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## **Fight Over Moshup Trail Sent Back to Land Court**

By IAN FEIN

An eight-year legal battle over property rights in Aquinnah resurfaced last week when the Massachusetts Court of Appeals reversed a 2001 state land court decision that had the potential to block the development of more than 100 acres of rare coastal heathland off Moshup Trail.

The complicated case centers on whether a group of private

landowners and developers should be granted access to a vast area of landlocked lots between Moshup Trail and State Road.

The densely worded appeals court decision issued by the Hon. Leon J. Lombardi last Thursday does not appear to favor one side in the case over the other - and in fact attorneys on both sides are calling it a win. It does appear to have the effect of taking a lengthy and procedurally complex case, and throwing it into further limbo. Judge Lombardi has remanded the case back to the land court, unless either party appeals his decision to the Massachusetts Supreme Judicial Court.

Yesterday attorneys on both sides

of the case struggled to make sense of the ruling.

"Our view at the conservation society is that we have an obligation to protect the hard-fought conservation gains we've made here," said Brendan O'Neill, executive director of the Vineyard Conservation Society, one of some 70 Moshup Trail property owners listed as defendants in the case. "That's been our position throughout this multi-year process. There has been a lot of procedural this-and-that, but it's safe to say that we'll keep our eye on the ball."

Mr. O'Neill called the appeals court decision a mixed bag.

On its face the ruling appeared

damaging to the conservation efforts because it overturned a previous land court decision that had dismissed the possibility of obtaining legal access to more than 100 landlocked lots.

The 2001 land court decision by the Hon. Mark Green found that because State Road was the only road in existence when the lots were created, any potential access to the landlocked lots - no matter how close to Moshup Trail - must run north to State Road. The land court also found that any northern access would run through land held by the Wampanoag Tribe of Gay Head (Aquinnah), and that easements through tribal land could not be obtained because the United States government - which acts as

a trustee of the land for the tribe - would not join the case. The case involves an arcane piece of land law known as easement by necessity. In order to establish an easement by necessity, a landowner must bring into court every abutting landowner affected by the implied easement.

Judge Lombardi found that it did not matter whether Moshup Trail, which was built in 1960, existed when the lots were created in 1870. He also decided that the tribe could be joined as a legal party without the federal government, based on the recent supreme judicial court decision regarding tribal sovereignty.

H Theodore Cohen, an attorney with the firm Keegan, Werlin LLP

of Boston, who is representing the plaintiffs, said his clients - including trustees James J. Decoulos and Maria Kitras of Bear Realty Trust, as well as Mark Harding of Wampworx in Mashpee - were happy with the decision.

"In general the plaintiffs are very pleased that the appeals court has acknowledged that the easements do not have to go to State Road," Mr. Cohen said from his Boston office yesterday, "and that the Wampanoags can be made a party to the proceeding."

Jennifer Roberts, who represents the conservation society, chose not to comment about the ongoing case.

Other pieces of the decision last week, however, appeared to favor the conservation society.

Judge Lombardi found that a significant number of the landlocked lots in question - including one of the plaintiff's largest parcels - do not have the unity of title required for an easement by necessity.

Incorporated by the state legislature in 1870, the entire town of Gay Head (now named Aquinnah) was made up of setoff lots. At the time some of the lots were already held by individual owners, while many others were created from state land.

Judge Lombardi ruled last week that because it did not own those

previously held lots, the state could not create access to them.

The decision also cast doubt on the merits of the plaintiffs' case for the parcels that are still eligible for potential easements. Just because a lot is landlocked, Judge Lombardi wrote, does not mean it deserves or was intended to have an access.

"It is well established in this commonwealth: necessity alone does not an easement create," Judge Lombardi wrote.

Ultimately Judge Lombardi sent the complicated questions back to the land court. He also acknowledged the convoluted nature of the case.

"[W]e pause to note that it sometimes is difficult to determine from the pleadings what owners are claiming what easements for what lots, or even what parties remain interested in the case," he wrote in his decision. "On remand it will be for the trial judge and parties to resolve the uncertainties."

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