**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

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| SANDIE, LLC, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | *Civil Action No. 6048-VCG* |
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| THE PLANTATIONS OWNERS ASSOCIATION, INC., and THE PLANTATION CONDOMINIUM ASSOCIATION, INC., | ) | |
| | ) | |
| Defendants. | ) | |

# MEMORANDUM OPINION

Date Submitted: April 30, 2012
Date Decided: July 25, 2012

Dean A. Campbell, of LAW OFFICE OF DEAN A. CAMPBELL, LLC, Georgetown, Delaware, Attorney for Plaintiff.

David C. Hutt, of WILSON, HALBROOK & BAYARD, P.A., Georgetown, Delaware, Attorney for Defendants.

GLASSCOCK, Vice Chancellor

This matter involves access over and maintenance of roads and use of a parking area in The Plantations. The Plantations is an attractive and well-maintained condominium and housing development, located just south of the community of Belltown, Delaware, a few miles west of Lewes.[1] When the original developer of The Plantations, Crown Estates, created the subdivision in 1986, it retained a 4.3 acre parcel (the "Recreation Area") within the area dedicated to The Plantations. Crown Estates established recreational facilities in the Recreation Area, including a pool, tennis courts, and a gym. The residents of The Plantations had access to these facilities only as did other members of the general public; that is, they could use the facilities for a fee. In other words, Crown Estates retained

[1] Sussex County has been my home, man and boy. I like to think no one is more aware of, and grateful for, its virtues and amenities than am I. Sussex County, however, has a history that should not be forgotten. As Vice President Biden has pointed out, Delaware was a slave state, *see Joe Biden's Greatest Hits*, WALL ST. J., Aug. 23, 2008, http://online.wsj.com/article/SB121948704367466393.html, and the main locus of its chattel slavery was the broad fields of Sussex. WILLIAM H. WILLIAMS, SLAVERY & FREEDOM IN DELAWARE 1639–1865, at 99 (1996). The County is adjacent to Maryland's Eastern Shore, whose most famous daughter and son are Harriet Tubman, born on the Brodas plantation, celebrated conductor of the Underground Railroad and advocate for women's suffrage, and Frederick Douglass, the escaped slave and abolitionist who became one of nineteenth-century America's most famous intellectuals. A few miles to the east, Sussex' most infamous resident was the notorious slave catcher Patty Cannon. In more recent times, *de jure* and customary racial segregation of public facilities, including schools, beaches and hospital wards, existed well within living memory. Belltown itself is an historic settlement of African Americans, many of whom in the early years of the last century made the three-mile walk into Lewes for work each morning, and the three-mile walk home each night. *See* DELAWARE: A GUIDE TO THE FIRST STATE 493-94 (Jeannette Eckman, Anthony Higgins & William H. Conner eds., 1938). Belltown's school, which closed in the 1960s, was a one room, racially segregated facility. *Belltown Focus of Lewes Historical Society Meeting Slated Feb. 19*, CAPE GAZETTE, Feb. 18, 1999, at 24. Sussex, like the rest of formerly segregated America, has made enormous strides in civil rights in the past half-century, and the bad times described are gone, one might say, with the wind. And yet, when the developer in the 1980s picked a name for its upscale gated development adjacent to Belltown, it chose "The Plantations." Go figure.

from the land used to establish The Plantations a parcel on which it conducted a private health club business.

In creating the Recreation Area, however, Crown Estates failed to reserve an express easement to the public road. Thus, when the owners of the Recreation Area and customers of the health facility access the property, they must do so over lands owned by Defendants The Plantations Owners Association, Inc. (the "Owners Association"), and The Plantation Condominium Association, Inc. (the "Condominium Association," and together with the Owners Association, the "Associations"). The Associations own and maintain the common areas of The Plantations, including the roads and parking areas. Most of the customers of the health facility are not owners of property in The Plantations.

The Recreation Area, which is still in use as a health facility, has been sold and is now owned by the Plaintiff, Sandie, LLC ("Sandie"). In the past, the Associations and the owners of the Recreation Area have been able to come to terms on an agreement for access by the owners and their customers to facilities constructed on the Recreation Area as well as to an adjacent parking lot and storage shed on the property. Sandie and the Associations have been unable to reach such an agreement, however. Sandie brought this action, seeking to establish that an easement exists in its favor over the roads of the Associations and for use of a parking lot adjacent to the Recreation Area. Sandie also asserts that it is under no

obligation to contribute to the upkeep of the property over which it claims an easement. In support of its claim, Sandie relies heavily on a Declaration of Covenants, Conditions and Restrictions for The Plantations (the "Declaration"), which Crown Estates filed contemporaneously with the initial plots that subdivided The Plantations. The Declaration is, in parts, poorly drafted and unclear. The parties have filed cross motions for summary judgment, which have been briefed and argued. This is my decision on those motions.

## I. BACKGROUND

### *A. The Parties and the Property*

The Defendants, the Owners Association and the Condominium Association, are not-for-profit Delaware corporations that manage and administer the homeowners and condominium associations, and their respective properties, within The Plantations.[2] The Plantations is a residential community located on the west side of County Road No. 275, now known as Plantations Road, near Lewes, Delaware.[3] The Plantations includes a number of single-family homes and condominium units. The Defendants maintain the common elements of The

[2] The parties have been less than precise in delineating which association owns which of the roads and lots at issue. The distinction between the two entities does not ultimately affect my analysis, however.

[3] The Plantations is also known today as "Plantations West" due to its location relative to County Road No. 275. The original developer of The Plantations also purchased property to the east of County Road No. 275 that was part of the original subdivision described below. That eastern parcel is now known as "Plantations East" and is not the subject of this litigation.

Plantations, which include, among other things, various roads, parking lots, buildings, and open spaces.

The Plantations also includes a parcel of property known as the "Recreation Area," which is owned by the Plaintiff, Sandie. The parties' property was part of a larger tract of land purchased by Crown Estates, the original developer, in July 1984 (the "Property"). Through a series of transactions following the subdivision of the Property, the Plaintiff came to own the Recreation Area, which now offers such recreational activities as tennis, fitness, swimming, and yoga.

When Crown Estates divided the Property, it retained ownership of the Recreation Area. Thus, rather than making the Recreation Area a common element to be controlled and operated by the Associations, Crown Estates chose to establish it as a standalone commercial enterprise. When it subdivided the Property, Crown Estates failed to reserve for the owner of the Recreation Area an easement for access to a public road. Presently, the only means of such access is Plantations Boulevard, a private road owned by the Associations.

Adjacent to the Recreation Area are additional lanes and a parking lot over which the Plaintiff claims an easement. One lane runs along the north side of the Recreation Area and connects Plantations Boulevard, which terminates in a circle in front of the Recreation Area, with a parking lot on the rear portion of the Recreation Area (the "North Lane"). The North Lane is currently the only means

by which vehicles can access the rear parking lot of the Recreation Area (the "Rear Lot"). Though a row of parking spaces abuts the front of the Recreation Area clubhouse, the Rear Lot contains the bulk of the parking spaces on the Plaintiff's property. East of and adjacent to the Plaintiff's property lies a larger parking lot owned by the Associations (the "Front Lot"). From the south end of the Front Lot runs a short paved road (the "Storage Lane") that leads to the main doors of a storage building located in the Recreation Area (the "Storage Shed"). The Storage Lane lies entirely on the Defendants' property, but appears to serve no purpose other than to provide vehicular access to the Storage Shed, which is located entirely on the Plaintiff's property. The Recreation Area's northern property line, by contrast, runs more or less directly down the center of the North Lane, rendering that lane practically unusable absent easement rights or agreement between the Associations and the owner of the Recreation Area.[4]

*B. Creation and Subdivision of The Plantations*

On July 20, 1984, Crown Estates acquired the Property, approximately 154.59 acres along County Road No. 275 in Lewes & Rehoboth Hundred, Sussex County, Delaware. On April 24, 1986, Sussex County approved a site plan for the Property, and on December 12, 1986, Crown Estates recorded plots with the Sussex County Recorder of Deeds (the "Initial Plots"). The Initial Plots divided the

[4] To aid the reader's comprehension, an exhibit graphically illustrating the layout described above is included at the end of this Opinion.

Property into six areas: Phase 1, Phase 2,[5] Phase 3,[6] Future Development, the Spray Irrigation Area, and the Recreation Area. Excluding the Future Development area, these areas constitute The Plantations.[7] Also on December 12, 1986, Crown Estates submitted Phase 1 to the Unit Property Act,[8] thereby subjecting it to condominium ownership.

*C. The Declaration*

On the same day that it recorded the Initial Plots and subjected Phase 1 to condominium ownership, Crown Estates recorded the Declaration. The Declaration sets forth restrictive covenants and conditions intended to govern the relationship between the developer of The Plantations and the Associations. The Plaintiff argues that the Declaration demonstrates Crown Estates' intent with respect to the easement right of the owner of the Recreation Area over Plantations Boulevard.

The preamble to the Declaration suggests a development plan that never came to pass. It provides that Crown Estates "will retain fee simple interest in . . . [the Recreation Area], which it desires to develop for recreational purposes for the

[5] Phases 1 and 2 now contain twenty-five condominium buildings, each comprising eight condominium units. The Condominium Association administers these properties.

[6] Phase 3 was subdivided into thirty-two single-family lots. The Owners Association administers these properties.

[7] The Future Development area is located on the eastern side of Plantations Road and is now known as "Plantations East." A corrective declaration was filed in June 1993 to clarify that the property subject to the Declaration included only the property west of Plantations Road, and not the Future Development area.

[8] 25 *Del. C.* § 2201 *et seq.*

benefit of the Property[9] and other property referred to as the 'spray irrigation area'."[10] The preamble further provides that Crown Estates, in order to "provide for the preservation of the values and amenities of the Property and for the development and maintenance of the Property . . . desires to subject the Property to the covenants, conditions, restrictions, easements, charges and liens," set forth in the Declaration, "for the benefit of the Property and each owner of a condominium unit, lot or improvement thereon."[11] The preamble also indicates Crown Estates' intent to create the Owners Association,[12] "to be delegated and assigned the responsibility of maintaining and administering the [Recreation Area] and administering and enforcing the covenants and restrictions and levying, collecting and disbursing the assessments and charges" created by the Declaration.[13]

The preamble is inconsistent with the ownership scheme ultimately realized.[14] It would make little sense for the Owners Association to be responsible

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[9] The Declaration uses the term "Property" to refer to The Plantations. *See* Declaration of Covenants, Conditions and Restrictions for The Plantations at 1, Pl.'s Mot. Summ. J. Opening Br. Ex. A [hereinafter "Declaration ___"].

[10] Declaration at 1.

[11] *Id.*

[12] It is not clear from the record when either the Owners Association or the Condominium Association was incorporated, or what portions of The Plantations those entities actually own. As stated earlier, this distinction does not affect my decision. Nevertheless, the thin and at times contradictory factual record of this case has not lent itself to a straightforward application of the law of servitudes.

[13] *Id.*

[14] Though these inconsistencies do not weigh on my decision regarding the Plaintiff's easement rights, they nonetheless inform the conflict that gave rise to this action: a deadlock between a homeowners association and the owner of a parcel encircled by the homeowners association's

for "maintaining and administering" the Recreation Area, over which it has no control or access rights. The preamble's assignment of this duty to the Owners Association would be consistent with a plan in which some commonality remained in perpetuity between the owner of the Recreation Area and the Owners Association, such as a situation where Crown Estates would retain ownership of the Recreation Area through the completion of its development, at which point Crown Estates would convey the Recreation Area to the Owners Association.[15] Alternatively, if the Declaration conferred certain rights or benefits not held by the public on the residents of The Plantations, the residents would at least receive some consideration for funding the maintenance of the Recreation Area. If such was the original plan, it was abandoned.

Despite the preamble's suggestion that a relationship more substantial than one of adjacency would exist going forward between the Owners Association and the Recreation Area owner, several provisions in the remainder of the Declaration contradict that suggestion. For instance, Article III, Section 2(A) states that Crown Estates "intends to convey the legal title to the [Recreation Area] to

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property, seemingly created for the benefit of the residents of the homeowners association, but presently operated as an independent commercial enterprise.

[15] Based on the Association's voting rights created by the Declaration, such a transfer of ownership appears to have been contemplated, albeit not ultimately effected. The Declaration creates two classes of voting membership, one of which comprises the Developer alone. *See id.* art. II, § 2(b). Pursuant to the Declaration, the Developer's voting rights are extinguished "at such time as the Developer transfers its interest in the Recreational and waste water facilities to the Association, but in any case shall terminate no later than December 31, 2016." *Id.*

RECREATION INTERNATIONAL, INC. . . . which will be the operating entity of the recreational facilities," while the preamble indicates that the to-be-created Owners Association would "maintain[ ] and administer[ ]" the Recreation Area.[16] Moreover, the Declaration does not restrict the right of Crown Estates or its successors to convey the Recreation Area to a third party, other than by providing the Owners Association with a right of first refusal.[17] Acknowledging that the Associations have never provided maintenance for the Recreation Area, and apparently recognizing that an obligation to do so would be unusual following a transfer of the Recreation Area to a third party for commercial use, the Plaintiff does not contend that the Declaration obligates the Defendants to maintain or administer the Recreation Area.[18]

Article III establishes the Homeowners' "Property Rights" in the Recreation Area. Section 1, purporting to establish "Owners' Easements of Enjoyment," provides that, "*[s]ubject to the provisions of Section 3 of this Article III*, every [Homeowner] *upon payment of fees established by [Crown Estates]* shall have a right of enjoyment in and to the [Recreation Area] and the recreational facilities

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[16] *Compare id.* art. III, § 2(A), *with id.* at 1. Recreation International, Inc. is a Delaware corporation owned by Crown Estates.

[17] *See id.* art. III, § 2(A) ("The Developer intends to convey the legal title to the [Recreation Area] to [Recreation International], a Delaware Corporation owned by the Developers, which will be the operating entity of the recreational facilities. The Developer hereby reserves the right to continue ownership for an indefinite time[;] However, Developer covenants for itself, it [sic] successors and assigns, that if developer divests itself of the property, or ownership of the corporation, it shall grant to the association the right of first refusal to purchase the facilities.").

[18] *See* Pl.'s Mot. Summ. J. Opening Br. at 4.

thereon, and such easement shall be appurtenant to and shall pass with the title to every condominium unit, lot or improvement thereon."[19] Section 1 only *purports* to establish easements of enjoyment because the Declaration does not grant the Homeowners any rights in the Recreation Area that are not also available to the general public. Section 1 conditions access on the "payment of fees established by the Developer."[20] Section 3, which limits the "rights" granted in Section 1, preserves "[t]he right of the [Crown Estates] to allow persons other than [a Homeowner] to use the recreational property and recreational facilities and to charge reasonable admission and other fees for the use thereof."[21] Additionally, Section 3 preserves "[t]he right of the Developer to establish allowable commercial uses in the 'recreational area', to build structures to house such uses and to lease said structures to business operators or to operate said businesses itself for an indefinite time."[22] In other words, Article III grants the Homeowners the "right" to pay for a health club membership, a "right" available to members of the public.

Article IV establishes the Associations' rights to levy and collect assessments from the Homeowners. Article IV, Section 2 sets forth the purpose of these assessments:

[19] Declaration art. III, § 1 (emphasis added).
[20] *Id.* art. III, § 1.
[21] *Id.* art. III, § 3(b).
[22] *Id.* art. III, § 3(d).

> The assessments levied by the Association shall be used exclusively for the purpose of promoting the recreation, health, safety and welfare of the residents of the Property and for the benefit of those persons permitted to use the [Recreation Area] and facilities by the Developer, and in particular for the improvement and maintenance of the Property, maintenance of roads, wastewater collection and treatment and other facilities devoted to the common use and enjoyment of the owners, including, but not limited to, the addition thereto, for the cost of labor, equipment, materials, management and supervision thereof, and for operating reserve funds and reserve funds for repair and replacement of the facilities thereon.[23]

Section 1 of Article IV makes clear that it is the Homeowners who are obligated by the Declaration to pay the assessments.[24] As the Plaintiff points out, the Declaration does not obligate the owner of the Recreation Area to pay assessments or otherwise contribute toward the maintenance of the common areas of The Plantations.

Neither, however, does the Declaration expressly grant the owner of the Recreation Area an easement over the roads or other property of The Plantations.[25] Article V, Section 2, sets forth access easements and provides that

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[23] *Id.* art. IV, § 2.

[24] *See id.* art. IV, § 1 ("The owner of each condominium unit, lot or improvement thereon, by acceptance of a deed lease or other transfer document therefor, whether or not it shall be so expressed in such deed or other transfer document, is deemed to covenant and agree to pay the Association: (1) annual assessments or charges, and (2) special assessments for capital improvements and operating, repair and replacement reserve funds . . . .").

[25] *See* Defs.' Counterclaim ¶ 19 ("None of the Initial Plots, the Restrictive Covenants, condominium documents or deeds conveying the Recreation Area contains an easement to allow the owner of the Recreation Area to have ingress and egress from County Road No. 275 (Plantations Road) to the Recreation Area."); Pls.'/Counterclaim Defs.' Answer to Counterclaim ¶ 19 ("Admitted.").

> [e]very owner shall have an easement over and across the Roads, and streets of the Plantations and Property owned by the Association, and such easement shall be appurtenant to and shall pass with the title to every unit, lot or improvement thereon. Any Owner may delegate his right of access to the Common Areas to the members of his family, tenants, or contract purchasers . . . who reside in the unit or to such other persons as may be permitted by the Association.[26]

The parties agree that the Plaintiff is not a unit or lot owner and is not a member of the Associations under the terms of the Declaration, and that therefore the language in Article V, Section 2, does not expressly grant the Plaintiff easement rights.[27]

Article VII provides that "[t]he Restrictions, Covenants and Conditions of [the] Declaration run with and bind the Property and shall inure to the benefit of and be enforceable by the Association, or the owner of any unit or parcel subject to [the] Declaration . . . ."[28]

The parties agree that under the terms of the Declaration, Sandie, as owner of the Recreation Area, is neither the holder of an express easement over the private roads of The Plantations (as are the Homeowners) nor subject to the annual and special assessments by the Associations (as are the Homeowners).

*D. Crown Estates Conveys The Plantations*

The history of the transfers of the common areas, the Recreation Area, and the undeveloped portions of The Plantations, to the best of my ability to decipher

[26] Declaration art. V, § 2.
[27] Article II, Section 1 of the Declaration defines the membership of the Owners Association. It provides that "[e]very owner of a condominium, lot or improvement thereon, in THE PLANTATIONS shall be a member of the Association." *Id.* art. I, § 1.
[28] *Id.* art. VII, § 1.

an unclear record, is as follows. On August 14, 1987, Crown Estates deeded the Recreation Area to Recreation International, Inc. ("Recreation International"), a Delaware corporation it owned. The survey calls in the deed describe the property line of the Recreation Area running "to the center of a road."[29] It is clear from the preceding calls that this description refers to Plantations Boulevard. Several months later, in mid-January 1988, Crown Estates submitted Phase 2 to the Unit Property Act. Though Phases 1 and 2 were thereafter subject to condominium ownership, Crown Estates remained the owner of the undeveloped portions of those properties.

On September 21, 1989, Crown Estates conveyed the undeveloped portions of Phases 1 and 2 to The 1600 Limited Partnership ("1600 LP"), an entity unaffiliated with Crown Estates. Simultaneous with that conveyance, Recreation International and the Associations conveyed the Recreation Area to YMG Recreation Corporation ("YMG"), an entity affiliated with 1600 LP.[30] It appears that control of the Associations, which owned the common areas, was transferred to 1600 LP as well.

At this time, the administration and management of the Owners' Association worked to fulfill the objectives of the Declaration by managing both the Recreation

[29] *See* Defs.' Mot. Partial Summ. J. App. Ex. I. Subsequent deeds of the Recreation Area also used Plantations Boulevard in describing the property. *See id.* Exs. M, V, W.

[30] For its part in the conveyance, the Owners' Association transferred its right of first refusal to YMG, a right created by the Declaration. *See* Declaration art. III, § 2.

Area and the common elements of The Plantations. This was feasible because, just as was the case under the tenure of Crown Estates, the entities that owned the Recreation Area and the common elements—YMG and 1600 LP, respectively—had a common owner. Nonetheless, the residents of The Plantations were not represented on the board of the Owners Association. In 1991, the residents of The Plantations organized the Plantations Civic Association, seeking a unified means of communicating with 1600 LP, the entity responsible for assessing fees under the Declaration. In January 1999, the residents assumed control of the Defendant Owners Association and Condominium Association, owners of the common areas including the private roads of The Plantations.

*E. Enter Sandie*

YMG conveyed the Recreation Area to the Plaintiff on December 19, 2007. In August 2008, the parties reached an initial agreement whereby Sandie would pay the Associations a monthly fee of $1200 for use of the roads of The Plantations and the Front Lot. This fee covered general road maintenance and groundskeeping on land owned by the Associations. In 2009, the parties renegotiated their agreement and entered a new one-year agreement raising the monthly contribution to $1650. In 2010, however, the parties' attempts to reach a new agreement failed. Sandie refused to pay any amount for general groundskeeping or road maintenance and balked at the Associations' attempt to allocate to Sandie 36% of these annual

expenses. Sandie also objected to the Associations' seeking a permanent easement agreement. Sandie sent a check for $300 to the Associations, purportedly offering that amount as a monthly payment for use of the Front Lot. The Associations refused to negotiate an agreement related only to use of the Front Lot, however, and returned the check. When the parties' negotiations regarding Sandie's contribution obligations fell through, the Associations barricaded the Front Lot.

*F. Procedural History*

In response to the barricading of the Front Lot, Sandie filed its Verified Complaint ("Complaint") in this action, seeking (1) a preliminary injunction ordering the removal of the barricade; (2) enforcement of the Plaintiff's rights under the Declaration; (3) enforcement of an implied easement, as an alternative to Count II; (4) damages for intentional interference with business relations;[31] and (5) an award of attorneys' fees. In addition to these five counts, the Plaintiff sought a temporary restraining order ("TRO") requiring the Owners Association to remove the Front Lot barricade. Chancellor Chandler heard argument on the TRO and on December 14, 2010, entered an order returning the parties to the status quo ante by requiring the Associations to remove the barricade and requiring the Plaintiff to pay $1,650 per month (the amount Sandie had been paying under its

[31] During the course of discovery, Sandie withdrew this count.

2009 agreement with the Associations) to the Register in Chancery pending the resolution of this case. Those payments have been continuing and are current.

The parties have filed cross motions for summary judgment on three issues: (1) whether the Plaintiff is obligated to contribute to the maintenance of Plantations Boulevard, over which it has an implied easement; (2) whether the Plaintiff has easement rights over the Front Lot, North Lane, or Storage Lane; (3) whether the Plaintiff and its customers have an easement right to use the Front Lot for parking purposes; and (4) whether the Plaintiff is entitled to attorneys' fees.

## II. STANDARD OF REVIEW

This Court will grant a party's motion for summary judgment where the record reflects that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law.[32] Issues on which the parties have cross-moved for summary judgment are deemed submitted for decision on a stipulated record, absent argument from either party that there remains an issue of fact material to the disposition of the cross motions.[33]

Here, the parties submit that no genuine issue of fact exists that is material to the disposition of their cross motions for summary judgment. Moreover, the parties have represented to the Court that further opportunity to develop the facts of this case beyond the extant record would be fruitless. The parties nonetheless agree

[32] Ch. Ct. R. 56(c).
[33] *Id.* 56(h).

that, should I find an obligation on the part of the Plaintiff to contribute to the maintenance of any property burdened by an easement, the extent of that obligation is a factual issue requiring further proceedings or agreement between the parties.

## III. ANALYSIS

The parties have cross-moved for summary judgment on the issue of whether the Plaintiff has easement rights over the roadways providing access to the Rear Lot and the Storage Shed (i.e., the North Lane, the Front Lot, and the Storage Lane). As to Plantations Boulevard, the parties do not dispute that the Plaintiff has an implied easement of access, be it one of necessity or through a quasi-easement or otherwise, over that road. Rather, they dispute whether the implied terms of the easement obligate the Plaintiff to contribute to the maintenance of Plantations Boulevard. The Plaintiff has additionally moved for summary judgment on the issue of attorneys' fees. I address these issues below.

### *A. Use of Roadways Adjacent to the Recreation Area*

The Recreation Area is occupied by structures in such a way that the Storage Shed and the Rear Lot can be accessed by vehicles only over the private roads of The Plantations. The roads in question lie adjacent to and in some areas partly upon the Recreation Area property. They include the North Lane, the Storage Lane, and a lane running across the Front Lot.

The parties have argued whether an implied easement, by way of a quasi-easement, exists over the private roads within The Plantations providing access to these portions of the Recreation Area. A quasi-easement exists when a single owner uses one of his properties to benefit another, and is a "quasi" easement in the sense that because easements merge with title, a common owner cannot own an actual easement in his own property.[34] A quasi-easement generally becomes an enforceable, implied easement, based on the preexisting use when title to the dominant and servient tracts is severed.[35] Given these common law requirements, the parties have argued forcefully as to when the partition of the Recreation Area from the rest of The Plantations effectively occurred, what the state of construction was at that time, and when the Associations acquired the potentially servient property. In my view, however, the proper analysis is altogether simpler than that called for in evaluating whether an implied easement was created in this manner.

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[34] *See Judge v. Rago*, 570 A.2d 253, 258 (Del. 1990) ("If a single party owns two parcels of property and uses one to benefit the other, no actual easement is created since only one owner is involved. Because this use resembles an easement, however, it is referred to as a 'quasi-easement.'").

[35] *See id.* at 258 ("If the property owner . . . conveys the 'quasi-servient tenement,' he may retain an actual easement appurtenant to the land he keeps, even if the conveyance is wholly silent on the question of easements and even if the easement is not absolutely necessary for the enjoyment of the retained property. . . . It is presumed that a grantor in this situation does not wish to abandon the preexisting land use; the grantee is put on notice by observing evidence of the preexisting use."); *Potter v. Gustafson*, 192 A.2d 453, 455 (Del. Ch. 1963) ("While the legal basis or rationale of the rule of implied easements from pre-existing use upon severance of title is often stated as an implied or presumed grant, the underlying basis of such rule is that unless the contrary is provided, all privileges and appurtenances which are obviously incident and necessary to the fair enjoyment of the property granted substantially in the condition in which it was enjoyed by the grantor are included in the grant.").

An easement can generally be created by express grant or reservation, by implication, or by prescription.[36] Nothing in the record supports an express easement, which requires a writing, or an easement by prescription, and the Plaintiff does not argue to the contrary. An easement may nonetheless be created by implication, without a writing, if the surrounding circumstances "indicate that the parties to a real estate transaction intended to convey an easement but failed to do so expressly."[37] A party may prove such intent in a number of ways, such as by the pre-conveyance existence of a quasi-easement (as described above), or by proof that an easement is necessary to provide the servient property with access to a public roadway.[38] Importantly, however, and despite the sometimes inconsistent statements of the case law, quasi-easements and easements of necessity are merely species of implied easements; the central inquiry in the creation of an implied easement is intent, the determination of which is not bounded by formulaic analyses, but rather a consideration of the indicia of intent surrounding the conveyance.[39] The party seeking the easement must prove such intent by clear and convincing evidence.[40]

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[36] *Judge*, 570 A.2d at 255.
[37] *Tubbs v. E & E Flood Farms, L.P.*, 13 A.3d 759, 764 (Del. Ch. 2011)
[38] *Judge*, 570 A.2d at 255.
[39] Though often treated as distinct types of easements, quasi-easements and easements by necessity are more accurately described as varieties of implied easements with analytical distinctions. While satisfaction of the test for either typically creates a presumption that an implied easement exists, the overarching inquiry remains one of intent. *See id.* at 258 n.4 ("Properly speaking, an easement of necessity is a form of implied easement, since necessity

The parties agree that the Defendant has an implied easement over Plantations Boulevard. The remaining issue is to what extent the Plaintiff and its customers may use the other private roads adjacent to and in some areas lying upon the Recreation Area that provide the only practical access to the Rear Lot and the

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(like the existence of a quasi-easement) allows a court to infer that the grantor intended to reserve access. However, it is helpful to view an easement of necessity as analytically distinct from an implied easement arising from a preexisting use." (citation removed)); *Pencader Assocs., Inc. v. Glasgow Trust*, 446 A.2d 1097, 1099 (Del. 1982) ("The easement is not actually created by the necessity; rather the necessity is . . . a fact offered in evidence to show an intention to establish a right of way by raising the presumption of a grant of access to the dominant estate over the servient estate. In essence, it is presumed that the parties intended a way-of-access to the dominant tenement over the servient tenement because it is unlikely that any one would purchase land to which there is no access. Any language in the conveyance, or otherwise admissible evidence, showing a contrary intent may be offered to overcome the presumption." (citations and internal quotation marks removed)). This point is illustrated in Herbert Thorndike Tiffany's *Law of Real Property*:

> It is perhaps unfortunate that the courts, in determining whether, in a particular case, an easement corresponding to a pre-existing quasi easement has passed with the land, have usually failed to recognize that the question is primarily one of construction, and have instead undertaken to lay down absolute rules as to what characteristics the particular easement or quasi easement must have, implying that, if it has these characteristics, the easement will pass as a matter of law. The characteristics ordinarily referred to in this connection are . . . that the use[ ] be apparent, that it be continuous, and that it be necessary . . . . But it does not seem that the presence or absence of any or all of these characteristics should be conclusive. Taking the case of a quasi easement which is not apparent, which is not continuous and which is not necessary, nevertheless a conveyance in terms of the quasi dominant tenement should, it is conceived, be construed as a conveyance of the lands with an easement appurtenant thereto corresponding to the pre-existing quasi easement, if this accords with the probable intention of the parties. On the other hand, even though the quasi easement has all the three characteristics named, an easement corresponding thereto evidently does not pass with the land if the language of the conveyance shows clearly an intention otherwise, or if the circumstances are such as to exclude a construction of the language of the conveyance as inclusive of the easement.

*Shpak v. Oletsky*, 373 A.2d 1234, 1240 (Md. Ct. App. 1977) (quoting HERBERT THORNDIKE TIFFANY, 3 THE LAW OF REAL PROPERTY § 781 (3d ed. 1939)).

[40] *Tubbs*, 13 A.3d at 764 ("The *prima facie* case for an implied easement requires clear and convincing evidence . . . .").

Storage Shed. The answer to that question, as with any implied easement, involves an ascertainment of intent.[41]

Delaware courts have long recognized that circumstances may imply an easement over the private roads in a development, in favor of property sold by the developer bounded by those roads, despite the lack of an express easement. In *Betley v. Gordy Construction Co.*,[42] two parcels of land were conveyed by a common owner to the plaintiffs. The lots bordered an existing road and were divided, according to the deeds, by "a . . . street newly established."[43] The fee to the street and the land behind the plaintiffs' properties was sold to a developer, who created a housing development on the land.[44] The developer attempted to exclude access from the "new street" to the plaintiffs' lots, by erecting a wall and landscaping.[45] Noting the reference to the street in the deed and the surrounding circumstances, including the physical layout of the lots, the court concluded that an easement by implication had been established.[46]

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[41] *Betley v. Gordy Constr. Co.*, 115 A.2d 475, 477 (Del. Ch. 1955).
[42] 115 A.2d 475 (Del. Ch. 1955).
[43] *Id.* at 476.
[44] *Id.* at 476-77.
[45] *Id.* at 476.
[46] *Id.* at 477-78. The court also noted the rule that reference in the deed to a recorded plot including the street in question implies an easement to the streets shown in the plot, in favor of the deeded property. *Id.* More recent case law has expanded this doctrine. In *Judge v. Rago*, our Supreme Court found that residents in a townhouse complex were entitled to travel on private streets adjacent to their property that were reflected in the recorded plot of their property, as well as other streets needed to reach a public highway, regardless of whether the latter access ways were depicted in the plot. 570 A.2d at 256. The *Judge* court explained that such a rule protects grantees, who are "entitled to rely upon the state of affairs represented in a recorded plot of the

Similarly, in *Tindall v. Corbi*,[47] the court addressed a situation in which lot owners were sold lots in a bayfront development in Dewey Beach, bounded by a private road which ran from the highway to Rehoboth Bay. The defendant developers conceded that an implied easement existed over the private road from each lot to the highway as required for ingress and egress, but denied that such an easement burdened the road to provide access to the water.[48] Considering the physical attributes of the road and lots, as well as the type of properties—vacation cottages—owned by the plaintiffs, the court found an easement by implication over the road to the beach of Rehoboth Bay: "I am satisfied that the easement embraced the right to use the beach to reach the water. This right is reasonably necessary if plaintiffs are fully to enjoy [their] easement in the road under the circumstances. It is therefore embraced within the easement."[49]

The rationale of *Tindall* is applicable here. The parties agree that an easement over the roadways of The Plantations exists, at least sufficient to give Sandie and its employees and customers access between the public road and the Recreation Area. The deed refers to "a road" as a boundary, and the evidence makes it clear that that road is Plantations Boulevard. In fact, the fee of the

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subject property." *Id.* It seems likely that there exists a recorded plot of The Plantations showing the Recreation Area bounded by private roadways. The parties have failed to place such a plot into evidence here, however.

[47] 145 A.2d 247 (Del. Ch. 1958).

[48] *Id.* at 248.

[49] *Id.* at 249.

Recreation Area includes a portion of Plantations Boulevard. From the time the Recreation Area was built out by the common owner, when conveyed to Sandie, and at present, the only access to the Rear Lot and the Storage Shed was over the private roadways of The Plantations, by traversing the North Lane and the Front Lot and Storage Lane, respectively. It is apparent that the locations of these roads, in consideration of the layout of the existing structures on the Recreation Area, were intended to provide the owner of the Recreation Area with a means of vehicular access to the portions of the Recreation Area to which these roadways run, namely, the Rear Lot and the Storage Shed.[50] Moreover, these private roadways are not only adjacent to the Recreation Area, the North Lane and Front Lot in fact occupy a portion of the Recreation Area. I find, therefore, by clear and convincing evidence, that the right to use these roads for access to the Rear Lot and Storage Shed was intended to be a part of the implied easement which the parties agree exists over a portion of the private roads of The Plantations. Accordingly, it is "embraced within the easement."[51]

[50] *See Tindall*, 145 A.2d at 249 (finding that an implied easement embraced a right reasonably necessary to enjoy that easement); *Betley*, 115 A.2d at 478 (finding the lack of a reasonable means of accessing one portion of a property from the other to be evidence of an implied easement).

[51] *Tindall*, 145 A.2d at 249. The easement includes transit of the Front Lot to the extent necessary to access the Storage Lane. Use of the Front Lot by the Plaintiff for parking is discussed below.

*B. Contribution Toward Maintenance of Shared Roadways*

What remains is what contribution, if any, the Plaintiff must make to the maintenance of the roadways. I find nothing in the Declaration that addresses this question. The Plaintiff points to language in the Declaration that confers on the Associations the right to extract dues from Homeowners, and that requires that those levies be used "exclusively" for purposes that include maintenance of the common areas, including the private roads burdened by the easement in favor of the Recreation Area, as described above. The Plaintiff argues that this language places the burden of maintenance on the Associations "exclusively." The Plaintiff simply misreads the document: the Associations must use funds levied "exclusively" for maintenance—that is, they cannot use the funds for other purposes—but nothing in the language says that the levies must be the exclusive *source* of funds to be used for maintenance. The documents in evidence are silent as to this issue.

In equity, those entitled to use land subject to an easement jointly have obligations for maintenance proportional to their use.[52] The record is insufficient for me to assign such obligations here. That result must await further factual

[52] *See, e.g.*, *Ayres v. Walker*, 1991 WL 225054, at *6 (Del. Ch. Oct. 4, 1991) *(*"Petitioners will also have to share any reasonable expenses in the future for the maintenance of that part of the dirt road which will be jointly used.").

development (or, more properly, a settlement of the issue through agreement of the parties).

*C. Use of the Front Lot*

Finally, the Plaintiff argues that it has a right for its customers to park, while using Plaintiff's facility, not just in the Rear Lot located in the Recreation Area but in the Front Lot, which is located entirely on land belonging to the Defendants. The Plaintiff points to a photograph showing that the Recreation Area was constructed, along with the Front Lot, at a time when the adjacent residential areas were incomplete. The Plaintiff attempts to deduce the year this photograph was taken by reference to numerous deeds, satellite images, and plot plans, which, when reviewed together, purportedly establish the Plaintiff's right arising in quasi-easement to use the lot. But the circumstances here do not lend themselves to establishment of rights in quasi-easement. As described above, a quasi-easement arises when a single owner uses one part of his property to the benefit of another part. That quasi-easement is converted to an implied easement when the original owner divides the property into separate parcels in such a way that it is clear on inspection of the land that one parcel is impressed with indicia of use in favor of the other, as when a driveway passes over one parcel to a house on the second. In such a case, an implied easement burdens the first parcel, despite the fact that no express easement was reserved.

In the instant case, in contrast, a developer reserved one portion of the development, the Recreation Area, for a commercial purpose; built infrastructure that served the development, including the Recreation Area, in an order determined, presumably, by reasons and purposes of the developer's own, and at any rate for purposes that the record does not disclose; transferred the Recreation Area to entities he controlled, and ultimately to the Plaintiff; and eventually transferred the common areas to the Defendant homeowners associations. The Defendants did not "purchase" the Front Lot subject to an apparent easement in favor of the Recreational Area, and the theory of quasi-easement is simply inapplicable. In any event, the Front Lot is as likely to have been created for the benefit of The Plantations' homeowners as for the general public wishing to use the Recreation Area. The developer could have reserved the fee of the Front Lot to the Recreation Area, just as he did the area occupied by the Rear Lot. Far from demonstrating by clear and convincing evidence that an implied easement exists, the record is devoid of evidence establishing an easement for the Plaintiff's employees and customers to park in the Front Lot. Of course, the Defendants are free to grant a license to the Plaintiff for the use of the lot, as part of a settlement of the remaining issues in this litigation.

*D. Attorneys' Fees*

Under the American Rule, each party must bear its own litigation costs, regardless of who prevails.[53] There is no basis for an award of fees to the Plaintiff under either of the statutes it cites[54] or under any recognized exception to the American Rule.

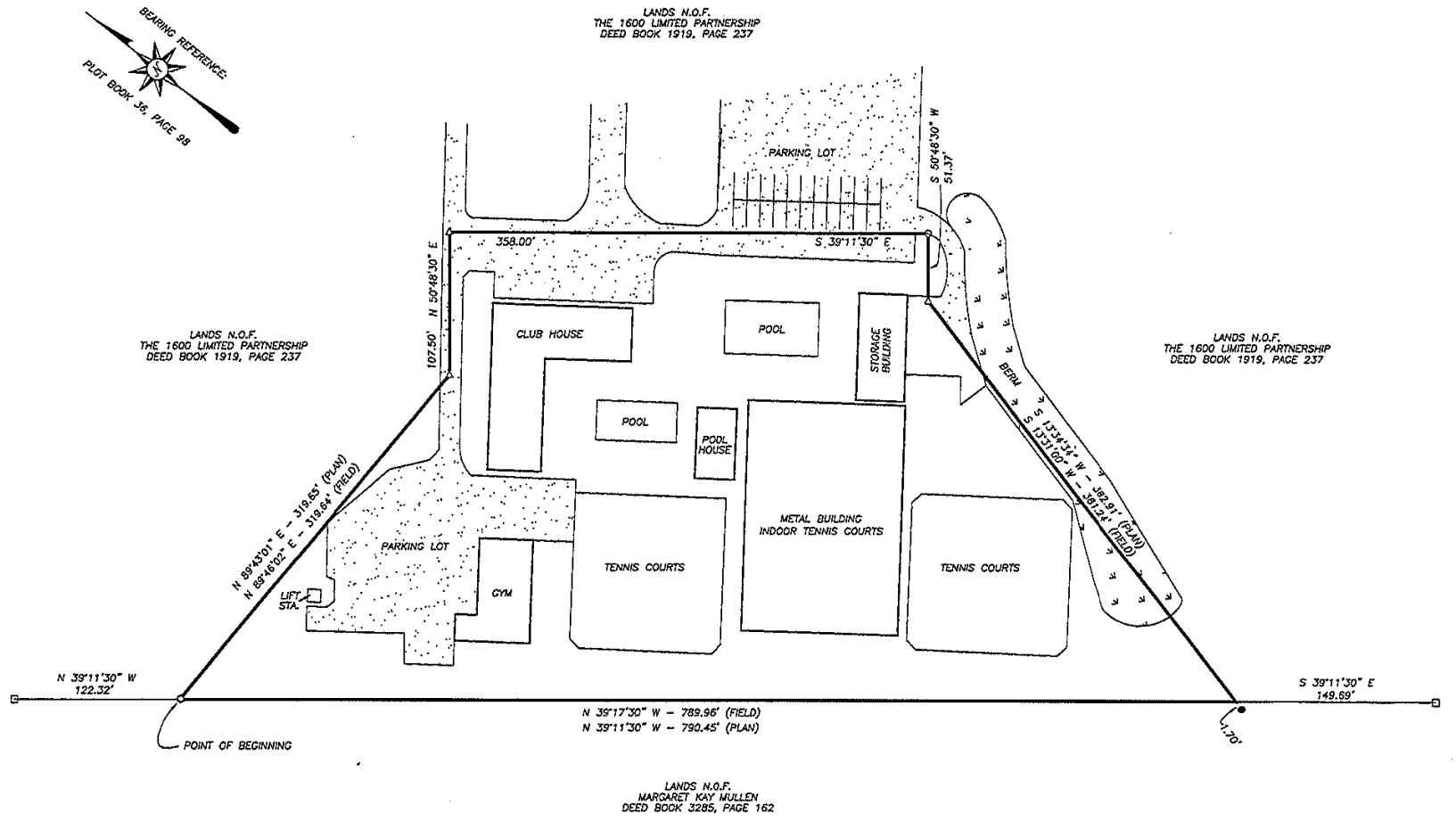
## IV. CONCLUSION

The Plaintiff has established an easement to use the private roadways of The Plantations in connection with its business. It has failed to demonstrate an easement for parking purposes in the Front Lot. The question of the extent of the Plaintiff's maintenance obligations in connection with the easement awaits further factual development or settlement. For the reasons above, each party's Motion for Summary Judgment is granted in part and denied in part. The parties should submit a document to be recorded with the Sussex County Recorder of Deeds describing the easement.

IT IS SO ORDERED.

[53] *Paron Capital Mgmt., LLC v. Crombie*, 2012 WL 2045857, at *15 (Del. Ch. May 22, 2012).
[54] *See* 10 *Del. C.* § 348(e); 25 *Del. C.* § 81-417(a).

TAX MAP NO. 3-34-6.00, PARCEL 553.02




| NOTE: | LEGEND: | | |
|---|---|---|---|
| CLASS "S", SUBURBAN SURVEY | □ FOUND CONCRETE MONUMENT<br>△ FOUND P.K. NAIL<br>○ TREE<br>● FOUND IRON BAR<br>○ SET IRON BAR<br>(FIELD) FIELD MEASUREMENT<br>(PLAN) RECORD PLAN MEASUREMENT | R.B. KEMP, III, P.L.S. 541 | Prepared By<br>ADAMS-KEMP ASSOCIATES, INC.<br>PROFESSIONAL LAND SURVEYORS AND PLANNERS<br>217 SOUTH RACE STREET<br>GEORGETOWN, DELAWARE 19947<br>PHONE: (302) 856-5699 |

# BOUNDARY SURVEY PLAN

PREPARED FOR

## SANDIE LLC & DAVE MARSHAL PROPERTIES LLC

FOR PROPERTY KNOWN AS
"RECREATION AREA" OF A DECLARATION PLAN FOR THE PLANTATIONS
PLOT BOOK 36, PAGE 98
SITUATED IN
LEWES AND REHOBOTH HUNDRED, SUSSEX COUNTY, STATE OF DELAWARE
AREA: 4.299 ACRES ± (MEASURED) 4.312 ACRES ± (PLAN)
SCALE: 1" = 50'
DATE: FEBRUARY 6, 2008

PLAN NO. 080114-C