BENJAMIN LAMBERT HALL, JR., ESQ.
ATTORNEY-AT-LAW
45 MAIN STREET PO Box 5155
EDGARTOWN, MASSACHUSETTS 02539-5155
(508) 627-5900
(508) 627-3702 FACSIMILE [NO SERVICE ACCEPTED]
B.HALL.JR@HALLLAWOFFICES.COM [NO SERVICE ACCEPTED]

August 23, 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 MOTION TO CORRECT, AMEND or MODIFY THE ORDER & JUDGMENT of JUDGE TROMBLY DATED AUGUST 12, 2010 together with a memorandum in support and a certificate of service. Kindly mark this motion for hearing before Judge Trombly on September 8, 2010 at 11 am. While I anticipate traveling to the court for this hearing, due to scheduling issues, I request that I be allowed to appear by telephone, if necessary.

Thank you for your courteous attention.

Sincerely,

Benjamin L. Hall, Jr.

encls.
Cc: service list

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 in hand to:

Nicholas J. Decoulos, Esq.
Decoulos & Decoulos
39 Cross Street, Suite 204
Peabody, MA 01960
FAX (978) 531-0936
decouloslaw@verizon.net

Brian M. Hurley, Esq.
Rackemann, Sawyer & Brewster
160 Federal Street
Boston, MA 02110-1700
Fax 617-737-2092
bmh@rackemann.com

Leslie-Ann Morse, Esq.
477 Old King's Hwy
Yarmouthport, MA 02675
FAX (508) 375-6303
lamorse@gis.net

Jack Fruchtman
JoAnn Fruchtman
1807 Kenway Road
Baltimore, MD 21209-1807
JFruchtman@towson.edu

Ronald H. Rappaport, Esq.
Reynolds, Rappaport & Kaplan
106 Cooke Street P.O. Box 2540
Edgartown, MA 02539
FAX 508-627-3088
rrappaport@rrklaw.net

Russell H. Smith
Susan Heckler Smith
RR 1, Box 261A Moshup Trail
Gay Head, MA 02535

Kelley A. Jordan-Price, Esq.
Hinckley Allen Snyder LLP
28 State Street
Boston, MA 02109-1775
FAX 617-345-9020
kprice@haslaw.com

Jennifer S.D. Roberts, Esq.
La Tanzi, Spaulding & Landreth, PC
8 Cardinal Lane PO Box 2300
Orleans, MA 02653
FAX (508) 255-3786
jroberts@latanzi.com

George B. Brush, Esq.
459 State Road PO Box 1317
West Tisbury, MA 02575
FAX 508 693-7778
george@georgebrush.net

Ronald L. Monterosso, Esq.
One Handy Ave.
Edgartown, MA 02539
FAX 508-627-8952
redmont3@juno.com

John M. Donnelly, Esq.
Assistant Attorney General
Government Bureau/Trial Division
One Ashburton Place, Room 1813
Boston, MA 02108
FAX 617 727-3076
john.m.donnelly@state.us.ma

Diane C. Tillotson, Esq.
Hemenway & Barnes
60 State Street
Boston, MA 02109-1899
FAX 617-227-0781
dtillotson@hembar.com

8/23, 2010

Benjamin L. Hall, Jr.

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 MOTION TO CORRECT, AMEND or MODIFY
THE ORDER & JUDGMENT of JUDGE TROMBLY DATED AUGUST 12, 2010

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, move this court, pursuant to Mass.R.Civ.P. 59 and 60 to correct, amend or modify the decision and judgment as ordered by the court on August 12, 2010, and, in support thereof, provide a memorandum of law herewith.

The decision and judgment rendered thereupon by the court on August 12, 2010, with all due respect, contain significant misstatements of fact, chronology, and errors in setting forth the history of proceedings, law of the case, and in applying the facts to the law, respectfully, requiring correction to prevent manifest prejudice to the Trusts.

RULE 60 CORRECTIONS SOUGHT TO DECISION

The Trusts' memorandum of law supporting this motion details the, respectfully, rather numerous erroneous findings of fact and misapplications of law set forth in the decision of August 12, 2010. The requests for correction in the Trusts' memorandum are incorporated herein by reference.

RULE 59(e) CORRECTIONS SOUGHT TO JUDGMENT

The Trusts seek a corollary correction to the facts set forth in the decision that are repeated or implied in the judgment as are set forth above. These are as follows:

1) That the parties, including the Defendants the Trusts and Plaintiffs Gorda and Bear I and II, did not "agree" as that term is defined for purposes of a case stated, to "submit this action to the court on a case-stated basis, without calling witnesses." The fact finding was limited to the issue of intent to provide for implied reasonable easements by necessity to allow for reasonable use of the premises so benefitted.

2) That Defendant GWRT, owning lots 707, 710, and 242 in the relevant area is NOT a Plaintiff.

3) That Defendant BLT, owning Lot 177 in the relevant area, respective rights were not determined nor addressed nor adjudicated.

4) That lot 302 is outside the relevant area and was not subjected to the case with the filing of the Third Amended Complaint.

5) That Defendants the Trusts counterclaims have not been addressed nor adjudicated hereby and therefore lots 707, 710 and 302 should NOT be listed as having had any rights declared.

6) That on the law, and the facts, there was no sufficient showing of an intent to landlock by the Commonwealth for either the 1871 or the 1878 set-offs, and that the Plaintiffs' lots and those owned by the Trusts as established in the Third Amended Complaint have the benefit of a reasonable easement by necessity across the lands of the other parties to and from Moshup Trail.

WHEREFORE 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"), respectfully requests that this Court correct, amend and/or modify, pursuant to Mass.R.Civ.P. 59 and 60 the decision and judgment as ordered by the court on August 12, 2010 as set forth in the Trusts' memorandum and hereinabove and for such other and further relief as this court deems just and equitable.

Dated: August 23, 2010

Benjamin L. Hall, Jr.
Trustee of Gossamer
RESPECTFULLY SUBMITTED,
Gossamer Wing Realty Trust
Baron's Land Trust
By Its Attorney,

BENJAMIN L. HALL, JR.
45 Main Street, P.O. Bx 5155
Edgartown, MA 02539
(508) 627-3700
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.

DEFENDANTS GOSSAMER WING REALTY TRUST
AND BARONS LAND TRUST MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO CORRECT, AMEND or MODIFY
THE ORDER & JUDGMENT of JUDGE TROMBLY DATED AUGUST 12, 2010

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, present this memorandum in support of the Trusts' motion, pursuant to Mass.R.Civ.P. 59 and 60 to correct, amend or modify the decision and judgment as ordered by the court on August 12, 2010, and, in support thereof, state as follows:

The decision and judgment rendered thereupon by the court on August 12, 2010, with all due respect, contain significant misstatements of fact, chronology, and errors in setting forth the history of proceedings, law of the case, and in applying the facts to the law, respectfully, requiring correction to prevent manifest prejudice to the Trusts.

MISSTATED OR OMITTED FACTS IN THE DECISION

The August 12, 2010 decision begins by laying out the procedural posture of the case, but immediately incorrectly misstates the background procedure and status of the case. The decision omits a critical procedural fact, that the judgment issued by Judge Lombardi on 8/21/2003 was a Rule 54(b) separate judgment that left all of the other counts then plead in effect and pending

resolution in the lower court. 8/12/2010 Decision Page 1. These included prescriptive cross claims of GWRT.

BIFURCATION WAS TO ADDRESS SOLE ISSUE OF INTENT ON EASEMENTS BY NECESSITY – NEVER ANY AGREEMENT ON CASE STATED NOR THAT ENTIRE CASE TO BE RESOLVED THEREBY

The decision then correctly denotes that Judge Lombardi had bi-furcated the case but immediately misconstrues that bifurcation order and expands, without notice to the parties, the fact-finding being conducted by the court to include the prescriptive easement claims. The decision at page 2 buries this finding and determination in a footnote.

The easement by necessity count of the case was bi-furcated into an "intent" portion, and then the other requisite portions (for e.g. necessary parties, location issues, etc. which Judge Lombardi decided would be left for another day if there was a finding on the question of intent). Order Lombardi, J. August 14, 2006. The bifurcation order did not address determining any aspect of the prescriptive count and such claims have always been left for later determination.

Because the decision does err in making findings on the prescriptive easement count, and expressly tracks many of Judge Green's findings in the decision of June 4, 2001, it is ironic that the June 4, 2001 decision stated that "[t]he record does establish that Zack's Cliffs Road eventually came into use and served as the principal means of access from plaintiffs' lots..." This 2001 finding while in the context of the easement by necessity analysis, also provides a finding supporting the prescriptive claim. This finding not mirrored in the instant decision, is an omission of great import. The decision does not address the use of Zach's Cliffs Road as an indicator of a tacitly agreed location for an easement by necessity that had been serving or would serve from Moshup Trail as noted as a possibility by the Appeals Court, nor does it lend this finding of fact to provide some support for the prescriptive claims, since the court had decided to raise such an issue.

The other Defendants, namely Vineyard Conservation Service repeatedly sought to strike proffered documents from the record based the argument that these documents related solely to the easement by prescription claim, which was NOT before the court in the limited fact finding to be undertaken in whatever process the court had compelled the parties to engage for such purported fact-finding. Yet, Ex. 26, an aerial photograph taken in 1947 with the lot lines superimposed shows Zach's Cliffs Road running through the area in issue as well as other trails running over Lots 710, 709, etc. The photo demonstrates that there was a system of roads used to

access many of the lots in question from before 1947. Other evidence presented, but stricken, would have confirmed that these ways still exist to greater or lesser degrees on the ground.

FAILURE OF AGREEMENT ON FACTS OR INFERENCES BARS DECISION BY CASE STATED – TRIAL SOLE MODE FOR FACT FINDING

The decision also at page 2 asserts that the "parties agreed to submit the action to the court on a case stated basis, without calling witnesses." This is, respectfully, patently incorrect. There is nothing in the record to suggest either any such "agreement" or that the entire "action" was to be so determined. In fact, the record is rife with disagreements as to whether witnesses could present testimony (for e.g. the effort of Plaintiff Kitras to call a surveyor by way of submitting his deposition testimony in respect to evidence found in the field that was suggestive of a failure of enclosure required under Tribal law to gain possessory rights over the enclosed parcel) and whether the procedural mode the court seemed to be ordering to resolve the facts was compliant with Massachusetts jurisprudence.

Both Kitras and the Trusts repeatedly pointed out in motions and memoranda that because there had been no sufficient "agreement" as to the procedure taken, that the only lawful mode for resolving the facts would be through a trial on the issue of "intent" alone. In fact, respectfully, the decision, in a footnote 2 on page 2, misconstrues the Trusts Motion for Clarification served on April 15, 2010, which was a plea for clarification on the issue of what fact-finding procedure the court was going to follow as well as a request for some clarity on the issue to be decided by the court in the fact finding procedure. Rather than provide some decisional analysis, the court omits any discussion of the issues raised by the Trusts in seeking clarification, but simply re-characterizes the Trusts motion as a request for a trial, and denied the same stating "[t]o the extent not clear herein, that request is denied." The motion did contain a request, among several others, that the court clarify the matter by ordering a trial as being the only mode permitted by law to resolve facts under the circumstances. Still, such a request belies the very underpinning for the decision that the "parties had agreed to submit this action to the court on a case stated basis..."

Lastly, Judge Lombardi, who had entertained discussion (during which there had been no "agreement" of using an alternative to trial as a means for the requisite fact-finding on the bifurcated sole issue of intent, indicated that the fact finding would be conducted by way of a trial. Judge Lombardi denoted in his order dated September 21, 2007 on page 2 that "...[t]he

deadline for discovery...shall be continued to a date...after plaintiffs serve...documents they propose to introduce at **trial**..." (emphasis supplied). This further undermines the notion that the parties had agreed to a case stated mode.

Moreover, because there was no agreement on the evidence or the inferences to be drawn therefrom, only a trial could resolve the issues. Frati v. Jannini, 226 Mass. 430, 431 (1917); Paradigm Properties, LLC.v. Zoning Board of Appeals of Somerville, Land Court Case No. 315232 (LJL).[1]

MISCONSTRUCTION AND OMISSION OF CRUCIAL FACTS

The court then uses Judge Green' s June 4, 2001 decision as the basis for finding certain facts, missing several important procedural steps that had occurred subsequent to that decision which greatly altered the landscape upon which the bi-furcated decision should have rested. As a result of the use of the Green decision as a basis for fact determination, there are several repeated remarkable errors of fact, including misnaming of GWRT as a Plaintiff when GWRT has been a Defendant, and ignoring the facts set forth in the Third Amended Complaint, which greatly altered the parties and lots in issue before the court in an effort to limit the parties to those the court felt were necessary to the bi-furcated decision on the sole issue of intent.

GOSSAMER WING MISNAMED A PLAINTIFF AGAIN

At par. 5, the decision finds as follows:

> 5. Plaintiff Benjamin L. Hall, Jr., as trustee of Gossamer Wing Realty Trust (Gossamer Wing), owns lots 707, 710 and 302 on the set-off plan (Gossamer Wing lots). Lot 710 is contiguous to Kitras lot 711; the other Gossamer Wing lots are not contiguous to any of the Kitras lots.

In Judge Green's Decision of June 4, 2001, the Court also designated Hall as a Plaintiff. By Motion to Correct, Amend or Modify, GWRT objected to his designation as Plaintiff and sought to have the Decision amended to express the true status of Hall as a Defendant. The

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[1] Since the court had, by 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 thus had already 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.'").

Court (Lombardi, J.) by Order dated September 17, 2002, allowed that portion of GWRT's motion relating to his misnomer claim and indicated that "Hall [GWRT] shall hereinafter be designated as a Defendant." This court, by using Judge Green's decision as a basis, mirrored the same error that previously had been corrected. This ought to be corrected for the same reasons stated in the GWRT Memorandum supporting its prior motion to correct dated August 28, 2002.

DEFENDANT BARONS LAND TRUST CLAIMS NOT ADDRESSED

Further missing from any discussion are the counterclaims of Defendant BLT which owns lot 177, adjacent to Kitras lot 178, and counterclaims of GWRT which owns Lots 242, 707 and 710 in the relevant area in issue. Lot 302 was omitted from the case with the filing of the Third Amended Complaint. So BLT and its lot, and GWRT and its lots remain without any adjudication of right in the decision and judgment

CHRONOLOGICAL MISCONSTRUCTION AND OMISSIONS

The court also, respectfully, failed to take heed of chronologically critical facts that, respectfully, led to a misconstruction of the facts and misinterpretation of legislative edicts.

In par. 7-18 at pages 2-5 of the decision, the court appears to find a chronology of the relevant events, but juxtaposes and overlays certain events in an out-of-order manner, leaving a somewhat distorted chain that impacted the logic and fact basis for the decision.

The decision did not address a central portion of the 1870 Act incorporating the Town of Gay Head [St. 1870, c. 213], Section 2, that conveyed the Common Lands to the new town of Gay Head. The bounds of these Common Lands had not yet been determined as of the date of enactment, but the Legislature was aware that Mr. Pease had been working diligently on the same under the 1863 and 1866 Statutes. The decision at par. 11 does correctly describe Section 6 where a mode is spelled out, much as in an 1869 Statute that made all Indians citizens of the Commonwealth, for dividing Indian lands among the new citizens, intending to enfranchise them.

But, in Stat. 1869, c. 463, the Legislature made all Indians citizens of the Commonwealth, subject to and with the benefit of its laws. (§1). This 1869 Act (§2) provided that all lands held in severalty until that time should become the land of the Indian possessors. It further addressed the landed rights of all Indians save for the Gay Head and Mashpee in providing a mechanism for division by partitioning or otherwise as noted therein. Now being subject to he laws of the Commonwealth as full citizens, there could be no further adverse

possession against the Commonwealth or its subdivisions. The effect of this then is that after the passage of this 1869 Act on June 23, 1869, no further lands could be enclosed and taken in severalty by Indians.

The decision opines that "Section 6 of that chapter established a new procedure for the determination of property rights in the town, in apparent substitution for the procedure prescribed under the 1863 resolution." Par. 11 Decision 8/12/10. But, there is no agreed fact or inference in the record to support this determination and there is no express provision in the statute that Section 6 of the 1870 Act was to "substitute" for the procedure under the 1863 Statute.

The SJC has repeatedly made clear the interpretation of statutory mandates as follows:

> We are guided in our analysis . . . by the familiar maxim that a statute must be interpreted "according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." Hanlon v. Rollins, 286 Mass. 444, 447, 190 N.E. 606 (1934). See Sullivan v. Brookline, 435 Mass. 353, 360, 758 N.E.2d 110 (2001). Where the language of a statute is unambiguous, it is conclusive of the Legislature's purpose. See Pyle v. School Comm. of S. Hadley, 423 Mass. 283, 285-286, 667 N.E.2d 869 (1996), and cases cited. A statute should be construed so as to give effect to each word, and no word shall be regarded as surplusage. See Wolfe v. Gormally, 440 Mass. 699, 704, 802 N.E.2d 64 (2004); Bankers Life & Cas. Co. v. Commissioner of Ins., 427 Mass. 136, 140, 691 N.E.2d 929 (1998). When amending a statute or enacting a new one, the Legislature is presumed to be aware of prior statutory language. See Commonwealth v. Callahan, 440 Mass. 436, 440-441, 799 N.E.2d 113 (2003); Charland v. Muzi Motors, Inc., 417 Mass. 580, 582-583, 631 N.E.2d 555 (1994).

Ropes & Gray LLP v. Jalbert, 454 Mass. 407, 412-413 (2009)

> . . . [A]n expansion of the statute is the province of the Legislature, not the judiciary. See Connors v. Boston, 430 Mass. 31, 42-43, 714 N.E.2d 335 (1999). "We are not free to ignore or to tamper with [a] clear expression of legislative intent. If the law is to be changed, the change can only be made by the Legislature." Commonwealth v. Jones, 417 Mass. 661, 664, 632 N.E.2d 408 (1994).

Ropes & Gray LLP v. Jalbert, 454 Mass. 407. 415 (2009)

Indeed, at the time of the enactment of the 1870 Statute, the work of Mr. Pease under the 1863 and 1866 Statutes had not yet been completed. The 1870 Statute, by its silence on the issue of the work Mr. Pease was already undertaking under 1863 and 1866 Statutes, about which the Legislature was aware (See Senate Document 14 of 1869 ("1869 Report") – again the import of

which is missed in the glossing over of this important document in par. 14 of the decision[2]), could not be construed to have contemplated that work would end. Once completed, the work of the determining the bounds of the severalty lots and those of the Common Lands would be finally resolved. See also Ch. 463 Acts 1869 (established Indian ownership of severalty lots created UP TO THE DATE OF ENACTMENT – enfranchised all Indians by making them Commonwealth citizens subject to and with the benefit of all laws – including no adverse possession against the Commonwealth or its cities and Towns). Indeed, when Mr. Pease filed his report in May 1871 with the Secretary of the Commonwealth and reported the same to the governor under the 1863 and 1866 Statutes, there was apparent satisfaction by Mr. Pease with his "fully and finally" determining the bounds of the severalty lots and the Common Lands. After all, it was he who had been conducting the work and who acknowledged it had been performed under the 1866 and 1863 Statutes. An original copy of the Report was also filed with the Probate Court, making the Judge in the partitioning action under the 1870 Statute aware of the fulfillment of the predicate required boundary determination to making a partition of those Common Lands fully and finally determined as of 1871.

Where the decision failed is that it missed the chronology that Mr. Pease's report in 1871, "fully and finally" resolving the boundary issues, established the limits of the Common Lands, as shown on the Sectional Plans as being Homestead lots and Lots 1- 173 only. All other lands thus demarcated were Common Lands that had been given to the Town under Section 2 of the 1870 Act. Because the Indians were now citizens as of 1869, no further lands could be taken adversely

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[2] The committee reported in respect to lands held in severalty that under 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" and that "in the performance of his duties, Mr. Pease is obliged, upon such examination and evidence as is accessible, to decide as to the ownership of property... The settling of this matter of ownership has now become absolutely essential in connection with the new condition upon which these people are about to enter;" Senate Document 14 of 1869 at 4-5. In connection with the determination of the extent of the common lands, the Committee noted that "[t]his [the division of the common lands], however, is a question of 'property,' which every 'citizen' should have the privilege of determining for himself, and the people of Gay Head have certainly the right to claim, as among the first proofs of their recognition to full citizenship, the disposition of their landed property, in accordance with their own wishes. Accordingly, we have inserted in the bill accompanying this Report, a section making the same provision for a distribution of their lands as was made last year for the other tribes. [See Stat. 1869, ch. 463, sect. 3.]" Id at 5. The process of setting off the land to the new citizens was called "enfranchisement." 1869 Statute.

by enclosure and possession under the Tribal custom, since the same was prohibited by Massachusetts law (no adverse possession against the government).

What Mr. Pease's 1871 report did was to fully and finally establish the bounds of the severalty lots not only under the 1866 and 1863 Statutes, but because it was filed with the governor and thereafter in October, 1871 recorded with the Dukes County Registry of Deeds, it became the final report of the bounds of the severalty lots in the partition matter as well. The 1870 Statute is not a substitute for the earlier statutes; it was established as another mechanism for establishing the bounds of the Common Lands had Mr. Pease not completed the same in the event of a partitioning under Section 6 of the 1870 Statute. Since the partitioning could be only of the Common Lands, the establishment of their bounds was a predicate to any partitioning, should it occur.

BUT FOR THE PETITION TO PARTITION LOTS 174 AND ABOVE WOULD NEVER HAVE BEEN CREATED AND WOULD HAVE REMAINED OWNED BY THE TOWN

From 1869 and thereafter, NO NEW SEVERALTY LOTS COULD BE CREATED. Therefore, between 1871 and 1878, Mr. Pease who had completed the work in determining the severalty lots "fully and finally" was without authority to find any further new severalty lots, and indeed, none could have been created by any Indians after the 1869 statute. His 1871 report took a snapshot to reflect the bounds as they stood for purposes of enforcing the 1869 and 1870 Statutes – all lands not described in Book 49 of the Registry of Deeds as either homestead lots or lot numbers 1-173 were the Common Lands and thus owned by the Town and subject only to disposition by way of the partition action. But for the partitioning of the Common Lands then, lots 174 and above could NEVER have been created.

ALL LOTS CREATED FROM THE COMMON LANDS HAD TO HAVE BEEN PARTITIONED AND COULD NOT HAVE BEEN SEVERALTY LOTS

The decision omits a crucial part of the 1878 report, and the critical interpretation to be drawn thereby. Because Pease had already established the bounds of the Common Lands, and because no new severalty lots could then be created, as a matter of fact and as a matter of law, all lots thereafter carved from the Common Lands have to be considered to have been partitioned, and simply cannot have been severalty lots, despite any loose language that suggests the contrary. Such loose language is found in the descriptions of lot 189 in Book 65 of the Registry of Deeds which the court also omits.

The Appeals Court remanded the matter to have the Land Court determine what lots were carved from the Common Lands and what easement rights run to the same. 64 Mass. App. Ct. at 300.

LEGISLATIVE INTENT TO ENFRANCHISE THE NEW CITIZENS WITH PROPERTY THEY COULD ACCESS AND USE

The 1869 Statute, the 1869 Report and the Governors Address to the General Court in 1869 all provide guidance of the intent of the legislature in its desire to provide the new citizens with land that they could get to and use. If the legislature had intended to "enfranchise" these new citizens with landlocked property that they could not lawfully access nor could they use, yet they would be burdened to keeping it safe from dangerous conditions and paying taxes and other obligations of ownership, why would the legislature have even bothered to provide for such enfranchisement?

Certainly the court would not opine that the Commonwealth of Massachusetts, a leader in the efforts to abolish slavery and treat all men equally, especially following the Civil War, when Massachusetts recognized that the treatment of its own native population was a form of indenture[3] and subjugation, and wished to enfranchise all of these peoples as full citizens, with the benefit and subject to the laws of the Commonwealth, could have intended to provide lands to the majority of the Gay Head tribal members that they could not even get to and thus could never actually use.

As a matter of law, under this historical context, neither the Legislature, who passed the 1870 Act creating the Town of Gay Head and granting to the new Town all of the Common Lands that were "fully and finally" determined by Pease's 1871 report and intending to enfranchise the new citizens with the right to self determine that they wanted the Common Lands partitioned among themselves as a showing of their new found status as equal citizens, nor the Town that was the grantor of the lands set-off in 1878 (not the Commonwealth as the other Defendants have repeated distorted – since the 1870 Act gave the Common Lands to the new Town), nor the Probate Court or the Commissioners appointed thereunder, could have intended to divide essentially all of the Town's lands and distribute them largely so as to result in no ability for the recipients to access them and thus incapable of use, thus rendering the entire episode as an effort in futility.

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[3] See the prophetic words expressed by Mr. Bird in his report at Ex. 71 p. 23.-24, 48-50.

This view of an intent to landlock would render the expressed desires of the legislature as unimportant and cast the set-offs as an effort in futility. Moreover, such a mal-distribution which gave some lots on ways, but gave most lots with no frontage on a way, could never have intended that the non-frontage lots be landlocked as the same would have violated the provisions of equal protection under the US Constitution and under the Massachusetts Declaration of Rights.

THE DECISION SELECTIVELY OMITS LANGUAGE OF THE FINDINGS OF THE SENATE COMMITTEE THAT ADVERT A LEGISLATIVE INTENT THAT IF THE NEW INDIAN CITIZENS DESIRED TO USE THE COMMON LANDS AS THEIR OWN, THEY COULD SO CHOOSE

At par. 14 on page 5 of the decision, the court describes the expectancy that the Common Lands were useless anyway, thus providing evidence of an intent to landlock. Such selective phrasing, respectfully, does not adduce a decision on all of the evidence.

What is missing from this passage is the context in which the Committee made the statement.

> In addition to what is held in severalty, there is the large tract of some nineteen hundred acres held in common. This land is uneven, rough, and not remarkably fertile. **A good deal of it, however, is, or might be made, reasonably productive with a slight expenditure, and, doubtless, would be if the owners had the means;** but, deficient as they are in the "worldly gear," it is, perhaps, better that these lands should continue to lie in common for the benefit of the whole community as pasturage and berry lands, than to be divided up into small lots to lie untilled and comparatively unused. **This, however, is a question of "property", which every "citizen" should have the privilege of determining for himself, and the people of Gay Head have certainly the right to claim, as among the first proofs of their recognition to full citizenship, the disposition of their landed property, in accordance with their own wishes.**

Report of the Committee of the Legislature of 1869, on the Condition of the Gay Head Indians, January, 1870; Page 5. (Ex. 10, Pg. 72)(emphasis supplied).

The Legislature then left it to the new citizens of the Commonwealth to decide for themselves whether the Common Lands should be divided and could be made productive as part of their new privileges. The citizens requested the partitioning indicating a desire to productively use the lands, and the same occurred. Certainly such a scheme whereby the legislature left the decision to the citizens as to the use of their property could NEVER be said to have intended to provide such citizens with landlocked property which they could not access and thus could NEVER make productive.

Further, the decision omits any reference to Peases'own report in 1871 in which he describes the physical characteristics of Gay Head in rather glowing terms:

> Its peculiar geological characteristics have long attracted the attention of scientific men. Hitchcock speaks of it in enthusiastic terms, as "**a most picturesque object of scenery**," and says, "**there is not a more interesting spot in the State to a geologist**." Sir Charles Lyell, the famous English geologist, is highly laudatory of it. There is also **enough of interest about it to attract the curious and the lovers of rare natural scenery, who are neither scientific nor learned**.
>
> "The territory embraces about every variety of soil, a portion of the land is of the very best quality, and capable, under good culture, of producing most abundant harvests." The surface is very irregular, abounding in hills and valleys, ponds and swamps, fine pasture-land and barren beach, with occasional patches of trees and tilled land.
>
> Increasing attention is paid to agriculture, but there is room for great improvement. As an abundance of that most excellent dressing, rockweed, can be procured, additional labor, energy and skill would bring a sure reward. **A very large portion of the lands now inclosed** [sic], **was, a generation since, wild, rough land, unfenced, and seldom tilled, and of course unproductive and of little value.** As it has been cleared up, fenced and tilled, **its value has largely increased.**
>
> . . . The chief interest of Gay Head is not in its agricultural capabilities, which have never yet been developed, but in the rare scenery, the rich and varied colors of its lofty cliffs present to the admiring gaze of the traveler and the passing voyager, in its singularly mixed clays and sands, and in the numerous specimens of fossils and petrifications found in its banks."

Commissioner Appointed to Complete the Examination and Determination of All Questions of Title to Land and of All Boundary Lines Between the Individual Owners, 1871" (Ex. 18, Pgs. 110-111) (emphasis added).

There is broad evidence of great potential in the use of the Common Lands for a variety of purposes.

THE DECISION IS CONTRARY TO ESTABLISHED LAND COURT PRECEDENT AND CREATES A SCHISM IN THE DECISIONAL LAW

The Land Court has repeatedly reserved rights for such easements that were created by the set-offs and has at least twice ruled that easements by necessity did arise from the set-offs.

The Land Court in Taylor v. Vanderhoop, Land Court Misc. 129925 (Cauchon, J. - decision July 19, 1989) ruled as follows:

> . . .[T]he respective properties of the Plaintiffs' and Defendants' originally comprised a portion of the common lands of the District of Gay Head. Following the enactment of Chapter 213 of the Acts and Resolves of 1870, however, the District of Gay

> Head was abolished and the Town of Gay Head established. Thereafter, the common lands were partitioned and conveyed to individual owners, the parcels owned by the Plaintiffs and Defendants being among those created by such partition. Accordingly, as it is immaterial whether the severance of common ownership results from execution of law, See Viall v. Carpenter, 80 Mass. (Gray XIV) 126 (1859); Flax v. Smith, 20 Mass. App. Ct. 149 (1985), a reasonable implication arises that some means of ingress to and egress from the resulting lots is necessary to the lot owners' enjoyment of their property. . . .
>
> . . .While the record is devoid of evidence that the Way existed at the time of the partitioning of the common lands, the easement, nevertheless, came into existence at that time as an undefined easement by necessity.

Taylor v. Vanderhoop, Land Court Misc. 129925 (Cauchon, J. - *Date:* July 19, 1989) at pages 9-10.

See also Black v Cape Cod Company, Mass. Land Court Misc. No. 69813, pgs 5-6 (1975) where the 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).

CHRONOLOGY ERRORS LEAD TO A MISPERCEPTION OF LAW IN PAR. 18 THAT AS LATE AS 1878 TRIBAL LAW STILL APPLIED

The decision contains another further error that Tribal law still applied as late as 1878 and that it was merely Indian law that granted each tribe member access rights over all the common lands. The second part of the prior sentence is quite a surprising finding in light of the courts use of Judge Green's decision as a basis for entry of findings. There is no evidence of such Indian law existing after 1869; the evidence is to the contrary. See further discussion at page 16 below.

Even Judge Green's decision found that the owners of the severalty lots determined in 1871 by Pease report "enjoyed such rights in the remaining common lands as may have appertained to tribal members... The commissioner's 1871 report did not sever the set-off lots from access to the public way, since the owners of such lots held rights in the common lands." Judge Green made no finding as to Tribal law in regards to crossing the commons. He was viewing the severalty owners as having rights to cross the Common Lands since each owners of a severalty lot would have an ownership interest in the commons as well, sufficient to provide a right of use and to cross in common with other severalty owners entitled thereto.

Judge Green's decision further found as follows:

> Though, as noted, the presumption may be overcome by evidence of an intent to create a parcel without access, no such evidence appears in the present case.[22]
>
> FN 22: VCS's argument regarding tribal customs of common use is interesting, but it does not support a conclusion that either the commissioners or the several set-off lot owners intended that there would be no access to the set-off lots. In so stating, I am not shifting from plaintiffs the burden of proof on the existence of a way by necessity; instead, I am applying in support of that burden the presumption that severance of land from a way implies an intention that the land should have a means of access to the way.

Decision Judge Green June 4, 2001.

As noted above, the Common Lands bounds were determined and accepted by the Commonwealth and by the Probate Court in 1871 and were, pursuant to the 1870 Statute, given to the Town and thus were no longer Indian lands.[4] The prior statute in 1869 had already made the Indians citizens of the Commonwealth and subject to the laws thereof. Even as early as the 1863 Statute did the legislature indicate an intent that the bounds of the severalty lots should be fixed "fully and finally." Par 8 of decision at page 3.

THE COURT MISCONSTRUES THE LAW OF NECESSITY

At page 7 of the decision, the court indicates that it is considering whether there is a strict necessity. However, the court itself quoted the law ". . . 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). Reasonable necessity is all that is required. Id.

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[4] This was confirmed by Congress by passage of 25 USC §1771 et seq. noted by the court at FN 4 on page 5 of the decision.

The Restatement Third, Property (Servitudes) § 2.15 involves easements by necessity. The court in its decision from FN 5 at pg. 6, respectfully, confuses the difference between easements by necessity (§2.15 of the Restatement 3d) and easements by implication (§2.12 of the Restatement 3d). This is a common misperception as even §2.15 of the Restatement 3d uses the term "implied" servitudes in its context.

Access rights are almost always necessary to the enjoyment of property. (Comment b. of §2.15 of the Restatement 3d 3d.). The most common access rights of necessity are those to connect the property to a public way, but there are others. Id. Servitudes by necessity arise on conveyances by governmental bodies as well as by other grantors. (Comment c. of §2.15 of the Restatement 3d.). Servitudes are implied on the basis of necessity alone, without proof of prior use and **the rights claimed must simply be necessary to the reasonable enjoyment of the property, including those rights which are reasonably required to make effective use of the property, and depend on the nature and location of the property and may change over time and include utility services depending on the normal uses of land in the community**. (Comment d of §2.15 of the Restatement 3d)(emphasis supplied) See also, United States v. 176.10 Acres of Land, 558 F.Supp. 1379 (D.Mass. 1983)(access easement by necessity includes right to bring in electricity because it is necessary today for a residence).

The servitudes by necessity will continue to be implied unless it is **clear that the parties intend to deprive the property of rights necessary to its enjoyment**. (Comment e of §2.15 of the Restatement 3d)(emphasis supplied). In determining whether an easement by necessity exists then requires an affirmative showing of a **clear intention** of the parties at the time of the original conveyance separating the parcels to deprive the dominant parcel of rights necessary to its enjoyment. Id. Under no circumstance of conveyance herein has the court found a **clear intention** to deprive, whether in 1871 or in 1878. The court, respectfully then should find an easement by necessity exists. Comment e of §2.15 of the Restatement 3d goes on to clarify this requirement as follows:

> . . . Thus, servitudes for rights necessary to enjoyment of the property will be implied unless it affirmatively appears from the language or circumstances of the conveyance that the parties did not intend that result. Mere proof that they failed to consider access rights, or incorrectly believed other means to be available, is not sufficient to justify exclusion of implied servitudes for rights necessary to its enjoyment.

(Comment e of §2.15 of the Restatement 3d).

"It is not the necessity which creates the right of way, but the fair construction of the act of the parties." Nichols v. Luce, 24 Pick. 102, 104 (1834). As noted hereinbefore, the partitioning of the Common Lands then owned by the Town was conducted by Commissioners, who were empowered by the Probate Court under direct statutory mandate of the 1870 Act. The power to divide the Town owned common lands derived from the General Court and carried with it the intentions of the legislature in passing that Act. The intentions included that if the citizens of Gay Head were desirous of making use of the Town owned Common lands, they should have that privilege. Provision of landlocked lots would frustrate that very purpose.

THE DECISION INCORRECTLY FINDS THERE ARE EXPRESS EASEMENTS GRANTED TO OTHER LOTS THEREBY NEGATING ACCESS EASEMENTS BY NECESSITY

The decision at page 5 at par. 15-18 finds that certain rights and easements existed for some lots in the 1878 set-off. This finding is an overstatement of the facts in the record. Certain rights that are *profits a prendre* appear to have been granted in some cases, but these are not "easements" at all, but are of a different character. 4 Powell on Real Property § 34.01[2] at 34-7 (2001). In fact, these *profits* contain no express access easement describing how one is to access the lots on which the *profits* are to be taken. *Profits* are subject to termination based upon the limited purpose of which they are created. Makepeace Bros. v. Barnstable, 292 Mass. 518 (1935). A *profit* is a destination right to take from the servient estate and is limited to that purpose while such a use is being made, while an easement has no such destination right and is simply a non-possessory right, such as the right to cross land of another for access. Powell, supra. Regardless, even if, *arguendo*, these *profits a prendre* are to be construed to be easements of some sort, NONE were nor did any include an express access easements for regular and common access to one's lot.

There is no express language anywhere in the deeds that describes how the peat can be removed over other lots and no description of how one is to access the lots on which there are fishing rights. The facts reveal that the only "easements" which the decision finds to rebut the presumption of law of an intent to provide for access are nothing more than express *profits à prendre* which themselves lack any express easement as to how to get to the encumbered lots to draw the *profits* and thus suffer from the same need for implied easements by necessity as every other lot that was set-off in 1878. As such, the other Defendants were estopped from such argument.

Regardless, the decision is erroneous in finding that such *profits* lacking themselves in express access easements, would show evidence of an intent to landlock. In support of this, respectfully, unfounded position, the decision cites Joyce v. Devaney, 322 Mass. 544 (1948) a case that is inapposite. In Joyce, the deeds in issue provided for express access easements which the court held negated the intent to also provide for easements by implication. In the instant matter, there is not one single instance where a lot was provided with an express easement for access that either the court has found or that the other Defendants have argued.

THE DECISION INCORRECTLY FINDS THAT UNTIL AS LATE AS 1878 THE LOTS WERE HELD BY THE COMMONWEALTH UNDER COMMON LAW AND THE TRIBE UNDER TRADITIONAL LAW- AND THEN ERRS IN DEEMING CUSTOMS OF ACCESS TO BE INDICATIVE OF A LACK OF STRICT NECESSITY FOR ACCESS

The decision incorrectly finds that until as late as 1878 the lots were held by the Commonwealth under common law and the Tribe under traditional law and that Tribal custom allowed for access across the common lands and lands in severalty. Page 9 Decision. The decision, in FN 6, incorrectly applies such assumed access privileges to the incorrect standard of strictly necessary, finding their existence to be proof that access rights were intentionally withheld. These findings, respectfully, go beyond the record and are factually incorrect. See also Comment e of §2.15 of the Restatement 3d, supra.

The record provides uncontroverted evidence that the common lands were conveyed to the newly incorporated town of Gay Head from the Commonwealth of Massachusetts (the sovereign state) under Chapter 213, Section 2 of the Acts of 1870 (Ex. 11). There were no enclosures on these lands, no possessory rights – and no individual Indian titles to ratify. The conveyance of the common lands to the Town in 1870 was in fee simple absolute. "Until 1870, title to the Gay Head Indians' land was held on behalf of the tribe as a whole." Cornwall v. Forger, 27 Mass. App. Ct. 336, 341 (1989).

The 1870 Act gave the Common Lands to the Town. **Any aboriginal title** held by the Wampanoag Tribal Council of Gay Head, Inc. or any other entity presently [August 18, 1987] or at any time in the past known as the Gay Head Indians, to any land or natural resources the transfer of which is consented to and approved in subsection (a) of this section **is considered extinguished as of the date of such transfer**. 25 U.S.C. § 1771b (emphasis added). Because the Town was the grantor of the common lands, the Defendants who have jointly argued each point, hold a "heavier burden" to justify why access rights to the set-off lots were not written, recorded

or expressly reserved. Perodeau v. O'Connor, 336 Mass. 472, 474 (1957); Boudreau v. Coleman, 29 Mass. App. Ct. 621, 629 (1990).

The decision further confuses the title issue by alleging that the common lands were "occupied" and had "two distinct levels of ownership in Indian lands: fee title and Indian title." James v. Watt, 716 F.2d 71, 74 (1st Cir. 1983). Richard L. Pease in 1871 resolved these aboriginal claims in completing his duty under Chapter 67 of the Acts of 1866 - **to complete the examination and determination of all questions of title to land** and of all boundary lines between the individual owners.

As noted hereinabove, the 1869 Act virtually abolished the system of Indian traditional law barring any new severalty lots and granted citizenship, making the Indians subject to and with the benefit of the laws of the Commonwealth. The 1871 report fixed the bounds of the severalty lots and the Common Lands.

The Common Lands, until 1870, were held by the District of Gay Head and were owned by all. Cornwall, supra. The use of the common lands for access is quite compatible with common law principles. See reference to Judge Green's decision on this point above.

Regardless, even if Tribal custom were assumed to still be in effect by the Commissioners, though they would have been mistaken, the behavior and acceptance of a custom of access over lands of the others establishes the exact opposite of that determined by the court, *viz.*, that this activity was actually in accord with an intent to allow for undefined easements by necessity to be fixed in location as the parties agreed. These access rights, unexpressed in any deed from either set-off in 1871 or in 1878, were presumed to have been part of the grant, and thus are implied easements necessary to the enjoyment of the lands granted to enfranchise the new citizens. See Comment e of §2.15 of the Restatement 3d, supra.

RULE 60 CORRECTIONS SOUGHT FOR DECISION

The Trusts seek each of erroneous findings and determinations of fact and law in the decision noted above to be corrected or otherwise addressed. The Decision, respectfully, makes a number of erroneous factual findings which misconstrue the record before the court and which erroneous findings have potential deleterious effects of issue preclusion, collateral estoppel and judicial estoppel against the Trusts on many issues some of which were not germane to the case as hand. Moreover, many of these errors create internal inconsistencies that require, as a matter of justice and judicial economy, correction to the Decision.

The Trusts move pursuant to Mass.R.Civ.P. 60 "and/or otherwise" to correct the Decision and pursuant to Mass.R.Civ.P. 59 to correct, alter or amend the Judgment entered thereunder of Judge Trombly on August 12, 2010. Rule 60(a) reads in relevant part as follows:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

Mass.R.Civ.P.60(a). The court has the power thereunder to address clerical errors, such as the misnomer of GWRT, actually a party defendant, as a "Plaintiff." See, Anderson v. Brady, 6 F.R.D. 587, 10 F.R. Serv. 60a.12, Case 1 (E.D. Ky. 1947).

The Reporters Note to the Mass.R.Civ.P. note that while findings and decisions may not expressly fall within Rule 60(b), they remain subject to the complete power of the court rendering them to afford such relief from them as justice requires. John Simmons Co. v. Grier Brothers Co., 258 U.S. 82, 12 S. Ct. 196, 66 L.Ed. 475 (1922)."

More substantive issues are addressed by the court's plenary power to administer its own decisions and judgments and correct errors therein and otherwise by Rule 60(b).

The Reporters Notes to Rule 60(b) state as follows:

> . . . A motion under Rule 60(b) performs the same function as the former Massachusetts procedures of writ of review, writ of error, writ of audita querela and petition to vacate judgment.
>
> ...Rule 60(b) affords a "party or his legal representative" a means of obtaining substantial relief from a "final judgment, order or proceeding." . . . Rule 60(b) incorporates all possible grounds for relief from judgment; such relief must be sought by "motion as prescribed in these rules or by an independent action." The phrase "independent action" has been interpreted to mean, not that a party could still utilize the older common law and equitable remedies for relief from judgment, but rather "that courts no longer are to be hemmed in by the uncertain boundaries of these and other common law remedial tools." Klapprott v. United States, 335 U.S. 601, 69 S. Ct. 384, 93 L.Ed. 266 (1949). The court now has power "to vacate judgments whenever such action is appropriate to accomplish justice." *Id.*

Rule 60(b), it is respectfully submitted, applicable to orders of dismissal rendered pursuant to the modality of judicial fact finding employed here, though the Trusts dispute the chosen procedure's legal validity.

While it may be argued that some of the factual errors found in the Decision are such as should be decided by an appellate court, commentators and the Appeals Court itself have set forth that it is "better practice" to move pursuant to Rule 60 first noting as follows:

> The filing of a rule 60(b) motion may, of course, be appropriate even if an appeal from the dismissal is taken. Indeed, "the better practice" is to move first to vacate the order under rule 60(b) or Mass.R.Civ.P. 59(e), 365 Mass. 828 (1974). 5 Moore's Federal Practice par. 41.11[2], at 41-143 - 41-144 (2d ed. 1984).

Wilkinson v. Guarino, 19 Mass. App. Ct. 1021, 1023, 476 N.E.2d 983, 986, 1985 Mass. App. LEXIS 1717 (1985).

GOSSAMER WING REALTY TRUST IS NOT A PLAINTIFF & SHOULD BE DENOTED CORRECTLY AS A DEFENDANT SO AS NOT TO IMPOSE UNFAIR ADDITIONAL BURDENS

The Decision denotes GWRT as a Plaintiff in the instant matter. This is patently untrue. No where in the record has GWRT become a progenitor in this action. GWRT (and BLT) has merely filed compulsory cross-claims and counter-claims in essence stating that if the court finds easements benefiting the Plaintiffs, the Trusts should also be awarded the same easement. The Decision also did not specifically deal with the Trust's counterclaim or cross-claims.

Such a determination places GWRT in the untenable position of having to fight for rights which it had never taken on the burden of proving. The Restatement 2d of Judgments provides a multitude of situations in which the declaration of GWRT as a Plaintiff would have unfair and preclusive effects, whereas correcting the record would preserve many of GWRT's rights to maintain positions attendant to his defensive position.

. Moreover, the failure of the decision to address the counterclaims and cross-claims of The Trusts leaves much left as uncertain, which is counter to the tenets of a declaration of rights, preclusion and finality which the courts and the common law seeks to impose.

Restatement 2d of Judgments §17 sets forth the general rule of merger and bar of judgments. Restatement 2d of Judgments §19 states as follows:

> §19 Judgment for Defendant – The General Rule of Bar
>
> A valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim.

Comment g. to Rest. 2d Judgments §19 indicates that this section applies to dismissal of claims pursuant to a motion for summary judgment.

However, the Rest. 2d Judgments, establishes a series of exceptions to the general rules, especially where there are multiple claims and multiple parties, each with varying interests. There are a multitude of potential findings for a reviewing or second court to consider and potential far-reaching effects on the parties and others. See Restatement 2d of Judgments §24 Comment e, f and h and §20 Comment n. Moreover, since the court did not expressly deal with GWRT's counterclaim or cross-claims, the conclusive effect of the decision is widely opened to interpretation and counter to the underlying principles of the common law. Restatement 2d of Judgments §§21, 22, 23.

Restatement 2d of Judgments §27 establishes rules governing Issue Preclusion and leaves many factors up to a determination of later courts. Issue preclusion does not apply to issues actually litigated, Comment e. Rest 2d Judgment §27, but leaves such determinations by a second court to searches of the record and even extrinsic evidence. Erroneously naming GWRT as a Plaintiff leaves much uncertainty as to future litigation, leaving GWRT in a precarious situation of having undetermined issues which could place unfair burdens on him in the future.

Erroneously naming GWRT as Plaintiff also subjects GWRT unfairly to greater likelihood of selective bar attendant with being an initiator of an action. Restatement 2d of Judgments §28 establishes exceptions to the general rule of issue preclusion. Section 28 (4) states as follows:

> The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action.

Restatement 2d of Judgments § 28 (5) states as follows:

> There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact on the determination on the public interest or the interests of those persons not themselves parties in the initial action, (b) because it is not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

The Restatement 2d Judgment thus foresees differing burdens (dependant on whether a Plaintiff or Defendant) as a basis for determining whether an issue is precluded or not. See also, Albernaz v. City of Fall River, 346 Mass. 336; 191 N.E.2d 771; 1963 Mass. LEXIS 604 (1963) (difference in weight given to preclusionary effect of "defensive" versus "offensive" estoppel). See also Eisel v. Columbia Packing Co., 181 F. Supp. 298 (D.Mass 1960). Restatement 2d of Judgments § 29.

OTHER MISTAKES MAY FURTHER BURDEN GWRT
WITH A PRECLUSIVE EFFECT ON
LOTS NOT CENTRAL TO THE DETERMINATION OF THE INSTANT CASE

Moreover, the other factual errors and their implicit determination in the decision have other potential effects on other lands owned by GWRT, and not necessarily only those mentioned in the decision. The Restatement Judgments Second §43 (1) sets forth the preclusive Effect of Judgment Determining Interests in Property on Successors to the Property.

As set forth below, Lot 302, found by the court to be owned by GWRT, simply due to its location, is beyond the area in issue as narrowed by the pleadings in the Third Amended Complaint and by existing parties. If this fact is not corrected in the judgment, there could be an unfair and unintended preclusive effect on GWRT pursuant to Restatement 2d Judgments §43 (1) due to the mere mention of GWRT's ownership of Lot 302 in the Decision.

RULE 59 CORRECTIONS SOUGHT TO JUDGMENT

Rule 59(e) governs motions to alter or amend a judgment. The Trusts seek a corollary correction to the facts set forth in the decision that are repeated or implied in the judgment as are set forth above. These are as follows:

1) That the parties, including the Defendants the Trusts and Plaintiffs Gorda and Bear I and II, did not "agree" as that term is defined for purposes of a case stated, to "submit this action to the court on a case-stated basis, without calling witnesses." The fact finding was limited to the issue of intent to provide for implied reasonable easements by necessity to allow for reasonable use of the premises so benefitted.

2) That Defendant GWRT, owning lots 707, 710, and 242 in the relevant area is NOT a Plaintiff.

3) That Defendant BLT, owning Lot 177 in the relevant area, respective rights were not determined nor addressed nor adjudicated.

4) That lot 302 is outside the relevant area and was not subjected to the case with the filing of the Third Amended Complaint.

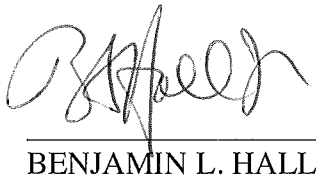
5) That Defendants the Trusts counterclaims have not been addressed nor adjudicated hereby and therefore lots 707, 710 and 302 should NOT be listed as having had any rights declared.

6) That on the law, and the facts, there was no sufficient showing of an intent to landlock by the Commonwealth for either the 1871 or the 1878 set-offs, and that the Plaintiffs' lots and those owned by the Trusts as established in the Third Amended Complaint have the benefit of a reasonable easement by necessity across the lands of the other parties to and from Moshup Trail.

WHEREFORE 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"), respectfully requests that this Court correct, amend and/or modify, pursuant to Mass.R.Civ.P. 59 and 60 the decision and judgment as ordered by the court on August 12, 2010 as set forth in the Trusts' memorandum hereinabove and for such other and further relief as this court deems just and equitable.

Dated: August 23, 2010

Benjamin L. Hall, Jr.
Trustee of Gossamer
RESPECTFULLY SUBMITTED,
Gossamer Wing Realty Trust
Baron's Land Trust
By Its Attorney,



BENJAMIN L. HALL, JR.
45 Main Street, P.O. Bx 5155
Edgartown, MA 02539
(508) 627-3700
BBO# 547622