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*5/7*  
May 7, 2010

Deborah Patterson, Recorder  
Land Court Department  
2<sup>nd</sup> Floor  
226 Causeway Street  
Boston, MA 02114

**RECEIVED**

MAY 10 2010

Nicholas J. Decoulos

RE: Maria A. Kitras, Trustee et al vs. Town of Aquinnah, et al  
Land Court Case No. 97 Misc. 238738 (CWT)

Dear Ms. Patterson:

Enclosed please find the Reply Brief of the Plaintiffs, Mark D. Harding and Sheila H. Besse and Charles D. Harding, Jr as they are Trustees of the Eleanor P. Harding Realty Trust, which I would ask you to please file with the papers on this matter..

If you have any questions please do not hesitate to contact me at 508-375-9080.

Yours very truly,



Leslie-Ann Morse

cc: Service List

COMMONWEALTH OF MASSACHUSETTS  
LAND COURT  
DEPARTMENT OF THE TRIAL COURT

DUKES, ss.

MISC. CASE NO. 238738

\*\*\*\*\*  
MARIA A. KITRAS, TRUSTEE, et als. \*  
Plaintiffs \*  
\*  
v. \*  
\*  
TOWN OF AQUINNAH, et als., \*  
Defendants \*  
\*\*\*\*\*

**PLAINTIFFS' MARK D. HARDING, AND TRUSTEES SHEILA H. BESSE AND  
CHARLES D. HARDING, JR. REPLY BRIEF  
OF DEFENDANTS' MEMORANDUM OF LAW ON THE ISSUE OF INTENT**

The plaintiffs, Mark D. Harding, and Sheila H. Besse and Charles D. Harding, Jr., as they are the trustees of the Eleanor P. Harding Realty Trust (the "Plaintiffs"), submit to the Court the following Reply Brief to the Memorandum of Law filed by Defendants' Town of Aquinnah, Vineyard Conservation Society, Inc, Martha's Vineyard Land Bank, Caroline B. Kennedy and Edwin Schlossberg, Jack and Joann Fruchtman, and David and Betsy Wice (the "Defendants") on April 21, 2010. The Reply Brief also addresses the Memorandum filed by Defendant Commonwealth of Massachusetts on April 21, 2010.

**PROFITS À PRENDRE GRANTED IN GAY HEAD**

At page 15 of Defendants' Reply Brief, they identify 36 set-off lots from 1878 that expressly reserved "...rights in and to the peat upon said premises."

A profit is similar to an easement, but includes the right "to take from the land of another either a part of the soil...or part of its produce." Gray v. Handy, 349 Mass. 438, 441 (1965).

Many jurisdictions provide a clear distinction between profits and easements. See, e.g., McDonald v. Board of Mississippi Levee Commissioners, 646 F.Supp. 449, 466-67 (N.D.Miss.1986) (easement holder lacks right to participate in profits; easement is a privilege without profit), aff'd, 832 F.2d 901 (5th Cir.1987); Alexander Dawson, Inc. v. Fling, 155 Colo. 599, 396 P.2d 599, 601 (1964) (a profit is a greater interest than an easement); Platt v. Pietras, 382 So.2d 414, 417 (Fla.Dist.Ct.App.1980) (right to take forage is a profit, not simply an easement); Oakley Valley Stone, Inc. v. Alastra, 110 Idaho 265, 715 P.2d 935, 937 (1985) (easement lacks right to participate in profits derived from land; right to hunt and fish is a profit); Cushing v. State, 434 A.2d 486, 494-95 (Me.1981) (right to cut and take timber is a profit, not a mere easement); Evans v. Holloway Sand and Gravel, Inc., 106 Mich.App. 70, 308 N.W.2d 440, 443 (1981) (a profit is a right that grows out of the soil while an easement is a privilege without profit).

One practical distinction between an "easement" and a "profit" should be kept in mind. A profit is generally thought of as being accompanied by easement rights to gain access to the servient estate. While courts will generally imply the easement rights, they should be made clear in the grant of the profit.

4 *Powell on Real Property* § 34.01[2] at 34-7 (2001).

Profits can be extinguished based upon the limited purpose for which they are created. Makepeace Bros. v. Barnstable, 292 Mass. 518 (1935) (affirmation of Land Court judgment which extinguished whaling operation profit due to the subsequent disappearance of whaling industry).

Aside from whether the excavation of peat remains a practical right that carries any weight today, the bigger problem that Defendants face with their argument is that the peat had to be removed from the individual set-off lots.

In the Chappaquiddick division of Indian Lands in 1850, which the Defendants providentially cite in their Reply Brief at page 7, the commissioners provided for express access to remove peat.

It is also intended that the persons, to whom the Peat Swamp is set off, shall have **the privilege of passing** to and from their several shares of said swamp with carts, teams, &c. for the purpose of taking their Peat &c. (emphasis added)

*Report of the Division of Indian Lands at Chappaquidick* at page 414 (Ex. 85).

The fishing rights which Defendants describe for set-off lots 382, 384 and 385 are also considered profits.<sup>1</sup> The Restatement of Property (Third) (2000) makes it clear that profits are "used most frequently for hunting and fishing rights and exploitation of natural resources through lumbering, mining, and other extractive activities." Id § 1.2 at page 15.<sup>2</sup>

What distinguishes a profit from an easement is that a profit holder has the right to remove a portion of the burdened property. In essence, a profit includes two property interests: the right to remove part of the servient tenement and access necessary to accomplish the removal (citations omitted).

Jon W. Bruce and James W. Ely, Jr. The Law of Easements and Licenses in Land § 1:9 at 1-25 (2010).

Controversy arises more frequently with regard to the scope of the profit. There are two aspects of this issue: What can be removed? and How can removal be accomplished? The first part of the issue concerns the subject matter of the profit. The second part concerns access. Problems develop when the parties do not cover these matters adequately in the instrument creating the profit. The question of what can be removed generally receives the most attention from the parties and thus is relatively well covered by specific provisions in the grant. Although there has been some litigation on this subject, most of the difficulty regarding the scope of a profit involves the question of access, particularly if large machinery must be used to locate or remove the item in question (citations omitted).

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<sup>1</sup> These lands were subject to a controversial zoning dispute between the Wampanoag Tribe and town of Aquinnah. Building Inspector and Zoning Officer of Aquinnah et al. v. Wampanoag Aquinnah Shellfish Hatchery Corporation et al., 443 Mass. 1 (2004). The Commonwealth intervened in support of the Town's opposition of tribal sovereignty.

<sup>2</sup> The Restatement describes these rights in section 1.2(e) *Profits are easements "plus"* [profits are easements (rights to enter and use land in the possession of another) plus the right to remove something from the land].

Id § 1:15 at 1-40 to 1-41.

The "easements" which Defendants identify are *profits à prendre* which have the same need for easements by necessity as every other lot that was set-off in 1878. There is no language anywhere in the deeds which describes how the peat can be removed over other lots.

**THE PHYSICAL CONDITION OF THE COMMON LANDS IN 1878**

Defendants next argue that the 1856 Report of the Commissioners (Ex. 72) appointed under chapter 15 of Resolves of 1855 to establish the boundary line between Gay Head and the town of Chilmark contains new information which casts a cloud on the intent of the Commissioners in 1878 to provide access to the set-off lots.

The Commissioners who visited the district of Gay Head and the town of Chilmark to establish the boundary line saw "with much regret, the condition of a large tract of the Gay Head lands" and "hope[d] that legislative wisdom may provide some adequate remedy." Ex. 72 at page 9.

Various individuals were involved in the efforts to establish the accurate boundary line between Chilmark and Gay Head. The Commissioners were particularly "indebted to Richard

L. Pease, Esq., of Edgartown, a gentleman whose intimate acquaintance with the records and history of Martha's Vineyard peculiarly fits him for the laborious task of searching the archives of the past, and educing facts long shrouded in obscurity." Ex. 72 at page 3.

To further support their challenge to the condition of the common lands in 1878, Defendants cite the "Report of the Committee of the Legislature of 1869, on the Condition of the Gay Head Indians, January, 1870", 1869 Senate Doc. No. 14.

The joint special committee of the Legislature, which consisted of two members of the senate and three members of the house, described the work of Richard L. Pease to complete the work to "ascertain and determine the existing boundary lines of the land held in severalty." (Ex. 10, Pg. 71). The committee noted 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."

Defendants point to the Appeals Court suggestion that the joint special committee "expected that these lots would 'lie untilled and comparatively unused' following division. Report of the Committee, 1869 Senate Doc. No. 14 at 5." Kitras v. Town of Aquinnah, 64 Mass. App. Ct. 285, 299 (2005).

Fifteen years after the Commissioners determined the boundary line between Chilmark and Gay Head - and one year after

the joint special committee's Report - Richard L. Pease provided his own report to the Legislature, which detailed a thorough description of the Gay Head land and its people.

Pease describes the physical characteristics of Gay Head at the beginning of his report:

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, 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).*

It is clear that Richard L. Pease, the most qualified individual who understood the physical condition of the common lands in 1878 better than anyone who lived outside of Gay Head, had a different perspective on the condition of the common lands than the Defendants.

#### **HISTORY OF ABORIGINAL TITLE**

The Defendants incorrectly stated that "the Commonwealth deeded the common lands to individuals in 1878". Defendants' Reply Brief at page 29.

The record reveals that the common lands were conveyed to the town of Gay Head from the Commonwealth of Massachusetts under Chapter 213, Section 2 of the Acts of 1870 (Ex. 11). As of 1870, there were no individual Wampanoags who claimed title to these common lands. The conveyance of the common lands to the Town in 1870 was in fee simple absolute. James v. Watt, 716 F.2d 71, 74 (1<sup>st</sup> Cir. 1983).

Furthermore, the Plaintiffs, who are of Wampanoag descent and derive their title from the original grantees of the common lands in 1878, have a different perspective on the Defendants'

interpretation of the Massachusetts Indian Land Claims Settlement, 25 U.S.C. § 1771 (the "Federal Act").

In addition to the Federal Act, the town of Aquinnah (formerly known as Gay Head) and the Commonwealth of Massachusetts were parties to state legislation enacted as Chapter 277 of the Acts of 1985, entitled "An Act to Implement the Settlement of the Gay Head Indian Land Claims" (the "State Act").

Both the Federal Act and the State Act incorporated by reference the "Joint Memorandum of Understanding Concerning Settlement of the Gay Head, Massachusetts Indian Land Claims" dated September 28, 1983 (the "Settlement Agreement"). Attached as Appendix A is the Settlement Agreement.

Paragraph 4 of the Settlement Agreement states that "The Town of Gay Head will convey all its rights, title and interest in the Town Common Lands (except for the shoreline as defined in Paragraph 10) to the Tribal Land Corporation." (page 2). The paragraph also provides for public access across the Common Lands.

The lands identified as the Common Lands in the Settlement Agreement are the same lands that Joseph T. Pease and Richard L. Pease left undivided in 1878. (Ex. 21, pages 189 and 192).

The Defendants argue on page 29 of their Reply Brief that the Wampanoag Tribe retained a "right of occupancy (including

the right of access) over all of the common lands" and that the Tribe retained aboriginal title.

Congress extinguished all aboriginal title "as of the date of such transfer". 25 U.S.C. § 1771b(b). In the current matter, the extinguishment of aboriginal title occurred during the transfer of the common lands from the Commonwealth to the Town in 1870. The Town agreed to "convey all its rights, title and interest" in the remaining common lands **back to the Tribe** (through its Tribal Land Corporation) as set forth in Paragraph 4 of the Settlement Agreement.

The Town's common lands were divided in 1878 and given to individual Wampanoag members. The action was a voluntary petition to the Probate Court to partition the common lands under Chapter 213, Section 6 of the Acts of 1870 (Ex. 11). The Legislature provided the Tribe with this option because its members had:

. . . 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).*

Because the Town was the grantor of the common lands, they held 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).

Defendants also suggest that the Wampanoags of Gay Head were not familiar with English Law and that they were "isolated", "differently situated" and "singularly anomalous". Defendants' Reply Brief at page 30. This characterization appears contrary to the content of the letter from Zaccheus Howwaswee to John Milton Earle on August 25, 1859. (Ex. 2, pages 2 and 4).

It was not the Wampanoags who were uneducated or irresponsible for failing to provide access to their new lots - but the Probate Court - who failed to fulfill its most basic of duties under the partition proceedings to provide access to the land it divided for the new citizens of the Commonwealth.

#### **CONCLUSION**

For the foregoing reasons, plaintiffs, Mark D. Harding, and Sheila H. Besse and Charles D. Harding, Jr., as they are the trustees of the Eleanor P. Harding Realty Trust, respectfully request that this Court grant easements by necessity to the lands carved from the common lands in 1878 as set forth in Count I of the complaint.

Respectfully submitted:

Mark D. Harding, and Sheila H. Besse  
and Charles D. Harding, Jr., as they  
are the trustees of the Eleanor P.  
Harding Realty Trust

By their Attorney:



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May 7, 2010

Appendix "A"

1983

DEC 8 10 35 AM '83

**JOINT MEMORANDUM OF UNDERSTANDING  
CONCERNING SETTLEMENT OF THE GAY HEAD,  
MASSACHUSETTS INDIAN LAND CLAIMS**

**WAMPANOAG TRIBAL COUNCIL  
OF GAY HEAD, INC.**

September 28, 1983

1. The Parties to the Settlement are the parties in the litigation before the United States District Court for the District of Massachusetts known as Wampanoag Tribal Council of Gay Head, Inc., et al. v. Town of Gay Head, et al., Civil Action No. 74-5826-G (including intervenors).

The Parties shall seek to have all others who may be interested in the Settlement act so as to assure that the Settlement becomes effective.

2. The Parties agree to the following settlement, all provisions of which are to be considered as inseparable and interdependent, except as otherwise specifically provided herein, and which are all conditioned upon requisite favorable action within 18 months of the execution of this settlement by other entities, including appropriate executive and legislative branches of the governments of the Town of Gay Head, the Commonwealth of Massachusetts, and the United States of America.

3. A state-chartered corporation (hereinafter called the Tribal Land Corporation) will be created by the Wampanoag Tribal Council of Gay Head, Inc. (hereinafter the Tribal Council) for the purpose of acquiring, managing, and permanently holding lands, including the lands defined in this settlement as the Settlement Lands. The Tribal Land Corporation shall hold the Settlement Lands, and any other land it may acquire, in the same manner, and subject to the same laws, as any other Massachusetts corporation, except to

the extent specifically modified by this agreement and the accompanying proposed legislation. Under no circumstances, including any future recognition of the existence of an Indian tribe in the Town of Gay Head, shall the civil or criminal jurisdiction of the Commonwealth of Massachusetts, or any of its political subdivisions, over the settlement lands, or any land owned by the Tribal Land Corporation in the Town of Gay Head, or the Commonwealth of Massachusetts, or any other Indian land in Gay Head, or the Commonwealth of Massachusetts, be impaired or otherwise altered, except to the extent modified in this agreement and in the accompanying proposed legislation.

4. The Town of Gay Head will convey all its rights, title and interest in the Town Common Lands (except for the shoreline as defined in Paragraph 10) to the Tribal Land Corporation. These lands comprise about 238 acres (which include the Cranberry Lands, the Face of the Cliffs, and the Herring Creek), and are described roughly on the map attached hereto and made part of this agreement. A survey shall be made in order to determine the precise acreage and boundaries of the Common Lands. The cost of the survey shall be regarded as part of the cost of the Tribal Land Corporation's acquisition of lands under this settlement and shall be financed out of the Federal funds appropriated pursuant to Paragraph 8. Existing surfaced roads across the Common Lands will continue to be owned and maintained by the Town of Gay Head or the Commonwealth of Massachusetts, as the case may be,



and shall be open to the public. Present unsurfaced roads providing access across the Common Lands to private lands beyond shall continue to be available for access to such private lands.

5. The Town of Gay Head shall convey the so-called Cook Lands (L. No. 395) to the Tribal Land Corporation. Such property, however, shall not be part of the Settlement Lands, and shall remain subject to taxation and foreclosure in the same manner as any other privately owned property in Gay Head. Any structure placed on this property shall be subject to all Federal, State and local laws, including Town zoning laws, State and Federal conservation laws, and the regulations of the Martha's Vineyard Commission, and in no event shall any structure or structures erected on this land comprise more than 3,000 square feet or exceed a height of twelve feet with a maximum peak of 16 feet. Changes in Town zoning laws made subsequent to the date of this Memorandum may be made applicable to such Cook lands only in the manner provided for changes to the Land Use Plan as described in Paragraph 16 of this Memorandum. If the said property is used for any purpose not permitted by the Land Use Plan, or is sold, leased or otherwise alienated by the Tribal Land Corporation to any entity other than one which is Indian controlled, all right, title and interest in the property shall revert to the Town of Gay Head, provided however, that nothing herein shall prevent the granting of a valid mortgage on the said property. All residents and property owners of Gay Head, their guests and

assigns, shall have an easement to use the pond beach on the Cook Lands for such recreational activities as are now carried out on such beach, including, but not limited to, fishing, swimming, outdoor recreation, or the beaching or anchorage of small boats, and shall have guaranteed access to such beach by land as provided in the Land Use Plan.

6. The Owners of the former Strock Estate will convey their ownership interest in certain lands formerly known as the Strock Estate in Gay Head to the Tribal Land Corporation. These lands consist of three parcels separate from each other--one parcel of about 57 acres, one of about 33 acres and one of about 85 acres, or a total of about 175 acres. (The precise lot numbers falling within these three parcels are listed in Appendix A.) These lands are to be sold to the Tribal Land Corporation at fair market value established without regard to Indian claims extinguished in accordance with Paragraph 8(d).

7. If the owners of the land located between the so-called Cranberry Lands portion of the Common Lands and Menemsha Creek (hereinafter called the Menemsha Neck Lands) are willing to sell their land, the parties will support the principle that the Federal Government should provide funds in order to acquire these lands so that they may become part of and be treated as Common Lands for purposes of this settlement. Such sales shall be at fair market value established without regard to Indian claims extinguished in accordance with Paragraph 8(d). If any owner refuses to sell

or if the Federal Government refuses to provide funds for these lands, the other provisions of this settlement will nevertheless remain in effect.

8. The parties to the settlement support the principle that:

(a) The Federal Government will appropriate funds to finance the survey of the Common Lands and the Cook property described in Paragraphs 4 and 5;

(b) The Federal Government will appropriate funds, in a sufficient amount to pay for the lands of the former Strock Estate described in Paragraph 6, based upon fair appraisal;

(c) The Parties will also seek Federal funds to pay for the Menemsha Neck Lands described in Paragraph 7, if any owners desire to sell, but if such funds are not obtained, the other provisions of this settlement will nevertheless remain in effect;

(d) ~~Congress~~ will enact legislation that eliminates all Indian claims of any kind, whether possessory, monetary, or otherwise, whether aboriginal or under recognized title involving lands and waters in the Town of Gay Head, and that effectively clears the titles to all land in Gay Head of any such claims, whether asserted in the past, present or future. That legislation will also extinguish all claims of any kind by the alleged Gay Head Tribe, whether possessory, monetary or otherwise, whether aboriginal or under recognized title involving any other

lands and waters within the Commonwealth of Massachusetts and that effectively clears the titles to all land in the Commonwealth of any such claims, whether asserted in the past, present or future. The alleged Gay Head Tribe and the Tribal Council on behalf of all persons of Indian descent hereby agree that this settlement is in full compensation for the claims so extinguished. This legislation shall not eliminate or affect the claim of any individual Indian which is pursued under any law generally applicable to non-Indians as well as Indians.

9. Neither the provisions of Paragraph 8 nor this Joint Memorandum of Understanding as a whole shall be deemed an admission of the existence of a tribe and are instead intended simply to extinguish claims made by any Indians, whether advanced by individuals, groups or tribes.

10. The Settlement Lands shall comprise the following:

(a) The Common Lands described in Paragraph 4, excluding the shoreline abutting on ocean, sound, or pond. Such shoreline, consisting of a strip of land extending 50 feet inland of mean high water along the ocean and sound and 30 feet inland of mean high water along Menemsha Pond, Menemsha Creek and any other body of water, shall continue to be owned by the Town of Gay Head and shall be available to all Gay Head residents and property owners, their guests and assigns, for recreational and other uses now commonly made of such shoreline, and shall be subject to a conservation trust

with the Town of Gay Head as Trustee that shall insure the continued right of such uses by such persons. Access to the shoreline across the common lands shall be preserved and the roads and paths established in accordance with the Land Use Plan mentioned in paragraph 16 for such access shall be maintained by the Town of Gay Head.

(b) The three parcels of the former Strock Estate described in paragraph 6.

(c) The Menemsha Neck Lands described in Paragraph 7 which, so far as they are acquired pursuant to this Settlement, shall be treated as though they were part of the Common Lands.


11. The Settlement Land shall be subject to an express federal statutory restriction against alienation. This statutory provision against alienation shall state explicitly that (a) no Indian tribe or band shall ever exercise sovereign jurisdiction as an Indian tribe other than to the extent agreed herein, over all or any part of the Settlement lands, or over any other land that may now or in the future be owned by or held in trust for, any Indian entity, but (b) the absence of such sovereignty shall not in any way prejudice Gay Head Indians in their efforts to obtain federal benefits available to Indians or to achieve recognition as a tribe. Notwithstanding the foregoing, the federal restriction against alienation shall permit the Tribal Land Corporation to convey a strip of land up to 70 feet wide beginning 30 feet inland from mean high water and 500 feet long, starting from the

terminus of the West Basin Road and running in an easterly direction along an area of West Basin now used for mooring boats, so that the Town may construct a bulkhead and related structures at this site, subject to the limitations set forth in the Land Use Plan.

12. Subject to the conditions expressly provided in this Agreement, the Settlement Lands are to be held in trust by the Tribal Land Corporation for the benefit of Gay Head Indians, defined as all descendants of the Indians listed in the census taken in 1869. A copy of the said census is included as Appendix B of this Agreement.

13. All Federal, State and Town laws shall apply to the Settlement Lands subject only to the following special provisions, regardless of any federal recognition the alleged Gay Head Tribe may acquire:

(a) The Settlement Lands will not be treated as real property subject to taxation pursuant to Massachusetts General Laws Chapter 59, or any successor State Law, but the Tribal Land Corporation will make payments in lieu of property taxes to the Town of Gay Head or other appropriate entity on the former Strock Estate, if and when improvements are placed on those lands. The fraction of land subject to such payments shall be determined in accordance with the density requirements of Town zoning ordinances. For example, if a house is placed on land which is zoned for two-acre homesites, then two acres of the land shall be subject to payments in lieu of



taxes. The amount of such payment shall be determined by assessing the value of the improvements and the value of the land attributable to such improvement, as determined in accordance with this section, and applying the town property tax rate or any other applicable tax rates just as though the improvements and attributable land were held by any private person. With respect to in-lieu payments that remain unpaid, neither the Town nor any other person will have the right of foreclosure against the Settlement Lands. Instead of its right of foreclosure, the Town or any other person otherwise entitled to foreclosure may enforce a lien against other assets of the Tribal Land Corporation or any subsidiary thereof, or any other entity controlled by the Tribal Council. If the in-lieu payments are not fully paid three years after they are due, the Town may seize the land and improvement on which the in-lieu payments are in arrears and lease such land and improvements on reasonable terms for periods of time not to exceed five years, the sums realized from such leases to be applied, after costs, to the payment of the amount in arrears. Seizure by the Town under this provision shall in no way affect title to the land, which shall remain with the Tribal Land Corporation, and at the expiration of any lease period during which all arrearages have been paid in full, control of the land and improvements shall be returned to the Tribal Land Corporation.

(b) The Tribal Land Corporation will have the right (after consultation with appropriate State and local officials) to establish its own regulations concerning hunting (but not trapping or fishing) by Indians on the Settlement Lands by means other than firearms or crossbow. These regulations by the Tribal Land Corporation shall impose reasonable standards of safety for persons and protection of wild life and the absence of such regulations imposing such standards of safety shall be deemed unreasonable. These safety and protection standards shall be subject to judicial review for reasonableness and may be enforced by State and local law enforcement officers. Hunting by firearm or crossbow shall remain subject to the State law.

14. The Gay Head Indians will not receive Federal recognition as a Tribe as a result of Congressional legislation to carry out the provisions of this Settlement, but they shall have the same right to petition for such recognition as other groups.

15. Plaintiffs in the lawsuit against the Town of Gay Head, known as Wampanoag Tribal Council of Gay Head, Inc., et al. v. Town of Gay Head, et al., agree to cause the lawsuit to be dismissed with prejudice at the time that the Federal legislation referred to in Paragraph 8 becomes effective.

16. The Settlement Lands will be subject to the Land Use Plan attached hereto and made a part hereof. The Land Use Plan shall be enacted as part of the zoning law of the Town of



Gay Head. Future amendments of the Land Use Plan as applicable to the Settlement Lands and embodied in the Town Zoning Law will require approval by the Tribal Land Corporation, by the Town of Gay Head (by whatever majority is usually required for such amendments) at two town meetings not less than one month apart, at least one of which shall be held during the month of July or August, and by such officials, if any, of the Commonwealth whose approval is required for amendments to zoning laws.

ACCEPTED:

For the Wampanoag Tribal Council of Gay Head, Inc.

By: *Udalya P. Buddin* Date: 11/19/83 Witness: *[Signature]*

For the Town of Gay Head:

By: *[Signature]* Date: 11/19/83 Witness: *[Signature]*

For the Taxpayers' Association of Gay Head, Inc.

By: *Hannah L. Mackin* Date: 11/19/83 Witness: *[Signature]*

For the Commonwealth of Massachusetts:

By: *Thomas H. Kelly* Date: 11/22/83 Witness: *[Signature]*

*True Copy of Attach.*

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*Wenona T. Silva, Town Clerk*