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August 31, 2005

Hon. Joseph Grasso
Appeals Court
John Adams Courthouse
One Pemberton Square
Boston, MA 02108

Re: Kitras, et als. v. Town of Aquinnah et al.
Appeals Court 2004-P-0472
Rescript issued August 18, 2005
Petition for Rehearing / Reargument

Dear Judge Grasso, Judge Trainor and Judge Brown:

Pursuant to Mass.R.App.P. 27, the Appellees / Cross-Appellants Defendant Gossamer Wing Realty Trust and Baron Land Trust hereby respectfully request that this honorable panel of the Appeals Court review certain findings in its most recent opinion. If left alone, the opinion will foster a legal construct of facts that create or recognize that the Commonwealth created a group of "second class" citizens from the Wampanoag Tribe by differentiating between the original occupiers of land (who end up, ironically, potentially, with less under the opinion) versus those who obtained set-off lots for a partition of the balance of the common lands in 1878.

These specific determinations are based on facts that are either incorrect or are otherwise not necessarily clear in the record and would require trial. Since this is the first time that an appellate level court has reviewed the manner in which the Commonwealth sponsored the division of the Indian lands at Gay Head, it is of the utmost importance that this Court acknowledge the facts correctly or send these matters back to the lower court for findings.

This opinion will, no doubt, take on an independent air of tremendous significance in how land matters are handled throughout the entire Town of Aquinnah, affecting several hundred landowners. By making the recommended corrections, this Court will do a great service in presenting a historical and legal construct of how the Commonwealth divided the lands and treated all members of the Wampanoag Tribe fairly and equally, not favoring one group over another. To conjure a ruling that finds otherwise may impose a great disservice to the storied history of this Commonwealth and leave a stain on the original claimants to the land.

This court's decision states as follows:

> By reports of 1871 and 1878, the Pease brothers formalized the boundaries of those lots already held in severalty, numbering them 1 through 188 or 189. With the

exception of certain land not relevant here, the common land was partitioned in 1878 into lots numbered 189 or 190 and above. . . .

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

(emphasis supplied).

THE RECORD DOES NOT CLEARLY ESTABLISH THE STATUS OF LOTS 174-189

The record shows that Lots 174-189 were set-off under the 1878 set-off. RA 402. These lots were "run out and bounded afterwards by the Commissioners who made **partition** of the Indian common lands."RA 402 (emphasis supplied). Arguably, these lots 174-189 were conveyed in Dukes County Registry of Deeds Book 65 were not held in severalty as they were expressly partitioned.

In his interpretation of law, Judge Green stated:

The record is unclear regarding the status of those lots [1-173] prior to the commissioner's 1871 report, but at least as of the submission of the commissioner's 1871 report, set-off lots 1-173 were owned by the owners determined by the commissioner's 1871 report, **HAD ENJOYED SUCH RIGHTS IN THE REMAINING COMMON LANDS AS MAY HAVE APPERTAINED TO TRIBAL MEMBERS.**

RA 604 (emphasis supplied).

Judge Green's decision at RA 605 (FN19) clearly denotes that the status of lots 174-189 is subject to interpretation. The lower court decision demarcates the unity of title at lot 173, and finds implicitly that what has been found to be the severalty lots 174-189 are to be included as part of the lots partitioned under the 1878 commissioner's report. (RA 604-611). This court finds a different demarcation line for purposes of unity of title analysis. Did this court intend to make a different finding overruling the lower court? This is not clear. Respectfully, since the record before this court and the lower court is merely a summary judgment record, such different findings should be resolved by trial.

Neither the record nor Appeals Court decision acknowledge that the first partition included "homestead" lots, large tracts of land claimed as residences of the oldest and most influential members of the community. Approximately 15 homesteads were granted during the first partition, along with Lots 1 – 173 (RA 402), and they are all recorded together in Book 49 at the Dukes County Registry of Deeds. Examples of these "homestead" lots can be found in Appendix A of Judge Green's decision (a large tract owned by Tacknash R.T. was the homestead

of Hebron Wamsley); and, the last plan of Volume I of the Record Appendix shows the homestead of Simon Johnson (two pages following RA 487 are not numbered). A careful examination of the Plan of Gay Head showing the Partition of the Common Lands, would reveal the full scale of "homestead" lots granted by the Commonwealth without any set-off lot number. R.A. 287. RA 360.

THE SEVERALTY LOTS THEMSELVES CLEARLY BENEFIT FROM EASEMENTS BY NECESSITY BUT ALSO MAY BE BURDENED BY SIMILAR EASEMENTS

The decision does not clearly return to the lower court the issue of the nature of title to the severalty lots, whether these lots also hold the benefit of easements by necessity or may be otherwise burdened thereby.

The 1866 map at RA 360 delineates graphically how the homestead lots and first severalty owners were stretched over the district. During the first phase of the division (Lots 1-173 and homestead lots run out and bounded under the statutes prior to the 1878 partition – RA 402[1]), the severalty owners clearly had rights in common to pass freely over the common lands, whether as part owners of the common or under an implied easement of necessity which meets the standards correctly noted by this court as cited in ***Orpin v. Morrison***, 230 Mass. 529, 533 (1918). However, when the common lands were partitioned by the Probate Court in 1878, these lots held in severalty retained an implied easement of necessity over the lots then divided. Id. Judge Green had found that the severalty lots 1-173 enjoyed such rights. (See excerpt above & RA 604-611).

During the first phase of the division, the severalty owners clearly had rights in common to pass freely over the common lands. However, when the common lands were partitioned by the Probate Court in 1878, these lots held in severalty retained an implied easement of necessity over the lots then divided. While the lower court found this, this court seems to say otherwise ("the unity of title required to imply an easement by necessity fails"). This court, respectfully, must make clear that this ruling would only affect an easement by necessity that might run OVER these lots to benefit the partitioned lots.[2] Judge Green noted that lots "1-173 were owned by the owners determined by the commissioner's 1871 report, **HAD ENJOYED SUCH RIGHTS IN THE REMAINING COMMON LANDS. . ."** RA 604 (emphasis supplied).

Judge Green's decision at RA 605 (FN19) clearly denotes that the status of lots 174-189 is subject to interpretation. The lower court decision demarcates the unity of title at lot 173, and finds implicitly that what has been found to be the severalty lots 174-189 are to be included as part of the lots partitioned under the 1878 commissioner's report. (RA 604-611).

[1] The petitioners respectfully disagree with the "finding" that lots 174 to 189 were duly part of the lots granted to the severalty owners. Lots 1-173 were all granted under

[2] The petitioners respectfully disagree that easements could not still run over Lots 1-189 or the homestead lots. Jones v. Stevens, 276 Mass. 319, 323-325 (1931)

Regardless of how the title was held, there has been no fact finding as to the possibility that each of these severalty lots may, in fact, also be burdened by easements by necessity to lands beyond. The decision of this court has assumed that the severalty owners gained a form of title NOT subjected to easements. There is nothing in the record of such fact, only that the bounds of the land were run out and title "acknowledged."

This decision leaves open the question of the application of Jones v. Stevens, 276 Mass. 319, 323-325 (1931)(a right of way may be appurtenant to land even though the servient tenement is not adjacent to the dominant, and even though it does not appear what the grantee's rights over the interveneing land, if any, may be; a way of necessity may exist over a lot not contiguous to the dominant estate in a case where the owner of the dominant estate had a right of way by prescription over the intervening lot) to each of the lots, whether severalty lots or the partitioned lots.

This court in footnote 6, does expressly indicate that the summary judgment record did not sufficiently establish either ways in use in 1878 or locations of easements by necessity. As such, the fact finding relating to the issue of easements relating to the severalty lots, respectfully, should, at the very least, be sent back to the lower court for trial.

There is Unity of Title and the Lower Court Demarcated a Different Point

It seems this court has adjusted the line of demarcation for unity of title from that determined by the lower court. Was this intended to enter a new finding overruling the lower court? The lower court found based only on a summary judgment record, which would have had to have been clear, unambiguous, uncontroverted and undisputed, that the unity of title of the lots in consideration in this case failed for lots 1-173 (as of the Commissioners' 1871 report) and found that the lots of Gay Head were to be classified into four categories. Lots 174 and above, though in two different classes were treated similarly. This court included Lots 174-189 as part of a different class and treated this group entirely differently.

This court has chosen to use seminal events of the Legislature as to when to begin the time line for "unity of title." Each of the severalty lots themselves, originated from what was all common land, prior to the possessory claims of the severalty individuals. Whether title was held by the tribal sovereign, or the Commonwealth when that occurred is a potential critical finding that is NOT clear from this summary judgment record reviewed by this court. As the court noted, "it is not entirely clear how, or under what authority, sometime after the Revolutionary War the Commonwealth assumed control of Gay Head and its residents became wards of the State." The issues of when one is to look for unity of title should be directed and clarified by this court.

The decision states that regardless of how title is described, the severalty lots were "owned" by others, but acknowledges that "the Commonwealth held a 'fee title' on those lots, meaning it had only 'a contingent future interest which ripened into a fee simple only when the Indians abandoned their possessory interest [Indian title] (or when the sovereign,

holding fee title, took that possessory interest)' citing *James v. Watt*, 716 F.2d 71, 74-75 (1st Cir.1983), cert. denied, 467 U.S. 1209 (1984) (internal quotation marks, citation and emphasis omitted). But it is the nature of that title held prior to the acts of the Commissioners that a court must "weigh" and is absolutely required when measuring "unity of title" as it is the title that is in issue, meaning that entire bundle of sticks of ownership. What exactly did the severalty lot owners hold in the way of title? According to the reasoning of the court, when the Commissioners acknowledged the boundaries according to the 1870 statute, this HAD TO operate as a **grant of what fee the Commonwealth still held in the land**. The unity of title, while not then clearly delineated, would not be broken necessarily by undefined possessory claims, whether recognized or acquisceced to by the Legislature. This court's own reasoning, to be consistent, should address specifically how that expressly found commonality of title, though recognized as partial, affects the overall "unity of title."

Utilities Can Be Run in Easements By Necessity

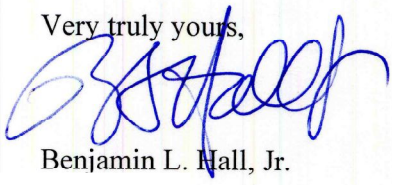
While the legal issue of whether utilities can be run through an easement by necessity was squarely before this panel of the Appeals Court, the decision did not address the matter, leaving the Land Court with no direct instruction on the matter. A different panel of this court has just ruled that easements by necessity include the right to run utilities. Daniel T. ADAMS vs. PLANNING BOARD OF WESTWOOD. Appeals Court Docket No. 03-P-1072, May 13, 2004. - August 31, 2005; Present: Greenberg, Porada, & Gelinas, JJ. Given this clear ruling of law just on the heels of the decision herein, it is respectfully requested that this panel follow suit and include the same ruling within a revised rescript.

Wherefore, pursuant to Mass.R.App.P. 27, the Appellees / Cross-Appellants Defendant Gossamer Wing Realty Trust and Baron Land Trust hereby respectfully request that this honorable panel of the Appeals Court review these findings in its opinion and review the matter and amend the rescript accordingly.

I certify that I have given all parties notice of this filing by mailing a copy of same, postage prepaid first-class, to all parties set forth on the attached service list.

Thank you in advance for your courtesy and cooperation in this matter.

Very truly yours,



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