(SEAL)

COMMONWEALTH OF MASSACHUSETTS
Land Court
Department of the Trial Court
Miscellaneous Case No. 238738

MARIA A. KITRAS, as TRUSTEE,[1] & others,[2]
Plaintiffs

vs.

TOWN OF AQUINNAH & others,[3]
Defendants

DECISION ON
CROSS-MOTIONS FOR SUMMARY JUDGMENT
AND MOTIONS TO DISMISS

In this action, plaintiffs seek to determine their access rights in the portion of Aquinnah, Dukes County, sometimes referred to as the "Zack's Cliffs" region. The question of access arises from the

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[1]Of Bear Realty Trust and of Bear II Realty Trust.

[2]Paul D. Pettegrove, as trustee of Gorda Realty Trust; Victoria Brown; Gardner Brown, Jr; Mark Harding; Benjamin L. Hall, Jr., as trustee of Gossamer Wing Realty Trust; and Eleanor Harding, as trustee of Eleanor P. Harding Trust.

[3]Vineyard Conservation Society, Inc.; David Wice and Betsy Wice; Susan Smith and Russell Smith; John F. Kennedy, Jr., and Caroline Kennedy; George B. Brush, as trustee of Toad Rock Realty Trust; South Shore Beach, Inc.; Leonard F. Vanderhoop, Jr.; Joanne Fruchtman a/k/a JoAnn Fruchtman and Jack Fruchtman; Peter Ochs; Hope E. Horgan; Helen S. James; Donald Taylor; Moshup Trail II Limited Partnership; Richard Hoye; Charles E. Derby; Shirley A. Jardin; persons unknown or unascertained being the heirs of Wallace E. Francis; Jeffrey Madison, as trustee of Tacknash Realty Trust; Estate of Edwin D. Vanderhoop; John A. Wiener; Sally D. Wiener; Patrick J. Evans; Scott Harrison; Julie B. Hoyle; Carmella Stephens, as trustee of Deer Meadow Realty Trust; Stella Winifred Hopkins a/k/a Winifred S. Hopkins; persons unknown or unascertained being the heirs of Esther Howwasswee; persons unknown or unascertained being the heirs of Savannah F. Cooper; Heidi B. Stutz; Michael W. Stutz; Hamilton Camman; Mary Elizabeth Pratt; persons unknown or unascertained being the heirs of Amos Smalley; June Noble; Richard Sullivan; Sarah Saltonstall; Steven Yaffe; Thomas Seeman; Lawrence B. Evans; Beverly A. Evans; Estate of William Vanderhoop; Kevin Craig; Cynthia Craig; Flavia Stutz; Robert Stutz; Selma Greenberg; William Greenberg; Wilma Greenberg; Alexandra Whitcomb; Rolph Lumley; Aurilla Fabio; other persons unknown or unascertained; and United States of America as trustee for the Wampanoag Tribe of Gay Head (Aquinnah).

set-off, in 1871 and 1878, of separate lots of land for ownership by individual members of the Wampanoag tribe. The two set-off reports made no express provision for easement or other access rights across or for the benefit of the various set-off lots. Plaintiffs are the successors in title to certain of the set-off lots who claim rights of access, under various legal theories, over other of the set-off lots now owned by defendants.[4]

Following a status conference held on February 29, 2000, and pursuant to the schedule established at the conference, VCS on October 6, 2000 filed its motion for summary judgment or, alternatively, to dismiss, together with a memorandum in support of the motion. A number of defendants thereafter joined in the VCS motion, including: JoAnn Fruchtman, Jack Fruchtman, Jr., Sarah Saltonstall, Mary Elizabeth Pratt, Caroline Kennedy, South Shore Beach, Inc., David Wice, and Betsy Wice. Defendants David Wice and Betsy Wice, defendant Thomas Seeman, defendant Caroline Kennedy, and defendants Russell Smith and Susan Smith, filed separate motions to dismiss the complaint. Defendants Beverly Evans, Patrick Evans and Lawrence Evans filed a separate motion for summary judgment. On November 7, 2000, plaintiff Kitras filed a cross-motion for summary judgment, together with a memorandum in support of the cross-motion, and plaintiffs Gardner Brown and Victoria Brown filed a separate motion adopting the arguments advanced in Ms. Kitras's memorandum.

I heard argument on the cross-motions and the motions to dismiss on December 18, 2000. At

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[4]A summary of the procedural history of this matter appears in orders entered on April 21, 1998, and November 30, 1999. The latter order includes reference to the dismissal of the complaint as to defendants Heidi B. Stutz; Michael W. Stutz; Kevin Craig; Cynthia Craig; Flavia Stutz; Selma Greenburg; William Greenburg; Wilma Greenburg, and (following removal to the Federal District Court and preceding the remand to this court) the United States of America. The dismissal as to the named private defendants was based on the failure of the complaint to assert a claim against the lots owned by such defendants. The dismissal as to the United States of America, entered in the Federal District Court on motion by the United States, was based on sovereign immunity.

the hearing, plaintiffs stipulated to the dismissal of the complaint as to the following defendants: Thomas Seeman; Lawrence B. Evans; Patrick J. Evans; and Beverly A. Evans.

In addition to the verified amended complaint, the summary judgment record includes (i) two affidavits of Jennifer S. D. Roberts, Esq., authenticating various documents; (ii) an affidavit of Brendan T. O'Neill, the executive director of defendant Vineyard Conservation Society, Inc. (VCS); (iii) an affidavit, with attachments, of James J. Decoulos;[5] (iv) an affidavit of Gardner Brown; (v) answers furnished by plaintiffs Victoria and Gardner Brown to interrogatories propounded by VCS; and (vi) responses and further responses furnished by plaintiffs Maria A. Kitras and Paul D. Pettegrove to interrogatories propounded by defendant VCS.[6]

The following facts are not in dispute.

1. Plaintiff Maria Kitras, as trustee of Bear Realty Trust and of Bear II Realty Trust (Kitras), holds record interests in lots 178, 711 and 713 (Kitras lots) as shown on a plan of land entitled "Plan of Gay Head Showing the Partition of the Common Lands As Made by Joseph T. Pease and Richard L. Pease, Commissioners Appointed by the Judge of Probate Under Section 6, Chapter 213 of the Acts of 1870 By John H. Mullin Civil Engineer" on file with the Dukes County registry of probate (set-off plan). As shown on the set-off plan, the Kitras lots are contiguous.

2. Plaintiff Paul D. Pettegrove, as trustee of Gorda Realty Trust (Pettegrove), owns lots 232 and 243 on the set-off plan (Pettegrove lots). Lot 232 enjoys an appurtenant easement for access

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[5]At the summary judgment hearing, I allowed VCS's motion to strike portions of the Decoulos affidavit as to paragraphs 11, 12, 14, 15, 27, 28, 29, 30, 31, 32, 33, 39, 42 and 43. I denied the motion to strike as to paragraphs 3, 4, 5, 6, 7, 8, 9, 20 and 38.

[6]The items listed in clause (vi) are in the record on the motion of defendant Vineyard Conservation Society, Inc. to supplement the summary judgment record filed on December 22, 2000, and heard and allowed on February 14, 2001.

under an agreement recorded with the Dukes County registry of deeds in book 640, page 895.[7]

3. Plaintiffs Gardner Brown and Victoria Brown (Browns) own lot 238 on the set-off plan (Brown lot). The Brown lot is contiguous to two of the Kitras lots (lots 178 and 713).

4. Plaintiffs Eleanor Harding, as trustee of Eleanor P. Harding Trust, and Mark Harding (Hardings) own lots 554 and 555 on the set-off plan (Harding lots). The Harding lots are contiguous to one of the Kitras lots (lot 711).

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. Lot 710 is contiguous to one of the Kitras lots (lot 711); the other Gossamer Wing lots are not contiguous to any of the Kitras lots.

6. Defendants own various other lots on the set-off plan, as described in the verified complaint and as identified on the sketch plan submitted by plaintiffs and attached as appendix A.[8]

7. By St. 1862, c. 184, § 4, the General Court established the district of Gay Head. Section 5 of the same chapter directed the clerk of the district of Gay Head to make and maintain a register of the existing members of the Gay Head tribe, and to make and maintain "a register of the lands of each Plantation, as at present held, whether in common or severalty, and if in severalty, by whom held."

8. By chapter 42 of the Resolves of 1863, the General Court appointed and commissioned

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[7]I take judicial notice of the record in land court miscellaneous case numbers 248339 and 249539.

[8]Some of the lot number designations on the sketch plan do not correspond to the designations on the set-off plan. For example, there is a lot numbered 242 shown on the sketch plan as owned by "Weiner;" that lot appears on the set-off plan as part of lot 96, adjacent to lot 314 (which is omitted from the sketch plan). In addition, certain of the designated owners are not current. For example, following the commencement of this action VCS acquired set-off lot 532, shown on appendix A as owned by "Nuovo." Nonetheless, for purposes of this decision the sketch plan is sufficiently accurate to serve as a useful guide to the general layout of the area and the relationship among the several parcels involved.

the treasurer of the district of Marshpee [sic] "to examine, and fully and finally to determine, all boundary lines between the individual owners of land located in the Indian district of Gay Head, in the county of Dukes County, and also to determine the boundary line between the common lands of said district and the individual owners adjoining said common lands; and he, the said commissioner, is hereby authorized to adjust, and fully and finally to settle, equitably, and as the interest of the petitioners and all other parties may require, all the matters, claims and controversies, now existing and growing out of or in connection with the boundaries of the aforesaid lands." The resolution further provided for hearing, following notice by publication, of all claims by interested parties, directed the commissioner to "make a report of his doings to the governor and council," and appropriated a sum not exceeding one hundred dollars as compensation for his services.

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.[9]

10. A short time before the commissioner's 1871 report, the General Court abolished the district of Gay Head, and in its place incorporated the town of Gay Head. St. 1870, c. 213. 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. The 1870 statute authorized the "judge of probate of the county of Dukes-county [sic], upon the application of the selectmen of Gay Head, or of any ten resident owners of land therein, after such notice as the judge

[9]A report submitted to the Senate observes that approximately nineteen hundred acres remained common lands, compared to approximately fifteen hundred acres held in severalty. See Sen. Doc. No. 14, 1869, p 4-5.

may direct to all parties interested and a hearing on the same, if he shall adjudge that it is for the interest of said parties that any or all of the common lands of said town be divided, shall appoint two discreet, disinterested persons commissioners to make partition of the same, and their award, being confirmed by said court, shall be final in the premises . . . 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." Pursuant to that authority, and on the petition of certain individual claimants (but contrary to the request of the Gay Head selectmen and others) the probate court appointed Joseph L. Pease and Richard L. Pease as commissioners to carry out the partition of common lands and the determination of claims to other lands held in severalty.

11. Commissioners Joseph Pease and Robert Pease submitted their final report to the probate court, which approved the report on December 21, 1878. The commissioners' 1878 report advises that

> "[the Commissioners] have made and completed a division of the common and undivided lands of Gay Head, among all the inhabitants of that town adjudged to be entitled thereto; and have made careful and correct descriptions of the boundaries and assignment of each lot in the division; and have also examined and defined the boundaries of those lots held or claimed by individuals of which no satisfactory record evidence of ownership existed.
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> In accordance with the almost unanimous desire of the inhabitants, the Commissioners determined to leave the cranberry lands near the sea shore, and the clay in the cliffs, undivided; it being, in their judgment, impracticable to make a division that would be, and continue to be, an equitable division of these cranberry lands, and of the clays in the cliffs, owing to the changes continually being made by the action of the elements.
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> The numbers refer to a map - made under the direction of the Commissioners - accompanying this Report."[10]

[10]The set-off plan is the map which accompanied the commissioners' 1878 report.

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 were run out and bounded afterwards by the Commissioners who made partition of the Indian common lands."[11]

13. Chapter 213 of the Acts of 1870 also directed the Dukes County county commissioners to lay out and construct a road from Chilmark to the Gay Head lighthouse. The road thus established (now called State Road) is shown on the set-off plan, passing in a generally east-west direction in the area north of plaintiffs' lots. At the time of the 1871 and 1878 commissioners' reports, there were no other public roads in the vicinity of the set-off lots.

14. By 1939, an unpaved way leading from State Road to and across the Kitras lots had developed on the ground. That way, known as "Zack's Cliffs Road," is visible on aerial photographs taken in 1939 and during the 1940s, and is shown on topographic maps from that and later periods.[12] The summary judgment record does not reveal when Zack's Cliffs Road first came into use, if at any time before 1939.

15. In 1954, a new road (called Moshup Trail) was established by layout approved by the Dukes County county commissioners and recorded with the Dukes County registry of deeds in book

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[11]The record does not include the portion of the report assigning lot 189, which is described in the quoted excerpt within both the lots resulting from the partition of common lands and the lots described on claims of ownership in severalty. It is immaterial for purposes of this decision which category applies to lot 189.

[12]A portion of the unpaved way, running in an east-west direction, appears to be known as "Old South Road," and provides the connection to State Road. Zack's Cliffs Road extends southerly from Old South Road, at a point west of the intersection between Old South Road and State Road.

227, page 564.[13] From its intersection with State Road east of plaintiffs' lots, Moshup Trail branches to the south and passes in a generally east-west direction in the area south of plaintiffs' lots.

16. By easement dated April 29, 1987, and recorded in book 472, page 317 (Gossamer Wing easement), Moshup Trail Limited Partnership acquired from Gossamer Wing for the benefit of lots 711 and 178 (as well as other lots not currently owned by any plaintiff) an express easement over lots 320 and 323 then owned by Gossamer Wing. A sketch plan attached to the Gossamer Wing easement shows a way, described to be forty feet wide, extending from lot 86 to State Road, and traversing lots 324, 325, 320, 179, 319, 300, 309 and 316. By contemporaneous easement recorded in book 472, page 319 (Moshup Trail easement), Gossamer Wing acquired from Moshup Trail Limited Partnership for the benefit of lots 302, 707 and 710 (as well as other lots not currently owned by any plaintiff) an express easement over lots 68, 71, 72, 73, 78, 79, 80, 85, 86, 87, 178, 179, 231, 246, 254, 294, 299, 300, 301, 309, 316, 319, 322, 324, 325, 334, 335, 351, 514, 52, 525, 700, 703, 705, and 711 then owned by Moshup Trail Limited Partnership. The Moshup Trail easement refers to an attached sketch plan, but the copy of the instrument in the record does not include such a plan. Following execution of the Gossamer Wing easement, Gossamer Wing acquired additional set-off lots. By first amendment to easement dated February 1, 1988, and recorded in book 493, page 293, the parties agreed that the Gossamer Wing easement would burden lots 302, 322, 334, 339, 707 and 710 (in addition to lots 320 and 323).[14] Combined, however, the Gossamer Wing easement (as amended) and the Moshup Trail easement do not extend from plaintiffs' property to State Road, as other land not

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[13]All references herein to recorded instruments or plans are to this registry, unless otherwise noted.

[14]The amendment does not include or refer to a plan illustrating where the way would be located on the newly-burdened lots, and they are not shown on the sketch plan attached to the original Gossamer Wing easement.

owned by any party to either easement intervenes between State Road and the lots benefitted by the easements.[15] The Gossamer Wing easement and the Moshup Trail easement do not appear to coincide with the historic traveled way of Zack's Cliffs Road.

17. In 1989, the United States of America, using its power of eminent domain, took set-off lots 78, 79 and 87.[16] A short time earlier, the United States also acquired from Moshup Trail Limited Partnership lots 68, 71, 72, 73, 80, 86, 179, 246, 254, 294, 299, 300, 301, 309, 316, 319, 324, and 325, under a deed dated February 1, 1988 and recorded in book 493, page 222. The deed states that the lots so conveyed enjoy the benefit of certain recorded easements, including the easement described in the Gossamer Wing easement agreement. The United States holds such property as trustee for the Wampanoag Tribe of Gay Head. Zack's Cliffs Road previously passed across lot 87; the eminent domain taking had the effect of extinguishing all rights of other parties in Zack's Cliffs Road over lot 87.[17] Zack's Cliffs Road also passed across lot 319, among the lots the United States acquired by deed from Moshup Trail Limited Partnership.

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By their amended verified complaint, plaintiffs claim easement rights (i) by implication or necessity in an unspecified location (count one), (ii) by prescription over Zack's Cliffs Road (count two), (iii) by prescription over a way called the "radio tower road" (count three), and (iv) by virtue of the alleged status of Zack's Cliffs Road as a public way by prescription (count iv). However, in response to interrogatories propounded by VCS, plaintiffs Kitras, Pettegrove and the Browns stated

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[15]As shown on appendix A, the intervening land appears to include set-off lots 88 and 244, and an unnumbered tract described on the sketch plan as owned by "Tacknash R. T."

[16]According to the declaration of taking, Moshup Trail Limited Partnership held an interest in each of the lots taken by eminent domain.

[17]Plaintiffs acknowledge this result in paragraph 29 of the amended verified complaint.

as to each of counts two, three and four that they "at the present time waive their claim, without prejudice." Accordingly, counts two, three and four of the amended verified complaint are dismissed as to plaintiffs Kitras, Pettegrove and the Browns. In addition, counts two and four are dismissed as to the remaining plaintiffs as against all defendants other than those defendants owning land across which Zack's Cliffs Road passes. According to the summary judgment record, those defendants (in other words, the remaining defendants as to counts two and four) are: VCS; George Brush, as trustee of Toad Rock Realty Trust; heirs of Esther Howwasswee; Moshup Trail II Limited Partnership; and Julie B. Hoyle. Similarly, count three of the complaint is dismissed as to all defendants other than those defendants owning land across which the radio tower road passes. According to the summary judgment record, those defendants (in other words, the remaining defendants as to count three) are: VCS; the Town of Aquinnah; and John F. Kennedy, Jr. and Caroline Kennedy.[18]

The parties' cross-motions principally address plaintiffs' claim of an easement by implication or necessity, arising from the severance of plaintiffs' respective lots from access to any public way as a result of the 1871 and 1878 set-offs.

The land subject to this action falls into three categories. The first category is the land held in severalty and determined according to the commissioner's 1871 report (in other words, lots 1-173). The record is unclear regarding the status of title to those lots prior to the commissioner's 1871 report, but at least as of the submission of the commissioner's 1871 report, set-off lots 1-173 were owned by the owners determined by the commissioner's 1871 report, and enjoyed such rights in the remaining common lands as may have appertained to tribal members. The second category is the land held in

[18]The response of defendant Caroline Kennedy to the cross-motions for summary judgment advises that defendant John F. Kennedy, Jr. is deceased, but that no motion has yet sought to substitute the executor of his estate.

severalty and determined according to the commissioners' 1878 report (in other words, lots 174-189).[19] The third category is the common land partitioned in favor of separate owners pursuant to the commissioners' 1878 report.[20]

On the summary judgment record, State Road was the only public way providing access to the set-off lots at the time of the commissioners' 1871 and 1878 reports. 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. By partitioning the common lands and assigning the resulting set-off lots to individual owners, the commissioners' 1878 report severed from the public way (i) each of the set-off lots (nos. 1-173) determined under the commissioner's 1871 report which did not have frontage on the public way, and (ii) each of the set-off lots (nos. 174 and higher) determined in severalty or partitioned and assigned under the commissioners' 1878 report which did not have frontage on the public highway. Plaintiffs' lots fall into the latter group.

"It 'is familiar law that if one conveys a part of his land in such form as to deprive himself of access to the remainder of it unless he goes across the land sold, he has a way of necessity over the granted portion. This comes by implication from the situation of the parties and from the terms of the grant when applied to the subject matter. The law presumes that one will not sell land to another without an understanding that the grantee shall have a legal right of access to it, if it is in the power of the grantor to give it, and it equally presumes an understanding of the parties that one selling a

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[19]VCS's memorandum suggests that lots 174-189 somehow came into separate ownership between the 1871 and 1878 reports. A more likely interpretation of the historical records is that the commissioner appointed under the 1866 resolution concluded his report upon the status of his efforts as of the adoption of St. 1870, § 213, before determining all claims of owners holding land in severalty, and that the commissioners' 1878 report completed the determination of such claims under the supervision of the probate court.

[20]A fourth category, not implicated in this action, is the land reserved as common land in the commissioners' 1878 report.

portion of his land shall have a legal right of access to the remainder over the part sold if he can reach it in no other way.'" Davis v. Sikes, 254 Mass. 540, 545-546 (1926), quoting New York & New England Railroad v. Railroad Commissioners, 162 Mass. 81, 83 (1894). See generally Restatement Third, Property (Servitudes) § 2.15.

"Easements by implication generally are created when land under single ownership is severed and the easement is reasonably necessary for the enjoyment of one of the parcels." Silverlieb v. Hebshie, 33 Mass. App. Ct. 911, 912 (1992). The severance of common ownership need not occur by means of a deed of conveyance; a severance occurring by partition will, under appropriate circumstances, give rise to an easement by implication. Mt. Holyoke Realty Corp. v. Holyoke Realty Corp., 284 Mass. 100, 106 (1933); Viall v. Carpenter, 14 Gray 126, 127 (1859). As the parties claiming an easement by implication, plaintiffs bear the burden of proving its existence. Boudreau v. Coleman, 29 Mass. App. Ct. 621, 633 (1990).

"The origin of an implied easement 'whether by grant or by reservation . . . must be found in a presumed intention of the parties, to be gathered from the language of the instruments when read in the light of the circumstances attending their execution, the physical condition of the premises, and the knowledge which the parties had or with which they are chargeable.'" Labounty v. Vickers, 352 Mass. 337, 344 (1967), quoting Dale v. Bedal, 305 Mass. 102, 103 (1940). "What is required, however, is not an actual subjective intent on the part of the grantor but a presumed objective intent of the grantor and grantee based upon the circumstances of the conveyance." Flax v. Smith, 20 Mass. App. Ct. 149, 153 (1985). "There are cases where a single circumstance may be so compelling as to require the finding of an intent to create an easement. For example, if, after a conveyance of some of his land, an owner is left with a parcel entirely surrounded by the land conveyed, the sole fact that he has no access to the land retained without crossing the land conveyed may be sufficient basis for the implication of

an easement . . ." Mt. Holyoke Realty Corp. v. Holyoke Realty Corp., 284 Mass. at 104. However, "[i]t 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).

The presumption noted in Davis v. Sikes (that one will not sell land to another without an understanding that the grantee shall have a legal right of access to it, if it is in the power of the grantor to give it) finds its root in the principle that a grant of land is presumed to include everything reasonably necessary for its use and enjoyment. See Gayetty v. Bethune, 14 Mass. 49, 56 (1817). See also Restatement Third, Property (Servitudes) § 2.15. The presumption "is, however, a pure presumption raised by the law . . . Such a presumption ought to be and is construed with strictness." Orpin v. Morrison, 230 Mass. 529, 533 (1918). Accordingly, the presumption may be overcome by evidence that the parties did not intend to provide a way of access. Id. at 533-534.

An easement often may be implied over a way already in existence and use when a parcel is severed from common ownership. See Dale v. Bedal, 305 Mass. 102, 104 (1940), and cases cited. However, it is not necessary for a way to be in existence and use at the time of such severance where the severance creates an absolute physical necessity. See, e.g., Nichols v. Luce, supra; Viall v. Carpenter, supra. Cf. Davis v. Sikes, 254 Mass. at 546.

"[A] party moving for summary judgment in a case in which the opposing party will have the burden of proof at trial is entitled to summary judgment if he demonstrates, by reference to material described in Mass. R. Civ. P. 56(c), unmet by countervailing materials, that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case." Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991).[21]

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[21]I note that plaintiffs have stipulated that they will not present any testimony on their claims beyond the summary judgment record.

The fact that the commissioners' 1878 report severed plaintiffs' lots from access to the only public way then in existence creates a presumption that the partition intended that each owner of a set-off lot would hold a way by necessity for access to their lot from the public way. 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] For the reasons discussed below, however, I do not reach the question whether a way arose by necessity on the commissioners' 1878 report, but I assume for purposes of the following discussion that a way by necessity did so arise.[23]

A right of way not defined in the instrument creating it may be located by implication, in the location of a way in use at the time the easement was created. See, e.g., Dunham v. Dodge, 235 Mass. 367, 371 (1920). Alternatively, an undefined easement may be located by express agreement of the parties. Cheever v. Graves, 32 Mass. App. Ct. 601, 605 (1992). "The practical adoption and use, for a long time, of a particular route, under a right of way granted by deed, without fixed and defined limits, if acquiesced in by the grantor, operate to determine the location of the way as effectually as if the same had been described in the deed." Davis v. Sikes, 254 Mass. 540, 546 (1926) (citations omitted). "After the location of an undefined way has been fixed, it cannot be changed except by agreement." Id. An easement created by necessity ceases when the necessity ceases. Viall v.

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[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.

[23]Even if an easement arose by necessity in 1878, however, such an easement does not include (as requested in plaintiffs' prayer for relief) the right to install utilities in the way. See Nylander v. Potter, 423 Mass. 158, 160 n.6 (1996); Nantucket Conservation Found., Inc. v. Russell Management, Inc., 2 Mass. App. Ct. (1974). See also Cumbie v. Goldsmith, 387 Mass. 409, 411-412 n.8 (1982).

Carpenter, 14 Gray at 127.[24]

As the only public way in the area in 1878 was State Road, located to the north of plaintiffs' lots, any way that arose by necessity on the commissioners' 1878 report must extend northerly from plaintiffs' lots to State Road. The record does not indicate the existence of any way in use on the ground at the time of the commissioners' 1878 report, and the present record is insufficient to establish conclusively the location of a way by necessity. The record does establish that Zack's Cliffs Road eventually came into use and served as the principal means of access from plaintiffs' lots to State Road.[25] That use suggests that the landowners in the area may have adopted Zack's Cliffs Road as the means of access to State Road, or at least from plaintiffs' lots to State Road.[26] However, Zack's Cliffs Road traverses, among other land, lots 87 and 88. Because set-off lots 87 and 88 were among the lots determined in severalty under the commissioner's 1871 report, they were not part of the common lands at the time the commissioners' 1878 report severed plaintiffs' lots from their access to State Road. Accordingly, a way by necessity arising from the commissioners' 1878 report cannot be imposed on lot 87 or lot 88.[27] In other words, to the extent Zack's Cliffs Road might serve to locate a way by

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[24]Accordingly, Pettegrove's claim of a way by necessity for the benefit of lot 232 fails, by reason of the express easement benefitting that lot.

[25]Paragraph 43 of plaintiffs' amended verified complaint asserts that, prior to the opening of the Moshup Trail, Zack's Cliffs Road and the other connecting ways were the sole means of access to plaintiffs' lots. That assertion is supported by the various aerial photographs and maps submitted in the record.

[26]Plaintiffs' complaint asserts that other ways, connecting to Zack's Cliffs Road, served other lots. However, the existence of such other ways does not affect plaintiffs' claim, as Zack's Cliffs Road runs directly through the Kitras lots.

[27]Because the parties have not addressed the question of plaintiffs' prescriptive use of Zack's Cliffs Road, I do not consider on the present record whether the use of Zack's Cliffs Road over the years gave rise to prescriptive rights in that way, or whether such prescriptive rights would serve to supercede an inchoate way by necessity in another location. Similarly, the record is not sufficient to allow me to determine whether the Moshup Trail easement and the Gossamer Wing easement served

necessity resulting from the partition under the commissioners' 1878 report, it may do so only over the lots it traverses which were partitioned into separate ownership under the commissioners' 1878 report, and not over the lots determined in severalty under the commissioner's 1871 report.[28]

Despite the difficulty of determining on the present record the definitive location of an easement by necessity for the benefit of plaintiffs' lots, any claim of an easement by necessity for the benefit of plaintiffs' lots necessarily implicates the lots currently held by the United States in trust for the Wampanoag Tribe of Gay Head which came out of the partition under the commissioners' 1878 report. Defendants accordingly argue that the United States is an indispensable party to this action, and that the complaint must be dismissed because the United States cannot be joined.

Mass. R. Civ. P. 19(a) provides:

> "A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent

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to relocate, by agreement, any way by necessity as it extends across the lots affected by those easements. A third possibility, not addressed by the parties (but suggested in the present record), is that Moshup Trail Limited Partnership (Kitras's predecessor in title) formerly held the Kitras lots in common with the lots currently owned by the United States. Such ownership could have merged any easement benefitting the Kitras lots with the fee in the lots currently held by the United States, and would suggest examination of plaintiffs' claim of an easement by necessity in the context of the 1988 conveyance by Moshup Trail Limited Partnership to the United States.

[28]Defendants argue that the 1989 eminent domain taking (which extinguished all rights in Zack's Cliffs Road as it passed through lot 87) terminated any easement by necessity plaintiffs may have acquired by virtue of the commissioners' 1878 report. A taking by eminent domain that deprives a parcel of its sole means of access does not give rise to an easement by necessity, or a right to extend or relocate the prior means of access. See Darman v. Dunderdale, 362 Mass. 633, 641 (1972); New England Continental Media, Inc. v. Milton, 32 Mass. App. Ct. 374, 378 (1992). Cf. Nylander v. Potter, 423 Mass. 158, 163 n.10 (1996). However, as any easement by necessity arising from the commissioners' 1878 report cannot traverse lot 87, the 1989 eminent domain taking cannot have extinguished plaintiffs' rights in such a way by necessity (unless the way had relocated onto lot 87 by other means).

> obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant."

Mass. R. Civ. P. 19(b) addresses the possibility that an indispensable party cannot be joined:

> "If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."

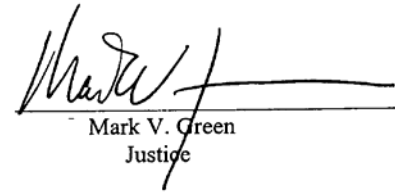
Because plaintiffs' claim of an easement by necessity necessarily implicates the land currently held by the United States, I consider the United States to be a party necessary for a just adjudication of the present action. As noted above, the summary judgment record strongly suggests that any easement by necessity that arose as a result of the commissioners' 1878 report was located by common use across a number of the lots now held by the United States. Any determination of plaintiffs' claim without the United States as a party presents a substantial likelihood of prejudice to the remaining defendants, who face the threat that an easement by necessity might now be located over their property simply because the easement cannot be placed on land of the United States.

"When, as here, a necessary party under Rule 19(a) is immune from suit, 'there is very little room for balancing other factors' set out in Rule 19(b), because immunity 'may be viewed as one of those interests compelling by themselves.'" Enterprise Management Consultants, Inc. v. United States of America, 883 F.2d 890, 894 (10th Cir. 1989), quoting Wichita & Affiliated Tribes of Oklahoma v. Hodel, 788 F.2d 765, 777 n.13 (D.C. Cir. 1986).

Because the present action cannot be determined in the absence of the United States without

substantial and unavoidable risk of prejudice to the remaining parties, I conclude that count one of the complaint must be dismissed pursuant to Mass. R. Civ. P. 19(b). In dismissing plaintiffs' claim, I am aware that the dismissal likely precludes plaintiffs' opportunity to prosecute their claims of an easement by necessity for so long as the United States owns lots set-off by partition under the commissioners' 1878 report. In mitigation of the apparent harshness of that result, I note that (i) plaintiffs (and their predeccssors in title) waited to present their claims for more than one hundred years after the commissioners' 1878 report and before the United States acquired the land it now holds (and for nine more years after the United States acquired such land); and (ii) the situation producing this dismissal (ownership of set-off lots by a party immune from suit) is a result of the 1988 conveyance to the United States by Kitras's immediate predecessor in title, without reservation of any right of access for its remaining land.[29]

Defendants' motions to dismiss are allowed, and plaintiffs' cross-motions for summary judgment are denied. Count one of the complaint is dismissed. The prescriptive claims of certain plaintiffs over the land of certain defendants remain for determination in such further proceedings as may be appropriate.[30]



Mark V. Green
Justice

Dated: June 4, 2001

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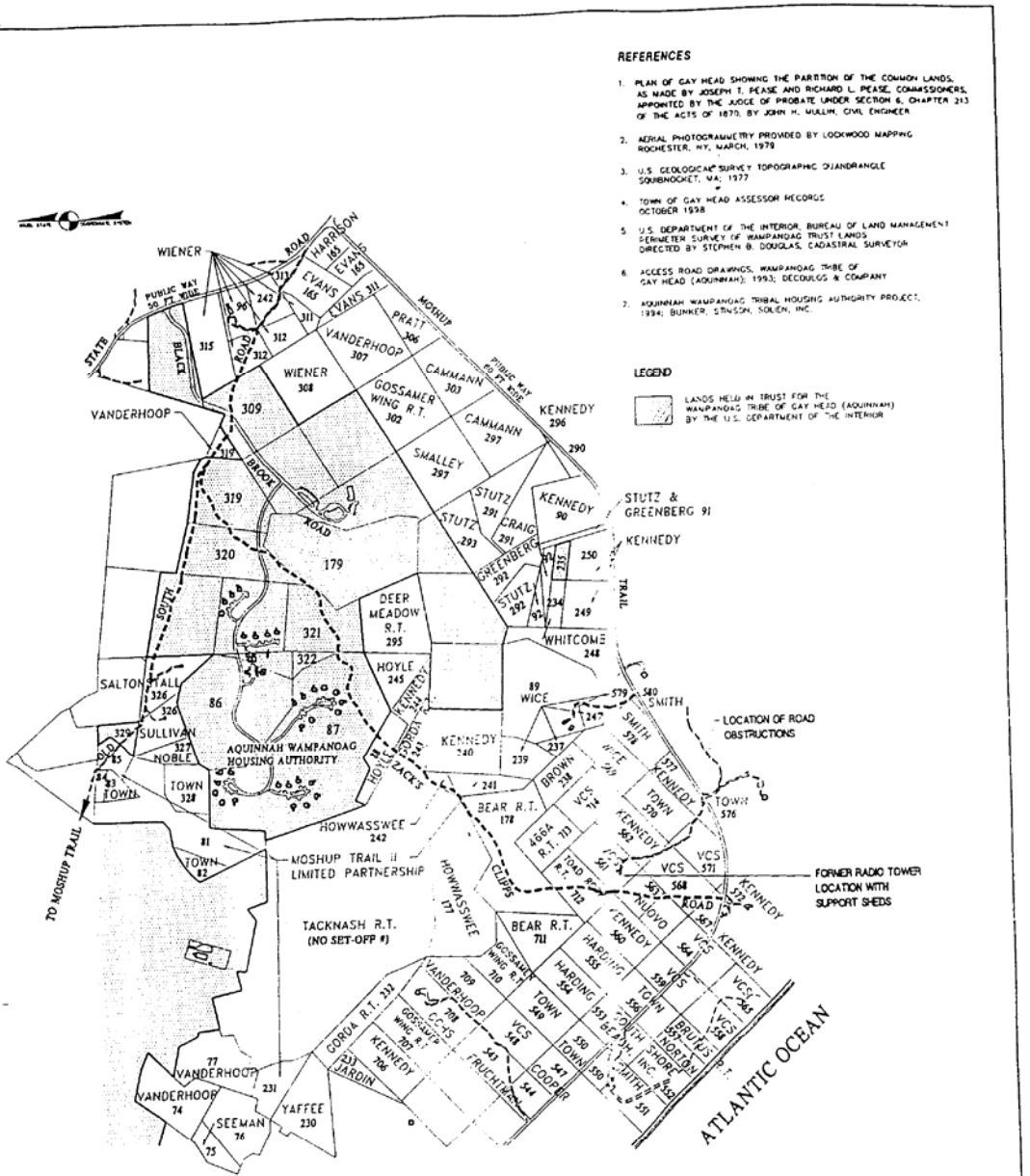
[29]I do not consider whether plaintiffs have any action in damages by reason of the United States' refusal to waive sovereign immunity.

[30]See the discussion on page 10, above.



MOSHUP TRAIL TO STATE ROAD ALONG ZACK'S CLIFFS ROAD
SET-OFF LOT DELINEATIONS
AQUINNAH, MASSACHUSETTS

DATE 10/14/98
SCALE 1" = 1000'
PLAN NO. 1

APPENDIX A