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June 10, 2009

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

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JUN 12 2009

Nicholas J. Decoulos

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

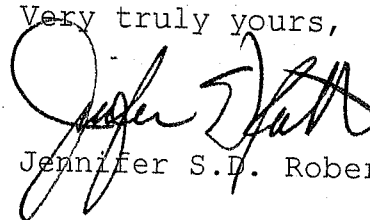
Dear Ms. Patterson:

Enclosed please find Defendants' Motion For Reconsideration Of Order On The Parties Motions To Strike Proposed Exhibits and a supporting memorandum of law. I would appreciate your bringing this to Judge Trombly's attention.

Also, I would like to request that the Court (Trombly, J.) schedule a status conference in this matter in order to set a briefing schedule, per the Court's November 21, 2008 order.

Thank you for your attention to this matter.

Very truly yours,



Jennifer S.D. Roberts

Encl.

cc: Service List (w/encl.)

COMMONWEALTH OF MASSACHUSETTS

DUKES, SS.

LAND COURT
DOCKET NO. 238738 (CWT)

* * * * *

MARIA A. KITRAS, Trustee,
et als.,

Plaintiffs,

v.

TOWN OF AQUINNAH, et als.,

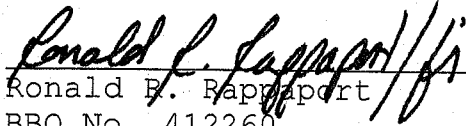
Defendants.

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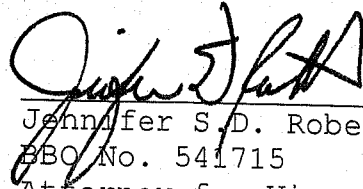
DEFENDANTS'
MOTION FOR RECONSIDERATION OF
ORDER
ON THE PARTIES' MOTIONS TO STRIKE
PROPOSED EXHIBITS

Pursuant to Rule 9, Land Court Rules, defendants Vineyard Conservation Society, Inc. ("VCS"), Town of Aquinnah, Caroline Kennedy and Edwin Schollossberg, The Martha's Vineyard Land Bank, Commonwealth of Massachusetts, David and Betsy Wice and Jack and JoAnn Fruchtman hereby move this Court for an order reconsidering its April 27, 2009 ruling striking defendants' proposed exhibits 69, 71, 72 and 73 on the grounds of relevance. As is more fully set forth in the memorandum of law filed herewith, those exhibits contain relevant information regarding tribal use and custom relied on by the Appeals Court in Kitras v. Town

Of Aquinnah, 64 Mass. App. Ct. 285 (2005) and should be admitted in evidence for purposes of assessing the intent of the parties to create an easement by necessity here.



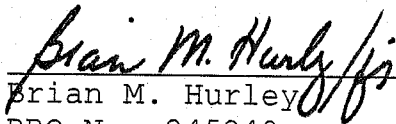
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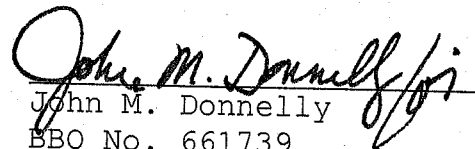
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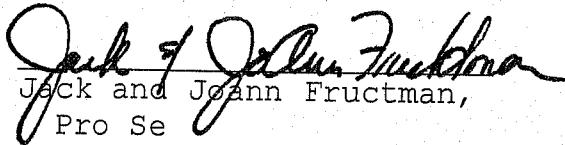
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Dated: June 10, 2009

Certificate Of Service

I hereby certify that I served a copy of the foregoing motion and associated memorandum of law by mailing a copy of the same, postage prepaid, to

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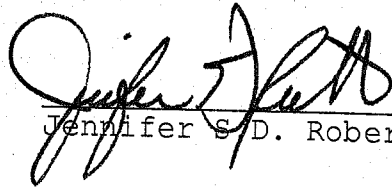
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A handwritten signature in black ink, appearing to read "Jennifer S.D. Roberts", is written over a horizontal line.

Jennifer S.D. Roberts

Dated: June 10, 2009

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 IN SUPPORT OF
DEFENDANTS'
MOTION FOR RECONSIDERATION OF
ORDER
ON THE PARTIES' MOTIONS TO STRIKE
PROPOSED EXHIBITS

Defendants Vineyard Conservation Society, Inc.
("VCS"), Town of Aquinnah, Caroline Kennedy and Edwin
Schlossberg, The Martha's Vineyard Land Bank, Commonwealth
of Massachusetts and David and Betsy Wice submit this
memorandum of law in support of their Motion For
Reconsideration Of Order On The Parties' Motions To Strike
Proposed Exhibits. As is more fully set forth below,
defendants' proposed exhibits 69, 71, 72 and 73¹ contain

¹ Proposed exhibit 69 consists of relevant pages from Charles Edward Banks' The History Of Martha's Vineyard, Dukes County, Massachusetts, prepared between 1890 and 1911 and originally published in 1911. Proposed exhibit 71 is the Report Of The Commissioners, 1849 House Doc. No. 46. Proposed exhibit 72 is the Report of the Commissioners, 1856

information regarding tribal use and custom previously found relevant and noted by the Appeals Court in its decision remanding this matter back to the Land Court. Kitras v. Town Of Aquinnah, 64 Mass. App. Ct. 285 (2005) (hereinafter, "Kitras"). They should be admitted in evidence for purposes of assessing the intent of the parties to create an easement by necessity here.

As has been often noted, the core issue in determining the existence of an easement by necessity—and the issue before this Court now in these bifurcated proceedings—is the intent of the parties. 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.

Joyce v. Devaney, 322 Mass. at 549, quoting Dale v. Bedal, 305 Mass. 102, 103 (1940).²

In Kitras, the Appeals Court assumed the existence of an easement by necessity for purposes of its analysis of whether the United States Of America was a necessary party to these proceedings. Having answered that question in the negative, the Appeals Court then remanded this matter for a

House Doc. No. 48. Proposed exhibit 73 is St. 1862, c. 184.

²Accord Perodeau v. O'Connor, 336 Mass. at 474; Krinsky v. Hoffman, 326 Mass. 683, 688 (1951); Sorel v. Boisjolie, 330 Mass. 513, 517 (1953).

determination of the issue of whether an easement by necessity existed:

We do not mean to suggest by our discussion that an easement by necessity for any given lot carved out of the common land either does or does not exist, but rather that the question requires thoughtful consideration and resolution by a fact finder.³ This question thus is best left for the trial judge, after the parties have had an opportunity to make whatever showing they wish or are able, remaining mindful that it is the proponents' burden to prove the existence of an implied easement.

Kitras, 64 Mass. App. Ct. at 300.

In remanding the matter, the Appeals Court noted a number of factors that it considered germane to the analysis, including historical sources:

We consider relevant the historical sources of information on tribal use and common custom applicable to the time. Though by itself hardly conclusive, and assuming the material's admissibility, we see no reason why the common practice, understanding and expectations of those persons receiving title should not shed light on the parties' probable, objectively considered intent.

Id. (citation omitted).

Notably, VCS quoted at length from proposed exhibit 69, Banks' history of Martha's Vineyard, in its brief to the Appeals Court in Kitras.³ As noted in the preface to Volume I, that history was prepared between 1890 and 1911 and contains a succinct history of land ownership in Gay Head. The Appeals Court itself relied on proposed exhibit

³ An excerpt from VCS's brief to the Appeals Court in Kitras, in which Banks' history is extensively cited, is attached hereto as Exhibit A.

71, a report of the commissioners on the condition of Indians remaining within the Commonwealth, proposed exhibit 72, a report of the commissioners assigned to establish the boundary line between lands of the Indians and lands of the white inhabitants of Chilmark, and proposed exhibit 73, St. 1862, c. 184.⁴

⁴ The Kitras court cited to proposed exhibits 72 and 73 (shown in bold below) for the following history:

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.** On May 6, 1687, Joseph Mittark, sachem of Gay Head, 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.

So matters stood until mid- Nineteenth Century when, apparently as part of the move to grant full citizenship to the Commonwealths' Native American residents, commissioners appointed by the Governor recommended that a boundary marked by a stone fence by established "between the lands of [the Gay Head Indians] and the lands of the white inhabitants of Chilmark." **Id. at 2.** Later, **by St. 1862, c. 184, §§4 and 5,** the Legislature established the district of Gay head and directed the clerk of the district to make and maintain "a register of the lands of [the district], as at present held, whether in common or severalty, and if in severalty, by whom held."

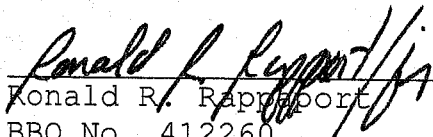
Kitras, 64 Mass. App. Ct. at 287 (emphasis added).

The Kitras court cited to proposed exhibit 71 in the following discussion:

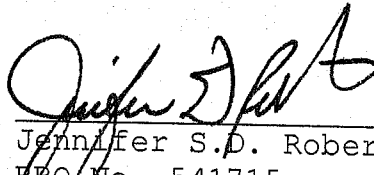
It will be recalled that the commissioners' process did not operate on virgin, untenanted land. Instead, what eventually became the town was tenanted as the time under discussion by individuals, many of whom claimed ownership of discrete and separated portions of that land. These claims developed out of what the commissioners understood to be the prevailing tribal law or tradition, with the "rule [being] that any native could, at any

It also bears noting that other similar sources have been proffered by the plaintiffs without objection by the defendants.⁵ To admit some, but not all, of these sources provides an incomplete picture of the circumstances prevailing in Gay Head during the 1870s.

Proposed exhibits 69, 72 and 73 are plainly relevant to the issues before this Court and should be admitted in evidence. Accordingly, defendants respectfully request that this Court reverse its April 27, 2009 Order On The Parties' Motions To Strike Proposed Exhibits on the issue of the admissibility of proposed exhibits 69, 72 and 73 and allow those exhibits in evidence in these proceedings.



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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." **Report of the Commissioners, 1849 House Doc. No. 46, at 20.**

⁵ For example, plaintiffs have offered Resolves 1863, c. 42 (proposed exhibit 5), Resolves 1866, c. 67 (proposed exhibit 7) and the Report Of The Committee, 1869 Senate Doc. No. 14, outlining the condition of the Gay Head Indians (proposed exhibit 10), all of which were also relied upon the by the Appeals Court in Kitras.

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EXHIBIT A

STATEMENT OF FACTS

History Of Land Ownership In Aquinnah Prior To 1871

Prior to its discovery in 1602 by one Captain Bartholomew Gosnold, Vol. II, Charles Edward Banks, M.D., The History Of Martha's Vineyard Dukes County Massachusetts, Annals of Gay Head, p.3 (1911) (hereinafter, "Banks"), Martha's Vineyard was populated by a branch of the Algonquian Indians. I Banks at p.36. At that time, the island was divided by the Indians into four governmental sections, one of which was Gay Head. Id. at p.39.

Although Gay Head remained largely isolated, II Banks, Annals of Gay Head, p. 6, there were sufficient attempts by Caucasians to obtain Indian land so as to cause the Gay Head chief Metaark to issue a formal declaration on September 11, 1681:

I Mettack Sachem att Kuhtuhquehtuet [Gay Head] and Nashauakequetget as far as Wanumuset:

Know yee all People that I Mettack and my principal men my children and people are owners of this: our land forever. They are ours, and our offspring forever shall enjoy them:--

I Mettack and we principall men together with our children and all our people are agreed that no person shall sell any Land . . .

Mass. Archives, XXXI, 10, quoted in II Banks, Annals of Gay Head, p.8.

Despite Metaark's attempt to retain Indian ownership of Gay Head "forever", his son, Joseph, purportedly

conveyed Gay Head to Governor Thomas Dongan of New York, later Earl of Limerick, on May 6, 1687.⁶ Ownership remained with the Earl of Limerick until approximately 1711, when he sold it to "The Society For the Propagation of the Gospel in New England and parts adjacent, in America." Id.

By the conclusion of the Revolutionary War, the newly created Commonwealth of Massachusetts took control of Gay Head and made the Indians involuntary wards of the state. II Banks, *Annals of Gay Head*, at p.14. As such, "[t]hey had no control over their lands or homes. They could make no sale of them to anyone except other members of their tribe." Id.

As of 1800, Gay Head was still an undivided tract. It was noted by a visitor some years later that "each man cultivates as much as he pleases, and no one intrudes on the spot which another has appropriated to his labor." V *North American Review* p. 319 (1817), quoted in II Banks, *Annals of Gay Head*, p. 15.

The situation remained unchanged as of 1849, when a commissioner appointed by the General Court issued his

⁶Richard L. Pease, Report of the Commissioner Appointed To Complete The Examination And Determination Of All Questions Of Title To Land, And Of All Boundary Lines Between The Individual Owners, Gay Head, On The Island Of Martha's Vineyard, Probate And Family Court Department Of The Trial Court, Dukes County, Vol. 59, Page 235, 245 (1871) (hereinafter, "Pease Report").

report:

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.

House Doc., No. 46, (1849), F.W. Bird's Report, quoted in the Pease Report at p. 246. Despite the peaceable relations described by him with respect to tribal land ownership, Mr. Bird recommended the prompt distribution of land in severalty on an equitable basis. II Banks, Annals of Gay Head, p.16.