(SEAL)

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

DUKES COUNTY, ss

MISCELLANEOUS
CASE NO. 238738 (CWT)

MARIA A. KITRAS, as Trustee of BEAR REALTY TRUST, *et al.*,

Plaintiffs

v.

TOWN OF AQUINNAH, *et al.*,

Defendants

DECISION

Plaintiffs filed this action in May 1997 seeking 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 set-offs, completed in 1871 and 1878, of separate lots of land for ownership by individual members of the Wampanoag tribe. Neither of the set-off reports created express provisions regarding 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.

By order dated June 4, 2001, this court (Green, J.) dismissed Plaintiffs' complaint for failure to join an indispensable party. This court (Lombardi, J.) later issued a judgment dismissing Plaintiffs' claims and Plaintiffs appealed from that judgment. The Appeals Court reversed the judgment and this action was returned to this court for further proceedings consistent with the Appeals Court opinion. See Kitras v. Town of Aquinnah, 64 Mass. App. Ct. 285 (2005). On August 14, 2006, this court (Lombardi, J.) issued an order bifurcating the case,

stating "[b]efore Defendants are put to the additional effort and expense of preparing documentation and retaining counsel, surveyors, engineers and historians to address the issue of where the unestablished easement or easements might be located, the Court should address the issue of whether or not there is any easement at all."

On March 29, 2007, this court (Lombardi, J.) granted Plaintiffs leave to amend their complaint. Plaintiffs Third Amended Verified Complaint contains two counts: one asserting an easement by necessity and one asserting an easement by prescription.[1] The parties agreed to submit this action to the court on a case stated basis, without calling witnesses.[2] The parties submitted proposed exhibit lists and this court ruled on three motions to strike, after which eighty-six exhibits were entered into evidence. Based on all the evidence and reasonable inferences drawn therefrom this court finds the following material facts:[3]

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

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

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[1] Plaintiffs have submitted no evidence supporting their claim of an easement by prescription. Therefore, this court finds that Plaintiffs have not carried their burden on this count.

[2] Subsequent to this agreement, Benjamin Hall submitted a request for a trial. To the extent not clear herein, that request hereby is denied. The facts relevant to a final determination of the issues raised by Plaintiffs' complaint are contained in reports and documents dating back the late 1800s. Consequently, witness testimony is likely irrelevant and unable to shed light on Plaintiffs' claims of easement by implication.

[3] These facts are taken in large part from this court's (Green, J.) Decision on Cross-Motions for Summary Judgment and Motions to Dismiss, dated June 4, 2001. Additional facts not included in the June 4th Decision, but relevant to this court's determination of the issues have been added where appropriate. Further, facts included in the June 4th Decision, but not relevant to this court's determination of the issues herein at issue have been omitted.

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

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 a commissioner, Charles Marston "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. Marston submitted a report in 1866 and reported that he had not been able to complete his work due to illness. However, Marston did create book of records setting forth descriptions of a large portion of the lots of land, which was recorded at the Dukes County Registry of Deeds in Book 49, at Page 1.

10. Marston died before completing the assigned task, and the General Court appointed a new commissioner, Richard L. Pease, in 1866. 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.

11. 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. 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 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.

12. 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]

13. 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."

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

14. In 1869, a special joint committee of the Senate and House was designated to visit the Indians of the District of Gay Head and inquire as to their condition. A report of that visit noted that the legislators found the common lands to be "uneven, rough, and not remarkably fertile." The legislators further opined that the lots would "lie untilled and comparatively unused" following the division of the common land.

15. The commissioners explicitly granted to certain individuals, some identified and some not, the right to take peat from various lots.

16. The commissioners also expressly reserved an easement for fishing and clearing creeks over Lots 382, 384, and 395.

17. In 1955 a taking was made by the Commonwealth for the purpose of laying out the Moshup Trail, which gave access to some of the lots conveyed in 1878, which are now owned by Defendants.

18. Leading up to the 1878 division of the subject property the land existed under two different systems of ownership. The Commonwealth abided by traditional common law rules of real property, while the tribe abided by Indian traditional law. Indian title gave each tribe member the right of occupancy, which could only be destroyed by the sovereign. Indian title also granted each tribe member the right of access over all common lands.[4]

* * * * *

Plaintiffs argue that they have acquired easements to access an existing public way by virtue of the 1871 and 1878 divisions. Plaintiffs claim that the divisions created an easement by necessity by landlocking certain parcels and providing no alternative access to a public way. Defendants do not dispute that certain parcels were landlocked by the divisions, but argue that there was no intent to create an easement. Defendants further argue that because Indian title granted every tribe member access over lands held in common, no strict necessity existed at the time of the 1871 and 1878 divisions. For the reasons set forth herein, this court finds that Plaintiffs have failed to meet their burden and finds that no easement was created.

[4] The federal government did eventually extinguish Indian title by passing 25 U.S.C. § 1771, et seq. in 1987. Congress retroactively approved prior transfers of land in Gay Head by the tribe or any individual Indian and extinguished Indian title in the land "as of the date of such transfer."

Easements by necessity are created "when land is conveyed which is inaccessible without trespass, except by passing over the land of the grantor, a right of way of necessity is presumed to be granted; otherwise, the grant would be practically useless." Schmidt v. Quinn, 136 Mass. 575, 576 (1884). This rule is not borne out of any public policy interest, Kitras v. Town of Aquinnah, 64 Mass. App. Ct. 285, 298 (2005), rather "the rule is founded on the presumed intention of the parties to the deed, construed, as it must be, with reference to the circumstances under which it was made." Richards v. Attleborough Branch Railroad Co., 153 Mass. 120, 122 (1891). However, "[i]t is the law of the Commonwealth that easements of necessity can only be granted in very limited circumstances of reasonable or absolute necessity." Goulding v. Cook, 422 Mass. 276, 280 (1996).[5]

In addressing Plaintiffs' claims, this court must "remain[] mindful that it is the proponents' burden to prove the existence of an implied easement." Kitras v. Town of Aquinnah, 64 Mass. App. Ct. 285, 300 (2005) (citing Cheever v. Graves, 32 Mass. App. Ct. 601, 607, 609 (1992). Additionally this court must consider that an easement by necessity should only be recognized where it can be found in the presumed intention of the parties, "a presumption of law which ought to be and is construed with strictness." Joyce v. Devaney, 322 Mass. 544 (1948) (internal quotation and citation omitted); see also Orpin v. Morrison, 230 Mass. 529, 533 (1918) ("It is a strong thing to raise a presumption of a grant in addition to the premises described in the absence of anything to that effect in the express words of the deed. Such a presumption ought to be and is construed with strictness. There is no reason in law or ethics why parties may not convey land without direct means of access, if they desire to do so.");

[5] Although Plaintiffs' brief refers to an "implied easement" this court notes that there is no evidence of the use prior to the division that would be necessary to prove an easement by implication. Additionally, Plaintiffs' brief argues that the easement has been proved through necessity. Consequently, this court understands Plaintiffs' argument to be one for an easement by necessity.

Home Inv. v. Iovieno, 243 Mass. 121, 124 (1922) ("It is a strong exercise of the power of the law to raise a presumption of a grant of a valuable right in addition to the premises described without any words indicative of such an intent in the deed. Such a presumption is construed with strictness even in the few instances where recognized.").

Therefore, the intent of the parties must be the touchstone of this court's analysis. Whether an easement by necessity has been created

> 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.

Sorel v. Boisjolie, 330 Mass. 513, 517 (1953). Furthermore, because the issue is one of intent, the benefitted and burdened parcels must have come from previous common ownership. Nylander v. Potter, 423 Mass. 158, 162 (1996) ("Without previous common ownership, Potter cannot claim an easement by necessity."). Finally, the court must consider whether there is strict necessity. Necessity is an indicator of the parties' intent and consequently if there is alternative access, the parties will not be presumed to have intended an easement. See Uliasz v. Gillette, 357 Mass. 96, 102 (1970). Additionally, the necessity must have existed at the time of the division and when the necessity ceases any intended easement also ceases. See Viall v. Carpenter, 80 Mass. 126 (1859). It is important to note, as did the Appeals Court, that "[i]t is well established that in this Commonwealth necessity alone does not an easement create." Kitras v. Town of Aquinnah, 64 Mass. App. Ct. 285, 298 (2005).

Plaintiffs' contend that the easement by necessity is presumed by the case law and point to Davis v. Sikes, 254 Mass. 536, 545-46 (1926). Defendants argue that the presumption should be not be applied to the unique circumstances presented by the instant case and further argue that

even if the presumption were applied they have produced sufficient evidence to rebut the presumption.

> A presumption imposes on the party against whom it is directed the burden of production to rebut or meet that presumption. . . If that party fails to come forward with evidence to rebut or meet the presumption, the fact is to be taken by the fact finder as established.

Massachusetts Guide to Evidence Rule 301(d). Assuming *arguendo* that the presumption articulated in Davis is applicable to this case, this court finds that Defendants have produced sufficient evidence to rebut the presumption.

Furthermore, this court has determined that, despite the fact that the 1871 and 1878 divisions landlocked certain parcels, no easements, other than those there were expressly granted, were intended. Defendants point to Joyce v. Devaney, 322 Mass. 544 (1948) and this court finds its analysis persuasive. "The deeds at the time of severance created the specific easements. . . . Those easements are unambiguous and definite. The creation of such express easements in the deed negatives, we think any intention to create easements by implication. Expressio unuius est exlusion alterius." Joyce, 322 Mass. at 549; see also Krinsky v. Hoffman, 326 Mass. 683, 688 (1951) ("[The trial judge] could have attached considerable weight to the fact that, while the deed expressly created an easement in favor of the grantee on the six foot strip owned by the grantor, it contained nothing about a similar right being reserved to the grantor over the grantee's strip. The subject of rights in the passageway was in the minds of the parties and the fact that nothing was inserted in the deed reserving to the plaintiffs rights similar to those granted to the defendant is significant."). As noted by the Appeals Court in Kitras,

> Particularly noteworthy in our estimation is the commissioners' silence on this issue, as is the fact that even the most cursory glance at a contemporaneous plot map shows that the vast majority of set-off lots had no frontage or obvious access to or from any

> public amenity. Also problematic is the difficulty of routing easements from common lands to public roads. . .without traversing those lands already held in severalty, that is, lots 1 through 188 or 189. With those problems evident, and in light of the careful and lengthy consideration given the partitioning process, the commissioners' failure explicitly to provide for easements might well be interpreted as a deliberate choice.

Kitras, 64 Mass. App. Ct. at 299. In light of the express easements granted by the commissioners, the failure to provide any easements for access appears intentional and serves to negate any presumed intent to create an easement.

Moreover, as noted in Kitras, this court should "consider relevant the historical sources of information on tribal use and common custom applicable at the time." Kitras, 64 Mass. App. Ct. at 300. The record here establishes that prior to the 1878 division of the common land, the lots were held by the Commonwealth under English common law rules of property and by the tribe under Indian traditional law. English title conveyed fee title while Indian title gave tribe members the right of occupancy. Therefore, the fee title carried no immediate right of possession. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823) ("While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy."). The prevailing custom among the tribe at the time of the division allowed for access for each member of the tribe as necessary over lands held in common and in severalty. The commissioners were familiar with this system and likely assumed easements for access were

unnecessary given the tribal culture at the time. This fact also negates any presumed intent to create an easement.[6]

Finally, the perceived condition of the land negates any presumed intent to create an easement. See Dale v. Bedal, 305 Mass. 102, 103 (1940). It is clear on this record that the common land was believed to be "uneven, rough, and not remarkably fertile" and that the legislators believed that the land would "lie untilled and comparatively unused" following the division of the common land.[7] As the Appeals Court stated in Kitras,

> The record reveals other circumstances that may render doubtful the parties' presumed intent to reserve easements, for example, the nature and then-perceived poor quality of the land so divided. See Dale v. Bedal, 305 Mass. 102, 103 (1940) (circumstances to be considered include 'the physical condition of the premises'). Without belaboring the point, it seems a legitimate question whether anyone at the time, objectively considered, would have troubled to provide for these 'uneven, rough, and not remarkably fertile' unclaimed and untenanted lots a beneficial conveyance by reserving for them easements to a road then in 'deplorable condition' and blocked to free travel by a stone wall and bars.

It is clear from the record before this court that the land was believed to be unfertile and unusable.

As acknowledged by the Appeals Court in Joyce, this "case is a hard one but if we should hold otherwise it would be another instance of a hard case making bad law." Joyce v. Devaney, 322 Mass. 544, 549 (1948). This court finds that the perceived condition of the land, in conjunction with the commissioners understanding of the Indian title system and tribal culture, and the express easements granted by the commissioners, is sufficient to negate any presumed

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[6] This observation also calls into question how strictly necessary access easements were at the time of division. As noted above, the necessity must have existed at the time of the division. See Viall v. Carpenter, 80 Mass. 126 (1859). If an easement was not necessary *at the time of division* it cannot be manufactured at a later point.

[7] It is worth noting that the current record supports the legislators' prediction that the land would "lie untilled and comparatively unused" following the division. As this court (Green, J.) noted in its 2001 decision "the plaintiffs (and their predecessors in title) waited to present their claims for more than one hundred years after the commissioners' 1878 report. . . ."

intent of the grantors to create an easement by necessity for any of Plaintiffs' lots. Further, this court finds that Plaintiffs have failed to introduce evidence sufficient to carry their substantial burden of proving easements by necessity.[7]

Judgment to issue accordingly.

Charles W. Trombly, Jr.
Justice

Dated: August 12, 2010

[7] Because I find that no easement by necessity was intended, I do not now reach the issues of merger and alternative access also raised by the pleadings.

(SEAL)

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

DUKES COUNTY, ss

MISCELLANEOUS
CASE NO. 238738 (CWT)

MARIA A. KITRAS, as Trustee of BEAR REALTY TRUST, *et al.*, Plaintiffs v. TOWN OF AQUINNAH, *et al.*, Defendants	**JUDGMENT**

Plaintiffs filed this action in May 1997 seeking 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 set-offs, completed in 1871 and 1878, of separate lots of land for ownership by individual members of the Wampanoag tribe. Neither of the set-off reports created express provisions regarding 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.

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On March 29, 2007, this court (Lombardi, J.) granted Plaintiffs leave to amend their complaint. Plaintiffs Third Amended Verified Complaint contains two counts: one asserting an easement by necessity and one asserting an easement by prescription. The parties agreed to submit this action to the court on a case stated basis, without calling witnesses. The parties submitted proposed exhibit lists and this court ruled on three motions to strike, after which eighty-six exhibits were entered into evidence.

After careful consideration of all of the evidence, the court has issued a decision of today's date, ruling that there was no intent to create easements by necessity providing access to Plaintiffs' lots.

In accordance with that decision, it is hereby

ADJUDGED and **DECLARED** that lots 178, 711, 713, 232, 243, 238, 554, 555, 707, 710, and 302 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," are not benefited by any easements by necessity for access over any of the lots owned by Defendants to this action.

CWT

By the Court (Trombly, J.)

Attest:

Deborah J. Patterson
Recorder

Dated: August 12, 2010

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER