



**Hemenway
& Barnes** LLP

52617

RECEIVED

MAY 25 2010

Nicholas J. Decoulos
Diane C. Tillotson
 Direct Dial (617) 557-9725
 dtillotson@hembar.com

60 State Street
 Boston, MA 02109-1899
 t 617 227 7940
 f 617 227 0781
 www.hembar.com

May 24, 2010

BY HAND

Trustees

Counselors at Law

Emily Rosa, Sessions Clerk
 Land Court
 226 Causeway Street
 Boston, MA 02114

Re: Maria A. Kitras, et al. v. Town of Aquinnah, et al.
Misc. Case No. 238738, TROMBLY, J

Dear Ms. Rosa:

Enclosed please find Defendants Martha's Vineyard Land Bank, Town of Aquinnah and Vineyard Conservation Society's Inc's Response to Certain Issues Raised in the Defendants' Gossamer Wing Realty Trust and Barons' Land Trust Brief as Ordered by the Court on January 21, 2010. If you should have any questions, please do not hesitate to call.

Sincerely,

Diane C. Tillotson

DCT/mac
 enclosure

cc: Service list
 James Lengyel

Timothy F. Fidgeon
 Michael B. Elefante
 Michael J. Puzo
 Thomas L. Guidi
 Edward Notis-McConarty
 Diane C. Tillotson
 Stephen W. Kidder
 Arthur B. Page
 Susan Hughes Banning
 Frederic J. Marx
 Nancy B. Gardiner
 Kurt F. Somerville
 Teresa A. Belmonte
 Brian C. Broderick
 Charles Fayerweather
 Nancy E. Dempze
 Joseph L. Bierwirth, Jr.
 Dennis R. Delaney
 Mark B. Elefante
 John J. Siciliano

Joan Garrity Flynn
 Cornelia R. Tenney
 Marcia M. Governale
 Sarah M. Waelchli
 Shana E. Maldonado

David H. Morse
 Roy A. Hammer
 Lawrence T. Perera
 John J. Madden
 George T. Shaw
 Deborah J. Hall
 Casimir de Rham, Jr.
 Of Counsel

COMMONWEALTH OF MASSACHUSETTS

DUKES, ss

LAND COURT DEPARTMENT
MISC. CASE NO. 238738
TROMBLY, J

MARIA A. KITRAS, AS SHE IS THE
TRUSTEE OF BEAR REALTY TRUST,
ET AL,

Plaintiffs

v.

TOWN of AQUINNAH, ET AL,

Defendants

DEFENDANTS MARTHA'S VINEYARD LAND BANK, TOWN OF AQUINNAH,
AND VINEYARD CONSERVATION SOCIETY'S INC'S RESPONSE TO CERTAIN
ISSUES RAISED IN THE DEFENDANTS' GOSSAMER WING REALTY TRUST
AND BARONS' LAND TRUST BRIEF AS ORDERED BY THE COURT ON
JANUARY 21, 2010

Defendants Martha's Vineyard Land Bank, Town of Aquinnah and Vineyard Conservation Society, Inc. (hereafter, collectively, "defendants") submit this response to certain issues raised in the brief of Defendants Gossamer Wing Realty Trust and Barons' Land Trust (collectively "the Trust").

1. The Court Ruled That All Requests for Admissions Served by the Trust on October 3, 2008 Were Untimely

At pages 7-11 of its brief, the Trust argues that because the defendants' objections to the Request for Admissions served by Benjamin J. Hall on behalf of Gossamer Wing Realty Trust and Barons' Land Trust omitted reference to Barons' Land Trust the statements are admitted as to Barons' Land Trust. This argument is ridiculous and exalts form over substance in a manner that should not be tolerated by this court.

First and foremost, Gossamer's argument ignores the fact that a single request for admissions was served upon each of the defendants named above and each of those defendants timely filed an objection to the request for admissions on several grounds, chief among them the fact that the request was not timely. The requests were not individualized with respect to the Gossamer Wing Realty Trust versus the Barons' Land Trust nor were there specific admissions sought that were related to the land of either of those trusts in any way. Within a week, the defendants named above served notice of the objection to the requests on Benjamin J. Hall, Jr. as attorney for both trusts. These objections, like the requests, were not addressed to the specific trusts and objected to the request "filed by Benjamin J. Hall, Jr.," who represents both trusts. It was clear from the content of the objections filed that the objections were directed to the issue of timeliness and to the nature of the requests made and had nothing to do with the identity of the parties.

Similarly, when the court reviewed, heard argument on and ruled upon the Trust's motion to compel answers and "to determine the sufficiency of responses" to requests for admissions from the defendants named herein the ruling was unequivocally that the Trust's requests directly conflicted with the court's discovery order and were untimely.¹ Moreover, as the court's ruling of December 4, 2008 did include a reference to the Barons' Land Trust, there is no question as to the scope of the court's ruling. There was no discussion or suggestion at the argument on the motion or by

¹ The motion was brought by Hall as Trustee of Gossamer but the court was asked to determine the sufficiency of the responses to the requests of both Trusts.

counsel for the Trust that there was a distinction to be made between Gossamer and Barons'.²

Rule 1 of the Massachusetts Rules of Civil Procedure mandates that the rules "shall be construed to secure the just, speedy and inexpensive determination of every action." The court's order ruling the requests for admissions were untimely was made on December 4, 2008, almost a year and a half ago. If the Trusts' counsel felt that the ruling was in error and the requests for admissions were both timely and relevant to the presentation of his case, the appropriate action would have been to seek interlocutory review in the Appeals Court. The request for admissions were served as one document to each of the defendants and each of the defendants filed the required objection to those requests. The suggestion that requests made by Barons' Land Trust were not objected to when the requests were identical and included in the same document is disingenuous and lacks merit.

2. The Issue To Be Decided Has Been Defined by the Appeals Court, by this Court and by the Parties and Needs No Further Clarification or Elaboration

Only the Trust and its counsel appear to have had difficulty determining the issue before the court concerning which the parties were directed to submit briefs.

Although the Trust quotes extensively from the Appeals Court decision and from those of Judges Lombardi and Green, the import of all of those decisions, i.e. that there is a

² In addition to ruling that the requests were untimely, the court also determined that through the requests for admissions the Trusts were attempting to litigate its former cross-claims against the defendants which had been dismissed and that in addition to being untimely, the requests were "irrelevant and inappropriate." Order Denying Motions to Compel Responses to Discovery Requests and to Determine the Sufficiency of Responses to Discovery Requests, December 4, 2008.

question as to whether an easement by necessity may be implied to benefit the lands of certain lot owners was apparently overlooked.

Likewise, counsel for the Trust similarly forgets that the parties were specifically asked by the court on several occasions whether any testimony from live witnesses was anticipated in this case and all parties responded that no such testimony was contemplated. Indeed, as there is no living witness who can testify as to the intent of either the commissioners or the owners of the severed lots, of necessity the evidence in this case consists of relevant documents of record as either agreed to by the parties or ruled upon by the court and the reasonable inferences that can be drawn from those documents. While the court may be left with the prospect of making limited factual determinations, those facts largely appear in the documents that the parties have agreed are admissible or may be reasonably inferred from those documents. Because none of the parties contemplated offering testimony in this case and because all evidence sought to be admitted is documentary in nature, the court properly determined that this issue could be determined on the documents either agreed upon or ruled upon and in the record.³

If the Trust disagrees with certain of the court's evidentiary rulings, as apparently it does, the appropriate course of action is to submit an offer of proof as to that evidence (as was done by plaintiffs) in order to complete the record for review in an appellate court.

³ This process is in fact no different from what would take place in the courtroom if the parties appeared together on a trial date. Documents would either be admitted by stipulation or the court would review each document and make a ruling as to its admissibility. The process agreed upon by the parties and the court in this case gave the parties and the court an opportunity for research and reflection before being required to respond and/or make a ruling.

3. There Is No Requirement that Defendants Prove "An Intent to Landlock" Each and Every One of the Parcels in Question.

The Trust's alleged confusion over which issue is being decided by the court has not prevented the Trust from misstating that issue at every opportunity in its brief.

Contrary to statements in the Trust's brief, the defendant's do not have to prove, as part of their case, an intent to landlock the parcels in question. If the court finds the presumption of access applicable in this case, the defendants must introduce evidence that rebuts that presumption. A presumption is not evidence but a rule of evidence and stands only until a defendant produces some evidence that calls the validity of the presumption into question. Standerwick v. Zoning Board of Appeals of Andover, 447 Mass. 20, 34 (2006) (citations omitted). The presumption that one who deeds a land locked parcel intends to provide access (assuming the grantor owns all land necessary to obtain that access, which is not the case here) does not require the defendants to prove that the commissioners intended to leave the land landlocked but only to produce some evidence that calls into question the validity of the presumption in this case. This the defendants have done.

Respectfully submitted,

MARTHA'S VINEYARD LAND
BANK

VINEYARD CONSERVATION
SOCIETY, INC.

By its Attorneys,

By its Attorney,

Diane C. Tillotson

Diane C. Tillotson
BBO #498400
Shana E. Maldonado
BBO #667391
Hemenway & Barnes LLP
60 State Street
Boston, MA 02109
(617) 227-7940

Jennifer S.D. Roberts (by OCT)

Jennifer S.D. Roberts, Esq.
BBO# 541715
LaTanzi, Spaulding & Landreth, P.C.
8 Cardinal Lane
Orleans, Massachusetts 02653
(508) 255-2133

TOWN OF AQUINNAH

By its Attorney,

Ronald H. Rappaport (by OCT)

Ronald H. Rappaport, Esq.
BBO# 412260
Reynolds Rappaport & Kaplan LLP
106 Cooke Street
P.O. Box 2540
Edgartown MA 02539
(508) 627-3711

Dated: May 24th, 2010

*I hereby certify under pains and penalties of
perjury that this document was served upon
counsel for all parties in this case on*

5-24-10

by hand/by mail

Diane C. Tillotson