

**LEGAL ANALYSIS OF THE OBLIGATION OF VICTORY LAKES OWNERS
TO CONTRIBUTE TO THE MAINTENANCE OF THE LAKES AND DAMS.**

FACTS

Throughout the late 1940's and the 1950s William and James Irish acquired a large number of contiguous properties in Monroe Township, Gloucester County. Within that combined property, they created three lakes, two of which were acquired by FVLA in 2004 – Upper Victory Lake and Sunset Lake. Irish then developed plans for a lakes community by subdividing the accumulated properties and marketing them as “Victory Lakes”. The advertisements for these properties included a promise that purchasers would have a right to use the lakes. The plans were submitted to the planning Board of Monroe Township and were approved by that body in a number of sections all designated as part of “Victory Lakes”. Some of those approved plans can be found online at i2e.uslandrecords.com.

Once approval was obtained from the Township, Irish began selling the lots as individual building lots. The original deeds to those lots granted the purchasers the **“right and privilege of enjoying the use of the water of Victory Lakes for the purpose of boating, fishing, swimming, provided that all of these privileges shall be governed by such rules and regulations as may be prescribed from time to time by the grantors”**. Some of the lots were eventually sold to the Lehman family and then to the Victory Sunset Maintenance Corporation, however, upon spot checking several titles to the lots in the original Irish plans, it appears that the chain of title to all of the originally subdivided lots contained the “right and privilege” to use the lakes.

This analysis is focused on establishing the legal and equitable obligation of the subsequent owners of the original Irish lots to contribute to the maintenance of the lakes and dams because of the easement to use the lake which exists in their chain of title.

ANALYSIS

Although the New Jersey Legislature has created statutes governing common interest communities, many such communities (such as Victory Lakes) had already formed by the time these laws were passed. The conceptual existence of common interest communities and the enforceable nature of their benefits and burdens therefore developed through case law long before the New Jersey legislature took action. Throughout Courts' analyses of common interest community membership, two key principles were established. First, the notice to or knowledge of a homeowner that they purchased a property within such a community; and second, the need for Courts to use equitable principles to avoid free-riding residents who refuse to pay their fair share of maintenance fees.

A. Early Common Interest Community Cases Established Principles for Assessments

In the early lake community case of Fitzgerald v. White Meadow Lake and Country Club, Inc., the Morris County Chancery Division held that one who buys into a community has notice through any preceding document in the chain of title and cannot later avoid his responsibility to fund the benefits received. Fitzgerald, No. C-3758-70 (Morris Cnty., Ch. Div.

Mar. 8, 1973). Similar to here, the focal point of the community in Fitzgerald was a lake.. On November 6, 1952, a property owners' association was formed by way of a "tripartite agreement" that conveyed this lake to the association "subject to the rights of property owners to the use of the various facilities."

The Court ruled that the homeowners must contribute to the common expenses of the lake and dam. The Court reasoned that the "purchasers had ample notice of this in their deed, and *subsequent purchasers have notice by the fact that this is in their chain of title* (emphasis supplied)." The Court further observed that regardless of whether any individual homeowner uses the lake facilities, there are clear benefits to owning property in such a community. It would therefore be entirely inequitable for those owners to avoid the costs necessary for maintaining the community, simply because of a supposed lack of lake facility use.

The Appellate Division reached a similar conclusion in the context of DEP enforcement actions related to common property in Lake Lookover Property Owner's Ass'n v. Olsen, 348 N.J. Super. 53 (App. Div. 2002). In Lake Lookover, the original developer granted easement rights to owners for use of the lake, although the phrasing in the different easements varied. In 1980, the DEP issued directives "aimed at effecting repair and reconstruction of the dam [that created the lake], which the DEP said was unsafe." These directives led to extensive litigation over many years, and eventually a settlement in which the association agreed repair the dam. Throughout the case, the association continued to inform its residents as to the seriousness of the dam issue and the actions being taken to address the threat it posed. Once confronted with the cost of this repair, however, the residents sought to abandon any rights to use the lake in an effort to avoid paying the requisite assessment.

The Appellate Division held that while this argument had a "deceptive simplicity", the owners could not suddenly avoid the burden that accompanies the benefits received in living around Lake Lookover. The Court reasoned that "[a] decision which would permit those who have enjoyed use of that easement to now avoid such payment, simply by an act of purported abandonment of the easement, would make little sense." After all, the association had "supervised use of the lake and attended to routine repairs and other matters that required attention throughout the life of the Lake Lookover community." The association also dealt with the complex litigation arising from DEP action, and notified residents as to the actions being taken. In sum, the Court denied the ability of owners to opt out of the association for *any* reason in light of the patent injustice that would be created by skirting the maintenance costs of a lake enjoyed by all.

The Appellate Division revisited the difficulties faced by community associations hit with expensive DEP actions in Citizens Voices Ass'n v. Collings Lakes Civic Ass'n, when it found that a contractual ceiling of \$48 monthly assessments was enforceable but could be changed if necessitated by cost overruns. Citizens, 396 N.J. Super. 432, 446 (App. Div. 2007). Much like the present case, Collings Lakes is a lake community that was formed in the 1950s by way of master deeds that placed covenants and restrictions on the land. Also, like Victory Lakes, for many years the annual fee was only assessed against those residents who voluntarily joined the association. However, a 2000 DEP action that required upgrades to the dam at Collings Lakes led the association to raise the annual fee to \$75 for volunteers and created mandatory membership for \$48. Some of the Collings Lakes residents challenged the increase on the basis that the master deeds explicitly capped the assessments at \$48. The trial court and Appellate Division held that "the general rule is that the dominant estate has a right to maintain an

easement and with that right to maintain goes the obligation to pay for that maintenance absent an agreement to the contrary." The Appellate Division found that the assessment cap in the master deeds constituted such an "agreement to the contrary", but specifically noted that Collings Lakes was free to later present evidence regarding the costs of dam repair in order to obtain an increase of the assessments. The Court thus clarified that its ruling was narrow in scope, and that there are many reasons for its ability to later change the assessment cap provided for in the master deeds.

For example, the Appellate Division ruled that it could have increased the assessment had there been firm costs in the record as to what the repairs would cost. The ability to do so is based on the Court's "reservoir of equitable power to modify or terminate a servitude should changes occur in the future which would make it impossible as a practical matter to accomplish the purpose for which the easement was created." The Appellate Division emphasized that there are a variety of equitable principles supporting the enforcement of assessments in a lake community that supersede any explicit contractual language. From owners' perspectives, for example, the refusal of some to pay assessments could lead to blighted areas and a decrease in property value for all residents. Furthermore, the Safe Dam Act was created so that the DEP could address dams that are "a security or safety concern." N.J.S.A. 58:4-1(a). The health and safety of the public may therefore also be at issue if communities refuse to pay maintenance fees for common property, and an unfair shifting of the burden to the general public would necessarily result. Citizens, 396 N.J. Super. at 446. The Appellate Division highlighted these collective action problems that arise in common interest communities, and the apparent ignorance of members as to property value benefits they receive, before ruling that the association could later increase the fees if it produced evidence on the subject of dam repair costs. That Collings Lakes matter was

finally resolved by a settlement and resulted in a court order requiring all property owners to contribute.

B. Courts Have Increasingly Placed Substance over Form in Enforcing Common Interest Communities in Recent Lake Community Litigation

As lake communities continue to age, Courts have continued expanding the emphasis on substance over form in enforcing assessments against residents who look to skirt their responsibility to contribute to maintenance. In 2013, residents in the Lake Arrowhead community argued that its governing association could not make membership in the community mandatory after it had been voluntary for 50 years. Unfair Share, No. MRS-C-43-11, *2 (Law Div. Oct. 28, 2013). The Morris County Law Division rejected this contention, finding that the residents knew they had purchased property in a common interest community and certainly benefitted from the lake at its center. The Court held that, in addition to prior deeds containing the necessary restrictions, even a physical inspection of the property would have put owners on notice that they were purchasing into a lake community that would have maintenance requirements. (citing Camp Clearwater v. Plock, 62 N.J. Super. 583, 598 (Ch. Div. 1950). Furthermore, while the association may have once been able to fund repairs using voluntary membership fees alone, the Court held that it "would be unreasonable for this Court to conclude that the [association] could not now seek payment of the necessary expenses to fulfill its responsibilities from all those who enjoyed residence in the Lake Arrowhead Community." The Court thus held that the change in circumstances required that the

association seek contribution from all residents, and proximity to the lake or use thereof did not change its ability to do so. In 2018, the Bergen County Law Division reached a similar conclusion as homeowners around Ramapo Mountain Lakes attempted to deny notice of membership in a common interest community. Ramapo Mountain Lakes Inc. v. Owners of Property in Ramapo Mountain Lakes, BER-L-5969-18 (Law Div. Dec. 21, 2018). Notably, the Court in Ramapo followed precedent in declining to adopt any single controlling fact on the issue of notice. Instead, the Court pointed to a variety of ways in which the residents could have discovered they were part of a common interest community that would have to contribute to lake maintenance. The Court noted that a title search would have shown the original deed came from a developer of the community, that the legal descriptions refer to the properties falling within a map of Ramapo Mountain Lakes, and a recorded conveyance of common property to an association. The Court ruled that any of these facts would have placed the owners on notice of inclusion in a common interest community, and thus the owners' denial of notice was disingenuous at best.

In addition to notice of the community, the Court pointed to the Planned Real Estate Development Full Disclosure Act ("PREDFDA") governing common interest communities. N.J.S.A. 45:22A, *et seq.* The Court noted that the statute was passed to govern property sold pursuant to a common promotional plan regardless of when it was created. As occurred throughout the cases over lake communities, the Ramapo Court emphasized the necessity of this statute and common law for overcoming the collective action problem. In fact, the Court reasoned that "the clear intent [of the statute] was to provide consistency of management and to *safeguard the interest of the owners.*" (emphasis added). The Court correctly identified that when it comes to common interest communities, a few dissidents can create havoc for the larger body

of owners. It is therefore necessary that the Courts enforce the principle that "[s]hared ownership means shared responsibilities." Against the backdrop of common law and state statute, the Ramapo Court concluded that an owner in a common interest community must contribute to common property maintenance in the state of New Jersey.

In 2019, Morris County provided the latest application of these principles in a lake community case. In Purzycki v. Lake Pasippany Property Owners' Ass'n, Inc., a lake community in which membership was voluntary for 80 years came to the realization that it simply could not fund its general maintenance obligations on a voluntary basis. Purzycki, No. MRS-C-2-17, at *1-2. The dissident residents argued that they lacked notice of inclusion in a common interest community. The Court rejected the argument and found that that a random sampling of deeds in the community disclosed an easement to use the lake, and thus notice that owners "could be subject to later assessments.". As was the case in Citizens and Ramapo, the Court focused on the non-excludable aspect of common property maintenance and collective action problem of protesting residents. Specifically, the Court held that "at a minimum, [the association's] role in maintaining the Lake and recreational facilities enhances or at the very least sustains the value of nearby properties, since a poorly maintained lake would certainly be unattractive to potential buyers, and could also implicate public health or safety." The Court concluded that associations have broad legal powers to use assessments to fund common property maintenance, and the Plaintiffs' denial of notice in that case failed to disturb that precedent.

C. The Victory Lakes Owners had Ample Notice that they Purchased Property in a Common Interest Community

With regard to the properties that were part of the original Irish subdivision plans, there is no genuine dispute that those owners had actual and constructive notice of their inclusion in a common interest community through both the location and a review of the chain of title and that equity requires they contribute to its maintenance.

At the outset, a "physical inspection of the property" alone would have put each owner on notice of its existence. See Unfair Share, No. MRS-C-43-11, at *2. It would be implausible for those owners to argue that the property was not heavily advertised to them as part of a lake community, or that they were otherwise unaware of the connection to Victory Lakes. The owners also cannot deny notice through their chain of title, as publicly filed maps and preceding deeds show a clear "common promotional plan and common name." as set forth in the opening paragraphs of this letter. (see sample Deed from Irish to Lennox).

A search of the plans on file with the County Clerk and available online show the Victory Lakes plan, and demonstrates clearly that Mr. Irish accumulated a single tract of contiguous land and then it was subdivided into a lake community. The subdivision plans, approved by the Township, provide detailed sketches of each plot of land that was included in the lake community. Accordingly, the chain of title and other available documents unequivocally establish that (1) the properties listed in the attachment to this letter were subdivided from a single plot of land; (2) that the land was included in a planned real estate development scheme, and (3) that the subdivision plans detail the listed properties' existence within the Victory Lake community.

D. Equity Requires that the Listed Property Owners in Victory Lakes Contribute to the Maintenance of Common Property

For almost fifty years, New Jersey Courts have recognized that owners in a lake community simply cannot have their cake and eat it too, In Fitzgerald, the Court was faced with a sunset clause on the obligation to pay into common property maintenance and ruled that it clearly undermined the intent of the covenant to run indefinitely. Fitzgerald, No. C-3758-70. The Court recognized that the lake did not stop needing maintenance on the expiration date and held that "the termination clause does not change the nature of the plan, which was to continue, and it does not terminate the obligation to pay dues or to be a member of the Country Club." The Appellate Division also rejected the argument of abandonment of an easement just as maintenance becomes expensive because "the fact is that the present easement holders or their predecessors in title have enjoyed the benefit of the Lake". Lake Lookover, 348 N.J. Super. at *66. While some lake communities may survive on voluntary membership for a limited time, circumstances change and the Court has extensive equitable power to ensure all property owners pay their fair share in its continued maintenance. See Unfair Share, No. MRS-C-43-11. This obligation becomes especially important when it is not just fellow residents whose interests are threatened by non-payment, but the safety of the public in general. See Citizens Voices, 396 N.J. Super. at 445 (noting the threat to public health and safety if dams are not maintained); see Purzycki.

The listed owners' duty to contribute funds to the maintenance of a lake that they have enjoyed and now presents a safety hazard to the public is therefore firmly established in New Jersey case law. All property in this case either sits on the 2 lakes owned by FVLA or is located within in close proximity. The FVLA has maintained the lake since its inception, built

and financed a dam that was required by the State all for the benefit of the Victory Lake community residents. These non-excludable services accrue to the benefit of the listed owners regardless of any recreational activities they undertake, and their "shared ownership means shared responsibilities." Ramapo, No. BER-L-5969-18, at *15. It is simply untenable for the listed owners to argue that they should not contribute to the association that maintains a lake that is at the center of their community.

This equitable principle becomes even more crucial when owners are not only risking their own and neighbors' property values, but the health and safety of the public in general. The New Jersey Dam Act was passed in order to provide the DEP with the power to address any dam or reservoir that "has a security or safety concern." N.J.S.A. 58:4-1, The DEP has extensive authority to do so, including requiring periodic reports from owners, the ability to compel any "additions and repairs" necessary to make it safe, and the liability of any owner for costs the DEP must undertake to fix an unsafe dam due to inaction. N.J.S.A. 58:4-5(a)-(c). It is this latter provision that addresses situations such as here, where the owner is an association that includes individuals refusing to contribute to the maintenance. Recognizing the problem this creates, the Court in Lake Lookover and Citizens Voices reiterated the equitable principles compelling contribution to maintenance costs and noted its importance in the context of environmental protection laws. Neither the community nor New Jersey residents can afford to permit dams to fall into disrepair when the very owners who enjoy its benefits refuse to make contributions to their maintenance.

Unfortunately, that is precisely the situation that exists at Victory Lakes where the State has mandated the rebuilding of the dam. The FVLA has undertaken extensive efforts for almost a decade in order to solve these problems for the benefit of the listed owners and the public in

general. The listed owners may not like paying to maintain the lakes, "[b]ut when one buys into an arrangement like this where there is adequate notice of what the legal situation is, one assumes the burdens as well as the benefits." Fitzgerald, No. C-3758-70, at *25. The listed owners purchased lake community property because they wanted to enjoy its benefits, and New Jersey Courts have firmly established that they cannot now risk public safety in an attempt to shift their burden onto others.

E. Conclusion

The listed owners of lots in the Victory Lakes Community that were part of the original Irish sub-division have clear legal and equitable obligations to contribute to the maintenance and upkeep of the lakes and dams and those obligations can be enforced by way of a declaratory judgment action or a simple collection action against the non-contributing owners.

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