

COMMONWEALTH OF MASSACHUSETTS

(SEAL)

LAND COURT

DEPARTMENT OF THE TRIAL COURT

COUNTY OF DUKES, ss

CASE NO. 97 MISC 238738 (CWT)

MARIA A. KITRAS, as Trustee of BEAR REALTY TRUST; MARIA A. KITRAS and JAMES J. DECOULOS, as Trustees of BEAR II REALTY TRUST and GORDA REALTY TRUST; and MARK D. HARDING, SHEILA H. BESSE, and CHARLES D. HARDING, JR., as Trustees of the ELEANOR P. HARDING REALTY TRUST,

Plaintiffs

v.

TOWN OF AQUINNAH, COMMONWEALTH OF MASSACHUSETTS, acting through its EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS, GEORGE D. BRUSH, as Trustee of the TOAD ROCK REALTY TRUST; CHARLES E. DERBY; JOANNE FRUCHTMAN; JACK FRUCHTMAN; BENJAMIN L. HALL, as Trustee of GOSSAMER WING REALTY TRUST; BRIAN M. HALL, as Trustee of BARON'S LAND TRUST; CAROLINE KENNEDY, individually, and with EDWIN SCHLOSSBERG, as guardians of their minor children ROSE KENNEDY SCHLOSSBERG, TATIANA CELIA KENNEDY SCHLOSSBERG, and JOHN BOUVIER KENNEDY SCHLOSSBERG; JEFFREY MADISON, as Trustee of TACKNASH REALTY TRUST; THE MARTHA'S VINEYARD LAND BANK; MOSHUP TRAIL II LIMITED PARTNERSHIP; PETER OCHS; PERSONS UNKNOWN OR UNASCERTAINED BEING THE HEIRS OF SAVANNAH COOPER, SUSAN SMITH, AND RUSSELL SMITH; BARBARA VANDERHOOP, as Executrix of the ESTATE OF LEONARD F. VANDERHOOP, JR.; VINEYARD CONSERVATION SOCIETY, INC.; DAVID WICE; BETSY WICE; and PERSONS UNKNOWN OR UNASCERTAINED WHO MAY HAVE AN INTEREST IN ANY LAND HERETOFORE OR HEREINAFTER MENTIONED OR DESCRIBED,

Defendants

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Nicholas J. Decoulos

ORDER DENYING THE PLAINTIFFS' MOTION FOR RECONSIDERATION
OF ORDER DATED APRIL 27, 2009

**AND
MOTION TO INCLUDE EXHIBIT 87**

This case comes before the Court on motions of the Plaintiffs, Maria A. Kitras, as Trustee of Bear Realty Trust; and Maria A. Kitras and James J. Decoulos, as Trustees of Bear II Realty Trust and Gorda Realty Trust, for reconsideration of a this Court's Order of April 27, 2009, and to admit proposed exhibit 87 into evidence. The action underlying this motion is for declaratory judgment, pursuant to G.L. c. 231A, § 1, to determine the rights of the parties to easements implied by necessity crossing certain parcels of real property, located in the Town of Aquinnah, owned of record by Defendants.

Through this motion, Plaintiffs seek to have the Court admit previously stricken exhibits 24, 30, and 38. In addition, Plaintiffs submit proposed exhibit 87 for admission. Defendants, Martha's Vineyard Land Bank, Town of Aquinnah, Caroline B. Kennedy, Edwin Schlossberg, Commonwealth of Massachusetts, and Vineyard Conservation Society, Inc., opposed the Motion to Include Exhibit 87 on September 2, 2009, and Defendants, David Wice and Betsy Wice, joined in the opposition on September 4, 2009. In support of their motions, Plaintiffs argue that these exhibits contain evidence that Lot 178 was held by the common grantor, not separately and, therefore, is not disqualified from being the beneficiary of an easement by necessity.

However, it is clear from the 2005 Appeals Court decision in this case that the court properly considered and foreclosed the issue of which lots were held separately and which lots were held in common ownership; Lot 178 was among the former. This determination is not dicta, as Plaintiffs suggest, but is explicitly a threshold determination made by the court in order to reach the question of whether the United States is an indispensable party. The Appeals Court found, affirmatively, that Lots 1 through 188 or 189 do not benefit from an easement implied by necessity but that Lots 189 or 190 and above may be so benefited, and remanded the case to this Court for further proceedings consistent with that opinion. Therefore, the issue of whether Lot 178 was held in separate ownership has been adjudicated, and this Court has no authority to consider it further.

Accordingly, it is hereby:

ORDERED that the Plaintiffs' Motion for Reconsideration of Order Dated April 27, 2009 is **DENIED**; and it is further

ORDERED that the Plaintiffs' Motion to Include Exhibit 87 is **DENIED**.

The admissibility of evidence in this case having been settled, this case is ready to be scheduled for briefing. Accordingly, it is further:

ORDERED that Plaintiffs shall file a brief of their case on or before March 8, 2010. Defendants shall file all reply briefs on or before forty-five (45) days after service of Plaintiffs' brief. Plaintiffs shall file a reply brief, if any, on or before fifteen (15) days

after service of Defendants' reply brief. Defendant shall file all surreply briefs, if any, on or before fifteen (15) days after service of Plaintiffs' reply brief.

So Ordered.

By the Court (Trombly, J.).

Attest:

CWT

Deborah J. Patterson
Recorder

Dated: January 21, 2010

A TRUE COPY
ATTEST:

Deborah J. Patterson
RECORDER