IN THE SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

W. LOWELL STARLING AND	:	
NANCY STARLING,	:	
Respondents	:	
v.	:	30 M.A.P. 2016
LAKE MEADE PROPERTY OWNERS	:	
ASSOCIATION, INC.	:	
Petitioner	:	
	:	

AMICUS CURIAE BRIEF SUBMITTED ON BEHALF OF THE PENNSYLVANIA/DELAWARE VALLEY CHAPTER OF THE COMMUNITY ASSOCIATIONS INSTITUTE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF AMICUS CURIAE

The Community Associations Institute (CAI) is an international membership organization dedicated to building better common-interest communities.[1]

A community association is a private, nonprofit organization of owners who share common ownership of, and maintenance responsibilities for, portions of their communities. It is established by a Declaration of Covenants, Easements, and Restrictions and a subdivision plan (collectively, "the Declaration") recorded by the developer ("Declarant") in the county Recorder of Deeds' office. The terms of the Declaration are governed by state law. The Bylaws of a community association govern how the association should function, including how often meetings of members are held, how many members are needed for a quorum, how often the board of directors of the community association meets, and how the board of directors is elected. The primary responsibility of an association is to provide for the maintenance and operation of common facilities, such as the roads

[1] There are three types of common interest communities: cooperatives, condominiums, and planned communities. A real estate cooperative is a community in which a corporation owns all the common facilities and the units themselves and a unit owner simply owns shares in the cooperative corporation. In a condominium, the unit owners own their individual units and a percentage share of the common facilities. In a planned community, a homeowners association owns the common facilities and the unit owners own the individual units. In a cooperative, the corporation owns everything; in a condominium, the unit owners own everything; in a planned community (like Lake Meade), there is split ownership.

and recreational amenities. In order to provide this service, the community association levies assessments.

CAI has more than 33,500 members in 60 chapters across the United States and overseas. It is the largest common-interest-community group in the country. CAI provides information, education, and resources to the homeowner volunteers who govern common interest communities (CICs) and the professionals that support them. CICs include condominiums, planned communities, and cooperatives.

CAI members include association board members and other homeowner leaders, community managers, association management firms, and other professionals who provide products and services to associations. CAI regularly presents educational seminars, maintains a large library of reference and resource materials, advocates on behalf of its communities, and serves as a clearinghouse for information on best practices in the industry. CAI provides education and resources to America's 300,000+ residential condominium, cooperative, and homeowner associations, and the professionals and suppliers who serve them.

The Pennsylvania and Delaware Valley Chapter of CAI (CAI-PaDVC) serves the community associations industry throughout the entire Commonwealth

of Pennsylvania, Southern New Jersey, and Northern Delaware. The CAI-PaDVC represents the interests of an estimated 2.8 million Pennsylvania residents (nearly one-fourth of the state's population) who live in approximately 10,000-12,000 condominiums, cooperatives and planned communities (governed by homeowner associations (HOAs)).

The instant decision involves Lake Meade, a planned community located in Adams County. Appellant Lake Meade Property Owners Association (LMPOA) is a member of CAI-PaDVC. The instant case has significant impact on not only Lake Meade, but all community associations in Pennsylvania that own and manage private roads in their planned communities. To that end, CAI-PaDVC respectfully requests the Pennsylvania Supreme Court grant it the opportunity to participate in this matter.

STATEMENT OF JURISDICTION

This case is before the Pennsylvania Supreme Court as a permissive appeal from a final order of the Superior Court. See 42 Pa. C.S. § 724(a).

This brief is submitted under the authority granted per Pa. R.A.P. 531.

ORDER IN QUESTION

This matter is on appeal from the Opinion and Order of the Pennsylvania Superior Court dated August 11, 2015 (matter docketed at 1779 MDA 2014 (authored by Judge Mary Jane Bowes)) which reads in part on page 24:

> In sum, we remand for the grant of partial relief to the Starlings as to Count Five of their Second Amended Complaint and for entry of an injunction permanently enjoining use of the entirety of the platted Custer Drive and the entirety of the platted cul de sac to any use other than for ingress and egress. We also reverse the grant of summary judgment in favor of the Association as to Counts One, Two, and Four of the Second Amended Complaint and remand for further proceedings consistent with this writing.
>
> Order reversed. Case remanded. Jurisdiction relinquished.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

As the issue before the Court involves a question of law, the proper standard of review is *de novo* and to the extent necessary, the scope of review is plenary. See Harkness v. Unemployment Comp. Bd. of Review, 591 Pa. 543, 549, 920 A.2d 162, 166 (2007) (citing Buffalo Township v. Jones, 571 Pa. 637, 644, n. 4, 813 A.2d 659, 664 (2002).

STATEMENT OF THE QUESTIONS INVOLVED

1. **Whether the Superior Court erred as a matter of law in holding that a fee simple owner of a private road who grants an easement over that road extinguishes its fees simple ownership of that road?**

   SUGGESTED ANSWER: In the affirmative*

2. **Whether the Superior Court's decision conflicts with Pa. R.C.P. 1035 when the court reversed the trial court's grant of summary judgment and directed the entry of injunctive relief in favor of the respondents and did so without considering the facts of record found by the trial court, without considering the record in the light most favorable to the petitioner and where there are genuine issues of material fact precluding the entry of judgment in the respondents' favor?**

3. **Whether the Superior Court erred as a matter of law in concluding that extrinsic evidence can vary property boundaries on a recorded subdivision plan?**

*Amicus Curiae, CAI-Pa/DVC, is submitting this brief in support of Petitioner, Lake Meade Property Owners Association, Inc's, position in regard to Issue 1 only.

STATEMENT OF THE CASE

Amicus, CAI-PaDVC hereby adopts and incorporates by reference the factual and procedural background contained in the brief of Petitioner, LAKE MEADE PROPERTY OWNERS ASSOCIATION, INC., found in its Statement of the Case.

SUMMARY OF ARGUMENT

It is respectfully suggested that the Superior Court's Order be REVERSED.

The Superior Court's opinion incorrectly analyzes the ownership, benefits and obligations regarding the community's private roads. Appellant Lake Meade Property Owners Association (LMPOA or Association) is the grantee of all common property, including the roads, in this planned community created by the original Declarant. LMPOA's fee simple title to the roads is subject to implied access easements - nonexclusive rights of use - appurtenant to the title to each residential lot in the community. Under common law, the road parcels are servient tenements and the residential lots are the dominant tenements. It was error for the Superior Court to conclude that access easements – rights of use benefitting the unit owners - somehow divest the Association's fee simple title to the roads.

The common law of implied easements, the Uniform Planned Community Act, and other planned community law define the ownership, rights, and responsibilities of owners in a planned community. It was error for the Superior Court to not follow the controlling law.

If allowed to stand, the Superior Court decision would cause significant conflicts in the law governing common interest communities and would have significant adverse impacts on other real estate beyond planned communities.

The Association owns the community's roads, as shown in a 1967 subdivision plan and conveyed by 1968 common area deed from the Declarant (developer of the community). The filing of this subdivision plan means the subdivision roads are subject to nonexclusive access easements benefitting each lot within the planned community. Easement rights are properly classified as legal servitudes. The unit owners' use of appurtenant easement rights for access to their individual subdivision lots does not divest LMPOA's fee simple title to the roads burdened by the servitude. It is reversible error to have concluded otherwise.

ARGUMENT OF AMICUS, CAI-PaDVC

THE SUPERIOR COURT ERRED IN CONCLUDING THAT THE USE OF IMPLIED EASEMENTS IN A PLANNED COMMUNITY DIVESTS THE ASSOCIATION'S FEE SIMPLE TITLE TO THE COMMUNITY'S PRIVATE ROADS.

1. **The Superior Court's Decision Must Be Reversed Because It Is Based On A Flawed Understanding Of The Impact Of Implied Easements On Fee Simple Title.**

The Superior Court incorrectly analyzed the impact of implied easements in this case and therefore its ruling should be REVERSED.

The developer of the Lake Meade subdivision and planned community, Lake Meade, Inc. (Declarant), through a series of conveyances in 1966, acquired title to all of the property developed as the Lake Meade subdivision. See 9/25/68 Deed.

In 1967, the Declarant filed municipal subdivision plans, imposed a set of uniform restrictive covenants on all units (lots) in the community, and started to market the lots. See 1967 Subdivision Plan. The filing of the subdivision plan, the transfer of the common area to the Association, the grant of nonexclusive common area easements, and the imposition of a common declaration of covenants for the Lake Meade community all create a legal duty for each unit owner to share the costs of operating and maintaining the common facilities. See Saw Creek Estates Community Association v. County of Pike, 581 Pa. 436, 866 A.2d 260 (2005);

Pinecrest Lake Community Trust v. Monroe County Board of Assessment Appeals, 64 A.3d 71 (Pa. Cmwlth. 2013). This shared assessment obligation classifies Lake Meade as a planned community under the Uniform Planned Community Act (UPCA). 68 Pa. C.S. § 5103.

In 1968, the Declarant conveyed all common area in the community, including the roads, to LMPOA by deed filed in the Adams County Recorder of Deeds office at Deed Book 269, page 369. See 1968 deed. This deed is important for two reasons: (1) it conveyed the roads to LMPOA in fee simple absolute; and (2) the roads were conveyed under and subject to the lot owners' implied rights of access - appurtenant easements for use and enjoyment by the unit owners within the community.

Fee simple absolute is the highest form of property ownership in the Commonwealth. See 6 Pa. Summ. Jur. 2d Property 5:5 (2nd ed). It is a freehold estate, that is, a continuous possessory estate for an indefinite period. See In Re: Incorporation of the Borough of Treasure Lake, 999 A.2d 644,649 (Pa. Cmwlth. 2010), appeal denied 13 A.3d 481(2010). Fee simple title includes the entirety of all rights available for the property, including an unlimited right of alienation. See In re: Estate of Rider, 711 A.2d 1018, 1021 (Pa. Super. 1998). As the owner of the

property in fee simple, the Declarant had a complete right to grant easements over the common property to buyers of units in the community.

An easement is an interest in land owned by another person, permitting the party to use the subject property in some fashion consistent with the rights of the owner. See Stanton v. Lackawanna Energy, Ltd., 584 Pa. 550, 565, 886 A.2d 667, 676 (2005); Reed v. Reese, 473 Pa. 321, 328, 374 A.2d 665, 668-69 (1976); Assalita v. Chesnut Ridge Homeowners Association, 866 A.2d 1214, 1218 (Pa. Cmwlth. 2005); Kapp v. Norfolk Southern Railway Company, 350 F.Supp.2d 597, 606 (M.D. Pa. 2004); Restatement of Property 3d-Servitudes, § 1.2.

An easement is considered an easement *appurtenant* when it provides a privilege of use benefitting another property owner without a profit to the burdened owner. See Piper v. Morris, 466 Pa. 89, 94, 351 A.2d 635, 638 (1976). There must be both a servient tenement (the burdened land) and a dominant tenement (the benefitted land) in order to create an appurtenant easement. See Riverwatch Condominium Owners Association v. Restoration Development Corporation, 980 A.2d 674, 686 (Pa. Cmwlth. 2009); Kapp v. Norfolk Southern Railway Company, 350 F.Supp.2d 597, 606 (M.D. Pa. 2004). If multiple parties use the same easement, then each must exercise those use rights so as to not interfere with the

other easement holder's use. See McNaughton Properties, LP v. Barr, 981 A.2d 222, 225 (Pa. Super. 1999).

It is important to understand that, unlike fee simple title, an easement is a *nonpossessory* interest in land, permitting the *use* of the property only for certain purposes. See Borough of Duncansville v. Beard, 919 A.2d 327,332 (Pa. Cmwlth. 2007). Section 1:2 of the applicable Restatement also confirms that an easement is a nonpossessory right; it states:

> ...The holder of the easement or profit is entitled to make only the uses reasonably necessary for the specified purpose. The transferor of an easement or profit retains the right to make all uses of the land that do not unreasonably interfere with exercise of the rights generated by the servitude... Restatement Third, Property (Servitudes), §1:2, Comment d.

If an easement arises from the filing of and by reference to a subdivision plan, it is considered an implied easement, rather than an express easement. Assalita v. Chesnut Ridge Homeowners Association, 866 A.2d 1214, 1218 (Pa. Cmwlth. 2005). Even more importantly, an easement burdening a property cannot divest the burdened property owner's right to possession of that property. See Lerner v. Poulos, 412 Pa. 388, 395, 194 A.2d 874, 877 (1963).

The Superior Court's decision is flawed because it disregarded these long-established tenets of real property law. The Superior Court discussed these issues

at pp. 11-15 of its opinion, where it reached several unsupported conclusions that do not comport with Pennsylvania law.

The most glaring error is the Superior Court's conclusion that the existence and use of easements over the common area roads in the planned community somehow divested the Association's fee simple title to Custer Drive. The Pennsylvania Supreme Court has specifically rejected this conclusion in the case of Clements v. Sannutti, when it ruled: "It is the traditionally established doctrine that there can be no easement, no incorporeal right, binding the servient tenement, the effect of which would be to deprive its owner of the right of use or possession thereof." Clements v. Sannuti, 356 Pa. 63, 65, 51 A.2d 697, 698 (1947).

The United States District Court for the Middle District of Pennsylvania utilized a unique analogy in describing this easement/fee simple dynamic in the case of Kapp v. Norfolk Southern Railway Company, 350 F. Supp.2d 597 (M.D. Pa. 2004). In Kapp, the court referenced a bundle of sticks as encompassing the entirety of ownership rights held in fee simple. It went on to state:

> In essence, an easement represents the transfer of a single stick of the bundle of fee simple rights from one parcel to another. See Dolan v. City of Tigard, 512 U.S. 374, 393, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994); United States v. 13.98 Acres, 702 F.Supp. 1113, 1114-15 (D.Del.1988). The stick constitutes a certain use of the land to be enjoyed by the holder. See *Dolan*, 512 U.S. at 393, 114 S.Ct. 2309; Restatement (Third) of Property: Servitudes § 1.2. In granting an

> easement, the owner of the servient estate grants one stick to the owner of the dominant estate. See id. §§ 1.2, 1.3, 1.5. It thereafter remains in the bundle of rights attached to fee simple ownership of that parcel and may be enforced by the landowner. See id. §§ 5.1, 5.6.

Kapp v. Norfolk S. Ry Co., 350 F. Supp. 2d 597, 606-07 (M.D. Pa. 2004).

The "bundle of sticks" analogy in Kapp provides a perfect paradigm for analyzing the present set of facts. The Declarant only granted one stick, in the form of an implied easement, to each unit owner. As the grantee of title to the common facilities, LMPOA should have all of the other sticks in the bundle. The Superior Court, however, incorrectly ruled that all of the remaining sticks in the bundle were either divested or transferred.

Without any legal substantiation, the Superior Court simply chose to disregard the fundamental rule that one who owns a property in fee simple (and thereby has exclusive possession), may grant an easement to someone else for mere use of a part of the property but still retains all other rights of ownership. See Mercantile Library Co. of Philadelphia v. Fid. Trust Co., 235 Pa. 5, 15, 83 A. 592, 595 (1912). Similarly, the grant of an easement does not deprive the landowner of its right to use and enjoy the property. Minard Run Oil Co. v. Pennzoil Co., 419 Pa. 334, 335, 214 A.2d 234, 235 (1965); see also Allegheny Valley R. Co. v. City of Pittsburgh, 95 A.3d 938, 945 (Pa. Commw. Ct. 2014) (quoting In re Condemnation Proceeding by S. Whitehall Twp. Auth., 940 A.2d at 628 ("A fee

simple interest may be burdened by an easement and that easement may indeed decrease the value of the land by limiting its development, but the presence of the easement in no way diminishes or extinguishes the possessory interest of the fee holder.")

The Superior Court's decision concludes in error that the fee simple title has been destroyed. See p. 13 of 8/11/15 Opinion. The correct conclusion is that an easement holder enjoys use of a property that *someone else continues to own.* Mere enjoyment of the easement cannot terminate the landowner's fee simple title; an easement is a mere servitude burdening the underlying title. The Superior Court mistakenly concluded that the unit owners' easement effectively gives them title to the land, not just a right to limited use.

The Superior Court's decision also misapplies the Supreme Court's ruling in Kao v. Haldeman, 556 Pa. 279, 728 A.2d 345, 347 (1999), by concluding that a unit owner acquires all rights in a road plotted on a subdivision plan. The Superior Court's conclusion is only partially correct. Unit owners *do* acquire property rights over the plotted roads, but not fee simple title; they just own an *easement.* See Kapp, generally. It was error for the Court to extrapolate this reasoning to swallow up fee simple ownership.

Lastly, the failure to consider Lake Meade's status as a planned community also led to obvious flaws in the Court's reasoning.[2] For example, at page 14 of the decision, the Superior Court states that there is a risk that the Association could somehow convey the roads to a third party if it has title to the roads. This idea is untenable for both practical and legal reasons. The roads are common facilities and legally encumbered by access easements benefitting each owner in the community. First, if there were a sale of fee title to the roads, the conveyance would not divest the lot owners' easements. See Locust Lake Village Property Owners' Association v. Wengerd, 899 A.2d 1193 (Pa. Cmwlth. 2006). Second, those easements could only be extinguished with the consent of the benefitted owners.[3] Third, a conveyance of common facilities would require a supermajority vote of the lot owners or even a unanimous vote.[4] The Superior Court's notion that the Association could or would convey Custer Drive evidences a fundamental

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[2] Amicus also recognizes that the Superior Court looked to Section 2.13 of the Restatement of Property 3d-Servitudes in resolving the easement/ fee simple issue. Since the parties have never denied Lake Meade's status as a planned community under the UPCA, to the extent that the Restatement is applicable, the more targeted treatment of the issue in Chapter 6, Common-Interest Communities, should have been utilized. Chapter 6 would confirm LMPOA as the owner of the common areas (Custer Drive) in fee simple.

[3] The UPCA, in a nonretroactive provision, Section 5318, requires 80% membership approval. 68 Pa. C.S. § 5318.

[4] See , e.g., UPCA section 5302(a)(8), as amended, specifically restricting powers of an association to encumber or convey common facilities. 68 Pa. C.S. § 5302(a)(8)

misunderstanding, or, worse yet, a complete disregard, of the laws governing common interest communities.

The community's Declarant (Lake Meade, Inc.) owned the entirety of the land in the community, subdivided the property, and conveyed the lots to third party buyers. It owned and then transferred to the Association fee simple title to the common areas - meaning everything in the community other than the single-family residential lots. See 68 Pa. C.S. § 5103 at comment 4 ("the common elements include by definition all of the real estate in the planned community not designated as part of the units"). The common area, most notably, includes the private roads. While the roads are under and subject to the lot owners' access easements, title to the roads have been conveyed to and remain assets of the Association. There is no factual or legal basis for the Superior Court to conclude that LMPOA's fee simple ownership of the roads terminated because the roads were subject to access easements. Therefore, the Decision must be REVERSED.

2. **The Current Decision Must Be Reversed To Avoid Significant Confusion Amongst Real Estate Interest Holders.**

If allowed to stand, the Superior Court's decision could have wide-reaching adverse impacts on a diverse set of real estate stakeholders. The impacts would be

felt both within planned communities and throughout the real estate market generally.

The Superior Court decision ignores decades of well-reasoned common law decisions dealing with implied easements generally and common interest communities in particular. Its decision disregards and calls into question the entire Meadow Run line of appellate decisions on these subjects. See Meadow Run & Mountain Lake Park Ass'n v. Berkel, 598 A.2d 1024 (Pa. Super. 1991). Meadow Run and its progeny stand for the proposition that owners of units within a common interest community enjoy implied easements to use and enjoy the common facilities, which are owned and maintained by the Association. Along with this right of use and enjoyment comes a commensurate obligation to pay for the maintenance of these common facilities in the form of assessments payable to the community association. See Spinnler Point Colony Association v. Nash, 689 A.2d 1026 (Pa. Cmwlth. 1997); E.L.C.A. Development Corporation v. Lackawanna County Board of Assessment Appeals, 752 A.2d 466 (Pa. Cmwlth. 2000); Hess v. Barton Glen Club, 718 A.2d 908 (Pa. Cmwlth. 1998).

Second, the present decision turns on their heads the well-settled expectations of planned community unit owners about the future uses of the common areas within any planned community. Thirdly, it could create an entire

class of wrong-minded plaintiffs who seek to divest community associations of legally-vested title to the common areas in their respective planned communities.

This decision could also have long-term impacts on the expectations of sellers and buyers of properties outside of planned communities. Under the Superior Court decision, any easement holder could assert a right equal to fee simple ownership of the property upon which they enjoy an easement, as if the easement exhausts the uses of the property. This could have major impacts on title and the title insurance industry. Moreover, if this decision brings into question the ownership of all roads in planned communities, the result would impact and create serious confusion amongst the taxing bodies and assessors.

Affirming the Superior Court's decision exposes property owners throughout the Commonwealth to unforeseen problems that would impact property values and taxes on such properties and would lead to great uncertainty in the real estate industry.

This case was improperly decided and there is simply too much at stake to allow it to stand.

CONCLUSION

For the above referenced reasons, Amicus, CAI-PaDVC respectfully requests that the Court REVERSE the Order of the Superior Court and rule that the granting of an easement to unit owners over a road in a common interest community does not divest fee simple ownership of the road from the Association.

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	:	

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of May, 2016, a true and correct copy of *Brief of Amicus, Pennsylvania/Delaware Valley Chapter of the Community Associations Institute* was served by first class mail, postage prepaid, as follows:

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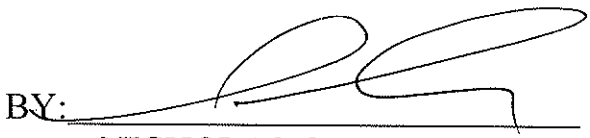
BY: 

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