

**IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA  
BUSINESS COURT DIVISION**

**GLADE SPRINGS VILLAGE PROPERTY  
OWNERS ASSOCIATION, INC.,**

**Plaintiff,**

**VS.**

**Civil Action No.: 19-C-357  
Presiding Judge: Jennifer P. Dent  
Resolution Judge: Michael D. Lorensen**

**EMCO GLADE SPRINGS HOSPITALITY,  
LLC, et al.,**

**Defendants.**

**ORDER DENYING MOTION FOR SUMMARY JUDGMENT  
REGARDING MALLARD LAKE DAM**

Comes now the Court this 2<sup>nd</sup> day of December 2020, upon GSR, LLC's Motion for Summary Judgment Granting It a Declaration that the Deed of Easements Requires the POA to Reimburse GSR for Repairs to Mallard Lake Dam.

The Plaintiff, Glade Springs Village Property Owners Association, Inc., by counsel, Mark A. Sadd, Esq., and Ramonda C. Marling, Esq., and Defendant, GSR, LLC, by counsel, Arie M. Spitz, Esq., have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

**FINDINGS OF FACT**

1. On September 29, 2020, Defendant GSR, LLC (hereinafter "Defendant", "GSR" or "Resort") filed the instant GSR, LLC's Motion for Summary Judgment Granting It a Declaration that the Deed of Easements Requires the POA to Reimburse GSR for Repairs to Mallard Lake Dam, requesting the Court enter an Order declaring that Plaintiff Glade Springs Village Property

Owners Association, Inc. (hereinafter “Plaintiff” or “POA”) must comply with certain alleged obligations contained within the Deed of Easements and Licenses (hereinafter “DOE”) and that the POA’s obligations under said DOE include the obligation to reimburse the Resort for expenses it incurs for repairs and maintenance made to Mallard Lake Dam, specifically including needed work to the Mallard Lake Dam consisting of replacements to the pipes that allow water to flow out of the dam. *See* Def’s Mot., p. 1-2, 4.

2. On October 16, 2020, the POA filed their Response to the instant motion, arguing the DOE does not require it to reimburse for the work done to the dam, because the work is an upgrade to bring the dam in compliance with the law and because the dam is not an area adjacent to the road, as required by the DOE. *See* Pl’s Resp., p. 4-9.

3. On October 26, 2020, GSR filed its Reply reiterating its position that the dam is subject to the DOE, and arguing that the needed work is not merely an upgrade to bring in compliance with the law, but is either a capital expense, repair, or replacement as contemplated by the DOE. *See* Reply, p. 3-4. Also, GSR urges in the Reply that the needed work is subject to the DOE because said work is necessary in order to operate and maintain the road known as Lake Drive and Mallard Lake itself. *Id.* at 4. Indeed, the Reply specifies that the work is needed in order for Lake Drive to continue to be used and for Mallard Lake to continue to exist. *Id.* at 5.

4. On November 2, 2020, the POA filed a motion for leave to file a Sur-Reply to the instant motion. That same day, the Court entered an Order granting that request and allowing until November 18, 2020 for the POA to file such Sur-Reply.

5. Thereafter, on November 18, 2020, the POA filed its Sur-Reply, reiterating its argument that the work that must be done, even if characterized as a capital expense, repair, or

replacement, is still needed to bring the dam in compliance with the law. *See* Sur-Reply, p. 5. Further, the POA alleges Mallard Lake Dam is not part of Lake Drive or Mallard Lake. *Id.* at 8.

6. On November 23, 2020, GSR filed a Response to Sur-Reply Regarding Mallard Lake Dam, reiterating GSR is the owner of the dam and averring that the tax assessor had made an error when assigning tax tickets, arguing the phrase “areas adjacent to” is not a standalone phrase and applies to the Roads, as well as the Gatehouse and the Common Properties, and arguing the phrase “regarding use and enjoyment of” applies to the property subject thereto in Paragraph 5. *See* Resp. to Sur-Reply, p. 1-3.

7. On November 24, 2020, GSR filed a Corrected Response to Sur-Reply Regarding Mallard Lake Dam.

8. The Court now finds this issue ripe for adjudication.

### **STANDARD OF LAW**

9. Motions for summary judgment are governed by Rule 56, which states that “judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” W. Va. R. Civ. P. 56(c). West Virginia courts do “not favor the use of summary judgment, especially in complex cases, where issues involving motive and intent are present, or where factual development is necessary to clarify application of the law.” *Alpine Property Owners Ass’n, Inc. v. Mountaintop Dev. Co.*, 179 W.Va. 12, 17 (1987).

10. Therefore, “[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. Pt. 3, *Aetna Cas. and Surety Co. v. Fed. Ins.*

*Co. of New York*, 148 W.Va. 160, 171 (1963); Syl. Pt. 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992); Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52 (1995). A motion for summary judgment should be denied “even where there is no dispute to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom.” *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59 (internal quotations and citations omitted).

11. However, if the moving party has properly supported their motion for summary judgment with affirmative evidence that there is no genuine issue of material fact, then “the burden of production shifts to the nonmoving party ‘who must either (1) rehabilitate the evidence attacked by the movant, (2) produce additional evidence showing the existence of a genuine issue for trial or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f).’” *Id.* at 60.

### **CONCLUSIONS OF LAW**

12. In this matter, GSR has moved this Court for an Order declaring that the POA must comply with certain alleged obligations contained within the DOE and that the POA’s obligations under said DOE include the obligation to reimburse the Resort for expenses it incurs for repairs and maintenance made to Mallard Lake Dam, specifically including needed work to the Mallard Lake Dam consisting of replacements to the pipes that allow water to flow out of the dam. *See* Def’s Mot., p. 1-2, 4.

13. As an initial matter, it is not disputed that the work needed is the replacements of the pipes that allow water to flow out of the dam. *See* Def’s Mot., p. 4. However, the POA has also proffered in its Response that the “upgrade requires re-engineering of the dam, redesigning of the dam, and utilization of different material with a different configuration”. *See* Pl’s Resp., p. 8, 9.

14. As an initial matter, the Court considers the ownership of the Mallard Lake Dam. The motion is brought by Defendant GSR, LLC, a party to the instant litigation. However, the POA has proffered evidence that GSR, LLC does not own the dam. *See* Pl’s Resp., p. 2. It appears that the dam is owned by an entity named Glade Acquisitions, LLC, who is not a party to this litigation, and is not a party to the DOE. *Id.* at 2-3.

15. The Court considers the POA has proffered that the original Application for a Certificate of Approval for Mallard Dam filed with the Division of Environmental Protection, Office of Water Resources, Dam Safety Section listed Glade Acquisitions as the surface owner. *Id.* at 2. Further, the Monitoring and Emergency Action Plan and Maintenance Plan for Mallard Dam also listed Glade Acquisitions as the owner. *Id.* Finally, the Court considers that Terradon Corporation (the engineers) has been instructed to submit its proposal for future work on Mallard Dam to Glade Acquisitions, not GSR. *Id.* It was also proffered that John James, an engineer with Terradon Corporation, has been working with Glade Acquisitions for *several years* on Mallard Dam. *Id.* at 3.

16. On the other hand, GSR has proffered in the Reply that the deed from Glade Springs Resort, LLC to EMCO conveyed the property including the dam to Defendant EMCO, and thereafter Defendant EMCO conveyed “all property, including Mallard Lake and Dam” to Defendant GSR. *See* Reply, p. 2. Further clouding the ownership issue is evidence that was proffered indicating the tax ticket for the dam property lists Justice Holdings, LLC (not a party to this litigation) as the owner. *See* Pl’s Mot. for Sur-Reply, p. 2.

17. The Court finds and considers that neither Glade Acquisitions, LLC nor Justice Holdings, LLC are parties to this litigation or parties to the DOE. If GSR, LLC is then not, presumably, responsible for costs related to Mallard Lake Dam, it would not be proper for GSR,

LLC to seek summary judgment under the DOE for an asset it does not own and compelling reimbursement to entities which are not parties to the DOE containing the reimbursement provision. However, because the ownership issue appears unsettled, the Court will address the parties' other arguments.

18. Next, the Court considers whether the Mallard Lake Dam property is subject to the DOE, and, if said property is subject to the DOE, whether the POA is contractually required to reimburse GSR for the needed work to the dam.

19. In making this determination, the Court first considers the language of the DOE, which was attached as Exhibit 2 to the instant motion. On May 4, 2001, the POA and Glade Springs Resort Limited Liability Company (predecessor-in-interest to the Resort) entered into the DOE. *See* Def's Mot., p. 3. The parties do not appear to dispute the applicability of Paragraph 3(a) of the DOE.

20. Paragraph 3(a) of the DOE states, in pertinent part: "Glade shall operate, maintain and repair Roads, areas adjacent to the Roads, the Gatehouse, the Common Properties and parking lots located within Glade Springs Resort...Glade shall (i) make any and all capital expenditures, repairs and replacements and pay all operating costs, including without limitation, payroll and utility costs necessary to operate, maintain and repair the roads, including repairs caused as the result of construction activities on the Cooper Property, areas adjacent to the Roads, the Gatehouse, the Common Properties and the parking lots...". *Id.*; *see also* Pl's Resp., p. 5. In exchange, the POA "shall pay the costs incurred by [the Resort] pursuant to paragraph 3(a) hereunder[.]" *See* Def's Mot., p. 3.

21. Further, the DOE grants the POA "a non-exclusive right to use the lake at the entrance to Glade Springs Resort and any trails or outdoor playgrounds or play areas...

(collectively, the Common Properties).” *See* Pl’s Resp., p. 5. The Court considers that significantly, Mallard Lake Dam is not listed as one of the enumerated items of Common Property under the DOE. *Id.* Further, the dam is not mentioned at all in the DOE. *Id.* The Court considers that the DOE, which went so far as to enumerate items such as the Gatehouse, trails, playgrounds, and play areas, did not expressly do the same with the dam, which certainly is a large-scale structure. The Court finds this does *not* support the motion’s contention that the dam is subject to the DOE.

22. Further, with regard to the DOE’s inclusion of “*areas adjacent to the Roads, the Gatehouse, the Common Properties and the parking lots...*”, GSR argues the dam is adjacent to Lake Drive (one of the Roads) and Mallard Lake (a Common Property), and thus, subject to the DOE. *See* Def’s Mot., p. 4, 8. However, the phrasing in the DOE is “*areas adjacent to the Roads...*”, and the word “areas” cannot be excluded.

23. Further, “*areas adjacent to the Roads...*” is a stand-alone item in the enumeration of items subject to the cost-sharing provisions of Paragraph 3, and “*areas adjacent to*” only modifies the “the Roads”. *See* Sur-Reply, p. 10. Further, the ordinary meaning of the word area limits the DOE to the ground adjacent to the Roads, such as the berm, and not structural improvements such as Mallard Lake Dam. *Id.* at 11. If the parties had intended to include a structure such as the dam under the DOE they would have specifically referenced the dam. *See* Pl’s Resp., p. 6.

24. Beyond being an “area adjacent to the Roads”, GSR has proffered that the dam is either *part of* Lake Drive (and therefore part of one of the Roads) or part of Mallard Lake (and therefore part of the Common Properties). *See* Reply, p. 3. However, the Court considers that a dam is a barrier, in this case, to prevent the flow of water, while a lake is an inland body of standing

water. *See* Sur-Reply, p. 8. A dam and a lake are plainly separate distinct. Further, a road is an open pathway for ingress and egress of vehicles, persons, and animals. *Id.* Again, plainly, a dam and road are separate and distinct. *Id.*

25. The Court notes that the title documents submitted by GSR in support of its ownership argument in the motion recognize and acknowledge that the dam is separate and distinct as it separately lists Resort Roads, Mallard Lake and Mallard Dam. *See* Sur-Reply, p. 9. Utilizing the plain and ordinary meaning of the words, it is clear that Mallard Lake Dam is neither part of Lake Drive nor part of Mallard Lake. For all of these reasons, the Court finds and concludes that the Mallard Lake Dam is not subject to the DOE.

26. Finally, even if the Mallard Lake Dam fell within the purview of the DOE, which it does not, the Court will analyze the needed work sought to be done to the dam. Relevant to this examination is Paragraph 5 of the DOE, entitled Compliance with Law, which states: “The POA shall, at its sole cost and expenses, and Glade shall, at its sole costs and expenses, comply substantially with all codes, laws, ordinances, orders, rules, regulations, statutes, and other governmental requirements regarding use and enjoyment of all easements, licenses and rights to use granted herein (collectively, the “Easements”) and the property subject thereto.” *See* Resp., p. 9.

27. The needed work to the Mallard Lake Dam consists of replacements to the pipes that allow water to flow out of the dam. *See* Def’s Mot., p. 4. Further, the Court notes that the POA has also proffered in its Response that the “upgrade requires re-engineering of the dam, redesigning of the dam, and utilization of different material with a different configuration”. *See* Pl’s Resp., p. 8, 9.



28. At any rate, GSR classifies the needed work as capital expenditures, repairs and replacements necessary to operate, maintain, and repair Mallard Lake Dam. *See* Def's Mot., p. 9. Specifically, GSR argues that whether considered a capital improvement to the dam, a repair to the dam, or maintenance of the dam, the DOE requires reimbursement for the work needed. *Id.*

29. On the other hand, the POA classifies the needed work as an upgrade, one which is necessary to bring the dam into compliance with the Dam Safety and Control Act. *See* Pl's Resp., p. 7. As such, the POA argues said work does not constitute a capital improvement, maintenance, or repair. *Id.*

30. As an initial matter, the Court finds no conflict between Paragraph 3 and Paragraph 5 of the DOE. *See* Pl's Sur-Reply, p. 3. Instead, the two provisions can easily be reconciled to effectuate the intent of the parties. *See Berry v. Humphreys*, 76 W. Va. 668, 86 S.E. 568 (1915). When reading Paragraphs 3 and 5 together, it is evident from the express terms that the intention is Paragraph 5 is to operate as an exception to the general cost-sharing provisions set forth in Paragraph 3. *See* Pl's Sur-Reply, p. 5.

31. As such, the Court finds and concludes that the cost-sharing provisions of Paragraph 3 apply to the costs incurred in the operation, maintenance and repair of the Roads, areas adjacent to the Roads, the Gatehouse, the Common Properties and the parking lots located within Glade Springs Resort, except when costs are incurred to ensure that the POA's use and enjoyment of the Easements comply with all codes, laws, ordinances, orders, rules, regulations, statutes, and other governmental requirements (collectively, the law) or when costs are incurred to ensure that the property subject to the Easements complies with the law. *See* Pl's Sur-Reply, p. 5.

32. Further, it is clear from the record that the work to be done on Mallard Lake Dam, whether viewed as a capital improvement, repair, replacement, or upgrade, must be done to bring

the dam into compliance with the Dam Safety and Control Act. *See* Pl's Sur-Reply, p. 5. The Court considers that the following evidence of record was proffered in support of this contention: A letter from Delbert Shriver, Senior Engineer/Program Manager of the DEP EE Dam Safety, stating the WVDEP Dam Safety issued a Certificate of Approval to modify the Mallard Lake Dam to bring it in compliance with the Dam Control Act, email correspondence from a representative of Terradon (engineers) described the work as "Dam modifications", testimony from John James, an engineer with Terradon, stating that the dam is not in compliance with Dam Safety and it was agreed that it would be upgraded. *Id.* at 6.

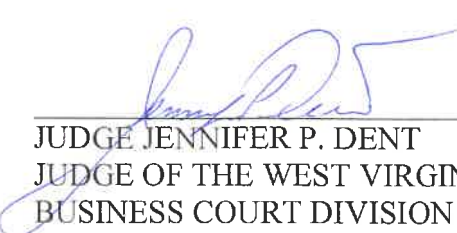
33. Therefore, the Court finds record evidence shows Mallard Lake Dam is not in compliance with the Dam Safety and Control Act, and is being upgraded and modified - not repaired - to bring it into compliance with the Dam Safety and Control Act. Applying paragraph 5 of the DOE, Defendant is solely responsible for the cost of bringing Mallard Lake Dam into compliance with the Dam Safety and Control Act.

34. For all of these reasons, the Court finds the Mallard Lake Dam is not subject to the DOE and GSR, LLC's Motion for Summary Judgment Granting It a Declaration that the Deed of Easements Requires the POA to Reimburse GSR for Repairs to Mallard Lake Dam should be denied.

### **CONCLUSION**

**WHEREFORE**, it is hereby **ORDERED** and **ADJUDGED** that GSR, LLC's Motion for Summary Judgment Granting It a Declaration that the Deed of Easements Requires the POA to Reimburse GSR for Repairs to Mallard Lake Dam is hereby **DENIED**. The Court notes the objections of the parties to any adverse ruling herein. The Clerk shall enter the foregoing and

forward attested copies hereof to all counsel, and to the Business Court Central Office at  
Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.



---

JUDGE JENNIFER P. DENT  
JUDGE OF THE WEST VIRGINIA  
BUSINESS COURT DIVISION