relied on, among other cases cited by plaintiff's counsel, *Clark v Cogge,* (1606) Cro. Jac. 170, 79 Eng. Rep. 149.).

English easement by necessity cases, including but not limited to those cited in the preceding section of this brief, were cited by Chief Justice Shaw in *Bowen v. Conner,* 60 Mass. (6 Cush.) 132, 136 (1850).

The English rule that when anyone grants property, he is deemed to grant also that without which the thing cannot be used, was recited in Latin with citations to several English cases in *Nichols v. Luce,* 41 Mass. (24 Pick.) 102, 103-104 (1834).

An implied easement by necessity even takes priority over warranty covenants in a deed. *Brigham v. Smith,* 70 Mass. (4 Gray) 297, 298 (1855). In that case, where the attorneys for the parties cited both English and Massachusetts cases, easement by necessity doctrine was recited as black letter law, with these words:

> If A conveys land to B, to which B can have access only by passing over other land of A, a way of necessity passes by the grant. If A conveys land to B, leaving other land of A, to which he can have access only by passing over the

> land granted, a way of necessity is reserved in the grant. These points are settled, as well in the cases cited for the plaintiff, as those cited for the defendant.

Based on the English and Massachusetts discussed above, REBA is incorrect when it asserts an easement by necessity in this case would somehow broaden that doctrine.

III. Where, as in the case *sub judice,* property conveyed would otherwise be landlocked, "This strengthens the conclusion, that it was the intention of both parties, that such a way should be established."[12]

The quotation in the above topic heading, from *Bowen v. Conner,* 60 Mass. (6 Cush.) 132, 135 (1850), was authored by the great Chief Justice Lemuel Shaw.[13]

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[12] *Bowen v. Conner,* 60 Mass. (6 Cush.) 132, 135 (1850) (Shaw, C.J.)

[13] Lemuel Shaw served as Chief Justice of this court from 1830 to 1860. He was praised by Oliver Wendell Holmes in The Common Law, at page 106 (1881) and was described as "one of our greatest Chief Justices" in *Brown v. Commissioner of Correction,* 336 Mass. 718, 720 (1958). His life and work are the subject of three published biographies. Elijah Adlow, The Genius of Lemuel Shaw Shaw: Expounder of the Common Law (1962); Leonard W. levy, The Law of the Commonwealth and Chief Justice Shaw (1957); Frederic Hathaway Chase, Lemuel Shaw Shaw: Chief Justice (1918).

Where, as in the present case, property is completely landlocked and useless without a right of access implied into the deed severing common ownership, the English and Massachusetts cases discussed above in the preceding two sections of this amicus brief show that intent is presumed. The strength of this presumption is illuminated with these words from *Davis v. Sikes,* 254 Mass. 540, 545-546 (1926), quoting *New York & N.E.R. Co. v. Board of Railroad Com'rs.,* 162 Mass. 81, 83 (1894):[14]

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

[14] *Davis v. Sikes, supra*, was abrogated in part on other grounds by *M.P.M. Builders, LLC v. Dwyer,* 442 Mass. 87, 89-91 (2004), abandoning rule that "once the location of an easement has been defined, it cannot be changed except by agreement of the parties" and adopting Restatement (Third) of Property (Servitudes) § 4.8(3).

> portion of his land shall have a legal right of access to the remainder over the part sold if he can reach it in no other way. This presumption prevails over the ordinary covenants of a warranty deed."

The fact that property is otherwise landlocked is sufficient to establish the presumed intention necessary to support the implied easement. *Adams v. Planning Board of Westwood,* 64 Mass. App. Ct. 383, 390-391 (2005) ("[A] conveyance of land that renders the grantor's remaining land landlocked ordinarily gives rise to an easement by necessity, based on the presumed intention of the grantor to retain access to his remaining land. See *Bedford v. Cerasuolo,* 62 Mass. App. Ct. 73, 77 (2004).").

This strong presumption of intent to provide access where property is landlocked has been rebutted successfully only in cases where the facts compelled that result. Factual context is essential for an accurate picture of how the easement by necessity doctrine has been applied in specific situations by Massachusetts cases.

In *Gayetty v. Bethune,* 14 Mass. 49, 55-56, the presumption of intent to create an easement by necessity was overcome by the facts set forth at the end of the following quotation:

> This right depending upon necessity, exists only where the person claiming it has no other means of passing from his estate into the public street or road. In the case before us, there is an avenue, and one which was provided when the house was built, leading from the street to the land in the rear of the house; besides which, the house abuts on the street or square; so that the plaintiff may open a passage, if he has not one already. A right like this is to be construed strictly. In the case of *Pernam* vs. *Weed* [2 Mass. 203 (1806], the plaintiff had no other way to get from his land to the public street; and the front land had been taken from him *invito* by his creditor. In other cases, when a man has granted land surrounded by land of his own, which he retains, he is supposed tacitly to have granted a right of way, upon the well-known principle, that when a man grants any thing, he is held to have granted every thing necessary to the use and enjoyment of the thing granted. It may well be doubted whether, if a man voluntarily take a conveyance of land, which is surrounded on all sides by land of his grantor and others, he can enforce this right of way, under a plea of necessity, against any one but him who conveyed to him. Now, in the case at bar, the plaintiff must be held to have voluntarily purchased, knowing the situation of the estate; and if he had no access to the back part of it, but over the land of another, it was his own folly; and he should not burden another with a way over his land, for his convenience.

> The idea of necessity in this case seems to be referred altogether to the ancient barn, which formerly stood upon the land, now owned by the plaintiff, in the rear of the house. But that barn has not been standing for sixteen years, and there is no reason to suppose that it had been used as such within the last thirty years. Now, if it could be maintained that a barn was necessary within a town or city, still the plaintiff cannot be supposed to have purchased with a view to the enjoyment of one which had disappeared long before he purchased; and he cannot now found a claim upon a necessity, which arises from a desire to erect a new barn upon the same site.

In *Orpin v. Morrison,* 230 Mass. 529, 533-534 (1918), "the actual intention of the parties as disclosed by the oral testimony makes it plain that there was express understanding that there should be no right of way over other land of the grantor. Hence there is no right of way to the lot over land of Morrison and Berry."

This court stated in *Home Inv. Co. v. Iovieno,* 243 Mass. 121, 123-124 (1922), that "It appears to be conceded by the plaintiff that the defendants have an ordinary easement of passage over Jordan Promenade in common with others. The defendants claim much more and assert in substance a right to its exclusive use for the needs of their business." The defendants went much farther and "erected an ice elevator and an ice chute

to the ice house [located on the defendants' own land] and have dug a ditch across it." 243 Mass. at 123. The court held that "While they are utterly without right to establish the structures and maintain the ditch and other obstructions which are the subject of this suit, there is nothing in law to prevent them from merely crossing Jordan Promenade from their land to Jordan Pond and return in any appropriate way." 243 Mass. at 125.

In *Joyce v. Devaney,* 322 Mass. 544, 549-550 (1948), an attempt to establish an easement by necessity was defeated by the well established rule that an express easement negates any intent for an implied easement, with these words (citations omitted):

> The deeds at the time of severance created the specific easements shown on the Harden plan. That plan was then on record. Those easements are unambiguous and definite. The creation of such express easements in the deeds negatives, we think, any intention to create easements by implication. Expressio unius est exclusio alterius. What the parties may have intended cannot override the language of the deeds.

The present case has none of the facts that defeated an easement by necessity in the Massachusetts decisions reviewed above. The presumption of intent to

create access to property that is otherwise landlocked and useless has not been rebutted here.

And it is the defendants in the case *sub judice* who should rebut that presumption by clear and convincing evidence, both under the Massachusetts cases reviewed above in this section and under Restatement (Third) of Property (Servitudes)§ 2.15 (2000 & Supp. 2015), which states as follows (underlining added for emphasis):

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

The above quoted Restatement section is discussed detail below in section V of this brief.

IV. In Massachusetts, where (unlike western states) all estate titles do not originate with the federal government as common grantor, "There appears no compelling modern reason here to distinguish between governmental and private grantors, and we adopt the Restatement's approach"[15]

The quotation in the topic heading above is from *Kitras v. Town of Aquinnah,* 64 Mass. App. Ct. 285, 292

n. 5 (2005), *review denied,* 445 Mass. 1109 (2005) (Adopting Restatement (Third) of Property (Servitudes) §2.15, comment c (2000 & Supp. 2015), where the court stated as follows:

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

The comprehensive discussion in the Bruce & Ely easement treatise quoted above by the Appeals Court,

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[15] *Kitras v. Town of Aquinnah,* 64 Mass. App. Ct. 285, 292 n. 5 (2005) (Adopting Restatement (Third) of Property (Servitudes) §2.15, comment c).

together with the authorities cited by that treatise,[16] refute the incomplete one-sided presentation in the REBA amicus brief (at pages 8-14). Bruce & Ely state as follows:[17]

> Controversy exists as to whether governmental ownership of both tracts may fulfill the unity-of-title standard.[22] One line of authority holds that it may not, thus preventing either the grantee or the government from obtaining an easement of necessity.[23] The rationale for this approach is unclear,[24] but one commentator suggests that it may be based on "some remnant of the prerogative of the sovereign."[25] A separate group of decisions indicates that governmental ownership of both the dominant and the servient estates may satisfy the unity-of-title requirement.[26] Such an approach is consistent with both theories underlying the easement-of-necessity concept. It furthers the public policy of promoting productive use of land and also is in harmony with the presumption that the parties intended to grant or to reserve an easement to benefit the landlocked parcel.[27] The Supreme Court of the United States, however, has concluded that the federal government cannot rely on the easement-of-necessity doctrine because the existence of its power of eminent domain prevents it from satisfying the requirement of necessity.[28] The Supreme Court of California and the Supreme Court of Montana each embraced this rationale in refusing to recognize an easement of necessity by implied reservation claimed by the federal

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[16] James W. Ely, Jr. & Jon W. Bruce, The Law of Easements & Licenses in Land, § 4:7 "Common ownership" & authorities cited in nn. 22-34 (2001 & Supp. 2015).

[17] *Id.*

> government's successor in title to the alleged dominant estate.[29] Similarly, a California appellate court has indicated that the state cannot acquire an easement of necessity over private lands because it has the power of eminent domain and thus is unable to satisfy the necessity standard.[30] This approach has surface appeal because it ensures a servient owner of compensation for the creation of any easement benefiting the government.[31] Nonetheless, it is arguable that the government should not be forced to pay for access that a private individual may obtain without payment.[32] In this regard, one may ask whether it is appropriate to give the grantee of the servient estate a windfall merely because the government is the grantor and then spread the expense of the condemnation award among the taxpaying public.[33] Moreover, a private landowner who has succeeded the government as owner of the alleged dominant estate may be foreclosed from pursuing an easement-of-necessity remedy available to other private landowners.[34]

The Bruce & Ely treatise has been cited in other decisions of this court and the Appeals Court.[18]

Reaching the same conclusion as the Bruce & Ely treatise is 3 Tiffany Real Property, § 793 "Necessary ways—Rights generally" & cases cited in nn. 11 —

[18] *Kaplan v. Boudreaux,* 410 Mass. 435, 440 (1991); *Citation Ins. Co. v. Newman,* 80 Mass. App. Ct. 143, 148-149 (2011); *Denardo v. Stanton,* 74 Mass. App. Ct. 358, 364 n. 10 (2009); *Harmouda v. Harris,* 66 Mass. App. Ct. 22, 27 (2006); *Stone v. Perkins,* 59 Mass. App. Ct. 265, 268 (2003); *Westchester Assoc., Inc. v. Boston Edison Co.,* 47 Mass. App. Ct. 133, 136 n. 8 (1999).

13.10(3rd ed. 1939 & Supp. 2015), which states as follows:

> Whether the previous ownership by the state or federal government of both pieces of land, with a subsequent grant or sale by it of one or both of them, is sufficient to justify a finding of a way of necessity, appears to be open to question. In one case[11] it was held that a right of way of necessity was to be regarded as reserved upon a grant by the federal government, but there are cases to the effect that the doctrine of ways of necessity has no application in connection with such a grant.[12] And it has also been decided that such a right does not exist in favor of a grantee of the state over land retained by the state.[13] It is not entirely clear why a conveyance by the government should be subject to a different rule in this respect from a conveyance by a private individual. The same intention may well be imputed to it as to an individual, not itself to hold or to vest in another land which cannot be utilized for lack of a means of approach, and the same considerations of public policy in favor of the utilization of the land apply in both cases.[13.10]

The Tiffany treatise has been cited by this court in over 60 decisions during the past 90 years.[19]

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[19] *E.g., Hershman-Tcherepnin v. Tcherepnin,* 452 Mass. 77, 94 (2008); *Parkinson v. Board of Assessors of Medfield, 395 Mass. 643, 646* (1985); *Widett & Widett v. Snyder,* 392 Mass. 778, 785 (1984); *Allen v. Wood,* 256 Mass. 343, 349 (1926). A complete list will be submitted upon request; the Westlaw search used was Tiffany /5 “Real Property”.

The REBA amicus brief (at pages 8-14) relies for its claim of governmental exemption on cases involving land in states far to the west of New England, where all land ownership originated with the federal government. The REBA amicus brief (at pages 10-11 & 14) quotes *Granite Beach Holdings, LLC v. State ex rel Dept. of Natural Resources,* 103 Wash. App. 186, 11 P.3d 847 (2000), where the court expressly stated the reason it found persuasive the argument that "original ownership by the USA should not be considered unit of title when analyzing whether an implied easement exists … [is] because all ownership of land in the western states can be so traced."[20]

[20] 103 Wash. App. At 196, 11 P.3d at 853. The court's complete statement is as follows:

> The State argues that common original ownership by the USA should not be considered unity of title when analyzing whether an implied easement exists, in that an implied reservation in favor of the USA at the date of its original ownership, without evidence of Congressional intent to imply such a reserved easement, would make the mandatory element that a party establish common ownership at the date of severance meaningless—because all ownership of land in the western states can be so traced. The State's argument is persuasive.

REBA also relies (at pages 9-12 & n. 3 of its amicus brief) on *Leo Sheep Co. v. U.S.*, 440 U.S. 668, 99 S.Ct. 1403, 59 L.Ed.2d 677 (1979), but omits to mention the following reasons (neither of which are applicable to the case *sub judice*) why the Supreme Court declined to follow the common law easement by necessity doctrine in that case:

> Where a private landowner conveys to another individual a portion of his lands in a certain area and retains the rest, it is presumed at common law that the grantor has reserved an easement to pass over the granted property if such passage is necessary to reach the retained property. These rights-of-way are referred to as "easements by necessity." There are two problems with the Government's reliance on that notion in this case. First of all, whatever right of passage a private landowner might have, it is not at all clear that it would include the right to construct a road for public access to a recreational area. More importantly, the easement is not actually a matter of necessity in this case because the Government has the power of eminent domain. Jurisdictions have generally seen eminent domain and easements by necessity as alternative ways to effect the same result. For example, the State of Wyoming no longer recognizes the common-law easement by necessity in cases involving landlocked estates. It provides instead for a procedure whereby the landlocked owner can have an access route condemned on his behalf upon payment of the necessary compensation to the owner of the servient estate. For similar reasons other state

> courts have held that the "easement by necessity" doctrine is not available to the sovereign.

440 U.S. at 679-680, 99 S.Ct. at 1409-1410.[21]

Massachusetts land titles, where they can be traced back to 17th or 18th century beginnings, generally originate in colonial proprietors' votes. *See, Campbell v. Nickerson,* 73 Mass. App. Ct. 20, 22-25 (2008), *review denied,* 453 Mass. 1101 (2009) (Upholding validity of unrecorded easement created by grant in 1713 proprietor's vote, encumbering plaintiffs' land.)[22]

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[21] State "statutes authorizing the owner of landlocked property to condemn a private right-of-way over neighboring land" are listed in James W. Ely, Jr. & Jon W. Bruce, The Law of Easements & Licenses in Land, § 4:14 "Easements of necessity--Statutory ways of necessity" at nn. 2 & 3 (2001 & Supp. 2015)

[22] *See also, Adams v. Frothingham,* 3 Mass. 352, 360 (1807) ("[A]lmost all the titles, which have been derived from proprietors of townships, have nothing better to depend upon than a vote recorded in the proprietors' books; and where a possession was taken in conformity to the vote, and transmitted by the grantee to his heirs or assigns, titles so acquired have been respected and maintained in our courts of law."); *Inhabitants of Gloucster v. Gaffney,* 90 Mass. (8 Allen) 11, 13 (1864) (By ancient usage in this commonwealth, as well as under the authority of provincial statutes, proprietors of common lands had authority to alien their lands by votes; and such votes, when duly proved by record or otherwise, are

Your amicus respectfully submits that for the reasons set forth above, this court should adopt the conclusion reached by the Appeals Court in that court's prior *Kitras v. Aquinnah* decision, 64 Mass. App. Ct. at 292 n. 5.

V. Restatement (Third) of Property (Servitudes) §2.15 is consistent with Massachusetts common law and should be adopted.

Your amicus respectfully submits that the above topic heading is fully supported by the Massachusetts cases discussed above in section III of this brief.

Further, this court has never rejected a provision of the Restatement (Third) of Property (Servitudes) (2000 & Supp. 2015), and has adopted the Restatement where it was inconsistent with prior Massachusetts common law. *M.P.M. Builders, LLC v. Dwyer,* 442 Mass. 87, 91(2004) ("Regardless of what heretofore has been the common law, we conclude that § 4.8(3) of the Restatement is a sensible development in

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deemed to be competent and sufficient proof of title and seisin, … . [Citations omitted.]")

the law and now adopt it as the law of the Commonwealth."). In that case, unilateral relocation of an easement (with judicial approval) by the servient estate owner was authorized for the first time in Massachusetts.

Restatement § 4.8, *supra,* was adopted to support reduction in dimensions of an easement in *Martin v. Simmons Properties, LLC,* 467 Mass. 1, 11-12 (2014), again modifying prior Massachusetts common law.

This court relied in part on Restatement (Third) of Property (Servitudes) § 1.2 (2000 & Supp. 2015) in distinguishing a negative easement creating a land use restriction from an affirmative easement in *Patterson v. Paul.* 448 Mass. 658, 662-663 (2007).

Cater v. Bednarek, 462 Mass. 523, 531-532 (2012) adopted Restatement (Third) of Property (Servitudes) § 7.6 (2000 & Supp. 2015), holding "We conclude that § 7.6 of the Restatement adequately reflects the equitable concerns that must be considered in determining whether an easement should be modified or

extinguished by estoppel, and adopt its legal standard." 462 Mass. at 532.

In *Bortolotti v. Hayden,* 449 Mass. 193, 201-202, 204 (2007), this court cited Restatement (Third) of Property (Servitudes) §3.3 (2000 & Supp. 2015), agreeing with that section's "position that the common-law rule against perpetuities does not apply to a right of first refusal to purchase land." 449 Mass. at 202.

Several sections of Restatement (Third) of Property (Servitudes) (2000 & Supp. 2015) were cited to support this court's broad interpretation supporting validity of Agricultural Preservation Restrictions in *Twomey v. Commissioner of Food & Agriculture*, 435 Mass. 497, 501-502 (2001).

Restatement (Third) of Property (Servitudes) § 7.15 (2000 & Supp. 2015) was cited to support the rule that "any amendment to a deed or instrument that changes the duration of a land use restriction must also be recorded to make it fully enforceable during

its new duration." *Stop & Shop Supermarket Co. v. Urstadt Biddle Properties, Inc.*, 433 Mass. 285, 291 (2001).

Finally, the Case Citations for Restatement (Third) of Property (Servitudes) § 2.15 (2000 & Supp. 2015), list about thirty cases from other jurisdictions, none of which have rejected §2.15.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the principal brief and reply briefs filed by plaintiffs-appellants Kitras and Harding, your Amicus joins them in asking this Court to reverse the Land Court's decision, to order entry of a judgment declaring all of the plaintiffs'-appellants' lots have the benefit of an appurtenant easement by necessity, and to remand the case to locate those easements on the ground.

In addition, your amicus asks this court to adopt Restatement (Third) of Property (Servitudes), § 2.15 "Servitudes Created by Necessity" (2000 & Supp. 2015).

Respectfully submitted,

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Dated November 9, 2015

Mass.R.App.P. 16(k) CERTIFICATE

I hereby certify that to the best of my knowledge this brief complies with the rules of court that pertain to the filing of briefs, including but not limited to those rules listed in Mass.R.App.P. 16(k).

Michael Pill, Esq.

CERTIFICATE OF MAILING AND SERVICE

I certify that I have today, November 9, 2015, which is within the time fixed for filing, sent via Federal Express to the Clerk of this Court, one original and seventeen copies of the within and foregoing amicus brief, and two copies each to each of the following via first class U.S. Mail:

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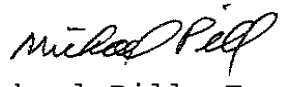

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