COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-11885

MARIA A. KITRAS, et al.,
Plaintiffs-Appellants,

v.

TOWN OF AQUINNAH, et al.,
Defendants-Appellees

ON APPEAL FROM A JUDGMENT OF THE LAND COURT

APPELLANTS' REPLY BRIEF

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Explanation of Abbreviations

Add. refers to the Addendum reproduced at the end of our blue brief.

Supp. Add. refers to the Supplemental Addendum reproduced at the end of this reply brief.

A. refers to the Appendix of documents reproduced at the end of the blue brief.

S.A. refers to the Supplemental Appendix, filed with a motion for leave to file these documents.

E. refers to the separately-bound volume of Exhibits.

T. refers to the separately-bound volume of transcripts.

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ARGUMENT IN REPLY

I. THE VINEYARD CONSERVATION SOCIETY, INC., IS MISTAKEN ABOUT THE APPLICABLE STANDARD OF REVIEW.

VCS asks this Court to change the applicable standard of review of factual findings where, as here, the evidence below was all documentary. VCS Br. 18-20. No such change is permissible.

Nine years after Anderson v. Bessemer City, 470 U.S. 564 (1985)--the federal case on which VCS relies--the Supreme Judicial Court restated and reaffirmed Massachusetts law, leaving no room for doubt:

> We have consistently held that lower court findings based on documentary evidence available to an appellate court are not entitled to deference.

Commonwealth v. Novo, 442 Mass. 262, 266 (2004). "[W]henever the evidence before the trial court is reduced to a tangible form," the SJC held, factual findings are reviewed *de novo* in both civil and criminal appeals. Id., citing Guempel v. Great American Ins. Co., 11 Mass. App. Ct. 845, 848 (1981) ("Despite the third sentence of Mass.R.Civ.P. 52(a), 365 Mass. 816 (1974), we may draw our own conclusions from the evidence with recognition that the trial judge's opportunity to appraise all the documents was no better than ours is now.")

This standard of review remains the law of the Commonwealth, as stated by the Supreme Judicial Court. "[W]here factual findings are based solely on documentary evidence, they receive no special deference." Bd. of Registration in Medicine v. Doe, 457 Mass. 738, 742 (2010). Review here is *de novo*.

II. CONTRARY TO APPELLEES' CONTENTIONS, THE HISTORIC CONTEXT OF THIS PARTITION IS COMPELLING EVIDENCE OF THE "MATERIAL CIRCUMSTANCES AND PERTINENT FACTS" KNOWN TO THE PARTIES AT THE TIME OF THE CONVEYANCES.

In our principal brief we urged as follows:

> Behind the legal presumption in issue here--the General Court's intent to give the Gay Head Indians land with lawful access--is this history of white settlers' descendants, inspired by the post-Civil War amendments, seeking to expand the Union's freedoms to its Indian residents. This history compels the conclusion that the General Court intended the property rights conveyed to be rights in *salable* land. Salable land requires access rights that run with the land.

Kit. Br. 31.

Contrary to the briefs of Martha's Vineyard Land Bank et al., MVLB Br. 7-9, and the Commonwealth, AG Br. 9, we are not asking this Court to decide this case on the basis of any public policy, past or present; policy is not a determining factor here. Kitras v. Town of Aquinnah, 64 Mass. App. Ct. 285, 288-289 (2005).

Rather, we urge that if this Court were to decide this case *without* considering the historic context of

this partition, it would be turning a blind eye to significant "material conditions known to the parties at the time." Id. at 299, quoting Orpin v. Morrison, 230 Mass. 529, 53 (1918).

Appellees' inescapable contention, buried deep in their arguments and necessary to meet their burden of proof, is that the General Court authorized partition of 1900 acres of common Indian land, E. 81-82, with the unconscionable intent to create lots which were inaccessible, unusable and, for all practical purposes, unsalable under the common law of Massachusetts.

The recorded history, as we have shown, Kit. Br. 6-20, 28-31, paints a very different picture. These legislators were brimming with moral and constitutional fervor, E. 77, and among their concerns was to rectify the injustice that the native people "could make no sale of their lands to any except other members of their tribe." E. 34, 127. Partition of the Gay Head land, giving individual tribe members the ability to alienate property, was an explicit step toward full enfranchisement which, as VCS concedes, they lacked after becoming citizens in 1869. VCS Br. 45-46.

Contrary to MVLB's brief, MBLB at 7, the General Court's 1870 committee was clear about its intention to

remedy this "political anomaly." E. 69-70. As both the Kitras and Harding plaintiffs pointed out, S.A. 25, 47, in 1870 the legislative committee explained its central reason for recommending that the Gay Head people have the power to partition their common land:

> This ... is a question of "property," which every "citizen" should have the privilege of determining for himself, and the people of Gay Head have certainly the right to claim, as among the first proofs of their recognition to full citizenship, the disposition of their landed property, in accordance with their own wishes. E71.

The Hall Defendants--consistently "aligned with the Plaintiffs" in this case, VCS Br. 2 n.2--linked these events to Massachusetts' recent leadership role in the efforts to abolish slavery. These legislators, Hall urged, who intended "full enfranchisement of our native brethren," could not possibly have

> intended to divide ... the Town's lands and distribute them ... so as to result in no ability for the recipients to access them and thus [making them] incapable of use [and] rendering the whole episode an exercise in futility.

S.A. 50-51.

Appellants demonstrably raised the historic context of these conveyances below, and not "for the first time on appeal." VCS Br. 18, 44.

III. CONTRARY TO VCS'S CONTENTION, THE LEGISLATURE'S SPECULATION THAT THE LOTS MIGHT "LIE UNTILLED AND RELATIVELY UNUSED" WAS NOT BECAUSE THE LAND WAS WORTHLESS BUT BECAUSE THE PEOPLE WERE SO POOR.

When the 1870 legislative committee said that, if partitioned, the resulting lots might remain "untilled and comparatively unused," they were demonstrably not referring to the worthlessness of the land, as urged by VCS. VCS Br. 41. They were explicitly referring to the Gay Head people's poverty: to their lack of "means" to make the "slight expenditure" necessary for the land to become "reasonably productive." E. 71.

Further, contrary to VCS's related claim, VCS Br. 41, it is irrelevant that these conveyances took place long before anyone filed suit for access. Recently, in Richards v. Jackson, 82 Mass. App. Ct. 1104, 28 Mass. App. Unpub. LEXIS 844 (June 28, 2012, Mem. and Order, Rule 1:28), this Court affirmed a judgment finding an easement by necessity on Martha's Vineyard based on a conveyance in 1840. Supp. Add. 1-2.

IV. CONTRARY TO MVLB'S CONTENTION, EASEMENTS BY NECESSITY CAN ARISE WHEN A GRANTOR, HAVING UNITY OF TITLE, DIVIDES ITS LAND AND CONVEYS ALL LOTS.

At the time of partition, the Town of Gay Head had unity of title in the land conveyed. VCS Br. 15; E. 84. MVLB mistakenly claims that, because the

Plaintiffs claim easements over lots not retained by the grantor[1] at the time of partition, the common law of easement by necessity does not apply. MVLB Br. 2-3.

There is nothing to this argument, raised by MVLB without benefit of legal authority.[2] Here is black letter law on the subject:

> Implied servitudes can arise when the grantor simultaneously conveys all the grantor's interests to two or more grantees, as well as when the grantor retains some interest.

RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES), § 2.15, comment c (2000).

V. CONTRARY TO THE COMMONWEALTH'S CONTENTION, IT IS SETTLED THAT THE LAW OF EASEMENTS BY NECESSITY APPLIES TO THESE CONVEYANCES.

Notwithstanding the law of the case, Kitras v. Town of Aquinnah, 64 Mass. App. Ct. 285, 292 n. 5 (2005), the Attorney General persists in arguing that the common law presumption of an easement by necessity is not applicable to conveyances by "the sovereign," i.e., the Commonwealth. AG Br. 4-8. This Court has

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[1]For purposes of this argument, it does not matter whether the "grantor" is viewed as the Town, which owned the common land, or the Commissioner, who partitioned it on behalf of the Commonwealth.

[2]Kellogg v. Bd. of Registration in Medicine, 461 Mass. 1001, 1003 (2011) (bald assertions of error without legal argument do not rise to the level of appellate argument); Mass. R. App. P. 16(a)(4).

rejected this claim as a matter of law. Id..[3]

VI. CONTRARY TO VCS'S CONTENTION, A GRANTOR'S FAILURE TO SPECIFY AN ACCESS EASEMENT IS A NEUTRAL FACT IN CASES OF EASEMENT BY NECESSITY.

Citing no supporting case law, VCS relies on this Court's observation that the Commissioners gave "careful and lengthy consideration" to their task, as evidence that they affirmatively intended to convey landlocked parcels. VCS Br. 41-43. In 2005, however, this Court reversed a judgment which had been based in part on such reasoning, noting that in *all* cases of easement by necessity "careful drafting would have avoided the problem." Murphy v. Olsen, 63 Mass. App. Ct. 417, 422 (2005).

In any event, as a matter of simple logic, it does not follow from the Commissioners' care in some of their duties that they carefully intended to convey lots with no lawful access to a public way. Their 1870 report says nothing about Indian law. E.69-78. Given their intent to make these people citizens with the same rights and privileges as everyone else, E.77, and given the holding in Clark v. Williams, 36 Mass. 499,

[3]It is thus unnecessary to distinguish cases cited by the Commonwealth, where the sovereign owned the land at the time of conveyance, from the present case, where the sovereign conveyed the land to the Town of Gay Head eight years before conveyance. E84.

500-502 (1837), it is improbable that they considered Indian traditional law at all. Kit.Br. 36-38.

VII. CONTRARY TO VCS'S CONTENTION, THE RECORD NOWHERE REBUTS THE PRESUMPTION THAT THE INDIAN PETITIONERS INTENDED TO RECEIVE PARTITIONED LOTS WITH LEGAL ACCESS.

Nor is it logical that tribal members whose Town owned all the land in common, with access on a public way, E.75, 84, 196, 794, would intentionally seek to partition it into legally inaccessible lots. VCS urges that, despite the presumption that in 1878 both parties intended these partitioned lots to have "a legal right of access," Davis v. Sikes, 254 Mass. 540, 545-546 (1926), the general evidence of "Indian tribal law, custom and usage" proved that the Gay Head petitioners had no such intent. In short, VCS mistakenly contends that it proved that these Indians clung to their traditional rights and never intended to receive lots with common law access. VCS Br. 35, 46.

The Gay Head Indians were hardly clinging to their traditional law. Their rights under traditional law were indisputably "insecure," causing litigation, "much difficulty and embarrassment," and "possibly great wrong to innocent and deserving parties." E.40. Knowing full well the importance of property rights under the common law, these people explicitly sought to

receive its protections. E.3 (1859 letter from Zacheus Howwaswee to Commissioner Earle, on the importance of legalizing Indian title); E. 89, 95 (petitions to partition common land owned by Town of Gay Head). It is unthinkable that these people intended to trade legally accessible common land for legally landlocked lots, and the record contains no such evidence.

CONCLUSION

For these reasons and for those stated in their principal brief, the Kitras and Harding plaintiffs ask this Court to reverse the Land Court's decision; to order the entry of a judgment declaring that all their lots have access easements by necessity; and to remand the case to locate those easements on the ground.

Respectfully submitted,

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Certificate of Compliance

I certify that this brief complies with the rules of this Court that pertain to the filing of briefs, including, but not limited to: Mass. R. App. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. App. P. 16(e) (references to the record); Mass. R. App. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. App. P. 16(h) (length of briefs); Mass. R. App. P. 18 (appendix to the briefs); and Mass. R. App. P. 20 (form of briefs, appendices, and other papers).

Wendy Sibbison, Esq.

SUPPLEMENTAL ADDENDUM--TABLE OF CONTENTS

Richards v. Jackson, 82 Mass. App. Ct. 1104, 28 Mass. App. Unpub. LEXIS 844 (June 28, 2012, Mem. and Order, Rule 1:28) . . . . . Supp. Add. 1

82 Mass. App. Ct. 1104; 969 N.E.2d 749;
2012 Mass. App. Unpub. LEXIS 844, *

JAMES A. RICHARDS vs. GLENN D. JACKSON & another.[1]

1 Martha's Vineyard Land Bank Commission (Land Bank). Glenn D. Jackson has not taken part in the appeal; the Land Bank is the only appealing party.

11-P-471

APPEALS COURT OF MASSACHUSETTS

82 Mass. App. Ct. 1104; 969 N.E.2d 749; 2012 Mass. App. Unpub. LEXIS 844

June 28, 2012, Entered

PRIOR HISTORY: Richards v. Jackson, 2010 Mass. LCR LEXIS 127 (2010)

DISPOSITION: [*1] Judgment affirmed. Order denying motion for new trial affirmed.

JUDGES: Grasso, Mills & Trainor, JJ.

OPINION

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a bench trial on September 22, 2009, the Land Court issued a judgment declaring that the plaintiff's property, a twenty-nine acre parcel of land in Tisbury (locus), has the benefit of an easement by necessity over the defendant Jackson's adjoining property (Jackson parcel) to reach Stoney Hill Road, a public way. The Martha's Vineyard Land Bank Commission (Land Bank)[2] moved for a new trial, and its motion was denied by the trial judge. The Land Bank appeals from that denial and from the judgment.

2 As the parties have not argued the point, we pass over the question of the Land Bank's standing to challenge the judge's determination that Richards possesses an easement of passage over Jackson's property. The Land Bank is a party to the case on the basis of its holding of an agricultural preservation restriction and view easement on the Jackson parcel.

The Land Bank argues that the judge erred because (1) the record did not support the creation of an easement by necessity, and (2) even if such an easement existed, the likely route would have been to the [*2] north, over a parcel of land other than Jackson's. We affirm the judgment. After a review of the record, we conclude that

the judge was within his discretion to credit the large amount of evidence on the record supporting the existence of the implied easement by necessity created at the time of the 1840 division.[3] It was within the judge's discretion not to credit the assertions made by the defendants' sole testifying expert witness at trial, or those made by the Land Bank's experts in affidavits that were previously submitted at the summary judgment stage.[4] See North Adams Apartments Ltd. Partnership v. North Adams, 78 Mass. App. Ct. 602, 607, 940 N.E.2d 494 (2011).

3 For the requirements for an implied easement by necessity, see New England Continental Media, Inc. v. Milton, 32 Mass. App. Ct. 374, 378, 588 N.E.2d 1382 (1992), and Kitras v. Aquinnah, 64 Mass. App. Ct. 285, 291, 833 N.E.2d 157 (2005).

4 Although it had the opportunity to do so, the Land Bank did not call these two experts, Robert M. McCarron and Douglas R. Hoehn, to provide live testimony on its behalf at trial.

We note that although the trial judge determined that the easement was located "from Locus to Stoney Hill Road over the Jackson Parcel," he made no more specific [*3] findings regarding the exact placement of the easement. However, "[t]he mere fact that the precise location is undefined does not negate the existence of the right of access." Cheever v. Graves, 32 Mass. App. Ct. 601, 605, 592 N.E.2d 758 (1992). Furthermore, "the parties are free to locate a previously undefined right of access, or in the absence of agreement by the parties as to its location a court may fix the bounds of a right of way not located by the instrument creating it." Id. at 605-606, citing Mugar v. Massachusetts Bay Transp. Authy., 28 Mass. App. Ct. 443, 445, 552 N.E.2d 121 (1990).

Judgment affirmed.

Order denying motion for new trial affirmed.

By the Court (Grasso, Mills & Trainor, JJ.),

Entered: June 28, 2012.