COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-11885

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

v.

TOWN OF AQUINNAH, et al.,
Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE LAND COURT

BRIEF FOR AMICI CURIAE THE REAL ESTATE BAR ASSOCIATION FOR MASSACHUSETTS, INC., AND THE ABSTRACT CLUB IN SUPPORT OF DEFENDANTS-APPELLEES AND URGING AFFIRMANCE

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Real Estate Bar Association for Massachusetts, Inc. ("REBA") and The Abstract Club respectfully submit this brief pursuant to the Court's July 28, 2015, solicitation of amicus briefs.

REBA, formerly known as the Massachusetts Conveyancers Association, is the largest specialty bar in the Commonwealth, a non-profit corporation that has been in existence for over 100 years. It has over 2,000 members practicing throughout the Commonwealth. Through its meetings, educational programs, publications, and committees, REBA assists its members in remaining current with developments in the field of real estate law and practice and sharing in the effort to improve that practice. REBA also promulgates title standards, practice standards, ethical standards, and real estate forms, providing authoritative guidance to its members and the real estate bar generally as to the application of statutes, cases, and established legal principles to a wide variety of circumstances

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[1] Pursuant to Aspinall v. Philip Morris Cos., 442 Mass. 381, 480 n.8 (2004), undersigned counsel state that (1) Wilmer Cutler Pickering Hale and Dorr LLP does not represent any of the parties to this case in other litigation presenting the same issues as are presented in this case; and (2) no counsel for a party authored this brief in whole or in part, nor has any party made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Over 125 years after the lots at issue were originally partitioned and conveyed by the State, Plaintiffs-Appellants now seek to upset the scope of the rights of those parcels by asserting implied easements by necessity over lots of other grantees to the same partition. If allowed to stand, the Appeals Court's decision recognizing these easements would upend well-settled titles and introduce uncertainty and variability into the law of title across the Commonwealth. The Appeals Court's reasoning and judgment should be rejected, and the decision of the Land Court affirmed.

Transparency in the scope of property rights in the Commonwealth is essential to a rational title system. Because rights not expressed in a deed can operate to cloud title, recognition of any implied property right--like the implied easements by necessity claimed here--must be narrowly circumscribed and limited in scope (pp. 4-7).

The Court should follow the course of other jurisdictions and decline to extend the doctrine of implied easements by necessity to governmental land transfers, as such an extension would lead to unpredictability of title and would entitle

landholders in the Commonwealth to easements by necessity with increased frequency (pp. 7-14).

Should this Court decide not to set a categorical bar to land grants by a governmental entity, it should nonetheless require parties asserting an easement by necessity to make a heightened showing before imposing such an easement where the common titleholder was a governmental entity (pp. 14-16). Under this heightened requirement, Plaintiffs-Appellants, who rely on the landlocked nature of the parcels to establish easements by necessity, have failed to satisfy their burden of proving the existence of easements by necessity (pp. 16-19).

Finally, the position of the Restatement § 2.15 is inconsistent with the Commonwealth's common law easement by necessity doctrine. Because the Restatement's stance on easements by necessity would broaden easements by necessity in the Commonwealth and lead to "springing easements" for property rights that have, until now, been well-settled, this Court should decline to follow the Restatement's approach (pp. 20-24).

ARGUMENT

I. EASEMENTS BY NECESSITY HAVE BEEN AND SHOULD CONTINUE TO BE NARROWLY CONSTRUED IN THE COMMONWEALTH

The goal of the title system in the Commonwealth

is to provide persons with notice of the property rights of another. See Kozdras v. Land/Vest Props., Inc., 382 Mass. 34, 44 (1980) ("'The purpose of land registration is to provide a means by which title to land may be readily and reliably ascertained.'" [quoting State St. Bank & Trust Co. v. Beale, 353 Mass. 103, 107 (1967)]); Lamson & Co., Inc. v. Abrams, 305 Mass. 238, 244 (1940) ("The purpose of the recording statute, G.L. (Ter. Ed.) c. 183, § 4, is to show the condition of the title to a parcel of land and to protect purchasers from conveyances that are not recorded and of which they have no notice."). Express grants of rights detailed in an instrument ensure that all parties are aware of the full panoply of rights or burdens attached to a particular piece of property.

Thus, "[t]he ordinary rule is that a written contract expresses the full purpose of the parties and cannot be amplified or narrowed by evidence as to their unstated intent." Home Inv. Co. v. Iovieno, 243 Mass. 121, 124 (1922). This notwithstanding, the Commonwealth nevertheless recognizes a ***limited*** number of rights by implication even where a party fails to codify those rights. As to implied easements of access, the Commonwealth recognizes easements by prescription, easements by estoppel, and easements by

necessity. Nylander v. Potter, 423 Mass. 158, 162-163 (1996) (concluding that express easements or easements by necessity, estoppel, or prescription are "the only means recognized in Massachusetts in creating an easement of access"). Underlying these exceptions, however, is the recognition that presuming a grant of a property right, in addition to the land conveyed, where there are no words in the deed about that additional property right is a powerful exercise of the law. E.g., Iovieno, supra (recognizing limitation to implied easements); Orpin v. Morrison, 230 Mass. 529, 533 (1918) (same). Accordingly, implied grants, including implied easements, are strictly construed. Iovieno, supra (implied easements are "construed with strictness even in the few instances where recognized"); accord Orpin, supra ("Such a presumption [of an implied easement] ought to be and is construed with strictness.").

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. Accordingly, the Court should decline to do so. See,

e.g., Nylander, 423 Mass. at 163 (concluding that "sound public policy" supported finding no easement where finding easement "would leave no indication in the public records and could prove disruptive to the title examination systems of this Commonwealth"); Iovieno, 243 Mass. at 124 ("[t]he exceptions" to binding parties to express terms of instrument in favor of implied easements "are few and there is no tendency to enlarge them").

II. RECOGNIZING EASEMENTS BY NECESSITY BASED ON UNITY OF TITLE IN A GOVERNMENTAL ENTITY WOULD HAVE A SWEEPING EFFECT ON TITLE IN THE COMMONWEALTH

In light of this well-settled skepticism of implied easements, the Court should decline the invitation to extend the doctrine of easements by necessity to grants where the common owner is a governmental entity. Permitting easements by necessity to be implied where a governmental entity is the common owner would significantly broaden the recognition of easements by necessity, and would cloud title to properties across the Commonwealth over a significant period of time--as the facts of this case itself reflect. However, even if this Court decides to recognize easements by necessity where a governmental entity is the common owner, such an easement cannot be implied without an appropriately heightened showing. Under this heightened burden,

Plaintiffs-Appellants have failed to sustain their burden of proving the existence of easements by necessity.

A. Recognizing Easements By Necessity In Situations Where A Governmental Entity Is The Common Grantor Would Significantly Disrupt Title

To conclude that Plaintiffs-Appellants are entitled to easements by necessity, this Court must address a preliminary question: whether the doctrine of easements by necessity is applicable where the common titleholder was a governmental entity. This Court should decline the invitation to extend the doctrine of implied easements by necessity in this manner. Endorsing such an extension would have sweeping effect, upsetting the settled expectations of the parties to many land conveyances within the Commonwealth, given that many properties throughout the Commonwealth can trace their title back to a common governmental owner.[2]

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[2] Given the broad-reaching effect such an extension of the easement by necessity doctrine would have throughout the Commonwealth, this Court should reserve the decision to the Legislature in the first instance to ensure that the issue is fulsomely debated, and the scope of its effect fully analyzed prior to implementation. See, e.g., Liberty Mutual Ins. Co. v. Westerlind, 374 Mass. 524, 526 (1978) (reserving decision on issue to Legislature so "the resolution can be based on full consideration of the competing interests and the ramifications involved with any change").

Indeed, many jurisdictions have declined to recognize such a rule, or expressed apt skepticism as to such a rule, based on this very concern. E.g., United States v. Rindge, 208 F. 611, 619 (S.D. Cal. 1913) ("It is, in my judgment, very doubtful whether the doctrine of implied ways of necessity has any application to grants from the general government, under the public land laws."); Guess v. Azar, 57 So.2d 443, 445 (Fla. 1952) ("The right to a way of necessity is founded on an implied grant, but no such implication arises from conveyances by the State."); Pearne v. Coal Creek Min. & Mfg. Co., 18 S.W. 402, 404 (Tenn. 1891) (easement by necessity doctrine "is a doctrine well recognized by all the courts, but it has no application to the state, in the grant by her of unsettled lands"); State v. Black Bros., 116 Tex. 615, 627 (1927) (concluding that court "should be slow to extend this doctrine of implied reservation of way of necessity to cases where the unity of title on which it rests can be found only in the sovereign" and noting authorities "seem rather harmonious in refusing to apply the doctrine where the tracts were under the same ownership only before title passed from the sovereign"). See also Leo Sheep Co. v. United States, 440 U.S. 668, 682 (1979) ("[W]e are unwilling to imply rights-of-way, with the substantial impact that such

implication would have on property rights granted over 100 years ago, in the absence of a stronger case for their implication[.]"); Granite Beach Holdings, LLC v. State ex rel. Dep't of Natural Resources, 103 Wash. App. 186, 199 (2000) (declining to imply easement by necessity for federal land grants absent evidence of congressional intent and reasoning "to do otherwise would impair the predictability of land titles and make" unity of title "meaningless in the western United States because the entire west was owned by the federal government at one time").

In Black Bros., 116 Tex. at 627, the Supreme Court of Texas declined to extend the doctrine of easements by necessity to land grants where the common grantor is a sovereign. Id. ("'The mere fact that all of the land was originally part of the public domain and hence owned by a common grantor cannot confer the peculiar right out of which a way of necessity arises.'" [citation omitted]). See also id. at 628-629. In declining to extend the doctrine, the court noted that expanding the doctrine to lands where the government was the common owner would permit grantees who succeeded to the government's title to have an implied right of way over the surrounding and adjacent lands held by others who also received their land from the government. Id. at 629; accord Rindge,

208 F. at 619 (if easement by necessity doctrine applied to grants by sovereign "every grantee of a portion of the public domain from the time the land laws were extended over the same and those succeeding to his title would have an implied right of way over the surrounding and adjacent public lands, and a junior grant thereof if necessary to reach his own land, and a junior grantee and his successors in interest would have such a way over a prior grant under similar circumstances simply because they derive title from a common source.").

For similar reasons, the Supreme Court of Tennessee declined to extend the doctrine of implied easements by necessity to land grants by a sovereign in Pearne, 18 S.W. at 404. The court concluded that the easement by necessity doctrine is "well recognized by all the courts, but it has no application to the state, in the grant by her of unsettled lands." Id. In reaching the decision, the court expressly noted the pervasive effect to title on land throughout the state which would occur should it adopt the doctrine: "It would be ruinous to establish the precedent contended for, since by it every grantee, from the earliest history of the state, and those who succeed to his title, would have an implied right of way over all surrounding and adjacent lands held under junior

grants, even to the utmost limits of the state." Id.[3]

The cautions underlying these jurisdictions' decisions not to imply easements by necessity where the common titleholder is a governmental entity--the pervasive effect of burdening a significant portion of land in the Commonwealth and the potential to upend settled title rights--apply with equal force to the easements at issue in this case. Here, the setoffs to the lots at issue occurred in 1878.[4] Nearly 140 years ***after*** those lots were partitioned and conveyed, this Court is asked to determine, and potentially alter, the scope of the rights of all adjacent parcels to Plaintiffs-Appellants', which, until now, have been conveyed and utilized free of any right-of-way

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[3] In Leo Sheep Co., 440 U.S. at 679-682, the Supreme Court of the United States expressed doubt as to the viability of implying easements by necessity where the federal government was the common owner. Id. at 680-681 ("The applicability of the doctrine of easement by necessity in this case is, therefore, somewhat strained, and ultimately of little significance."). The Court also emphasized the importance of predictability of land title, and cautioned against upending title to land that had otherwise been settled for a significant period of time. Id. at 682 ("[W]e are unwilling to imply rights-of-way, with the substantial impact that such implication would have on property rights granted over 100 years ago, in the absence of a stronger case for their implication[.]"); id. at 687 ("This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned[.]").

[4] Amici curiae take no position on the question whether Lot 178 was subject to unity of title.

encumbrances. See Leo Sheep Co., 440 U.S. at 681-682 (declining to imply a right of way that would have "substantial impact . . . on property rights granted over 100 years ago"). And the Gay Head (Aquinnah) partition in 1878 alone created ***hundreds*** of lots that have the potential to now be burdened with easements by necessity. See Ex. 494, 502, 719 (creating lots 190 through 736).[5] Extrapolating to the rest of the Commonwealth, many more parcels will be affected. Moreover, the easements by necessity that Plaintiffs-Appellants assert would be sited over the property of other ***grantees*** to the same partition, underscoring the concern that recognizing the easement by necessity doctrine for grants by a sovereign will broadly enable parties to site easements over any land held by the former governmental unit. See Black Bros., 116 Tex. at 629 (explaining that recognizing easements by necessity from governmental entity would provide grantee "an implied right of way over all surrounding and adjacent lands held under junior grants").[6]

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[5] All citations to the Exhibits before the Land Court, as submitted as part of the record before the Appeals Court, are cited as "Ex." herein.

[6] Under the circumstances presented by the Plaintiffs-Appellants here, it is not just junior land grants that would be burdened with easements by necessity, see Black Bros., 116 Tex. at 629; the burden of potential implied easements by necessity

Because extending the doctrine of easements by necessity to land grants where unity of title once resided in a sovereign would lead to uncertainty to land title throughout the Commonwealth and would extend the scope of easements by necessity--a doctrine that has been construed narrowly throughout the history of the Commonwealth--this Court should deem the easement by necessity doctrine inapplicable where the former common owner was a governmental entity. To conclude otherwise would render the unity of title requirement meaningless. See Granite Beach Holdings, LLC, 103 Wash. App. at 199.

B. Even If This Court Extends The Easement By Necessity Doctrine To Grants Where A Governmental Entity Is The Common Owner, A Party Asserting An Easement By Necessity Should Be Required To Make A Significant Showing Of Intent To Create An Easement

In the event this Court were to conclude that easements by necessity can be implied where the common owner of the lots in issue was a governmental entity (which it should decline to do), it should require a party asserting an easement by necessity in such circumstances to make a heightened showing that the creation of such an easement was intended. Because Plaintiffs-Appellants have failed to make such a showing given the circumstances surrounding the

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would extend to ***any*** surrounding land held by the State at the time of partition.

conveyances here, the Court should affirm the Land Court's decision.

In Murphy v. Burch, 46 Cal. 4th 157 (2009), in determining whether a right of way by necessity in land that was granted by the federal government existed, the Supreme Court of California declined to adopt a rule barring easements by necessity where a governmental entity was the common owner. Id. at 167 ("[W]e need not and do not presently impose a categorical bar to all easement-by-necessity claims tracing common ownership to the federal government[.]"). Nevertheless, the court required a heightened showing that an easement by necessity was intended. See id. The court recognized the public policy concerns implicated by an extension of the easement by necessity doctrine, specifically referencing "interfere[nce] with the certainty and predictability of land titles conferred by a sovereign without any express reservation of rights" and "that the common-ownership requirement would be meaningless unless stronger showings are required for implying an easement by necessity in cases" where the government was the common owner. Id. at 165. Acknowledging these, the court held "***extreme caution*** must be exercised in determining whether the circumstances surrounding a governmental land grant are sufficient

to overcome the inference prompted by the omission of an express reference to a reserved right of access." Id. at 167 (emphasis added). See also Leo Sheep Co., 440 U.S. at 680-682 (even were Court to recognize easements by necessity for grants where governmental entity was common owner, there was insufficient showing of intent to create easements by necessity, especially where Congress reserved some easements).

If this Court does not reject the availability of easements by necessity in situations like this one, at a minimum, the Court should impose a heightened showing of intent to be borne by the party asserting the easement. Under such circumstances, the mere fact that a parcel is landlocked cannot in and of itself be sufficient to establish an easement by necessity. See, e.g., Murphy, 46 Cal. 4th at 171 ("[T]he need for access, by itself, does not entitle a landlocked property owner to burden a neighbor's land when the easement claim must be traced back to a federal patent."). See also Dale v. Bedal, 305 Mass. 102, 103 (1940) ("[I]mplied easements, whether by grant or by reservation, do not arise out of necessity alone.").

Where, as here, there are many indicia that there was no intent to create implied access easements beyond the mere fact that the parcels are landlocked, Plaintiffs-Appellants cannot satisfy this showing.

The following circumstances directly undermine the intent to create easements by necessity: (1) the express reservation of the right to remove peat and to access a creek for fishing in some deeds;[7] (2) the juxtaposition between an earlier, similar partition on Martha's Vineyard that included roadways and the commissioners' decision in the Gay Head (Aquinnah) partition to decline to do so, especially where a cursory review of the plot map evidences that the vast majority of the lots partitioned in 1878 had no access to a public way;[8] and (3) that the easements sought to be imposed are over the land of other grantees to the same partition rather than between a grantor-grantee, making these easements more akin to easements over

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[7] See, e.g., Ex. 516-517, 587-588, 592; Joyce v. Devaney, 322 Mass. 544, 549 (1948) ("The creation of such express easements in the deeds negatives, we think, any intention to create easements by implication."); Boudreau v. Coleman, 29 Mass. App. Ct. 621, 630 (1990) ("Having expressly reserved some easements, failure to reserve others must be regarded as significant."). See also Murphy, 46 Cal. 4th at 168 ("[A]ny implication of a reservation for access appears negated by the circumstance that two of the statutes expressly provided for limited rights of reversion in the government, but omitted reservation of any other interest.").

[8] See Ex. 194, 196, 773. Cf. Krinsky v. Hoffman, 326 Mass. 683, 688 (1951); Joyce, 322 Mass. at 549 ("The creation of such express easements in the deeds negatives, we think, any intention to create easements by implication.")

land of a stranger, which Commonwealth law prohibits.[9] Each of these factors, as well as the factors cited by Justice Agnes in his dissent, see Kitras v. Town of Aquinnah, 87 Mass. App. Ct. 10, 19, 26-29 (2015) (Agnes, J., dissenting), demonstrate that Plaintiffs-Appellants have failed to meet the heightened burden that should be required for implying easements by necessity where a governmental entity was

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[9] See Mt. Holyoke Realty Corp. v. Holyoke Realty Corp., 284 Mass. 100, 107 (1933) ("In the case of simultaneous conveyances of two parcels by ordinary deeds the fact that the grantor would no longer have any interest or concern in the use which should be made of the properties, might . . . go far toward negativing an intent to create an easement which put a limitation on the right to use one parcel and increased the beneficial use of the other."). Cf. Richards v. Attleboro Branch R. Co., 153 Mass. 120, 122 (1891) (easement by necessity can be created "out of other land of the grantor, or reserved to the grantor out of the land granted, never out of the land of a stranger.")

In Viall v. Carpenter, 80 Mass. 126, 128 (1859), this Court did suggest that an easement by necessity could exist from a partition by the Probate Court; however, such a conclusion was unnecessary to the Court's resolution of the case as the requisite necessity for the easement no longer existed. Id. ("[W]hen the necessity for the way ceased, the right ceased, in whomsoever the title to the land had vested."). Furthermore, the partition at issue in Viall was limited--it was a partition of a piece of real estate to the decedent's heirs. See id. at 127. By contrast, here, the partition was wide-scale in scope, creating hundreds of parcels. See Ex. 494, 502, 719 (creating lots 190 through 736). Thus, the same public policy concerns that are at play here were not implicated in Viall.

the common titleholder.[10]

Nevertheless, should the Court decide to determine that easements by necessity exist in this case (which it should not), it should limit its conclusion to the precise facts of this case. As previously noted, the subsidiary conclusions necessary to holding that easements by necessity exist would broaden the scope of the easement by necessity doctrine in the Commonwealth; this would create uncertainty in property interests throughout the Commonwealth, especially where such interests have otherwise been settled for hundreds of years. To mitigate the wide-sweeping effect to property interests across the Commonwealth, the Court should make clear that any finding of easements by necessity here is limited to the particular facts and historical circumstances presented in this case.

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[10] These factors also demonstrate that, even under the traditional private land transaction standard for easements by necessity, Plaintiffs-Appellants have failed to establish that these easements exist. See supra at 16-18. See, e.g., Krinsky, 326 Mass. at 688 ("The burden of establishing that the easement in question was impliedly reserved was on the plaintiffs."). See also 28 A.L. Eno, Jr. & W.V. Hovey, Real Estate Law § 4:45 (4th ed. 2004) ("The party who asserts an easement over another's property has the burden of proving the nature and extent of any such easement.").

III. THE RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) ON EASEMENTS BY NECESSITY IS INCONSISTENT WITH THE LAW OF THE COMMONWEALTH, AND THIS COURT SHOULD DECLINE TO FOLLOW IT

In the Commonwealth, the burden is on the proponent of the implied easement to clearly establish that the parties intended to create such an easement, and the landlocked nature of a parcel does not, in and of itself, establish an easement by necessity. And, in fact, it is established law that parties can alienate landlocked parcels. The Restatement's position that an easement by necessity is to be implied for landlocked parcels "unless the parties clearly indicate they intended a contrary result," Restatement § 2.15, cmt. b, is in tension with Massachusetts common law and broadens the scope of easements by necessity within the Commonwealth. Because following the Restatement would further extend an implied right to an easement by necessity, this Court should decline to rest upon the Restatement.

Massachusetts law is clear: an implied easement by necessity will only be found where the implied easement ***itself*** is clearly intended by the parties to the conveyance based on the facts that existed at the time of conveyance--a burden that the party asserting the easement must carry. E.g., Mt. Holyoke Realty Corp., 284 Mass. at 105 ("The burden of proving the intent of the parties to create an easement which is

unexpressed in terms in a deed is upon the party asserting it."); Kane v. Vanzura, 78 Mass. App. Ct. 749, 755 (2011) ("In the absence of an express reservation, an easement by necessity will arise 'only if clearly so intended by the parties to the deed.'" [citation omitted]). A parcel's landlocked nature alone does not create an easement by necessity. Dale, 305 Mass. at 103 ("[I]mplied easements, whether by grant or by reservation, do not arise out of necessity alone."); Nichols v. Luce, 41 Mass. 102, 104 (1834) ("It is not the necessity which creates the right of way, but the fair construction of the acts of the parties."); accord Joyce, 322 Mass. at 549. Rather, whether an easement by necessity exists, must be gleaned from the language of the instruments of the grant, the circumstances surrounding the transfer, and ***the material conditions known to the parties at the time of transfer***; necessity is but one of those factors considered. E.g., Orpin, 230 Mass. at 533. ("The way is created, not by the necessity of the grantee, but as a deduction as to the intention of the parties from the instrument of grant, the circumstances under which it was executed and all the material conditions known to the parties at the time."); Nichols, supra at 103-104 ("*Necessity* is only a circumstance resorted to for the purpose of showing

the intention of the parties." [emphasis in original]). As this Court has recognized, "[t]here is no reason in law or ethics why parties may not convey land without direct means of access, if they desire to do so." Orpin, supra.[11]

The Restatement's summation of easement by necessity law stands in direct contrast to the law of this Commonwealth. Under the Restatement's formulation, implied easements by necessity for landlocked parcels are strongly favored and are to be implied as a matter of course. See Restatement § 2.15, cmt. b ("In a conveyance that would otherwise deprive the owner of access to property, access rights will ***always*** be implied, unless the parties ***clearly indicate*** they intended a contrary result." [emphases added]); id., cmt. c ("[S]ervitudes by necessity will

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[11] In accordance with this principle, no public policy underlies the Commonwealth's recognition of easements by necessity. E.g., Orpin, 230 Mass. at 533-534 (where one purchases land "knowing its situation fully and that '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'" [citation omitted]); Richards, 153 Mass. at 122 ("The law does not give a right of way over the land of other persons to every owner of land who otherwise would have no means of access to it."); id. at 121-122 (rejecting premise that "foundation of the rule whereby a right of necessity" exists "is that it is against public policy that the owner of land should cut himself off from all access to it"). But see Buss v. Dyer, 125 Mass. 287, 291 (1878).

be implied unless it is clear that the parties intended to deprive the property of rights necessary to its enjoyment."). To avoid the imposition of an implied easement by necessity, it must be "clear[]" that the parties "intended a contrary result." Id., cmt. b. This bright line rule in favor of easements by necessity effectively places the burden on the party ***opposing*** the easement to justify why it should not enter. This approach, if adopted, would reverse the burdens under Massachusetts law, and escalate the frequency with which easements by necessity are both claimed and recognized.

Accordingly, following the Restatement's approach here would broaden the scope of easements by necessity, and would lead to springing easements within the Commonwealth for rights that would have otherwise been settled. Given their implicit nature and their ability to burden another's estate, in some cases over 100 years after the initial conveyance, this Court should decline to follow such a wide-reaching approach to easements by necessity.[12] As this Court has recognized, it is a strong exercise of the law to presume the conveyance of a valuable

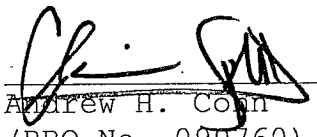
[12] Following the Restatement's position would broaden the easement by necessity doctrine wholesale in the Commonwealth--not just to the governmental land transactions at issue here, but also to private land transactions.

property right--in the absence of any words to that effect in the instrument--in addition to the land transferred. See Orpin, 230 Mass. at 533 ("It is a strong thing to raise a presumption of a grant in addition to the premises described in the absence of anything to that effect in the express words of the deed. Such a presumption ought to be and is construed with strictness.").

CONCLUSION

Land transfers are serious transactions, and parties should be tasked with expressly negotiating for the rights they wish to reserve. Accordingly, the implied right of an easement by necessity should be strictly construed. Recognizing easements by necessity on this record, or following the Restatement's lenient approach to easements by necessity, would significantly expand the scope of the easement by necessity doctrine within the Commonwealth. For all of the foregoing reasons, amici curiae respectfully request that this Court conclude that easements by necessity do not exist over the lots at issue and affirm the judgment of the Land Court.

October 20, 2015 Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Claire M. Specht, hereby certify, under the penalties of perjury that on October 20, 2015, I caused true and accurate copies of the foregoing to be filed in the office of the clerk of the Supreme Judicial Court and served two copies upon the following counsel by overnight mail:

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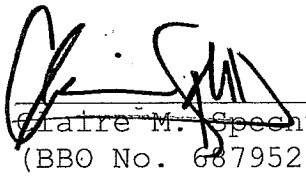
MASSACHUSETTS RULE OF APPELLATE PROCEDURE 16(K) CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs.



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