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COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

BRISTOL COUNTY

No. 2011-P-1683

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BROOKS WILLIAMSON AND NANCY WILLIAMSON,  
PLAINTIFF-APPELLEES,

v.

PAUL KIM AND VIOLA KIM,  
DEFENDANT-APPELLANTS.

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ON APPEAL FROM THE A JUDGMENT OF THE LAND COURT,  
CASE No. 00 MISC. 267626 (KCL)

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BRIEF FOR PLAINTIFF-APPELLEES  
BROOKS AND NANCY WILLIAMSON

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**STATEMENT OF ISSUES.**

1. Whether the Land Court correctly ruled that appellants Paul Kim and Viola Kim do not have the benefit of an easement implied from prior use over the way which allegedly crosses the property of appellee's Brooks Williamson and Nancy Williamson.
2. Whether the Land Court correctly ruled that the Kims do not have the benefit of an easement by necessity over the Williamsons' property.
3. Whether the Land Court correctly ruled that George Lake did not acquire, and the Kims do not now have, a prescriptive easement to use the alleged way over the Williamsons' property.

**STATEMENT OF THE CASE.**

Nature of the Case, Course of Proceedings and  
Disposition Below.

The central issue on this appeal is whether or not the Kims have rights to use that portion of an alleged way which the Kims have called "Elmer Gifford Road" (hereinafter the "way" or "alleged way ") which allegedly crosses the Williamsons' property at 486 Horseneck Road, Westport, Massachusetts (hereinafter



the "Williamson property" or sometimes the "Gifford homestead").

On November 8, 2000, the Williamsons filed a Complaint against the Kims which included a petition to quiet title, a request for injunctive relief and a claim for trespass. Appendix, page ("A-\_\_") 2. On November 22, 2000, the Kims filed an Answer and Counterclaims.

After a five day bench trial at which the court heard 16 witnesses<sup>1</sup>, the Land Court (Long, J.), entered judgment for the Williamsons on their claims and on the Kims' counterclaims, declaring that "the Kims have no rights to any portion of the Williamsons' property," and dismissing with prejudice the Kims' Counterclaims "for 'public road' by prescription, 'private way' by prescription, necessity or implication, and for a derelict fee interest in one-half of the Williamsons' driveway." A-14.

On August 12, 2011, the Kims filed a Notice of Appeal.

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<sup>1</sup> And, by agreement, the deposition testimony of the late Carlton Lees. (A-27).

Statement of Relevant Facts.

The Williamsons and the Kims own adjacent parcels of land between Horseneck Road and Division Road in Westport, Massachusetts. The Kims also own additional land between Horseneck and Division Roads that is not contiguous with the Williamsons' land. All of the parcels are shown on a plan entitled "Plan Showing Land Formerly Owned by Mark Gifford Compiled From Westport Assessors Plats, November 20, 2000," ("the 11/20/00 Plan"). A-5. That plan was prepared by Paul Kim, himself. Testimony of Paul Kim, Appendix Volume TR ("TR \_\_") IV, p. 57, ll. 5-6. That plan, purports to show the position of "Elmer Gifford Road." A-5.

As shown on the 11/20/00 Plan, the Williamsons' home is located on a parcel with frontage on Horseneck Road, which they acquired in 1995 from the Estate of Ethel Gifford (Mark Gifford's surviving spouse) by a deed recorded in Book 3545, page 90. A-12.

In the 1960s, Blanche Southard ("Southard") had purchased from Mark Gifford, at different times, land shown on the 11/20/00 Plan as shaded parcels and labeled "First Parcel", "Second Parcel" and "Third Parcel." A-5. The First Parcel has frontage on Division Road and was conveyed from Gifford to

Southard in 1963 by a deed recorded at Book 1427, Page 451. A-8. The Second Parcel was conveyed by Mark Gifford to Southard in 1965 by deed recorded at Book 1503, Page 378. A-9. The Second Parcel abuts the eastern boundary of the Williamsons' land and the eastern boundary of the Third Parcel. Mark Gifford conveyed the Third Parcel to Southard in 1968 by deed recorded at Book 1579, Page 140. A-10. It has frontage on Horseneck Road, and abuts the northern boundary of the Williamsons' land. A-5. The Gifford family cemetery is located on the Third Parcel. TR I, p. 51, ll. 9-12 (William White); Plan of Land, Horseneck Road, Westport, dated September 22, 1995 ("9/22/95 Plan"), A-15.

The Land Court found that "none of those deeds [to Southard] contained any reference to, or grant of easement in, any portion of the pathway and there was no evidence that Ms. Southard ever used any part of it except on the land she bought. There was likewise no reference to, or grant of easement in, the driveway on the farmhouse parcel in any of the Gifford/Southard deeds, and again no evidence that Ms. Southard ever used that driveway in connection with the parcels she purchased." Decision, A-14, p.7.

By a 1993 deed recorded at Book 3009, Page 124, Southard conveyed all three parcels to the Kims for \$25,000. A-11. That deed also conveyed a fourth parcel, shown as the "George Lake House" on the 11/20/00 Plan, A-5. TR IV, p. 77, ll. 5-14 (Kim) (hereinafter the "Lake property"). The Land Court found that "there was no reference to or purported grant of easement in, either the pathway or the driveway on the farmhouse parcel, nor any reference to an access route to Horseneck Road." Decision, A-14, p.7.

The alleged way is asserted to run from Horseneck Road to Division Road. A-5. From Horseneck Road, the alleged way is asserted to first traverse land owned by the Williamsons and then to pass through the Kims' property known as the Second Parcel. Id. After passing through the Second Parcel, the alleged way runs through two parcels not owned by either the Williamsons or the Kims, and then crosses the Kims' First Parcel, ending at Division Road. Id.

At all relevant times, the Gifford homestead was maintained as a private residence, separated from the Second Parcel's woodlands by walls and gates.

Throughout all the relevant time periods, the Gifford homestead/Williamson property was clearly

physically separated from the undifferentiated woodland on the Second Parcel by means of stone walls and gates which the Giffords maintained. The Land Court found:

[I]t is important to focus on the identity and circumstances of those users and, in particular, to remember that there was a stone wall and gate at the boundary of the farmhouse parcel, clearly separating it from the woods and fields behind it. The farmhouse parcel was, and very definitely seen [sic] as, a 'residence' with private yards around it (its section of the pathway ran through those yards) rather than undifferentiated, little used, woodland and fields like the woodlot and hayfield parcels to its rear.

Decision, A-14, p. 7.

Numerous witnesses testified that the Giffords maintained two gates on the lane, one located just northeast of the garage, and a second located further east on the lane, at what is now the boundary line between the Second Parcel and the Williamson property. There is also photographic evidence of the existence of the gates.

a. Testimony concerning the gates.

According to Russell Tripp, the Giffords maintained two gates across the way, one by the barn and one where the trees begin on Trial Exhibit 9KK-1 (A-17) (the property line). TR II, p. 53, ll. 8-22

(Russell Tripp). The gates were closed whenever the cows would come to pasture, which was a daily occurrence. Id., p. 54, ll. 3-8. This continued for the entire period when the Tripps were farming the Gifford land, from the 1920s until about 1990, so the gates would be shut every day during that period. Id., p. 54, ll. 9-20. The gates on the Gifford property were latched. Id., p. 57, ll. 19-21. Alvin Tripp confirmed his brother's testimony. TR II, pp. 83, 84, 109, 110 (Alvin Tripp). William White also remembers a gate on the property line in the 1940s. TR I, p. 25, ll. 3 - 9 (White).

Ethel Shaw testified that there had always been a gate on the way at the edge of the Giffords' yard, (TR II, p. 232, ll. 21-22 (Shaw)), right at the edge of the woods. Id., p. 234, ll. 1-6, 19-24. That gate was always closed. Id., p. 235, ll. 3-6.

Charlotte McMurray also testified that between 1957 and 1994, the Giffords maintained two gates across the way, one on the north side of the barn (garage) (TR III, p. 216, ll. 15-23, p. 228, ll. 15-17 (McMurray)) and the other at the east property line as shown on the 9/22/95 Plan (A-15). Id., p. 220, ll.

21-23. The gate along the property line was never opened. Id., p. 227, ll. 9-13.

Mark Gidley's testimony concerning the gates is consistent with that of the other witnesses. There was a gate in the area immediately to the south of the east barway (TR III, p. 253, ll. 9-10 p. 253, ll. 14-16 (Mark Gidley)) and another between what is now the Williamson property and the Second Parcel. Id., p. 264, ll. 22-24, p. 265, ll. 1-5. That gate was closed at all times that Mark Gidley can remember. Id., p. 265, ll. 6-8. The gate on the property line was secured with a wire bail mechanism. Id., p. 270, ll. 22-23. "It was a boundary you just could not go past". Id., p. 261, ll. 22-24.

Jean Gidley also testified that there was a gate behind the garage (TR III, p. 60, ll. 17-24, p. 61, ll. 1-2 (Jean Gidley)) and another at the Williamson property line with the Second Parcel, also crossing the way. Id., p. 60, ll. 17-24, p. 61, ll. 1-2. The gate at the property line was present at the property at least from the earliest time that Jean Gidley (who was born in 1926) can remember, remained there through

1948, and Ms. Gidley also observed it after 1948 when she visited her parents. Id., p. 62, ll. 4-8.<sup>2</sup>

b. Photographic evidence of the gates.

Photograph B-00161 (A-17) shows the remnants of the gate across the way located near the barn closest to the house.<sup>3</sup> The remains of the gate at the property line appear in Trial Exhibit 16 (A-23).<sup>4</sup>

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<sup>2</sup> Paul Kim, however, denies that gates were ever present across the way on the Gifford homestead. TR IV, p. 87, ll. 16-21, p. 91, ll. 2-7, p. 94, ll. 11-14, p. 119, ll. 1-6 (Kim). He is the only witness who denies the existence of the gates.

<sup>3</sup> In Photograph B-00161 (A-17), the barn closest to the house (garage) is shown on the right and the photograph is looking east into the wood lot. TR V, p. 95, ll. 2-8 (Brooks Williamson). The break in the stone wall shown in photograph B-00161 (A-17) was there when the Williamson's purchased the property. Id., p. 96, ll. 9-11. The wood posts shown to the left of the barn on Photograph B-00161 are the remnants of a gate consisting of a pillar on one side and a couple of slats. Id., p. 96, ll. 13-24, p. 97, ll. 1-2. With reference to the 9/22/95 Plan (A-15), the wood slats shown to the left of the barn on Photograph B-00161 are coming off the barn closest to the house (the garage) from its northeast corner. Id., p. 98, ll. 7-20. The wood comes off the corner of the garage and comes out into the way, jutting out to the north. Id., p. 155, ll. 24; p. 156, ll. 1-4.

<sup>4</sup> When Mr. Williamson walled up the opening in the wall at the property boundary line through which the way purportedly travels, he saw pieces of wood in that location as well as barbed wire. Vol. V, p. 190, ll. 6-10; 17-18; p. 191, ll. 4-12 (Brooks Williamson). The photograph which is Exhibit 16, shows on its left side a fence post or gate post. Id., p. 191, ll. 16-24.



The use of the alleged way was very limited and was permissive.

The evidence at trial established that very few people used the alleged way at all. Since the late 1940s, those few people at best walked or rode a horse rather than driving a motor vehicle and it appears that virtually no one has driven a vehicle on the alleged way as a means of travel from Horseneck Road to Division Road or Division Road to Horseneck Road since at least the late 1940s. Not only was the use infrequent, intermittent and seasonal, but, more important, it appears that everyone (with minor and inconsequential exceptions) who used the alleged way west of the boundary line (between the Williamson property/Gifford homestead and the Second Parcel) had permission to do so.

According to Carlton Lees, anybody could use the way "with the Giffords' permission." Lees Deposition, Second Supplemental Appendix, A-27, p. 38, ll. 18-20. Lees' conversations with Mark and Ethel Gifford "were always to the effect that [the way] was a private lane and they would give people permission to go through." Id., p. 109, ll. 11-15. "[I]n general, [Ethel]

indicated that people used that [the lane] by permission." Id., p. 112, ll. 8-11.

The Land Court found that all of the use was permissive, stating: "[A]side from an occasional hunter or weekend walker on the Kims' portion of the path [the First and Second Parcels], everyone who used it did so with permission." Decision, A-14, p. 14. (Emphasis added). With respect to George Lake's use, the Land Court found that:

George Lake, a local shell fisher, frequently drove the length of the pathway and driveway to get from his house on Division Road to the Westport River bank. But he too was a friend of the Gifford family, doing carpentry work at the Giffords' farmhouse and often stopping at the house to talk. His use ceased in the 1950's. I find this use was permissive.

Decision, A-14, p. 7.

The trial evidence also established that he used the way to travel from his home on Division Road through to Horseneck Road on his way to the river. However, Lake used the way with the Giffords' express permission.

Carlton Lees testified that Mark Gifford had given Lake permission (Lees Deposition, Second Supplemental Appendix, A-27, p. 37, ll. 8-17, p. 109,

ll. 2-6) and that people used the Giffords' land "with the Giffords' permission." Id., p. 38, ll. 18-20.

Jean Gidley had a conversation with her father, Mark, in which she asked why George Lake went on their property. Her father responded that he had given George Lake permission to do so. TR III, p. 48, ll. 22-24, p. 50, ll. 9-12, p. 55, ll. 2-6 (Jean Gidley). When Gidley spoke with her father concerning the fact that George Lake had been granted permission to use the way, he told her that he, her father, had granted George Lake permission to use the way. Id., p. 138, ll. 11-12.

The use of the way was a best seasonal and intermittent. Further, the way east of the Gifford homestead became impassible by the 1950's at the latest.

Even the very few persons who claim to have used the way did so only intermittently and on a seasonal basis. Even in earlier years when the way may have been passable, it was impassible during mud season and after snow storms. Further, by the 1950s, the way had become completely overgrown and impassable at all times.

The Land Court found that "the pathway section on the farmhouse parcel is now grassed-over and has been

for some time. The section on the woodlot and hayfield [Second and First] parcels, overgrown since the 1950's, have recently been cut, mowed and widened by the Kims..." Decision, A-14, p.5 (Emphasis added). The Court also found that, "[b]y the mid-1950's, the pathway was filled with brush and small trees. Few, if any, vehicles of any kind used it thereafter. If anyone was on it after that time, they were walking or riding a horse." Id. , pp. 6-7. (Emphasis in original).

In the years 1948 to 1980, gradually trees grew in across the lane. TR III, p. 64, l. 19 (Jean Gidley). It started as underbrush in the 1950s and became trees. Id., p. 64, ll. 21-23. During that period, (1948-80) the condition of the way changed. Id., p. 65, ll. 9-12. The way became impassable to any vehicles. "The underbrush started to grow into the path; and the underbrush eventually became trees; and it was not possible to take a vehicle on that lane through to Division Road". Id., p. 66, ll. 8-15.

During the 1960s or early 1970's, Mark Gidley remembers seeing a huge tree growing in the center of the way. About 50 to 60 feet east of the Williamson property line on the way, there was "a huge tree right

at that point where you could not ... go any further.”  
TR III, p. 267, ll. 21-24 (Mark Gidley). The huge  
tree in the right of way within 50 feet of the  
Williamson property line was 60 or 70 feet high and it  
was spread out. Id., p. 279, ll. 17-24, p. 280, ll. 1-  
3. It was growing pretty much in the center of the  
way. Id., p. 281, l. 21. While Mark Gidley does not  
remember seeing the large tree when he was smaller and  
going east of the property line to obtain Christmas  
trees, he did see the it when he was in his late teens  
or early 20s. Id., p. 283, ll. 3-15. The last time  
Mark Gidley saw that tree was in the late 1960s or  
early 1970s. Id., p. 280, ll. 16-17.

The condition of the way west of the boundary  
line (on the Williamson's property), and the  
placement of the garage structure, is  
inconsistent with the existence of a right of way  
over the Williamson property.

At trial there was testimony as to the condition  
of that portion of the way west of the boundary line  
(on what is now the Williamson property). That  
evidence refutes any suggestion that there was ever a  
right of way or traveled road west of what is now the  
Williamson property line. Further, the location of  
the garage structure conflicts with Kim's claim that  
the stone walls bounding the Williamson driveway and

those running east-west to the east of the garage, define a public road crossing the Williamsons' property.

- a. No evidence that there had ever been a traveled way west of the boundary line.

There was testimony at trial that the condition of the area east of the garage, and the area in front of the two barns, gave no indication that a right of way existed in those locations. These areas were simply grass, with no ruts or indentations to indicate the presence of a way. There were not ruts or indentations inconsistent with those that would be produced by the Giffords' own tractor, which operated east of the garage.

In the period 1957 to 1994, east of the garage, the way consisted of nothing but grass. TR III, p. 217, ll. 16-24 (McMurray). The portion of the way from the garage east to the property line was just grass. TR III, p. 253, ll. 20-24, p. 254, ll. 1-2 (Mark Gidley). The area between the two stone walls shown on the 9/22/95 Plan, A-15, east of the garage, was grassy. TR III, p. 265, ll. 21-24 (Mark Gidley).

The tractor did go back and forth along that area. Id., p. 266, ll. 1-3. However, the tractor drove only

to about the mid-point between the garage and the eastern property line. Id., p. 266, ll. 6-10, p. 266, ll. 17-20.

The condition of the roadway on the Williamson property between the garage and the boundary line with the Second Parcel in November of 1999, was that of a mowed lawn. TR IV, p. 115, ll. 23-24, p. 116, ll. 1-6 (Kim). Trial Exhibit 9KK (A-17), depicts the gravel driveway and then, to the east, a tree and two stone walls running east and west with a flat grassy area between them. Exhibit 9GG (A.-17) is taken from the Kim's property looking onto the Williamson property. TR V, p. 88, ll. 14-16 (Brooks Williamson). Mr. Williamson did not observe any evidence at the location depicted in Exhibit 9GG of either ruts or configurations similar to those in his driveway that would indicate any travel. Id., p. 89, ll. 11-15. Mr. Williamson did not observe any tire marks, ruts or any indication that the way had been traveled by any vehicle. Id., p. 90, ll. 4-7. See also Photographs B-161 (Exhibit 9Y) (A.-17), B-171 (Exhibit 9DD) (A.-17) (both of which also show that between the walls there was only grass). Nor is there any evidence of a

"roadbed" east of the barns and west of the boundary line.

In addition, no stone walls bound the purported way in the area south of (in front of) the two barns. There is no indication that any way ever existed in this area. See 9/22/95 Plan, A-15.

Finally, at least one-half of the alleged way west of the boundary between the Williamson property and the Second Parcel consists of the Williamsons' private driveway. See 9/22/95 Plan, A-15. There is no reason to believe, based on the evidence at trial, that ruts and other evidence of travel on that driveway are the result of anything other than private use of the driveway by the Giffords, the Williamsons and their invited guests.

Kim's testimony was inconsistent as to whether there were conditions on the ground in this area which indicated the presence of a traveled way. He testified that there were no such indications, agreeing that while the Williamson driveway consists of dirt tracks with a center of grass, there are no such marks on the Williamson property to the east of the barns where the way is supposedly located. TR IV, p. 188, ll. 16-24, p. 189, ll. 1-2 (Kim). He further



admitted that he does not see any ruts in the photographs (Id., p. 188, ll. 3-4) and that he had never seen any ruts on the Williamson property on the alleged way. Id., p. 188, ll. 14-15.

However, he also claimed that there were "indentations" which evidence the existence of a way. Id., p. 116, ll. 15-17. He indicated that that he believes there is an indication of two lanes where tires would be in the way on the Williamson property east of the barns. Id., p. 189, ll. 9-15. According to Kim, what he is speaking of is not tread marks but that "there may be evidence of depressions". Id., p. 190, ll. 1-2. However, he is not positive. Id., p. 190, l. 4. As evidence of the "indentations", Kim cited the photograph which is Trial Exhibit 16 (A-23). TR IV, p. 190, ll. 21-24 (Kim). However, this and all the other photographs show no such indentations.

- b. The location of the garage is inconsistent with Kim's claim that the stone walls define the edges of a public road crossing the Williamson property.

The 9/22/95 Plan (A-15) labels "gravel driveway," a portion of what Kim asserts is a right of way. TR IV, p. 229, ll. 21-24, p. 230, l. 1 (Kim). Kim is asserting that there is a right of way running from

the ends of the driveway walls as shown on the 9/22/95 Plan (A-15) through the area between the house and the barns and connecting to the ends of the two stone walls which begin east of the garage and run east to the boundary with the Second Parcel. Id., p. 230, ll. 6-13. However, the 9/22/95 Plan clearly shows that, if a right of way existed in the area between the house and the barns, in the location asserted by Kim, it would run through the northwest corner of the garage. (A-15).

The Kims have suitable access to the Second Parcel from both Division Road and Horseneck Road, and it is not necessary for them to use the way for such access.

a. Access to the Second Parcel.

The evidence at trial established that the Kims can access the Second Parcel from both Division Road and Horseneck Road, and it is not necessary for them to use the way on the Williamson property for such access. First, there is access to the Second Parcel via the way from Division Road. When conducting logging for Kim, White and LeDoux accessed the Second Parcel from Division Road via the way as it ran over Kim's and other abutters' property. TR II, p. 147, ll. 3-11 (LeDoux). Kim has admitted that the Second

Parcel can be reached in this manner without passing through the Williamson's property. It is possible to access the Second Parcel from Division Road. TR V, p. 13, ll. 20-23 (Kim). That is in fact what Kim has been doing. Id., p. 13, ll. 24, p. 14, ll. 1-2. "It is possible to access Second Parcel from Division Road over Elmer Gifford Road; that's correct." Id., p. 14, ll. 9-10.

Further, even if the only access to the Second Parcel were from Horseneck Road, the Kims have direct access to the road without using any portion of the way. In 2003-2004, White and LeDoux did logging for Kim on the western half of the Second Parcel. TR II, p. 146 ll. 22-24 (LeDoux). They then hauled the wood which they cut on the western half of the Second Parcel onto the eastern half of the Third Parcel as shown on the 11/20/00 Plan (A-5). Id., p. 147, ll. 13-17, 23-24, p. 148, ll. 1-2. They opened a hole in the stone wall on the boundary between the Second and Third Parcels, north of the way. Id., p. 148, ll. 3-11. The hole in the wall between the Second and Third Parcels is approximately 6 feet. north of the way. TR V, p. 265, ll. 1-10 (Nancy Williamson). When Mr. White and Mr. LeDoux were doing logging on Second

Parcel, they were able to access Third Parcel from Second Parcel without using the way because a hole had been made in the wall between the two parcels. TR II, p. 208, ll. 1-5 (LeDoux). The hole in the wall between the Second and Third Parcels was approximately 15 feet wide. Id., p. 208, ll. 8-11. As a result, the road or way created by White and LeDoux from Second Parcel to Third Parcel was approximately the same width as the way. Id., p. 209, ll. 5-8. After creating the hole through the wall between the Second and Third Parcels, White and LeDoux had no difficulty traveling between the two parcels with their logs solely on Kim's property (the Third Parcel). Id., p. 209, ll. 11-13.

Thereafter, Mr. LeDoux and Mr. White obtained Mr. Kim's permission and made a hole in the wall between the Third Parcel and Horseneck Road, north of the way. Id., p. 151, ll. 15-18, p. 152, ll. 11-23, p. 209 ll. 14-17. That hole was created in the winter of 2002 - 2003, probably in 2003. Id., p. 153, ll. 6-9. With reference to the 9/22/95 Plan (A-15), the hole created between the Third Parcel and Horseneck Road began about 10 feet north of the intersection between the gravel driveway (the way) and Horseneck Road and was

15 feet in width. Id., p. 152, ll. 11-23. That opening still exists today. Id., p. 152, l. 24 p. 153, ll. 1-2.

Kim owns the wall separating the Second and Third Parcels. TR IV, p. 183, ll. 20-22 (Kim). He could give permission to have that stone wall removed. Id., p. 183, l. 24, p. 184, ll. 1-2. White testified that Kim gave permission for the hole between the Second and Third Parcels to be created. TR I, p. 60, ll. 19-22 (White). Kim also was aware that White and LeDoux created a hole through the stone wall separating the Third Parcel from Horseneck Road. TR IV, p. 171, ll. 21-23 (Kim). Nobody complained to Kim after a portion of that wall was removed by White and LeDoux. Id., p. 184, ll. 3-6.

After both openings were made, it was possible to travel from Horseneck Road, through the Third Parcel and into the Second Parcel, without using the way over the Williamson property. White and LeDoux could travel from the Second Parcel through the Third Parcel and exit at Horseneck Road through the openings that they had made through the walls by traveling solely on Kim's property. Id., p. 185, ll. 5-11. In fact, that is what they did. Id., p. 185, ll. 12-13. Despite the

presence of the cemetery, there was sufficient area between the barn and the cemetery to allow travel from Second Parcel, through Third Parcel to Horseneck Road. Id., p. 185, ll. 15-23.

While Kim denied at trial that he can access his Third Parcel from Horseneck Road directly or that he can access Second Parcel by entering from Horseneck Road and traveling over the Third Parcel, rather than traveling through the Williamson property, id., p. 204, ll. 18-24, p. 205, ll. 1-2, he was forced to agree that, in his deposition, he had testified that such access existed but was "not nearly as convenient". Id., p. 205, ll. 3-15

b. The wetlands issue.

The evidence at trial established that Kim could travel from Horseneck Road, through the Third Parcel and into the Second Parcel, without crossing any wetland area. Kim's expert, Walter Hewitson, testified that the first 15 feet or so of the Second Parcel, east of the stone wall at the Williamson property line, is grass upland. TR IV, p. 15, ll. 16-19 (Hewitson). Therefore, Kim can access the Second Parcel by traveling: (1) from Horseneck Road, east through the Third Parcel to the boundary between the

Second and Third Parcels; (2) through the break in the wall and onto the upland which is the first 15 feet of the Second Parcel east of the wall; (3) turning south and traveling along that upland strip a short distance to connect to the easternmost 15 feet of the way on the Second Parcel; and (4) then traveling further east into the Second Parcel on the way.

In his negotiation with the Trustees of Reservations concerning a proposed agricultural restriction, Kim submitted a plan indicating that the westernmost portions of the Second Parcel were buildable and not wetlands. There were negotiations with the Trustees of Reservations concerning this agricultural restriction. TR V, p. 40, ll. 1-4 (Kim). Kim prepared a plan showing a number of lots in order to show the property at its highest and best use so that an appraiser could determine the potential value of the property. Id., p. 216, ll. 1-8. Trial Exhibit 14 (A-22) is the March 17, 2003, plan ("3/17/03 Plan") that Kim proposed showing the lots. TR IV, p. 217, ll. 13-19 (Kim). That plan shows that the westernmost proposed lot, adjacent to the Williamson property, as a buildable lot. Id., p. 217, ll. 20-23. Next to that lot is another buildable lot. Id., p. 217, l.

24, p. 218, l. 1. And to the north of the way, as shown on the 3/17/03 Plan, just to the east of the boundary line, another buildable lot is shown. Id., p. 218, ll. 5-10. In a letter dated April 6, 2003, to Paul O'Leary, the appraiser (Trial Exhibit 17, A-24), in addressing which lots were wet and which were buildable, Kim never mentioned lots 1, 10 or 11 as shown on Trial Exhibit 14 (A-22) as potential problems with being buildable because they were wet. TR IV, p. 226, ll. 21-24, p. 227, l. 1 (Kim).

#### **SUMMARY OF ARGUMENT.**

This Court should accept the Land Court's findings of fact unless it determines them to be clearly erroneous, it is the Kims' burden to show that a finding is clearly erroneous, and the Land Court's findings must be accepted if supported on any reasonable view of the evidence. See infra, pp. 30-31. Moreover, this Court should "affirm [the] judgment as long as the result is correct on any ground apparent in the record that supports the result reached by the trial court." Infra, p. 31.

The Land Court correctly held that the Kims do not have the benefit of an easement implied from prior use. Infra, pp. 31-41. In order for an easement



implied from prior use to arise, the claimant must establish that during common ownership of a parcel of land an apparent and obvious use of one part of the parcel is made for the benefit of another part and such use is being actually made up to the time of severance and is reasonably necessary for the enjoyment of the other parcel. Infra, p. 32.

Reasonable necessity is a essential element to create an easement by implication. Infra, pp. 33-35. However, the reasonable necessity required for an easement by implication does not exist if the party claiming the easement has access to his land from another parcel. Infra, pp. 34-35. This is true even if the route over his own land is less convenient. Infra, p. 34. A landowner must explore the possibility of, and take advantage of, permissive access through the land of third parties before necessity can be established. Infra, pp. 34-35.

In the present case, there was no necessity when the Second Parcel was conveyed to Southard, and there is none now. Infra, pp. 35-39. First, there was access to the Second Parcel, via the way, from Division Road, when the Second Parcel was deeded to Southard. Infra, pp. 35-36. Second, even if the

Second Parcel was landlocked when it was conveyed to Southard, the Land Court correctly found that it ceased to be, and the necessity required for an easement implied from prior use ceased, when Southard acquired the Third Parcel from the Gifford's in 1968. Infra, pp. 36-39. This Court should reject the Kims' claim that the termination of necessity did not terminate any easement implied from prior use. Infra, p. 37.

After Southard acquired the Third Parcel, the Second Parcel had access to Horseneck Road, through the Third Parcel. Infra, pp. 37. There is no merit to the Kims' claim that the Third Parcel was surrounded by stone walls which prevented access to Horseneck Road. Infra, pp. 37-38. Nor should this Court accept the Kims' assertion that alleged wetland conditions on the border between the Second and Third Parcels prevents access to the Second Parcel from Horseneck Road other than via the way over the Williamson property. Infra, pp. 38-39. A 15-foot strip of upland on the border between the Second and Third Parcels allows the Kims to access the Second Parcel via the Third. Infra, pp. 38-39.

Even setting aside the availability of access via the 15 foot upland strip, and the ability to access the Second Parcel from Division Road, the Kims have not adequately established the impossibility of building a path from the break in the wall between the Second and Third Parcels, east through any wetlands, and into the remainder of the Second Parcel. Infra, p. 39.

In addition to the lack of necessity, there is no easement implied from prior use because, at the time of the conveyance of the Second Parcel in 1965, any asserted way over what is now the Williamson property was not being used to access the Second Parcel.

Infra, p. 40. In order to show an easement implied from prior use, the Kims must establish that the way over what is now the Williamson property was being used at the time of the conveyance to benefit the property conveyed (the Second Parcel). Infra, p. 40.

Here, the evidence at trial establishes that the alleged way, at least on the western portion of the Second Parcel, and the eastern portion of what is now the Williamson property, was completely overgrown by mid-1960s and was entirely impassible at that time.

Infra, p. 40. Further, there was no evidence that a

