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Molly Sterling

# TOWN OF TRURO

# PLANNING BOARD

Form C  
APPLICATION FOR APPROVAL OF A DEFINITIVE PLAN

Date Aug. 13, 2015

To the Planning Board of the Town of Truro, MA

The undersigned, being the applicant as defined under Chapter 41, Section 81-L, for approval of a proposed subdivision shown on a plan entitled Definitive Subdivision of Land prepared for Fisher Road Realty Trust

by Outermost Land Survey, Inc. dated 05/13/13 and described as follows:

Located: Off Benson Road, South Truro

Assessor's Map(s) and Parcel(s): Map 53 Parcel 50


Number of Lots Proposed: 1 Total acreage of Tract: 3.46

Said applicant hereby submits said plan as a *Definitive* subdivision plan in accordance with the Rules and Regulations of the Truro Planning Board and makes application to the Board for approval of said plan.

The undersigned's title to said land is derived under deed from Willie J. Cater and Gloria J. Cater dated 3/19/2007 and recorded in the Barnstable Registry of Deeds Book and Page: 22682 Page 84.

or by Land Court Certificate of Title No. \_\_\_\_\_ registered in Barnstable County, and said land is free of encumbrances except for the following:  
:

Said plan ~~has~~ has not (circle appropriate) evolved from a preliminary plan submitted to the Board on \_\_\_\_\_ and approved/approved with modifications/disapproved (circle appropriate) on \_\_\_\_\_.

Applicant's Signature  Applicant's Telephone Number 508-487-1160

Applicant's Legal Mailing Address Willie J. Cater & Gloria J. Cater, Trustees of the Fisher Road Realty Trust by Christopher J. Snow, Esq  
P.O. Box 291, Provincetown, MA 02657

Owner's Signature if not the applicant or applicant's authorization if not the owner , Trustee

Owner's Legal Mailing Address 559 Chestnut Hill Avenue, Brookline, MA

Surveyor Name/Address Donald T. Poole, PLS, Outermost Land Survey, Inc.  
(Or Person responsible for preparation of the plan) 3904 Main Street, Brewster, MA 02631

File twelve (12) copies each of this form and applicable plan(s) with the Town Clerk

**WILLIE J. CATER & GLORIA J. CATER, TRUSTEES OF  
FISHER ROAD REALTY TRUST  
APPLICATION FOR APPROVAL OF DEFINITIVE PLAN  
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**Tab A**

**INTRODUCTORY STATEMENT OF  
WILLIE J. CATER AND GLORIA J. CATER, TRUSTEES OF  
FISHER ROAD REALTY TRUST  
IN SUPPORT OF THEIR APPLICATION  
FOR APPROVAL OF DEFINITIVE PLAN  
AND REQUEST FOR WAIVERS**

**Introduction:**

Dr. Willie J. Cater and his wife Gloria J. Cater, Trustees of Fisher Road Realty Trust (“The Caters”) are the owners of a parcel of land ("Cater Parcel") known and numbered 9B Benson Road which is located in the vicinity of South Truro. The parcel comprises approximately 3.46 acres and is located at the top of a large dune overlooking Cape Cod Bay. The Cater Parcel is landlocked and does not currently enjoy frontage along a public way.

The Caters file this supplemental statement in support of their application to the Town of Truro Planning Board for approval of a single lot subdivision of their land. The Caters seek authorization to construct an access roadway and establish frontage sufficient to meet the Town's zoning requirements in a manner set forth in the Subdivision Plan and Road Construction Plan attached to their Application at **Exhibits K, L and M**. This Supplement is also offered to explain and justify certain of the waivers requested in **Exhibit O**.

**Factual Background:**

The Cater Parcel was created in 1899 out of a much larger tract of land owned, at the time, by Charles W. Cobb who carved the Cater Parcel out of the northwest corner of the land and conveyed it by deed to Lorenzo D. Baker dated September 25, 1899, and recorded in the Barnstable Registry of Deeds at Book 239, Page 398 and referenced in Plan Book 6, Page 127. A copy of the 1899 Deed is attached, **Exhibit B**.

Cobb also granted Baker a right of way over his land to the east to what was then known as a so-called “proprietor's way” and which is now known as Fisher Road, which then abutted the eastern boundary of Cobb's estate.

The 1899 Deed did not include a description of the exact location of the right of way by metes and bounds nor was there in 1899, nor at any time since, a way on the ground leading from the Cater Parcel over the remainder of the Cobb estate to the east. Moreover, as no home or other building was ever erected on the Cater Parcel and no apparent need ever arose for frequent access to that lot, no established route of access to and from the Cater Parcel ever emerged from a course of use.

In the years following execution of the 1899 deed creating the Cater Parcel, the remainder of Cobb's estate was further subdivided into nineteen residential lots. Residential structures were subsequently constructed on fourteen (14) of the lots. Benson Road was laid out, constructed, and accepted by the Town of Truro as a public way. A sketch depicting the Cater Parcel and the surrounding subdivision is attached as **Exhibit C** and is based on the Town of Truro's Assessor's Atlas.

The Caters purchased their lot in June, 1979 by deed from Howard B. French and the property was transferred to the Fisher Road Realty Trust, Willie J. Cater and Gloria J. Cater, Trustees in 2007. Copies of the deeds are collectively attached as **Exhibit D**. As successors to Lorenzo Baker, the Caters acquired the right of way set forth in the 1899 Deed. In or about the early 1990's the Caters began exploring ways in which they could construct a roadway to gain access to their Parcel for purposes of constructing a home.

In 1994, the Truro Conservation Trust acquired the parcel immediately to the south and east of the Cater Parcel. In the same year, the owners of lots 51, 57 and 58 (as shown on **Exhibit C**) which are located along Benson Road created a trust into which they deeded lots 89, 90 and 91 each of which abuts the Conservation Trust parcel.

In circumstances where the exact location of a right of way is not fixed by deed, the owners of the properties both benefitting and burdened by the right of way may establish the location of the right of way by mutual agreement. In this instance, the trustees of the Truro Conservation Trust, the owners of lots 51, 57 and 58 and the trustees owning lots 89, 90 and 91, all refused to acknowledge the existence of the right of way created by Cobb in his 1899 Deed and refused to engage in any discussions that might have led to an agreement concerning its location. Indeed, as the Planning Board considered and ultimately approved the so-called

Thornley Subdivision to the immediate north, some of those very same land owners urged the Planning Board to adopt a provision prohibiting access to the Cater Parcel from the Thornley Subdivision.

**Land Court Litigation Confirming Existence and Validity  
Of Right of Way and Fixing Its Location:**

In the absence of an agreement among those most directly affected by the 1899 right of way, the Caters brought an action in the Massachusetts Land Court for the purpose of (1) establishing the existence and validity of their right of way and (2) fixing its location. The Caters commenced their action in the Massachusetts Land Court in August, 1998 and named as adverse parties the Trustees of the Truro Conservation Trust and the owners of the lots lying between Benson Road and the Conservation Trust property. Additional land owners were added to the case at the insistence of the adverse parties. All of the adverse parties asserted a variety of defenses in which they alleged that the Caters' right of way had been abandoned, released, or extinguished by operation of law under several various theories. The Land Court rejected those claims after the first of a two phase trial and rendered a decision in July 2007 which confirmed the existence and continuing validity of the right of way. A copy of the Court's Decision Following First Phase of Trial is attached as **Exhibit E**. In its decision, the Land Court expressly found that there was no evidence presented at trial showing that the use of the right of way granted by the 1899 Deed would result in any substantial or unreasonable harm to any of the abutters. *Id.*, p. 18.

After the owners of the surrounding properties failed to reach any agreement concerning where to fix the location of the right of way, the Land Court held a second phase of trial for that purpose. The Land Court handed down its Decision Following Second Phase (**Exhibit F**) in July 2010 and entered Judgment (**Exhibit G**). In doing so, the Court not only fixed the location of the right of way, but also imposed certain restrictions on the specifications to which any roadway could be constructed over the easement. First, the Court fixed the location of the right of way so that it straddles the boundary line dividing Lots 51 and 58 and then runs westward up the eastern side of the dune through the Truro Conservation Trust lot.

Although the Caters requested that the Court allow construction of a roadway over the right of way which would comply with the minimum road specifications required by the Town of Truro Rules and Regulations Governing the Subdivision of Land (Truro Subdivision Regulation") applicable to a single lot subdivision, the Court instead imposed limitations on the width and grade of such a roadway. Citing Rural Road Alternative of the Truro Subdivision Regulations permitting waiver of strict compliance with the Town's regulations, the Court ruled that the width of any roadway constructed over the right of way may not exceed twelve feet. *See Exhibit G, p. 2-3.*

Notwithstanding that to reach the Cater Parcel from the east along the route fixed by the Court the roadway must traverse some very steep grades, the Court also imposed a restriction prohibiting the slope of any roadway to be less than ten percent where traversing grades of ten percent or more. *See Exhibit G, pp. 2-3.*

Although the two express restrictions preclude construction of a driveway meeting the minimum specifications set by the Subdivision Regulation, the Court also ordered that the roadway comply with all applicable laws and all permits required by law. *See Exhibit G, p. 3.*

In setting the foregoing restrictions, the Court sought to minimize the impact that a driveway providing access to the Caters' lot would have on the surrounding landscape, environment, and aesthetic characteristics of the area. In particular, the Court held that the restrictions imposed on the grade and driveway width would reduce the necessary amount of cutting and filling and reduce the amount by which the landscape would be disturbed. *See Land Court discussion, Exhibit F, pp. 15-22.*

In a challenge to the foregoing limitations, the Caters filed an appeal before the Massachusetts Appeals Court. Owners of the lots over which the Court fixed the location of the right of way filed a cross appeal. On its own initiative, the Supreme Judicial Court transferred the case from the Appeals Court to its own docket in exercise of its authority to take immediate jurisdiction of the appeal.

In June, 2012, the Supreme Judicial Court issued its decision upholding the judgment of the Land Court confirming the existence and validity of the right of way. The Supreme Judicial Court also vacated so much of the judgment as imposed limitations on the width and slope of any roadway constructed over the right of way holding that those limitations conflicted with that part of the Land Court Judgment requiring such construction to satisfy all applicable legal and regulatory requirements. The Supreme Judicial Court remanded the matter back to the Land Court to resolve the contradiction inherent in its Judgment. A copy of the Supreme Judicial Court's decision is attached as **Exhibit H**.

Following remand by the Supreme Judicial Court, the Land Court entertained further briefs and held hearings with respect to the extent to which its Judgment precluded the Caters from meeting the applicable roadway specifications set by the Truro Subdivision Regulation. At these hearings, the Caters urged the Land Court to amend its judgment to eliminate, altogether, the restrictions it had imposed regarding the roadway's permissible width and grade, pointing out that Truro's Subdivision Regulation stated clearly that the fourteen foot width requirement may not be waived.

After extensive briefs and arguments on the issue, the Land Court issued its Decision Directing Entry of Amended Judgment Following Remand From Supreme Judicial Court on February 4, 2013 a copy of which is annexed as **Exhibit I**. The Land Court then entered an Amended Judgment After Rescript, **Exhibit J**.

In its most recent decision the Land Court concluded that, pursuant to Massachusetts General Laws Chapter 41, Section 81R, the Truro Planning Board has the lawful discretion to waive virtually any of its regulatory standards, notwithstanding the express provision in the Rural Road Alternative provision of the Subdivision Regulation precluding waiver of the minimum roadway width. The Land Court noted that the decision to waive or not is generally committed to a planning board's discretion, *citing Krafchuk v. Planning Bd. of Ipswich*, 453 Mass. 517, 529 (2009) which holds that unless the waiver granted substantially derogates from the intent and purpose of the subdivision control law, a reviewing court will uphold the waiver.



The Land Court also noted that in some cases it may constitute an abuse of discretion for a planning board to decline to waive a particular subdivision rule, *citing Musto v. Planning Bd. of Medfield*, 54 Mass. App. Ct. 831 (2002). Accordingly, in its Amended Judgment After Rescript, **Exhibit J**, the Land Court directed that, in applying for any and all necessary permits or other authorizations to access their property, the Caters (or their successors) "seek from the appropriate governmental boards(s) and officials(s) waivers, permits, and other approvals indicated or necessary to lay out and construct within the Easement a driveway or roadway with the dimensions, grade, width, confirmation, location and route contemplated by this Judgment."

**Request for Waivers:**

In compliance with the Judgment of the Land Court, the Caters have submitted the request for waivers of the Town of Truro Rules and Regulations Governing the Subdivision of Land, Appendix 2, Table 1, Recommended Geometric Design Standards for Subdivisions as set forth in **Exhibit O** attached to the Application for Approval of Definitive Plan.

Among the following reasons, the Applicants submit that the waivers are justified because:

1. The application calls for the creation of subdivision for only a single residential lot on an existing parcel which was created in 1899.
2. Because the locus is landlocked, the requested approval of the definitive plan is a reasonable and necessary method by which the Applicants can meet the minimum frontage requirement of fifty feet as required by the Town of Truro Zoning Bylaw Sign Code, Section 50.1, Table A, Note 2.
3. The roadway width exceeds the minimum eight foot requirement specified in Section 1-9-13-1 of the Town of Truro General Bylaws.
4. The proposed roadway width and grade conform to the restrictions imposed by the Land Court.
5. As found by the Land Court, the restrictions and limitations imposed by the Judgment with respect to direction, width and grade of the roadway which may be constructed over the right of way are intended to balance the needs of the Caters for access with the interests of the surrounding property owners in preserving, as

6. much as reasonably possible, the natural environment, scenic vistas, property values and privacy. *See Exhibit F, pp. 15-22.*
7. Citing trial testimony given by expert witnesses, the Land Court found that the overwhelming evidence convinced the Court that a safe and convenient driveway does not require a width greater than twelve feet.
8. The dimensional limitations imposed by the Land Court and the justification on which it relied are consistent with the interests reflected in the Rural Road Alternative set forth in Section 3.7 of the Truro Subdivision Regulation. The Land Court took pains to fix the location, route and roadway specifications to ensure that any roadway on the right of way would be the shortest possible and produce the lowest impact on the natural environment and aesthetic characteristics of the area.
9. Although the Rural Road Alternative provides that in no instance may the width of the road surface be waived, the Planning Board Handbook and Policies stipulate that the Board may waive its own subdivision rules and regulations.
10. In its Decision Directing Entry of Amended Judgment, **Exhibit I**, the Land Court specifically found that that the Subdivision Control law empowers a Planning Board to waive its own regulations so long as doing so does not derogate from the intent and purpose of the subdivision control law. *See Exhibit I, pp. 4-7.*
11. In this instance, the Land Court implicitly held that, as a matter of law, the restrictions it has imposed on the roadway width and grade do not derogate from the intent and purpose of the subdivision control law else it would not have required the Caters to seek Planning Board waiver of the regulatory specifications concerning those conditions.
12. Further, permitting construction of a roadway in consonance with the Land Court directive and as set forth in this application preserves, to the fullest extent possible, the natural environment, scenic vistas, property values and privacy for the benefit of all members of the surrounding community.

#### **Statement Concerning Timing of Construction**

The applicants anticipate completing construction within two years of the approval of the Definitive Plan.

**Conclusion:**

For the foregoing reasons, the Caters request that the Truro Planning Board approve their application for approval of their definitive plan with the waivers as requested or as may otherwise be necessary.

**Tab B**

398  
OK  
239

# Know all Men by these Present

That Charles W. Cobb of Turo in the County of Barnstable  
and state of Massachusetts

IN CONSIDERATION OF Fifty Dollars (\$50)  
paid by Lorenzo D. Baker of Wellfleet in the County of Barn-  
stable and state of Massachusetts  
the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell, and convey unto the said Lorenzo D. Baker,  
his heirs and assigns forever a certain piece or parcel of beach  
land situated in Town of Turo in the County of Barnstable  
and state of Massachusetts, and bounded and described as  
follows: Bounded on the north by land of the estate of the  
late Seare Rich; on the east by land of the grantor, on the  
south by land of the grantor and on the west by Cape Cod  
Bay. Said land is twenty (20) rods on the north side;  
twenty-five (25) rods on the east side, fourteen (14) rods on  
the south side and twenty (20) rods on the west side on the top  
of the bank, stakes and stones marking each corner of said  
land including also a right of way to above described premises  
across my land on the east in the road now established re-  
turning however my right of way to the shore on the south  
side of said described premises. The above described premises  
are a part of the same decided to me by Salathiel Hamilton  
in deed dated April 24, 1875.

Plan filed - Plan Book 6, Page 127.

TO HAVE AND TO HOLD the above granted premises with all the privileges and appurtenances thereto belonging to the said  
Lorenzo D. Baker and his Heirs and Assigns  
to their own use and behoof forever.

And I do hereby for myself  
and my Heirs, Executors, and Administrators, do covenant with the said grantee  
and his Heirs and Assigns, that I am lawfully seized in fee simple of the  
fore granted premises: that they are free from all incumbrances.

That I have good right to sell and convey the same to the said  
as aforesaid; and that I will, and my Heirs, Executors, and  
Administrators shall, WARRANT AND DEFEND the same to the said grantee  
and his Heirs and Assigns forever against the lawful claims and demands of all persons.

And for the consideration aforesaid I Mercy S. Cobb wife of said  
Charles W. Cobb

do hereby release unto the said grantee and his heirs and assigns all right of or to both  
DOWER and HOMESTEAD in the granted premises.

IN WITNESS WHEREOF we the said Mary S. Cobb  
and Charles W. Cobb

have hereunto set our hand and seal this seventh day of September  
in the year of our Lord one thousand Eight Hundred and ninety nine (1899)

Signed, Sealed, and Delivered, in presence of  
John B. Dyer

Charles W. Cobb (S)  
Mary S. Cobb (S)

Commonwealth of Massachusetts

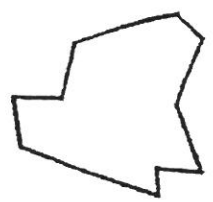
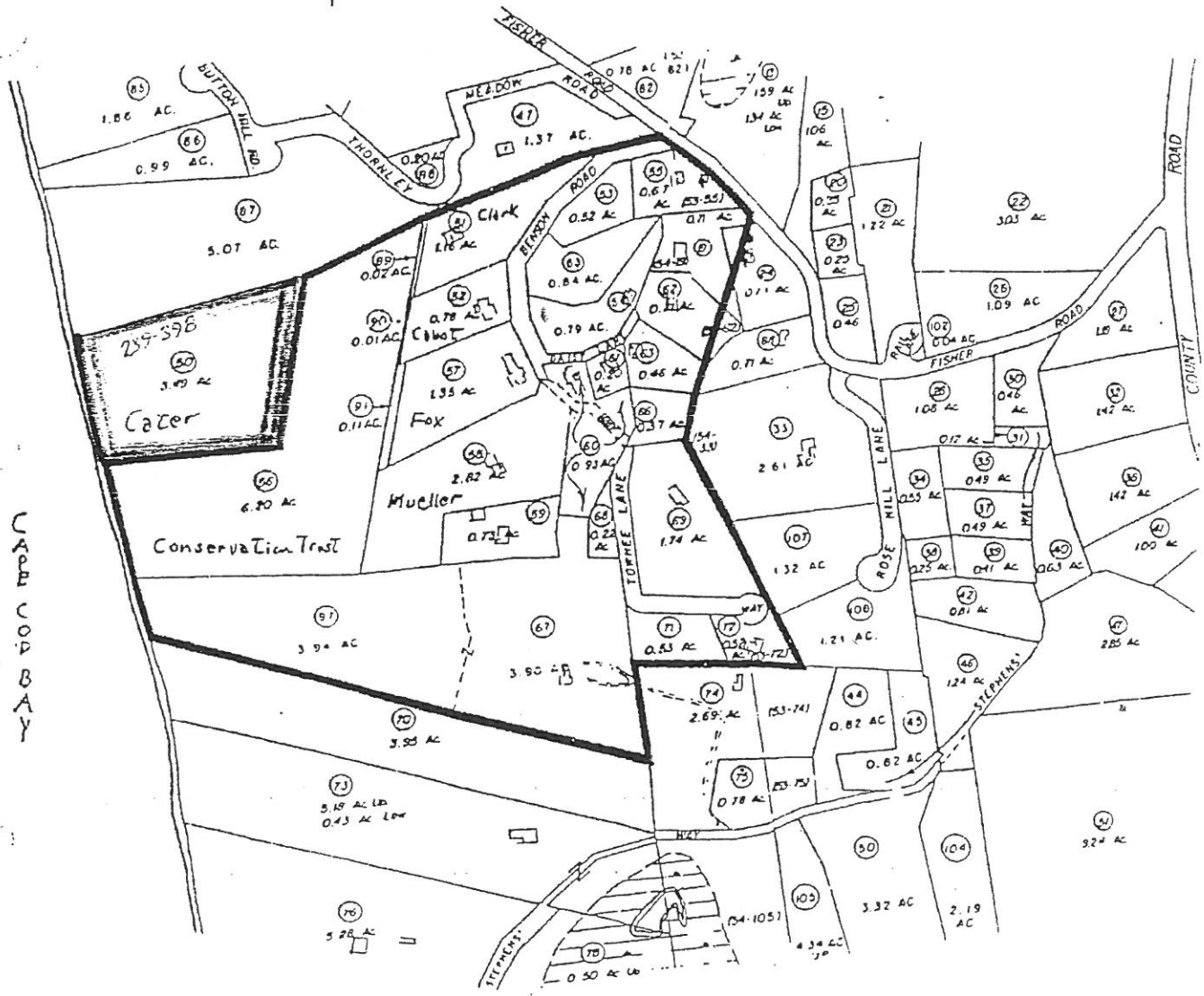
Barnstable ss. September 7, 1899.

Then personally appeared the above named  
Charles W. Cobb  
and acknowledged the foregoing instrument to be  
his free act and deed; before me,  
John B. Dyer JUSTICE OF THE PEACE.

**Tab C**

N (approx)

# SKETCH



= 1899 Cobb  
Property  
AFTER  
DEED OF  
LOT 50 TO BAKER

**Tab D**



I, HOWARD P. FRENCH,

of Natick, Middlesex

County, Massachusetts,

being executed for the full consideration of Forty-six Thousand and no/100 Dollars (\$46,000.00) paid

grants WILLIE J. CATER and GLORIA J. CATER, being husband and wife, as joint tenants, and not as tenants by the entirety, both

of 559 Chestnut Hill Avenue, Brookline, Massachusetts, 02146,

with quitclaim returns the land M located in South Truro, Barnstable County, Massachusetts, South of the Pamet River and West of the railroad, and being known and described as Lot B in the Assessor's records of the Town of Truro, Massachusetts, bounded and described as follows:

- NORTHERLY by land of the grantor, formerly of Sears Rich, Five Hundred and Eighty (580) feet, more or less;
- EASTERLY by lands now or formerly of Manuel Fisher, Four Hundred and Twelve (412) feet, more or less;
- SOUTHERLY by lands formerly of the heirs of Charles W. Cobb, Four Hundred and Forty-six (446) feet, more or less; and
- WESTERLY by Cape Cod Bay, Two Hundred and Eighty (280) feet, more or less.

Being comprised of three and 96/100 (3.96) acres more or less according to Plan No. 5 showing lands of the Captain L. D. Baker estate in Truro, Massachusetts, July, August, 1917, by Arthur L. Sparrow, surveyor, Orleans, Massachusetts, and recorded in Plan Book 6, Page 127, Barnstable Registry of Deeds.

The premises are conveyed together with a right of way as mentioned in and reference is made to, deed of Charles W. Cobb to Lorenzo D. Baker, dated September 7, 1899, recorded in Barnstable Registry of Deeds, Book 2, Page 39; and a further right of way as more particularly described in deed of said grantor to Douglas S. Callander, et ux., dated April 19, 1979, recorded with said Barnstable Registry of Deeds in Book 2903, Page 181. \*See below.

For my title see deed of Bertha L. French to me, recorded with said Deeds in Book 2071, Page 21.

The access through Lot D shall begin at the Southeasterly corner of Lot D, thence running Northerly along the Easterly side line of said Lot D to a point opposite the Southeasterly corner of the granted premises (Lot B); thence turning and running Westerly on a line connecting with said Southeasterly corner of Lot B.

ANTE(S) ADDRESS:

CATER V. CHAPLIN ET AL.  
TEMP TRIAL EX# 103

EXHIBIT  
FRENCH

CATER V. CHAPLIN

BARNSTABLE

095033

COMMONWEALTH OF MASSACHUSETTS  
DEEDS & EXCISE

JUN 28 '79  
104.88

CANCELLED

Executed as a sealed instrument this 26th day of June, 1979.

\_\_\_\_\_  
Howard B. French

\_\_\_\_\_

\_\_\_\_\_

The Commonwealth of Massachusetts

Middlesex,

ss.

June 26,

1979

Then personally appeared the above named Howard B. French

and acknowledged the foregoing instrument to be his free act and deed, before me

*Francis G. McGee*  
FRANCIS G. MCGEE Notary Public

My commission expires August 1, 198

QUITCLAIM DEED

We, Willie J. Cater and Gloria J. Cater, husband and wife, of Brookline, Norfolk County, Massachusetts, for consideration paid, and in full consideration of One Dollar (\$1.00), grant to Willie J. Cater and Gloria J. Cater, as they are trustees of the Fisher Road Realty Trust, u/d/t dated March 19, 2007, with a Trust Certificate having been recorded immediately subsequent hereto, with quitclaim covenants:

The land

located in South Truro, Barnstable County, Massachusetts, South of the Pamet River and West of the railroad, and being known and described as Lot B in the Assessor's records of the Town of Truro, Massachusetts, bounded and described as follows:

- NORTHWESTERLY by land now or formerly of Howard B. French, formerly or Sears Rich, Five Hundred and Eighty (580) feet, more or less;
- EASTERLY by lands now or formerly of Manuel Fisher, Four Hundred and Twelve (412) feet, more or less;
- SOUTHERLY by lands formerly of the heirs of Charles W. Cobb, Four Hundred and Forty-six (446) feet, more or less; and
- WESTERLY by Cape Cod Bay, Two Hundred and Eighty (280) Feet, more or less.

Being comprised of three and 96/100 (3.96) acres more or less according to Plan No. 5 showing lands of the Captain L. D. Baker estate in Truro, Massachusetts, July, August, 1917, by Arthur L. Sparrow, surveyor, Orleans, Massachusetts, and recorded in Plan Book 6, Page 127, Barnstable Registry of Deeds.

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The access through Lot D shall begin at the Southeasterly corner of Lot D, thence running Northerly along the Easterly side line of said Lot D to a point opposite the Southeasterly corner of the granted premises (Lot B), thence turning and running Westerly on a line connecting with said Southeasterly corner of Lot B.

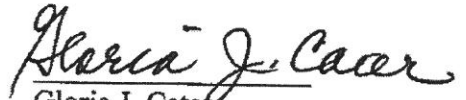
For Grantors' title see deed from Howard B. French to Willie J. Cater and Gloria J. Cater recorded with Barnstable County Registry of Deeds at Book 2944, Page 75.

WARREN J. HURWITZ, ESQUIRE  
233 Needham St., Suite 300  
Newton, MA 02464

*Also Plan 202  
Property address: 9B Benson Rd, S. Truro, MA*

WITNESS our hand and seals this 19 day of <sup>March</sup> April 2007.

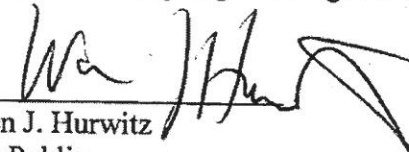
  
Willie J. Cater

  
Gloria J. Cater

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss

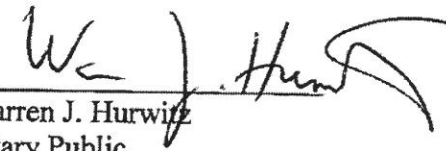
On this 19 day of <sup>March</sup> April, 2007, before me, the undersigned notary public, personally appeared WILLIE J. CATER proved through satisfactory evidence of identification, being personal knowledge of the signatory, to be the person whose name is signed above, and acknowledged the foregoing to be signed voluntarily for its stated purpose.

  
Warren J. Hurwitz  
Notary Public  
My commission expires: 2-19-10

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss

On this 19 day of <sup>March</sup> April, 2007, before me, the undersigned notary public, personally appeared GLORIA J. CATER proved through satisfactory evidence of identification, being personal knowledge of the signatory, to be the person whose name is signed above, and acknowledged the foregoing to be signed voluntarily for its stated purpose.

  
Warren J. Hurwitz  
Notary Public  
My commission expires: 2-19-10

**Tab E**

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

(SEAL)

DEPARTMENT OF THE TRIAL COURT

BARNSTABLE, ss.

MISCELLANEOUS CASE  
No. 250365 (GHP)

GLORIA J. CATER and WILLIE J. CATER,

Plaintiffs,

v.

ROBERT BEDNAREK, BRENDA BOLEYN, BETSEY  
BROWN, FRED GAECHTER, CAROL GREEN, CURTIN  
HARTMAN, HOWARD IRWIN, JOHN MARKSBURY,  
and JOEL SEARCY, as they are trustees of Truro  
Conservation Trust; LUCY CLARK, JENNIFER CLARK  
KRUGER, and MITCH BROCK, as they are trustees of  
Silvia M. Clark Revocable Trust; SUSAN B. CABOT,  
SYLVIA CLARK, and JOAN F. FOX, individually and as  
trustees of Cabot-Clark-Fox Real Estate Trust;  
JOAN F. FOX, as trustee of the Residence Trust Agreement;  
SARA C. MUELLER and PHILIP P. MUELLER, III, as  
trustees of the Philip P. Mueller Truro Realty Trust;  
PAUL D. KIERNAN; ELIZABETH ADLER;  
RAYMOND E. DEMMING; and LOIS C. DEMMING,

Defendants,

and

LUCY CLARK, JENNIFER CLARK KRUGER, and  
MITCH BROCK, as trustees of the Silvia M. Clark  
Revocable Trust,

Third-Party Plaintiffs,

v.

NANCY F. CALLANDER, as trustee of  
Shambles Realty Trust; ETHAN R. COHEN; and  
NATALIE FERRIE-COHEN,

Third-Party Defendants.

**DECISION  
FOLLOWING  
FIRST PHASE OF TRIAL**

Plaintiffs Willie J. Cater and Gloria J. Cater ("Caters") seek declaratory and injunctive relief confirming the validity, and establishing the location, of a general right of way benefitting their land located on the shores of Cape Cod Bay in Truro, Barnstable County, Massachusetts. All defendants filed answers denying the existence of the right of way, denying that it burdens their lands, and asserting that if the right of way ever did exist, it has been terminated, abandoned, released, or extinguished.<sup>1</sup> Defendants argue in the alternative that, if the easement exists, its burden rightly falls on the lots owned by the third-party defendants.<sup>2</sup>

By order dated May 2, 2001, the court (Kilborn, C.J.) denied cross-motions for summary judgment and ordered that certain facts were established for the purposes of trial, including that the disputed easement existed of record. The parties required substantial time to ready this case for trial, in part due to the need to prolong the discovery period to accommodate the addition and substitution of parties holding title to land potentially subject to the right of way at issue.

Following colloquy with the parties at a pre-trial conference held May 23, 2005, the court (Piper, J.) ordered that trial in this case be bifurcated into two phases. The first phase of trial would concern whether the parties to the instrument creating the general right of way at issue had an intention to place the right of way in a certain location. The first phase of trial would also address whether the right of way had been terminated, abandoned, released, or extinguished. If

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<sup>1</sup> In addition, the defendant trustees of the Philip P. Mueller Truro Realty Trust cross-claim that, if the right of way exists, it does not burden their property. Defendants Raymond E. Demming and Lois C. Demming have asserted a counterclaim for declaration that, to the extent there exists an easement, it is a mutual easement that provides the Demmings with a right of way extending over the Cater property.

<sup>2</sup> On January 30, 2003, the defendant trustees of the Sylvia M. Clark Revocable Trust filed a third-party complaint against Nancy F. Callander, as trustee of the Shambles Realty Trust, and against Ethan R. Cohen and Natalie Ferrier-Cohen.

the evidence during the first phase of trial showed that the easement was valid but there was no intention to place it in a certain location, then the case was to proceed to a further evidentiary hearing on the location of the easement.

On July 20 and 21, 2005, this case came on to be tried to the court (Piper, J.) on the first phase issues. Prior to the trial, on July 19, 2005, the court took a view of the locus. A stenographer, Karen Smith, was sworn to record the trial proceedings and produce a transcript. The three witnesses testifying at the trial were Richard M. Golder (title examiner), Donald T. Poole (land surveyor), and Chester N. Lay (land surveyor). Thirty-two exhibits were entered in evidence and are incorporated in this decision for the purpose of any appeal. Following the trial, the parties were given the opportunity to submit post-trial memoranda. The Caters filed a post-trial brief on October 11, 2005. Defendants and third-party defendants filed responsive briefs on November 14 and 22, 2005. A reply brief was filed by the Caters on December 9, 2005.

On all of the testimony, exhibits, stipulations, and other evidence properly introduced at trial or otherwise before me, and the reasonable inferences drawn therefrom, and taking into account the May 2, 2001 order denying cross-motions for summary judgment as well as the pleadings, memoranda, and argument of the parties, I find and rule as follows:

1. The Caters are record owners of a parcel of land ("Cater Parcel") known as and numbered 9B Benson Road in Truro, and shown as Lot 50 on Sheets 53 and 54 of the Town of Truro Assessor's Atlas ("Assessor's Map").
2. As of September 1899, the Cater Parcel and the land of all defendants and third-party defendants (except for third-party defendants Ethan Cohen and Natalie Ferrier-Cohen ("Cohens")) was owned by Charles W. Cobb ("Cobb"). Cobb had, prior to that time, acquired title by grant of at least two parcels of land: one parcel by deeds all dated



February 26, 1855, recorded with the Barnstable County Registry of Deeds ("Registry") in Book 530, at Pages 129-131, and another large tract of land by deed dated April 24, 1875, recorded with the Registry in Book 531, at Page 157.

3. The land which Cobb held by these deeds extended from Cape Cod Bay eastward beyond what is now Benson Road to a so-called "proprietor's way," which is now known as Fisher Road.
4. Benson Road, which did not exist in 1899, is a public way lying generally to the east of the Cater Parcel, between that location and Fisher Road. The Truro selectmen laid out Benson Road and the Truro Town Meeting voted to accept Benson Road on February 15, 1943.
5. By deed dated September 7, 1899 ("1899 Deed"), Cobb subdivided his property, creating and conveying the Cater Parcel to Lorenzo D. Baker ("Baker"). The 1899 Deed states in relevant part:

"...including also a right of way to above described premises across my land on the east in the road now established reserving however my right of way to the shore on the south side of said described premises."
6. At the time of the 1899 conveyance, each of the defendants' and third-party defendants' parcels (except for the Cohens' parcel) constituted a portion of Cobb's land to the east of the Cater Parcel.
7. By deed dated June 17, 1908 ("1908 Deed") and recorded with the Registry in Book 289, Page 462, Mercy S. Cobb and Allison B. Cobb conveyed to Manuel Fisher a parcel of land ("Fisher Parcel") that included the frontage along what is now Fisher Road and the land now owned by the following defendants: the trustees of the Sylvia M. Clark

Revocable Trust, currently Lucy Clark, Jennifer Clark Kruger, and Mitch Brock ("Clark trustees"); Susan B. Cabot ("Cabot"); Joan F. Fox ("Fox"), as trustee of the Residence Trust Agreement; the trustees of the Cabot-Clark-Fox Trust, currently Cabot, Sylvia Clark, and Fox; and the trustees of the Philip P. Mueller Truro Realty Trust, currently Sara C. Mueller and Phillip P. Mueller, III ("Mueller trustees"). The 1908 Deed warrants that the granted premises are "free from all incumbrances" and makes no reference to the easement granted by the 1899 Deed.

8. The Caters acquired the Cater Parcel from Howard B. French ("French") by deed dated June 26, 1979 and recorded with the Registry on June 29, 1979 in Book 2944, at Page 75.

The deed states:

The premises are conveyed together with a right of way as mentioned in and referenced is made to, deed of Charles W. Cobb to Lorenzo D. Baker, dated September 7, 1899, recorded in Barnstable Registry of Deeds, Book 2, Page 39; and a further right of way as more particularly described in deed of said grantor to Douglas S. Callander, et ux., dated April 19, 1979, recorded with said Barnstable Registry of Deeds in Book 2903, Page 181.\* See below.

9. Currently, the following parties own the following parcels, as those parcels are shown on Sheets 53 and 54 of the Assessor's Map:<sup>3</sup>

Lot 50 (9B Benson Road)	Caters
Lot 51 (7 Benson Road)	Clark trustees
Lot 52 (9 Benson Road)	Cabot
Lot 56 (9A Benson Road)	Trustees of Truro Conservation Trust
Lot 57 (11 Benson Road)	Trustee of Residence Trust Agreement

<sup>3</sup> A copy of a marked portion of these sheets, showing the location of the parcels involved, accompanies this Decision as an exhibit to help explain the general location of the holdings involved. On this exhibit, the 1899 Cobb land is outlined in bold.

Lot 58 (1 Benson Lane)	Mueller trustees
Lots 60, 64, 65 (10 Benson Road)	Paul Kiernan and Elizabeth Adler ("Kiernan/Adler defendants")
Lots 66, 69, 71; the "Carrie Fisher Right of Way"	Raymond E. Demming and Lois C. Demming ("Demmings")
Lots 89, 90, and 91	Trustees of the Clark-Cabot-Fox Trust
Lots 67 and 97	Nancy Callander, Trustee of the Shambles Realty Trust ("Callander")
Lot 74	Cohens

10. There was not in 1899 and has never since then been a way on the ground leading from the Cater Parcel (Lot 50) over the land of the Truro Conservation Trust (Lot 56) and thence through any of the properties of the defendants or third-party defendants.
11. In 1899, the proprietor's roads that are now Fisher Road and Stephens' Way were unpaved, rough cart paths.
12. In 1899, the proprietor's road that is now Fisher Road was the only established way of record lying easterly of the Cater Parcel and also being contiguous to Cobb's estate. A route running easterly from the Cater Parcel to what is now Fisher Road would most likely pass over land now owned by the following parties to this case (in addition to land located easterly of Benson Road, now owned by various non-parties): the trustees of the Truro Conservation Trust (Lot 56), the trustees of the Cabot-Clark-Fox Real Estate Trust (Lots 89, 90, and 91), the Clark trustees (Lot 51), Cabot (Lot 52), Fox (Lot 57), and the Mueller trustees (Lot 58).
13. In 1899, the land owned by Cobb did not extend as far south as Stephens' Way and did not include Lot 74, the parcel now owned by the Cohens. However, at that time a

pathway did lead from Stephens' Way over Lot 74 to Cobb's homestead (located on Lot 67, now owned by Callander). That pathway was approximately 575 feet in length, with only approximately 100 feet of its length located on what was Cobb's land in 1899. The pathway today serves as a driveway for the Cohens and Callander.

14. There is no evidence that, at the time of the 1899 conveyance, there existed a record easement appurtenant to Cobb's land (including the Cater Parcel) providing a right of way across what is now the Cohens' parcel. There did exist some manner of the cart path leading from Stephens' Way to the Cobb homestead, and the right to use it to gain access to the homestead might have arisen by permission as equally as by long-standing prescriptive use. In any event, given this state of the title, rights to use such a route (which required passage over the land of others without any record right to do so) to travel beyond the homestead, and to reach the Cater parcel, would have not been easily or lightly passed along by Cobb to Baker, the original 1899 third-party purchaser of the Cater parcel. This route does not, for this reason, seem a likely candidate for the easement Cobb bestowed on Baker in the 1899 Deed.
15. In 1899, any route running from the Cater Parcel to either Fisher Road or Stephens' Way would have traversed steep grades. The grades to the east and the south, as they existed in 1899, would not have made routes running from the Cater Parcel to either proprietor's way impossible, infeasible, or impracticable. Given the nature of the vehicles which would have been in the mind of the parties to the 1899 Deed, any reasonable route running from the Cater Parcel to Fisher Road would include grades no greater than approximately fifteen percent. There is nothing in the evidence which I credit showing that the easement set out in the 1899 Deed would, as a matter of the terrain along route it

would have to traverse, not have been reasonably able to run from the Cater Parcel to Fisher Road, as opposed to Stephens Way or any other terminus.

16. The distance from the Cater Parcel to Fisher Road (approximately 1,100 feet) is shorter than the distance from the Cater Parcel to Stephens' Way (approximately 1,500 feet). The distance from the Cater Parcel to the Callander/Cohen driveway is approximately 900 feet.
17. Cabot and her husband purchased Lot 52 with frontage on Benson Road, and the existing house on that parcel, in 1972. Since 1972, Cabot has lived in the house for at least part of every year and has made several improvements to the property: adding trees, flowering shrubs, and perennial bed; paving the driveway; installing a Title V septic system in line with the driveway; and enlarging the deck. By deed dated April 13, 1978, recorded with the Registry in Book 2696, at Page 168, Cabot acquired Lot 52 solely in her name.
18. The Mueller trustees acquired Lot 58 from Phillip P. Mueller ("Mueller"), who acquired title to that parcel by deed dated November 9, 1979, recorded with the Registry in Book 3012, at Page 261. A single family residence existed on the parcel at the time of Mueller's purchase. The Mueller trustees' parcel does not front on Benson Road: instead, it enjoys a deeded right of way, created in Mueller's 1979 deed and various easements to his predecessors, that runs from the Mueller trustees' parcel to Benson Road across land owned by the Kiernan/Adler defendants and the Demmings.
19. Fox, as trustee of the Residence Trust Agreement, acquired title to Lot 57, which has frontage on Benson Road, by deed dated December 3, 1983, recorded with the Registry in Book 3962, at Page 262. Fox acquired the parcel with an existing single-family residence. Her deed has no reference to her property's being subject to any right of way

- and contains a restriction attempting to prohibit or limit access over her property.
20. The Clark trustees acquired Parcel 51 from Sylvia M. Clark ("Clark") by deed dated February 15, 1989, recorded with the Registry in Book 6705, at Page 308. Clark acquired the parcel, with an existing single family residence, as an individual by deed dated October 20, 1976. Clark's deed has no reference to any right of way. Since 1976, Clark and her family have used the property exclusively as a residence.
  21. The defendant trustees of the Cabot-Clark-Fox Trust (Cabot, Clark, and Fox), acquired Lots 89, 90, and 91 by deeds dated August 19, 1994 and recorded with the Registry in Book 9328, at Pages 145, 147, and 149. These parcels form a narrow strip that abut the land of Cabot (Lot 52), the Clark trustees (Lot 51), and Fox (Lot 57), which all lie to the east of the strip, and land of the Truro Conservation Trust (Lot 56), which lies to the west of the strip.
  22. The trustees of the Truro Conservation Trust acquired Lot 56 by deed dated December 27, 1994, recorded with the Registry in Book 9500, at Page 282. The Truro Conservation Trust has been recognized as a not-for-profit organization by the Attorney General of the Commonwealth, and as a public charity by the Internal Revenue Service. The Truro Conservation Trust is a land trust and its primary charitable purpose is to "help preserve the rural character of the Town of Truro."
  23. The Truro Conservation Trust has admitted that the Caters have "deeded claims of access" over their Lot 56. Lot 56 is part of a rare costal heathland. The portion of the heathland which has been designated as Lots 50, 56, 67, 73, 74, and 78, and Lot 105 on Sheet 54 of the Assessor's Atlas constitutes a forty-acre area, on which are only four structures. Subsequent to the Truro Conservation Trust's purchase of Lot 56, it was

granted a conservation restriction on 3.84 acres of Lot 67, and received a gift of Lot 105.

24. From 1899 to 1997, the Caters and their predecessors in title did not seek to define the location of the easement granted in the 1899 Deed. During that time, Cobb's former land was subdivided into nineteen lots and Benson Road was laid out, constructed, and accepted as a public way. In addition, fourteen homes were constructed on the land, including on the following lots owned by parties to this case in the years indicated: the Clark trustees' Lot 51 (1969); Cabot's Lot 52 (1950); Fox's Lot 57 (1931); the Mueller trustees' Lot 58 (1948); the Kiernan/Adler defendants' Lot 60 (1937); and the Demmings' Lot 69 (1964).

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In this case, I am asked to determine the continuing validity of the general easement granted in the 1899 Deed and to determine whether the parties to that deed, Cobb and Baker, intended that the easement be placed in a particular location. The Caters contend that the right of way was intended to run generally in an easterly direction from the Cater Parcel towards what is now Fisher Road. Defendants assert that the parties to the 1899 Deed intended the easement to run southeasterly towards a proprietor's road now known as Stephens' Way.

For the reasons stated below, I find and rule that the location of the right of way contemplated by the 1899 Deed, though not fixed with specificity at the time, was intended by the parties to the 1899 Deed to run easterly from the Cater Parcel over Cobb's land and then to the proprietor's way now known as Fisher Road. Because the defendants have not demonstrated that the right of way has been extinguished, a further evidentiary hearing is required to establish the appropriate, equitable location of the easement.

#### **I. Establishment and Location of the Easement**

The 1899 Deed granted to Baker, the Caters' predecessor in title, an express easement: "a right of way to above described premises across my land on the east in the road now established." The intent of the parties to an instrument may be discerned by interpreting the language in light of the circumstances existing when the instrument was executed. See Well-Built Homes, Inc. v. Shuster, 64 Mass. App. Ct. 619, 634 (2005) (citing Allen v. Massachusetts Bonding & Ins. Co., 248 Mass. 378, 383 (1924)). In general, a right of way not definitely fixed by deed is construed as the "right to such way as is reasonably necessary and convenient for the purposes for which it is granted." Western Massachusetts Elec. Co. v. Sambo's of Mass., Inc., 8 Mass. App. Ct. 815, 824 (1979).

#### A. Language of the 1899 Deed

Although the 1899 Deed did not on its face fix the route of the right of way in metes and bounds,<sup>4</sup> its language provides some guidance concerning the intended location of the right of way. First, the 1899 Deed specifies that the right of way is to be located "across *my* land on the east" (emphasis added). This language favors the Caters' interpretation of the 1899 Deed. In 1899, the proprietor's road that is now Fisher Road was the only established way of record lying easterly of the Cater Parcel and also being contiguous to Cobb's estate. Stephens Way, which lies in a southeasterly direction from the Cater Parcel, did not directly abut Cobb's land. Stephens' Way could be accessed from Cobb's homestead (located on the parcel now owned by

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<sup>4</sup> It is well established that the mere fact that the precise location is undefined does not negate the existence of the right of way. Cheevers v. Graves, 32 Mass. App. Ct. 601, 605 (1992) (citing Rice v. Vineyard Grove Co., 270 Mass. 81, 87 (1930)). In the absence of agreement by the parties as to the location of a right of way not located by the instrument creating it, the court may fix its bounds. Id. at 605-06 (citing Mugar v. Massachusetts Bay Transp. Auth., 28 Mass. App. Ct. 443, 445 (1990)). See Mahoney v. Wilson, 260 Mass. 412, 414 (1927) ("The law is settled that if the bounds of a way are not located by the deed which creates it, the parties may fix the location upon the servient premises, and, if they do not, a court may do so."). The determination of the most equitable and appropriate route for the easement has been reserved to the second phase of the trial.



Callander) via a pathway running across the land now owned by the Cohens.<sup>5</sup> Thus, only Fisher Road could be reached from the Cater's Parcel by traveling only over land owned by Cobb.

The parties dispute whether the phrase "in the road now established" refers only to one of the established proprietor's ways – either Fisher Road or Stephens' Way – or also refers to the only roadway then existing on Cobb's land, namely the pathway leading from Stephens Way over the Cohens' parcel, to Cobb's homestead (on Callander's parcel). The evidence at trial showed that there was no roadway on the ground in 1899 that led from either proprietor's way to the Cater Parcel. This fact supports an interpretation of this phrase as granting rights to access over Cobb's land--one of the established proprietor's ways.

### **B. Topography**

Topographical features of the Cater Parcel and surrounding areas would have influenced the potential specific route of the 1899 right of way; the majority of the testimony presented at trial concerned the topography of the Cater Parcel and Cobb's surrounding land. The trial included conflicting opinion testimony from two registered land surveyors. Chester Lay ("Lay") opined that a way running due east from the Cater Parcel to Fisher Road would have been impracticable in 1899, as the terrain had steep grades that would have prevented travel by horse. Lay further opined that the topography of Cobb's land favored a route from the Cater Parcel, passing over what is now the Callander/Cohen driveway, to Stephen's Way.

Lay's testimony was contradicted by the testimony of Donald Poole ("Poole"). Poole testified that it would have been possible and feasible, in 1899, to route the right of way so as to ascend the steeper grades at an angle such that the grade would in no location be steeper than

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<sup>5</sup> Most of the path leading from Cobb's land to Stephens' Way lies on the parcel now owned by the Cohens. The pathway measures approximately 575 feet, of which only about 100 feet lies on what was then Cobb's land.

fifteen percent. Poole also testified that laying out a route running from the Cater Parcel to Stephens' Way would have required the negotiation of similarly steep grades.

The weight of the evidence, including the surveyors' testimony as well as the various topographical maps admitted in evidence for all purposes, shows that an east-west right of way leading from the Cater Parcel to Fisher Road would not have been impossible or impractical. A route running from the Cater Parcel to either proprietor's way would have necessitated traversing steep grades. The right of way would presumably have been laid out in a manner that avoided the steepest grades. In addition, I find that at least one significant objective of the right of way would have been to reach what was a major roadway at that time, Old County Road, and that the most direct route from the Cater Parcel would have been by heading east directly to Fisher Road (rather than taking Stephens' Way to Fisher Road to reach Old County Road, a much more roundabout itinerary).

### **C. 1908 Deed**

Defendants point to the 1908 Deed as evidence that the right of way was not intended to run over the Fisher Parcel to Fisher Road. They note that Mercy Cobb, a signatory to the 1899 Deed, in 1908 conveyed the Fisher Parcel by a deed that warranted there were no encumbrances on that land. This argument does not persuade me. Mercy Cobb was not a party to the 1899 Deed; she signed that deed merely for the limited purpose of releasing her rights to dower and homestead. By the time Mercy gave her deed in 1908, she may well have had no clear recollection of the right established by her husband in the 1899 Deed, particularly because the evidence is that there was no laid out way existing on the ground in the years between the 1899 Deed's delivery and Mercy's execution of the deed of the Fisher Parcel in 1908. The absence of a reference to the 1899 Deed's easement in the 1908 Deed does not prove to me that the

easement created in 1899 plainly was intended at that time to head in a less advantageous direction. At most it proves to me, as all seem prepared to agree, that the easement had not been laid out in the years following its creation. No evidence was introduced at trial to link the routine general warranty contained in the 1908 Deed to what is truly at issue in this case: the intentions the parties to the 1899 Deed – Mercy Cobb’s husband and Baker – concerning the route of the right of way they established.

#### **D. Conclusion**

For the foregoing reasons, I find and rule that, although the 1899 Deed does not fix precisely the location of the easement, it does establish that the easement is to run in a generally easterly direction from the Cater Parcel over Cobb’s land to reach Fisher Road. A route running easterly from the Cater Parcel to what is now Fisher Road would most likely pass over land now owned by the following parties to this case (in addition to land located easterly of Benson Road, now owned by various non-parties): the trustees of the Truro Conservation Trust (Lot 56), the trustees of the Cabot-Clark-Fox Real Estate Trust (Lots 89, 90, and 91), the Clark trustees (Lot 51), Cabot (Lot 52), Fox (Lot 57), and the Mueller trustees (Lot 58). I decide that when judgment enters in this case, it will declare that the disputed easement does not burden any of the lands of the other defendants and third-party defendants: the Kiernan/Adler defendants, the Demmings, Callander, and the Cohens.

#### **II. Continuing Validity of the Easement**

Defendants have asserted as an affirmative defense that the easement has been extinguished. An express easement can only be extinguished by grant, release, abandonment, estoppel, or prescription. Emery v. Crowley, 371 Mass. 489, 495 (1976) (citing Delconte v. Salloum, 336 Mass. 184, 188 (1957)). There was no evidence introduced at trial that the right of

way was extinguished by express grant or release. As explained below, I find and rule that the evidence presented by defendants was insufficient to prove that the easement had been abandoned, or had come to be extinguished or unavailable by prescription or estoppel.

#### **A. Abandonment**

To show that the easement has been extinguished by abandonment, defendants must prove that the Caters or their predecessors in title had an intention to abandon the right of way. See Willard v. Stone, 253 Mass. 555, 561-562 (1925) (“abandonment of an easement, whether acquired by grant or prescription, cannot be found unless it clearly appears that such abandonment was intended by the owner”). There was no evidence presented showing unequivocal acts by the Caters or their predecessors in title “manifesting a design to relinquish their rights of way.” See Dubinsky v. Cama, 261 Mass. 47, 57 (1927). The only evidence presented by defendants to prove abandonment was the non-use of the easement by the Caters and their predecessors in title. It is well established that the mere non-use of an easement, no matter how long the duration, will not work an abandonment of an easement. See Desotell v. Szczygiel, 338 Mass. 153, 159 (1958); Parlante v. Brooks, 363 Mass. 879, 880 (1973); Lemeiux v. Rex Leather Finishing Corp., 7 Mass. App. Ct. 417, 421 (1979).<sup>6</sup> Therefore, the easement granted by the 1899 Deed has not been abandoned.

#### **B. Prescription**

Defendants argue that the improvement and development of the servient estate precludes the Caters from asserting their easement claim. Although an easement may be extinguished in

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<sup>6</sup> In light of this doctrine, the Mueller trustees’ argument, that the Caters’ non-use of the easement supports a finding that they are barred by laches from asserting their easement rights, is without merit.

whole or in part by adverse use of the servient estate, such adverse use must be “inconsistent with the continuance of the easement...or a use which would be privileged if, and only if, the easement did not exist and such use is both adverse as to the owner of the easement and...for the period of prescription, continuous and uninterrupted.” Lemeiux v. Rex Leather Finishing Corp., 7 Mass. App. Ct. 417, 423 (1979) (internal quotations and citation omitted). In addition, “it must

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either interfere with a use under the easement or have such an appearance of permanency as to create a risk of the development of doubt as to the continued existence of the easement.”

Delconte v. Salloum, 336 Mass. 184, 189 (1957) (quoting Am. Law of Property, § 8.102). Unless the occupation of the land by the servient tenant is irreconcilable with the rights of the dominant tenant, the use will not be deemed to extinguish the easement rights. Lemeiux, 7 Mass. App. Ct. at 423 (1979); New England Home for Deaf Mutes v. Leader Filling Stations, 276 Mass. 153, 158 (1931).

The only evidence presented to support this theory was that since 1899 there have been homes constructed, and other improvements made, on the land burdened by the easement benefitting the Cater Parcel. The evidence did not establish that this intervening development was irreparably inconsistent with the continued existence of the right of way. Because the easement has no definite location on the ground, the easement can be exercised over any part of the burdened parcels. The construction and landscaping undertaken on parts of the burdened parcels have not made passage over any of the defendants’ parcels infeasible. It is true that in some locations burdened by the Caters’ easement, houses long ago were erected, and that the use of the areas improved with these structures for the purposes of the easement would be inconsistent with its exercise in those particular locations. But the fact that the lots burdened by the disputed easement have houses on them does not lead to the conclusion that the easement

cannot be fixed by this court in a route that steers clear of those houses. The evidence supports a finding that the easement may have been cut off as to the areas of the defendants' lands which long have been occupied by structures. But the evidence does not support a finding that the easement no longer has vitality for this reason. The evidence demonstrated that a way could be located without significantly disturbing any of the buildings on these various properties. That the easement (which, after all, is sought only to serve a single house lot on the Cater land) would require some vehicular passage over a route that might be close to, and visible from, one or more of the houses involved, does not lead me to decide that the easement right has been cut off by incompatible use of the servient estate. The easement has not been extinguished on such a theory. The impact the exercise of the easement will have on the use and occupancy by the defendants of their houses will be a factor the court takes into consideration when it concludes this litigation by establishing the easement's location.

### C. Estoppel

Defendants urge the court to take the view that the failure of the Caters and their predecessors to give notice of their easement claim in the face of the subdivision and development of the Fisher Parcel, coupled with their failure to object to the 1908 warranty deed, is sufficient to warrant a finding that the easement at issue was extinguished by estoppel. Under Massachusetts law, an easement may be extinguished by estoppel where the servient owner has substantially and detrimentally changed his position in reasonable reliance on the dominant owner not assert the easement rights. Proulx v. D'Urso, 60 Mass. App. Ct. 701, 704 n. 2 (2004); Sindler v. William M. Bailey Co., 348 Mass. 589, 593 (1965); King v. Murphy, 140 Mass. 254,

255-256 (1885).<sup>7</sup>

The evidence at trial showed that the Caters and their predecessors in title did not seek to lay out or use the easement for a period of ninety-eight years (1899-1997), during which time the servient estate was subdivided into several parcels on which a public way and fourteen homes were constructed. A deposition transcript entered in evidence shows that Howard French (“French”), the Cater’s immediate predecessor in title, though aware of the subdivision of and the construction on the Fisher Parcel, did not advise the owners of the servient estates of the existence of the easement benefitting the Cater Parcel. The Caters, who purchased the Cater Parcel in 1979, did not inform any defendants of their easement right until eighteen years later, in 1997. Defendants also call to my attention that the existence of a right of way from the Cater Parcel across the parcels owned by the third-party defendants (Callander and the Cohens) reduces the necessity of the Caters asserting the easement granted by the 1899 Deed. Defendants assert that these facts, taken together, constitute an expression of an intention not to seek access across their improved lands to reach Fisher Road (or Benson Road).

This line of argument fails to persuade me, for much the same reasons as lead me to reject the argument that the easement has been cut off by incompatible use of the burdened land. There was no evidence presented showing that the use of the right of way granted by the 1899 Deed will result in substantial or unreasonable harm to any of the defendants. Given the evidence in this first phase of trial, I have confidence that the court will be able, after hearing further evidence, to fix the right of way in a location and manner which will to a considerable

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<sup>7</sup> Some jurisdictions have held that an easement may be terminated or modified where the dominant owner has remained silent as the servient land is subdivided and developed, reasoning that the servient owner in such a situation has suffered substantial detriment and reasonably believed that the easement no longer burdens the land. Defendants have not presented Massachusetts cases, other than those which contain facts supporting a finding that an easement has been extinguished by prescription, which have adopted this view.

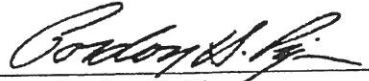
degree minimize the resultant impact on those properties affected. If that is so (and in the final analysis, of course, that will depend on the evidence in the forthcoming concluding phase of trial) then the most that the defendants will have been able to establish is that the location of the easement on their land(s) results in inconvenience and disruption, and potentially some diminution in the value of their holding. But the easement in the 1899 Deed has been of record and discoverable in the defendants' chains of title. The current parties who raise the defense of estoppel came to their titles not only with knowledge of the easement, but also with houses having been built on them much earlier. These parties are hard-pressed to have the court now say, on the evidence thus far adduced, that there has been the substantial and detrimental alteration of position to the extraordinary degree required to declare the easement at an end, and no longer available to the land it has for a century existed to benefit. Defendants have not shown that the easement has been extinguished by estoppel.

For the foregoing reasons, I decide that when judgment enters in this case it is to declare that the easement for the benefit of the Cater land created in the 1899 Deed is in force and effect; that that easement burdens of record the land(s) of one or more of the following parties: the trustees of the Truro Conservation Trust (Lot 56), the trustees of the Cabot-Clark-Fox Real Estate Trust (Lots 89, 90, and 91), the Clark trustees (Lot 51), Cabot (Lot 52), Fox (Lot 57), and the Mueller trustees (Lot 58); and that it does not burden of record the lands of any other parties to this action.

The parties whose land is of record burdened by the easement must now participate in a further, final phase of trial, after which the court will fix the location of the easement over their holdings. Those parties are by their counsel to confer, and to submit to the court within thirty days of the date of this decision a detailed joint written status report advising the court of their



collective or respective positions on their readiness to proceed to trial on the remaining question.  
Based on the report the court receives, the case will be set down for either a pre-trial conference  
or a status conference.



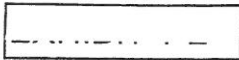
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Gordon H. Piper  
Justice

Dated: July 9, 2007

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**Tab F**



COMMONWEALTH OF MASSACHUSETTS

(SEAL)

LAND COURT

DEPARTMENT OF THE TRIAL COURT

BARNSTABLE, ss.

MISCELLANEOUS CASE  
No. 98 MISC 250365 (GHP)

GLORIA J. CATER and WILLIE J. CATER,

Plaintiffs,

v.

ROBERT BEDNAREK, BRENDA BOLEYN, BETSEY  
BROWN, FRED GAECHTER, CAROL GREEN, CURTIN  
HARTMAN, HOWARD IRWIN, JOHN MARKSBURY,  
and JOEL SEARCY, as they are trustees of Truro  
Conservation Trust; LUCY CLARK, JENNIFER CLARK  
KRUGER, and MITCH BROCK, as they are trustees of  
Silvia M. Clark Revocable Trust; SUSAN B. CABOT,  
SYLVIA CLARK, and JOAN F. FOX, individually and as  
trustees of Cabot-Clark-Fox Real Estate Trust;  
JOAN F. FOX, as trustee of the Residence Trust Agreement;  
SARA C. MUELLER and PHILIP P. MUELLER, III, as  
trustees of the Philip P. Mueller Truro Realty Trust;  
PAUL D. KIERNAN; ELIZABETH ADLER;  
RAYMOND E. DEMMING; and LOIS C. DEMMING,

Defendants,

and

LUCY CLARK, JENNIFER CLARK KRUGER, and  
MITCH BROCK, as trustees of the Silvia M. Clark  
Revocable Trust,

Third-Party Plaintiffs,

v.

NANCY F. CALLANDER, as trustee of  
Shambles Realty Trust; ETHAN R. COHEN; and  
NATALIE FERRIE-COHEN,

Third-Party Defendants.

**DECISION  
FOLLOWING  
SECOND PHASE OF TRIAL**

In this case, I must fix the location of a general right of way easement, the bounds of which were not determined by the 1899 deed ("1899 Deed") that created the easement. The right of way benefits the land of the plaintiffs, Willie J. Cater and Gloria J. Cater ("Caters"), located on the shores of Cape Cod Bay in Truro, Barnstable County, Massachusetts. In a decision following an earlier phase of trial, I determined that the easement created in the 1899 Deed is in force and effect; that that easement burdens of record the land(s) of one or more of the following parties: the trustees of the Truro Conservation Trust (Lot 56), the trustees of the Cabot-Clark-Fox Real Estate Trust (Lots 89, 90, and 91), the Clark trustees (Lot 51), Cabot (Lot 52), Fox (Lot 57), and the Mueller trustees (Lot 58); and that it does not burden of record the lands of any other parties to this action. See Cater v. Bednarek, 15 LCR 336, 342 (2007) (Case No. 98 MISC 250365) (Piper, J.) (Decision Following First Phase of Trial).

I incorporate fully the procedural history of this case as set forth in the Decision Following First Phase of Trial. During the year following the first phase of trial, the Caters and the remaining defendants attempted settlement, including attending a mediation session which proved unsuccessful. The parties came before the court (Piper, J.) for a status and scheduling conference on September 23, 2008, at which it was reported that settlement efforts had stalled, and a pretrial conference was scheduled for December 23, 2008. On December 15, 2008, the defendants Mueller filed a motion for summary judgment, seeking a declaration that in light of the Phase I Decision, the easement would not as a practical matter cross Lot 58, notwithstanding the legal entitlement to do so. On December 23, 2008, the court (Piper, J.) held hearing on the motion for

summary judgment and a pretrial conference. The court denied the motion,<sup>1</sup> and instructed all parties to hold dates in April, 2009 for the second phase of trial. In advance of trial, and to focus and simplify the issues for trial of this multi-party case, I issued orders. The Caters were to serve on all parties a plan proposing routes for the easement to take. Defendants were to respond with their own proposals, and evidence at trial would be limited to routes proposed in advance. On January 16, 2009, the defending parties filed a Joint Motion in Limine to Establish Scope of Phase II Trial to include the question whether the 1899 Deed created only a pedestrian right of way. On February 17, 2009, the court (Piper, J.) denied the motion following argument, ruling the Phase I Decision already had determined the easement was for a general right of way, unlimited by its terms. I incorporate into this Decision the rulings, as reflected on the court's docket for this case, on the motion for summary judgment and the motion in limine.

This case was tried to the court (Piper, J.) on April 1-3, 2009. A court reporter, Karen Smith, was sworn to record the trial proceedings and produce a transcript. The fourteen witnesses testifying at the phase II trial were: Donald T. Poole (land surveyor), Martin Donaghue (engineer), John O'Reilly (engineer, land surveyor), Lucy Clark (party), David J. Crispin (land surveyor, engineer), Philip P. Mueller (party), Joseph M. Clancy (appraiser), Robert M. Perry (engineer), Susan Cabot (party), Timothy J. Brady (land surveyor, engineer), Anne Eckstrom (appraiser), Therese Steiner (daughter of Joan Fox), and Joan Fox (party). Following the thirty-two exhibits from Phase I, exhibits thirty-three through seventy were entered in evidence. All exhibits from both phases of trial are incorporated in this decision for the purpose of any appeal. Following the trial, the parties were given the opportunity to submit posttrial memoranda. The Caters filed a

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<sup>1</sup> I discuss The Motion of the Mueller Trustee Defendants for Summary Judgment in greater detail infra.

posttrial brief on July 10, 2009. Defendants filed responsive briefs on July 14 and 24, 2009. Reply briefs were filed by the Caters and Joan Fox on July 24, 2009. I heard closing arguments on the record on August 18, 2009.

On all of the testimony, exhibits, stipulations, and other evidence properly introduced at trial or otherwise before me, and the reasonable inferences drawn therefrom, and taking into account the Decision Following First Phase of Trial, the order denying the motion for summary judgment of the Mueller defendants, and the ruling on the Defendants' Joint Motion in Limine, as well as the pleadings, memoranda, and argument of the parties, I find and rule as follows:

1. The Caters are record owners of a parcel of land ("Cater Parcel") known as and numbered 9B Benson Road in Truro, and shown as Lot 50 on Sheets 53 and 54 of the Town of Truro Assessor's Atlas ("Assessor's Map").
2. Benson Road is a public way lying generally to the east of the Cater Parcel, between that location and Fisher Road. The Truro selectmen laid out Benson Road and the Truro Town Meeting voted to accept Benson Road on February 15, 1943.
3. By deed dated September 7, 1899 and recorded with the Barnstable County Registry of Deeds ("Registry") at Book 2, Page 39 ("1899 Deed"), Charles W. Cobb ("Cobb"), who at one point owned the land of Cater and all the defendants (except Lot 74) subdivided his property, creating and conveying the Cater Parcel to Lorenzo D. Baker ("Baker"). The 1899 Deed states in relevant part:

"...including also a right of way to above described premises across my land on the east in the road now established reserving however my right of way to the shore on the south side of said described premises."

4. At the time of the 1899 conveyance, each of the defendants' parcels constituted a portion of Cobb's land to the east of the Cater Parcel.
5. The Caters acquired the Cater Parcel from Howard B. French ("French") by deed dated June 26, 1979 and recorded with the Registry on June 29, 1979 in Book 2944, at Page 75.

The deed states:

The premises are conveyed together with a right of way as mentioned in and reference is made to, deed of Charles W. Cobb to Lorenzo D. Baker, dated September 7, 1899, recorded in Barnstable Registry of Deeds, Book 2, Page 39; and a further right of way as more particularly described in deed of said grantor to Douglas S. Callander, et ux., dated April 19, 1979, recorded with said Barnstable Registry of Deeds in Book 2903, Page 181.\* See below.

6. Currently, the following parties own the following parcels, as those parcels are shown on Sheets 53 and 54 of the Assessor's Map:<sup>2</sup>

Lot 50 (9B Benson Road)	Caters
Lot 51 (7 Benson Road)	Clark trustees
Lot 52 (9 Benson Road)	Cabot
Lot 56 (9A Benson Road)	Trustees of Truro Conservation Trust
Lot 57 (11 Benson Road)	Trustee of Residence Trust Agreement
Lot 58 (1 Benson Lane)	Mueller trustees
Lots 60, 64, 65 (10 Benson Road)	Paul Kiernan and Elizabeth Adler ("Kiernan/Adler defendants")
Lots 66, 69, 71; the "Carrie Fisher Right of Way"	Raymond E. Demming and Lois C. Demming ("Demmings")

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<sup>2</sup> A copy of a marked portion of these sheets, showing the location of the parcels involved, accompanies the Decision Following First Phase of Trial as an exhibit to help explain the general location of the holdings involved. On this exhibit, the 1899 Cobb land is outlined in bold.

Lots 89, 90, and 91

Trustees of the Clark-Cabot-Fox Trust

Lots 67 and 97

Nancy Callander, Trustee of the Shambles Realty Trust ("Callander")

Lot 74

Cohens

7. There was not in 1899 and has never since then been a way on the ground leading from the Cater Parcel (Lot 50) over the land of the Truro Conservation Trust (Lot 56) and thence through any of the properties of the defendants or third-party defendants.
8. Cabot and her husband purchased Lot 52 with frontage on Benson Road, and the existing house on that parcel, in 1972. By deed dated April 13, 1978, recorded with the Registry in Book 2696, at Page 168, Cabot acquired Lot 52 solely in her name.
9. The Mueller trustees acquired Lot 58 from Phillip P. Mueller ("Mueller"), who acquired title to that parcel by deed dated November 9, 1979, recorded with the Registry in Book 3012, at Page 261. A single family residence existed on the parcel at the time of Mueller's purchase. The Mueller trustees' parcel does not front on Benson Road: instead, it enjoys a deeded right of way, created in Mueller's 1979 deed and various easements to his predecessors, that runs from the Mueller trustees' parcel to Benson Road across land owned by the Kiernan/Adler defendants and the Demmings. This easement appears on both the ground and on plans to be a southerly extension of Benson Road, and is known variously as "Benson Lane" or "Benson Way."
10. Fox, as trustee of the Residence Trust Agreement, acquired title to Lot 57, which has frontage on Benson Road, by deed dated December 3, 1983, recorded with the Registry in Book 3962, at Page 262. Fox acquired the parcel with an existing single-family residence. Her deed has no reference to her property being subject to any right of way, and contains a



restriction attempting to prohibit or limit access over her property.

11. The Clark trustees acquired Parcel 51 from Sylvia M. Clark (“Clark”) by deed dated February 15, 1989, recorded with the Registry in Book 6705, at Page 308. Clark acquired the parcel, with an existing single family residence, as an individual by deed dated October 20, 1976. Clark’s deed has no reference to any right of way. Since 1976, Clark and her family have used the property exclusively as a residence.
12. The defendant trustees of the Cabot-Clark-Fox Trust (Cabot, Clark, and Fox), acquired Lots 89, 90, and 91 by deeds dated August 19, 1994 and recorded with the Registry in Book 9328, at Pages 145, 147, and 149. These parcels form a narrow strip that abut the land of Cabot (Lot 52), the Clark trustees (Lot 51), and Fox (Lot 57), which all lie to the east of the strip, and land of the Truro Conservation Trust (Lot 56), which lies to the west of the strip.
13. The trustees of the Truro Conservation Trust acquired Lot 56 by deed dated December 27, 1994, recorded with the Registry in Book 9500, at Page 282. The Truro Conservation Trust has been recognized as a not-for-profit organization by the Attorney General of the Commonwealth, and as a public charity by the Internal Revenue Service. The Truro Conservation Trust is a land trust and its primary charitable purpose is to “help preserve the rural character of the Town of Truro.”
14. The Truro Conservation Trust has admitted that the Caters have “deeded claims of access” over their Lot 56. Lot 56 is part of a rare coastal heathland. The portion of the heathland which has been designated as Lots 50, 56, 67, 73, 74, and 78, and Lot 105 on Sheet 54 of the Assessor’s Atlas constitutes a forty-acre area, on which are only four structures. Subsequent to the Truro Conservation Trust’s purchase of Lot 56, the Trust was granted a

- conservation restriction on 3.84 acres of Lot 67, and received a gift of Lot 105.
15. The entirety of the former Cobb estate is mapped as a priority habitat under the Massachusetts Endangered Species Act, and is habitat for Broom Crowberry, a species of plant designated for Special Concern in Massachusetts, see 321 CODE MASS. REGS. § 10.90.
  16. From 1899 to 1997, the Caters and their predecessors in title did not seek to define the location of the easement granted in the 1899 Deed. During that time, Cobb's former land was subdivided into nineteen lots and Benson Road was laid out, constructed, and accepted as a public way. In addition, fourteen homes were constructed on the land, including on the following lots owned by parties to this case in the years indicated: the Clark trustees' Lot 51 (1969); Cabot's Lot 52 (1950); Fox's Lot 57 (1931); the Mueller trustees' Lot 58 (1948); the Kiernan/Adler defendants' Lot 60 (1937); and the Demmings' Lot 69 (1964).
  17. The Cater Parcel sits atop a high dune, overlooking Cape Cod Bay. The top of the Cater Parcel is approximately 100 feet above sea level. Benson Road, as it runs southerly (perpendicular to the rise in the Cater Parcel) climbs gently from approximately thirty feet to approximately fifty feet.
  18. The Clark trustees' Lot 51 comprises 1.21 acres, and is relatively flat, at or below elevation thirty.
  19. Cabot's Lot 52 comprises 0.78 acres. The Cabot lot slopes from elevation thirty-three to elevation thirty from Benson Road to the rear lot line.
  20. Fox's Lot 57 comprises 1.47 acres. The Fox property has an elevation of fifty feet at its frontage on Benson Road, then descends steeply toward the Trust Property to a nadir of

approximately fourteen feet.

21. The Mueller trustees' Lot 58 comprises 2.82 acres; like the Fox property, the Mueller land slopes westerly, starting at an elevation of fifty feet, reaching a nadir of seven feet, and then rising quickly to twenty feet at the boundary line.
22. In evidence as Exhibit 37 is a plan titled "Plan of Proposed Driveway, William J. Cater, Benson Road, Assessor's Map 53, Parcel 50, Truro, Mass.," prepared by Coastal Engineering, 260 Cranberry Highway, Orleans, Massachusetts, 02653, dated March 17, 2003 under the stamp of Martin R. Donaghue ("Original Coastal Engineering Route").
23. A subsequent plan by Coastal Engineering, titled "Plan Showing Proposed Driveway Option CEC-2, William J. Cater, 9 Benson Road, Truro, MA," prepared by Coastal Engineering, 260 Cranberry Highway, Orleans, Massachusetts, dated March 31, 2009 under the stamp of Martin R. Donaghue, is in evidence as Exhibit 38 ("Revised Coastal Engineering Route").
24. Defendant Clark trustees presented a plan titled "Road Concepts Off Benson Road, Truro, MA" by J.M. O'Reilly & Associates, Inc., 1573 Main Street – Route 6A, Brewster, Massachusetts ("O'Reilly Plan"). This plan, in evidence as Exhibit 40, depicts five different road concepts: Routes 1, 2, and 3 were designed by J.M. O'Reilly & Associates for Clark, Route 4 was designed by John O'Reilly for the Truro Conservation Trust in 2005, and the Original Coastal Engineering Plan, prepared for the Caters in 2003, appears as Route 5. All parties have stipulated that Route 3 on the O'Reilly Plan is not a serious consideration, and no party argues in favor of that route.
25. The Mueller defendants introduced "Plan of Land, Benson Road in Truro Massachusetts (Barnstable County) Topographic Detail Plan," dated February 29, 2002, by BSC Group,

349 Route 28, Unit D, West Yarmouth, Massachusetts, in evidence as Exhibit 39 (“BSC Group Route”).<sup>3</sup>

26. Exhibit 41 is a plan titled “Sketch Plan Showing Fox Proposed Easement Location, Benson Road to Cater Property, Truro, MA” dated February 20, 2009, prepared by East Cape Engineering, Inc., Orleans, Massachusetts, depicting a route labeled “B1” (“Route B1”).
27. Original Coastal Engineering Route represents a maximum twelve percent slope or grade as it climbs the dune from Benson Road to the top of the Cater Parcel. The Revised Coastal Engineering Route is shown at a ten percent maximum grade. Both routes are intended to be fourteen-foot wide driveways with a two-foot shoulder on each side.
28. O’Reilly Route 2 and O’Reilly Route 4 are designed to have grades of ten percent or less. Route 4 has grades of eight percent or less.<sup>4</sup>
29. The BSC Group Route is drawn at a ten-percent grade and is designed to be a twelve-foot roadway within a twenty-foot easement area.
30. Route B1 calls for a maximum grade of twelve percent. Although its width is not depicted on Exhibit 41 (the East Cape Engineering plan), the Fox defendants (Lot 57) who offer Route B1 concede that the easement should be twelve to fourteen feet in width.
31. The result of the December 23, 2008 denial of the Motion of the Mueller Trustee Defendants for Summary Judgment was a ruling that the Decision Following First Phase

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<sup>3</sup> Chalk B is a copy of Exhibit 39 with some color-coding as well as some annotations made during the examination of one witness.

<sup>4</sup> Route 4 was originally developed at the request of the Conservation Trust; O’Reilly’s instructions were to develop an alternative to the Original Coastal Engineering Route across the Trust land. This is why Route 4 and Original Coastal Engineering overlap from the Cabot property line to Benson Road.

of Trial did not preclude the possibility that the Cater easement would burden the southerly extension of Benson Road, portions of which may be owned in fee by Keirman/Adler, Demmings, Callander, or Cohen.

32. The Cabot septic system is between the house and the Clark property, and comprises a leach pit, septic tank, and connecting pipes.

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“The law is settled that if the bounds of a way are not located by the deed which creates it, the parties may fix the location upon the servient premises, and, if they do not, a court may do so.” Mahoney v. Wilson, 260 Mass. 412, 414 (1927); see also Mugar v. Mass. Bay Transp. Auth., 28 Mass. App. Ct. 443, 445-46 (1990) (“In the absence of agreement, the court may fix the bounds of a way not located by the instrument creating it.”). “[A] right of way not definitely fixed by deed will be construed as the ‘right to such a way as is reasonably necessary and convenient for the purposes for which it is granted.’” Mugar, at 446 (internal citations omitted). “[A] general right of way obtained by grant may be used for such purposes as are reasonably necessary to the full enjoyment of the premises to which the right of way is appurtenant.” Cannata v. Berkshire Natural Resources Council, Inc., 73 Mass. App. Ct. 789, 795 (2009) (citing Tehan v. Security Natl. Bank of Springfield, 340 Mass. 176, 182 (1959)).

When a court is called upon to fix the location of an easement, the court looks to principles of equity and fairness. The Restatement (Third) of Property (Servitudes) (2000), while not dispositive, offers some guidance in this task. Section 4.10, in comment b states “In resolving conflicts among the parties to servitudes, the public policy favoring socially productive use of land generally leads to striking a balance that maximizes the aggregate utility of the servitude beneficiary and the servient estate. Socially productive uses of land include maintaining stable

neighborhoods, conserving agricultural lands and open space, and preservation of historic sites, as well as development for residential, commercial, recreational, and industrial uses.” Comment h states that “In balancing the interests of the dominant- and servient-estate holders, conservation and neighborhood preservation concerns should be relevant as well as developmental concerns.” The interest of servient estate holders includes other concerns not enumerated by the Restatement, such as maintaining property values, privacy, and convenient access.

I also take guidance from the Truro Subdivision Regulations. The Design Standard section of the Regulations, at Section 3.3, titled “Respect for natural landscape,” provides that “consideration should be shown for the protection of natural features, such as large trees, water-courses, ponds, wetlands, beaches, dunes, scenic views and points, historic spots, and similar community assets.”

The competing equities are the right of the Caters to a “general right of way . . . for such purposes as are reasonably necessary to the full enjoyment of the premises to which the right of way is appurtenant.” Cannata, 73 Mass. App. Ct. at 795. The Caters argue that this standard necessarily requires the court to locate an easement within which can be constructed a right-of-way “sufficient to meet today’s legal requirements.”<sup>5</sup> On the other extreme is the argument that the scope of the Cater easement is limited to what would have been laid out at the time it was created in 1899. Neither position is correct.

The easement is not limited to what was reasonable in 1899. The Restatement (Third) of Property (Servitudes) § 4.8 (2000) states where the dimensions of a servitude are not determined by the instrument or circumstances surrounding its creation, the dimensions are those reasonably

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<sup>5</sup> I take no position on which version of the Truro zoning bylaws or subdivision regulations might be applicable to the locus in the event Cater seeks some kind of permitting or subdivision approval. There is, of course, no appeal of a decision of the zoning board or the planning board currently before the court.

necessary for the enjoyment of the servitude. Section 4.10 provides that, except as limited by the terms of the servitude, the “manner, frequency, and intensity of the use may change over time to take advantage of developments in technology and to accommodate normal development of the dominant estate[.]” This embodies the principle long followed by courts of this Commonwealth to be “very slow to hold that even ancient rights of way, not expressly restricted as to the type of vehicle could not be employed at all for the means of transportation in common use by a succeeding generation.” See Hodgkins v. Bianchini, 323 Mass. 169, 172-73 (1948) (quoting Swenson v. Marino, 306 Mass. 582, 587 (1940)) (internal elision omitted). When an easement is granted in “general terms without limitation or restriction[, s]uch a way is not limited to the purposes for which the dominant estate was used at the time the way was created.” Mahon v. Tully, 245 Mass. 571, 577 (1923).

Likewise, the Truro Subdivision Regulations are evidence of what might be reasonable – they are not determinative of what is reasonable. I am not bound to fix either the width of the driveway easement, or its location, in such a fashion as will guarantee approval by the Planning Board. The Decision Following First Phase of Trial determined that the easement was a general right of way serving a single house. The second phase of this trial was about locating that easement using equitable principles of property law, not determining whether various proposed routes and driveway designs would comply with the town’s land use regulations. To the extent that I rely on the Truro Subdivision Regulations, I treat them as just one more factor I must balance.

Within the Subdivision Regulations are “Recommended Geometric Design Standards” for

subdivision roads, and I take these design standards into account without being bound by them.<sup>6</sup> I also take into account the Rural Road Alternative in section 3.7 of the Subdivision Regulations, which gives the Planning Board discretion to waive strict compliance with the Design Standards for subdivisions on land “of a rural or sensitive nature” to allow the road to be “more in keeping with the rural landscape[.]” The Planning Board is instructed to weigh the following factors in deciding to grant waivers:

length of the road; design of the road and its compatibility with bordering permanent open space, scenic amenity, any other conservation measures; public safety; the adequacy of the proposed surface to withstand the expected intensity of vehicular traffic upon build-out of the subdivision; the provision of pull-offs, the applicant’s willingness to resurface following the construction of residences; provisions for protecting the road surface during the construction of residences; and the long-term adequacy of any homeowner’s maintenance agreement to protect the proposed surface; and applicable covenants restricting future density increases.

Cases such as M.P.M. Builders, LLC v. Dwyer, 442 Mass. 87 (2004), Western Massachusetts Elec. Co. v. Sambo’s of Massachusetts, Inc., 8 Mass. App. Ct. 815 (1979), and Pratt v. Sanger, 70 Mass. 84 (1855) (reversed on other grounds, O’Loughlin v. Bird, 128 Mass. 600 (1880)) stand for the proposition that, to the extent the Cater’s preferred location for the driveway is at odds with any of the defendants’, the court should be more favorable to the defendants. With the adoption of Restatement (Third) of Property (Servitudes) § 4.8 (3) (2000), the Supreme Judicial Court indicated that the appropriate balance between the needs of the dominant and servient estates is one which maximizes the “property utility” of the servient estate, and minimizes the costs associated with being burdened with an easement, all without “unreasonably interfering with the easement holder’s rights.” M.P.M. Builders, 442 Mass. at 90-

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<sup>6</sup> According to the Design Standards, a “Type A” subdivision road should have a right-of-way width of forty feet, a minimum roadway width of fourteen feet exclusive of berms, and a minimum four-foot shoulder on each side. The maximum grade is said to be eight percent.



91.

The equities that therefore I must balance are the Cater's right to reasonable access, against the rights of the defendants to have the natural environment, their scenic vistas, property values, and privacy preserved. These interests are in conflict because a road in most any location will infringe to some degree on these interests of the defendants. The more substantial the road, the more unwelcome impact on the servient estates, because construction of a wide, flat roadway produces increased disturbance of the surrounding landscape.

#### Width of the Cater Driveway

The Cater driveway should not exceed twelve feet when constructed. The overwhelming evidence at trial convinces me that a safe and convenient driveway does not require more than twelve feet. I am not convinced that equity requires a driveway that automatically complies with every requirement of the design standards of the Truro Subdivision Regulations, especially in light of the Rural Road Alternative, which specifically recognizes that strict adherence to the Design Standards is not always the best option for roadways over land "of a rural or sensitive nature[.]" I also am convinced by the argument pressed by the defendants that the Caters should not benefit from their extreme delay in exercising their easement rights. If the Cater Parcel had been developed contemporaneously with the rest of the neighborhood, the driveway would have preexisted the adoption of subdivision control regulations in 1955. Indeed, of the defendants, only the Clark house was constructed after the adoption of subdivision control in Truro. Increasing the width of the driveway from twelve feet to fourteen feet substantially increases the amount of the landscape that is disturbed, and there is no countervailing reason to do that.

### Easement Route From Benson Road to Trust Land

On balance, the most equitable way to reach the Trust Land from Benson Road is to construct a driveway over the boundary line between the Clark and Cabot properties. The shortest distance between Benson Road and the Trust Property is along the Cabot/Clark boundary line, where it is about 230 feet. The Trust Property is over 380 feet away from Benson Road traveling along the Fox/Mueller boundary line.

Straddling the property line is also the best way to spread the burden; the O'Reilly Route 2 places all the burden on Fox, with 380 linear feet of driveway on the Fox property, amounting to nearly 4,600 square feet of driveway on the Fox property. In contrast, straddling the property line between Cabot and Clark puts only about 1,400 square feet on each property. Dividing the driveway over two parcels leads to a smaller burden on each of the affected lot owners, and for that reason, locating the driveway on the boundary between Cabot and Clark causes the least amount of harm to any one property.

While I am aware that the Caters cannot possess an easement over their own land, nonetheless, where and how the driveway is likely to be constructed on the Cater Parcel is one equitable factor that I considered in making my determination on where the easement ought to be located. This is because I must attempt to minimize the impact on all of the sensitive dune areas, not just those held by the Conservation Trust. A driveway that enters the Cater land on its southern bound would require substantial additional construction to reach the "top" of the Cater land; this construction would require more disturbance of the dune, and a longer driveway has more potential to mar scenic vistas, the preservation of which I find to be a substantial equitable benefit to all the defendants. This is a major problem with Route 4 on the O'Reilly Plan, also Route 2, and with the Revised Coastal Engineering Route. I credit the opinion of Timothy J.

Brady that “[a]ny of the driveways that come to the southeast corner of the Cater property, in my opinion, are not done until they get up to the middle of the lot. They’re entering the lot at approximately elevation fifty-five. They’re going to, in my opinion, have to get up to at least elevation seventy or eighty[.]” Transcript Phase II Day 3, April 3, 2009, page 22 lines 13-19. I find more support for this position in that the Original Coastal Engineering plan, prepared for the Caters, shows the end of the driveway at the top of the dune, at about ninety-four feet. I find that the only reasonable conclusion that the evidence supports is that the location of the structure on the Cater Parcel will be at some location above ninety feet in elevation (the high point of the Cater Parcel is approximately 103 feet).

The amount of cut and fill required to construct a driveway that traverses the steep dunes at a passable slope<sup>7</sup> is a factor that I weighed heavily, but mostly in the context of determining the grade of the easement, *infra*. The only actual testimony at trial as to actual, calculated amounts of cut and fill came from Mr. O’Reilly, who claimed that Route 2 would require 525 cubic yards of fill and 230 cubic yards of cut and that the Original Coastal Engineering plan would require 1,550 cubic yards of cut and eighty-four cubic yards of fill. I am forced to discount the weight of this testimony because of the additional amount of cut and fill that would be required to extend O’Reilly’s Route 2 up the side of the dune northerly to the top of the Cater parcel. The Original Coastal Engineering Route ends at an elevation of approximately ninety-six. O’Reilly’s Route 2 is only shown climbing to an elevation of about thirty-six. I am convinced that the sixty feet of elevation that would need to be ascended eliminates any advantage in the amount of cut and fill

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<sup>7</sup> To get up the dune, which has a slope of twenty percent to thirty percent, the driveway will climb diagonally across the contours at a more shallow grade. To construct a level road on the side of a hill, earth is removed from the part of the hill above the road, and added to the hill below the road. The earth removed is “cut” and the earth added is “fill.” The technique of “balanced fill” seeks to use the cut as the fill to avoid trucking in extra earth, although this is not always possible depending on the actual conditions on the ground.

that Route 2 appears to have over the Original Coastal Engineering Route.

Perhaps more importantly, to get above ninety feet in elevation on the Cater Parcel, Route 2 would be substantially longer than Original Coastal Engineering because while the two routes would end in substantially the same location, Route 2 needs to traverse an extra 330 feet to get from the point where it meets the Cater Parcel, to the top of the dune. That number is not the length of the road, it is about 330 feet as a straight shot. A road which must curve to maintain passable grades would be markedly longer. The result would be an extension of Route 2 that cuts back in a northerly direction essentially parallel to Benson Road, but at an elevation twenty-five feet to thirty-five feet up the side of the dune from Benson Road. The impact on the view from below would be substantially worse than the Original Coastal Engineering Route.

A driveway that meets Benson Road at the Fox/Mueller property and traversed the Trust land westerly, like O'Reilly Route 2, would lie in the view to the south from the Cabot, Clark, and Fox properties. The fill required at the bottom of the so-called "valley" – the area of low elevation along the Fox / Trust bound – would significantly raise any driveway running in this location, making it a conspicuous feature of the view to the south from Cabot, Clark, and Fox. In contrast, a driveway along the BSC Group route, or the Original Coastal Engineering route, would be less conspicuous as it cuts across the Cabot/Clark land because it would lie at or about the existing grade. A driveway along a northern route would be visible only from the Clark property looking south.

The argument that a southern route is preferable because of the "dangerous curve" depicted on Original Coastal Engineering does not persuade me. The Cater Property is to the west and north of the land of the defendants and as a matter of simple geometry, all the proposed routes proceed from east to west across the Trust Land. O'Reilly's Route 2 does not show a curve (as

shown on Original Coastal Engineering) because it terminates at the boundary of the Cater parcel. To reach the top of the dune, Route 2 would also need some kind of a curve similar to that depicted on Original Coastal Engineering. Testimony about dangerous downgrade curves in roads is not persuasive because both routes would have such a curve.

The testimony at trial on how the presence of a driveway easement would affect property values does not convince me that one defendant would suffer worse than another. There is little question that the construction of an actual driveway across the land of one of the defendants will have an impact, of some sort at least, on the property value of the land traversed by the new drive. The evidence which I credit, however, leaves me unsatisfied just what the amount of that impact might be, measured in dollars.

It is unfortunate that one or at most two of the defendants with improved parcels must bear the attendant effect on their property value that comes from location of the easement route over their land, while those freed of that burden will have no loss. But this is a natural consequence of the task the court is asked to carry out. The easement must follow some particular route, and when it goes there, it doesn't go elsewhere. The parties have not referred me to authority for the proposition that those defendants who, as a result of this decision, will not find the easement crossing their parcels, should be ordered to pay some compensation to the other defendants, across whose parcels the drive will run. And even were I authorized to do that, the evidence which I credit in this case is insufficient for me to make any such award grounded in reliable fact.

It is important, but not critically so, to minimize the disruption of the footpath. A driveway straddling the Clark/Cabot lot line and proceeding relatively straight up the dune misses the footpath altogether. Any driveway easement that accesses Benson Road to the south of the

existing Cabot driveway must bisect the footpath at some point. There is nothing in the evidence that demonstrates an easement for a driveway must not disturb the footpath, but I find and rule that an easement which does not disturb the footpath is preferable to one that does.

Finally, a curb cut for a driveway off of Benson Road at the Clark/Cabot boundary is a preferable location compared to coming in on the Fox or Mueller land. For one, the presence of the retaining wall directly opposite the Fox driveway limits the area available for turning. More importantly, the Cater driveway would be the fifth route that converges at the end of Benson Road: the Fox driveway, the two twenty-foot ways on the Daisy Plan, and the private extension of Benson Road, Benson Lane. There is no need to further clog this area of the street when a driveway coming in on the Clark/Cabot boundary would be over twenty feet away from the nearest curb cut, the existing Cabot driveway.

The fact that the Clark septic system might lie in the path of the easement does not dissuade me. I am convinced, however, that if it turns out that the route as I have found it does in fact conflict with the Clark septic system, that relocating or reinforcing the system is an expense of constructing the driveway that is properly born by the Caters.

#### **Route of the Easement Across the Trust Land**

Whatever way the drive comes in from the street, it must make its way across the Trust Land to reach the Cater site. The route across the Trust Land is dictated by what is an acceptable grade for the driveway. A steep dune rises from the rear lot line of Cabot and Clark, climbing almost sixty vertical feet before reaching the Cater property, approximately 240 feet away. A road constructed to follow this direct line would be twenty-five percent grade, which is not practical for passage. Accordingly, the route of the easement will need to curve to follow the slope of the land, to permit construction of a road that has a reasonable steepness. The more the driveway curves,

the ratio of vertical rise to horizontal run changes to enable a more shallow driveway. The longer the driveway becomes, the more it damages the Trust property. What I must do is find a balance between the Caters' desire to have a shallow driveway, and the interest of the other parties in limiting the length of the driveway. To do this, I must first determine what is a reasonable slope for this particular easement.

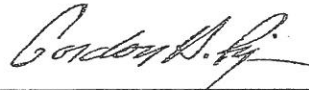
Again, I am mindful of the subdivision regulations, as Cater urges me to be. As stated, I do not find them controlling or find myself bound to locate the easement in a way which would necessarily comply with the subdivision regulations. The subdivision regulations are just one factor of many in determining a reasonable slope. For their part, the Subdivision Regulations state the maximum grade for a Type A roadway is eight percent. A footnote to the Recommended Geometric Standards states that "The 'Maximum Grade' may be waived, but cannot exceed 10%, [sic] for a distance of one hundred (100) feet."

In the Decision Following First Phase of Trial, I determined that the easement as originally contemplated would not have been steeper than fifteen percent. Taking this number as a starting point, and apparently also taking into account the Design Standards, all of the routes proposed are between eight percent grade and ten percent grade. I find and rule that the route depicted on the Original Coastal Engineering plan is the best option for a route across the Trust Land. My decision is supported by the fact that a ten percent grade allows for a shorter driveway because it is a more direct route up the face of the hill. There are two ways to go about constructing a driveway at a shallower grade: one is to proceed at a more shallow angle by making the driveway longer. The second is to increase the amount of cut and fill. It appears that a substantial amount of cut and fill is required to construct the Original Coastal Engineering route, however, I am convinced that the shorter length of that route, and the fact that it crosses the Cater property line at

a higher elevation, mean less aggregate cut and fill than a shallower, longer driveway, like Route 2.

On balance, the most equitable location for the easement is to pass westerly from Benson Road over the boundary line between Cabot and Clark, then to proceed west-southwesterly up the dune at a ten percent grade across the Trust Land to the Cater Parcel, and then curve to the north to terminate above the ninety-foot elevation mark on the Cater Parcel. The judgment that will enter in this case will provide for construction of a twelve-foot-wide driveway along the route just described, but within some band of discretion to account for unforeseen conditions on the ground.

Judgment accordingly.



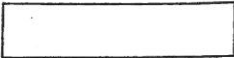
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Gordon H. Piper  
Justice

Dated: July 12, 2010



**Tab G**



COMMONWEALTH OF MASSACHUSETTS

LAND COURT

(SEAL)

DEPARTMENT OF THE TRIAL COURT

BARNSTABLE, ss.

MISCELLANEOUS CASE  
No. 98 MISC 250365 (GHP)

\_\_\_\_\_  
GLORIA J. CATER and WILLIE J. CATER,

Plaintiffs,

v.

ROBERT BEDNAREK, BRENDA BOLEYN, BETSEY  
BROWN, FRED GAECHTER, CAROL GREEN, CURTIN  
HARTMAN, HOWARD IRWIN, JOHN MARKSBURY,  
and JOEL SEARCY, as they are trustees of Truro  
Conservation Trust; LUCY CLARK, JENNIFER CLARK  
KRUGER, and MITCH BROCK, as they are trustees of  
Silvia M. Clark Revocable Trust; SUSAN B. CABOT,  
SYLVIA CLARK, and JOAN F. FOX, individually and as  
trustees of Cabot-Clark-Fox Real Estate Trust;  
JOAN F. FOX, as trustee of the Residence Trust Agreement;  
SARA C. MUELLER and PHILIP P. MUELLER, III, as  
trustees of the Philip P. Mueller Truro Realty Trust;  
PAUL D. KIERNAN; ELIZABETH ADLER;  
RAYMOND E. DEMMING; and LOIS C. DEMMING,

Defendants,

and

LUCY CLARK, JENNIFER CLARK KRUGER, and  
MITCH BROCK, as trustees of the Silvia M. Clark  
Revocable Trust,

Third-Party Plaintiffs,

v.

NANCY F. CALLANDER, as trustee of  
Shambles Realty Trust; ETHAN R. COHEN; and  
NATALIE FERRIE-COHEN,

Third-Party Defendants.  
\_\_\_\_\_

## J U D G M E N T

This action, which commenced August 21, 1998 with the filing of a complaint by Willie J. Cater and Gloria J. Cater ("Caters"), is request for declaratory and injunctive relief confirming the validity, and establishing the location, of a general right of way of record benefitting their land in Truro, Barnstable County, Massachusetts. The Caters' land is that acquired by them from Howard B. French by deed dated June 26, 1979 and recorded with the Barnstable County Registry of Deeds on June 29, 1979 in Book 2944, at Page 75.

This case came on to be tried before the court in two phases. In a decision dated July 9, 2007 and a decision of even date ("Phase II Decision"), the court (Piper, J.) has made findings of fact and rulings of law; the court has determined that the easement is in force and effect, and that the location of the easement is to be as described in the Phase II Decision.

In accordance with the court's decisions, it is

**ORDERED, ADJUDGED and DECLARED** that the easement ("Easement") recited in the deed from Charles W. Cobb to Lorenzo D. Baker, dated September 7, 1899, recorded with the Barnstable County Registry of Deeds ("Registry") in Book 2, Page 39 is in force and effect, and has not been extinguished, abandoned, frustrated in its purpose, or otherwise ceased to be valid and effective. It is further

**ORDERED, ADJUDGED and DECLARED** that, in equity, the Easement ought to be and hereby is located as follows:

From Benson Road, the Easement shall run westerly so that the centerline of the Easement coincides, as substantially as reasonably possible, with the boundary line between Lot 51 (7 Benson Road) of the Clark trustees, and Lot 52 (9 Benson Road) of Cabot.

From the boundary between the Cabot and Clark land and Lot 56 (9A Benson Road) of the Truro Conservation Trust, the Easement shall follow generally the route depicted on Exhibit 37, which is a plan titled "Plan of Proposed Driveway, William J. Cater, Benson Road, Assessor's Map 53, Parcel 50, Truro, Mass," prepared by Coastal Engineering, 260 Cranberry Highway, Orleans, Massachusetts, 02653, dated March 17, 2003 under the stamp of Martin R. Donaghue.

It is further

**ORDERED, ADJUDGED and DECLARED** that, in the event a driveway or roadway is constructed within the Easement, the finished surface of such driveway or roadway is not to exceed twelve (12) feet in width. It is further

**ORDERED, ADJUDGED and DECLARED** that, in the event a driveway or roadway is

constructed within the Easement, such driveway or roadway shall cross any terrain, the slope of which terrain is equal to or greater than ten (10) percent, at a finished grade equal to or greater than ten (10) percent; absent further order of this court, the Easement does not permit cut or fill on the land of any defendant to accommodate a finished grade of less than ten (10) percent of any driveway or roadway constructed on terrain the slope of which terrain is equal to or greater than ten (10) percent. It is further


**ORDERED, ADJUDGED and DECLARED** that the Easement shall permit, in addition to the width of a twelve-foot driveway or roadway, the construction of drainage features, improvements and site work for roadway support and stabilization, erosion controls, vegetative screening, habitat restoration, and timber guardrail. It is further

**ORDERED, ADJUDGED and DECLARED** that the costs of designing, engineering, obtaining approvals for, and constructing any driveway or roadway within the Easement shall be solely the responsibility of the dominant estate. These costs include without limitation the cost of any reasonably necessary or desirable upgrade, repair, or relocation of the Cabot septic system that may be caused, directly or indirectly, by the construction of a driveway or roadway within the Easement. It is further

**ORDERED, ADJUDGED and DECLARED** that nothing in this Judgment or the accompanying Phase II Decision shall permit the construction of any driveway, roadway, or route, including any curb cut, or any related work, other than in compliance with all applicable laws, nor without first obtaining all permits and approvals required by law. It is further

**ORDERED, ADJUDGED and DECLARED** that the Easement burdens the area described for its location in this Judgment, and no longer burdens any other land of any of the defendants. It is further

**ORDERED and ADJUDGED** that no damages, fees, costs, or other amounts are awarded to any party.

 By the Court. (Piper, J).

Attest:

Dated: July 12, 2010.

\_\_\_\_\_  
Deborah J. Patterson  
Recorder

A TRUE COPY  
ATTEST:

  
RECORDER

**Tab H**

The Deputy Reporter of Decisions is directed to furnish attested copies of this opinion to the clerk of this court. The clerk in turn will transmit one copy, under the seal of the court, to the clerk of the United States District Court for the District of Massachusetts, as the answer to the questions certified, and will also transmit a copy to the parties.



462 Mass. 523

Gloria J. CATER & another<sup>1</sup>

v.

Robert BEDNAREK & others,<sup>2</sup>  
trustees,<sup>3</sup> & others.<sup>4</sup>

Supreme Judicial Court of Massachusetts,  
Suffolk.

Argued Feb. 7, 2012.

Decided June 15, 2012.

**Background:** Owners of property with no frontage on any street brought action against owners of neighboring property comprising the alleged servient estate, seeking to confirm existence of easement and to determine the location of the right of way. The Land Court Department, Suffolk County, Gordon H. Piper, J., confirmed easement's existence and specified its location. Neighboring property owners appealed. The Supreme Judicial Court on

1. Willie J. Cater.
2. Brenda Boleyn, Betsey Brown, Fred Gachter, Carol Green, Curtin Hartman, Howard Irwin, John Marksbury, and Joel Searcy.
3. Of the Truro Conservation Trust.
4. Lucy Clark, Jennifer Clark Kruger, and Mitch Brock, trustees of the Silvia M. Clark

its own initiative transferred the case from the Appeals Court.

**Holdings:** The Supreme Judicial Court, Gants, J., held that:

- (1) easement was not extinguished by estoppel, despite development of servient estate and passage of a century before owners of dominant estate sought to establish easement's precise location, but
- (2) judge erred in limiting width of roadway to twelve feet while requiring compliance with subdivision regulations that required a minimum width of fourteen feet.

Vacated and remanded.

### 1. Easements ¶1

A "servient estate" is an estate burdened by an easement; a "dominant estate" is an estate that benefits from an easement.

See publication Words and Phrases for other judicial constructions and definitions.

### 2. Easements ¶30(1)

Abandonment of an easement requires a showing of intent to abandon the easement by acts inconsistent with the continued existence of the easement; nonuse of itself, no matter how long continued, will not work an abandonment.

### 3. Easements ¶32

To wholly extinguish an easement by prescription, the acts of the servient ten-

Revocable Trust; Susan B. Cabot, Sylvia Clark, and Joan F. Fox, individually and as trustees of the Cabot-Clark-Fox Real Estate Trust; Joan F. Fox, trustee of the Residence Trust Agreement; and Sara C. Mueller and Philip P. Mueller, III, trustees of the Philip P. Mueller Truro Realty Trust.

ant must be utterly inconsistent with any right of the dominant tenant, manifestly adverse to every claim by it, and incompatible with the existence of the easement for at least the prescriptive period of twenty years; where the acts of the servient tenant render the use of only part of a right of way impossible, the easement is extinguished only as to that part.

#### 4. Easements $\S$ 44(2)

Where the instrument creating the easement does not specify its dimensions, a judge must establish dimensions that are reasonably necessary for the enjoyment of the dominant estate, and should not limit the right of way to the purposes for which the dominant estate was used or the means of transportation in common use at the time the easement was created.

#### 5. Easements $\S$ 26(1)

An easement may be extinguished by estoppel.

#### 6. Easements $\S$ 26(1)

Extinguishment of easement by estoppel is based on the policies of preventing the injustice and unjust enrichment that would result if servitude beneficiaries were able to mislead a burdened party into believing that the servitude will be modified or terminated and then to obtain an injunction or judgment for damages when the burdened party violates the servitude.

#### 7. Easements $\S$ 26(1)

Although the balance is struck in favor of preventing injustice, courts should be cautious in applying estoppel to modify or extinguish an easement, particularly where the servitude in question is of substantial value to the dominant estate.

#### 8. Easements $\S$ 26(1)

Easement providing right of way to nearby road was not extinguished by estoppel when servient estate was sold, sub-

divided and developed during the century that passed before property owners brought action to establish easement's precise location; easement did not specify a location, developed parcels adjoining road were sufficiently large to permit construction of roadway to dominant estate without substantial detriment to the development on the servient land, and it was not reasonable to infer from silence that the owners of the dominant estate communicated an intention to terminate the only easement that assured them access to a public way.

#### 9. Easements $\S$ 44(2)

Where the instrument creating an easement does not fix its location or bounds, a court may do so in the absence of agreement by the parties.

#### 10. Easements $\S$ 44(2)

Judge locating right-of-way easement providing property owners access to public road over servient estate erred in limiting the width of the finished surface of the roadway to twelve feet, where subdivision regulations required an access road to have a width of at least fourteen feet, subdivision planning board was without discretion to waive the minimum width requirement, and judgment forbade construction of any roadway that was not in compliance with local laws.

#### 11. Easements $\S$ 44(2), 61(10)

It is not an abuse of discretion for a judge locating right-of-way easement to impose limits on a roadway that comply with design standards in town regulations only if the town planning board in its discretion waives strict compliance with those standards, provided the judgment forbids the construction of any such roadway without permitting approval; if the planning board were in its discretion to deny the waiver, the judgment would not authorize construction of the roadway, and the plaintiffs would need to apply to the

judge for a modification of the judgment that either would comply with local laws and regulations without a waiver, or include terms more likely to result in a planning board waiver.

Bruce W. Edmands for the plaintiffs.

Thomas Frisardi, Boston, for Lucy Clark & others.

Christopher M. Morrison, Boston, for Robert Bednarek & others.

The following were present but did not argue:

Edward A. Gottlieb, Brighton, for Joan F. Fox.

Lois M. Farmer, Hyannis, for Philip P. Mueller, III, & another.

Andrew M. Higgins, Boston, for Susan B. Cabot.

Paul D. Kiernan, pro se.

Present: IRELAND, C.J., SPINA,  
CORDY, BOTSFORD, GANTS,  
DUFFLY, & LENK, JJ.

GANTS, J.

[1] <sup>524</sup>The plaintiffs, Gloria J. Cater and Willie J. Cater, own a parcel of land (Cater parcel) on a hill overlooking Cape Cod Bay in the town of Truro (town) with no frontage on any street. The parcel, however, has the benefit of an unspecified easement conveyed in an 1899 deed that

provides a "right of way" to reach a nearby road. In the century that passed before the plaintiffs filed suit in the Land Court in 1998 to confirm the validity of the easement and to establish its precise location and characteristics, the servient estate had been sold and subdivided into numerous lots and houses had been built on many of the subdivided lots.<sup>5</sup> As a result, the Land Court judge confronted an equitable dilemma: without an easement allowing construction of a roadway<sup>6</sup> from the street to the Cater parcel, the plaintiffs could not build a home on the dominant estate, but any such easement would intersect a subdivided lot and diminish the value and enjoyment of a servient property.

After a phased trial, the judge made detailed findings of fact and in two carefully considered decisions attempted to balance the competing interests of the dominant and servient estates. The judge concluded that the plaintiffs continued to hold a valid easement and placed the easement along the shortest and most direct route between the Cater parcel and the nearest public street that could be reached over the servient estate. The judge chose a route that straddles the property line of two servient subdivided parcels, limited to twelve feet the width of the finished <sup>525</sup>surface of any roadway constructed within the easement, and established the minimum grade on any roadway built within the easement wherever the natural grade of the terrain was steeper than ten per cent.<sup>7</sup> Appeals and cross appeals

5. A servient estate is an estate burdened by an easement. A dominant estate is an estate that benefits from an easement (here, the Cater parcel). See *M.P.M. Bldrs., LLC v. Dwyer*, 442 Mass. 87, 88 n. 2, 809 N.E.2d 1053 (2004); Black's Law Dictionary 629 (9th ed.2009).

6. The original easement granted a "right of way." The Land Court judge's opinion used the language "driveway or roadway," and de-

scribed the "easement [as] a general right of way serving a single house." We use the term "roadway" in this opinion.

7. The judgment also provides that the costs of designing and constructing the roadway must be borne by the owners of the dominant estate and that they are responsible for the cost of upgrading, repairing, or relocating a septic system if required by the construction.



were entered in the Appeals Court, and we transferred the case to this court on our own motion.

The defendants claim that the judge erred in failing to find that the easement had been extinguished by estoppel because of the silence of the dominant estate holders over many years regarding the existence of the easement while the servient estate was sold, subdivided, and developed as residential property. The plaintiffs claim that the judge erred in limiting the width of the finished surface of the roadway to twelve feet and imposing other limitations on its construction that they contend will prevent them from obtaining the necessary approval from the town's planning board to construct the roadway they need to build a home on their parcel.

We conclude that the judge did not err in concluding that the easement had not been extinguished by estoppel. We also conclude, however, that the judge erred in limiting the width of the finished surface of any roadway built within the easement to twelve feet where the roadway must conform to the town's rules and regulations governing the subdivision of land, effective September 10, 2007 (subdivision regulations), which require that the minimum width of a roadway for a single-family residence be at least fourteen feet and allow no waiver of this requirement. We therefore vacate the judgment and remand the case to the Land Court for further proceedings consistent with this opinion.

8. A copy of a map of the area is attached as an Appendix. The outer enclosed region on that map depicts the land originally owned by Charles W. Cobb. The western edge of the map depicts Cape Cod Bay.

9. The judge found that the "road now established" referred to the road now known as Fisher Road. No party to this appeal now challenges that portion of the judge's decision.

*Background.* The facts are not materially in dispute. The Cater parcel was created in 1899 when Charles W. Cobb carved off and conveyed the northeast corner of his estate to Lorenzo D. Baker by a deed dated September 7, 1899 (1899 deed).<sup>8</sup> Cobb's remaining estate (Cobb estate) extended eastward to a "proprietor's way" now known as Fisher Road, which at that time was the only road bordering the Cobb estate. In the 1899 deed, Cobb granted to Baker and his successors a "right of way . . . across my land on the east in the road now established."<sup>9</sup> The 1899 deed does not include a more detailed description of either the location or the width of the right of way. No footpath or roadway existed in 1899 across land that had once been part of the Cobb estate to connect the Cater parcel to any street, and none has been established.

Over the next eighty years, the Cobb estate was further divided, transferred, and developed so that by 1976 the estate had been split into nineteen parcels of various shapes and sizes. We relate only the details relevant to this appeal.

In 1908, Cobb's widow<sup>10</sup> conveyed a plot of land by warranty deed to Manuel Fisher (Fisher estate) that was carved out of the Cobb estate and is adjacent to the Cater parcel, and includes the parcels now held by the defendants. The warranty deed stated on a printed form that the property was "free from all incumbrances" and makes no reference to the easement in the 1899 deed.<sup>11</sup>

10. Cobb's widow had not been a grantor on the 1899 deed of the Cater parcel to Lorenzo D. Baker, but she had been a signatory on that deed for the limited purpose of releasing her dower and homestead rights.

11. The 1899 deed and the 1908 deed are each conveyances of part of a larger tract of land owned by Cobb. Neither the 1899 nor the 1908 deed references any other deed. Nei-

In 1943, Benson Road, which connected to Fisher Road many of the parcels subdivided from what had been the Fisher estate, was accepted by the town as a public road. Benson Road lies west of Fisher Road, closer to the Cater parcel, so the shortest right of way from the Cater parcel to Fisher Road crosses Benson Road before reaching Fisher Road. To reach Benson Road from the Cater parcel, a right of way must pass through undeveloped land owned by the defendant Truro Conservation Trust (Conservation Trust parcel) and then pass through one of §27four developed properties with frontage on Benson Road: from north to south, property owned by the Silvia M. Clark Revocable Trust (Clark parcel), Susan Cabot (Cabot parcel), Joan F. Fox, as trustee of the Residence Trust Agreement (Fox parcel), and the trustees of the Philip P. Mueller Truro Realty Trust (Mueller parcel).<sup>12</sup> These four properties were developed at different times: a house was built on the Fox parcel in 1931; on the Mueller parcel in 1948; on the Cabot parcel in 1950; and finally on the Clark parcel in 1969.<sup>13</sup>

The Caters purchased their parcel in 1979 and their deed also recited the right of way created in the 1899 deed. In August, 1998, the Caters commenced this litigation in the Land Court seeking to con-

firm the existence of the easement recited in the 1899 deed and to determine the location of the right of way.

firm the existence of the easement recited in the 1899 deed and to determine the location of the right of way.

In 2007, after the first phase of the trial, the judge found that, "although the 1899 [d]eed does not fix precisely the location of the easement, it does establish that the easement is to run in a generally easterly direction from the Cater Parcel over Cobb's land to reach Fisher Road," and, with the subsequent construction of Benson Road, would pass over the Conservation Trust parcel and could potentially burden the Clark, Cabot, Fox, and Mueller parcels, as well as the undeveloped Cabot-Clark-Fox parcel, until it reached Benson Road.

[2, 3] The judge recognized that the Caters and their predecessors in title had not sought to make use of the easement for ninety-eight years, until 1997, and only then informed the defendants of the easement.<sup>14</sup> The judge found, however, that there was no evidence the easement had been extinguished by an express §28grant or release, or that the Caters or their predecessors in title had abandoned the right of way. The judge noted that the only evidence of abandonment was the nonuse of the easement, and that "the mere non-use of an easement, no matter how long the duration, will not work an

other the 1899 nor the 1908 deed is in the linear chain of title of the other, but Cobb's original land holdings are recorded at the Barnstable County registry of deeds.

12. The right of way may also need to cross small strips of undeveloped land adjoining the Clark, Cabot, and Fox parcels on the border with the Truro Conservation Trust parcel (Conservation Trust parcel), owned by the trustees of the Cabot-Clark-Fox parcel.

13. The deed for the Conservation Trust parcel identifies the 1899 easement benefiting the Cater parcel, but none of the deeds for the Clark, Cabot, Fox, or Mueller parcels identi-

fies the 1899 easement. A 1983 deed for the Fox parcel, however, appears to recognize the possibility of an easement benefiting the Cater parcel because the deed added language attempting to negate such an easement, declaring that no part of the parcel "is to be used in any way to provide means of access or egress to the property or any part thereof ... of Edgar W. Cobb [sic]."

14. The judge, however, noted that the existence of the easement has been of record and discoverable since 1899, and that the defendants had constructive knowledge of its existence.

abandonment of an easement.”<sup>15</sup> The judge found that the construction of houses on these parcels and the passage of time had caused the easement to be modified by prescription in that the easement now had to “steer[] clear” of the houses. However, the judge found that the easement had not been extinguished by prescription because the development of these parcels was not “irreparably inconsistent with the continued existence of the right of way.”<sup>16</sup> The judge also found that the easement had not been extinguished by estoppel, because the defendants had failed to show “the substantial and detrimental alteration of position to the extraordinary degree required to declare the easement at an end.” He added that he was confident §529 that, in the second phase of the trial, he could “fix the right of way in a location and manner” that would mini-

mize the impact on the properties affected, and avoid “substantial or unreasonable harm to any of the defendants.”

[4] In 2010, after the second phase of the trial, the judge specified the location of an easement from the Cater parcel that crosses the undeveloped Conservation Trust parcel and two of the Cabot-Clark-Fox parcels, and then straddles the property line between the Clark parcel and the Cabot parcel until it reaches Benson Road.<sup>17</sup> He determined that this right of way was the shortest route from the Cater parcel to Benson Road, and that straddling the property line was the fairest way to spread the burden on the Clark and Cabot properties and would cause the least amount of harm to any one burdened property. In determining the dimensions of the right of way, the judge recognized that

15. Abandonment of an easement requires a showing of intent to abandon the easement by acts inconsistent with the continued existence of the easement. *Parlane v. Brooks*, 363 Mass. 879, 880, 294 N.E.2d 424 (1973), citing *Sindler v. William M. Bailey Co.*, 348 Mass. 589, 592, 204 N.E.2d 717 (1965). See Restatement (Third) of Property (Servitudes) § 7.4 comment. b (2000) (Restatement) (“Abandonment is normally used to describe a situation in which a servitude has terminated because all beneficiaries have relinquished their rights to use an easement . . .”). “[N]onuse of itself, no matter how long continued, will not work an abandonment.” *Desotell v. Szczygiel*, 338 Mass. 153, 159, 154 N.E.2d 698 (1958). See *Willets v. Langhaar*, 212 Mass. 573, 575, 99 N.E. 466 (1912).

16. To wholly extinguish an easement by prescription, the “acts of the servient tenant [must be] utterly inconsistent with any right of the dominant tenant, manifestly adverse to every claim by it, and incompatible with the existence of the easement” for at least the prescriptive period of twenty years. *New England Home for Deaf Mutes v. Leader Filling Stations Corp.*, 276 Mass. 153, 159, 177 N.E. 97 (1931) (*New England Home*). See *Post v. McHugh*, 76 Mass.App.Ct. 200, 204–205, 920 N.E.2d 898 (2010), quoting *New*

*England Home, supra* (“To extinguish easement rights, a servient tenant’s adverse acts must render use of an easement ‘practically impossible for the [twenty-year] period required for prescription’”). See also Restatement, *supra* at § 7.7 (where use of servient property violates easement burdening property and adverse use maintained for prescriptive period, easement modified or extinguished). See generally W.V. Hovey, M. Pill, & D.M. Baird, *Real Estate Law* § 8.51 at 131–134 (4th ed. Supp.2011). “Where the acts of the servient tenant render the use of only part of a right of way impossible, the easement is extinguished only as to that part.” *Yagjian v. O’Brien*, 19 Mass.App.Ct. 733, 736–737, 477 N.E.2d 202 (1985), citing *Brooks v. West Boston Gas Co.*, 260 Mass. 407, 410–411, 157 N.E. 362 (1927).

17. The burdened parcels, as they appear in the town of Truro assessor’s map, sheet nos. 53 and 54 of the Truro assessor’s atlas, are parcels 51 (Clark parcel), 52 (Cabot parcel), 89 and 90 (two of the Cabot-Clark-Fox parcels), and parcel 56 (Conservation Trust parcel). In the Appendix to this opinion, the Cabot-Clark-Fox parcels are not visible but are thin strips of land on the border between the Truro Conservation Trust parcel and the Clark and Cabot parcels, respectively.

he must balance the Caters' right of reasonable access to their property with the defendants' rights "to have the natural environment, their scenic vistas, property values, and privacy preserved." He acknowledged that these rights were in conflict, and that, because of dunes that the easement must cross, "construction of a wide, flat roadway [within the easement] produces increased disturbance of the surrounding landscape."<sup>18</sup>

The judge determined that "a safe and convenient [roadway] does not require more than twelve feet" and ordered that the finished surface of any roadway "is not to exceed twelve (12) 1330feet in width."<sup>19</sup> He added that "[i]ncreasing the width of the [roadway] from twelve feet to fourteen feet substantially increases the amount of the landscape that is disturbed, and there is no countervailing reason to do that." The judge also recognized that, in fixing the location of the roadway through the dunes on the Conservation Trust parcel, there was a trade-off between the grade of any roadway built within the easement and its length: the steeper the grade of the road up the dunes to the Cater parcel, the shorter the road would need to be. To shorten the length of the roadway, and thus reduce the impact on the burdened

defendants' land, the judge forbade a finished grade of less than ten per cent where the natural grade of the terrain was above ten per cent.

The judge rejected the Caters' argument that a reasonable easement included a finished roadway that complied with the town's regulations governing the subdivision of land, concluding that the subdivision regulations "are evidence of what might be reasonable [but] are not determinative of what is reasonable." The judge declared that he was not bound to fix the location, width, or grade of the easement so that it complied with the town's land use regulations and would be guaranteed approval by its planning board. Rather, he treated the subdivision regulations "as just one more factor I must balance." But he specified that "nothing in this [j]udgment or the accompanying Phase II [d]ecision shall permit the construction of any [roadway] other than in compliance with all applicable laws, nor without first obtaining all permits and approvals required by law."

*Discussion.* 1. *Extinguishment of easement by estoppel.* The defendants contend that the judge erred in concluding that the easement was not extinguished by estop-

18. The judge rejected arguments that the scope of the Cater easement is limited to what was reasonable in 1899, which essentially meant a right of way that could accommodate a horse and buggy. He correctly concluded that, where the instrument creating the easement does not specify its dimensions, a judge must establish dimensions that are reasonably necessary for the enjoyment of the dominant estate, and should not limit the right of way to the purposes for which the dominant estate was used or the means of transportation in common use at the time the easement was created. See *Hodgkins v. Bianchini*, 323 Mass. 169, 172-173, 80 N.E.2d 464 (1948); *Mahon v. Tully*, 245 Mass. 571, 577, 139 N.E. 797 (1923).

19. The judge limited to twelve feet in width the "finished surface" of the roadway, not the easement itself. His order did not specify a maximum width of the easement but ordered that the "[e]asement shall permit, in addition to the width of a twelve-foot driveway or roadway, the construction of drainage features, improvements and site work for roadway support and stabilization, erosion controls, vegetative screening, habitat restoration, and timber guardrail." The judge appears to have left the easement width unspecified because there was evidence at trial that the amount of land required to support the construction of these features may vary with the terrain.

pel.<sup>20</sup> They urge us to § 531 recognize that an easement may be extinguished by estoppel, and to adopt the elements required for a finding of estoppel set forth in Restatement (Third) of Property (Servitudes) § 7.6 (2000) (Restatement), titled, "Modification or Extinguishment by Estoppel," which provides:

"A servitude is modified or terminated when the person holding the benefit of the servitude communicates to the party burdened by the servitude, by conduct, words, or *silence*, an intention to modify or terminate the servitude, under circumstances in which it is reasonable to foresee that the burdened party will substantially change position on the basis of that communication, and the burdened party does substantially and detrimentally change position in reasonable reliance on that communication" (emphasis added).

The defendants argue that the silence of the Caters and their predecessors in title while the land between the Cater parcel and Fisher Road was developed "clearly signifies a belief that the easement will not be used," and that the defendants were reasonably permitted to rely on this silence in developing their properties and did so.<sup>21</sup>

[5, 6] Our prior case law has stated that an easement may be extinguished by estoppel. See, e.g., *Emery v. Crowley*, 371 Mass. 489, 495, 359 N.E.2d 1256 (1976) ("express easement can be extinguished only by grant, release, abandonment, estoppel or prescription"); *Delconte v. Salloum*, 336 Mass. 184, 188, 143 N.E.2d 210 (1957) (same). But it appears that no reported appellate case in Massachusetts has found extinguishment of an easement

by estoppel or has set forth the relevant legal standard. "Estoppel is based on the policies of preventing the injustice and unjust enrichment that would result if servitude beneficiaries were able to mislead a burdened party into believing that the servitude will be modified or terminated and then to obtain an injunction or judgment for damages when the burdened party violates the servitude." § 532 Restatement, *supra* at § 7.6 comment. a (rationale). We conclude that § 7.6 of the Restatement adequately reflects the equitable concerns that must be considered in determining whether an easement should be modified or extinguished by estoppel, and adopt its legal standard.

[7] We also adopt the commentary in the Restatement that reflects the need for caution before modifying or extinguishing an easement by estoppel:

"These policies [of estoppel] conflict with the policies underlying the Statute of Frauds and recording acts which require that transactions designed to modify or terminate servitudes be evidenced by formal written instruments. Although the balance is struck in favor of preventing injustice, courts should be cautious in applying estoppel, particularly where the servitude in question is of substantial value to the dominant estate."

*Id.*

[8] Here, the defendants claim that they were misled by the silence of the owners of the dominant estate regarding the existence of an easement when the defendants built and improved their homes on the servient land. To prevail on a claim of estoppel based on silence, the defen-

20. On appeal, the defendants do not advance their claim that the judge erred by not finding extinguishment of the easement by abandonment or by prescription.

21. The Truro Conservation Trust alleges no detrimental reliance, but urges us to accept this view on behalf of the defendants who have developed their parcels.

dants must prove that the silence of the owner of the dominant estate communicated an intention to modify or terminate the easement to the owner of the servient estate, which the latter reasonably relied on to its substantial detriment. See *id.* at § 7.6. Generally, silence reasonably may communicate such an intention only where the owner of the dominant estate knows that the owner of the servient estate intends to develop the servient property in a manner that is fundamentally inconsistent with the continued existence of the easement, and it is reasonably foreseeable that the servient estate owner will interpret the dominant estate owner's silence as assent and proceed with the inconsistent development to his detriment. See, e.g., *id.* at § 7.4 comment. b (distinguishing estoppel from abandonment as requiring "interaction between benefited and burdened parties and involv[ing] unethical conduct on the part of the servitude beneficiary").

The judge did not err in finding that the easement was not §583 extinguished by estoppel where the deed that created the easement did not specify a location, and where the judge found the defendants "hard-pressed" to demonstrate detrimental reliance as to the entirety of their properties. The construction of houses on the Fox parcel in 1931, the Mueller parcel in 1948, and the Cabot parcel in 1950 was certainly not fundamentally inconsistent with the continued existence of the easement, because the Caters' predecessor in title reasonably would have recognized that the right of way could easily pass through the still undeveloped Clark parcel to Benson Road. Even when a house was built on the Clark parcel in 1969, the judge did not clearly err in finding that the silence of the Caters' predecessor in title

was not fundamentally inconsistent with the continued existence of the easement because the developed parcels adjoining Benson Road were sufficiently large to permit the construction of a roadway to the Cater parcel without substantial detriment to the development on the servient land. The dominant owners' silence regarding the easement during construction of the houses could not reasonably be understood to communicate an intention to terminate the easement as long as a roadway that would not produce substantial detriment remained possible.<sup>22</sup>

Nor in these circumstances would it have been reasonable for the servient estate owners to have understood from the silence of the dominant estate owners an intention to terminate the easement. The undeveloped Cater parcel is obviously landlocked on three sides while bounded on the fourth side by Cape Cod Bay. A right of way through the defendants' parcels is the shortest route to a public street that does not require permission from the owner of another property. In these circumstances, it was not reasonable to infer from their silence that the owners of the Cater parcel communicated an intention to terminate the only easement that assured them access to a public way.

[9,10] 2. *Width and grade of easement.* Where the instrument creating an easement does not fix its location or bounds, a court may do so in the absence of agreement by the parties. See *Mahoney v. Wilson*, 260 Mass. 412, 414, 157 N.E. 592 (1927); *Mugar v. Massachusetts Bay Transp. Auth.*, 28 Mass.App.Ct. 443, 445, 552 N.E.2d 121 (1990). In §594 establishing the location and bounds of a right of way, a judge inevitably will confront a conflict between a dominant

22. The plaintiffs and the defendants have proposed at least nine distinct routes where the

easement could be located.

estate and a servient estate, and “the public policy favoring socially productive use of land generally leads to striking a balance that maximizes the aggregate utility of the [dominant] and servient estate.” Restatement, *supra* at § 4.10 comment. b. This generally means that a judge should strike “a balance between minimizing the damage to the servient estate and maximizing the utility to the [dominant estate],” *id.* at § 4.8 comment. b, recognizing that the holder of an easement is entitled to use the servient estate “in a manner that is reasonably necessary for the convenient enjoyment” of the dominant estate. *Id.* at § 4.10. We conclude that the judge ably applied these principles in establishing the location of the easement, and did not clearly err in doing so.

The judge’s rulings regarding the width and grade of the roadway present more difficult questions. Because the Cater parcel did not have any lot frontage, a home could not be built on that lot in compliance with the town’s zoning bylaws unless an access road to the property was designed and built in conformance with the town’s subdivision regulations.<sup>23</sup> Under the design standards specified in the subdivision regulations, an access road must have a width of at least fourteen feet, a shoulder of four feet, and a right of way of forty feet. In addition, the design standards permit a maximum grade of eight per cent, which “may be waived, but cannot exceed [ten per cent], for a distance of one hundred (100) feet.”

The subdivision regulations also provide that, “[w]here approval is sought for a subdivision on land of a rural or sensitive nature, the [planning board] may, at its discretion, waive strict compliance with the

[design standards] in order to allow roads servicing not more than four (4) dwellings to be more in keeping with the rural landscape. . . .” The subdivision regulations limit the discretion of the planning board under this provision, § 53B entitled “Rural Road Alternative,” in one regard: “in no instance shall the width of the road surface be waived.”

[11] The judge reasonably understood that the rural road alternative could apply to a roadway built within the easement, because the road must cross delicate sand dunes to reach a public way, and that the planning board could waive the design standards to preserve the character of the land. It is not an abuse of discretion for a judge to impose limits on a roadway that comply with design standards in town regulations only if the town planning board in its discretion waives strict compliance with those standards, provided the judgment, as it does here, forbids the construction of any such roadway without permitting approval. If the planning board were in its discretion to deny the waiver, the judgment would not authorize construction of the roadway, and the plaintiffs would need to apply to the judge for a modification of the judgment that either would comply with local laws and regulations without a waiver, or include terms more likely to result in a planning board waiver.

The problem with the judgment here is that it establishes a maximum width of twelve feet for the roadway, which is two feet less than the minimum roadway width in the design standards, and the planning board, under the rural road alternative, is expressly prohibited from waiving the minimum width requirement. The judge appears not to have been aware of this limi-

23. In theory, a zoning variance could be sought to build on the parcel without complying with the subdivision regulations, but no party suggests this is a real possibility where

there was no frontage on a public road and the subdivision regulations are designed to address the construction of roads for “access to one or more lots” (emphasis added).

tation on the planning board's discretion. No party in the litigation brought it to his attention and the expert witnesses that addressed this point at trial suggested the minimum road width requirement could be waived by the planning board.<sup>24</sup> Therefore, as to the width of the roadway, the judgment suffers from an inherent contradiction: compliance with the judgment cannot be in compliance with law, but compliance<sup>536</sup> with law is required by the judgment. We therefore vacate the judgment and remand the case to the Land Court to permit the judge to resolve this contradiction.

On remand the judge should also consider whether there is an inherent contradiction in the judgment as to the requirements regarding the finished grade of the roadway. Under the judgment, where the natural grade of the terrain is above ten per cent, the grade of the finished roadway may not be less than ten per cent. Under the design standards in the subdivision regulations, the maximum grade of a roadway is eight per cent. The standards note

24. At trial, one of the defendant's experts, John Michael O'Reilly, was asked whether the subdivision regulation requirement of a "minimum roadway width, not including berms, of fourteen feet," could be waived by the planning board, and answered, "I believe [it has] the ability to waive most of these requirements. I don't know whether or not [it] will." Later, he testified that he prepared a

that the maximum grade may be waived, but cannot exceed ten per cent for a distance of one hundred feet. The rural road alternative provision in the subdivision regulations, however, places no restriction on the planning board's discretion to waive the grade requirement, so it is not clear whether the board may grant a waiver to permit a maximum grade of more than ten per cent or whether any waiver is limited to a maximum grade of ten per cent for a distance of one hundred feet or less. The judge appears to have recognized this ambiguity in the town's subdivision regulations because the judgment provides that, "*absent further order of this court, the Easement does not permit . . . a finished grade of less than ten (10) percent*" (emphasis added).

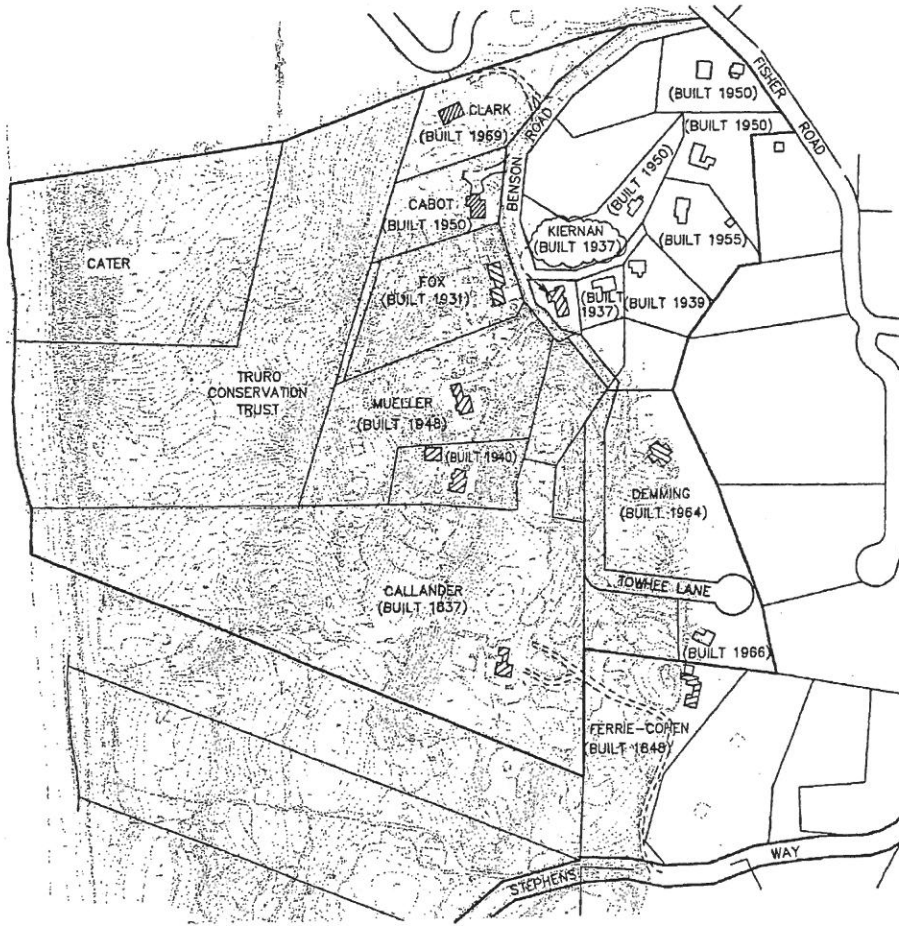
*Conclusion.* The judgment is vacated and the case is remanded to the Land Court for further proceedings consistent with this opinion.

*So ordered.*

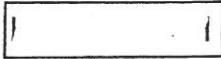
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"concept" for a proposed paved right of way, and his "concept was based on a twelve-foot" wide easement. When asked if "in [his] experience, a twelve-foot easement is wide enough for a [roadway]," O'Reilly responded, "For a [roadway]." A second expert for the defendants, Timothy J. Brady, likewise testified that a roadway twelve feet or less in width was adequate.





**Tab I**



COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

BARNSTABLE, ss.

MISCELLANEOUS CASE  
No. 98 MISC 250365 (GHP)

GLORIA J. CATER and WILLIE J. CATER,  
Plaintiffs,

v.

ROBERT BEDNAREK, BRENDA BOLEYN, BETSEY  
BROWN, FRED GAECHTER, CAROL GREEN, CURTIN  
HARTMAN, HOWARD IRWIN, JOHN MARKSBURY,  
and JOEL SEARCY, as they are trustees of Truro  
Conservation Trust; LUCY CLARK, JENNIFER CLARK  
KRUGER, and MITCH BROCK, as they are trustees of  
Silvia M. Clark Revocable Trust; SUSAN B. CABOT,  
SYLVIA CLARK, and JOAN F. FOX, individually and as  
trustees of Cabot-Clark-Fox Real Estate Trust;  
JOAN F. FOX, as trustee of the Residence Trust Agreement;  
SARA C. MUELLER and PHILIP P. MUELLER, III, as  
trustees of the Philip P. Mueller Truro Realty Trust;  
PAUL D. KIERNAN; ELIZABETH ADLER;  
RAYMOND E. DEMMING; and LOIS C. DEMMING,

Defendants,

and

LUCY CLARK, JENNIFER CLARK KRUGER, and  
MITCH BROCK, as trustees of the Silvia M. Clark  
Revocable Trust,

Third-Party Plaintiffs,

v.

NANCY F. CALLANDER, as trustee of  
Shambles Realty Trust; ETHAN R. COHEN; and  
NATALIE FERRIE-COHEN,

Third-Party Defendants.

(SEAL)

DECISION  
DIRECTING  
ENTRY OF AMENDED JUDGMENT  
FOLLOWING  
REMAND FROM SUPREME JUDICIAL COURT

Judgment entered in this case on July 12, 2010. The case was heard on appeal in the Supreme Judicial Court. Cater v. Bednarek, 462 Mass. 523 (2012). The judgment of this court was vacated, and the case remanded for further proceedings. The Supreme Judicial Court directed that this court address on remand two issues concerning the judgment, those having to do with the width and the grade of the roadway authorized by the judgment; the rest of the judgment the Supreme Judicial Court did not disturb.

I ordered that the parties provide the court with their views on the actions the court ought to take to comply with the Supreme Judicial Court's rescript and to enter judgment after remand. The parties submitted a responsive report, and appeared at a hearing to review the steps required to comply with the Supreme Judicial Court's directives. Following that hearing, I asked counsel to submit supplemental memoranda setting forth their positions on what is required to bring the case to judgment. I invited memoranda on (1) the municipal planning board's legal ability or inability to waive the local subdivision rules' 14-foot road width requirement, (2) the form of plaintiffs' intended application to the planning board, whether under G.L. c. 41, § 81Y or another section, and (3) whether the judgment to be issued by the court need address whether the subject driveway will service more than one lot. Each of the parties who appeared at the hearing subsequently submitted or joined in supplemental memoranda. Taking into account the positions of the parties as presented to the court in these memoranda and at the hearing, I now determine

the form the judgment of this court ought to take to follow the instruction of the Supreme Judicial Court.

#### Width of the Roadway.

The decisions I reached after two phases of trial sought to achieve a balance among the competing interests of the landowners who are parties to this long-standing dispute. One of the difficult issues in striking an equitable balance was to weigh the need for a roadway adequate in width to accommodate the uses to be made of it by the plaintiffs (who seek to develop their parcel for residential use), against the impact the roadway's width would produce on the land of the defendants over which the roadway would travel, much of which is of sensitive, even fragile, environmental condition. After weighing all of the evidence at trial, I determined that these competing interests, both meritorious, would be served adequately by limiting the finished surface of the driveway to twelve feet in width. A wider finished surface would be unnecessarily intrusive and detrimental to the burdened land, and was not required to serve the reasonably expected use of the Caters' residential parcel. That is why the judgment I ordered entered had a twelve foot wide maximum for the finished surface of the road.

On appeal, the Supreme Judicial Court was troubled by the judgment's twelve-foot roadway surface limit, because of concern that the subdivision control law regulations of the Truro Planning Board (which the SJC concluded would likely need to be satisfied before the Caters could get in the ground with an access roadway and then be permitted to improve their land for residential purposes) included design standards which specified a minimum width of fourteen feet for an access road – fourteen feet of width, a shoulder of four feet, and a right of way of forty feet. 462 Mass. at 534.

The SJC also observed that the subdivision regulations gave the planning board leave, “[w]here approval is sought for a subdivision on land of a rural or sensitive nature... [ to, in] its discretion, waive strict compliance with the [design standards] in order to allow roads servicing not more than four (4) dwellings to be more in keeping with the rural landscape....” *Id.* The SJC expressed concern, however, about provisions of the subdivision regulations that purported to “limit the discretion of the planning board under this provision, entitled ‘Rural Road Alternative,’ in one regard: ‘in no instance shall the width of the road surface be waived.’” *Id.* at 534-535.

The remand was to have this court deal with this apparent problem with the judgment—that it limited the finished surface of the authorized roadway to no more than twelve feet, while the subdivision regulations placed the width minimum at fourteen feet and purported to make this width regulation one which could not be waived. The SJC noted that at the time I rendered my decision, I appeared “not to have been aware of this limitation on the planning board’s discretion. No party in the litigation brought it to his attention and the expert witnesses that addressed this point at trial suggested the minimum road width requirements could be waived by the planning board.” 462 Mass. at 535.

I may not have been as blissfully ignorant as the SJC’s opinion charitably suggests. Rather, the judgment proceeded on the understanding that the twelve-foot limit the court imposed on the roadway’s finished surface was narrower than required by planning board subdivision regulations, and that those regulations, at least on their face, purported to make that minimum width “nonwaivable.” However, as the testimony summarized by the SJC in note 24 of its opinion strongly suggested to me, I nevertheless was convinced of the genuine possibility that the

planning board might in appropriate circumstances waive compliance with the roadway width requirements imposed by its regulations. I concluded that-- notwithstanding the provision grafted on to the road width regulations that, while they might be reduced to respect land of a rural or sensitive nature, the width might not be waived to anything less than fourteen feet--as both a legal matter and a prudential one, the board might waive the width requirement to authorize a road meeting the twelve feet maximum imposed in the judgment.

Just like the provisions setting minimum width requirements for subdivision roads, the provision that purportedly locks in the fourteen foot road surface width as "nonwaivable" is part of the Town's subdivision rules and regulations, adopted by its planning board under G.L. c. 41, § 81Q. The statute authorizes these rules and regulations if they are "reasonable," and "not inconsistent with the subdivision control law," other statutes, and valid ordinances. Subdivision rules and regulations must comply with and yield to statutes. Subdivision rules and regulations are not zoning by-laws, enacted by two-thirds vote of a town's legislative body, the town meeting, and which only can be varied by a lawful variance duly granted.

Rather, subdivision rules and regulations are capable of being waived by the planning board. The subdivision control law provides explicitly for waiver. G.L. c. 41, § 81R authorizes a planning board "in any particular case, where such action is in the public interest and not inconsistent with the intent and purpose of the subdivision control law, [to] waive strict compliance with its rules and regulations, and with the frontage or access requirements specified in said law...."

Nothing in this or any other section of the subdivision control law affords a planning board the power to make some or all of its rules and regulations not waivable. The power to

waive a subdivision rule exists as a matter of statutory mandate, and resides in a planning board as to all of the subdivision rules, without limitation, provided the statutory prerequisites are met, including that the waiver is in the public interest and not inconsistent with governing statutes and local ordinances. If those conditions are satisfied, the planning board in any particular case is free in its discretion to waive a rule or regulation which otherwise might stand in the way of approval of a plan showing access. The decision to waive or not is generally committed to a planning board's discretion, see, *eg.*, Krafchuk v. Planning Bd. of Ipswich, 453 Mass. 517, 529 (2009) (pursuant to § 81R, "a planning board enjoys broad discretion to waive strict compliance with its rules and regulations...."). Unless the waiver granted substantially derogates from the intent and purpose of the subdivision control law, a reviewing court will uphold the waiver. *Id.*

In some cases our courts have found an abuse of discretion where a planning board declined to waive a particular subdivision rule. See Musto v. Planning Bd. of Medfield, 54 Mass. App. Ct. 831 (2002), in which Justice Lenk, then sitting in the Appeals Court, upheld a determination by Justice Green, then sitting in the Land Court, and explained that, while a planning board enjoys broad discretion under § 81R to waive or not strict compliance with its subdivision rules and regulations, "there may be circumstances where a planning board's decision to deny a waiver may constitute an abuse of discretion, just as there may be circumstances where granting a waiver may be an abuse of discretion." *Id.*, at 837. The Musto court upheld this court's determination that the planning board had improperly withheld a waiver of a dead-end street limit, where the public safety purposes for which the limit was adopted did not necessitate denial of the requested waiver, and the waiver's denial was based on improper criteria. *Id.*, at 838.



No appellate decision has taken the view that a planning board, in adopting subdivision rules and regulations, may immunize some of them from even being considered by the board for waiver, simply by saying so in the regulations themselves. If a board were able to do so, it could flout the statutory waiver opportunity which the legislature has made available under section 81R. At a minimum, it would seem that such a "no waiver" rule might itself, in appropriate instances, be waived by a board in a particular case if the public interest required it.

I conclude, as I did at the time judgment entered initially, that the purported "no waiver" language of the Truro board's subdivision rules and regulations, which suggests that the fourteen foot width of road surface rule should "in no instance.. be waived," is merely precatory, and does not as a legal matter prevent the board, if and when presented with a meritorious application for waiver as to a road surface less than fourteen feet, from granting that waiver. None of the parties have urged me to a different view, all apparently accepting that under subdivision control law in Massachusetts, a planning board may not lawfully bulletproof its regulations by adopting one rule which makes some or all of the rest of them incapable of waiver, no matter the circumstances which later present themselves when a waiver is sought.

I do not read the Supreme Judicial Court's opinion in its review of this case to hold that the planning board is legally incapable of even considering a waiver of the fourteen-foot road surface minimum. That legal question never was argued to the SJC, and on remand the parties have been unable to find legal authority for the proposition that a planning board may adopt a valid and preclusive "no waiver" rule when it promulgates subdivision rules and regulations. Instead, I take away from the opinion that the SJC had understandable discomfort with a scenario where the court, in balancing the parties' interests, set limits on the easement's breadth, and in

doing so imposed a width requirement which was less than allowed under the applicable development regulations.

What I had in mind was that the Caters would seek permits and approvals in the Town that would allow the Caters to build on their residential property by accessing it over a roadway built in compliance with the dimensional limitations the judgment imposed. Those limitations were set to serve very compelling competing interests of the owners of the sensitive land over which the roadway is to pass. If the strictures of the court's judgment require the Caters to obtain relief, even of a discretionary nature, from municipal boards and officials, including the planning board, before they may lay out the roadway within the location the judgment specifies, the Caters need to seek that relief. If, to adhere to the judgment, the roadway width limits of the Truro subdivision rules need to be waived, the Caters should make that request. If I were to direct that the Caters automatically receive, as a matter of property law, an easement of whatever width is the minimum demanded by the subdivision rules from time to time to build as of right, I would be giving the property rights of the burdened landowners shorter shrift than they deserve. I would be imposing on them the environmental and other impacts which they would not need to shoulder if a waiver or other dispensation could be secured. If the Caters owned the land over which the easement is to run, they as fee landowners might well seek waivers to minimize the width of the road and its impact on their own land. It hardly seems fair that the burdened owners be forced to accept, without any alternative even attempted, the full-bore roadway which the rules require in the absence of waiver. I would be remiss in not requiring the Caters at least to seek that relief.

I do not read the SJC to say, however, that should the waivers not be secured, the Caters

are to be left with no hope of access. To the contrary, if the Caters ultimately do not get permission to build a road surface with a width of twelve feet, as the judgment provides, they should be free to return to this court to seek modification of that provision. They should be empowered in such a case to present to the court the results of their attempt to build their road in compliance with the judgment, and to request that the court permit them a different configuration of the roadway, so as to vindicate their easement rights.

I did not detail all of this in my decision and judgment because I was mindful of the obligation to limit my decision, already sufficiently involved, to the case and parties before me. I recognized that any question about the permits and approvals necessary to build the roadway would need to be heard before local officials and boards (including the planning board), none of whom were parties before this court. I also realized that there was no specific set of plans for the development of the Cater land, or for the construction of the disputed roadway, which had been presented to the municipal authorities. I was loathe to opine about the limits of municipal authority and discretion in connection with a plan for an access roadway which had yet to be fully designed and submitted to any official. The boards and other municipal representatives who consider and act on plans such as these need to do so in the first instance, and without a court leaning over their shoulders. It would not be appropriate for a court to direct a nonparty board to grant a waiver to accommodate the court's decision resolving an easement dispute, and I did not and will not do so. There are different legal goals and standards which apply to the resolution of private parties' easement rights, as a matter of property law, on the one hand, and those governing land use decision making by public authorities, on the other. The municipal authorities who consider the Caters' requests will be free to act as the legal responsibilities of

those officials dictate.

However, I do recognize that there well may be legal challenges arising from the decisions local land use boards may render when the Caters formally put in their requests for permits and approvals. Those challenges may come from, among others, one or more of the parties to this case. I am mindful that none of the defendants wish to have the Caters' easement pass over or near their land, that the court has imposed a route which burdens some of the defendants' land over their strenuous objection, and that a land use decision which keeps the roadway from being installed in that route will prevent or delay the unwelcome for those defendants. A board decision which authorizes a roadway in keeping with the rights established in the judgment of this court may well be challenged by some of the defendants in the pending action, and a contrary board decision may be challenged by the Caters, if not others. I do think it would be appropriate for litigation in which a party to the current action seeks judicial review of a local land use decision concerning the route, dimensions, and particulars of the roadway serving the Cater land to be brought in this court, and the judgment in this case will require that.

*Finished Grade of the Roadway.*

The Supreme Judicial Court also directed that I consider on remand "whether there is an inherent contradiction in the judgment as to the requirements regarding finished grade of the roadway." 462 Mass. at 536.

On this issue, too, I came to the grade requirements embodied in the judgment after considering all the evidence, weighing the competing interests of the plaintiffs and of the landowners over whose holdings the roadway would pass. The grade of the roadway has important implications for the environmental impact the construction and presence of the road

will visit on the dunes and other sensitive portions of the route, as the decision I issued explains in detail.

On the question of the finished grade of the roadway, I intended that the Caters seek the approvals necessary to build the road to the grade authorized in the judgment. As the SJC noted, “the rural road alternative provision in the subdivision regulations, however, places no restriction on the planning board’s discretion to waive the grade requirement...” Id. There is, as well, a provision which sets a design standard that “the maximum grade may be waived, but cannot exceed ten per cent for a distance of one hundred feet.” Id. As I concluded on the question of the finished roadway width, I also concluded that the board may, in appropriate cases in its discretion grant waivers sufficient to allow a roadway to be built with a grade of not less than ten per cent where the natural grade of the terrain is above ten per cent. To the extent that the board’s subdivision regulations may be read to mean that the board has declared “nonwaivable” the requirement that the maximum grade not exceed ten per cent for a distance of one hundred feet, I did not and do not consider that nonwaiver language to be binding so as to make the board legally incapable of granting such a waiver. The waiver opportunity made available by the legislature under §81R must be respected, and the board’s attempt to wall off certain aspects of its regulations from any possible waiver would need to yield.

The judgment’s finished grade requirement will be kept intact. The Caters will have the responsibility to seek waivers and other approvals needed to bring into reality the roadway authorized by the judgment. If they ultimately cannot obtain those waivers and approvals, they may apply to the court for modification of the judgment. The court will require that any judicial appeals from local board decisions on the question of the waiver of the subdivision rules

regarding finished grade of the roadway which are filed by any of the parties to this action be filed in the Land Court.

Other Issues.


I decline to specify the method or manner in which the Caters should seek the approvals they need to put in the roadway authorized by the judgment. It would not be appropriate to dictate the zoning or subdivision status of the Cater parcel in a way which would influence, much less bind, the Town and its boards and officials, who have not been parties to any of this lengthy easement litigation. It is for the Caters to proceed as they believe the law entitles them. To the extent, however, that to build the roadway in compliance with the judgment the Caters need to seek waivers from the planning board of its subdivision rules and regulations, particularly as to the finished surface width and grade, the Caters will have to do so. If they ultimately cannot secure the waivers required, they will be permitted to return to this court to seek modification of the judgment.

Some of the parties also urge me to amend the judgment to make it emphatic that the Caters' use of the easement established in this litigation is limited to using it to serve one single family house. The Supreme Judicial Court remarked that the trial court opinion "described the 'easement [as] a general right of way serving a single house.'" 462 Mass. at n. 6. The judgment itself does not make any such limitation explicit, and there was no appeal brought, or any alteration of the judgment directed by the SJC, on this point. I decline to alter the judgment on this ground.

I do observe, however, that, to the extent the Caters now or later seek to develop their parcel more intensively than for a single family residential use, and press their right to do so

while at the same time urging waivers of subdivision rules that control the dimensions and grade of the roadway used to access their land, their efforts to obtain those waivers may be met with understandable greater hesitation in light of the more intensive use the roadway would be called upon to serve. And if those waivers ultimately are not granted, and the Caters as a consequence return to the court to seek modification of the judgment in this case, the court, in considering their request for modification, would have to take into account that they failed to secure the waivers at a time when they sought to use the roadway for more than just one home.

Amended judgment accordingly.



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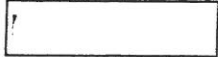
Gordon H. Piper  
Justice

Dated: February 4, 2013.

**Tab J**



COMMONWEALTH OF MASSACHUSETTS



LAND COURT

DEPARTMENT OF THE TRIAL COURT

BARNSTABLE. ss.

MISCELLANEOUS CASE  
No. 98 MISC 250365 (GHP)

\_\_\_\_\_  
GLORIA J. CATER and WILLIE J. CATER,

Plaintiffs,

v.

ROBERT BEDNAREK, BRENDA BOLEYN, BETSEY  
BROWN, FRED GAECHTER, CAROL GREEN, CURTIN  
HARTMAN, HOWARD IRWIN, JOHN MARKSBURY,  
and JOEL SEARCY, as they are trustees of Truro  
Conservation Trust; LUCY CLARK, JENNIFER CLARK  
KRUGER, and MITCH BROCK, as they are trustees of  
Silvia M. Clark Revocable Trust; SUSAN B. CABOT,  
SYLVIA CLARK, and JOAN F. FOX, individually and as  
trustees of Cabot-Clark-Fox Real Estate Trust;  
JOAN F. FOX, as trustee of the Residence Trust Agreement;  
SARA C. MUELLER and PHILIP P. MUELLER, III, as  
trustees of the Philip P. Mueller Truro Realty Trust;  
PAUL D. KIERNAN; ELIZABETH ADLER;  
RAYMOND E. DEMMING; and LOIS C. DEMMING,

Defendants,

and

LUCY CLARK, JENNIFER CLARK KRUGER, and  
MITCH BROCK, as trustees of the Silvia M. Clark  
Revocable Trust,

Third-Party Plaintiffs,

v.

NANCY F. CALLANDER, as trustee of  
Shambles Realty Trust; ETHAN R. COHEN; and  
NATALIE FERRIE-COHEN,

Third-Party Defendants.  
\_\_\_\_\_

**A M E N D E D**  
**J U D G M E N T**  
**A F T E R**  
**R E S C R I P T**

Judgment entered in this case on July 12, 2010. The case was heard on appeal in the Supreme Judicial Court. Cater v. Bednarek, 462 Mass. 523 (2012). The judgment of this court was vacated, and the case remanded for further proceedings. The Supreme Judicial Court directed that this court address on remand two issues concerning the judgment, those having to do with the width and the grade of the roadway authorized by the judgment; the rest of the judgment the Supreme Judicial Court did not disturb.

After rescript from the Supreme Judicial Court, this court conducted further proceedings to determine the form of the judgment to be entered in compliance with the rescript. After hearing and briefing, the court (Piper, J.), in a decision of even date, has directed the entry of an amended judgment. In accordance with that decision, the judgment entered July 12, 2010 is amended and restated in its entirety as follows:

\*\*\*\*\*

This action, which commenced August 21, 1998 with the filing of a complaint by Willie J. Cater and Gloria J. Cater ("Caters"), is request for declaratory and injunctive relief confirming the validity, and establishing the location, of a general right of way of record benefitting their land in Truro, Barnstable County, Massachusetts. The Caters' land is that acquired by them from Howard B. French by deed dated June 26, 1979 and recorded with the Barnstable County Registry of Deeds on June 29, 1979 in Book 2944, at Page 75.

This case came on to be tried before the court in two phases. In a decision dated July 9, 2007 and a decision of July 12, 2010 ("Phase II Decision"), the court (Piper, J.) has made findings of fact and rulings of law; the court has determined that the easement is in force and effect, and that the location of the easement is to be as described in the Phase II Decision.

In accordance with the court's decisions, it is

**ORDERED, ADJUDGED and DECLARED** that the easement ("Easement") recited in the deed from Charles W. Cobb to Lorenzo D. Baker, dated September 7, 1899, recorded with the Barnstable County Registry of Deeds ("Registry") in Book 2, Page 39 is in force and effect, and has not been extinguished, abandoned, frustrated in its purpose, or otherwise ceased to be valid and effective. It is further

**ORDERED, ADJUDGED and DECLARED** that, in equity, the Easement ought to be and hereby is located as follows:

From Benson Road, the Easement shall run westerly so that the centerline of the Easement coincides, as substantially as reasonably possible, with the boundary line between Lot 51 (7 Benson Road) of the Clark trustees, and Lot 52 (9 Benson Road) of Cabot.

From the boundary between the Cabot and Clark land and Lot 56 (9A Benson Road) of the Truro Conservation Trust, the Easement shall follow generally the route depicted on Exhibit 37, which is a plan titled "Plan of Proposed Driveway, William J. Cater, Benson Road, Assessor's Map 53, Parcel 50, Truro, Mass.," prepared by Coastal Engineering, 260 Cranberry Highway, Orleans, Massachusetts, 02653, dated March 17, 2003 under the stamp of Martin R. Donaghue.

It is further

**ORDERED, ADJUDGED and DECLARED** that, in the event a driveway or roadway is constructed within the Easement, the finished surface of such driveway or roadway is not to exceed twelve (12) feet in width, absent further order of this court. It is further

**ORDERED, ADJUDGED and DECLARED** that, in the event a driveway or roadway is constructed within the Easement, such driveway or roadway shall cross any terrain, the slope of which terrain is equal to or greater than ten (10) percent, at a finished grade equal to or greater than ten (10) percent; absent further order of this court, the Easement does not permit cut or fill on the land of any defendant to accommodate a finished grade of less than ten (10) percent of any driveway or roadway constructed on terrain the slope of which terrain is equal to or greater than ten (10) percent. It is further

**ORDERED, ADJUDGED and DECLARED** that the Easement shall permit, in addition to the width of a twelve-foot driveway or roadway, the construction of drainage features, improvements and site work for roadway support and stabilization, erosion controls, vegetative screening, habitat restoration, and timber guardrail. It is further

**ORDERED, ADJUDGED and DECLARED** that the costs of designing, engineering, obtaining approvals for, and constructing any driveway or roadway within the Easement shall be solely the responsibility of the dominant estate. These costs include without limitation the cost of any reasonably necessary or desirable upgrade, repair, or relocation of the Cabot septic system that may be caused, directly or indirectly, by the construction of a driveway or roadway within the Easement. It is further

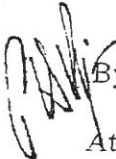
**ORDERED, ADJUDGED and DECLARED** that nothing in this Judgment or the accompanying Phase II Decision shall permit the construction of any driveway, roadway, or route, including any curb cut, or any related work, other than in compliance with all applicable laws, nor without first obtaining all permits and approvals required by law. It is further

**ORDERED, ADJUDGED and DECLARED** that the Easement burdens the area described for its location in this Judgment, and no longer burdens any other land of any of the

defendants. It is further

**ORDERED and ADJUDGED** that the owners of the dominant estate may seek from the appropriate governmental board(s) and official(s) waivers, permits, and other approvals indicated or necessary to lay out and construct within the Easement a driveway or roadway with the dimensions, grade, width, configuration, location and route contemplated by this Judgment. Nothing in this Judgment shall prohibit the owners of the dominant estate, should they be unable, despite reasonable best efforts, to secure waivers, permits, and other approvals as to (i) the width of the surface of the driveway or roadway or (ii) the finished grade of the driveway or roadway, from seeking to modify this Judgment, so that it would allow them to lay out and construct the driveway or roadway consistently with applicable law, rules, and regulations and with those waivers, permits, and other approvals the owners of the dominant estate have with reasonable best efforts been able to secure. Any party to this action who brings any judicial appeal from the decision or determination of any governmental board(s) or official(s) upon a request for a waiver, permit or other approval respecting (i) the width of the surface of the driveway or roadway or (ii) the finished grade of the driveway or roadway, shall bring that judicial appeal in this court, provided it has subject matter jurisdiction over the appeal. It is further

**ORDERED and ADJUDGED** that no damages, fees, costs, or other amounts are awarded to any party.

 By the Court. (Piper, J.)

Attest:

Dated: February 4, 2013.

\_\_\_\_\_  
Deborah J. Patterson  
Recorder

A TRUE COPY  
ATTEST:

  
RECORDER

**Tab K**

Plan Note:  
 1) No Lots may be conveyed and no building permits shall be issued by the Town of Truro until all applicable requirements of the rules and Regulations Governing the Subdivision of Land have been met.  
 2) All utilities shall be underground.  
 3) Zoning District + Residential  
 4) Owner: Willie J. & Gloria J. Cater  
 559 Chestnut Hill Avenue  
 Brookline MA 02146

Button Hill Realty Trust  
 John M. & Nancy O. Thornley, Trustees  
 #10 Thornley Meadow Road  
 Deed Book 9503, Page 165  
 Assessors Map 53, Parcel 87

**Approval Required  
 Truro Planning Board**

**Application Date      Date Approved      Date of Endorsement**

Application Date	Date Approved	Date of Endorsement

Statement of Conditions of Planning Board Approval Dated: \_\_\_\_\_

**Truro Board of Health Approval**

Date \_\_\_\_\_

For Registry Use only

Cape Cod Bay (tidal)  
 Approx. Mean High Water

Approx. Bottom of Bank

Top of Bank  
 180'± BY TOP OF BANK

Approx. Flood Zone  
 Elev= 16 NGVD 1929

N07°57'28" E  
 283.00'

S 82°02'40" E 475'±

N82°02'34" W 215.10'  
 350'± to top of bank

S88°19'36" W 136.77'

S88°20'05" W 151.50'

**Lot 1**

3.48 ACRES (150,720 SF±) Total Lot area  
 to Mean High Water (approximate)  
 (2.02 ACRES To Top of bank)

Iron pipe found,  
 11/3/95

Cabot-Clark-Fox Real Estate Trust  
 #0 Benson Road Road  
 Deed Book 9328, Pages 145 to 149  
 Assessors Map 53, Parcel 89  
 Plan Book 499, Page 79

Centerline of Easement

Area of Cul-De-Sac  
 6,646±S.F./0.15 Acs

Hopper View Lane  
 (Private Way)

85.90'  
 S 79°16'57" W

S 29°20'42" W

411.94'

207.77'

170'±

50.0'±

50.0'±

S 65°10'02" E

420'±

220'± to top of bank

118.28'

Iron pipe found,  
 11/3/95

Truro Conservation Trust  
 #9-A Benson Road  
 Deed Book 21988, Page 71  
 Assessors map 53, Parcel 56

Cabot-Clark-Fox Real Estate Trust  
 #0 Benson Road Road  
 Deed Book 9328, Pages 145 to 149  
 Assessors Map 53, Parcel 89  
 Plan Book 499, Page 79

Steven Loffredo & Helen Hershkoff  
 #0 Benson Road Road  
 Deed Book 27830, Page 94  
 Assessors Map 53, Parcel 52  
 Plan Book 264, Page 13



I hereby certify that this plan was prepared in conformance with the Regulations of the Registry of Deeds as adopted Jan 1, 1976, and amended Jan 7 1988.

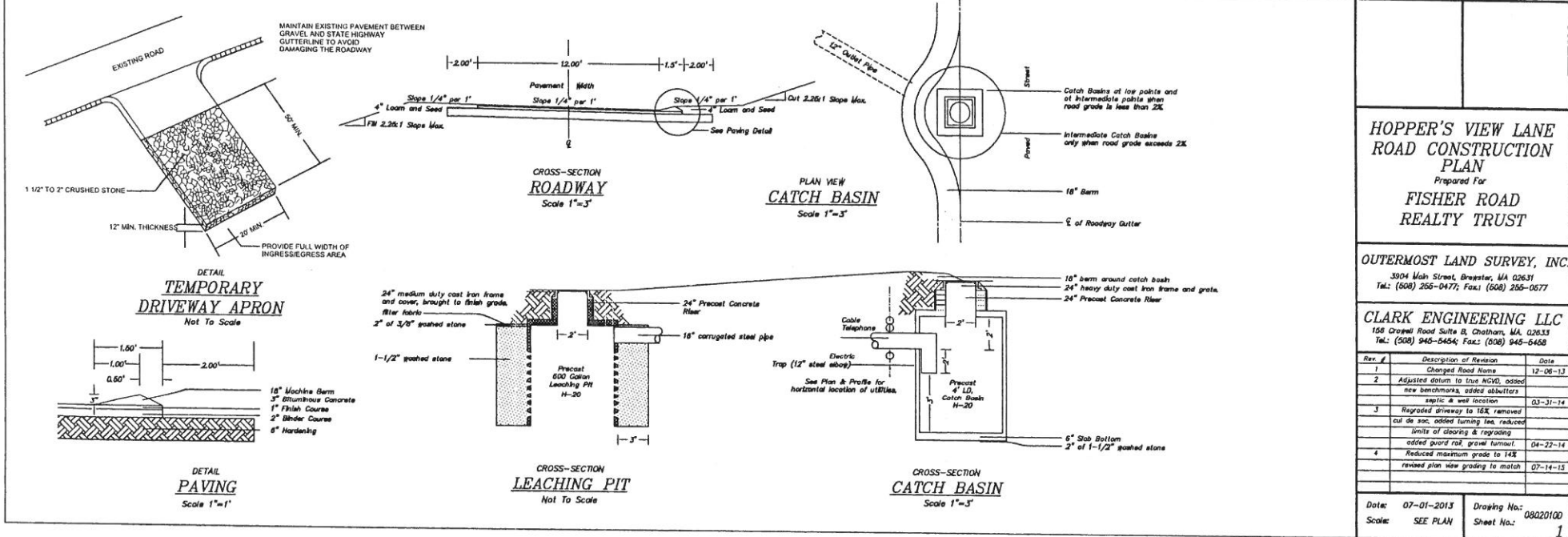
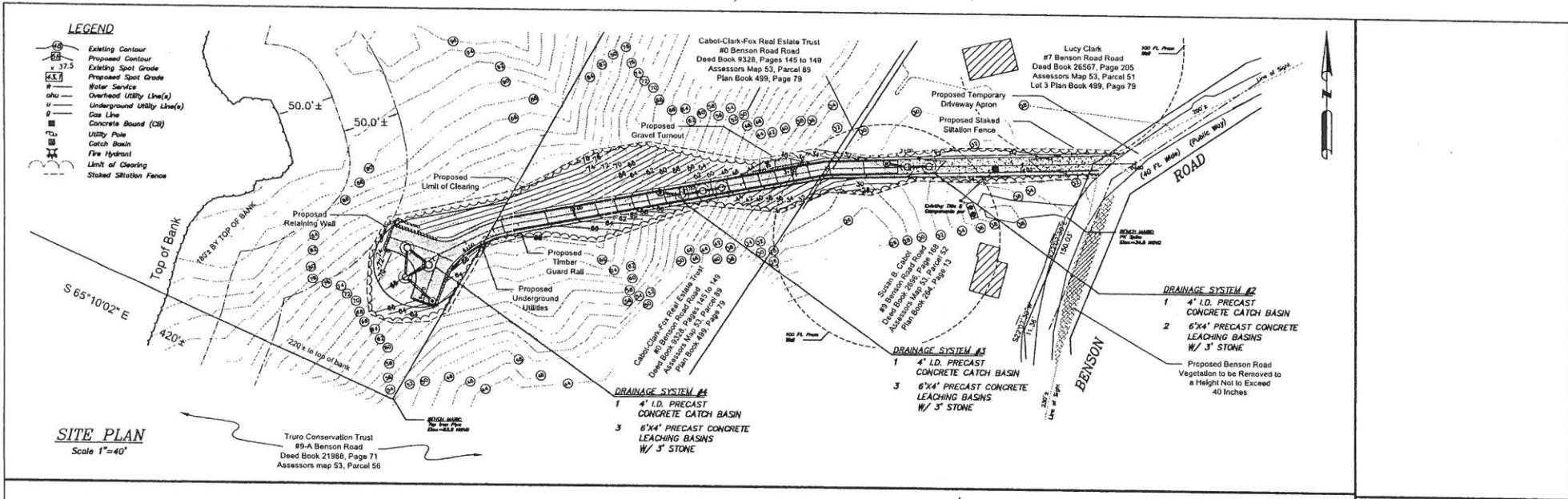
Donald T. Poole PLS #32662

Date \_\_\_\_\_



**Definitive Subdivision Plan of Land  
 prepared for  
 Fisher Road Realty Trust  
 Deed Book 22682, Page 84  
 Assessors Map 53, Parcel 80  
 Truro, MA  
 May 13, 2013 Scale 1"=40'  
 ols#155-1**

**Tab L**



**HOPPER'S VIEW LANE ROAD CONSTRUCTION PLAN**  
Prepared For  
**FISHER ROAD REALTY TRUST**

**OUTERMOST LAND SURVEY, INC.**  
3904 Main Street, Brewster, MA 02631  
Tel.: (508) 265-0477; Fax: (508) 265-0577

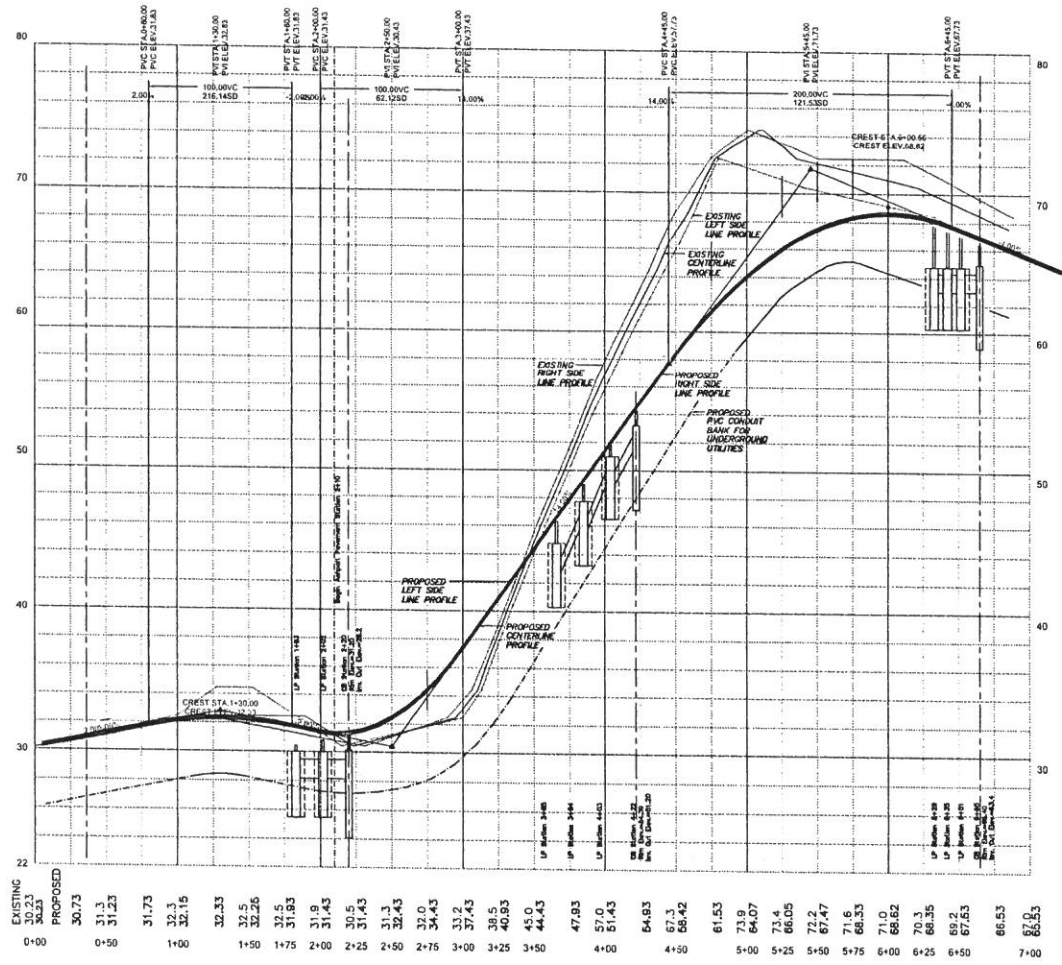
**CLARK ENGINEERING LLC**  
159 Cromwell Road Suite B, Chatham, MA 02633  
Tel.: (508) 945-5454; Fax: (508) 945-5458

Rev #	Description of Revision	Date
1	Changed Road Name	12-06-13
2	Adjusted datum to true NGVD, added new benchmarks, added abutments, septic & well location	03-31-14
3	Regraded driveway to 16% removed cut de. soc, added turning tea, reduced limits of clearing & regrading, added guard rail gravel turnout	04-22-14
4	Reduced maximum grade to 14% revised plan view grading to match	07-14-15

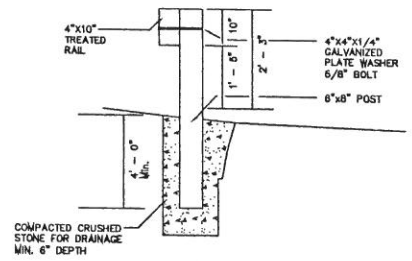
Date: 07-01-2013 Drawing No: 08020100  
Scale: SEE PLAN Sheet No.: 1



**Tab M**



**HOPPER'S VIEW LANE**  
 SCALE: HORIZONTAL 1"=40'  
 VERTICAL 1"=4'



**GUARD RAIL DETAIL**  
 NOT TO SCALE

**HOPPER'S VIEW LANE**  
**PROFILE**  
**PLAN**  
 Prepared For  
**FISHER ROAD**  
**REALTY TRUST**

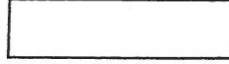
**OUTERMOST LAND SURVEY, INC.**  
 3904 Main Street, Braintree, MA 02633  
 Tel.: (508) 265-0477; Fax: (508) 265-0577

**CLARK ENGINEERING LLC**  
 156 Crystal Road Suite B, Chatham, MA 02633  
 Tel.: (508) 945-6404; Fax: (508) 945-6468

Rev. #	Description of Revision	Date
1	Changed Road Name	12-06-13
2	Adjusted Datum to Inva NGVD	03-31-14
3	Changed profile to T&E removed first catchbasin, labeled beginning of asphalt paving, added guard rail det.	04-25-14
4	Reduced maximum grade to 14%	07-14-15

Date: 07-01-2013  
 Scale: SEE PLAN  
 Drawing No.: 08020100  
 Sheet No.: 1

**Tab N**



## **DRAINAGE CALCULATIONS**

**PREPARED FOR**

**HOPPER VIEW LANE**

**Prepared By:**

**Clark Engineering LLC  
156 Crowell Road, Suite B  
Chatham, MA 02633  
Tel: 508-945-5454  
Fax: 508-945-5458**

## **DRAINAGE CALCULATIONS**

*Using the*  
**RATIONAL METHOD**  
**Q=CiA**

- Q - Peak runoff** rate in cubic feet per second, (cfs), due to maximum storm of a given frequency for sizing leaching facility.
- C- Coefficient of runoff** is the percentage of precipitation that runs off, based on soil type, vegetative cover or developed surface and slope.
- I- Rainfall intensity**, in inches per hour. Rainfall intensity is determined from the Barnstable Rainfall Intensity Duration Frequency Chart provided by Mass Highway. It is assumed that for small parking facilities that the **Time of Concentration** would be less than 0.1 hours therefore a maximum rainfall intensity for a 50 year storm event would be used. From the Chart the rainfall intensity **I= 6.9 in/hr.**
- A- Area** of watershed or drainage basin.

Allowable infiltration rate in in/min varies with the underlying soil conditions. The following is the allowable infiltration rates used, based upon soil tests performed on site:

<u>Soil Characteristics</u>	<u>Infiltration Rate or</u>	<u>Runoff (CFS)/Infiltration Area (SF)</u>
Sand w/ 5-10% Fines	0.8 to 1.4 in/min	0.7 to 0.9
Sand w/ 10-20% Fines	0.4 to 0.8 in/min	0.4 to 0.7
Sand w/ 20-30% Fines	0.2 to 0.4 in/min	0.1 to 0.4

From the Barnstable County Soil Survey the area is underlined with coarse to medium sand of the Carver series. These soils are excessively drained and an infiltration ratio of 0.9 is used for these calculations.

Pre-Development

Exhibit 8-13

Intensity - Duration - Frequency Curve for Barnstable, MA

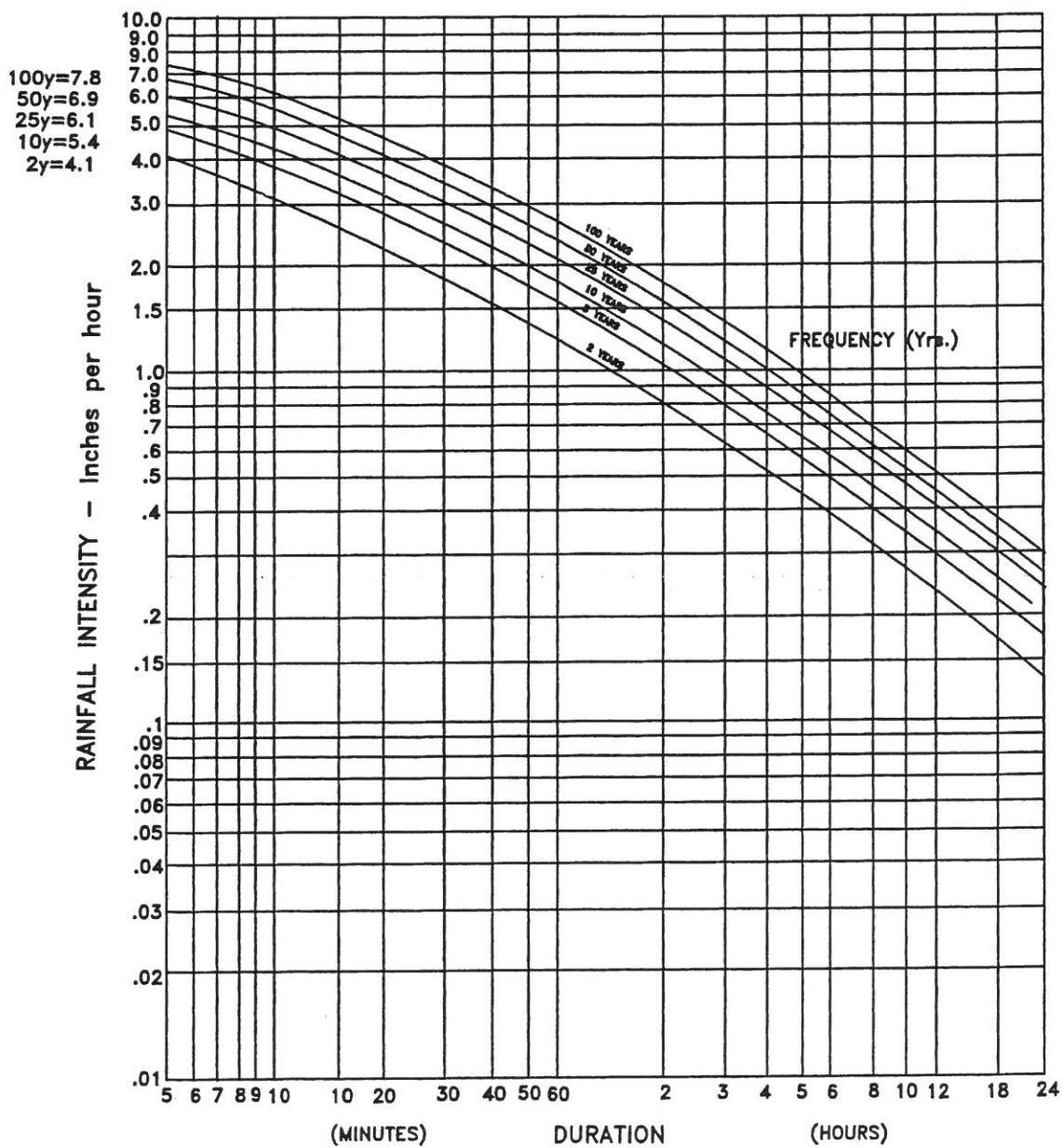
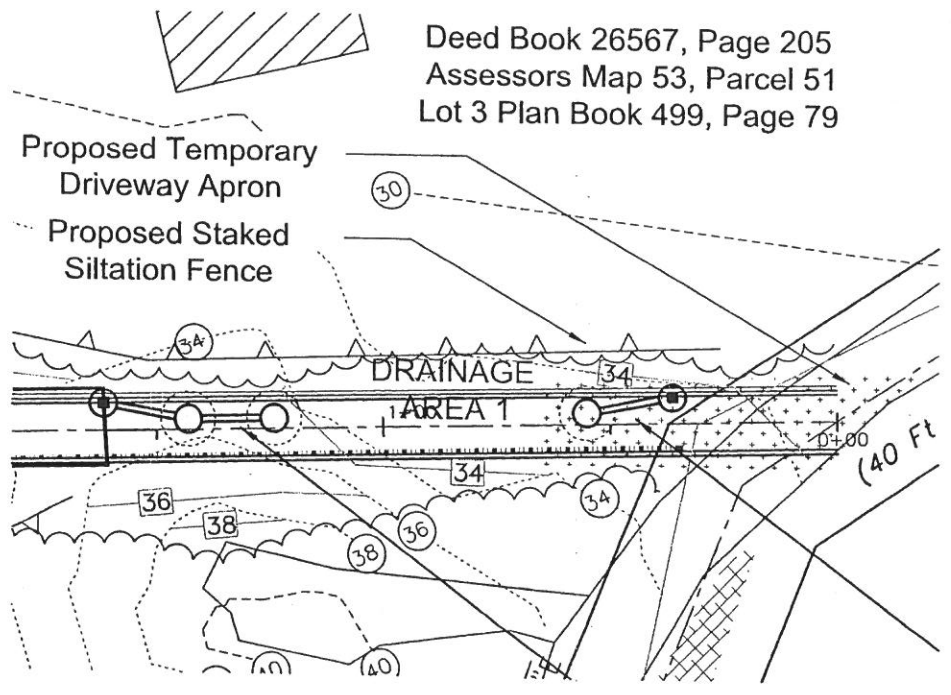


FIGURE 1

Deed Book 26567, Page 205  
Assessors Map 53, Parcel 51  
Lot 3 Plan Book 499, Page 79



HOPPERS VIEW LANE

System # 1

1. Area of contribution (A)

Impervious area	(A1) =	1,920	S.F.	0.044	Acres
Gravel Parking	(A2) =	0	S.F.	0.000	Acres
Pervious area (Landscaped Areas)	(A3) =	3,000	S.F.	0.069	Acres
Total	(A) =	4,920	S.F.	0.113	Acres

2. Coefficient of runoff

Impervious area	(C1) =	0.90
Gravel Parking	(C2) =	0.50
Landscaped Areas	(C3) =	0.30

3. Composite coefficient of runoff [C]

$$= [(A1 \times C1) + (A2 \times C2) + (A3 \times C3)] / \text{Total Area}$$

$$= 0.534$$

4. Rainfall intensity (I) from chart = 6.90 inches per hour

5. Average Runoff (Q) = CIA in cubic feet per second (cfs)

$$= 0.534 \times 6.90 \text{ in/hr} \times 0.113$$

$$= 0.42 \text{ cfs}$$

or = 187 gpm

6. Infiltration Ratio (IR) = Q(gpm)/Leaching Area(sf)

Based on percolation rate IR = 0.9

7. Leaching Area Required

$$Q/IR = 208 \text{ sf}$$

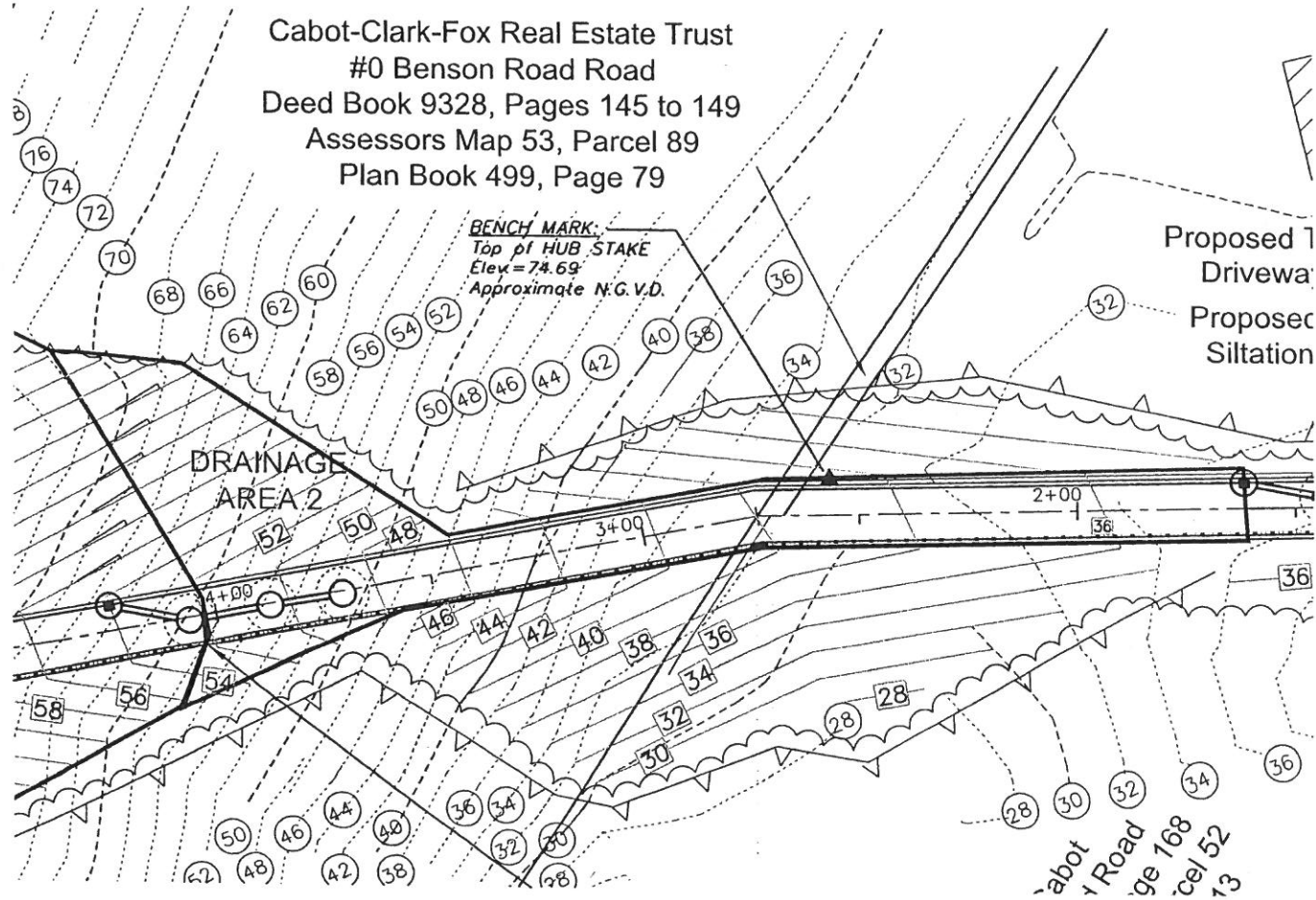


Cabot-Clark-Fox Real Estate Trust  
#0 Benson Road Road  
Deed Book 9328, Pages 145 to 149  
Assessors Map 53, Parcel 89  
Plan Book 499, Page 79

BENCH MARK:  
Top of HUB STAKE  
Elev = 74.69  
Approximate N.G.V.D.

Proposed 1  
Driveway  
Proposed  
Siltation

DRAINAGE  
AREA 2



Cabot  
Road  
Page 168  
Parcel 52  
13

HOPPERS VIEW LANE

System # 2

1. Area of contribution (A)

Impervious area	(A1) =	2,900	S.F.	0.067	Acres
Gravel Parking	(A2) =	0	S.F.	0.000	Acres
Pervious area (Landscaped Areas)	(A3) =	3,400	S.F.	0.078	Acres
Total	(A) =	6,300	S.F.	0.145	Acres

2. Coefficient of runoff

Impervious area	(C1) =	0.90
Gravel Parking	(C2) =	0.50
Landscaped Areas	(C3) =	0.30

3. Composite coefficient of runoff [C]

$$= [(A1 \times C1) + (A2 \times C2) + (A3 \times C3)] / \text{Total Area}$$
$$= 0.576$$

4. Rainfall intensity (I) from chart = 6.90 inches per hour

5. Average Runoff (Q) = CIA in cubic feet per second (cfs)

$$= 0.576 \times 6.90 \text{ in/hr} \times 0.145$$
$$= 0.58 \text{ cfs}$$

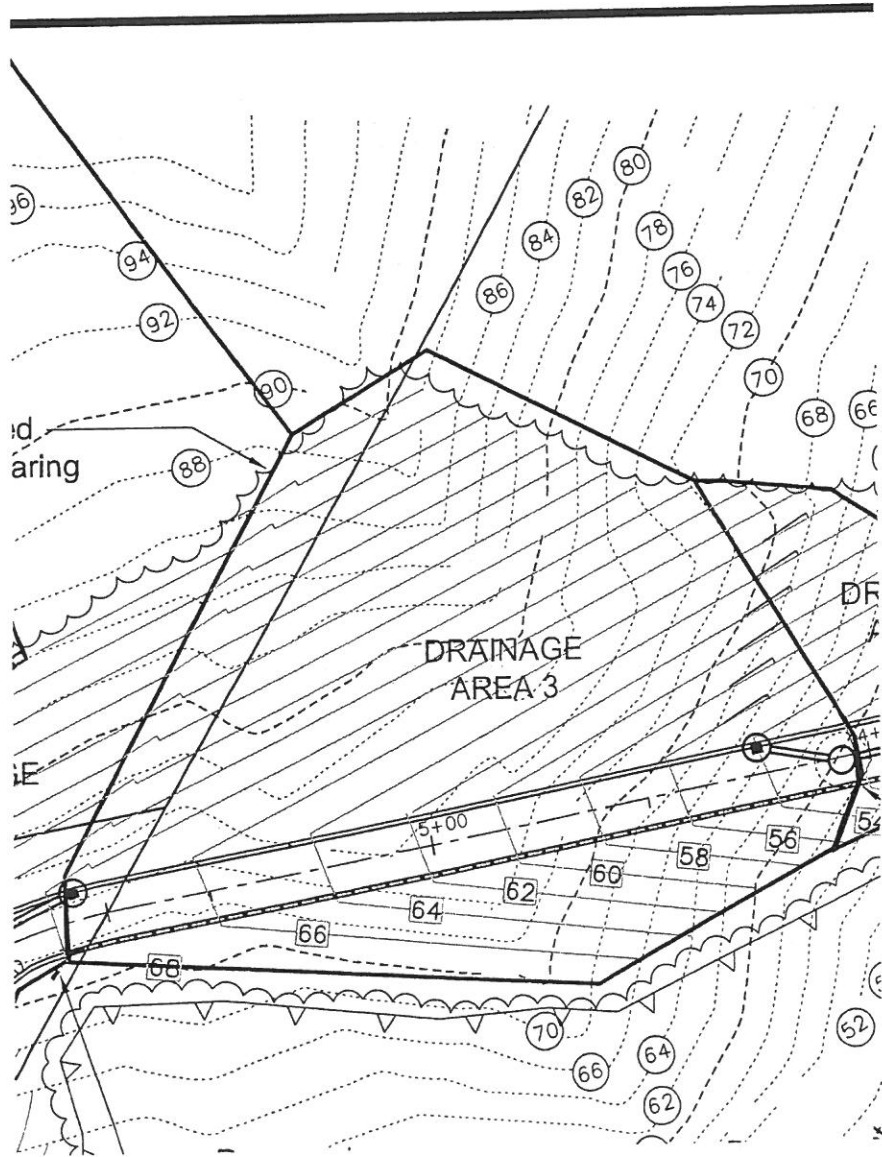
or = 258 gpm

6. Infiltration Ratio (IR) = Q(gpm)/Leaching Area(sf)

Based on percolation rate IR = 0.9

7. Leaching Area Required

$$Q/IR = 287 \text{ sf}$$



HOPPERS VIEW LANE

System #

3

1. Area of contribution (A)

Impervious area	(A1) =	2,200	S.F.	0.051	Acres
Gravel Parking	(A2) =	0	S.F.	0.000	Acres
Pervious area (Landscaped Areas)	(A3) =	14,600	S.F.	0.335	Acres
Total	(A) =	16,800	S.F.	0.386	Acres

2. Coefficient of runoff

Impervious area	(C1) =	0.90
Gravel Parking	(C2) =	0.50
Landscaped Areas	(C3) =	0.30

3. Composite coefficient of runoff [C]

$$= [(A1 \times C1) + (A2 \times C2) + (A3 \times C3)] / \text{Total Area}$$
$$= 0.379$$

4. Rainfall intensity (I) from chart

$$= 6.90 \text{ inches per hour}$$

5. Average Runoff (Q) = CIA in cubic feet per second (cfs)

$$= 0.379 \times 6.900 \text{ in/hr} \times 0.386$$
$$= 1.01 \text{ cfs}$$
$$\text{or} = 452 \text{ gpm}$$

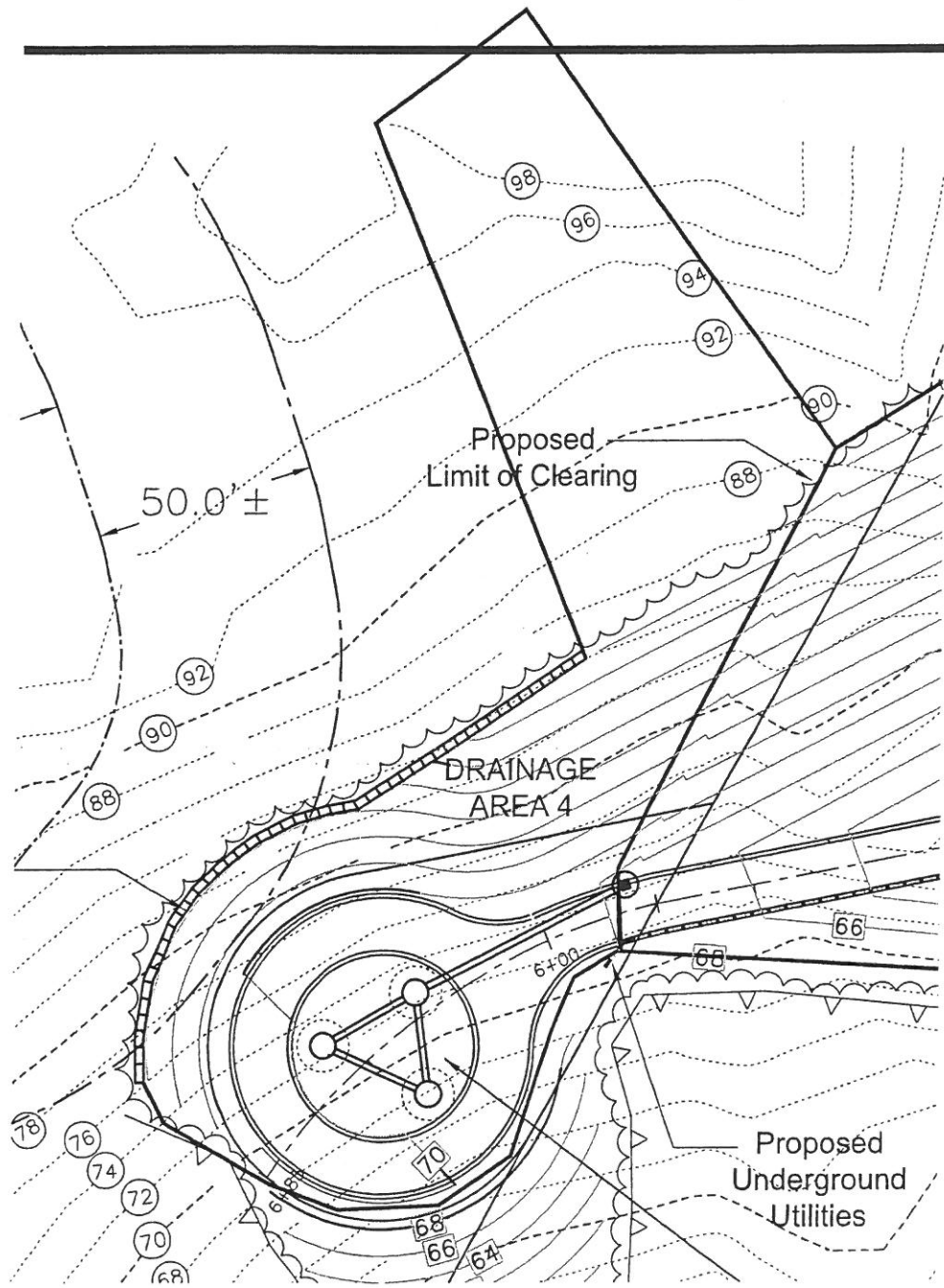
6. Infiltration Ratio (IR) = Q(gpm)/Leaching Area(sf)

Based on percolation rate

$$\text{IR} = 0.9$$

7. Leaching Area Required

$$Q/\text{IR} = 502 \text{ sf}$$



HOPPERS VIEW LANE

System #

4

1. Area of contribution (A)

Impervious area	(A1) =	3,800	S.F.	0.087	Acres
Gravel Parking	(A2) =	0	S.F.	0.000	Acres
Pervious area (Landscaped Areas)	(A3) =	12,500	S.F.	0.287	Acres
Total	(A) =	16,300	S.F.	0.374	Acres

2. Coefficient of runoff

Impervious area	(C1) =	0.90
Gravel Parking	(C2) =	0.50
Landscaped Areas	(C3) =	0.30

3. Composite coefficient of runoff [C]

$$= [(A1 \times C1) + (A2 \times C2) + (A3 \times C3)] / \text{Total Area}$$
$$= 0.440$$

4. Rainfall intensity (I) from chart

$$= 6.90 \text{ inches per hour}$$

5. Average Runoff (Q) = CIA in cubic feet per second (cfs)

$$= 0.440 \times 6.900 \text{ in/hr} \times 0.374$$
$$= 1.14 \text{ cfs}$$
$$\text{or} = 510 \text{ gpm}$$

6. Infiltration Ratio (IR) = Q(gpm)/Leaching Area(sf)

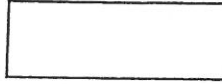
Based on percolation rate

$$\text{IR} = 0.9$$

7. Leaching Area Required

$$Q/\text{IR} = 566 \text{ sf}$$

**Tab O**



**CLARK  
ENGINEERING LLC**  
156 Crowell Road, Suite B  
Chatham, MA 02633

**David A. Clark, P.E.**  
**Wendy M. Jones**  
**Phone: (508) 945-5454**  
**Fax: (508) 945-5458**

## REQUEST FOR WAIVERS

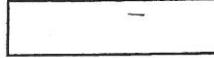
### Hopper Lane Road Construction

Pursuant to the Town of Truro, Rules and Regulations Governing the Subdivision of Land, Appendix 2, Table 1, Recommended Geometric Design Standards for Subdivisions the following waivers are requested:

<b>Standard</b>	<b>Requirement</b>	<b>Proposed</b>	<b>Waiver Requested</b>
<b>Roadway Layout</b>			
Minimum right of way width	40 feet	12 feet	28 feet
Minimum roadway width	14 feet	12 feet	2 feet
Shoulder width	4 feet	2 feet	2 feet
<b>Vertical Alignment</b>			
Clear sight distance	200 feet	125 feet	75 feet
<b>Grade</b>			
Maximum grade	8% or 10% For 100 feet	>8% & <10 % for 250 feet	150 feet
<b>Intersection Standards</b>			
Minimum intersection angle	60 deg.	32 deg.	28 deg.
Minimum curb radius	20 feet	0 feet	20 feet



**Tab P**



APPLICATION FOR APPROVAL OF DEFINITIVE PLAN

APPLICANTS PROPOSED ALTERNATIVE STREET NAMES

The applicants propose that the access road to their property which is the subject of review by the Town of Truro Planning Board be named:

**Hopper View Lane**

Alternatively:

**Cater Heights Road**

or

**Cater Hill Road**

**Tab Q**

**TOWN OF TRURO**  
**ASSESSOR'S OFFICE**

P.O. Box 2012, Truro, MA 02666

Tel. 508-349-7004, Ext. 15+16+17 Fax 508-349-5506

Date: July 24, 2015

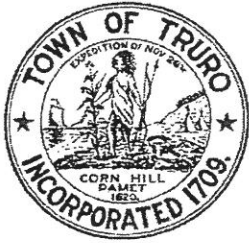
To: Planning Board

From: Assessor's Office

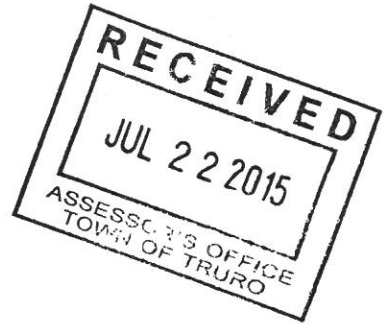
Attached is a list of abutters for the property located at 98 Benson Road  
on Assessor's Map 53 Parcel 50. The current owner(s) as of 7/11/15  
is/are Fisher Road Realty Trust.

The names and addresses of the abutters are as of 7/24/15 according to the most  
recent documents received from the Barnstable County Registry of Deeds.

Certified by: Aimee Kopasz



**TOWN OF TRURO**  
Assessors Office  
Certified Abutters List  
Request Form



*Paid  
check #  
20595*

DATE: \_\_\_\_\_  
NAME OF APPLICANT: Fisher Road Realty Trust, Willie J. Cater and Gloria J. Cater, Trustees  
NAME OF AGENT (if any): Christopher J. Snow, Esq.  
MAILING ADDRESS: P.O. Box 291, Provincetown, MA 02657  
PHONE: HOME \_\_\_\_\_ WORK 508-487-1160  
CELL \_\_\_\_\_ FAX \_\_\_\_\_  
PROPERTY LOCATION: 9B Benson Road  
(street address)  
PROPERTY IDENTIFICATION NUMBER: MAP 53 PARCEL 50

**ABUTTERS LIST NEEDED FOR:** (Fee must accompany the application unless other arrangements are made)

Please check applicable:

	FEE:		FEE:
<input type="checkbox"/> Board of Health	\$10.00	<input type="checkbox"/> Planning Board	
<input type="checkbox"/> Cape Cod Commission	\$15.00	<input type="checkbox"/> Special Permit	\$15.00
<input type="checkbox"/> Conservation Commission	\$10.00	<input type="checkbox"/> Site Plan	\$15.00
<input type="checkbox"/> Zoning Board of Appeals	\$15.00	<input type="checkbox"/> Preliminary Subdivision	\$15.00
<input type="checkbox"/> Licensing	\$15.00	<input checked="" type="checkbox"/> Definitive Subdivision	\$15.00
<input type="checkbox"/> Other _____			Inquire

(Please Specify)

*Please Note: The Office has up to 10 calendar days to process your order.*

**THIS SECTION FOR ASSESSORS OFFICE USE ONLY**

Date request received by Assessors: 7/22/15 Date completed: 7/24/15

List completed by: Dennis Kopasz

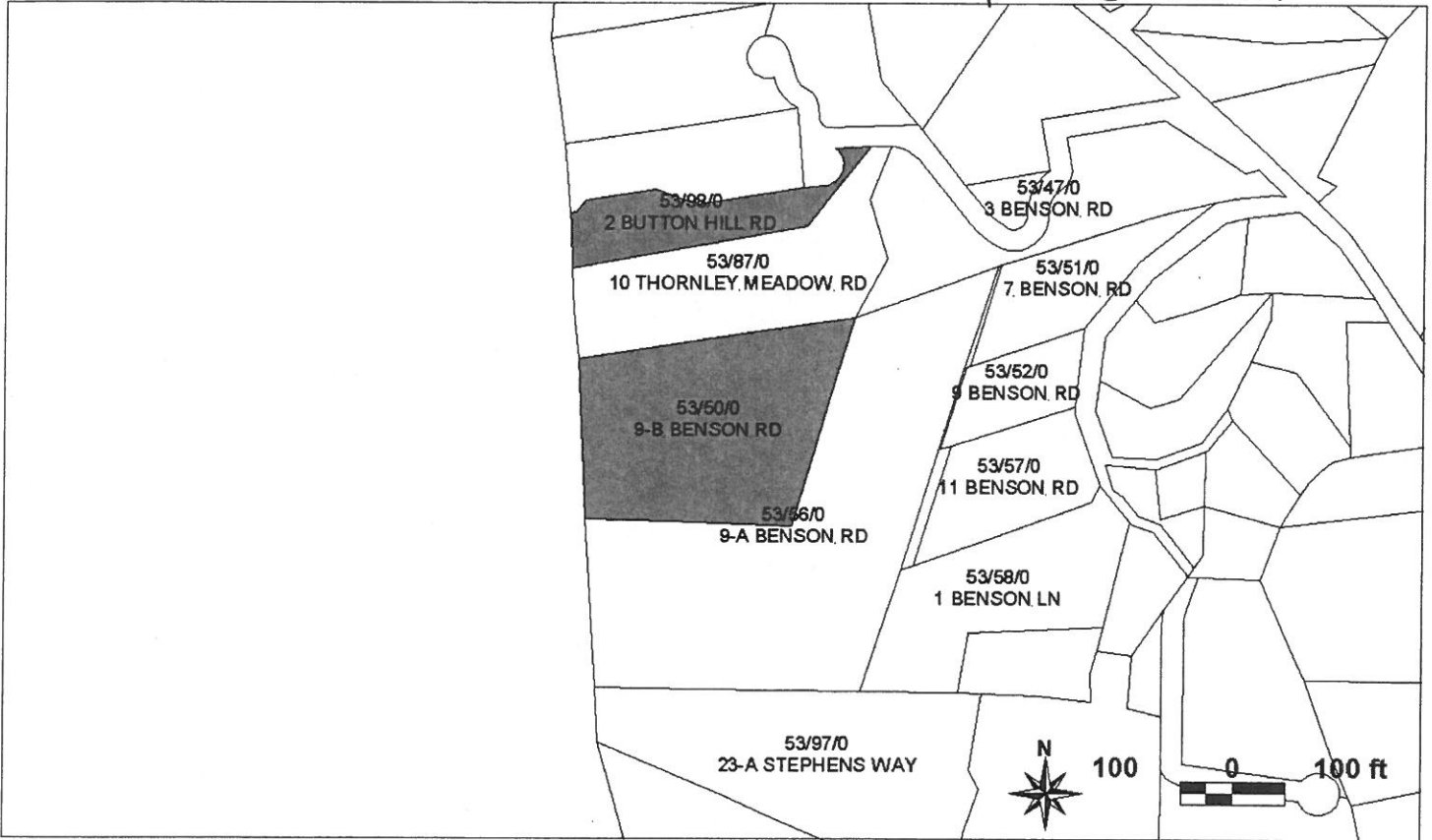
TOWN OF TRURO, MA  
 BOARD OF ASSESSORS  
 P.O. BOX 2012, TRURO MA 02666

Planning Board

9 B Benson Road

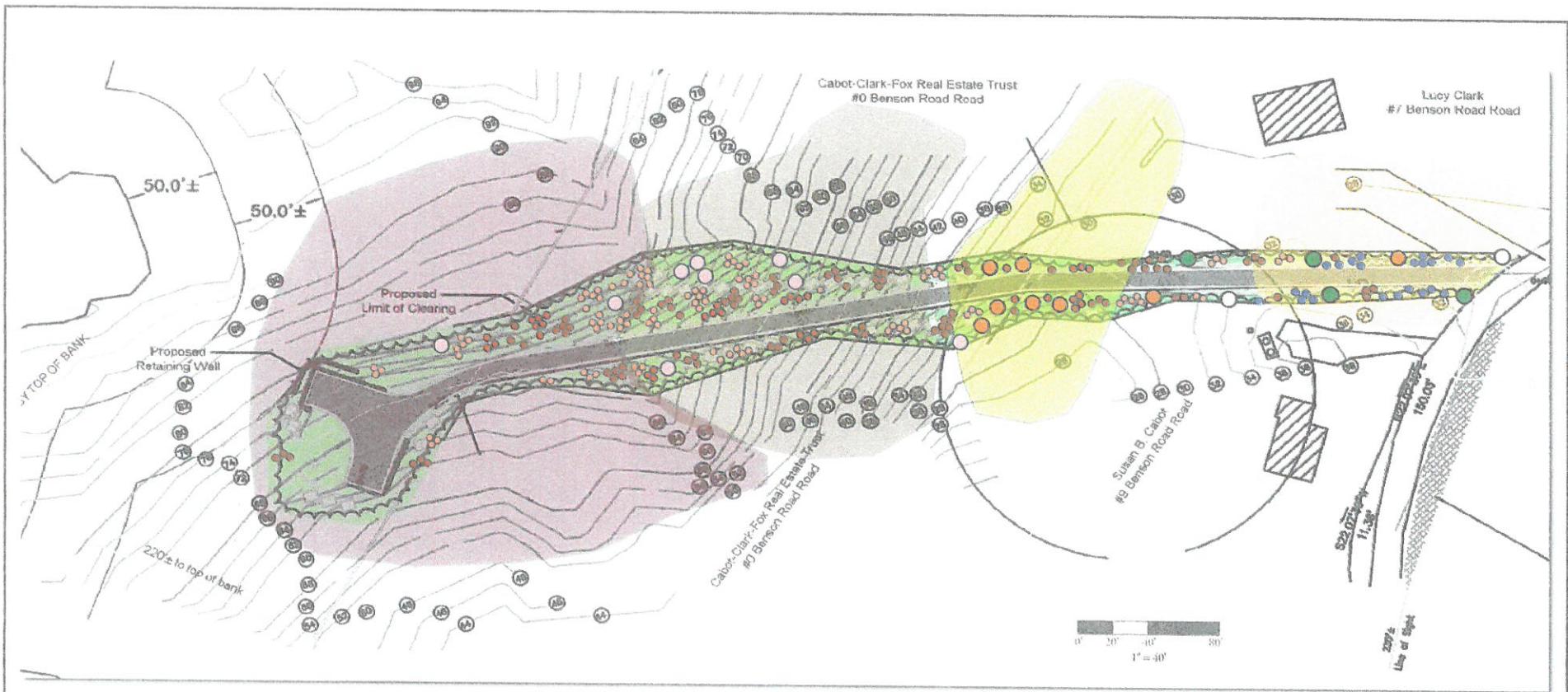
Custom Abutters List

map #53 Parcel # 50



Key	Parcel ID	Owner	Location	Mailing Street	Mailing City	ST	ZipCd/Country
3236	53-98-0-R	BUTTON HILL REALTY TRUST TRS: THORNLEY JOHN M & NANCY O	2 BUTTON HILL RD	PO BOX 23	TRURO	MA	02666-0023
3194	53-50-0-R	FISHER ROAD REALTY TRUST TRS: CATER WILLIE J & GLORIA J	9-B BENSON RD	559 CHESTNUT HILL AVE	BROOKLINE	MA	02445-4113
3228	53-87-0-R	BUTTON HILL REALTY TRUST TRS: THORNLEY JOHN M & NANCY O	10 THORNLEY MEADOW RD	PO BOX 23	TRURO	MA	02666-0023
3200	53-56-0-E	TRURO CONSERVATION TRUST TRS: BROWN BETSEY ET AL	9-A BENSON RD	PO BOX 327	NO TRURO	MA	02652-0327
3235	53-97-0-R	SHAMBLES REALTY TRUST TRS: CALLANDER NANCY F ET AL	23-A STEPHENS WAY	CONCORD PARK 68 COMMONWEALTH AVE #315	CONCORD	MA	01742
3230	53-89-0-R	CABOT-CLARK-FOX REAL EST TRUST TRS: CABOT SUSAN B ET AL	0 BENSON RD	1217 E ST. SE	WASHINGTON	DC	20003
3202	53-58-0-R	MUELLER TRURO REALTY TRUST MUELLER PHILIP P III ETAL -TRS	1 BENSON LN	171 WIG HILL RD	HADDAM	CT	06438
3201	53-57-0-R	FOX JOAN F	11 BENSON RD	C/O KEYS & SIMPKINSON ONE WEST FOURTH ST	CINCINNATI	OH	45202
3196	53-52-0-R	LOFFREDO STEPHEN & HERSHKOFF HELEN	9 BENSON RD	242 WEST 12TH ST	NEW YORK	NY	10014
3195	53-51-0-R	CLARK LUCY	7 BENSON RD	1217 E ST SE	WASHINGTON	DC	20003
3192	53-47-0-R	THORNLEY JOHN M & NANCY O	3 BENSON RD	PO BOX 23	TRURO	MA	02666-0023

**Tab R**



**Plan Notes:**

- Site Plan provided by Clark Engineering LLC dated July 1, 2013, Revised April 22, 2014.
- The restoration area within the limit of work (shaded in green) is approximately 25,422 square feet.
- The area directly along Benson Road (shown in yellow-orange) is dominated by invasive plant species including Tree of heaven, black locust, white poplar, shrub honeysuckle and vine honeysuckle. Selective herbicide treatment and mechanical removal will be used to manage invasive species within the project area. Please see Invasive Species Management/Restoration Plan for details.
- Moving west from Benson Road plant communities within the limit of work will be restored with appropriate native vegetation according to each plant community. The area shown in green above is predominantly pitch pine with crinkle hairgrass and Pennsylvania sedge. Further west, little bluestem and Pennsylvania sedge comprise the dominant sandplain/grassland plant community. This transitions to a heathland/maritime shrub plant community on the steepest part of the slope (shown in tan), opening up to sandplain/heathland between the top of the slope and top of coastal bank (shown in red). Colored areas are shown only to illustrate the dominant plant communities within and around the proposed limit of work.
- Beach heather (*Hudsonia tomentosa*) will be removed from the project area within the sandplain/heathland plant community prior to clearing and excavation, and held in a protected area off-site to be restored after construction is completed.
- All disturbed areas will be seeded with a custom mix of native warm season grasses and forbs including Crinkle hairgrass (*Deschampsia flexuosa*), little bluestem (*Schizachyrium scoparium*), poverty grass (*Danthonia spicata*), seaside goldenrod (*Solidago sempervirens*), Asters (*aster* spp.), and butterfly weed (*Asclepias tuberosa*).
- Temporary irrigation will be required for the first two to three growing seasons. Once plants are established temporary irrigation will be removed.

**Planting Schedule**

Latin Name	Common Name	Size	Spacing	Quantity
<b>TREES</b>				
<i>Quercus ilicifolia</i>	Scrub oak	5 Gallon	10' On Center	10
<i>Pinus rigida</i>	Pitch pine	2" cal	10' On Center	17
<i>Juniperus virginiana</i>	Eastern red cedar	5/6" BB	10' On Center	4
<i>Quercus alba</i>	White oak	2" cal	10' On Center	2
<b>SHRUBS</b>				
<i>Myrica pensylvanica</i>	Northern bayberry	1 Gallon	5' On Center	154
<i>Prunus maritima</i>	Beach plum	1 Gallon	5' On Center	171
<i>Arctostaphylos uva-ursi</i>	Bearberry	4" Pot	18-24" On Center	4000
<i>Vaccinium angustifolium</i>	Lowbush blueberry	1 gallon	4' On Center	50
<i>Viburnum dentatum</i>	Arrowwood viburnum	3 Gallon	5' On Center	11
<i>Vaccinium corymbosum</i>	Highbush blueberry	3 Gallon	5' On Center	11
<i>Myrica pensylvanica</i>	Northern bayberry	3 Gallon	5' On Center	15

- Eastern red cedar
- White oak
- Highbush blueberry/Arrowwood viburnum
- Northern Bayberry
- Beach Plum
- Scrub Oak
- Lowbush blueberry
- Pitch Pine

Restoration area (within the limit of work)

Vegetation dominated by invasive plant species. Tree of heaven, black locust, shrub honeysuckle, vine honeysuckle dominant.

Pitch pine dominated plant community. Crinkle hairgrass/Pennsylvania sedge/Little bluestem groundcover

Heathland/Grassland & Maritime shrub - Beachplum/Bayberry dominant with scrub oak. Pennsylvania sedge and Little bluestem transitions to bearberry dominated groundcover.

Sandplain/Heathland plant community. Bearberry dominant. Beach heather, reinder lichen, stiff aster, sickle-leaf aster groundcover.

GRASSES AND WILDFLOWERS				
<i>Carex pensylvanica</i>	Pennsylvania sedge	5" Plug	18-24" On Center	3000
<i>Deschampsia flexuosa</i>	Crinkle hairgrass	5" Plug	18-24" On Center	500
<i>Schizachyrium scoparium</i>	Little bluestem	5" Plug	18-24" On Center	500
<i>Pityopsis filicata</i>	Sickle-leaved golden aster	5" Plug	18-24" On Center	300
<i>Ionactis linearifolia</i>	Stiff aster	5" Plug	18-24" On Center	300
<i>Asclepias tuberosa</i>	Butterfly weed	5" Plug	18-24" On Center	300



**Tab S**



## **INVASIVE SPECIES MANAGEMENT/RESTORATION PLAN**

.....

**April 28, 2014**  
**HOPPER'S VIEW LANE - ROAD**  
**CONSTRUCTION AREA**  
**TRURO, MASSACHUSETTS**

### Contents

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Invasive Plant Management	9-11
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Long Term Management	13
References	14

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Restoration Plan	7

## Introduction

This Invasive Species Management / Restoration Plan will address the main issues that specifically pertain to restoring the native vegetation around the proposed roadway at Hopper's View Lane in Truro, Massachusetts.

The main actions to be addressed in this Plan are:

- Management/removal of invasive species located within the project area.
- Restoration of native plant communities including pitch pine/scrub oak, sandplain grassland, sandplain heathland, and maritime shrubland within the limit of work area for roadway construction.

## Goals/Objectives

1. Manage invasive plant species within the project area.
2. Restore invasive species management area with trees, shrubs, grasses and forbs.
3. Restore areas within the limit of work with appropriate native vegetation.

The goals of this plan are to protect the ecological integrity, function, and wildlife habitat value of areas within the proposed limit of work. This will be accomplished through the management of invasive species including shrub honeysuckle, vine honeysuckle, multiflora rose, tree of heaven, white poplar, and black locust, and the restoration of native plant communities within the limit of work, thereby protecting and improving the ecological integrity and wildlife habitat value of this area. Dense vertical layers of vegetation including native tree, shrub, and groundcover species will be re-established within the project area.

## Project Area

The proposed project area is shaded in orange. The proposed road is shown in gray.



## Existing Conditions

The project area is located directly off of Benson Road on Cape Cod Bay in Truro. The proposed roadway area will be located between 7 and 9 Benson Road and runs westward toward Lot 9B. A variety of native and invasive plant species comprise the vegetation within and directly surrounding the proposed roadway area. A sandplain/heathland/grassland plant community consisting of beach plum, bayberry, bearberry, lowbush blueberry, beach heather, reindeer lichen, Pennsylvania sedge, little bluestem, crinkle hairgrass and native forbs is the dominant plant community throughout the area. In addition to these shrub and groundcover species, tree species including pitch pine, scrub oak, black oak and black cherry are clustered throughout the proposed project area. This area (shaded in orange on the map on page 2) is approximately 25,422 square feet. Areas within the proposed limit of work are stable and are currently well-vegetated.

The area directly abutting Benson Road is heavily colonized by invasive vegetation including shrub honeysuckle (*Lonicera morrowii, bella*), vine honeysuckle (*Lonicera japonica*), tree of heaven (*Ailanthus altissima*), black locust (*Robinia pseudoacacia*), white poplar (*Populus alba*) and multiflora rose (*Rosa multiflora*). Native vegetation in this heavily invaded area includes one eastern red cedar (*Juniperus virginiana*), black cherry (*Prunus serotina*), pitch pine (*Pinus rigida*), scrub oak (*Quercus ilicifolia*), and wild onion grass (*Allium canadense*). A portion of this area will be disturbed by the proposed road construction.



View from Benson Road looking north at area heavily colonized by invasive vegetation. Shrub honeysuckle borders the road.



View from west looking into area heavily invaded by invasive vegetation.



The densely growing invasive vegetation keeps much native vegetation from growing by Benson Road.



View looking into black cherry and white poplar trees smothered by invasive vines.

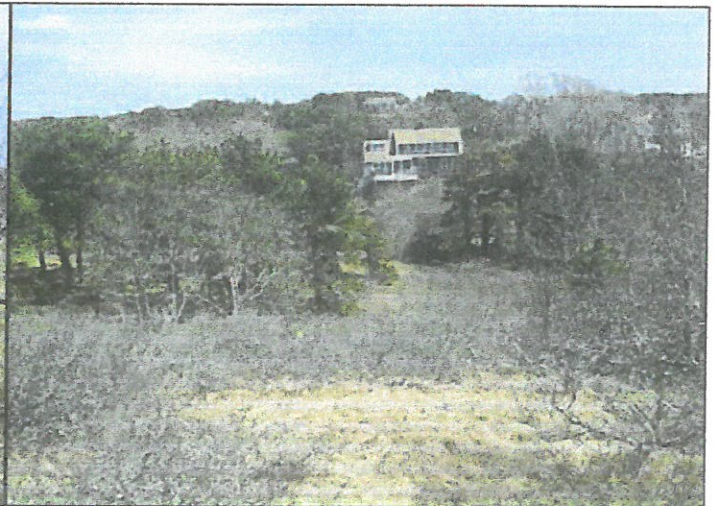
## Existing Conditions (continued)

Directly to the west of the invasive species area, the landscape opens up into a sandplain/grassland plant community with native species including little bluestem (*Schizachyrium scoparium*), Pennsylvania sedge (*Carex pensylvanica*), and crinkle hairgrass (*Deschampsia flexuosa*) dominant. A pitch pine stand abuts this grassland area, and transitions into a sandplain/heathland/grassland - maritime shrubland plant community on the existing slope. Bearberry (*Arctostaphylos uva-ursi*), beach heather (*Hudsonia tomentosa*), reindeer lichen (*Cladonia rangiferina*), aster spp., scrub oak (*Quercus ilicifolia*), pitch pine (*Pinus rigida*), beach plum (*Prunus maritima*), and black oak (*Quercus velutina*) are dominant. This community transitions to sandplain/heathland at the top of the slope and continues to the top of coastal bank. Bearberry (*Arctostaphylos uva-ursi*), beach heather (*Hudsonia tomentosa*), and reindeer lichen (*Cladonia rangiferina*) are the dominant plant species in this area. Slopes are well-vegetated, and there is no evidence of erosion within the limit of work.

The project area lies within Estimated Habitats for Rare Wildlife as defined by the Natural Heritage and Endangered Species Program.



View of scrub oak (foreground), Pennsylvania sedge (groundcover), pitch pine (background).



View looking east toward sandplain heathland and grassland with a dense cover of beach plum (left) and Pennsylvania sedge and crinkle hairgrass (right) as the ground cover. Pitch pine and black oak trees in middle ground. Nine Benson Road is in the background.



Beach heather, little bluestem, and reindeer lichen dominate this area of sandplain heathland.



View of sandplain grassland (foreground) and scrub oaks (background).

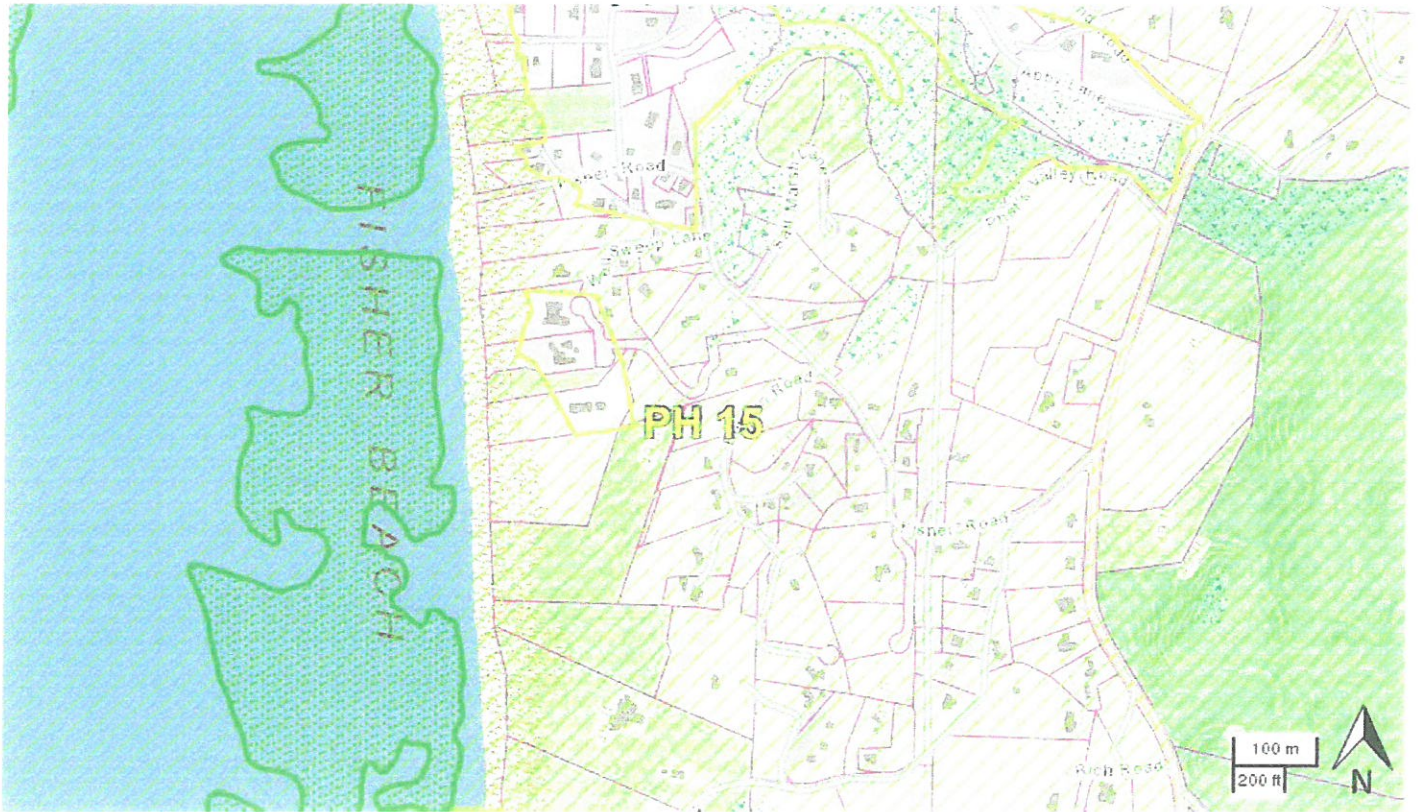


Bearberry, scrub oak, and little bluestem growing at western-most area of the project area.



View looking west of well-vegetated slope. Plant community transitions from maritime shrubland (left) to sandplain grassland (middle) to sandplain heathland (right/foreground).

### NHESP Priority/Rare Habitats



NHESP Benson Road Truro MA

[http://maps.massgis.state.ma.us/map\\_ol/oliver.php](http://maps.massgis.state.ma.us/map_ol/oliver.php)

## Invasive Species Removal/Vegetation Restoration

Invasive species management will begin with a selective basal bark/injection herbicide pretreatment of invasive vegetation within the limit of work. This pretreatment will be followed approximately two weeks later (giving time for herbicide to translocate to root systems) by cutting and removing invasive species. It is expected that some root material that has not been destroyed by herbicide pre-treatment will be left behind, and that there is a substantial invasive species seed bank throughout the area. Therefore, follow-up treatments beginning in the fall of 2014 and continuing through winter, late summer and fall for the next three to five growing seasons will be necessary. Please see the Invasive Plant Management/Three Year Management Time-Line in this document for details.

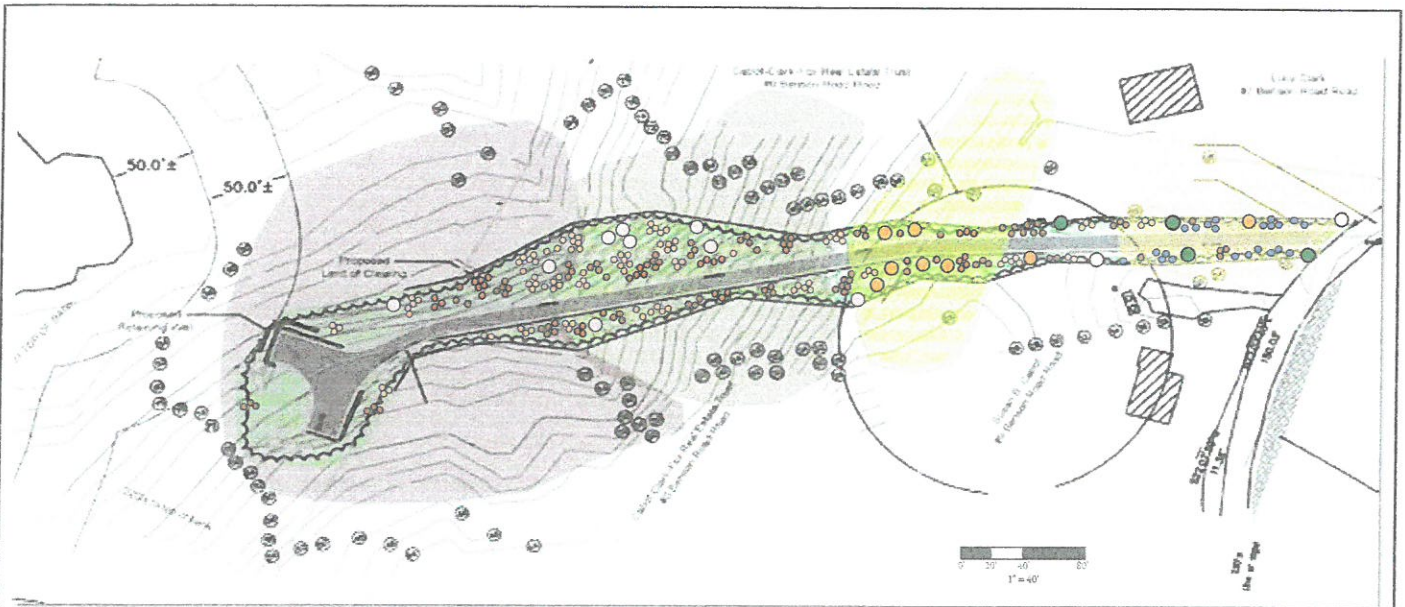
After the initial intensive invasive species management is completed, the project area will be seeded with a custom mix of deep rooted native warm and cool season grasses and forbs including crinkle hairgrass (*Deschampsia flexuosa*), little bluestem (*Schizachyrium scoparium*), poverty grass (*Danthonia spicata*), seaside goldenrod (*Solidago sempervirens*), asters (*aster spp.*), and butterfly weed (*Asclepias tuberosa*). Restoration planting in the project area will begin once the roadway construction is completed. At this time we should have reached greater than 80% control of the invasive species infestation, allowing for successful replanting of native species. Native vegetation proposed for the invasive species management area includes bayberry (*Myrica pensylvanica*), eastern red cedar (*Juniperus virginiana*), scrub oak (*Quercus ilicifolia*), pitch pine (*Pinus rigida*), Pennsylvania sedge (*Carex pensylvanica*), and crinkle hairgrass (*Deschampsia flexuosa*). These plants will restore the appropriate native vegetation, increase biodiversity, provide habitat for wildlife, and improve screening for neighbors on Benson Road.

Restoration planting for the remaining areas within the limit of work include vegetation appropriate for the existing natural plant communities on site including maritime shrubland, sandplain grasslands, and sandplain heathlands. Vegetation will include bayberry (*Myrica pensylvanica*), scrub oak (*Quercus ilicifolia*), Pennsylvania sedge (*Carex pensylvanica*), and crinkle hairgrass (*Deschampsia flexuosa*), beach plum (*Prunus maritima*), bearberry (*Arctostaphylos uva-ursi*), little bluestem (*Schizachyrium scoparium*), sickle-leaved golden aster (*Pityopsis falcata*), stiff aster (*Ionactis linarifolia*), and butterfly weed (*Asclepias tuberosa*).

Due to the difficulty of sourcing beach heather (*Hudsonia tomentosa*) and reindeer lichen (*Cladonia rangiferina*), we recommend transplanting some of the existing beach heather and reindeer lichen from within the limit of work. Plants may be stored off-site in order to monitor their health and provide adequate water. Plants will be transplanted back to the project area when restoration planting begins.

Please see the accompanying Planting Plan for detailed information regarding proposed restoration planting including species, quantity, size and spacing.

# Restoration/Planting Plan



### Plan Notes:

- Site Plan provided by Clark Engineering LLC dated July 1, 2013, Revised April 22, 2014.
- The restoration area within the limit of work (shaded in green) is approximately 25,422 square feet.
- The area directly along Emson Road (shown in yellow-orange) is dominated by invasive plant species including Tree of heaven, black locust, white poplar, shrub honeysuckle and vine honeysuckle. Selective herbicide treatment and mechanical removal will be used to manage invasive species within the project area. Please see Invasive Species Management/Restoration Plan for details.
- Mowing west from Benson Road plant communities within the limit of work will be restored with appropriate native vegetation according to each plant community. The area shown in green above is predominantly pitch pine with crinkle hairgrass and Pennsylvania sedge. Further west, little bluestem and Pennsylvania sedge comprise the dominant sandplain/grassland plant community. This transitions to a heathland/maritime shrub plant community on the steeper part of the slope (shown in tan), opening up to sandplain/heathland between the top of the slope and top of coastal bank (shown in red). Colored areas are shown only to illustrate the dominant plant communities within and around the proposed limit of work.
- Beach heather (*Headsia tomentosa*) will be removed from the project area within the sandplain/heathland plant community prior to clearing and excavation, and held in a protected area off-site to be restored after construction is completed.
- All disturbed areas will be seeded with a common mix of native warm season grasses and forbs including Crinkle hairgrass (*Deschampsia flexuosa*), little bluestem (*Schizachyrium scoparium*), poverty grass (*Danthonia spicata*), seaside goldenrod (*Solidago sempervirens*), Aster (*Aster* spp.), and butterfly weed (*Asclepias tuberosa*).
- Temporary irrigation will be required for the first two to three growing seasons. Once plants are established temporary irrigation will be removed.

### Planting Schedule

Latin Name	Common Name	Size	Spacing	Quantity
<b>TREES</b>				
<i>Quercus ilicifolia</i>	Scrubby oak	5 Gallon	10' On Center	10
<i>Pinus rigida</i>	Pitch pine	2" cal	10' On Center	17
<i>Juniperus virginiana</i>	Eastern red cedar	5/6 BB	10' On Center	4
<i>Quercus alba</i>	White oak	2" cal	10' On Center	2
<b>SHRUBS</b>				
<i>Myrica pennsylvanica</i>	Northern Bayberry	1 Gallon	5' On Center	154
<i>Prunus maritima</i>	Beach plum	1 Gallon	5' On Center	171
<i>Arctostaphylos uva-ursi</i>	Beachberry	4" Pot	18-24" On Center	4000
<i>Vaccinium angustifolium</i>	Lowbush blueberry	1 gallon	4' On Center	50
<i>Viburnum dentatum</i>	Arrowwood viburnum	3 Gallon	5' On Center	11
<i>Vaccinium corymbosum</i>	Highbush blueberry	5 Gallon	5' On Center	11
<i>Myrica pennsylvanica</i>	Northern bayberry	3 Gallon	5' On Center	15

- Eastern red cedar
- White oak
- Highbush blueberry
- Arrowwood viburnum
- Northern Bayberry
- Beach Plum
- Scrubby Oak
- Lowbush blueberry
- Pitch Pine
- Restoration area (within the limit of work)
- Vegetation dominated by invasive plant species. Tree of heaven, black locust, shrub honeysuckle, vine honeysuckle dominant.
- Pitch pine dominated plant community. Crinkle hairgrass/Pennsylvania sedge/Little bluestem groundcover

### GRASSES AND WILDFLOWERS

Latin Name	Common Name	Size	Spacing	Quantity
<i>Carex pennsylvanica</i>	Pennsylvania sedge	5" Plug	18-24" On Center	2000
<i>Deschampsia flexuosa</i>	Crinkle hairgrass	5" Plug	18-24" On Center	500
<i>Schizachyrium scoparium</i>	Little bluestem	5" Plug	18-24" On Center	500
<i>Pycnopogon fasciatus</i>	Sickle-leaved golden aster	5" Plug	18-24" On Center	500
<i>Imaretis linearifolia</i>	Stiff aster	5" Plug	18-24" On Center	300
<i>Asclepias tuberosa</i>	Butterfly weed	5" Plug	18-24" On Center	300

- Heathland/Grassland & Maritime scrub - Beach plum/bayberry dominant with scrub oak, Pennsylvania sedge and Little bluestem transitions to beachberry dominated groundcover.
- Sandplain/Heathland plant community. Beachberry dominant. Beach heather, reindeer lichen, stiff aster, sickle-leaf aster groundcover.

RESTORATION/PLANTING PLAN | APRIL 22, 2014  
 HOPPER'S VIEW LANE - ROAD CONSTRUCTION AREA, TRURO, MA  
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## Planting Schedule

Latin Name	Common Name	Size	Spacing	Quantity
<b>TREES</b>				
<i>Quercus ilicifolia</i>	Scrub oak	5 Gallon	10' On Center	10
<i>Pinus rigida</i>	Pitch pine	2" cal	10' On Center	17
<i>Juniperus virginiana</i>	Eastern red cedar	5/6' BB	10' On Center	4
<i>Quercus alba</i>	White oak	2" cal	10' On Center	2
<b>SHRUBS</b>				
<i>Myrica pensylvanica</i>	Northern bayberry	1 Gallon	5' On Center	154
<i>Prunus maritima</i>	Beach plum	1 Gallon	5' On Center	171
<i>Arctostaphylos uva-ursi</i>	Bearberry	4" Pot	18-24" On Center	4000
<i>Vaccinium angustifolium</i>	Lowbush blueberry	1 gallon	4' On Center	50
<i>Viburnum dentatum</i>	Arrowood viburnum	3 Gallon	5' On Center	11
<i>Vaccinium corymbosum</i>	Highbush blueberry	3 Gallon	5' On Center	11
<i>Myrica pensylvanica</i>	Northern bayberry	3 Gallon	5' On Center	15
<b>GRASSES AND WILDFLOWERS</b>				
<i>Carex pensylvanica</i>	Pennsylvania sedge	5" Plug	18-24" On Center	3000
<i>Deschampsia flexuosa</i>	Crinkle hairgrass	5" Plug	18-24" On Center	500
<i>Schizachyrium scoparium</i>	Little bluestem	5" Plug	18-24" On Center	500
<i>Pityopsis falcata</i>	Sickle-leaved golden aster	5" Plug	18-24" On Center	300
<i>Ionactis linariifolia</i>	Stiff aster	5" Plug	18-24" On Center	300
<i>Asclepias tuberosa</i>	Butterfly weed	5" Plug	18-24" On Center	300

## Invasive Plant Management

Invasive plants, also known as noxious weeds, are plants introduced from other regions that have the ability to reproduce rapidly and displace native species. According to the National Invasive Species Council (NISC) “Invasive species may prey upon, displace or otherwise harm native species. Some invasive species also alter ecosystem processes, transport disease, interfere with crop production, or cause illnesses in animals and humans; affecting both aquatic and terrestrial habitats.” Invasive plants threaten natural communities by reducing habitat and food for native insects, birds, and other wildlife. These invasive plants have a competitive advantage because they are no longer controlled by their natural predators, and can quickly spread out of control. For these reasons, invasive species are of national and global concern. NISC’s five-year *National Invasive Species Management Plan (2008-2012)* focuses on 5 Strategic Goals for managing invasive species nationwide:

- Prevention
- Early Detection and Rapid Response
- Control and Management
- Restoration
- Organizational Collaboration

While we recognize that prevention is the best and most important management strategy, it is often too late to prevent invasive species colonization of our landscapes, including our most sensitive resource areas. Whenever land disturbance occurs, whether for development or simply for planting, we recommend a monitoring program to ensure that invasive vegetation does not expand into these disturbed areas, preparing a plan for Early Detection and Rapid Response.

On project sites where invasive species have been identified, BlueFlax Design follows NISC’s guidelines for **Control and Management**; **Restoration**; and **Organizational Collaboration**.

**Control and Management** calls for containing and reducing the spread of invasive populations to minimize their harmful impacts. **Restoration** calls for the restoration of high-value ecosystems to meet resource conservation goals; **Organizational Collaboration** calls for maximizing management effectiveness through collaboration with property owners, experienced land management professionals, and local Conservation Commissions (for project sites within Conservation Jurisdiction).

The following invasive plant species (as listed by the Massachusetts Invasive Plant Advisory Group) have been identified within the proposed project area.

**Black Locust (*Robinia pseudoacacia*)** spreads rapidly by both seed and root suckers. By managing the invasive tree, understory species will respond positively, increasing fruit production and understory canopy development. Additional sunlight will also enhance the herbaceous groundcovers.

Note: Black Locust is known to re-sprout vigorously after removal. Substantial root sucker growth should be expected from the remaining root material within 60 days of the initial removal. Re-sprouting can be minimized with the application of a glyphosate-based herbicide applied directly to the cut stem.



Black locust bark

Black locust leaves



Tree of heaven canopy



Tree of heaven leaves

**Multi-flora rose (*Rosa multiflora*)** Initially introduced from Japan to provide erosion control, this prolific species, which reproduces both by seed and vegetatively, can create impenetrable thickets that out compete native plants species. Multi-flora rose can tolerate a wide range of site conditions, including salt and wind, and can be found throughout coastal areas on Cape Cod.



Multi-flora rose shrub



Multi flora rose flowers and leaves.

**Shrub Honeysuckle (*Lonicera morrowii, bella*)** will invade a wide variety of native habitats, with or without any previous disturbance. Shrub honeysuckle has a broad tolerance to a variety of moisture regimes and habitats, making most natural communities susceptible to invasions. This species is believed to produce allelopathic chemicals that inhibit the growth of other plants, thereby out-competing native vegetation.



Shrub honeysuckle flowering



Shrub honeysuckle leaves and flowers

**Tree of Heaven (*Ailanthus altissima*)** is a fast growing native tree of China that has been defined as an invasive plant by the Massachusetts Invasive Plant Group. Tree-of-heaven displaces native vegetation by forming dense thickets and produces toxins in the soil that inhibit growth of other vegetation. The ability to re-sprout from cut stumps and from roots that are left in the soil as well as it's high seed producing ability help tree-of-heaven to colonize disturbed areas and compete with native vegetation.



**Vine Honeysuckle (*Lonicera japonica*)** is an evergreen to semi-evergreen vine that can be found either trailing or climbing to over 80 ft. (24 m) in length. This species invades a variety of habitats including forest floors, canopies, roadsides, wetlands, and disturbed areas. *Lonicera japonica* can girdle saplings by twining around them, and can form dense mats in the canopies of trees, shading everything below.



Close up of vine honeysuckle flowers and leaves



Vine honeysuckle aggressively climbing a tree

**White Poplar (*Populus alba*)** According to the National Park Services Alien Plant Working Group, white poplar out-competes native tree and shrub species, particularly in forest edges and fields. Due to its ability to thrive in many different soil types and site conditions, and to its ability to spread through large seed crops, root sprouts, and stump sprouts, this plant is considered an ecological threat. Dense stands of white poplar prevent other plants from coexisting by reducing the amount of available sunlight, nutrients, water and space available.



White poplar leaves



Canopy of a white poplar

# Three Year Land Management Time-Line

Using objectives developed by the National Invasive Species Council for **Control and Management, Restoration and Organizational Collaboration** as our guide, BlueFlax Design proposes the following methods and techniques for managing the invasive species listed above from within the proposed project area:

## Control and Management Objectives:

- Identify and evaluate appropriate invasive species control methods; create action plan
- Reduce the spread and harm caused by invasive species using the identified methods of control
- Perform control and management activities according to the outlined action plan. Invasive species management objectives within the project area are as follows:

**Populus alba, Robinia pseudoacacia and Ailanthus altissima**- Reduce these species by 90% in management year one, 95% in management year two and reach and maintain 95%+ reduction in year three and ongoing.

**Lonicera japonica** - Reduce this species by 90% in management year one, 95% in management year two, and reach and maintain 95%+ reduction in management year three and ongoing.

**Lonicera morrowii/bella and Rosa multiflora** - Reduce these species by 90% in management year one, 95% in management year two, and reach and maintain 95+% reduction in management year three and on going.

Objectives will vary based on management outside of the limit of work area. If invasive species are managed throughout the approximately 7000 square foot invaded area, control levels stated above can be successfully reached.

## Restoration Objectives

- Restore high-value areas within the limit of work impacted by invasive species as described in the Restoration Plan dated April 22, 2014

## Organizational Collaboration Objectives

- Provide regular reports covering effectiveness of invasive species management and achieved objectives along with the health of restored native vegetation including dated color photographs of the project area to the Town of Truro and NHESP annually for the three-year duration of the Land Management Plan.

## Summer/Fall 2014

- Pre-treat all invasive species throughout the project area with basal bark treatment (vines) or injection treatment (shrubs).
- Approximately 2 weeks after pre-treatment, cut and remove trees, and mechanically uproot invasive vines, shrub honeysuckle, and multiflora rose. If any root material is left in the ground, apply a 20% concentration of a Glyphosate-based herbicide to shrub honeysuckle by wiping directly onto the cut stump immediately following the cutting treatment.
- Remove all vegetation debris from the site for proper disposal.
- After initial invasive species removal is complete immediately seed areas to stabilize soils.
- Begin removing plant material to be protected from within the proposed project area. Store plants off-site until project is complete and transplanting can commence.

## Winter - 2014

- Continue invasive plant management by using a cut & wipe application of a 20% concentration of a Glyphosate-based herbicide to invasive plants.
- If garlic mustard is present in the project area, hand pull the basal growth, bag the debris and remove from site to be disposed of properly.

## Spring - 2015

- Monitor invasive plant response to previous season's management treatments and calibrate upcoming treatments to correspond with the observed plant response.
- Commence restoration planting of the invasive species management area.
- Once roadway construction project is complete begin restoration planting throughout the limit of work.
- Plan irrigation needs for upcoming growing season.
- Prepare and submit the first monitoring report to the Truro Planning Board.

## Summer - 2015

- Should any previously cut invasive plants re-sprout, selectively remove them by using a cut & wipe application of a 20% concentration of a Glyphosate-based herbicide to all other invasive shrubs after July 15th.
- Adjust temporary irrigation as necessary to ensure proper care of newly installed vegetation while using the least amount of water necessary to support plant establishment.
- Repeat the above treatment in late summer, if necessary.

### **Fall -2015**

- Continue to monitor health of restored native vegetation, adjusting irrigation as necessary until system is turned off for the season.

### **Winter - 2015**

- Continue invasive plant management by using a cut & wipe application of a 20% concentration of a Glyphosate-based herbicide to invasive plants.
- If garlic mustard is present in the project area, hand pull the basal growth, bag the debris and remove from site to be disposed of properly.

### **Spring - 2016**

- Monitor invasive plant response to earlier management treatments and calibrate upcoming treatments to correspond with the observed plant response.
- Assess health of restored vegetation, replace any vegetation that may have succumbed to winter kill.
- Plan irrigation needs for upcoming growing season.
- Prepare and submit the second monitoring report to the Truro Planning Board.

### **Summer - 2016**

- Should any previously cut invasive plants re-sprout, selectively remove them by using a cut & wipe application of a 20% concentration of a Glyphosate-based herbicide to all other invasive shrubs after July 15th.
- Adjust temporary irrigation as necessary to ensure proper care of newly installed vegetation while using the least amount of water necessary to support plant establishment.

### **Fall - 2016**

- Continue to monitor health of restored native vegetation, adjusting irrigation as necessary until system is removed.

### **Winter - 2016**

- Continue invasive plant management by using a cut & wipe application of a 20% concentration of a Glyphosate-based herbicide to invasive plants.
- If garlic mustard is present in the project area, hand pull the basal growth, bag the debris and remove from site to be disposed of properly.

### **Spring- 2017**

- Monitor invasive plant response to earlier management treatments and calibrate upcoming treatments to correspond with the observed plant response.
- Assess health of restored vegetation, replace any vegetation that may have succumbed to winter kill.
- Restored vegetation should be established at this point, and temporary irrigation no longer necessary.
- Prepare and submit the third monitoring report to the Truro Planning Board.

### **Summer - 2017**

- Should any previously cut invasive plants re-sprout, selectively remove them by using a cut & wipe application of a 20% concentration of a Glyphosate-based herbicide to all other invasive shrubs after July 15th.
- Adjust temporary irrigation as necessary to ensure proper care of newly installed vegetation while using the least amount of water necessary to support plant establishment.

### **Fall - 2017**

- Continue to monitor health of restored native vegetation, adjusting irrigation as necessary until system is removed.
- Prepare and submit the Final monitoring report to the Truro Planning Board

### **Ongoing Invasive Species Maintenance**

After Fall 2017, invasive species should be under control. At this juncture invasive plants should be reduced to low enough numbers that an annual hand removal and selective herbicide treatment strategy will suffice to keep them out of the naturalized areas. (This will vary depending on actual carbohydrate stores in the roots and environmental conditions throughout the treatment period.) Invasive plants generally take a minimum of three to five years of active management to reach a level of successful control. Annual monitoring and minimal maintenance for invasive species should be ongoing throughout the restoration area.

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