

Law Office of
NICHOLAS J. DECOULOS
39 Cross Street (Suite 204)
Peabody, Massachusetts 01960-1666
Telephone (978) 532-1020

Nicholas J. Decoulos
(Ext. 12)

E-Mail: decouloslaw@verizon.net

File #5617

August 20, 2009

Massachusetts Land Court
226 Causeway Street
Boston, MA 02114

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

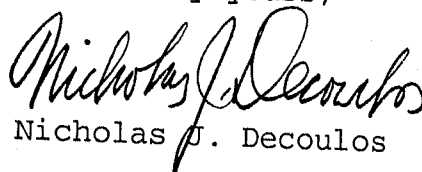
Dear Sir or Madam:

I enclose the following documents:

1. Plaintiffs' Motion for Reconsideration of Order Dated April 27, 2009.
2. Plaintiffs' Motion to Include Exhibit 87, which is attached thereto, with a supporting Affidavit of John J. Decoulos.
3. Enlarged copies of the Sectional Plans (Ex. 20), which replace the reduced copies thereof.

I did not mark for hearing the Plaintiffs' Motion to Include Exhibit 87, the reason being that on August 6, 2009, in accordance with the Court's Order dated July 20, 2009, I requested that the Court schedule a status conference concerning a trial schedule of this case. Therefore, I am requesting that the motion be heard on the same day that the status conference is held.

Very truly yours,


Nicholas J. Decoulos

NJD:aw
Enclosures
cc: Service List w/enc.

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 *

CERTIFICATE OF SERVICE

I, Nicholas J. Decoulos, do hereby certify that on this day I caused copies of the following documents to be served upon counsel and parties of record as follows:

DOCUMENTS SERVED:

1. Plaintiffs' Motion for Reconsideration of Order Dated April 27, 2009.
2. Plaintiffs' Motion to Include Exhibit 87.
3. Enlarged copies of Sectional Plans (Ex. 20)

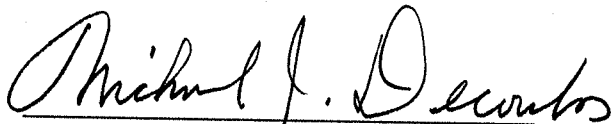
DATE AND MANNER OF SERVICE:

August 20, 2009, First class mail, postage prepaid

COUNSEL AND PARTIES OF RECORD:

See attached service list

Signed under the penalties of perjury.



Nicholas J. Decoulos
BBO #117760
39 Cross Street, Suite 204
Peabody, MA 01960
(978) 532-1020

Maria A. Kitras, Trustee, et al.

v.

Town of Aquinnah, et al.

Massachusetts Land Court No. 238738

Service List

John M. Donnelly,
Asst. Attorney General
Office of the Attorney General
Trial Division
One Ashburton Place
Boston, MA 02108

Estate of Leonard F. Vanderhoop
c/o Eric P. Rothenberg, Esquire
Orsi Arone Rothenberg
160 Gould Street, Suite 320
Needham, MA 02494

Mr. and Mrs. Jack Fruchtman, Jr.
1807 Kenway Road
Baltimore, MD 21209

Kelley A. Jordan-Price, Esquire
Hinckley, Allen, Snyder LLP
28 State Street
Boston, MA 02109-1775

Benjamin L. Hall, Jr., Esquire
45 Main Street
Edgartown, MA 02539

Brian M. Hurley, Esquire
Rackemann, Sawyer & Brewster, P.C.
160 Federal Street
Boston, MA 02110

Diane C. Tillotson, Esquire
Hemenway & Barnes
60 State Street
Boston, MA 02109-1899

Leslie-Ann Morse, Esquire
477 Old Kings Highway
Yarmouthport, MA 02675

Ronald H. Rappaport, Esquire
Reynolds, Rappaport & Kaplan, LLP
106 Cooke Street
P.O. Box 2540
Edgartown, MA 02539

Jennifer S.D. Roberts, Esquire
LaTanzi, Spaulding & Landreth, PC
8 Cardinal Lane
P.O. Box 2300
Orleans, MA 02653

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' MOTION FOR RECONSIDERATION
OF ORDER DATED APRIL 27, 2009

The Plaintiffs, Maria A. Kitras, as Trustee of Bear Realty Trust, Maria A. Kitras and James J. Decoulos, as Trustees of Bear II Realty Trust, and Maria A. Kitras and James J. Decoulos, as Trustees of Gorda Realty Trust, move the Court to reconsider the following rulings in its Order dated April 27, 2009, on the parties' motions to strike proposed exhibits.

The issue that has been raised by the Court's Order is whether Lot 178 was land held in severalty or in common in 1878 (II b p.3). The ruling on that issue will either benefit or deprive Lot 178 of an easement by necessity.

The Court has ordered that the following exhibits are not admitted:

II. THE PLAINTIFFS' PROPOSED EXHIBITS

b. *Proposed Exhibits 23 and 24, and 37-39*

Proposed exhibits 23 and 24 concern Lot 178, and proposed exhibits 37-39 concern Lot 79. The Appeals Court has determined that Lots 1-188 or 189 do not hold any easement rights. Accordingly, it is hereby ORDERED that to the extent that these proposed exhibits involve Lot 178 or Lot 79, they are not admitted.

- i. *Proposed Exhibits 25-36; 43-49; 51; 54-59; 61; 62; 64-67; and 76-80*

The parties have agreed to defer the issue of the admissibility of these proposed exhibits until the second half of the bifurcated case, as they concern the issues of easement by prescription and "ancient way." Accordingly, it is ORDERED that proposed exhibits 25-36; 43-49; 51; 54-59; 61; 62; 64-67; and 76-80 are not admitted in this half of the bifurcated case.

The reason given by the Court for not admitting exhibits 23-24 and 37-39, is that the Appeals Court has determined that Lots 1-188 or 189 do not hold any easement rights.

It is the Plaintiffs' contention that the following exhibits should not have been stricken because they will evidence beyond any doubt that Lot 178 was part of the common land and not granted as a severalty lot and, therefore, having the benefit of an easement by necessity.

1. Exhibit 24 (Page 202) 1878 Deed conveying Lot 178
2. Exhibit 30 (Page 241) Chain of Title to Lot 178
3. Exhibit 38 (Page 383) Plan depicting existing conditions of Lot 178, July 21, 2008.

Issues Before the Appeals Court.

The issues that were before the Appeals Court are stated in the Briefs filed by all of the parties and did not include the issue of whether Lot 178 was part of the common land.

The Brief of the Plaintiffs-Appellants contained the following Statement of Issues, as required by Rule 16(a)(2) of the Rules of Appellate Procedure:

A. Whether the Land Court erred in ruling that:
(1) any claim of an easement by implication or necessity for the benefit of Plaintiffs' lots could arise only from the actions of Commissioners appointed in 1870 in their 1878 Report;

(2) any such easement must extend only northerly from Plaintiffs' lots to State Road;

(3) any claim of such easement necessarily implicates the lots currently held by the United States in trust for the Wampanoag Tribe of Gay Head (Aquinnah); and

(4) any such easement does not include the right to install utilities in the easement way so determined.

B. Whether the Land Court erred in ruling that the United States is a necessary party and an indispensable party under Mass. R. Civ. P. 19 and, therefore, in its absence, Count One of the Plaintiffs' Amended Complaint must be dismissed.

C. Whether the Land Court erred in denying Plaintiffs' Motions to add the Wampanoag Tribe as a Defendant.

The Brief of the Defendant, VCS, contained the following Statement of Issues:

"Whether the lower court correctly concluded that the United States of America ("USA"), as Trustee for the Wampanoag Tribal Council of Gay Head,

Inc. ("the Tribe"), is an indispensable party to this action.

Whether the lower court properly exercised its discretion to deny motions to amend the complaint which (1) were filed five years after the commencement of the action and after a dispositive ruling by the lower court and (2) were futile, because the party sought to be joined by the amendment (the Tribe) is not the proper party, is not amenable to suit in state court and has not waived its sovereign immunity.

Whether, if this Court concludes that all necessary parties are before it, it should instruct the lower court to issue a judgment declaring that no easement by necessity benefits the Plaintiffs' land, either (1) because no such easement was necessary or intended by the parties or (2) because any such easement was extinguished.

Whether the issue of whether easements by necessity include utilities is ripe for review."

The Brief of the Defendant, Town of Aquinnah, contained the following Statement of Issues:

"The Defendant-Appellee/Cross-Appellant, Town of Aquinnah (the "Town"), adopts the Statement of Issues Presented for Review set out in the Brief of Defendant-Appellee/Cross-Appellant, Vineyard Conservation Society, ("VCS")."

The principal issue before the Appeals Court, which was unambiguously decided, was whether the United States and the Wampanoag Tribe were indispensable parties to this action.

The only facts relating to Lot 178, upon which the Appeals Court could rely, were those facts stated in the Land Court Decision of Judge Green.

The Land Court Decision, which was before the Appeals Court, contained the following paragraphs which relate to Lot 178.

Paragraph 9:

The commissioner appointed in 1863 died before completing the assigned task, and the General Court appointed a new commissioner, Richard L. Pease, in 1866. Resolves 1866, c.67. Commissioner Pease submitted his report on the lands held in severalty to the Governor in 1871, establishing set-off lots 1 through 173. As of the time of the commissioner's 1871 report, a significant portion of the land in Gay Head appears to have remained common land.

Paragraph 12:

The commissioners' 1878 report further explains that '[t]he lots of common lands drawn or assigned by the Commissioners . . . are numbered from no. 189 and upwards, in regular order. Lots no. 1 to no. 173, inclusive, were run out and bounded under previous provisions of the statutes. The record of these lots will be found in Land Records Book 49, pages 89 to 198, inclusive. Lots no. 174 to no. 189 [in 1878] were run out and bounded afterwards by the Commissioners who made partition of the Indian common lands.' (Emphasis supplied).

In the undisputed factual portion of the Land Court decision, paragraph 12, there is no mention that Lots 174-189 were ever held in severalty. In fact, the decision states "Lots 174 to 189 were run out and bounded by the Commissioners who made partition of the Indian common lands." (Ex. 21, p. 191).

Accordingly, the Appeals Court was never presented with the issue of which land specifically was held in severalty or in common, nor was it necessary to render it in its opinion.

Documents Not Part of the Record Before the Appeals Court.

The Appeals Court did not have before it the following documents, which are presently before the Court, because they were not included in the Record Appendix filed with the Appeals Court.

1. Exhibit 2, Page 2, August 25, 1859: Letter from Zacheus Hiawassee to John Milton Earle, Indian Commissioner, reproduced from the records of the American Antiquarian Society, with transcription, Page 4, re: custom of holding lots in severalty and title thereto.
2. Exhibit 3, Page 5, January 28, 1860: Letter from Leavitt Thaxter to John Milton Earle, Indian Commissioner, with transcript, Pages 9-10, which was in response to Exhibit 2, and the context thereof refers to the division of lands and the injurious consequences thereby.
3. Exhibit 4, Page 11, March 30, 1862: Report of John Milton Earle, Indian Commissioner, who was appointed pursuant to the Act of April 6, 1859.

"3. The economical state of all such persons, including the specification of all property of theirs in lands, and whether the same is held in severalty or in common, and whether now in their own possession, or lawfully possessed and occupied by others, and, in the latter case, by what color of alleged title; and also what proportion of such persons are paupers dependent on the towns in which they dwell, or on the State. (Emphasis supplied). (Ex. 4, pp. 15-16).
4. Exhibit 5, Page 56, March 30, 1862: Chapter 42 of the Acts of 1863 - Resolve relating to the establishment of boundary lines of Indian lands.
5. Exhibit 7, Pages 60-64, March 23, 1866: Boundary Lines in Gay Head, House No. 219. Report of Charles Marston, Commissioner.

6. Exhibit 8, Page 65, April 30, 1866: Chapter 67 of the Acts of 1866.
7. Exhibit 10, Page 68, January 1870: Report of the condition of the Gay Head Indians (particularly pp. 71-72).
8. Exhibit 20, Pages 162-168, the Sectional Plans, recorded October 26, 1871, Book 49, Pages 89-198.
9. Exhibit 24, Page 201, Conveyance of Lot 178. (The Appeals Court had the Deed, but it was illegible).
10. Exhibit 38, Page 383, Plan depicting Lot 178, existing conditions and certification.
11. Exhibit 86, (Mentioned at Page 131) "Map of Gay Head [undated] Martha's Vineyard, Mass. Showing the Land of Individual Owners and the General Fields or Commons. Made under the direction of Richard L. Please Esq. Commissioner appointed by Gov. Bullock under Resolve Chap. 67 of 1866. To determine the boundary lines of the Indian Lands at Gay Head. Scale 50 rods = one inch. By: John H. Mullin. Top. Engr.
12. PROPOSED Exhibit 87, Plan prepared by John J. Decoulos, PE PLS, supported by his Affidavit, which locates Lot 178 in the common lands.
Note - Proposed Exhibit 87 is the subject of a motion to add Exhibit 87 which accompanies this motion.

Decision of the Appeals Court Relating to Remand.

At p. 286, the Appeals Court set forth the issues before

it:

On cross motions for dismissal or summary judgment, a Land Court judge concluded that any easements by necessity would burden tribal land; that the claims could not fairly be adjudicated in the absence of that land's trustee, the United States (which had been dismissed from the litigation on sovereign immunity grounds); and that the owners' claims therefore must be dismissed for want of an indispensable party. A different judge denied subsequent attempts to join the Tribe directly and, pursuant to Mass.R.Civ.P. 54(b),

365 Mass. 820 (1974), entered a partial judgment from which these appeals and cross appeals mainly have been taken. We reverse and remand.

At p. 298, the Appeals Court unambiguously stated that it was assuming facts:

We have until now assumed, for lots numbered 189 or 190 and above, the intent to create easements. This assumption seemingly arises naturally from the necessity created by dividing the common land; the assumption may ultimately be found to be factually correct, but this is not inevitable. (Emphasis supplied).

This Appeals Court statement was also reiterated by Justice Leon J. Lombardi in his August 14, 2006 Order at page 4. Justice Lombardi also stated that "The first task for this court, therefore, is to decide whether there is a factual or legal basis for that assumption." Ibid.

The Appeals Court could not and did not make any findings of fact as was stated at page 300:

We do not mean to suggest by our discussion that an easement by necessity for any given lot carved out of the common land either does or does not exist, but rather that the question requires thoughtful consideration and resolution by a fact finder. This question thus is best left for the trial judge, after the parties have had an opportunity to make whatever showing they wish or are able, ^{FN10} remaining mindful that it is the proponents' burden to prove the existence of an implied easement. (Emphasis supplied).

The Appeals Court erred the cardinal rule of findings of fact, when it stated that it "assumed" that Lots 189 or above were part of the common land. In the same paragraph, the

Appeals Court stated to this Court, that the assumption could inevitably be wrong.

The Appeals Court delegated to this Court the task of making findings of fact, when it stated: "We have until now assumed, . . ." and remanded the matter to this Court for that explicit purpose.

Obiter Dictum

The portion of the decision of the Appeals Court relating to whether or not Lot 178 was held in severalty is to be considered as obiter dictum, which is defined in Black's Law Dictionary (8th ed. 2004), as follows:

obiter dictum (ob-i-t<<schwa>>r dik-t<<schwa>>m).
[Latin "something said in passing"] A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive). - Often shortened to *dictum* or, less commonly, *obiter*. . . .

"Strictly speaking an 'obiter dictum' is a remark made or opinion expressed by a judge, in his decision upon a cause, 'by the way' - that is, incidentally or collaterally, and not directly upon the question before the court; or it is any statement of law enunciated by the judge or court merely by way of illustration, argument, analogy, or suggestion.... In the common speech of lawyers, all such extrajudicial expressions of legal opinion are referred to as 'dicta,' or 'obiter dicta,' these two terms being used interchangeably." William M. Lile et al., *Brief Making and the Use of Law Books* 304 (3d ed. 1914).

The trial court is authorized to reject dictum.

United States of America v. Crawley, 837 F.2d 291, 292-293 (1988).

An alternative to definition is to ask what is at stake in the definition. What is at stake in

distinguishing holding from dictum is that a dictum is not authoritative. It is the part of an opinion that a later court, even if it is an inferior court, is free to reject. (Emphasis supplied).

Dictum is not law or precedence.

Dedham Water Co., Inc. v. Cumberland Farms Dairy, Inc., 972 F.2d 453, 459 (1992).

To be sure, these statements are *obiter dictum*, that is, observations relevant, but not essential, to the determination of the legal questions then before the court. Dictum constitutes neither the law of the case nor the stuff of binding precedent. See Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller, 957 F.2d 1575, 1578 (11th Cir.1992); Milgard Tempering, Inc. v. Selas Corp., 902 F.2d 703, 715-16 (9th Cir.1990). In short, dictum contained in an appellate court's opinion has no preclusive effect in subsequent proceedings in the same, or any other, case.

Because it was not an issue before the Appeals Court, this Court should consider the conveyance of Lots 174-189 and make its own determination as to whether those lots have the benefit of an easement by necessity.

Erickson v. Ames, 264 Mass. 436, 444 (1928).

Expressions in some of the earlier cases, which bear a contrary aspect, are to be taken as not essential to the point decided and hence not binding upon the court or falling within the protection of the doctrine of *stare decisis*.

Gould v. Wagner, 196 Mass. 270, 277 (1907).

It may be doubted whether the point now under consideration was in the mind of any one of the judges. However that may be, the statement was obiter and does not conclude us from deciding the point the other way in case we are of opinion that it should be so decided.

The decision of the Appeals Court, as it relates to lots held in severalty or the common land, was not factual when it used the word "assume" and went beyond the issue before it as stated in the briefs of all of the parties. This court should consider the assumption made by the Appeals Court, as what it actually is, obiter dictum.

Origin of Land Titles in Gay Head.

The documentary evidence is undisputed.

On August 25, 1859, the term "severalty" was first mentioned and described in the exhibits submitted to the Court in a letter from Zacheus Howwasswee to John Milton Earle (Ex. 2, pp. 2-3 transcribed on p. 4) in which he stated:

The land that we hold in severalty which come by heirship or purchase enclosed or taken in the rough and cleared as ours according to all Indian customs in severalty, we think our titles ought be confirmed.

Pursuant to the Act of April 6, 1859, John Milton Earle was appointed Commissioner and was ordered to make a report concerning the Indians of the Commonwealth. Earle's Report was submitted on March 8, 1862 to Governor John A. Andrew (Ex. 4, pp. 15-55). Earle was commissioned to examine into the

condition of all Indians. Relative to this case, Commissioner Earle examined:

"3. The economical state of all such persons, including the specification of all property of theirs in lands, and whether the same is held in severalty or in common, and whether now in their own possession, or lawfully possessed and occupied by others, and, in the latter case, by what color of alleged title; . . . (Emphasis supplied). (Ex. 4, pp. 15-16).

Commissioner Earle's Report provided a tabular listing of all of the land they held in severalty (Ex. 4, pp. 44 to 55). According to Earle's tabulation at page 47, Zacheus Howwasswee held 34 acres of land in severalty.

Earle stated in his 1861 Report the method by which a member of the tribe could obtain possession.

The land is generally rough, affording abundance of stone for fencing, Any member of the tribe may take up, fence in, and improve as much of this land as he pleases, and, when enclosed it becomes his own. The benefit to the plantation of having more land subdued and brought into cultivation, is considered a fair equivalent for its value in the natural state, and the title to land, so taken up and enclosed, is never called in question. (Ex. 4. p. 30)

If any man wishes for more land than he has, he has only to go upon the public domain and select what he wants, wherever he chooses, and fence it in, and it then becomes his own. If he will not do so much as this, for the sake of the land he wants, why should he have it? (Ex. 4, p. 39)

In January, 1870, a report was made by the Committee of the Legislature of 1869. (Ex. 10, Pgs. 68-84). At page 72, it is

stated: "In addition to what is held in severalty, there is a large tract of some 1900 acres held in common."

On April 30, 1870, pursuant to the enactment of Chapter 213 of the Acts of 1870 (Ex. 11, Pgs. 85-87), the District of Gay Head was abolished [by Section 1] and the Town of Gay Head was incorporated. Section 2 conveyed in fee simple absolute all of common lands to the Town of Gay Head. Section 6 began the division of the common lands and the defining by the Commissioners of boundaries of land held by individual owners and recognized the lands rightfully held by individual owners by stating, at pages 86-87:

[The judge] shall appoint two discreet, disinterested persons commissioners to make partition of the same [i.e., the common lands] . . . ; and the said judge of probate shall direct the said commissioners to examine and define the boundaries of the lands rightfully held by individual owners, and to properly describe and set forth the same in writing, and the title and boundaries thus set forth and described, being approved by the court, shall be final in the premises;

Thereafter, in an orderly process pursuant to Chapter 213, the following events occurred.

September 1, 1870, a petition was filed for the division and setting off of land held in severalty. (Pgs. 88-90).

October 17, 1870, a petition for partition was filed (Pgs. 94-96).

December 5, 1870, a warrant was returned to the Probate Court and Joseph T. Pease and Richard L. Pease

(the Peases) were appointed to make division of all of the common and undivided lands.

May, 1871, Richard L. Pease, as required by § 6 of c. 213, reported to the governor all of the boundary lines by the individual owners and the deeds to Lots 1-173 were recorded at the Registry of Deeds on October 26, 1871, Book 49, (Ex. 83, Pgs. 89-198) together with the Sectional Plans, upon which plans the lots were numbered from 1 through 173.

Zacheus Howwasswee, as requested by him in his letter to Earle (Ex. 1, Pgs. 2-3), received the land that he possessed which included Lots 51, 79, 93, 94 and 96, containing 35.3 acres, and the deeds are recorded at Book 49, Pages 140, 153, 160, 161 and 162. Zacheus Howwasswee died on June 26, 1873 (Ex. 23, Pg. 198).

The sectional plans and the map of Gay Head (Ex. 86) depict the subdivided lots of land held in severalty and the common lands. The sectional plans and the map of Gay Head were not available to the Land Court or to the Appeals Court and became newly discovered evidence after the Appeals Court decision.

December 21, 1878, the Peases reported to the Probate Court that they had completed their work and pursuant to the order of the judge of the probate court, the report was deposited in the office of the town clerk. (Ex. 21, Pgs. 189-194).

On December 21, 1878, in accordance with Section 6, the judge approved the report and ordered that the same be recorded at the Registry of Deeds.

As a result of the services performed by the Commissioners, from 1870 and 1878, the grantees of Lots 1-736 obtained deeds conveying fee simple absolute title, which accurately described the lots by metes and bounds and all of the lots are depicted on the set off plan. The deeds to Lots 1-736 are found in Exhibits 83 and 84.

The title that was vested in all of the grantees by the Commissioners has been the origin for the conveyances to the Plaintiffs and Defendants in this case.

The first time that Lot 178 was ever mentioned, depicted or described was on the set-off plan (Ex. 68) and in the Deed (Ex. 24, Pg. 202), both of which were the subject matter of the Report submitted by Commissioners to the Court dated May 12, 1879 (Ex. 17, Pg. 104) and the Report of the Commissioners dated December 12, 1878 (Ex. 21, Pg. 189 Transcript at Pg. 192).

There was no evidence or reference in any of the documents before the Appeals Court or this Court, that Lot 178 was part of the severalty lots.

The 1878 Report of Joseph T. Pease and Richard L. Pease was before the Appeals Court and is before this Court as Exhibit 21, Page 189. The Appeals Court did not have the Report of Richard L. Pease dated May 22, 1871, Exhibit 18; the Sectional Plans, Exhibit 20; or the Map of Gay Head, Exhibit 86.

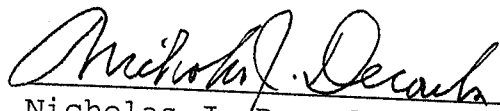
There is no evidence that Lot 178 was possessed by an Indian or that there was any stone wall defining its boundaries. (See Exhibit 38, Plan of Existing Conditions). Lot 178 was located on the common land as depicted on the map of Gay Head (Ex. 86).

See the Manual of Instructions for the Survey of Lands and Preparation of Plans, particularly, Section 2.1.3.5.9. "Because stone walls often mark property lines or evidence of property lines, they are important monuments to be located."

In consideration of the foregoing, it is respectfully requested that the Court reconsider its Order dated April 27, 2009, and include Exhibits 24, 30, 38 and the proposed Exhibit 87, which is the subject of the motion heretofore mentioned.

Maria A. Kitras as she is the Trustee
of Bear Realty Trust, Bear II Realty
Trust and Gorda Realty Trust; James J.
Decoulos as he is the Trustee of Bear
II Realty Trust and Gorda Realty Trust

By their Attorney:



Nicholas J. Decoulos
BBO# 117760
39 Cross Street, Suite 204
Peabody, MA 01960
Tel. 978-532-1020
August 20, 2009

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

DUKES, ss.

MISC. CASE NO. 238738

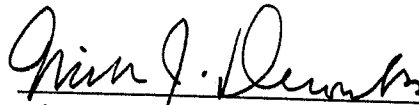
MARIA A. KITRAS, TRUSTEE, et als. *
Plaintiffs *
*
v. *
*
TOWN OF AQUINNAH, et als., *
Defendants *

PLAINTIFFS' MOTION TO INCLUDE EXHIBIT 87

The Plaintiffs, Maria A. Kitras, as Trustee of Bear Realty Trust, Maria A. Kitras and James J. Decoulos, as Trustees of Bear II Realty Trust, and Maria A. Kitras and James J. Decoulos, as Trustees of Gorda Realty Trust, move the Court to include as Exhibit 87 the attached plan prepared by John J. Decoulos, which locates Lot 178 in the common lands. This motion is supported by the Affidavit of John J. Decoulos also attached hereto.

Maria A. Kitras as she is the Trustee of Bear Realty Trust, Bear II Realty Trust and Gorda Realty Trust; James J. Decoulos as he is the Trustee of Bear II Realty Trust and Gorda Realty Trust

By their Attorney:

A handwritten signature in cursive script, appearing to read "Nicholas J. Decoulos", is written over a horizontal line.

Nicholas J. Decoulos

BBO# 117760

39 Cross Street, Suite 204

Peabody, MA 01960

Tel. 978-532-1020

August 20, 2009

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 *

AFFIDAVIT OF JOHN J. DECOULOS

I, John J. Decoulos, do hereby state that the following statements are based upon my own knowledge, information and extensive field work, and that the facts and matters set forth herein are true and correct, and so far as based upon information and belief, I do believe the information to be true:

1. I am a graduate of Worcester Polytechnic Institute and I am a registered Professional Engineer and a registered Professional Land Surveyor.

2. I was commissioned by the Trustees of the Bear Realty Trust and Bear II Realty Trust to measure the area of Lots 51, 79, 93, 94 and 96.

3. I was given copies of the five deeds conveying those lots to Zacheus Howwasswee in 1871.

4. In order to obtain the area measurements, I obtained access to the deeds recorded at the Dukes County Registry of Deeds (the "Registry") in Book 49, between pages 89 and 198; traversed each of the five lots by metes and bounds; reviewed the location and drawing of the lots as shown on the "Sectional Plans of Indian Lands on Gay Head made under the direction of Richard L. Pease, Esq., Commissioner appointed by Gov. Bullock under the Resolve of Chapter 67, 1866 to determine the boundary lines of Indian Lands at Gay Head; Scale 25 rods to an inch, by John H. Mullin, Top. Eng." recorded at the Registry of Deeds on May 22, 2007 (the "Sectional Plans"); and reviewed the "Plan of Gay Head showing the Partition of the Common Lands as made by Joseph T. Pease and Richard L. Pease, Commissioners appointed by the Judge of the Probate under Section 6 of Chapter 213 of the Acts of 1870, by John J. Mullin; Scale: 200 feet to an inch" (the "1878 Plan Showing the Partition of the Common Lands") on file with the Dukes County Registry of Probate.

5. According to my study and calculations:

Lot 51 contains 4.5 acres;

Lot 79 contains 24.8 acres;

Lot 93 contains 1.3 acres;

Lot 94 contains 1.8 acres; and

Lot 96 contains 2.9 acres.

The total area of the five lots is 35.3 acres.

6. I have computed the area of Lot 178 as 9.237 acres shown on a plan entitled "Plan of Land in Aquinnah, MA, Set Off Lot 178; Date: July 21, 2008; Scale: 1" = 200'; By: John J. Decoulos" (Exhibit 38, page 383).

7. I have placed Lots 174 through 189 from the 1878 Plan Showing the Partition of the Common Lands onto the "Map of Gay Head, Martha's Vineyard, Mass., Showing the Lands of Individual Owners and the General Fields or Commons, made under the direction of Richard L. Pease, Esq., Commissioner appointed by Gov. Bullock under Resolve Chap. 67 1866, to Determine the Boundary Lines of the Indian Lands at Gay Head; Scale: 50 rods = one inch; By: John H. Mullin, Top. Engr." recorded at the Registry in Plan Book 5, Plan 34 (the "1871 Map of Gay Head"). A plan showing the placement of Lots 174 through 189 on the 1871 Map of Gay Head is attached hereto as Exhibit A.

8. Lots 174 through 189 are located on the General Fields or Commons as shown on the Sectional Plans and the 1871 Map of Gay Head.

Signed under the pains and penalties of perjury this 18th day of August, 2009.


John J. Decoulos

LEGEND

79 Lot Numbers 1 - 173 established in 1871 shown in blue. See also "Sectional Plans on Gay Head made under the Direction of Richard L. Pease, Esq., Commissioner appointed by Gov. Bullock, under Resolve Chapter 67, 1866 to determine the boundary lines of Indian Lands at Gay Head; Scale: 25 Rods to an Inch; John H. Mullin, Top. Eng." on file with the Dukes County Registry of Deeds.

174 Lot Numbers 174 - 189 established in 1878 shown in red. See "Plan of Gay Head showing the Partition of the Common Lands as made by Joseph T. Pease and Richard L. Pease, Commissioners appointed by the Judge of the Probate under Section 6 of Chapter 213 of the Acts of 1870, by John H. Mullin, Scale: 200 feet to an inch" on file with the Dukes County Registry of Probate.

Plan modifications by: John J. Decoulos, PE, PLS
Approximate Scale: 1"= 1000'
Date: July 20, 2009

MAP
of
GAY HEAD

MARTHA'S VINEYARD, MASS.

SHOWING THE LANDS OF INDIVIDUAL OWNERS

and the
GENERAL FIELDS OR COMMONS,

made under the direction of

RICHARD L. PEASE Esq.

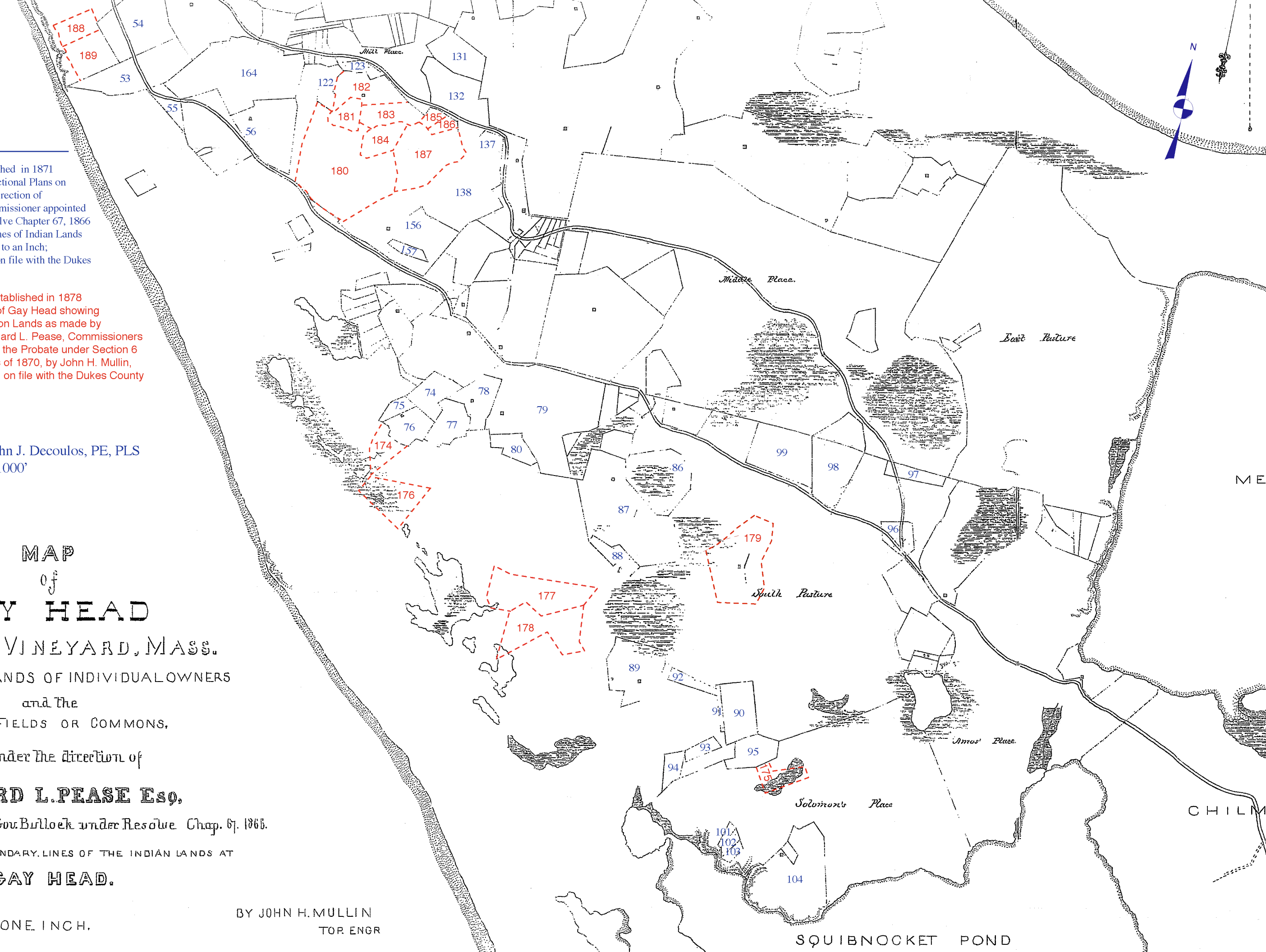
Commissioner appointed by Gov. Bullock under Resolve Chap. 67, 1866.

TO DETERMINE THE BOUNDARY LINES OF THE INDIAN LANDS AT

GAY HEAD.

SCALE 50 RODS = ONE INCH.

BY JOHN H. MULLIN
TOP ENGR



ME

CHILM

SQUIBNOCKET POND