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June 17, 2010

Land Court
226 Causeway St. 2d Flr.
Boston, MA 02114

Re: Kitras, et al, v. Town of Aquinnah, et als. Land Court 238738 (CWT)

Dear Ms. Misset:

As you know, I represent Gossamer Wing Realty Trust ("GWRT") as well as Barons Land Trust ("BLT") in the referenced matter. Enclosed please find for filing and docketing the Defendants Gossamer Wing Realty Trust And Barons Land Trust Opposition to Defendants Town of Aquinnah, Vineyard Conservation Society, Inc., Martha's Vineyard Land Bank, Jack and Joann Fruchtman, Caroline B. Kennedy And Edwin Schlossberg, David and Betsy Wice, and Commonwealth of Massachusetts Motion To Strike Evidence prepared on behalf of BLT and GWRT.

Thank you for your courteous attention.

Sincerely,

Benjamin L. Hall, Jr.

Cc: service list

COMMONWEALTH OF MASSACHUSETTS

DUKES COUNTY, ss.	TRIAL COURT LAND COURT DEPARTMENT CASE No. 97 Misc. 238738 (CWT)
MARIA A. KITRAS as she is TRUSTEE OF BEAR REALTY TRUST, et als., Plaintiffs, -versus- TOWN OF AQUINNAH, et als. Defendants.	)

DEFENDANTS GOSSAMER WING REALTY TRUST AND BARONS LAND TRUST OPPOSITION TO THE OTHER DEFENDANTS' MOTION TO STRIKE EVIDENCE

Now comes Defendant Gossamer Wing Realty Trust, Benjamin L. Hall, Jr., Trustee ("GWRT"), and Brian M. Hall as he is Trustee of Barons Land Trust ("BLT")(collectively the "Trusts"), by and through their attorney, Benjamin L. Hall, Jr., Esq., and hereby present this memorandum in opposition to the other Defendants' Motion to Strike Evidence and state as follows:

DEFENDANTS SEEK TO STRIKE RELEVANT REBUTTAL DOCUMENTS THEY CITE OVERTLY AND IMPLICITLY BUT WHICH THEY, THEMSELVES INTENTIONALLY OMITTED FROM THE RECORD

The other Defendants seek to strike documents submitted by the Trusts with their Sur-Reply in rebuttal to the arguments of the other Defendants in their brief. These include the Ch. CXIV of the Acts of 1828 (the "1828 Statute")-Ex. F - repeatedly cited in the other Defendants' Brief, which was sponsored and originally drafted and attached as a part of House Report H.R. No. 68 by H.R. Child dated March 1, 1827 (the "Child Report") -Ex. G, implicitly cited (under a doctrine of completeness - noted below) in the Defendants' Briefs but never provided by Defendants as part of the record, and a Petition to Partition the Common Lands at Chappaquiddick under Ch 463 of the Acts of 1869.- Ex. H. - that is strictly rebuttal.

The other Defendants argue prejudice against the court reviewing a complete set of documents directly arising out of the documents submitted by the Defendants, as part of the

truth-finding determination by the court.

Defendants argue that they are being "denied the opportunity to consider that evidence in crafting their own submissions and, due to the illegibility of at least some of the proposed evidence, are still denied a meaningful opportunity to consider that evidence." Upon receipt of the motion, the Trusts counsel sent additional clear copies of the documents to the Defendants.

The record has not yet been tested for admissibility (See order of 4/27/09 and argument below) and thus is not yet evidence. Therefore, the "evidence" cannot be said to have been closed.

Regardless, if these documents are to be considered "evidence" at this time, the documents are clearly relevant to a consideration of the relevance and weight to be accorded to the Defendants' Proposed Ex. 85, the 1850 Set-Off of Chappaquiddick. Massachusetts Guide to Evidence §401 (Flashner Judicial Institute, 2008-2009 guide prepared for the SJC Advisory Committee on Evidence Law)("Evid. Guide"). They cannot be excluded, except upon a showing of substantial unfair prejudice. Id. at 403. Moreover, because the 1850 set-off was authorized by the 1828 Statute (which the moving parties themselves repeatedly cited in their briefs, but did not submit as part of the record), which statute itself came out of the House Report of 1827, these documents come before the court for help in judicial notice, as well as for rebuttal. see argument below.

The other Defendants arguments are disingenuine at best. Repeatedly at pages 5-8 of their Brief they cite to the 1828 Act (Ex. F to the GWRT - BLT Surreply), which they did NOT provide to the court. An adverse inference for the same, respectfully, ought to be applied to this intentional omission. The 1828 Act is based on the very bill proffered in the Child Report (Ex. G to the GWRT - BLT Surreply). The rebuttal evidence consists entirely of official records of the Commonwealth, including, a special act of the legislature and the report that preceded the same explaining the legislative intent in regard thereto. These documents are required to be reviewed by the court as the court is required to take Judicial Notice of such public acts of the Legislature. Evid. Guide §202.

The last is an official record of a set-off of Chappaquiddick that occurred in a more relevant time frame than the 1850 Chappaquiddick set-off proffered by the other Defendants. The other Defendants do not challenge the authenticity of these documents, nor their relevance. They only claim to have been prejudiced. Yet, they themselves made numerous references to the

1828 Act, which itself resulted from the Child Report with what became the 1828 Act attached as a proposed bill, and had access to all of the other exhibits placed in rebuttal. There can be no prejudice under these circumstances.

Since it was impossible to predict how the other Defendants might try to use the 1850 Chappaquiddick set-off to argue inferences about an intent to landlock by the Probate Court and its appointed Commissioners under the 1870 Statute in the partition of 1878 in Gay Head, there was no need to seek any documentation to refute the same arguments until after they were presented in April, 2010. Upon seeing the distortion foisted on this court by the other Defendants in their Brief, rebuttal of the same by other documentation not then in the record should, respectfully, be considered by the court.

BACKGROUND

On April 27, 2009, the court ruled on certain motions to strike documents that had been proffered between the parties as part of a "record" which were to be submitted in some evidentiary proceeding involving written briefs only regarding the issue of intent to provide implied easements to the lots carved from the Common Lands[1], which proceeding has not yet, respectfully, been fully delineated by the court. Regardless, such a proceeding is not a full trial on the merits, and the court expressly left open the question of ultimate admissibility, and, accordingly, the evidence has not yet closed.

The court initially found that documents pre-dating the 1878 Set-off (Defendants proposed Exhibits 69-73) were not relevant and struck them, yet did not strike Defendants' Proposed Exhibit 85, the 1850 Chappaquiddick set-off, finding "this evidence could be relevant to show the practice and intent of the commissioner in the instant case." Order 4/27/09. Respectfully, the court did NOT determine the relevance of the 1850 Set-off, but merely found that it "could be relevant," leaving the question of when relevance would be determined to a future date.[2]

The court, on 4/27/09, respectfully, applied a different standard to the admissibility of the

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[1] This was one of the issues to be determined on remand as ordered by the Appeals Court. Kitras, 64 Mass. App. Ct. at 300. Note the Plan of Lands carved from the Common Lands was submitted as an attachment to the Defendants' Brief, which plan showed Lots 177 and 178 thereupon.

[2] The Trusts have moved the court to clarify the mode of fact-finding and have marked the same for hearing with the instant motion. The mode of fact-finding must further account for disputes on the relevance, and thus admissibility of the evidence.

proposed Exhibit 85, the 1850 Chappaquiddick set-off than was applied to proposed Exhibits 69-73. Later, on August 18, 2009, on reconsideration, the court reversed itself, and, without any explanation, agreed that Defendants' Proposed Exhibits 69-73 would be "reinstated and not stricken from the record." Order 8/18/09. Regardless, the court left the 1850 set-off as part of the documents that would be considered.

On January 21, 2010, the court ordered a briefing schedule, respectfully, without establishing a method for (1) determining admissibility of the documents then in the record, and (2) without establishing what mode for fact-finding was being used by the briefing.

WITHOUT ANY MODE FOR TESTING ADMISSIBILITY, THOUGH EXPRESSLY LEFT BY THE COURT FOR A FUTURE TIME, DOCUMENTS TO REBUT THE ARGUMENTS IN RESPECT TO INFERENCES TO BE DRAWN, MUST BE CONSIDERED BY THE COURT

It was, and continues to be, respectfully, not entirely clear how the court would determine the admissibility of documents submitted in the "record" and further not clear how the Defendants would use this 1850 set-off, so distant in time from the 1878 set-off, as part of the argument in respect to inferences to be drawn. Since the court's modality for determining these issues remains an open question, documents rebutting the arguments now set forth by the Defendants in the briefs, are admissible to the record simply in rebuttal to the documents the court had previously admitted into the record, leaving open the question of admissibility as evidence as noted by the court on 4/27/09.

To the extent the admissibility of the 1850 set-off has not yet been determined, it appearing the court by allowing the same into the record might be inclined to admit the same, countervailing evidence rebutting the inferences that the Defendants seek the court to draw should likewise be placed before the court. These documents are relevant to rebut the arguments made by the other Defendants. A party may present rebuttal evidence as a matter of right and in which the denial of that right would be an error of law when a party seeks to present evidence to refute evidence of the other side so long as it is not inconsistent with his own case. Drake v. Goodman, 386 Mass. 88, 92 (1982) citing McCormick, Evidence § 4, at 6 (2d ed. 1972); K.B. Hughes, Evidence § 182 (1961); 6 J. Wigmore, Evidence § 1873 (Chadbourn rev. 1976). This can be done after a party has rested his case, (Cobb, Bates & Yerxa Co. v. Hills, 208 Mass. 270, 272), or even after oral arguments have begun, (Short v. Farmer, 260 Mass. 102 (1927)).

Here, the inferences to be drawn from the documents submitted by the other Defendants,

to wit, the 1850 Chappaquiddick set-off, were never presented prior to the Brief of the other Defendants. Rebuttal documents to these newly proffered inferences, respectfully, ought to be considered by the court. Drake, supra. Moreover, it is only fair, that the court should consider the complete set of documents. The 1850 set-off was authorized by the 1828 Statute, which, as noted, the Defendants even cited in their own brief. Implicitly then, the Defendants have opened the door to provide the basis for the 1828 Statute, which is the House Report of 1827, which set forth the bill that became the 1828 Statute as a part thereof. See Doctrine of Completeness. Evid. Guide §106.

ADVERSE INFERENCE TO BE DRAWN FROM LACK OF SUBMISSION

If the court determines to strike this relevant rebuttal documentation, the Trusts respectfully request that the court draw an adverse inference from the lack of presentation of the 1827 House Report and the 1828 Statute when making rulings on the relevance, admissibility and the weight to be placed on the 1850 Chappaquiddick set-off.

THE PROCEDURAL PROCESS OF FACT-FINDING LACKS THE REQUISITE AGREEMENT UNDER FRATI AS NOTED BY THE TRUSTS IN THE MOTION TO CLARIFY

Where even the documents to be reviewed by a court were never agreed but were, nonetheless, as the court determined, respectfully, placed in an un-agreed manner, with the admissibility of the documents to be later determined, before any inferences to be drawn therefrom could be argued, there should be an opportunity to rebut. See Drake, supra and arguments above.

Since there has been no trial, the evidence cannot be said to have been "closed." The arguments and submissions were made with the court-ordered sur-reply in a rebuttal format.

In order to establish what exactly is to be "briefed" and why, all of the facts must be somehow be placed before the Court, either by trial, by agreement as to the evidence or by an agreement upon all of the material facts. See the case of Frati v. Jannini, 226 Mass. 430, 431 (1917), which was cited for authority in the case of Paradigm Properties, LLC.v. Zoning Board of Appeals of Somerville, Land Court Case No. 315232 (LJL). The court has ordered briefing, but has not established the mechanism by which it will resolve the facts.

There are three ways in which a case at law may be presented for decision on its merits.

(1) One is by the introduction of oral and documentary evidence in the ordinary way, which results ultimately in a verdict if the trial is had before the jury, or in a finding if trial is had

before the judge. Frati at 431.

(2) The second way is by agreement of parties as to the evidence which shall be considered by the court or jury. In such instance the agreement merely takes the place of the evidence which otherwise would be introduced in the usual way, and either the jury renders a general verdict or the judge makes a general finding founded upon that evidence. Id.

(3) The third way is for the parties to agree upon all the material ultimate facts, on which the rights of the parties are to be determined by the law. Id.

Since the court has, by pre-trial motion, stricken certain documents proposed, and allowed other documents to be reviewed by the court in some undefined pre-trial process, over objection, the facts to be ascertained by the documents so stricken or allowed over objection CANNOT be "by agreement." The court has, in a pre-trial process, already, implicitly and expressly, discarded proposed facts from which inferences could be drawn, thereby barring any agreement on material facts. Scaccia v. Boston Elev. Rwy. Co., 308 Mass. 310, 312-313 (1941)(The Scaccia court quoted from Atlantic Maritime Co. v. Gloucester, 228 Mass. 519, 520-521: ""If such inferences need to be drawn in order to reach the ultimate essential facts, then there has not been 'agreement as to all the material facts' by the parties within the meaning of those words in the statute.'"). Accordingly, the Court has not prescribed exactly that manner of fact determination it intends to utilize on any one of the principles set forth in the Frati case, and has still to determine the admissibility of the documents.

DEFENDANTS ATTEMPT TO SUBMIT ADDITIONAL BRIEFING WITHOUT LEAVE

Moreover, while the other Defendants seek no relief on the same, they improperly take the opportunity to file a form of Sur_Sur-Reply without leave of court, making claims about the sectional plans in par. 5 of their memorandum. The court established a briefing schedule on January 21, 2010 and permitted no further briefing to occur following the Sur-reply Briefs. Yet, the other Defendants attempt to submit further argument after the Briefing has been closed in a direct violation and attempt to end-run around the court's January 21, 2010 order. The Trusts move to strike this procedurally incorrect and prejudicial effort set forth at par. 5 of the other Defendants' motion together with the letter of Diane Powers attached which is NOT even in an

affidavit form as required to support any motion.[3]

The other Defendants state:

> 5. The Defendants also contest the Gossamer Defendants' contention that the Sectional Plans admitted as Exhibit 20 in these proceedings "were discovered after the prior Appeals Court decision herein. Gossamer Surreply at 3 n.2. Those plans have been freely available in the records of the Dukes County Registry Of Deeds since at least the 1970s. See Exhibit A hereto (letter dated May 27, 2010 from Dianne E. Powers, Register of Deeds, to Jennifer S.D. Roberts, Esq.).

Regardless, the Defendants' statement that these were any sort of official records before May 22, 2007 is incorrect. See attached letter of Diane E. Powers, Register of Deeds dated May 22, 2007, which is part of Ex. 20 of the Record already before the court. The Sectional Plans were not maintained as records and no marginal reference for these Sectional plans existed anywhere in Book 49, which contains all of the set-offs of various homestead lots and Lots 1-173, and includes reference to the report of Pease in which he reported to the Governor that he had fully and finally determined the bounds of the lands held in severalty and the bounds of the Common Lands. The book simply was in the registry. See affidavit of Benjamin L. Hall, Jr. attached. This book entitled "Sectional Plans" simply appeared on a shelf in the main anteroom of the Registry of Deeds in late 2006, following the Appeals Court rescript. Before that time, this book may have been about the Registry, but was never in such an open and obvious place prior thereto, AND no formal index or reference of the same existed in any of the official records of the registry before May 22, 2007, when the Registrar of Deeds decided that the Sectional Plans were a part of the official record. Id. See letter from Diane Powers dated May 22, 2007 included in Ex. 20 and attached hereto for reference. As such, Hall, who had been an attorney doing title work for over 20 years as of 2006, was not aware, nor could he have been, despite diligent search of the set-offs in the Registry, of the existence of or import of this book, because, until 2007, the same was NOT a "record" to which he ever could have been directed.

THE OTHER DEFENDANTS ALSO SUBMITTED REBUTTAL DOCUMENTS ATTACHED TO THEIR BRIEF AND ARE ESTOPPED FROM NOW SEEKING TO STRIKE THE TRUSTS' REBUTTAL EVIDENCE

Attached to the other Defendants' Brief was a list of the exhibits from the Joint Appendix

[3] The other Defendants insertion of this argument in the motion while seeking no relief in respect to the same is a blatant attempt to seek to supplement their briefs already before the court, in open violation of the January 21, 2010 order.

created by them with the Plaintiffs, and disingenuously titled to make it appear that the Trusts had not proffered documents that the other Defendants had NEVER sought to strike, together with two pages of Plans showing the lots carved from the Common Lands (including Lots 177 and 178 - see attached), offered as additional documentary evidence. If these other Defendants could place additional documents before the court, then they are estopped from now arguing that the Trusts cannot put relevant rebuttal documents before the court as well.

WHEREFORE the Trusts request that the court deny the motion to strike and further strike the arguments of the other Defendants in regards to the Sectional Plans in par. 5 of their memorandum.

RESPECTFULLY SUBMITTED,
Gossamer Wing Realty Trust
Baron's Land Trust
By Its Attorney,

Edgartown, Massachusetts

BENJAMIN L. HALL, JR.
45 Main Street, P.O. Bx 5155
Edgartown, MA 02539
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BBO# 547622

COMMONWEALTH OF MASSACHUSETTS

DUKES COUNTY, ss.

TRIAL COURT
LAND COURT DEPARTMENT
CASE No. 97 Misc. 238738 (CWT)

MARIA A. KITRAS as she is TRUSTEE OF BEAR REALTY TRUST, et als.,

Plaintiffs,

-versus-

TOWN OF AQUINNAH, et als.

Defendants.

AFFIDAVIT OF BENJAMIN L. HALL, JR.

I, Benjamin L. Hall, Jr. hereby depose and state as follows:

1. I am the attorney for Defendant Gossamer Wing Realty Trust, Benjamin L. Hall, Jr., Trustee ("GWRT"), and Brian M. Hall as he is Trustee of Barons Land Trust ("BLT")(collectively the "Trusts").

2. I have practiced law in Edgartown since 1986. I have regularly reviewed the records at the Dukes County Registry of Deeds since the 1970's when I was learning the real estate business. I have been active in doing real estate title research since that time, doing a fair number of titles in Aquinnah.

3. The Sectional Plans in the record and before the court for the first time, were not maintained as records and no marginal reference for these Sectional Plans existed anywhere in Book 49, which contains all of the set-offs of various homestead lots and Lots 1-173, and includes reference to the report of Pease in which he reported to the Governor that he had fully and finally determined the bounds of the lands held in severalty and the bounds of the Common Lands.

4. This book entitled "Sectional Plans" simply appeared on a shelf in the main anteroom of the Registry of Deeds in late 2006, following the Appeals Court rescript. Before that time, this book may have been about the Registry, but was never in such an open and obvious place prior thereto, AND no formal index or reference of the same existed in any of the official

records of the registry before May 22, 2007, when the Registrar of Deeds decided that the Sectional Plans were a part of the official record. See letter from Diane Powers dated May 22, 2007 included in Ex. 20 and attached hereto for reference. As such, as of 2006, I was not aware, nor could he have been, despite diligent search for all relevant records of the set-offs, of the existence of this record, because, until 2007, the same was NOT a "record" to which I ever would have been directed. Therefore, at best, the Sectional Plans book simply was in the Registry and not a part of any official index of records prior to May, 2007..

Signed this 16th day of June, 2010 under the pains and penalties of perjury.

Benjamin L. Hall, Jr.

DUKES COUNTY REGISTRY OF DEEDS
P. O. BOX 5231
EDGARTOWN, MA. 02539

TELEPHONE
(508) 627-4025

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(508) 627-7821

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registry@dukescounty.org

DIANNE E. POWERS
REGISTER

DEBRA S. LEVESQUE
ASST. REGISTER

May 22, 2007

Mr. Benjamin Hall, Jr., Esq
P.O. Box 5155
Edgartown, MA 02539

Re: Sectional Plans of Indian Lands at Gay Head

Dear Mr. Hall:

Based on research, information gathered from several sources and input from the chief examiner of the Land Court I have determined that the plans you referred to in your December 6, 2006 email are in fact a part of the document recorded on October 26, 1871 in Book 49, Pages 89 to 198. My apologies for the delay in this determination, but I needed to be 100% certain before I could make this statement.

For purposes of identification I have made a notation in the margin of the document in Book 49, a notation in the inside cover of the book containing the plans (copies enclosed) and have moved the plans to the appropriate location. Should you require certified copies of these plans unfortunately you will need to order the complete document as to the best of my knowledge we cannot certify anything other than a complete document.

If you have additional questions please feel free to contact me.

Sincerely,

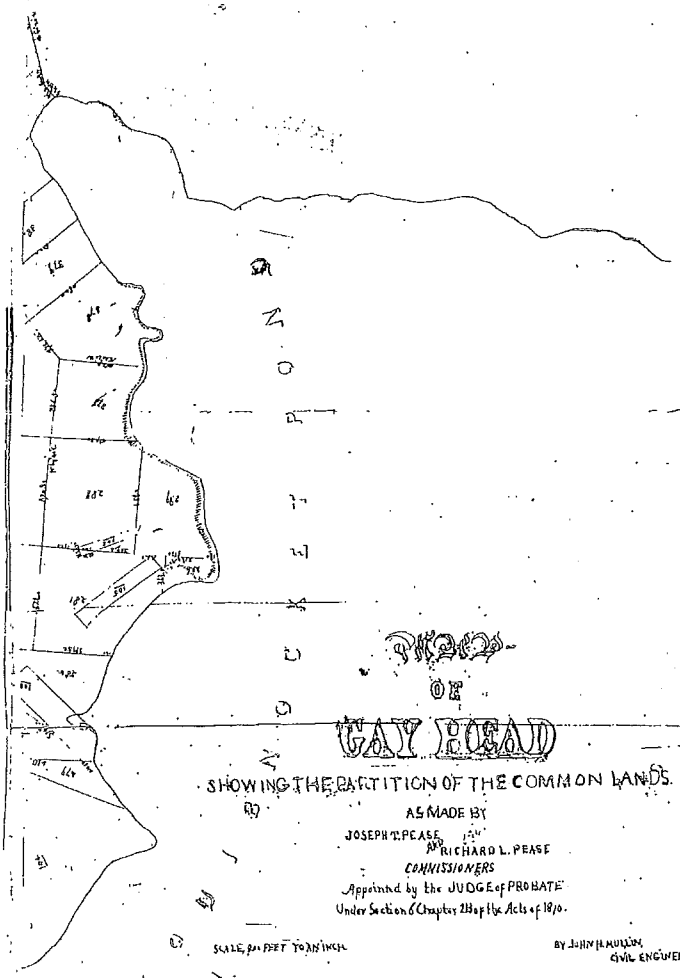
Dianne Powers

Dianne E. Powers, Register

/dp
Enc.
cc: James Decoulos
Nicholas Decoulos, Esq.

PART OF EX. 20
OF THE RECORD

CHILMARK



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

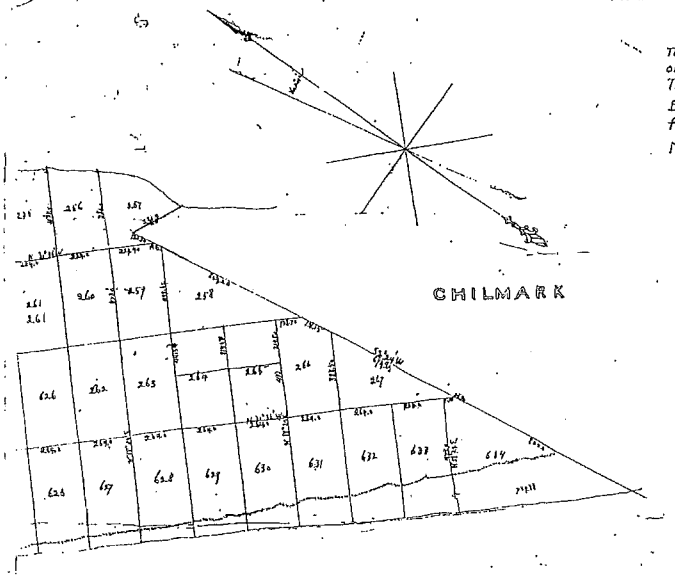
Under Section 6 Chapter 218 of the Acts of 1870.

SCALE 80 FEET TO AN INCH.

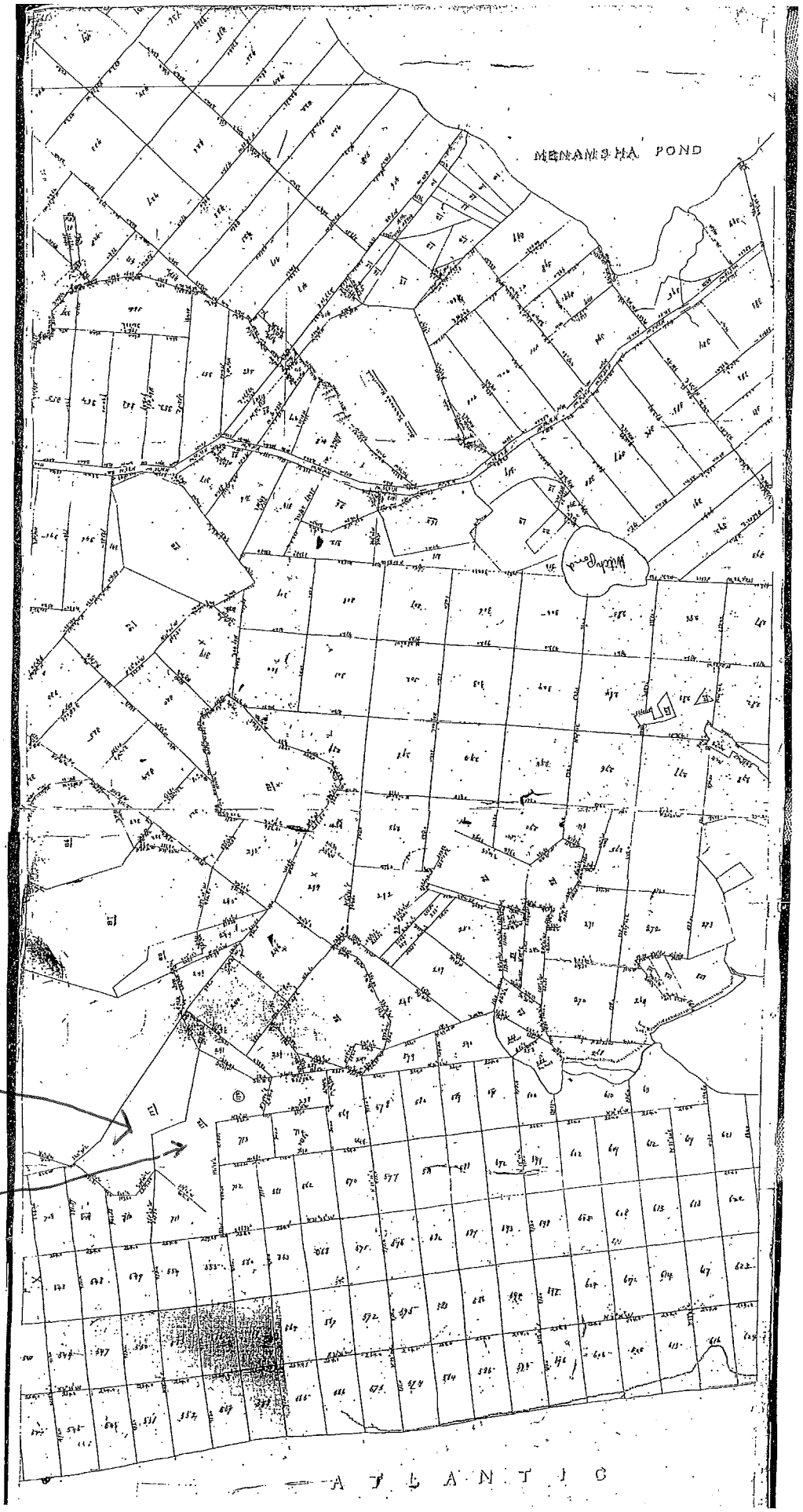
BY JOHN H. MULLIN, CIVIL ENGINEER.

The red lines show the boundaries of the lots indicated by the numerals enclosed. The descriptions of said lots are given in Books, Nos 49 and 65 in the Registry of Deeds for Dukes County

November, 1922. Wm. S. Smith, Surveyor.



OCEAN



Lots
177
178

CERTIFICATE OF SERVICE

I, Benjamin L. Hall, Jr., hereby certify that on the date subscribed below I served a copy of the foregoing documents by first-class mail, postage prepaid and/or by fax and/or and/or by email and/or in hand and/or by FEDEX to:

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6/17, 2010

Benjamin L. Hall, Jr.