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COMMONWEALTH OF MASSACHUSETTS  
The Supreme Judicial Court

DUKES, SS.

No. SJC-11885

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MARIA KITRAS, TRUSTEE, AND OTHERS,  
*Plaintiff-Appellants,*

v.

TOWN OF AQUINNAH AND OTHERS,  
*Defendant-Appellees.*

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ON APPEAL FROM A DECISION OF THE LAND COURT

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**BRIEF OF THE DEFENDANT-APPELLEE  
COMMONWEALTH OF MASSACHUSETTS**

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## STATEMENT OF ISSUE

Whether the presumption that an implied easement by necessity over undefined lands of the defendants exists for the benefit of Plaintiffs'<sup>1</sup> land is applicable in the circumstances of this case where the conveyances in question represent a wholesale, simultaneous division of common lands pursuant to an act of the Legislature and the easements sought to be imposed are not over lands of the "common grantor," but of other simultaneous grantees, and where the public way to which easements of access are sought did not even exist until 80 years after the original conveyances.

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<sup>1</sup> Appellants Maria Kitras, James J. DeCoulos, Mark Harding, Sheila H. Besse, and Charles D. Harding, in the capacities described at the Plaintiffs-Appellants' Brief, p. 1 n. 1-2 (PAB1, n. 1-2), are referred to as Plaintiffs throughout this brief.

## STATEMENT OF THE CASE

The Commonwealth holds a reversionary interest in some of the land at issue held by the Town of Aquinnah and the Martha's Vineyard Land Bank. Title to the land reverts back to the Commonwealth if the land is no longer being used for conservation purposes.

The Commonwealth was not originally a Defendant and was joined as a Defendant after the decision of the Appeals Court in *Kitras v. Town of Aquinnah*, 65 Mass. App. Ct. 285 (2005).

The Commonwealth adopts the Statement of the Case by the Vineyard Conservation Society in its brief.

## ARGUMENT

### 1. **The Land Court Decision Should Be Affirmed Based on the Co-Defendants' Arguments.**

The Commonwealth urges this Court to affirm the finding of the Land Court, because implied easements by necessity were not created when the subject land was partitioned by the Commonwealth beginning in 1878.<sup>2</sup>

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<sup>2</sup> The Town of Gay Head held title to the common land, St. 1870, c. 213, § 2, but the Commonwealth through its Probate Court and paid commissioners conveyed the subject land to its initial private land holders. See St. 1870, § 5 (authorizing probate court to appoint commissioners to divide and convey common land upon application of Gay Head selectmen or petition of 10 citizens); E492-E719 (order of conveyance of lot nos. 174 to 719).

In support, the Commonwealth adopts the argument of the Co-defendants-Appellees<sup>3</sup> in the Vineyard Land Bank brief and in Sections II and III of the Vineyard Conservation Society brief.

In addition, the Commonwealth asks the Court to consider the following:

**2. No Public Policy Exists Favoring Implied Easements of Access in Massachusetts.**

The Plaintiffs argue that the inhabitants of Gay Head had a right to salable property--accessible to a public way. PAB31. There is no public policy in Massachusetts jurisprudence, however, that favors the creation of easements by necessity to make land either accessible or productive. See *Kitras*, 64 Mass. App. Ct. at 298, citing *Richards v. Attleboro Branch R. Co.*, 153 Mass. 120,122 (1891) ("Neither does there exist a public policy favoring the creation of implied easements when needed to render land either accessible or productive."). To recognize a retroactive change in

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<sup>3</sup> Co-defendants-Appellees are the following: the Vineyard Conservation Society, the Town of Aquinnah, the Martha's Vineyard Land Bank, Jack Fruchtman, JoAnn Fruchtman, Caroline Kennedy, Edwin Schlossberg, David Wise, and Betsy Wise. A121. They are collectively referred to as the "Co-defendants" throughout this brief. Benjamin L. Hall, Jr. and Brian M. Hall are named Defendants who are aligned with the Plaintiffs in this case, A461-464, and are not included as "Co-Defendants."

public policy now would change the status quo and the reasonable reliance and current expectations of present land holders.

Here, the Plaintiffs bought landlocked parcels at their own risk. See *Orpin v. Morrison*, 230 Mass. 529, 533-34 (1918), quoting from *Gayetty v. Bethune*, 14 Mass. 49, 56 (1817) (stating that if one purchases land knowing "he had no access to the back part of it, but over the land of another, it was his own folly; and he should not burden another with a way over his land, for his convenience"). And it is a well-known rule of common law that necessity alone does not make an easement by necessity. *Kitras*, 64 Mass. App. Ct. at 298 (citations omitted). The Plaintiffs should not now be able to obtain access without compensation to the Co-Defendants for such a retroactive change in public policy.<sup>4</sup>

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<sup>4</sup> Other states that recognize a right of access by an implied easement of necessity require compensation for the exercise of that right, for example:

*Louisiana*: Louisiana Civil Code Article 689 reads - "The owner of an estate that has no access to a public road may claim a right of passage over neighboring property to the nearest public road. He is bound to indemnify his neighbor for the damage he may occasion." La. Civ. Code art. 689.

*Wyoming*: There is a statutory right of access and a process which allows the holder of a landlocked estate

3. **Even Assuming that Implied Easements Were Granted or Reserved in 1878, No Such Easements Arose Over the Land of the Co-Defendants.**

While the Plaintiffs ask this Court apply the common law of easements in this case, the facts as pled fail to imply a right to use the land of the Co-Defendants for the Plaintiffs' easement interest. Implied easements arise from the circumstances surrounding the **original** grant of land from the common owner: "[t]he origin of an implied easement whether by grant or by reservation ... 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.**" *Reagan v. Brissey*, 446 Mass. 452, 458 (2006) (citations omitted) (emphasis added). Yet, the implied easement interests sought today by the Plaintiff could not possibly have existed or been intended to exist in 1878, when the original deeds were granted to the Plaintiffs, the Co-Defendants, and

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to bring a condemnation action for an access road. Wyo. Stat. §§ 24-9-101 to 24-9-104. Damages are paid to the servient estate holder by the dominant estate holder. Wyo. Stat. § 24-9-101(j).



over 500 other land holders in Aquinnah. See E492-E719 (granting deeds to lots nos. 174 to 736).

Implies easements to a road built in 1955 could not possibly have existed in 1878. The Plaintiffs are seeking recognition of implied easement interests reserved over the Co-Defendants' land between the Plaintiffs parcels and the Moshup Trail. A140 (The Co-Defendants' land is generally to the **south** of the Plaintiffs' land and between the Plaintiffs' land and the Moshup Trail). The Town of Aquinnah constructed the Moshup Trail in 1955 under its eminent domain powers almost 80 years after the initial 1878 conveyances. A3 (August 8, 2010 decision at 3).

The only existing public roads in Gay Head in 1878, however, were generally **north** of the Plaintiffs' parcel. cf. A138 (map showing subject parcels) with E196 (plan of land made by commissioners appoint by Judge of Probate Court circa 1878); see also A136. Yet, the Plaintiffs have not included any land holders to the north of their properties as Defendants.

Convenience itself will not create an easement by necessity. *Harvey Corp. v. Bloomfield*, 320 Mass. 326, 329 (1946). The fact that an implied easement to the Moshup Trail, which was not built until nearly 80

years after the original conveyances, would be more convenient today does not create an implied easement by necessity over the Co-Defendants' parcels which were created in 1878.

Thus, the interests sought here are not implied easements by necessity contemplated by common law, as they could not have been contemplated by any of the parties in 1878. The Land Court's decision therefore came to the proper conclusion.

#### **CONCLUSION**

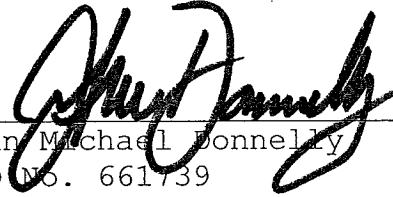
Based on the reasons stated above this Court should affirm the decision of the Land Court.

Respectfully submitted,

THE COMMONWEALTH OF  
MASSACHUSETTS

Through its attorneys

MAURA HEALEY  
ATTORNEY GENERAL



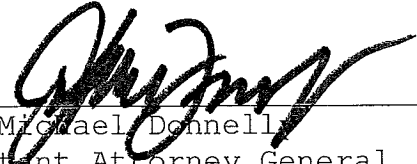
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Dated: October 20, 2015

CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(k)

I certify that the foregoing brief complies with all of the rules of court that pertain to the filing of briefs, including but not limited to the requirements of Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure.



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John Michael Donnelly  
Assistant Attorney General  
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## ADDENDUM

La. Civ. Code. art. 689. Enclosed estate; right of passage.

Wyo. Stat. § 24-9-101 (1977). Petition; initial hearing; appointment of viewers and appraisers; bond; rules; certification to district court.

Wyo. Stat. § 24-9-102 (1977). Repealed by Laws 2000, ch. 88, § 2, eff. March 14, 2000.

Wyo. Stat. § 24-9-103. Report of viewers and appraisers; second hearing; order by commissioners; appeal.

Wyo. Stat. § 24-9-104. Water and timber ways.

La. Civ. Code art. 689

**Art. 689. Enclosed estate; right of passage**

The owner of an estate that has no access to a public road may claim a right of passage over neighboring property to the nearest public road. He is bound to indemnify his neighbor for the damage he may occasion.

**Credits**

Acts 1977, No. 514, § 1, eff. Jan. 1, 1978.

**Editors' Notes**

**REVISION COMMENT--1977**

This provision is based on Article 699 of the Louisiana Civil Code of 1870. It changes the law as it declares that an estate is enclosed if it does not have access to a public road, even though it has access to a railway or tramway.

§ 24-9-101. Petition; initial hearing; appointment of viewers and appraisers; bond; rules; certification to district court

(a) Any person whose land has no outlet to, nor connection with a public road, may file an application in writing with the board of county commissioners in the county where his land is located for a private road leading from his land to some convenient public road. The application shall contain the following information:

(i) The legal description of the land owned by the applicant to which access is sought and a statement that the land is located within the county;

(ii) A specific statement as to why the land has no legally enforceable access, other than a waterway, and whether the land is surrounded on all sides by land owned by another person or persons or a natural or man-made barrier making access unreasonably costly;

(iii) A description of the applicant's efforts to purchase a legally enforceable access to a public road;

(iv) A description sufficient to identify the general location of any access routes proposed by the applicant;

(v) The legal description and the names and addresses of the affected parties of all land over which any proposed access routes would cross. Affected parties includes the owners of record, owners of recorded easements and rights of way and any lessee, mortgagee or occupant of the land over which any proposed road would cross and may include the state of Wyoming; and

(vi) A statement as to whether any actions of the applicant or any person with the consent and knowledge of the applicant, caused the applicant's land to lose or to not have any legally enforceable access.

(b) Within ten (10) days after filing an application with the board, the applicant shall give notice in writing by certified mail, with return receipt, to the affected parties of all lands over which any private road is applied for, of his pending application for a private road. The notice shall include a complete copy of the original application and any amendments thereto. Each affected party receiving notice under this subsection shall, within forty-five (45) days of receiving notice, provide written notice by certified mail with return receipt requested, to the board

and the applicant of the location and description, in the manner described in paragraphs (a)(iv) and (v) of this section, of any alternate routes proposed by the affected party.

(c) The board shall review the application within eighty-five (85) days of its receipt and if the board finds the application contains the information required by subsection (a) of this section and notice has been provided in accordance with subsection (b) of this section, it shall schedule a hearing to determine whether the applicant has no legally enforceable access to his land. The hearing shall be scheduled not sooner than one hundred forty-five (145) days after the filing of the application with the board.

(d) If the applicant has had access to his land and that access is being denied or restricted, the board of county commissioners may grant temporary access to the applicant over a route identified by the board until the application has been processed and finalized.

(e) After the board has scheduled a hearing date under subsection (c) of this section, the applicant shall give written notice of the date, time and place of the hearing on the application, by certified mail with return receipt, to all affected parties named in the original application, all landowners affected by any alternative routes proposed as provided in subsection (b) of this section and any other landowners the board believes may be affected by the application or by any alternative route which may be considered by the board. The written notice shall include a copy of the original application and any amendments thereto and shall be provided at least forty-five (45) days prior to the pending hearing. If any affected party, including any landowner affected by any alternative route proposed as provided in subsection (b) of this section, is a nonresident, and there is no resident agent upon which personal service can be had, then the notice may be published once a week for three (3) weeks in a newspaper published in the county. The first publication shall be at least forty-five (45) days prior to the hearing.

(f) The board may assess to the applicant costs for acting on the application under this section and W.S. 24-9-103 and require the applicant to file a bond to pay for those costs.

(g) All affected parties having an interest in the lands through which the proposed road or any alternative road may pass may appear at the hearing and be heard by the board as to the necessity of the road and all matters pertaining thereto.

(h) If at the completion of the hearing the board finds that the applicant has



satisfied the requirements of this section and access is necessary because the applicant has no legally enforceable access, the board shall within thirty (30) days of the completion of the hearing enter its order so finding and certify the application directly to the district court unless the board elects to retain jurisdiction. If the application is certified the court shall proceed as provided in subsection (m) of this section. If the board elects to retain jurisdiction it shall proceed with the application as provided in this subsection, subsections (j) through (k) of this section and W.S. 24-9-103. The board shall appoint three (3) disinterested freeholders and electors of the county, as viewers and appraisers. Before entering upon their duties the viewers shall take and subscribe to an oath that they will faithfully and impartially perform their duties under their appointment as viewers and appraisers. The board shall cause an order to be issued directing them to meet on a day named in the order on the proposed road, and view and appraise any damages and make a recommendation to the board. Prior to meeting on-site to view the proposed road, the viewers shall give notice in writing to the applicant and affected parties of the lands through which the proposed road or any alternative road may pass, of the time and place where the viewers will meet, at least ten (10) days before viewing the road, at which time and place all persons interested may appear and be heard by the viewers. The viewers and appraisers shall then proceed to locate and mark out a private road and alternative routes as they deem appropriate, provided the location of the road shall not be marked out to cross the lands of any affected party who was not given notice under subsection (e) of this section. The viewers and appraisers shall recommend the most reasonable and convenient route, provided that access shall be along section and boundary lines whenever practical. The viewers and appraisers may recommend specific conditions that the board place on the road as the board deems necessary, including provisions for maintenance and limitations on the amount and type of use. The proposed road shall not exceed thirty (30) feet in width from a certain point on the land of the applicant to some certain point on the public road, and shall be located so as to do the least possible damage to the lands through which the private road is located. The viewers and appraisers shall also appraise any damages sustained by the owner over which the road is to be established and make full and true returns, with a plat of the road to the board of county commissioners. The viewers and appraisers shall also determine whether or not any gates or cattleguards shall be placed at proper points on the road, and appraise any damages in accordance with that determination.

(j) In determining any damages to be suffered by the owner or owners of the lands through which the access shall be provided, the viewers and appraisers shall appraise the value of the property before and after the road is in place. Damages also may include reasonable compensation for any improvements on the lands over which any private road is to be granted which were not paid for and will be used by the applicant.

(k) All hearings conducted by the board of county commissioners under this

section and W.S. 24-9-103 shall be held in accordance with the Wyoming Administrative Procedure Act, as it applies to a contested case. The board shall enforce the provisions of this article in accordance with the Wyoming Administrative Procedure Act.

(m) If the board certifies the application directly to the district court the board shall within twenty (20) days of entering its order send notice of the certification in writing to the clerk of the district court and to all affected parties having an interest in the lands through which the proposed road or any alternative road may pass. The certification shall be filed as a civil action in district court upon payment of a filing fee by the applicant as provided in W.S. 5-3-206(a)(i). The certification shall be an interlocutory decision by the board. The certification and order finding necessity shall not be subject to appellate nor de novo review by the district court. The court shall proceed with the matter in the manner provided in and consistent with subsections (h) and (j) of this section and W.S. 24-9-103, except that the case shall be conducted in accordance with the rules of civil procedure, the court shall act in place of the board of county commissioners, and the provisions of the Wyoming Administrative Procedure Act shall not apply. Entry of a final order by the court shall constitute a final decision of the board under the Wyoming Administrative Procedure Act and the Wyoming Rules of Appellate Procedure and a final order of the court under the Wyoming Rules of Civil Procedure and the Wyoming Administrative Procedure Act.

### **Credits**

Laws 1895, ch. 69, § 28; Laws 1901, ch. 11, § 1; Laws 1985, ch. 56, § 1; Laws 2000, ch. 88, § 1, eff. March 14, 2000; Laws 2003, ch. 9, § 1, eff. July 1, 2003; Laws 2008, ch. 58, § 1, eff. July 1, 2008; Laws 2009, ch. 188, § 1, eff. July 1, 2009; Laws 2011, ch. 46, § 1, eff. July 1, 2011.

**Codifications:** R.S. 1899, § 1933; C.S. 1910, § 2540; C.S. 1920, § 3012; R.S. 1931, § 52-231; C.S. 1945, § 48-331; W.S. 1957, § 24-92.

§ 24-9-103. Report of viewers and appraisers; second hearing; order by commissioners; appeal

(a) The viewers and appraisers so appointed, or a majority of them, shall make a report of their recommendations to the board of county commissioners at the next regular session, and also the amount of damages, if any, appraised by them, and the person or persons entitled to such damages. Upon receiving the report of the viewers and appraisers, the board shall hold a hearing after twenty (20) days prior written notice to all affected parties having an interest in the lands through which the proposed road or any alternative road may pass, at which time the affected parties may address the report. The board may either accept, reject or modify the report and recommendations. The board shall select the most reasonable and convenient route for the access, provided that access shall be along section and boundary lines whenever practical. In compliance with the Wyoming Administrative Procedure Act, the board shall issue an order specifying the route selected by the board, any conditions imposed by the board and any damages and costs to be paid by the applicant.

(b) The applicant and any other person aggrieved by the action of the board including the amount of any damages awarded, may appeal to the district court at any time within thirty (30) days from the date of the order.

(c) After the board of county commissioners has received proof of payment by the applicant of any damages and costs ordered to be paid, the board shall cause a certified copy of the order to be filed with the county clerk declaring the road to be a private road, and citing in the order any conditions imposed by the board.

(d) In addition to paying any damages to be suffered by the affected parties having an interest in the land through which the access shall be provided, the applicant shall be responsible for obtaining and for paying for any engineering and construction costs incurred concerning the location and construction of the road.

(e) If the proposed private road is located in two (2) or more counties, or if all parties and the board of county commissioners so stipulate, the applicant may bring a private road action in district court in the county where any of the affected lands are located.

(f) In addition to paying other damages and costs required by this section and by W.S. 24-9-101, the applicant shall be responsible for paying the reasonable costs of an appraisal obtained by an affected party if that appraisal was adopted in

substantial part as a basis for damages and varied more than fifteen percent (15%) from the valuation determined by the viewers and appraisers appointed under W.S. 24-9-101(h).

### **Credits**

Laws 1895, ch. 69, § 30; Laws 1901, ch. 11, § 2; Laws 2000, ch. 88, § 1, eff. March 14, 2000; Laws 2009, ch. 168, § 206, eff. July 1, 2009; Laws 2012, ch. 7, § 1, eff. July 1, 2012.

**Codifications:** R.S. 1899, § 1935; C.S. 1910, § 2542; C.S. 1920, § 3014; R.S. 1931, § 52-233; C.S. 1945, § 48-333; W.S. 1957, § 24-94.

Wyo. Stat. § 24-9-104 (1977)

§ 24-9-104. Water and timber ways

Upon the presentation of a petition signed by at least five (5) freeholders of any neighborhood, praying for passage to any watercourse for the purpose of watering livestock, or for the convenient access to timber, the board of county commissioners may, in their discretion, establish such water or timber way as provided in W.S. 24-9-101 through 24-9-103 relating to the opening of private roads.

**Credits**

Laws 1895, ch. 69, § 31.

**Codifications:** R.S. 1899, § 1936; C.S. 1910, § 2543; C.S. 1920, § 3015; R.S. 1931, § 52-234; C.S. 1945, § 48-334; W.S. 1957, § 24-95.