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August 1, 2009

BY EXPRESS MAIL EO 963 576 332 US
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 Sir/Madam:

As you know, I represent Gossamer Wing Realty Trust as well as Barons Land Trust in the referenced matter. Enclosed please find for filing and docketing and then directly to Judge Trombly DEFENDANTS GOSSAMER WING REALTY TRUST AND BARONS LAND TRUST OPPOSITION TO THE MOTION FOR RECONSIDERATION OF THE COURT ORDER DATED APRIL 27, 2009 BY VARIOUS OTHER DEFENDANTS & CROSS – MOTION TO RECONSIDER THE SAME ORDER. Thank you.

Sincerely,

Benjamin L. Hall, Jr.

Cc: service list

CERTIFICATE OF SERVICE

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8/1, 2009

Benjamin L. Hall, Jr.

COMMONWEALTH OF MASSACHUSETTS

DUKES COUNTY, ss.	TRIAL COURT LAND COURT DEPARTMENT DOCKET NO. 238738
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 MOTION FOR RECONSIDERATION OF THE COURT ORDER DATED APRIL 27, 2009 BY VARIOUS OTHER DEFENDANTS &
CROSS – MOTION TO RECONSIDER THE SAME ORDER

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, as and for their memorandum in opposition to the motion to reconsider the order of the court dated April 27, 2009 filed by certain other Defendants, notably the Vineyard Conservation Society, Inc., the Martha's Vineyard Land Bank, the Town of Aquinnah, Caroline B. Kennedy and Edwin Schlossberg, David and Betsy Wice, Jack and JoAnne Fruchtman and the Commonwealth of Massachusetts (the "Opponents") and FURTHER, as and for the Trusts' Cross-Motion to reconsider the same order, strike the Defendants' proposed Exhibit 85 and to reverse the order as it struck all of the Trusts' proposed exhibits, and to clarify in the orde the question before the court including the shifted burden of production onto the Opponents and hereby state as follows:

THE COURT MISAPPREHENDS THE ADMISSIBLE BASIS
OF THE TRUSTS' PROPOSED EXHIBITS

The court in ruling on the Trusts' proposed exhibits stated that "[t]he Trust's proposed exhibits consist of certain documents concerning lots, which the Appeals Court has previously determined do not hold easement rights." This finding, respectfully, is simply incorrect, and not a

fair reading nor interpretation of what are proffered and why. The court, respectfully, appears to have overlooked the arguments in the Trusts' opposition to the motion to strike which involves lots 242 and 710 (as well as 177), lots which unequivocally have been determined to be deserving of a determination of right with respect to easement. While noted elsewhere herein, the Appeals Court did not rule as this court has now re-determined, regardless, the Trusts' proffered documents are admissible with regard to the other lots, 242 and 710, on which a prior judge of this court, has ruled, in this case, the Trusts do have counterclaims, and thus are entitled to a declaration of rights with respect to easements. As noted previously and again below, the Trusts' proposed documents provide inferential and probative information and judicial admissions by opponents as to facts relevant to the question before the court, which is stated succinctly as follows: "Was there an intent by the Commissioners in 1878, when setting off the common lands, to landlock these properties, rendering them useless to the members of the Wampanoag Tribe of Gay Head, the newly "enfranchised" citizens of the Commonwealth?" The Trusts ask the court to set forth this very question in an order to be clear about what the fact-finding issue in this portion of the bi-furcated case is supposed to be.

THE TRUSTS' PROPOSED DOCUMENTS CONTAIN PROBATIVE INFORMATION OF A RELEVANT NATURE AS TO LOTS 242 AND 710 (& 177) TOGETHER WITH JUDICIAL ADMISSIONS BY THE OPPONENTS

A judicial admission is an act or a statement of a party or his attorney occurring in a court proceeding that conclusively determine an issue, relieving the other party of the need to provide any evidence thereon. Brock & Avery Handbook of Massachusetts Evidence 8th Ed. Aspen Law © 2007 Brock & Avery §2.2 ("Mass. Evid. Handbook").

The Trusts designated the Defendant Town of Aquinnah's Opposition to Additional Joint Motion of [the Trusts] to Amend Answer, Crossclaims and Counterclaims because this document contained judicial admissions. At page 5 thereof, the Town admitted that "Zack's Cliffs Road may provide access to Lots 177 **and 242**…" (emphasis supplied). This is clearly relevant on the issue of an intent to landlock, the burden of which is on the Defendants as noted elsewhere herein.

Certain documents submitted by the Trusts clearly contain extrinsic evidence of inferential and probative value that is clearly admissible. See Mass. Evid. Handbook §5.5.4 citing Conroy v. Fall River Herald News Co., 306 Mass 488, 493 (1940) (inference that state of things once proved to exist, existed earlier – citing Wigmore and other Massachusetts cases). The

state of the roads, movement of people due to storms, relieving themselves of possession or occupancy of certain lands, historical studies, etc. all have inferential and extrinsic value with regard to countering any meeting of presumptive burden placed on Defendants on the issue of intent to landlock.

Usually extrinsic evidence may not be adduced to contradict or affect the language of deeds but the "great exception to the application of this rule to the construction of deeds is in the case of ways of necessity, where, by a fiction of law, there is an implied reservation or grant to meet a special emergency, on grounds of public policy, as it has been said, in order that no land should be left inaccessible for purposes of cultivation." Buss v. Dyer, 125 Mass. 287, 291 (1878).

The Broscheit trial transcript contains testimony by the Executive Director of the VCS. It also contains testimony regarding the presence on the ground of certain roads and their condition. These inferences again relate to the issue of intent.

The court respectfully, is requested to take judicial notice of Frangos v. Town of Aquinnah, (Misc. 299511), that involves the same issue of intent, involving many of the same parties, thus invoking estoppel against these common parties in arguing in a different fashion than they had in Frangos. The VCS Response to Admissions in the Frangos case (Misc. 299511) are offered because VCS admits in #2 that the public does have the right to enjoy the VCS lands in issue in that case. What that means is subject to further inference, to be argued.

The VCS Response to Document Requests in Frangos, numbered 4 and 5, allow the court to draw inferences that VCS has no scientific studies or reports of its lands that could demonstrate an intent to landlock. Otherwise, these would have been provided.

The VCS responses to Gossamer Wing's Interrogatories in this case dated June 14, 2004 are offered to show again that there is no evidence of an intent to landlock. See Responses to numbers 5 (no fact relating to intent to landlock), 7 (limited to crossclaims and says nothing about claims or counterclaims), 9 (no experts to testify on intent to landlock), 15 (no information provided in respect to data on VCS lands that could relate to issue of intent to landlock).

The VCS responses to Interrogatories in Frangos are offered because VCS in response #9 admits it owns no lands which are crossed by private parties to get to the land of the private parties. This is clearly probative on the issue of an intent to landlock.

In the Frangos v. Town of Aquinnah US District Court matter, where, again, many of the parties are common and the issue of intent was also a central question, giving rise to the doctrine of estoppel to bar a party from arguing differently than they have previously on the same issue, the Town responded to interrogatories in which the Town provides no evidence of an intent to landlock in response #1. In #16, the Town provides no evidence that the assessors do not assess all lands in Town as if they have access. This information is clearly inferential as an admission, or probative on the issue of an intent to landlock, and the Town is estopped on the basis of its own statements from arguing in a different fashion.

THE OPPONENTS CONTINUE TO DISTORT THE LAW ON INTENT AND THE SHIFTED BURDEN OF PRODUCTION IN THE ARGUMENT SEEKING REVERSAL

The Opponents continue to try to confound this court into shifting the burden of production away from the Opponents themselves by distorting the law of the presumption on intent in regard to easements by necessity. As shown, the question now before the court since adopting the bi-furcation order of Judge Lombardi, is stated succinctly as follows: "Was there an intent by the Commissioners in 1878, when setting off the common lands, to landlock these properties, rendering them useless to the members of the Wampanoag Tribe of Gay Head, the newly "enfranchised" citizens of the Commonwealth?" The Trusts request that this court incorporate this question and the burden of production as falling upon the opponents into an order outlining the law expected to be determined by the facts presented.

As shown hereinbelow, the Opponents instead subvert the law, by ignoring the shifted burden of production, and try to frame the question as to whether there was an intent to provide the easement at all. Such would re-write the law, and again, impose upon the successors in title to the tribal members, a reading that would have, in essence, enfranchised the tribal members with lands to which they would have no access and thus could use not. This would hardly "enfranchise" the new citizens at all.

As such, the question of relevance must be tested against the question to be decided, among other factors, including the remand order of the Appeals Court, relative areas of discussion based on presumed facts from the limited summary judgment record reviewed and discussed by the Appeals Court, and questions opened for inferential fact finding whether by a review of material not previously seen or now viewed in a fact-finding light.

THE PRESUMPTION ARISING WITH THE 1878 SET-OFF *SHIFTS THE BURDEN OF PRODUCTION* TO THE OPPONENTS TO SHOW THERE WAS AN INTENT TO LANDLOCK

The law ***presumes*** that one will not sell land to another without an understanding that the grantee shall have a legal right of access to it, if it is in the power of the grantor to give it, and it equally presumes an understanding of the parties that one selling a portion of his land shall have a legal right of access to the remainder over the part sold if he can reach it in no other way. Davis v. Sikes, 254 Mass. 540, 545-546 (1926)(emphasis supplied), quoting New York & New England Railroad v. Railroad Commissioners, 162 Mass. 81, 83 (1894). See generally Restatement Third, Property (Servitudes) ß 2.15. See also Black v Cape Cod Company, Mass. Land Court Misc. No. 69813, pgs 5-6 (1975) [1].

The **presumed** intent is not an actual subjective intent on the part of the grantor but an objective intent of the grantor and grantee based upon the circumstances of the conveyance that land would not be granted without a means to access it. See Restatement of Property § 476, comment g (1944); Restatement of Property (Third) §2.12.

This presumption, shifts the burden of production to the opponents, essentially putting on them the burden of proof that there was an intent to landlock the parcels in issue in this case. See, Massachusetts Guide to Evidence §301(d) (Flashner Judicial Institute, 2008-2009 guide prepared for the SJC Advisory Committee on Evidence Law)("Evid. Guide"). See also Brock & Avery Handbook of Massachusetts Evidence 8th Ed. Aspen Law © 2007 Brock & Avery §5.5 ("Mass. Evid. Handbook").

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[1] The Black court stated therein as follows:

> The partition of 1878 of the land held in common by the Indians was to establish parcels to be owned individually by the Indians, and this partition contained no provision for access to and from landlocked parcels by the designated owners of such parcels. **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.** Rights of way of necessity are created by a presumption of law. Where a landowner conveys a portion of his land in such a manner that he is unable to reach the land retained without travelling over the land conveyed, the law presumes in the absence of contrary evidence that the intent of the parties to the conveyance was to provide access to the former by passage over the latter. Davis v. Sikes, 254 Mass. 540.

Black v Cape Cod Company, supra (emphasis supplied).

THE BURDEN OF PRODUCTION SHIFTS TO THE OPPONENTS

It is axiomatic that there are two distinctive parts to the so-called "burden of proof." The first is the burden of persuasion that arises on the filing of the claim and is on the proponent of the claims. Evid. Guide §301(d) Mass. Evid. Handbook §5.5. The other part is the burden of production, which is the burden that one must put on evidence sufficient to carry the overall burden of persuasion. Id.

Accordingly, as noted by the Kitras Appeals Court, the burden of persuasion on the issue of intent **starts** on the persons offering the same. Id. The burden of production on the issue, however, shifts to the opponents upon the raising of the presumption to show the negative of the fact presumed.

The Evid. Guide at Section 301(d) states as follows:

> (d) Presumptions. *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 may be defined by statute, 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 that 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.

Evid. Guide §301(d)(*emphasis italicized*).

This presumption of an intent to provide access by an easement of necessity noted in the law above, then, shifts the burden of production to the opponents, essentially putting on them the burden of producing sufficient evidence that there was an intent to landlock the parcels in issue in this case, the negative of the initial burden of persuasion of the proponent of the easement. Id.

THE SHIFTING OF THE BURDEN OF PRODUCTION ONTO THE OPPONENTS IS THE LAW OF THE CASE

Judge Green's explanation on this point in his decision of June 4, 2001 was quoted in the previously filed Trusts' opposition. This was wholly in accord with the Appeals Court decision and the Evid. Guide §301(d) that the initial burden of persuasion is on the proponent of the easement by necessity. But, **upon showing the 1878 actions by the commissioners in setting off Lots 174 and above, the burden of production shifts to the opponents, who must now prove there was an intent to land lock these parcels.** The Opponents by choral repetition, seek to drum a different framing of the question of intent into the court's viewpoint.

This finding of the shifted burden by Judge Green was NEVER reviewed nor was it overturned by the Appeals Court, and continues to stand as law of the case. The Appeals Court merely reiterated that the initial burden lies with the proponent, but did not discuss the burden shift of the presumption, expressly leaving the collection of evidence, ruling thereupon, and the fact finding for this court.

The Appeals Court, in passing, noted expressly in *dicta*, that the burden was on the proponent of an "implied" easement.[2] This is true of the initial burden, until the division of land from a common grantor (a break of the unity of title) is shown. Once shown, however, the burden shifts to the opponents to show there was an intent to landlock. See Davis v Sikes, supra and discussion above. The Appeals Court did not discuss, nor did it limit in any way, the presumption (noted in the cases cited by the Trusts and by Judge Green in the June 4, 2001 decision herein) that THEN arises upon showing that lots carved by a common grantor (the 1878 Commissioners) had no access to a public way, that shifts the burden of production to the opponents to show the opposite, to wit, that it was the intention of the Commissioners to grant only landlocked lots. The Appeals Court NEVER directed the lower court to ignore nor to interpret the rules of evidence in anyway.

Because the presumption shifts the burden onto the Defendants, many of the arguments of relevance raised in general by the Defendants, are inapposite. The documents provided by the Plaintiffs and the Trusts, in essence, only come into play when and if the Defendants can meet

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[2] The Appeals Court made clear that it was in its "discussion" of the perceived status of certain lots (whether particular lots had easements by necessity to be left to the fact finder) when it merely noted the law on the burden to prove an existence of an implied easement, without further discussing the presumption that is raised with regard to an easement by necessity, stating, as quoted by VCS:

> 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. 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. Cheever v. Graves, 32 Mass.App. Ct. 601, 607, 592 N.E.2d 758 (1992).

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

their burden of production to show that there is evidence of an intent to landlock. If not, the intent to provide for such easements by necessity is ESTABLISHED. Evid. Guide §301(d).

Many of the Trusts' proposed documents the court summarily struck, assuming all were being offered with respect to Lot 177 only, address the issue of the burden being on the Defendants, and show that Defendants adduce no evidence of an intent to landlock on the part of the Commissioners. Indeed, the Black, supra court as noted in the footnote above, found that there was no evidence of an intent to landlock the set-off parcels.

THE COURT SHOULD FURTHER STRIKE DEFENDANTS PROPOSED EXHIBIT 85 AS IT ALSO WAS PRODUCED PRIOR TO 1878 AND THUS IS INCONSISTENT WITH THE ORDER STRIKING PROPOSED EXHIBITS 69-73

The court ordered Defendants' proposed exhibits 69-73 struck because they relate to periods prior to 1878 and thus are not relevant. This same rationale was NOT applied to proposed Exhibit 85, the 1850 Commissioners Set-Off of Chappaquiddick, performed under an entirely different set of laws and at a time in history significantly different from that of the 1863, 1869, and 1870 legislative acts that ended up creating the two set-offs of land that became the lands of the Town of Gay Head. The latter three enactments relevant here came during the time when all native peoples were being recognized as full citizens, and it was the plan of the legislature to fully "enfranchise" the Tribal members with landownership rights for their own benefit and consistent with the rights of all other citizens of the Commonwealth. Whatever had been mandated for a set-off of lands to the Chappaquiddick tribe was so remote in time and conducted pursuant to different historical perspective and background (i.e. when the tribal peoples of Massachusetts were not being considered as citizens but continued generally to be wards of the Commonwelath), as to be irrelevant to the question that is now before the court of an intent to landlock the Gay Head tribal citizens of the Commonwealth in 1878 set-offs under the legislative acts of 1863, 1869 and 1870, that had significantly different historical basis, and different geographical area than that of 1850.

THE COURT MISAPPREHENDS THE RULING OF THE APPEALS COURT WITH RESPECT TO LOTS 174 AND ABOVE

The court order of 4/27/09, respectfully, mis-apprehends the law and the remand ruling of the Appeals Court that sets forth the fact-finding mission, resulting in a more limited view of relevance than the remand directives of the Appeals Court decision in this matter. (Kitras v Town of Aquinnah, 64 Mass. App. Ct. 285 (2006))

The court in ruling on Plaintiffs' proposed exhibits 23 and 24, 37-39 stated that "[t]he Appeals Court has determined that Lots 1-188 or 189 do not hold any easement rights." Such was not, respectfully, the ruling of the Appeals Court, but also deviates greatly from the suggested procedure to be undertaken on remand actually in the Appeals Court order.

THIS COURT IS REQUIRED TO TEST ALL LOTS IN ISSUE FOR AN EASEMENT BY NECESSITY AT THE FACT-FINDING STAGE, TO DRAW ALL INFERENCES AVAILABLE FROM THE EVIDENCE AS TO WHETHER LOTS 174 AND ABOVE WERE ALL PART OF THE COMMON LANDS PRIOR TO 1878 AND HAS NEW EVIDENCE AS TO WHETHER LOTS 174 -189 WERE SEVERALTY LOTS

In the April 27, 2009 order, it appears this court has determined, with no discussion for guidance as to how it made such a determination, that the Appeals Court has "ruled," on the limited summary judgment record before it, that Lots 174-188 or 189, "do not hold easement rights." Respectfully, such is a mis-reading of the decision of the Kitras court, which simply reversed the decision of Judge Green of June 4, 2001 that dismissed the case ONLY for lack of the United States as a necessary party, and remanded the case for fact finding as noted. The Appeals Court specifically stated that it would "leave the question of scope of any easements to trial." 64 Mass. App. Ct. 285, 301 (2005).

Even as VCS has again quoted directly from the Appeals Court, the court directed:

> "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.** 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. . .

64 Mass. App. Ct. 285, 300 (emphasis supplied).

This was part of the remand directive of the Appeals Court. The rest was expressly "discussion" or *dicta*.

The Appeals Court expressly left the questions as to "any given lot carved from the common land" to the trial judge, leaving the parties to "make whatever showing they wish." Id.

THE QUESTION OF WHAT LAND CONSTITUTED THE COMMON LANDS AT THE TIME OF COMMENCEMENT OF THE PETITION TO PARTITION THAT CREATED LOTS 174 AND ABOVE REMAINS OPEN

The common lands consisted of all lands in the then District of Gay Head that were not determined to be held in severalty under statutes of 1863 and 1866. [St. 1870, c. 213]. The

common lands were given by the Commonwealth to the Town under the 1870 statute that created the Town. [St. 1870, c. 213]. Lots 1-173 were the only lots fully and finally determined in a report of 1871, by the Commissioner appointed by the General Court, to be the lots held in severalty. This occurred a year after the General Court had enacted the 1870 statute that created the town and gave all of the remaining common lands to the new Town of Gay Head, subject to the rights to have it partitioned. Since only lots 1-173 were found to be in severalty, it is easy to inferentially determine that all of the remaining lands that became the Town were part of the common lands and given to the Town, thus preventing any further Tribal land acquisition under the old method of fencing and occupying. The Tribal members were now full citizens and subject to the laws of the Commonwealth, including that one cannot gain property adversely against a Town. Lots 174 and above were created in 1878, could not have become, after October 1871, a severalty lot. and thus had to be carved from the common lands. This inference has never before been reviewed or adjudged by any fact-finding court and remains an open question that must be resolved as ordered as part of the Appeals Court remand order.

LOTS 174-189 WERE NOT AMONG
PEASE'S 1871 REPORT "FULLY & FINALLY" DETERMINING THE
LANDS HELD IN SEVRALTY AND THUS, AS OF 1871
WERE PART OF THE COMMON LANDS GIVEN TO THE TOWN

In 1871, Richard Pease, as Commissioner under the 1866 Statute [St. 1866, c. 67], that carried forward the work of Mr. Marston from the 1863 Statute [St. 1863, c. 42] that ordered him to determine "fully and finally" the bounds of the lands held in severalty and the bounds of the common lands, in 1871, after the partition action to divide the Common Lands had already commenced under the 1870 Statute that created the Town, filed his report with the governor which was also thereafter recorded at the Dukes County Registry of Deeds in Book 49, setting out ONLY Lot numbers 1-173. Mr. Pease reported to the governor that he had "completed" the work assigned him (i.e. he had "fully and finally" determined the bounds of the lands held in severalty and thus the common lands). Thus, all lands in numbers 174 and above were part of the Common Lands and had to be set-off therefrom.

Pease's report followed the enactment of the 1870 statute, of which he was undoubtedly aware, that dictated that all of the remaining lands were common lands and these were given to the Town. Lots 174-188 or 189 were NOT as of 1871 determined to have been severalty lots under Pease's "final" determination, but were among the lots much later created from these

common lands and simply did not exist until 1878. It is a question of inferential fact yet to be reviewed and determined as to whether, after fully and finally determining the bounds of the common lands and the bounds of the lands held in severalty in 1871 under the 1866 and 1863 statutes, and after the tribal members had all become citizens of the Commonwealth as of 1870 (at the latest), Pease could possibly determine that between 1871 and 1878 additional lands could become occupied and enclosed under the prior tribal law, in a way that would clearly be adverse against the Commonwealth or the Town, or rather that these lands were simply part of the overall partition of the common lands.

As noted hereafter, disputed inferences as to the interpretation of these facts, are beyond summary judgment, were beyond the disputed facts of the record on summary judgment which would only look at undisputed evidence, and can only be resolved with an evidentiary hearing, which the Appeals Court was NOT reviewing.

THE APPEALS COURT REVIEWED A LIMITED SUMMARY JUDGMENT RECORD TO SEE IF ANY LOTS COULD HAVE HAD AN EASEMENT BY NECESSITY BEFORE IT COULD REACH THE SECOND, AND CENTRAL QUESTION, AS TO WHETHER THE US WAS AN INDISPENSIBLE PARTY:
THE APPEALS COURT NOTED IT HAD MERELY DISCUSSED A REVIEW OF FACTS OF A LIMITED RECORD OF SUMMARY JUDGMENT THAT IT THEN EXPRESSLY REMANDED FOR FULL FACT FINDING

Despite the direct quote of the Appeals Court (Kitras at 300) that the prior *discussion* [of unity of title etc.] should not be construed to mean that the record reviewed by the Appeals Court would determine what lots may benefit from an easement by necessity, but that all such determinations are to be made by this court as fact-finder, after any showing the parties wish to make, this court has, respectfully now ruled that Lots 174 – 188 or 189 have NO EASEMENT RIGHTS, at all.

Some of the defendants, including VCS have previously conceded that "[a]s noted by the Appeals Court, it did not need to reach the issue of whether the United States was an indispensable party 'unless easements by necessity may be implied for some or all of the lots in question.' 64 Mass. App. Ct. at 291."

The Appeals Court was expressly looking to see IF ANY of the lots in question could have an easement by necessity implied. If so, it would go to the next step to see if the United States was indeed a necessary party. The Appeals Court was NOT reviewing the summary judgment record to make a determination as to which particular lots may or may not have

easements by necessity. Indeed, the Appeals Court expressly left that question for the trial judge on remand. Kitras at 300.

Since the Appeals Court did find, on the standard of review of a summary judgment record only, that there were, at least, some lots that could benefit from an easement by necessity, it then went on to its review of the necessary parties issue and ultimate holding, the expressed "discussion" (Id at 300) about unity of title and the history on lots 174-188 or 189 perceived by the Appeals Court and the inferences drawn according to said standard, had no bearing on its decision, but was "unintegrated *dictum*" not essential to the decision. See Better Boating Assn v. BMG Chart Prods., Inc., 61 Mass. App. Ct. 542, 550 (2004); Commonwealth v. Hall, 48 Mass. App. Ct. 727, 731(2000) (the quoted material was dictum – the court made clear it was discussing matters not essential to its decision)[3]. In the instant case, the Appeals Court went further to remand **all such decisions to this court**. Id at 300. The question of easements for lots carved from the common lands, Lots 174 and above, remains expressly open. By ruling that the Appeals Court ruled that Lots 1-188 or 189 do not have easement rights, respectfully, is NOT the Appeals Court ruling and ought to be corrected.

SUMMARY JUDGMENT REVIEWS A LIMITED RECORD &
DOES NOT BIND THE TRIAL COURT

Not only did the Appeals Court expressly remand the question of whether the lots in issue might have an easement by necessity to the trial court, the Kitras court (at 293 – seven pages before the court specifically remands all such questions) that it had "considered most favorably from the complainants' perspective" the record before it, which was a summary judgment record only, the standard of review and fact finding on such a limited record, as noted below, do not bind a lower court on remand to find the same set of facts, especially where the Appeals Court has expressly directed such further fact-finding.

Given that the record to be developed before this court is to be a fact-finding mission, an entirely different record and facts may yet be presented as the parties wish as the Appeals Court directed. Id at 300. See also, Goulet v. Whitin Mach. Works, 399 Mass. 547 (1987)(new trial judge not bound by prior hearing evidence –pleadings conformed to the evidence presented under liberal Rules of Civil Procedure).

[3] These cases support the finding that the unity of title discussion was mere "discussion" as expressed by the Appeals Court, or *dicta* and not part of the holding.

Since the case was remanded for further fact-finding, new documents may be presented and different inferences drawn to determine and establish facts. Facts previously found, including disputed inferences drawn and interpretation thereof, under a prior summary judgment do not bind a court, if the claim is based on facts (or disputed inferences to be drawn and interpreted) entered into the record subsequently to the prior judgment. See, Phoenix Hardware Co. v Paragon Paint & Hardware Corp. 1 FRD 116 (DCNY 1939).

Additional fact-finding is required to determine the inferences that may be drawn from the documents. The rule of law has been stated as follows:

> In considering a motion for summary judgment, the trial court must determine whether a genuine issue of material fact exists rather than how that issue should be resolved, and a summary judgment should be granted only when the truth is clear. Lighting Fixture & Elec. Sup. Co. v. Continental Ins. Co., 5 Cir., 1969, 420 F.2d 1211, 1213; United States v. Burket, 5 Cir., 1968, 402 F.2d 426, 430. Even though the basic facts are undisputed, **a summary judgment may be improper if the parties disagree regarding the material factual inferences that properly may be drawn from these facts**. *See, e.g.*, N.L.R.B. v. Smith Industries, Inc., 5 Cir., 1968, 403 F.2d 889, 893; Keating v. Jones Development of Missouri, Inc., 5 Cir., 1968, 398 F.2d 1011, 1013.

Cole v Chevron Chemical Co., Oronite Div., 427 F.2d 390. 393 (5th Cir. 1970)(emphasis supplied).

On the same issue, another court stated the rule as follows:

> There are cases, however, such as Cali v Eastern Airlines, Inc., 442 F.2d 65 (2d Cir. 1971) and Empire Electronics Co. v United States, 311 F.2d 175 (2d Cir. 1962), which hold that although there may be no dispute as to the basic evidentiary facts, summary judgment is improper where the case stands or falls on the inference that may be drawn from these facts--particularly, where the inferences depend upon subjective feelings and intent. See comments so holding in Donnelly v Guion, 467 F.2d 290, 294 (2d Cir. 1972) This rule applies where the 'undisputed evidentiary facts disclose competing material inferences as to which reasonable minds might disagree . . .' (442 F.2d at 71)

Dalesio v. Allen-Bradley Co.. 64 F.R.D. 554, 556 (W.D.Pa., 1974)(emphasis supplied).

THE APPEALS COURT REMANDED THE CASE FOR FACT FINDING: NEW EVIDENCE IN RESPECT TO LOTS 177 AND 178

This court has ruled that the Appeals Court ruled that lots 174-188 or 189 do not have easement rights. The Trusts respectfully, dispute that this was the ruling of the Appeals Court.

The Appeals Court expressly sent this issue back to the trial court. There is new evidence to present to the court on this issue, not previously before the court in this matter.

The Appeals Court reversed Judge Green's dismissal under Rule 56 summary judgment, which was based on the papers then presented to the court, and which lower court order had been grounded solely on a determination of a lack of necessary parties. The Appeals Court remanded the case for fact finding to the trial court. Kitras at 300. Some facts already established by Judge Green were NOT overruled, the 1878 Commissioners set-off being one. Other facts were assumed by the Appeals Court under a standard of review for a summary judgment. Still others were stated by the Appeals Court, in "discussion" (*dicta*), on the summary judgment record as perceived by the Appeals Court. Since the case was remanded for fact finding, as noted above, new documents may be presented and different inferences drawn to determine and establish facts.

One of the areas subject to new evidence or establishment of fact is the status of Lots 174-188 or 189. New evidence of the Sectional Plans, together with new documents now brought before the court could lead the court to actually make a firm determination as to these lots that was lacking from the June 4, 2001 decision. Note that this June 2001 order was based on limited evidence since it was only a summary judgment hearing and NOT a trial or other mode for finding of fact.

As noted above, if Lots 1-173 were finally determined to have been those lots held in severalty under the tribal law of possession and this work was completed in 1871, how could more land have been enclosed after 1871 when this land was now the common lands held by the Town? The tribal members were all, after 1870, citizens of Massachusetts and under Massachusetts law, could NOT obtain adverse possession against a Town. The set-off of lots 174-188 or 189 and above HAD TO HAVE BEEN according to the partitioning of the common lands, and cannot be said to have been severalty lots as of the time of their set-off in 1878.

Regardless, this possession of the severalty lots was subject to the right of the Commonwealth to regain full seisin by restoration of the underlying fee, always held in the Commonwealth, if possession was given up. James v Watt, 716 F.2d 71, 74-75 (1st Cir.1983), cert. denied, 467 U.S. 1209 (1984) cited by Kitras v. Town of Aquinnah, 64 Mass. App. Ct. 285, rev. den'd, 445 Mass. 1109 (2005)

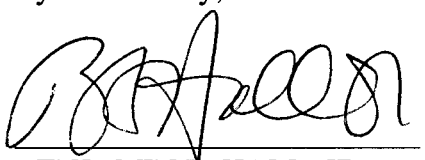
New evidence has been discovered that puts into question whether certain lots in the 174-188 or 189 group, those being lots 177 and 178, were possessed or could have been possessed pursuant to the tribal rule of enclosure and possession, during the period 1871 to 1878, regardless of the fact that the law applied to these new citizens, prohibited them from gaining title adversely by possession against the Town. Richard Pease in 1871 reported he had fully and finally settled all questions with respect to the severalty lots, listing them as Lots 1-173, leaving all other lands in the hands of the new Town under the 1870 statute, then if lots 177 and 178 had become later enclosed and possessed. If these lots were not enclosed or possessed, pursuant to the law of the James v Watt court, the fee would have returned to the Town as part common land and would have been subject to the partitioning.

In the Burgess document, newly proffered by the Plaintiffs, there is new evidence of no occupancy of Lots 177 and 178. This is clearly probative on the issue of an intent to landlock, or whether an easement exists for these lots.

WHEREFORE the Trusts request that the court allow the Trusts' cross-motion to reverse the order of April 27, 2009 with respect to the Trusts' documents allowing the same to be admitted and further strike Defendants' proposed exhibit 85, and further clarify that the burden of production is on the Defendants opposing the easements and that the question to be determined is as follows: "Was there an intent by the Commissioners in 1878, when setting off the common lands, to landlock these properties, rendering them useless to the members of the Wampanoag Tribe of Gay Head, the newly "enfranchised" citizens of the Commonwealth?"

Edgartown, Massachusetts

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



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