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April 21, 2010

By Federal Express

Ms. Deborah J. Patterson, Recorder
Land Court Department of the Trial Court
226 Causeway Street
Boston, Massachusetts 02114

Re: Maria A. Kitras, et al.
Vs. Town of Aquinnah, et als.
Docket No. 238738

Dear Ms. Patterson:

Enclosed for filing in the above-referenced matter, please find Memorandum Of Law On The Issue Of Intent Submitted By Defendants The Town Of Aquinnah, Vineyard Conservation Society, Inc., Martha' Vineyard Land Bank, Caroline B. Kennedy and Edwin Schlossberg, Jack and JoAnn Fruchtman and David and Betsy Wice.

I have also enclosed a copy of Exhibit 68, Plan of Gay Head Showing the Partition of the Common Lands As Made by Joseph T. Pease and Richard L. Pease, Commissioners Appointed by the Judge of Probate Under Section 6, Chapter 213 of the Acts of 1870 By John H. Mullin Civil Engineer, the certified copy of which was previously filed with the Court but is no longer available.

Thank you for your assistance.

Very truly yours,

Jennifer S.D. Roberts

Encl.
cc: Service List (w/encls.)

COMMONWEALTH OF MASSACHUSETTS

DUKES, SS.

LAND COURT
DOCKET NO.
238738(CWT)

MARIA A. KITRAS, Trustee, et als.,

Plaintiffs,

v.

TOWN OF AQUINNAH, et als.,

Defendants.

MEMORANDUM OF LAW ON THE ISSUE OF INTENT SUBMITTED BY DEFENDANTS THE TOWN OF AQUINNAH, VINEYARD CONSERVATION SOCIETY, INC., MARTHA'S VINEYARD LAND BANK, CAROLINE B. KENNEDY AND EDWIN SCHLOSSBERG, JACK AND JOANN FRUCHTMAN, AND DAVID AND BETSY WICE

I. Introduction

Defendants Town of Aquinnah, Vineyard Conservation Society, Inc., Martha's Vineyard Land Bank, Jack and JoAnn Fruchtman, Caroline B. Kennedy and Edwin Schlossberg, and David and Betsy Wice submit this memorandum of law to set forth the legal and factual bases upon which the plaintiffs'[1] claim of an easement by

[1] The plaintiffs in this action are Maria A. Kitras, as Trustee of Bear Realty Trust, Maria A. Kitras and James J. Decoulos, as Trustees of Bear II Realty Trust, Maria A. Kitras and James J. Decoulos, as Trustees of Gorda Realty Trust, Mark D. Harding, and

necessity must be rejected, there being no basis for finding an intent to create an easement of access to the plaintiffs' lots at the time of their partition in 1878. As is more fully set forth below, the record evidence in this matter compels the conclusion that no easement of necessity was intended: (1) other easements were expressly provided for in the relevant deeds, while no mention was made of an easement for access; (2) the lands conveyed were of poor quality and little value, such that no easement for access was required or sought for some 120 years after the 1878 division; and (3) the system of aboriginal title in effect in Gay Head, in particular, would have made access easements unnecessary. As is also set forth below, the presumption upon which the plaintiffs rely to carry their burden of proof is not applicable here, both because the presumption does not apply on the unique facts of this case and because, even if it did apply, the above-recited evidence serves to defeat it.

On this record, the plaintiffs have failed to carry their burden of proof on the critical issue of whether an

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Sheila H. Besse and Charles D. Harding, as Trustees of the Eleanor P. Harding Realty Trust. They are referred to collectively herein as "plaintiffs."

easement by necessity was intended by the parties to the 1878 conveyances.

II. Procedural History

This action was commenced with the filing of a complaint in May, 1997. By order dated June 4, 2001, the Land Court (Green, J.) ordered the action dismissed because of the lack of an indispensable party. The Appeals Court, in Kitras v. Town of Aquinnah, 64 Mass. App. Ct. 285 (2005) (hereinafter, "Kitras"), reversed the judgment resulting from that order and, after the denial of requests for further appellate review by both sides, the matter was returned to the Land Court for further proceedings consistent with the Appeals Court's opinion.

Back in the Land Court, the case was bifurcated by order dated August 14, 2006 (Lombardi, J.), the Court agreeing with defendants David H. and Betsy W. Wice that "[b]efore Defendants are put to the additional effort and expense of preparing documentation and retaining counsel, surveyors, engineers and historians to address the issue of where the unestablished easement or easements might be located, the Court should address the issue of whether or not there is any easement at all" (emphasis in original).

Order at p. 4.[2] In moving forward, the Court reiterated that "the parties must be mindful of the well-established standard articulated by the Kitras court: '[I]t is the proponents' burden to prove the existence of an implied easement'" (citations omitted). Order at p. 5.

In addition, plaintiffs sought leave to file an amended complaint, which leave was granted by order of this Court dated March 29, 2007 (Lombardi, J.), with certain modifications. The amended complaint, denominated Third Amended Verified Complaint, March 12, 2007, As Modified By Order Dated March 29, 2007, asserted two counts, one claiming an easement by necessity to plaintiffs' lots, and one claiming an easement by prescription.

The parties exchanged proposed evidence and presented motions to strike various items of the other party's evidence, which motions were ruled on by this Court (Trombly, J.) on April 27, 2009, August 18, 2009 and January 21, 2010. As a result, the evidence to be considered by the Court in this matter has now been set.

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[2] In their brief, plaintiffs have also argued for the right to install utilities over whatever easement is found. Plaintiffs' Brief at pp. 15-16. That issue is beyond the scope of the present proceeding and is not considered here. Only if and when the court finds an intent to create an easement, and further finds in favor of the plaintiffs on the merger and extinguishment matters noted in Kitras, 64 Mass. App. Ct. at 300, will the issue of the scope of the easement be ripe for consideration.

A revised exhibit list, which excludes proposed evidence determined to be inadmissible but retains the same numbering as in the original lists, is attached hereto as Appendix A and exhibit references used herein are to that list.

III. Statement Of Facts

A. Land Ownership In Aquinnah Prior To 1776

The early history of Aquinnah land title is set forth in Kitras, 64 Mass. App. Ct. at 286-287:

> The area of Martha's Vineyard originally known as Gay Head, now the town of Aquinnah, was "and is still the home of a remnant of that race, which … the white man found here as lords of the soil." Report of the Commissioners, 1856 House Doc. No. 48 at 3 [Ex. 72]. On May 6, 1687, 'Joseph Mittark, sachem of Gay Head," as an Algonquian and chief's son, purportedly deeded Gay Head to New York Governor Thomas Dongan. Id. at 6. Dongan, in turn, on May 10, 1711, transferred his fee to an English religious entity. Id. at 4. This entity neglected Gay Head, neither "demanding rents" nor "exercising over it any jurisdiction or control." Id. at 5. Although 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.

B. The Acts of 1811 and 1828 And The Division Of The Chappaquiddick Land

By the Act of June 25, 1811, the Governor of the Commonwealth of Massachusetts was authorized to appoint "three proper persons to be guardians to the Indian, mulatto, and negro proprietors of Gay Head." Ex. 4,

Report to the Governor and Council Concerning the Indians of the Commonwealth, 1862 House Doc. No. 215 at 39 ("Earle Report"). The guardians were appointed, but, the Indians being dissatisfied with them, they resigned and the guardianship disappeared. Id. at 40.

The Act of 1828 provided, with respect to Gay Head, that whenever the Indians and people of color of Gay Head voted to accept the Act, then the Governor could authorize a guardian to act and, upon their request, appoint suitable persons to divide their land. Ex. 4, Earle Report at 40. The members of the tribe never voted to do so. Id.

The Act of 1828 was also the basis for the division of lands of the Chappaquiddick tribe. As set forth in the Report of the Commissioners, 1849 House Doc. No. 46 ("Bird Report"), the Chappaquiddick were described as "far in advance of any other tribe in the State. ... These favorable changes, they attribute partly to the division of their lands under the act of 1828." Ex. 71, Bird Report at 7. At that time, and under that Act, commissioners divided 487 acres among 17 families, reserving 205 acres for public purposes. Id. at 8.

By 1849, some 20 years later, the authors of the Bird Report concurred with the Chappaquiddick's guardian

that the common lands should also "be wholly and finally divided." Ex. 71, Bird Report at 10. The division of the common lands was accomplished by Jeremiah Pease and Richard Beetle, pursuant to the 1828 Act. Their report, dated December 27, 1850, was recorded at Book 34, Page 390, at the Dukes County Registry of Deeds. Ex. 85, Report of the division of Indian lands at Chappaquiddick. Of particular note, the commissioners provided for access to the common lands so divided:

> A road or cartway, by gates and bars, for the accommodation of all concerned, is reserved to and from Cohog Point, so called, on the Southeast side of said Neck; and also, on the Southwest side of said Neck from the Pond to the Harbor.
>
> We have also reserved a road leading from the Swimming Place Road, so called, to Sampson's Hill, for the accommodation of the persons herein named, to whom the wood land is set off; and a road leading from the Landing Place to the road on the Northeast side of the Indian Line fence, said road being twenty feet in width.
>
> It is also intended that the persons, to whom the Peat Swamp is set off, shall have the privilege of passing to and from their several shares of said swamp with carts, teams, &c. for the purpose of taking their Peat &c.

Id. at 414.

C. The Status Of Land Titles In Gay Head

The record in this case indicates that, by the time of the Bird Report in 1850, the condition of the Gay Head Indians was recognized as different from that of the

other tribes of the Commonwealth. The Bird Report contains, at Appendix B, a letter from Leavitt Thaxter, guardian of the Chappaquiddick and Christiantown tribes of Martha's Vineyard, reporting on the condition of his wards, whom he described as "both surrounded with a white population, with whom they have intercourse, the tendency of which, is, to assimilate them in manners, customs, &c." Ex. 71, Bird Report, App. B at 76. Of the Gay Head tribe, Mr. Thaxter stated that "[t]he Gay Head Indians are differently situated. They live on a peninsula, and have little intercourse with the whites; consequently, they are more peculiar in their manners and customs, and are not so far advanced in the art and science of agriculture, as the two first-mentioned tribes." Id.

Regarding Gay Head, the authors of the Bird Report themselves noted that "[t]he legal condition of this tribe is singularly anomalous." Ex. 71, Bird Report at 19.

> For about thirty years, they have been without any guardian, and the division of their lands, and indeed the whole arrangements of their affairs, except of the school money, have been left to themselves. None of the lands are held, as far as we could learn, by any title, depending for its validity upon statute law. The primitive title, possession, to which has been added, inclosure [sic], is the only title recognized or required. The rule has been, that any native could, at any time, appropriate to his own use such portion of the

> unimproved common land, as he wished, and, as soon as he enclosed it, with a fence, of however frail structure, it belonged to him and his heirs forever. That rule still exists.

Id. at 20. "They do not know, and they do not want to know, under what law they live." Id. at 23. Among the recommendations of the Bird Report, the authors "urge[d] particularly the importance of confirming the titles of proprietors of lands held in severalty, and of fixing the law of division and descent." Id. at 56.

Some six years after the Bird Report, on March 9, 1855, the Legislature approved a resolve on the petition of certain of the Gay Head Indians to establish a boundary between the Indians of Gay Head and the inhabitants of Chilmark. Ex. 72, Report of the Commissioners, 1856 House Doc. No. 48 at 2. The commissioners appointed to that task reported back to the Governor the following year, having created the boundary line. Ex. 72, Report of the Commissioners, 1856 House Doc. No. 48. In their report, they noted that:

> [o]wing to too close Feeding, and other causes, the sands of the beach, no longer covered, as formerly, with an abundant growth of beach-grass, become the sport of the breeze, and are every year extending inland, covering acre after acre of meadow and tillage land; many acres of which have, within the memory of our informants, been thus swallowed up, and now lie wholly waste and useless.

> It is painful to behold this Sahara-like desolation, especially when the conviction becomes irresistible that, unless some remedy is found, the whole will eventually become one cheerless desert waste.

Id. at 9.

By the Act of April 6, 1859, John Milton Earle was appointed commissioner to "examine into the condition of all Indians and the descendants of Indians domiciled in this Commonwealth, and to make report to the governor." Ex. 4, Earle Report, at 6. Once again speaking of the Gay Head tribe, Mr. Thaxter wrote to Mr. Earle regarding the division of the lands: "I fear the consequences of any material change, especially relative to the Indians of Gay Head, who are differently situated than any of the others, especially from their isolated position." Ex. 3, January 28, 1860 letter from Leavitt Thaxter to Hon. John Milton Earle.

In his report, and in contrast to Mr. Bird, Mr. Earle considered the distribution of land in severalty to individual Indians, accomplished in Mashpee by Act of March 2, 1842, to have been "disastrous." Ex. 4, Earle Report at 42. Mr. Earle concluded that the Indian traditional law employed in Gay Head, allowing as it did for ownership of land in common, rather than the Commonwealth's laws, worked "favorably." Earle's report

on the method of land holding obtaining in Gay Head, written only a decade before the land was set-off in severalty, is worth quoting at some length:

> The land is generally rough, affording abundance of stone for fencing, and a considerable portion of what is not taken up and enclosed, or is not used for pasturage, is grown up to bushes, which afford convenient summer fuel for common culinary purposes. Any member of the tribe may take up, fence in, and improve as much of this land as he pleases, and, when enclosed, it becomes his own. The benefit to the plantation of having more land subdued and brought into cultivation, is considered a fair equivalent for its value in the natural state, and the title to land, so taken up and enclosed, is never called in question. How long this state of things may continue, and no difficulty grow out of it, is not easy to be foreseen, and will depend upon some contingency, which shall bring rival interests in collision. To outsiders it seems strange that such a community should live together in peace, from generation to generation, holding real estate in common and severalty, yet without any recorded title of that held in severalty, or any written law regulating its transfer or descent. Yet it is no more remarkable than the whole civil polity of the tribe, by which a community residing in the State, and nominally of the State, and subject to its laws, is yet a sort of *imperium in imperio*, not governed by the laws to which it is nominally subject, but having its own independent law, by which all its internal affairs are regulated. This law is the unwritten Indian traditional law, which, from its apparently favorable working, is probably as well adapted to their condition and circumstances as any that can be devised. At any rate, they adhere to it with great tenacity, and are fearful of any innovations upon it. This, probably, is a prominent reason of their jealousy of foreigners, and of the

> rigorous exclusion of them from any foothold in their domain, except when intermarried with one of the tribe. The rule, to "let well enough alone," is perhaps the true one to adopt in this case, and it is believed that no advantage will accrue, either to the Indians or the State, by any change or modification of the system, till some contingency shall arise that imperiously demands it, and then it should be done only with a thorough understanding of the subject in all its bearings and relations, and with a knowledge of the system and its operation, and of the rights acquired under it, and of those which will be affected or acquired by a change,--an understanding which no man living now possesses.

Ex. 4, Earle Report at 33-34.

D. Determination Of Boundary Lines Of Gay Head Land Held In Severalty

One year after the Earle Report, the General Court passed an act creating the District of Gay Head. Ex. 73, St. 1862, c. 184, § 4. The following year, the General Court appointed a commissioner, Charles Marston, to:

> "examine, and fully and finally to determine, all boundary lines between the individual owners of land located in the Indian district of Gay Head … and also to determine the boundary line between the common lands of said district and the individual owners adjoining said common lands."

Ex. 5, Resolves, ch. 42 (1863). Marston submitted his report in 1866. Ex. 7, Report of the Hon. Charles Marston, 1866 House Doc. 219. Marston reported that he had not completed his work, due to "the infirmities of advancing age and sickness." Id. at 3. He did, however,

create a book of records setting forth descriptions of "a very large proportion of the lots of land," which book was ultimately recorded at the Dukes County Registry of Deeds in 1871 at Book 49, Page 1. Ex. 82.

Richard Pease was appointed to complete Marston's work. Ex. 7, Resolves 1866, c. 67. He did so and reported back to the Governor and Council in May, 1871. Ex. 18, Report of the Commissioner. Like Marston, Pease also provided a book of records, this time setting forth by lot number detailed descriptions of the lots previously delineated by Mr. Marston, and, as required by his appointment, descriptions of the undivided common lands. Ex. 83, Land Titles and Boundary Lines of the Indian Lands at Gay Head Martha's Vineyard Mass. as Reported to his Excellency, the Governor, and the Honorable Council, By Richard L. Pease, Commissioner May, 1871.

E. Division of Gay Head Lands Held in Common

Meanwhile, in 1869, a special joint committee of the Senate and House was designated to visit the Indians of the District of Gay Head and inquire as to their condition. The report of that visit, Ex. 10, Report of the Committee, 1869 Sen. Doc. No. 14, noted that, under Mr. Pease's "active and judicious supervision, order is

being rapidly brought out of chaos and the limits of each person's lot marked out by stakes and bounds." Ex. 10 at p. 5. Regarding the common lands, the legislators noted that "[t]his land is uneven, rough, and not remarkably fertile." Id. The legislators proposed legislation that would incorporate Gay Head as a town, direct the county commissioners to lay out a road from Chilmark to the Gay Head lighthouse, and grant authority in the judge of probate for Dukes County to appoint commissioners to divide the common lands or sell them, with the proceeds being paid over to the town's treasurer. Ex. 10 at 13-16. The legislation was adopted as Chapter 213 of the Acts of 1870. Ex. 11.

Thereafter, a petition was presented to the Dukes County judge of probate in September, 1870 to divide the common lands, Ex. 12, as a result of which the court issued an order on December 5, 1870, decreeing that the common lands be divided, and that Joseph L. Pease and Richard L. Pease be appointed to make that division. Ex. 16, Order. The commissioners issued their report in 1878. "[I]n accordance with the near unanimous desire of the inhabitants," Ex. 84, Indian Lands At Gay Head at 1, the commissioners did not divide the cranberry lands or

the clay cliffs. The remainder of the common land was divided into lots numbered 189 and upwards. Ex. 84 at 3.

Of particular note in the division of the common lands, the commissioners expressly provided for what were, in effect, profits à prendre: the right of various individuals, some identified and some not, to take peat from various lots. So, for example, the description of Lot 193 includes a statement "[r]eserving however any right or rights to peat on the premises that may justly belong to any person or persons, to them, their heirs and assigns." Ex. 84 at 162. The description of Lot 218 includes a statement "[r]eserving however to William Jeffers, his heirs and assigns all his rights in and to the peat upon said premises." Ex. 84 at 175. Similar language is found in the descriptions for lots 221, 225, 240-241, 244-246, 254, 277, 293-296, 298, 304, 306-308, 311, 321, 329, 334, 340, 351-356, 365-366½, 369, 378, and 419.

In addition, the commissioners expressly reserved an easement for fishing and clearing creeks over Lots 382, 384 and 395: "[r]eserving for the use of the proprietors, in the Herring Fishery, for the purpose of fishing and clearing the creeks, a strip of land, one rod wide, on

each side of the creek, so long as the said reservation may be needed for that purpose." Ex. 84 at 244-45, 249.

IV. Argument

Plaintiffs claim an easement by necessity for the benefit of their lots,[3] relying on a presumption of law to establish the requisite intent to create such an easement, a presumption that they contend has not been rebutted by the defendants. In fact, the record evidence here establishes that there was no intent to create an easement by necessity, as a result of which the plaintiffs' presumption drops away and the plaintiffs are left with a burden of proof that they have failed to carry.

A. The Applicable Law

1. Easements By Necessity[4]

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[3] The Kitras plaintiffs apparently still argue that their Lot 178 is entitled to an easement by necessity over the defendants' lands. That argument was decided adversely to them by the Appeals Court. Kitras, 64 Mass. App. Ct. at 293 (regarding lots 1 through 188 or 189, "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"). Accordingly, it is not addressed further here.

[4] The law with respect to easements by necessity and implied easements advanced in 1998. The prior Restatement Of Property failed to differentiate between the two, instead listing a series of factors for either situation, including both prior use and the degree of necessity. J.W. Bruce and James W. Ely, Jr., The Law Of Easements And Licenses In Land (2001) at § 4:3. The new Restatement Of Property (Third) (1998) contains separate sections on easements by necessity, § 2.15, and easements by implication, § 2.12. As described in The Law Of Easements And Licenses In Land at § 4:2:

> Easements of necessity, also called easements by necessity or ways of necessity, are typically implied to provide access to a landlocked parcel. Easements implied from quasi-easements,

The Supreme Judicial Court has defined easements by necessity as follows: "when land is conveyed which is inaccessible without trespass, except by passing over the land of the grantor, a right of way by necessity is presumed to be granted; otherwise, the grant would be practically useless." Schmidt v. Quinn, 136 Mass. 575, 576 (1884).[5] This rule is not based on any public policy against landlocked parcels. Kitras, 64 Mass. App. Ct. at 298 ("Neither does there exist a public policy favoring the creation of implied easements when needed to render land either accessible or productive."). Instead, "the rule is founded on the presumed intention of the parties to the deed, construed, as it must be, with reference to the circumstances under which it was made." Richards v. Attleborough Branch Railroad Co., 153 Mass. 120, 122 (1891).

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also called implied easements or easements by implication, are based on a landowner's prior use of part of the landowner's property (the quasi-servient tenement) for the benefit of another portion of the property (the quasi-dominant tenement). Such use does not amount to a true easement because one cannot obtain an easement in one's own land. Instead, it constitutes a quasi-easement that may ripen into an implied easement once either the quasi-servient tenement of the quasi dominant tenement is transferred to a third party.

It is plain that there can be no easement by implication here, since there is no history of use, prior to the 1878 division, of any particular way over any of the defendants' lots to any of the plaintiffs' lots.

[5] Accord, Davis v. Sikes, 254 Mass. 540, 545 (1926) ("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").

Easements by necessity, being unascertainable on the record, are discouraged: "It is the law in this Commonwealth that easements of necessity can only be granted in very limited circumstances of reasonable or absolute necessity." Goulding v. Cook, 422 Mass. 276, 280 (1996).[6] To that end, the Supreme Judicial Court has adopted a number of rules that make the creation of such interests more difficult. First, the Court has imposed the burden of proof on the party arguing for the existence of such an easement.[7] Second, the Supreme Judicial Court has imposed an even heavier burden on a grantor claiming such an unwritten, unrecorded, reserved right.[8] Finally, the Court has directed that such an

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[6] Accord, Nichols v. Luce, 41 Mass. 102, 105 (1833) ("But these implications of grants are looked upon with jealousy and construed with strictness.").

[7] See Mt. Holyoke Realty Corporation v. Holyoke Realty Corporation, 284 Mass. 100, 105 (1933) ("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."); Boudreau v. Coleman, 29 Mass. App. Ct. 621, 629 (1990) ("The parties asserting the easement, here the defendants, have the burden of proving its existence.").

[8] Perodeau v. O'Connor, 336 Mass. 472, 474 (1957) (citation omitted) ("the rule that 'a deed is to be construed most strongly against the grantor may render it more difficult to imply an easement by reservation for the grantor's benefit than an easement by grant for the grantee's benefit.'"); Krinsky v. Hoffman, 326 Mass. 683, 688 (1951) ("the law will imply an easement in favor of the grantee more readily than it will in favor of the grantor."); Dale v. Bedal, 305 Mass. 102, 103 (1940) ("And the rule that a deed is to be construed most strongly against the grantor may render it more difficult to imply an easement by reservation for the grantor's benefit than an easement by grant for the grantee's benefit."); Boudreau v. Coleman, 29 Mass. App. Ct. at 629 ("The burden is heavier for a grantor asserting the right to an easement by implied reservation for his benefit than for a grantee asserting such a right by implied grant.").

easement be recognized only if it can be found in the presumed intention of the parties, "a presumption of law which 'ought to be and is **construed with strictness.**'" Joyce v. Devaney, 322 Mass. 544 (1948) (citation omitted) (emphasis added).[9]

The touchstone of the analysis is the intent of the parties. As the Supreme Judicial Court has often stated, whether an implied easement has been created:

> must be found in a presumed intention of the parties, to be gathered from the language of the instruments when read in the light of the circumstances attending their execution, the physical condition of the premises, and the knowledge which the parties had or with which they are chargeable.

Sorel v. Boisjolie, 330 Mass. 513, 517 (1953), Krinsky v. Hoffman, 326 Mass. at 688, and Joyce v. Devaney, 322 Mass. at 549, all quoting Dale v. Bedal, 305 Mass. at 103.[10]

Because the issue is one of intent, the benefitted and burdened estates must have had previous common

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[9] Accord, Orpin v. Morrison, 230 Mass. 529, 533 (1918)("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. There is no reason in law or ethics why parties may not convey land without direct means of access, if they desire to do so."); Home Inv. Co. v. Iovieno, 243 Mass. 121, 124 (1922) ("It is a strong exercise of the power of the law to raise a presumption of a grant of a valuable right in addition to the premises described without any words indicative of such an intent in the deed. Such a presumption is construed with strictness even in the few instances where recognized.").

[10] Accord Perodeau v. O'Connor, 336 Mass. at 474.

ownership.[11] The necessity of the easement is another factor to be considered, although not the predominating consideration.[12] As noted in Kitras, "[i]t is well established in this Commonwealth: necessity alone does not an easement create." 64 Mass. App. Ct. at 298. Because necessity is an indicator of the parties' intent, if there is alternative access, the parties will not be deemed to have intended an easement.[13] Moreover, the necessity must have existed at the time of the grant,[14] and it ceases when the necessity ceases.[15]

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[11] See Nylander v. Potter, 423 Mass. 158, 162 (1996) ("Without previous common ownership, Potter cannot claim an easement by necessity."); Uliasz v. Gillette, 357 Mass. 96, 102 (1970) ("easements because of necessity can be implied only for the benefit of or against parties to a particular conveyance and their successors in title, and not for the benefit of or against strangers to the chain of title.") (citation omitted); Richards v. Attleborough Branch Railroad Co., 153 Mass. at 122 ("never out of the land of a stranger. The law does not give a right of way over the land of other persons to the owner of land who would otherwise have no means to access it.").

[12] See Ward v. McGlory, 358 Mass. 322, 325 (1970) ("An implied easement of necessity, however, is not created because it is necessary to the grantee, but rather to effectuate the intent of the parties."); Perodeau v. O'Connor, 336 Mass. at 474 ("Necessity of the easement is merely one element to determine that intention ..."); Orpin v. Morrison, 230 Mass. at 533 ("It is not the necessity which creates the right of way, but the fair construction of the act of the parties. Necessity is only a circumstance resorted to for the purpose of showing the intent of the parties.").

[13] See Uliasz v. Gillette, 357 Mass. at 102 (where petitioners had access to their property from another way) ("In this case there is no reasonable necessity for implying any easement in favor of the petitioners."); Silverlieb v. Hebshie, 33 Mass. App. Ct. 911, 912 (1992) ("No easement by implication arose, first, because as previously observed, it has not been made to appear that the Hebshies lacked an alternative route over their own land to the Brockton sewer, ...").

[14] Schmidt, 136 Mass. at 576-77 ("A right of way by necessity can only be presumed if the necessity existed at the time of the grant"); Richards, 153 Mass. at 122 ("A way of necessity can be

2. Presumptions

Because the plaintiffs rely on a presumption of law to satisfy their burden of proof in this case, a brief examination of the law regarding presumptions is in order. As noted by the plaintiffs, Rule 301(d) of the Massachusetts Guide To Evidence provides the following statement of the law:

> A presumption imposes on the party against whom it is directed the burden of production to rebut or meet that presumption. The extent of that burden maybe defined by statue, regulation or the common law. If that party fails to come forward with evidence to rebut or meet that presumption, the fact is to be taken by the fact finder as established. If the party comes forward with evidence to rebut or meet the presumption, the presumption shall have no further force or effect. A presumption does not shift the burden of persuasion, which remains throughout the trial on the party on whom it was originally cast.

See also Standerwick v. Zoning Board of Appeals of Andover, 447 Mass. 20, 34 (2006)("A presumption does not shift the burden of proof; it is a rule of evidence that aids the party bearing the burden of proof in sustaining that burden by 'throw[ing] on his adversary the burden of going forward with the evidence.' Epstein v. Boston Housing Authority, 317 Mass. 297, 302 (1944).").

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presumed to have been granted or reserved only when the necessity existed at the time of the grant.").

[15] Viall v. Carpenter, 80 Mass. 126 (1859)("the right ceased when the necessity ceased"); Schmidt, 136 Mass. at 577 (a way by necessity "continues only so long as the necessity continues.").

Given the unique circumstances presented in the instant action, the presumption, which is "construed with strictness even in the few instances where recognized," Home Inv. Co., supra, is not applicable. The wholesale division of the common lands of a tribe is not an event to which the presumption has previously been applied. To do so here would be to read the presumption expansively, contrary to the great weight of authority.

In any event, even if the presumption is applicable to the facts of this case, defendants have mustered substantial evidence to rebut it. As is more fully set forth below, the record contains the deeds to the common lands in Gay Head and Chappaquiddick, descriptions of the physical condition of the common lands, and the history of aboriginal and English title—evidence that is more than ample to rebut the presumption relied upon by the plaintiffs. That being so, the presumption has "no further force or effect," Rule 301(d), Mass. G. Evid., and the plaintiffs are left with a burden of proof on the issue of intent that they have failed to carry: the only fact plaintiffs point to in their favor is the "necessity" of obtaining access to their otherwise landlocked lots, a fact that, as noted in Kitras, supra, "does not an easement create."

B. No Easement By Necessity Was Intended[16]

1. The Language of the Grants

As noted above, express easements are scattered throughout the deed descriptions of the set offs of the common lands. That fact, coupled with the absence of any express easements for access, is conclusive of the issue of whether an easement by necessity was intended here. The decision in Joyce v. Devaney, supra, and its progeny are dispositive.

In Joyce, two lots were created sharing a common driveway. An easement 85 feet long and eight feet wide was intended to reach to the rear of both properties where a garage was located on each lot. Because the houses, as constructed, were approximately 20 feet further back than was originally proposed, the owner of one lot could only reach his garage by driving over the other lot for a distance of an additional 18 feet. "Thus it is not possible for the plaintiffs to enter their garage without trespassing on lot A for this distance."

[16] Plaintiffs rely on the decision of the Land Court in Black v. Cape Cod Co., Misc. Case No. 69813 (1975), where the court found that "there is no evidence whatsoever that the Commonwealth intended in the partition of 1878 to provide parcels of land to individual Indians without allowing them any means of access." Because it does not appear that the Black court was presented with the evidence contained in the record of this proceeding, because none of its analysis on the issue of intent was necessary to its decision (the action was dismissed for lack of necessary parties), and because it did not have the benefit of the Appeals Court's decision in Kitras, the decision in Black is not persuasive here.

322 Mass. at 546. The plaintiffs and their predecessor drove over lot A for some fifteen years before controversy erupted and the defendants blocked the end of the 85 foot way. The plaintiffs brought suit, contending that they had the benefit of an easement by implication over the abutting lot to reach their garage. The trial court found no such right, and the Appeals Court affirmed:

> 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 deed negatives, we think any intention to create easements by implication.** Expressio unius est exclusion alterius. What the parties may have intended cannot override the language of the deeds.

322 Mass. at 549 (emphasis added).[17] The Joyce court noted that "[t]he case is a hard one but if we should hold otherwise it would be another instance of a hard case making bad law." Id. at 550.

Several years after the decision in Joyce, the Supreme Judicial Court issued its decision in Krinsky v. Hoffman, supra. There, the plaintiffs sought to establish an easement by implication over a six foot

[17] Expressio unius est exclusion alterius: "[a] canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative." Black's Law Dictionary 602 (7th ed. 1999).

strip in an adjoining passageway. The Krinsky court upheld the trial court's finding of no easement:

> [The trial judge] could have attached considerable weight to the fact that, while the deed expressly created an easement in favor of the grantee on the six foot strip owned by the grantor, it contained nothing about a similar right being reserved to the grantor over the grantee's strip. The subject of rights in the passageway was in the minds of the parties and the fact that nothing was inserted in the deed reserving to the plaintiffs rights similar to those granted to the defendant is significant.

326 Mass. at 688. See also Zotos v. Armstrong, 63 Mass. App. Ct. 654, 657 (2005) quoting Boudreau v. Coleman, 29 Mass. App. Ct. 621, 629 (1990) ("having expressly reserved some easements, failure to reserve others must be regarded as significant.").

The principal evidence in this case is in the deeds to lots 190 to 736, Ex. 84. The Appeals Court in Kitras, even without the full set of deeds to the common lands, found the commissioners' failure to provide access easements compelling:

> Particularly noteworthy in our estimation is the commissioners' silence on this issue, as is the fact that even the most cursory glance at a contemporaneous plot map shows that the vast majority of set-off lots had no frontage or obvious access to or from any public amenity. Also problematic is the difficulty of routing easements from the common lands to public roads (at least those arguably existing at the time) without traversing those lands already held in severalty, that is, lots 1 through 188 or 189. With those problems evident, and in light of the careful and

> lengthy consideration given the partitioning process, the commissioners' failure explicitly to provide for easements might well be interpreted as a deliberate choice.

64 Mass. App. Ct. at 299.

The fact, as now revealed in the record, that the commissioners expressly reserved (1) numerous rights to remove peat from various lots and (2) a right over three lots for fishing and clearing creeks to all of the "proprietors" only serves to heighten the Appeals Court's concern about the failure to expressly provide access. In view of the express easements granted, the failure to expressly provide for access was intentional and negates any presumed intent to create an easement.

2. The Condition Of The Premises

The Kitras court also pointed to the condition of the land divided as another indicator of intent:

> [T]he record reveals other circumstances that may render doubtful the parties' presumed intent to reserve easements, for example, the nature and the perceived poor quality of the land so divided. See Dale v. Bedal, 305 Mass. 102, 103 (1940) (circumstances to be considered include "the physical condition of the premises"). Without belaboring the point, it seems a legitimate question whether anyone at the time, objectively considered, would have troubled to provide for these "uneven, rough and not remarkably fertile" unclaimed and untenanted lots a beneficial conveyance by reserving for them easements to a road then in "deplorable condition" and blocked to free travel by a stone wall and bars. The 1869 Legislative committee, at least, expected that these lots would "lie untilled

> and comparatively unused" following division. Report of the Committee, 1869 Senate Doc. No. 14, at 5.

64 Mass. App. Ct. at 299.

To that description can now be added that of the 1856 Report of the Commissioners, noted above, describing "Sahara-like desolation." Furthermore, the expectation that the lots would "lie untilled and comparatively unused" is borne out on this record. The instant action to obtain access was not commenced until 1997, some 120 years after the lots were set off.

3. Common Practice

The Kitras court also "consider[ed] relevant the historical sources of information on tribal use and common custom applicable at the time." 64 Mass. App. Ct. at 300. The record in this case reveals that, leading up to the 1878 division of the common lands, the lots were held by two different entities—the Commonwealth and the Gay Head tribe—under two different systems of land ownership. The Commonwealth had its English common law rules of real property, and the tribe had its Indian traditional law. Earle himself noted this duality when he described the tribe as "a sort of *imperium in imperio*, not governed by the laws to which it is nominally subject, but having its own independent law, by which all

its internal affairs are regulated." Ex. 4, Earle Report at 33.

This concept of dual systems of land ownership was early recognized by the United States Supreme Court in Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 574 (1823) (European sovereigns held "ultimate dominion" in the land "subject only to the Indian right of occupancy," generally called "original Indian title" or "aboriginal Indian title"). As more recently described by the First Circuit Court of Appeals, "American courts recognize two distinct levels of ownership in Indian lands: fee title and Indian title." James v. Watt, 716 F.2d 71, 74 (1st Cir. 1983). Fee title passed to the European sovereign upon discovery, then to the individual states at the time of the revolution. Id. Title to Indian lands within the borders of the thirteen original states was retained by those states. Id.

> Indian title, which gave Indians a "right of occupancy," coexisted with the fee title. This "right of occupancy" was legally significant in several ways. For one thing, only the sovereign (the king, the state, the federal government) could destroy this right: and, as long as the Indians retained it, ownership of the fee title brought with it no present right of possession. Rather, the fee owner "received a contingent future interest which ripened into a fee simple" only when the Indians abandoned their possessory interest (or when the sovereign, holding fee title, took that possessory

interest). F. Cohen, Handbook of Federal Indian Law, 321 n.372 (1942).

716 F.2d at 74.

Here, then, when the Commonwealth deeded the common lands to individuals in 1878, it deeded its fee title in those lands. However, at the time, it did not, nor did Congress, extinguish aboriginal title, with the result that the tribe's right of occupancy (including the right of access) over all of the common lands continued.[18] Therefore, no access easement was necessary at the time of the 1878 division, and none was, therefore, created. See Schmidt, Richards, and Boudreau, supra.

This view accords with historical fact. The commissioners were plainly familiar with the English real property law concept of easements—they created easements

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[18] In 1974, the Gay Head tribe commenced a lawsuit in federal court asserting land claims against the Town of Gay Head and its selectmen on federal constitutional and statutory grounds. See James v. Bellotti, 733 F.2d 989, 991 (1st Cir. 1984). While there are no reported decisions in the tribe's 1974 lawsuit, one may derive from the reported decisions in related cases that the tribe challenged the land division. Id., James v. Watt, supra, James v. Hodel, 696 F. Supp. 699 (D.C.D.C. 1988); James v. Wampanoag Tribal Council Of Gay Head, Inc., 23 Mass. App. Ct. 122 (1986). Indeed, the Massachusetts Indian Land Claims Settlement Act, 25 U.S.C. § 1771, references "a lawsuit that involves Indian claims to certain public lands with the town of Gay Head, Massachusetts" and notes that the lawsuit has "cloud[ed] the titles to much of the land in the Town."

To settle the tribe's claims, Congress passed § 1771 et seq. In particular, Congress retroactively approved prior transfers of land in Gay Head from, by or on behalf of the tribe or any individual Indian, "including any transfer pursuant to any statute of the State," §1771(a), and extinguished any aboriginal title in the land "as of the date of such transfer." § 1771(b). It was upon the passing of this statute, in 1987, that the Tribe's Indian title, or right of occupancy, was expressly terminated retroactively.

for peat removal, fishing and creek clearing—but were silent on the issue of access in their deeds. Being familiar with the Gay Head tribe's method of land use, they may well have assumed that access to these common lands would be, as it had always been, by tacit consent of the tribe, unfixed and changing to meet the changing needs of tribe members, under tribal law.

With respect to tribe members, one certainly cannot assume familiarity with English law. As noted above, the Gay Head tribe was described as "differently situated," "isolated," and "singularly anomalous." As described in the 1849 Bird Report and the 1861 Earle Report, the Gay Head Indians held property pursuant to unwritten "primitive" or "traditional" law. If it was enclosed, the encloser owned it; if not, it was held in common by the tribe. There is no indication here that tribe members had any concept of real property resembling an easement, nor any need for such a concept. It is difficult, therefore, to attribute to them any intent to create such a right.

The condition of Gay Head is to be contrasted with that of the Chappaquiddick tribe. The commissioners dividing the common lands of the Chappaquiddick, who were much more assimilated, provided for express access

easements. See discussion supra at p. 6. That commissioners would make such provision in one case, and not in the other, underscores the notion that the lack of express easements in the division of the Gay Head common lands was a deliberate choice.

On this record, plaintiffs have not carried the heavy burden of proof placed on them. The evidence does not support an intent to create easements to the plaintiffs' lots and, in fact, is to the contrary.

V. Conclusion

For the reasons set forth above, defendants Town of Aquinnah, Vineyard Conservation Society, Inc., Martha's Vineyard Land Bank, Jack and JoAnn Fruchtman, Caroline Kennedy Schlossberg and Edwin Schlossberg, and David and Betsy Wice respectfully request that this Court issue an order dismissing Count I of the plaintiffs' complaint. As noted by Judge Green in his 2001 decision, "[i]n mitigation of the apparent harshness of that result, I note that … the plaintiffs (and their predecessors in title) waited to present their claims for more than one hundred years after the commissioners' 1878 report ...."

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Dated: April 21, 2010

Appendix A

List Of Exhibits Admitted In Evidence

Document No.

2. August 25, 1859: Letter from Zacheus Howwasswee to John Milton Earle, Indian Commissioner, reproduced from the records of the American Antiquarian Society, with transcription, re: custom of holding lots in severalty and title thereto.

3. January 28, 1860: Letter from Leavitt Thaxter to John Milton Earle, Indian Commissioner, with transcript.

4. March 30, 1862: Report of John Milton Earle, Indian Commissioner, consisting of excerpts pertaining to the Gay Head tribe.

5. March 30, 1863: Chapter 42 of the Acts of 1863 - Resolve relating to the establishment of boundary lines of Indian lands.

6. March 13, 1866: Report statement by Charles Marston recorded in Book 49, Page 2 [it reads page 3 on bottom, but is recorded in Page 2], with transcription.[19]

7. March 23, 1866: Boundary Lines in Gay Head, House No. 219. Report of Charles Marston, Commissioner, to Governor Alexander H. Bullock and the Executive Council of the Commonwealth of Massachusetts, re: boundary lines between the common lands and individual owners adjoining said lands.

8. April 30, 1866: Chapter 67 of the Acts of 1866 - Resolve relating to the establishment of the boundary lines of Indian lands at Gay Head.

9. Undated, "Map of Gay Head, Martha's Vineyard, Mass. Showing the Lands of Individual Owners and the General Fields or Commons, Made under the Direction of Richard L. Pease, Esq. Commissioner Appointed by Gov. Bullock Under Resolve Chap. By

[19] All deed references made to the Dukes County Registry of Deeds (the "Registry") located in Edgartown, Massachusetts

1866 to Determine the Boundary Lines of the Indian lands at Gay Head. By: John H. Mullin, Top. Engr. Scale 50 Rods = One Inch." (Full scale is not available).

10. January, 1870: Report of the condition of the Gay Head Indians, including proposed act to incorporate the Town of Gay Head.

11. April 30, 1870: Chapter 213 of the Acts of 1870 - An Act to incorporate the Town of Gay Head. Section 2 conveys title to the Common Lands to the Town of Gay Head, which includes Lots 174 to 736.

12. September 1, 1870: Petition, Citation and Decree to the Dukes County Probate Court (the "Probate Court") for the Division and Setting Off of Our Lands in Gay Head (returned on December 5, 1870) pursuant to Chapter 213, Section 6 of the Acts of 1870, with transcription.

13. September 7, 1870: Remonstrance to the Petition of persons in Gay Head for Division of Common Lands, with transcription.

14. October 17, 1870: Petition in and of the Citizens of Gay Head, with transcription.

15. December 5, 1870: Citation for Division of Gay Head Common Lands and Establishing Boundaries of Other Lands. Appointment of Joseph T. Pease and Richard L. Pease to make division of lands by Judge Theodore G. Mayhew, with transcription.

16. December 5, 1870: Appointment of Joseph T. Pease and Richard L. Pease by the Probate Court, with transcription.

17. May 12, 1879: Return of Warrant by Joseph T. Pease and Richard L. Pease, with transcription.

18. May 22, 1871: Report of the Commissioner, Richard L. Pease, appointed to complete the examination and determination of all questions of title to land, and of all boundary lines between the individual owners, at Gay Head, on the island of Martha's Vineyard; under a Resolve of the

Legislature of 1866, Chapter 67.

19. May, 1871: Summary Land titles and Boundary Lines of the Indian Lands at Gay Head, Martha's Vineyard, Mass., as Reported to his Excellency, the Governor and the Honorable Council, by Richard L. Pease, Commissioner, May, 1871. Deeds conveyed by Richard L. Pease to the aforementioned Lots 1-173 recorded at Book 49, Pages 100-198.

20. October 26, 1871: Reduced Sectional Plans recorded at the Registry and referenced at Book 49, Pages 89-198, depicting Lots 1-173, consisting of 23 pages, which letter dated May 22, 2007, acknowledging the original receipt of the Sectional Plans, signed by Diane E. powers, Register, Dukes County Registry of Deeds.

21. December 21, 1878: Report of Joseph T. Pease and Richard L. Pease to the Probate Court and order and approval by the Probate Court, as recorded in Book 65, Pages 150 to 152, with transcription. The original set off plan measures over 10 feet in length. That plan has been cut in sheets of 26 x 26 and is in a bound volume consisting of approximately 15 sheets and is on file with the Dukes County Probate Court. It cannot be copied because of its size.

22. December 21, 1878: Summary Map of Gay Head lands depicting a substantial portion of lots partitioned from the common land by Joseph T. Pease and Richard L. Pease, prepared by John Mullin, Civil Engineer, (1878). Lots 1-173 and homestead lots deeded between 1866-1871 are cross-hatched; and Lots 174-189 conveyed in 1878 are labeled.

63. May 9, 2008: Plan of existing wetland resources Moshup Trail (larger plan available)

68. Certified copy, Plan of Gay Head Showing the Partition of the Common Lands As Made by Joseph T. Pease and Richard L. Pease, Commissioners Appointed by the Judge of Probate Under Section 6, Chapter 213 of the Acts of 1870 By John H. Mullin Civil Engineer, on file with the Dukes

County Registry of Probate and Exhibit 4 to the Affidavit of Jennifer S.D. Roberts sworn to on October 3, 2000, previously filed in this matter.

69. Charles Edward Banks, M.D., The History Of Martha's Vineyard, Dukes County, Massachusetts, Vol. I, Preface, pp. 5-10; Vol. II, Town Annals, Preface, pp. 5-10 and Annals of Gay Head, pp. 1-19, 28-29; Vol. III, Preface.

71. F.W. Bird's Report, House Doc., No. 46 (1849).

72. 1856 House Doc., No. 48.

73. St. 1862, c. 184.

74. Certified copy, first three pages of "Set-Off" book of Indian Lands at Gay Head, on file with the Probate & Family Court Department of the Trial Court, Dukes County.

82. Gay Head homestead lots, unnumbered tracts, dated 1866 and recorded with the Dukes County Registry of Deeds on October 26, 1871 at Book 49, Page 1.

83. Gay Head homestead lots numbered 1 through 173, recorded with the Dukes County Registry of Deeds on October 26, 1871 at Book 49, Page 89.

84. Gay Head lots numbered 174 through 736, recorded with the Dukes County Registry of Deeds on January 20, 1879 at Book 65, Page 150.

85. Report of the division of Indian lands at Chappaquiddick recorded with the Dukes County Registry of Deeds at Book 34, Page 390.

86. Map of Gay Head, Martha's Vineyard, Mass. Showing The Lands Of Individual Owners and the General Fields Or Commons made under the direction of Richard L. Pease, Esq. Commissioner appointed by Gov. Bullock under Resolve Chap. 67, 1866 To Determine The Boundary Lines Of The Indian Lands At Gay Head,

recorded with the Dukes County Registry of Deeds at Plan Book 5, Page 34.

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