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May 21, 2010

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Ms. Deborah J. Patterson, Recorder
Land Court Department of the Trial Court
226 Causeway Street
Boston, Massachusetts 02114

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

Dear Ms. Patterson:

Enclosed for filing in the above-referenced matter, please find Surreply Of Defendants The Town Of Aquinnah, Vineyard Conservation Society, Inc., Martha' Vineyard Land Bank, Caroline B. Kennedy and Edwin Schlossberg, Jack and JoAnn Fruchtman and David and Betsy Wice.

Thank you for your assistance.

Very truly yours,

Jennifer S.D. Roberts

Encl.

cc: Service List (w/encl.)

COMMONWEALTH OF MASSACHUSETTS

DUKES, SS.

LAND COURT
DOCKET NO.
238738(CWT)

* * * * * * * * * * * * * * * * *

MARIA A. KITRAS, Trustee, et als.,

Plaintiffs,

v.

TOWN OF AQUINNAH, et als.,

Defendants.

* * * * * * * * * * * * * * * * *

SURREPLY OF DEFENDANTS THE TOWN OF AQUINNAH, VINEYARD CONSERVATION SOCIETY, INC., MARTHA'S VINEYARD LAND BANK, CAROLINE B. KENNEDY AND EDWIN SCHLOSSBERG, JACK AND JOANN FRUCHTMAN, AND DAVID AND BETSY WICE

I. Introduction

Defendants Town of Aquinnah, Vineyard Conservation Society, Inc., Martha's Vineyard Land Bank, Jack and JoAnn Fruchtman, Caroline B. Kennedy and Edwin Schlossberg, and David and Betsy Wice submit this surreply to respond to the issues raised in Plaintiffs' Reply Brief To Defendants' Memorandum Of Law On The Issue Of Intent ("the Kitras Reply") and Plaintiffs' Mark D. Harding, And Trustees Sheila H. Besse And Charles D. Harding, Jr. Reply Brief Of

[sic] Defendants' Memorandum Of Law On The Issue Of Intent ("the Harding Reply").

Most notably, plaintiffs have not contested that the defendants have proffered countervailing evidence on the issue of intent—the language of the grants in the Gay Head and Chappaquiddick divisions, the condition of the common lands divided in Gay Head, the 120 year delay in seeking access to the plaintiffs' lots, and tribal custom—such that the presumption relied upon by the plaintiffs has dropped out of this case, leaving the burden of proof on the plaintiffs. Moreover, as is set forth below, plaintiffs' arguments in reply do not alter the ultimate conclusion: the plaintiffs have failed to prove by a preponderance of the evidence that an easement by necessity was intended at the time of the 1878 division of Gay Head's common lands.[1]

II. Argument

A. "Expressio unius est exclusion alterius"

In their main brief, defendants point to the existence of other grants in the 1878 division by the commissioners (Ex. 84, Indian Lands At Gay Head), the failure of the commissioners to expressly provide an easement for access

[1] While nothing turns on it, the Kitras plaintiffs continue to argue, wrongly, that the division of the common lands commenced with Lot No. 174. Ex. 84, Indian Lands At Gay Head at 3 ("The lots of common lands drawn or assigned by the Commissioners Joseph T. Pease and Richard L. Pease … are numbered from No. 189 and upwards, in regular order").

to the lots, and the rule of construction that the expression of one thing negates the implication of others. In response, plaintiffs do not challenge that basic proposition, but contend instead that those express grants create further implied rights of access in their holders. Plaintiffs' analysis is wrong in a number of respects, most importantly in that the law of this Commonwealth does not imply rights of access for easements or profits à prendre held in gross.

As noted in the Kitras Reply, "[a] profit is a right in one person to take from the land of another either a part of the soil, such as minerals of all kinds from mines, stones from quarries, sand and gravel; or part of its produce, such as grass, crops of any kind, trees or timber, fish from lake or stream, game from woods, seaweed, and the like." Gray v. Handy, 349 Mass. 438, 440 (1965).[2] In Massachusetts, a profit is "similar to an easement in many ways, but encompasses the right 'to take from the land of another either part of the soil . . . or part of the

[2] Contrary to the assertion in the Harding Reply, the right to maintain try houses and accessories to try whale oil in Makepeace Bros. Inc. v. Town of Barnstable, 292 Mass. 518 (1935), was plainly not a profit, since no right to take from the land was involved. The applicable law with respect to extinguishment of profits is set forth, not in Makepeace, but in First National Bank of Boston v. Konner, 373 Mass. 463 (1977) (declining to hold that profits created for a special purpose are extinguished when it would be commercially impractical or economically wasteful to attempt to revise the activity which the profit was created to serve).

produce.'" Commercial Wharf East Condominium Ass'n v. Waterfront Parking Corp., 407 Mass. 123, 134 n.4 (1990) (emphasis added), quoting Gray, supra. In this case, the rights identified by defendants are profits à prendre (for the removal of peat) and easements for access for a limited purpose ("for the purpose of fishing and clearing the creeks, a strip of land, one rod wide, on each side of the creek").

Whatever may be the rule elsewhere, Massachusetts recognizes easements in gross. Goodrich v. Burbank, 94 Mass. 459, 460-461 (1866)(citation omitted) ("There are dicta, perhaps authorities, to the effect that an easement proper, like a way in gross, cannot be created by grant, so as to be assignable or inheritable. However the law may be elsewhere, it would be difficult to establish that doctrine in this commonwealth, where it has been held that ways in gross 'may be granted or may accrue in various forms to one, his heirs and assigns.'"). Massachusetts also recognizes that profits may be held in gross. See Goodrich, supra ("In the case of rights of profits à prendre, it seems to be held uniformly that, if enjoyed in connection with a certain estate, they are regarded as easements appurtenant thereto, but if granted to one in gross they are treated as an estate or interest in land,

and may be assignable or inheritable."); Carville v. Commonwealth, 192 Mass. 570, 571-572 (1906) (right to remove ice was an easement in gross); Bates Sand & Gravel Co., Inc. v. Commonwealth, 8 Mass. App. Ct. 331, 334 (1979), aff'd, 380 Mass. 933 (1980) ("A profit à prendre may be held in gross").

Based on the language of the grants at issue here, they are grants in gross. They run to individuals, either by name or by class, and not to the owners of particular lots, and are not necessary to the use or enjoyment of other land. See DeNardo v. Stanton, 74 Mass. App. Ct. 358, 361 (2009) ("an easement is appurtenant [to land] when it is 'created to benefit and does benefit the possessor of the land in his use of the land.' Schwartzman v. Schoening, 41 Mass. app. Ct. 220, 223, 669 N.E.2d 228 (1996)." See Restatement Of Property, §453 & comment b (1944) ("In order that an easement may be appurtenant to a particular tract of land, not only must it appear that the easement was created for the purpose of benefitting the possessor of that land in his use of it, but the use permitted by the easement must be such as really to benefit its owner as the possessor of that tract of land. Moreover, the easement must in some degree benefit the possessor of the land in

his physical use or enjoyment of the tract of land to which the easement is appurtenant")).

And, plaintiffs' argument to the contrary, the law of this Commonwealth does not recognize implied rights of access for rights in gross. Jones v. Stevens, 276 Mass. 318, 324 (1931) ("It has been held in the case of an easement in gross that it is not essential to the validity of the easement that the grantee at the time of the grant should have a legal interest in intervening lands so as to be able to reach the servient tenement."); Goodrich, 94 Mass at 462 (right in gross to take water from a spring is valid even in the absence of right to lay pipes over intermediate land) ("It is true that the grantee cannot make the grant useful without acquiring from the owner of the intermediate land the right to lay pipes therein, nor can he use the water in a house until he obtains the right to possess that house. But these may be acquired afterwards.").

In sum, plaintiffs are wrong as a matter of law that access must be implied for the rights expressly granted in the 1878 division, and have failed to rebut defendants' assertion that the express grant of these rights is evidence that other rights were not intended.

B. The Physical Condition of the Premises

In support of their claim that no easement was intended, the defendants point to the Appeals Court's language questioning "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." Kitras v. Town of Aquinnah, 64 Mass. App. Ct. 285, 299 (2005). In response, plaintiffs argue in the Kitras Reply that the Appeals Court did not have the benefit of Richard L. Pease's 1871 Report of the Commissioner (Ex. 18), which provided a different description of the land, and both the Kitras Reply and the Harding Reply rely heavily on the description contained in that report.

In fact, the Appeals Court did have the benefit of the 1871 Report of the Commissioner, which it referenced in its decision. Kitras, 64 Mass. App. Ct. at 288-289 ("By reports of 1871 and 1878, the Pease brothers formalized the boundaries of those lots already held in severalty . . ."). Moreover, that report reinforces the diversity of conditions existing in Gay Head: "The surface is very irregular, abounding in hills and valleys, ponds, swamps,

fine pasture-land and barren beach, with occasional patches of trees and tilled land." Ex. 18, 1871 Report of the Commissioner, at 3-4. On this record (including the evidence cited by defendants in their main brief), it is reasonable to infer (1) that the best land on Martha's Vineyard was not in Gay Head, but in other towns controlled by Europeans, (2) that the best land in Gay Head, such as it was, was already held in severalty by individual tribe members, and (3) that what was left to be divided in 1878 was of the quality described by the Appeals Court.

The preponderance of the evidence supports the Appeals Court's proposition that the land was of such poor quality that access to it was not warranted, particularly if to do so would interfere with the rights of owners of other lands. See Kitras, 64 Mass. App. Ct. at 299 ("Also problematic is the difficulty of routing easements from the common lands to public roads (at least those arguably existing at the time) without traversing those lands already held in severalty, that is, lots 1 through 188 or 189.").

C. Aboriginal Title

Defendants assert that, because the common lands were the subject of both fee title and aboriginal title in 1878 and because aboriginal title recognized access, no easement

by necessity was intended at the time of the division of the common lands in 1878. In response, plaintiffs assert (1) that fee title to the common lands was transferred from the Commonwealth in 1870 when the Town of Gay Head was created, not in 1878, when the commissioners' report was recorded, and (2) that there was no aboriginal title in the common lands and thus no access pursuant to that title.

For defendants' purposes, it does not matter when fee title was transferred from the Commonwealth,[3] since the key determinant is the existence and extinguishment of aboriginal title, which all parties agree occurred in 1987, with the passage of 25 U.S.C. §1771b. And even if the extinguishment of aboriginal title was made retroactive in

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[3] On this record, it appears that some form of fee title to some lands may have been in the district of Gay Head when it was created in 1862. See Ex. 11, St. 1870, c. 213 § 2 ("All common lands, common funds, and all fishing and other rights held by the district of Gay Head are hereby transferred to the town of Gay Head, and shall be owned and enjoyed as like property and rights of other towns are owned and enjoyed."). In discussing a similar statutory history of land ownership respecting the Mashpee tribe, the Supreme Judicial Court noted that:

> [t]he tenure by which these lands were held was peculiar. In bestowing the privileges of citizenship upon these wards of the Commonwealth, and giving a title in fee simple to all lands held by them in severalty under existing provisions of law, it was not only a proper but a wise exercise of power for the Legislature to frame provisions by which common lands belonging to the town or the tribe, and the proceeds of the sale of such lands, should be divided.

In Re Coombs, 127 Mass. 278, 281 (1879) (emphasis added). Contrary to the Harding Reply, it is not at all clear if, and if so, when, the town obtained title to the common lands, whether the town was the "grantor" of the lands divided in 1878, or whether the "transfer" of the common lands for purposes of 25 U.S.C. § 1771b was the creation of the district of Gay Head in 1862, the creation of the Town of Gay Head in 1870, or the division on the common lands in 1878.

1987, tribe members could rely on aboriginal title as the source of their right of access in 1878 and for at least another century thereafter. There was, therefore, no necessity to create an easement at the time of the division, and no intent to do so.

D. Plaintiffs' Delay In Asserting Their Claims

Defendants also submit that the 120 year in delay in asserting a claim of access supports the Appeals Court's view that the land was of such little value that rights of access were unnecessary. Contrary to the Kitras Reply, defendants do not argue that the easement was extinguished as a result of the delay, but that it never came into existence because, given the poor nature of the land, it was unnecessary.

The Kitras Reply also cites to the Restatement Of Property regarding "the strong public policy" against unusable property. That is not the law of this Commonwealth. As recognized by the Appeals Court in Kitras, "[n]either does there exist a public policy favoring the creation of implied easements when needed to render land either accessible or productive." Kitras, 64 Mass. App. Ct. at 298.

E. The Chappaquiddick Set-Off

Defendants cite to the Chappaquiddick division as evidence that the commissioners on Martha's Vineyard were aware of and made provision for access in other instances, which would reflect a deliberate decision not to do so with respect to the Gay Head division. In the Kitras Reply, the plaintiffs argue that the existence of easements in the division of the Chappaquiddick common lands and the lack thereof in the division of the Gay Head common lands indicates, instead, an "oversight" with respect to Gay Head. The plaintiffs in the Harding Reply argue it was the fault of the Probate Court "who [sic] failed to fulfill its most basic duties under the partition proceedings to provide access to the land it divided for the new citizens of the Commonwealth." Those arguments are not supported by the record, which reveals a "careful and lengthy consideration given the partitioning process." Kitras, 64 Mass. App. Ct. at 299.

III. Conclusion

For the reasons set forth above and in their brief in chief, defendants Town of Aquinnah, Vineyard Conservation Society, Inc., Martha's Vineyard Land Bank, Jack and JoAnn Fruchtman, Caroline B. Kennedy and Edwin Schlossberg, and David and Betsy Wice hereby request that this Court enter

judgment in their favor on the grounds that plaintiffs have failed to prove by a preponderance of the evidence that an easement by necessity was intended in 1878 over the land of the defendants for the benefit of the plaintiffs' lots.

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Dated: May 21, 2010

Certificate Of Service

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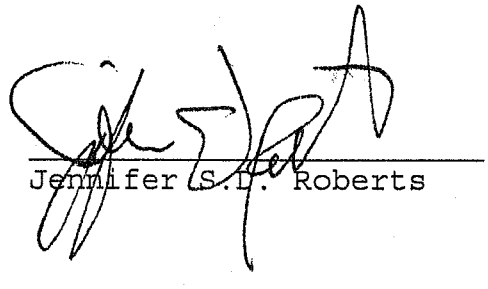

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