

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

DUKES, ss. C.A. No. 238738

MARIA A. KITRAS, TRUSTEE, et als.,
Plaintiffs

vs.

TOWN OF AQUINNAH, et als.,
Defendants

DEPOSITION OF JAMES J. DECOULOS, a
witness called by counsel for the Defendant,
Vineyard Conservation Society, taken pursuant
to the applicable provisions of the
Massachusetts Rules of Civil Procedure, before
Joann Denning, a Shorthand Reporter and Notary
Public in and for the Commonwealth of
Massachusetts, at Decoulos Law Office, 39 Cross
Street, Peabody, Massachusetts, on Thursday,
October 30, 2008, commencing at 10:33 a.m.

THOMAS J. HOUTON, COURT REPORTING
8 Victor Avenue, Beverly, Massachusetts 01915
978-922-0697

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- 1 last time you were on Zack's Cliffs Road?
- 2 A. In June.
- 3 Q. Of 2008?
- 4 A. Yes.
- 5 Q. What was the condition of Zack's Cliffs Road at
6 that point?
- 7 A. Overgrown.
- 8 Q. By that, small trees growing up in it?
- 9 A. In some places.
- 10 Q. Brush growing in it?
- 11 A. In some places. In other areas it was open and
12 passable.
- 13 Q. It's not passable by vehicle right now,
14 correct?
- 15 A. I don't know. I have passed over it in a
16 vehicle before, and I just don't know if it is
17 today.
- 18 Q. How many times have you driven over it in a
19 vehicle?
- 20 A. Half a dozen.
- 21 Q. On what we've marked as Exhibit 1 that shows a
22 path that's labeled Zack's Cliffs Road, that's
23 the road we're talking about?
- 24 A. Yeah. I don't know why you characterize it as

1 a path, but yes.

2 Q. Whatever it is. We'll call it a way. How's

3 that? What portion of it have you driven?

4 A. From Lot 87 down to 712.

5 MR. DECOULOS: Where does 87 start?

6 THE DEPONENT: (Indicating.)

7 Q. Can you point it out to me, too?

8 A. (Indicating.)

9 MR. DECOULOS: At the Wampanoag Housing

10 Authority.

11 Q. Down to?

12 A. 712.

13 Q. Over what period of time did those drives

14 occur?

15 A. Approximately from 1993 to 1996.

16 Q. For what purpose were -- what kind of vehicle

17 were you using?

18 A. 1991 Ford Explorer XLT.

19 Q. Four-Wheel Drive?

20 A. Yes.

21 Q. Engaged?

22 A. I'm not sure.

23 Q. For what purpose were you driving on Zack's

24 Cliffs Road during that period?

- 1 A. Engineering investigations and percolation
2 testing.
- 3 Q. For what purpose was that being done?
- 4 A. To inquire -- to conduct due diligence to
5 determine whether the land was suitable to
6 purchase.
- 7 Q. What land?
- 8 A. Lots 178, 711, 713, and 243.
- 9 Q. You said you did that approximately a half a
10 dozen times during that period?
- 11 A. Yes.
- 12 Q. Would it be fair to say it was done before your
13 acquisition because you were doing due
14 diligence?
- 15 A. Before and during.
- 16 Q. I don't know what you mean by during.
- 17 A. We purchased it in 1995, so I know that I
18 traveled down Zack's Cliffs Road after that
19 purchase. I'm certain that I went down it in
20 1996.
- 21 Q. How many times after your first purchase from
22 Feltz did you drive on Zack's Cliffs Road?
- 23 A. I can't recall. I'd be guessing.
- 24 Q. You told me your total time was six between

- 1 1993 and 1996?
- 2 A. Approximately six.
- 3 Q. Now I want to know shortening that time span
- 4 from 1995 to 1997 how often did you drive on
- 5 Zack's Cliffs Road?
- 6 A. I can't recall.
- 7 Q. Less than six?
- 8 A. Obviously.
- 9 Q. What other use have -- have you had any other
- 10 occasion to drive on Zack's Cliffs Road or have
- 11 we now exhausted your testimony on that
- 12 subject?
- 13 A. No, I've had plenty of occasion to drive on it,
- 14 but I haven't been able to drive on it.
- 15 Q. Bad question. How many times have you actually
- 16 driven on it other than what we've already
- 17 talked about?
- 18 A. None other.
- 19 Q. What other uses have you made of Zack's Cliffs
- 20 Road with respect to Lot 178?
- 21 A. I've walked up and down it.
- 22 Q. On what occasions?
- 23 A. Multiple occasions. So many that I can't
- 24 remember.

- 1 Q. For what purpose?
- 2 A. To conduct additional due diligence in
3 determining resource areas that may be
4 protected under local, state, or federal law.
- 5 Q. For what purpose were you determining resource
6 areas?
- 7 A. To identify suitability of the land for
8 building.
- 9 Q. Have you walked Zack's Cliffs Road for any
10 other purposes with respect to Lot 178?
- 11 A. I may have. I'm not sure.
- 12 Q. None that you recall today?
- 13 A. No.
- 14 Q. To your knowledge has your wife used Zack's
15 Cliffs Road in relation to her ownership of
16 Lot 178?
- 17 A. Yes.
- 18 Q. When?
- 19 A. We walked Zack's Cliffs Road in June with our
20 two sons, this June 2008.
- 21 Q. Has your wife to your knowledge walked it on
22 any other occasions?
- 23 A. Not that I'm aware of.
- 24 Q. Has your wife -- has your wife used Zack's

1 MS. LEWIS: Thanks. That's all I have.

2 EXAMINATION BY MR. HURLEY

3 Q. Jim, as I understand it in this case there's
4 basically two categories of claims. One is an
5 easement by necessity and one is an easement by
6 prescription. Is that fair to say?

7 A. Yes.

8 Q. With respect to the prescriptive claim we spent
9 most of our time on today, I understand that
10 that claim is over what we've called and
11 described as Zack's Cliffs Road, is that right?

12 A. Yes.

13 Q. As shown on Exhibit 1, can you tell me the
14 length of the road that you claim a
15 prescriptive easement over? In other words,
16 where does it start and where does it end?

17 A. Zack's Cliffs Road starts --

18 Q. I want to know where the prescriptive claim is.

19 A. We are seeking a prescriptive claim from
20 Set-Off Lot 319 on Exhibit 1 all the way to the
21 Atlantic Ocean.

22 Q. Is that actually stated in any of the pleadings
23 in this case?

24 A. I don't know.

- 1 Q. You claim a right to go over the property
2 that's owned by the tribe?
- 3 A. Yes.
- 4 Q. You claim a right to go over whoever it is that
5 owns property on the other side of Moshup
6 Trail, on the ocean side of Moshup Trail?
- 7 A. Yes.
- 8 Q. Is there any evidence of use of the area to the
9 other side, the ocean side of Moshup Trail
10 other than what you've identified today and
11 testified to today?
- 12 A. I've traveled down there by foot and car.
- 13 Q. Down to the ocean?
- 14 A. Yes.
- 15 Q. You've gone through the gate that you
16 referenced a few moments ago?
- 17 A. The gate hasn't always been there.
- 18 Q. How long has the gate been there?
- 19 A. Maybe since the mid-'90s.
- 20 Q. So were you going down there before the
21 mid-'90s?
- 22 A. Yes.
- 23 Q. By foot?
- 24 A. And car.

- 1 Q. For what purpose were you doing that?
- 2 A. Just to look at the ocean.
- 3 Q. How often did you do that in the early '90s
- 4 before the gate went up?
- 5 A. A few times.
- 6 Q. What is a few? Two, three?
- 7 A. Maybe three or four.
- 8 Q. Since the gate has been up, have you gone
- 9 through the gate down to the ocean?
- 10 A. I've walked the path.
- 11 Q. On how many occasions?
- 12 A. Maybe five or six.
- 13 Q. Spanning what period of years?
- 14 A. The last ten years.
- 15 Q. Other than the information that -- other than
- 16 what you've just told me now and the
- 17 information you've given us earlier today in
- 18 the form of plans and aerial photographs and
- 19 the testimony or the anticipated testimony that
- 20 you described, any other information as it
- 21 relates to the use of what you call Zack's
- 22 Cliffs Road on the ocean side of Moshup Trail?
- 23 A. I know representatives of the Cournoyer Family
- 24 who hold beach shares on the Atlantic Ocean as

- 1 shown on that Cournoyer plan which is an
2 exhibit, I know they travel along there and
3 there's a parking area down there for them to
4 enjoy those beach lots.
- 5 Q. Your understanding is that they've utilized
6 Zack's Cliffs Road to get to those beaches?
- 7 A. Yes, absolutely.
- 8 Q. When did they tell you that?
- 9 A. Francis told me in the early '90s that he would
10 go down there and he had a right to get there.
- 11 Q. Who else from the Cournoyer Family told you
12 that?
- 13 A. No one else.
- 14 Q. Other than Francis has anyone told you about
15 the use of Zack's Cliffs Road on the ocean side
16 of Moshup Trail?
- 17 A. Yes, Jeff Madison, Donald Malonson.
- 18 Q. Let's start with Jeff Madison. Jeff Madison
19 specifically told you that he has gone down
20 through that area to the beach?
- 21 A. I can't remember specifically if it was south
22 of Moshup Trail or not, but we were talking
23 generally about Zack's Cliffs Road.
- 24 Q. You have no specific recollection of his

- 1 telling you that he used the area to the ocean
2 side of Moshup Trail?
- 3 A. That's correct.
- 4 Q. Do you have a memory of any of the people that
5 you've identified, Don Malonson, June Manning,
6 Buddy Vanderhoop, do you have a memory of any
7 of those people telling you specifically they
8 went down Zack's Cliffs trail on the ocean side
9 of Moshup Trail?
- 10 A. I think Donald Malonson told me that.
- 11 Q. Specifically what did he tell you?
- 12 A. He told me that they would travel Zack's Cliffs
13 Road to the ocean by car.
- 14 Q. They being who?
- 15 A. He and his family, friends.
- 16 Q. Did he tell you how often he did that?
- 17 A. No.
- 18 Q. Over what period of time?
- 19 A. No, just that before Moshup Trail was built.
- 20 Q. When was Moshup Trail built, do you know?
- 21 A. Approximately 1960.
- 22 Q. Has anyone told you that they used Zack's
23 Cliffs trail on the ocean side of Moshup Trail
24 since the gate was installed in what you say

- 1 was the mid-1990's?
- 2 A. Francis has told me that he's used it.
- 3 Q. Is the gate locked?
- 4 A. Sometimes.
- 5 Q. Do you know who installed the gate?
- 6 A. No.
- 7 Q. Do you know a gentleman named Alex Forger?
- 8 A. I know who he is, but I don't know him.
- 9 Q. Have you ever talked to him?
- 10 A. I don't believe so.
- 11 Q. With respect to your claim of prescriptive
12 easement over Zack's Cliffs Road, can you tell
13 me by reference to Exhibit No. 1 what your
14 understanding is as to the ownership of the
15 lots that it crosses from Lot 319 down to the
16 ocean? In other words, who are the people over
17 whose property you claim Zack's Cliffs Road
18 runs?
- 19 A. From 319 to Lot 87 the land is owned by the
20 United States of America in trust for the
21 Wampanoags. On Lot 88 it's owned -- do you
22 want me to read the individual ownership to
23 you?
- 24 Q. Just your understanding. Go right down the

- 1 line.
- 2 A. Everyone who's identified on the plan.
- 3 Beginning from the Wampanoag lands, it's Hoyle,
- 4 Tacknash Realty Trust, Border Realty Trust,
- 5 Kennedy, Howwasswee --
- 6 Q. When you say "Kennedy," you're referring to
- 7 that tip of Lot 240?
- 8 A. Yes.
- 9 Q. Is it your understanding that Zack's Cliffs
- 10 Road is actually on Lot 240?
- 11 A. I don't know. It appears from Exhibit 17 that
- 12 Zack's Cliffs Road does pass slightly over Lot
- 13 240.
- 14 Q. But you don't know that for sure?
- 15 A. I'm pretty sure. If it's shown on this
- 16 Exhibit 17, I know it's accurate.
- 17 Q. Keep going. Tell me the other properties.
- 18 We've made it up to 240.
- 19 A. Howwasswee 242.
- 20 Q. Who owns 242, do you know?
- 21 A. I know that the Hall family is asserting a
- 22 claim to title.
- 23 Q. Are you talking about Benjamin Hall?
- 24 A. Yeah.

- 1 Q. The same Benjamin Hall that's the trustee of
2 the Gossamer Wing Realty Trust?
- 3 A. Yes, but I believe that -- I don't believe that
4 he's the trustee of that family's trust there.
5 I think it's held by maybe his brother Brian as
6 trustee of Baron's Land Trust maybe.
- 7 I believe that the Land Bank is asserting
8 -- Martha's Vineyard Land Bank is asserting
9 title to 242. I'm sure that there are many
10 other interests that haven't been identified.
- 11 Q. Does Ben Hall's family also own the Lot 177,
12 the Howwasswee lot?
- 13 A. They're asserting ownership.
- 14 Q. Does the Land Bank claim an interest there as
15 well?
- 16 A. Yes.
- 17 Q. Anyone else that you know of?
- 18 A. On those two lots?
- 19 Q. On the Howwasswee lots.
- 20 A. Not that I know of.
- 21 Q. What's the next lot that it hits?
- 22 A. 241 which is -- I guess I already mentioned
23 that Moshup Trail II Limited Partnership is
24 shown on Exhibit 1.

- 1 Q. Is that the Barry White parcel?
- 2 A. Yes.
- 3 Q. Then it comes to your property, 178?
- 4 A. Yes, although we are asserting an ownership
5 interest in 241 as well.
- 6 Q. You are?
- 7 A. Yeah. Then Bear Realty Trust property Lot 178,
8 then the road continues through Toad Rock
9 Realty Trust, Lot 712.
- 10 Q. That's Jeffery Madison and George Brush?
- 11 A. No. That's just George as trustee, and I don't
12 know who the beneficiaries are.
- 13 Q. Have you had any conversations with George
14 about the fact that you are claiming a
15 prescriptive easement over that property?
- 16 A. I don't believe so.
- 17 Q. Am I correct to understand that Mr. Brush has
18 not entered this case and objected to that
19 prescriptive easement claim?
- 20 A. I believe that's correct.
- 21 Q. You have no agreements or understandings with
22 him about his decision not to interpose an
23 objection here?
- 24 A. No.

- 1 Q. What's the next property that Zack's Cliffs
2 Road crosses?
- 3 A. It appears to be Set-Off Lot 561 owned by the
4 Vineyard Conservation Society, then Lot 563
5 formerly owned by Frank Nuovo.
- 6 Q. Who owns that now, do you know?
- 7 A. I believe the Vineyard Conservation Society
8 does, but I'm not certain.
- 9 Q. Then where does it go?
- 10 A. Then across VCS property Set-Off Lot 568,
11 Kennedy property 567, then onto Kennedy
12 property 572 it looks like.
- 13 Q. Do you know whose property crosses and meanders
14 down to the ocean as you've described it?
- 15 A. I think the Cournoyer plan which is one of the
16 exhibits shows that ownership.
- 17 Q. Can you find that for me. They're all in
18 order, I believe.
- 19 A. It's Exhibit 12. It appears -- these lots,
20 they're labeled with both the Aquinnah assessor
21 map and parcel designation as well as the
22 set-off lot designation. The set-off lot
23 designation is the larger number in the middle
24 of the lot. Unfortunately I can't read the

- 1 first lot that it comes onto from Moshup Trail.
- 2 Q. That's fine. I think it's 572.
- 3 A. 572 then, 574 -- I'm sorry, 573 which is zoned.
- 4 That's the subdivided beach lots that the
- 5 Cournoyers created.
- 6 Q. Which is that?
- 7 A. 573. That's where that parking area is that I
- 8 mentioned. Then Zack's Cliffs Road extends
- 9 onto 574 held by Alexander Forger as trustee,
- 10 584, again Forger, 585 Forger.
- 11 Q. Does it stop there?
- 12 A. It appears as though it stops at 585.
- 13 Q. You see that 585 is registered land?
- 14 A. Yes.
- 15 Q. Do you claim a prescriptive right over Toad
- 16 Rock Road?
- 17 A. Not at this time.
- 18 Q. What does that mean, not at this time?
- 19 A. We may have a claim against it. We may have a
- 20 claim to use Toad Rock Road.
- 21 Q. But you've not asserted it in this case?
- 22 A. That's correct.
- 23 Q. You said that Zack's Cliffs Road runs over the
- 24 Tacknash Realty Trust property, is that right?

- 1 A. No, I don't think so. Did I say that?
- 2 Q. I think you did, but whatever. You don't have
3 that understanding, that it crosses Tacknash's
4 property?
- 5 A. No.
- 6 Q. Tacknash Realty Trust I think you said earlier
7 today that that is the property that is
8 sometimes referred to as the Walmsley
9 homestead?
- 10 A. Yes.
- 11 Q. Are you familiar with the trustees of the
12 Tacknash Realty Trust?
- 13 A. I believe there's only one trustee.
- 14 Q. Is that Jeffery Madison?
- 15 A. Yes.
- 16 Q. Have you had any conversations with Jeffery
17 about your claim of a prescriptive easement
18 over Zack's Cliffs Road?
- 19 A. No, just discussions about the use of Zack's
20 Cliffs Road in the past but nothing related
21 specifically to this litigation.
- 22 Q. Do you know whether or not Jeffery claims a
23 similar right over Zack's Cliffs Road?
- 24 A. No, I don't.