CHANCERY DIVISION: SUSSEX COUNTY
DOCKET NO. C-4130-77

NEEPAULIN COMMUNITY, INC.,

Plaintiff,

-vs-

CIVIC LEAGUE OF LAKE NEEPAULIN, INC., and ANTHONY J. MORASKI, personally,

Defendants.

MORRIS COUNTY COURTHOUSE
MORRISTOWN, NEW JERSEY

FEBRUARY 4, 1981

BEFORE:

REGINALD STANTON, J.S.C.

APPEARANCES:

KOVATH & FITZGIBBONS, ESQS.
BY: WILLIAM FITZGIBBONS, ESQ.
For the Plaintiff

DOLAN & DOLAN, ESQS.
BY: LEWIS B. DOLAN, JR., ESQ.
For the Defendants

RAYMOND J. MASTANDREA, C.S.R.
OFFICIAL COURT REPORTER

THE COURT: This action involves a large residential development in the Township of Washington, Sussex County, New Jersey. The development centers around a lake and contains approximately 900 individual lots, perhaps four or five hundred of those lots actually have houses on them and the remainder are either large collections of vacant lots held by the developer for future development or they're individual lots held by individual people who have not yet gotten around to constructing a house on them.

Each of the lots in the development, which is Lake Neepaulin, is burdened by restrictions and convenants which have previously been inserted in the chain of title and which have been previously determined by judgment of the Law Division, Sussex County, to run with the land. It's important to keep in mind that I am not the first judge who has looked at the situation at Lake Neepaulin and the judgment to be entered in this case is not the first judgment which will effect the Lake Neepaulin

community.

Back on September 12, 1968, in an action entitled Lake Neepaulin Property Owners Association versus Neepaulin Beach Club Association, Inc., Law Division, Sussex County, docket No. L-33434-65, Judge Alexander P. Waugh entered a comprehensive judgment that was designed to order the affairs of this community and to permit the community to function effectively for the indefinite future. That judgment decided many things which we have to take account of in deciding the present case.

One of the things the judgment decided was that there was a neighborhood scheme in effect at Lake Neepaulin. That all 900 or so lots, all of the lots in the community were part of the neighborhood scheme and that the owner of each lot had the right to use certain recreational facilities which had formerly been owned by the developers of the Lake Neepaulin community.

There is at the present time a large 40 acre lake which is basically owned by the

successor to the developer, the successor to the developer appears as the plaintiff in our present action.

There is also a beach development, developed beachfront of four or five hundred feet along the lake which is used for swimming.

There is a separate 18 acre parcel, two blocks from the lake on which there is a clubhouse and some other recreational facilities and there is a pool located about a mile away from the lake which is on an eight-acre plot.

The lake, beachfront, the 18 acre clubhouse tract, if we can call it that, the eight-acre pool tract are all properties which are owned by the plaintiff in this case, the Neepaulin Community, Inc. And for present purposes, the plaintiff should be treated as the successor of the developers of this tract.

The land which they hold is subject to being used by the owners of all of the lots in Lake Neepaulin provided that those owners pay certain fees which have been

imposed upon them by various instruments in their chain of title.

The basic charge imposed by previous fees on each lot is $30 per year. Every lot owner essentially is supposed to pay that $30 a year, whether or not he proposes to use the previously described recreational facilities and in return he's supposed to pay the $30 whether or not he uses the facilities. If he does not pay the plaintiff corporation, as successor to the developer, has the right to sue and to collect. If the owner does not pay, the lot owner does not pay, he may, during the period of his non-payment, be excluded from the right to use the recreational facilities.

This basic scheme was established by previous deeds and Judge Waugh's 1968 judgment confirms the existence of that scheme, imposes upon all of the lot owners the duty to pay the $30 a year assessment and also imposes upon the plaintiff corporation, derivatively now, the obligation to maintain, to take the money collected from the lot owners assessment and to use that to

maintain and operate the recreational facilities in the development.

This Lake Neepaulin, which is involved in our present case, is like many other lake communities in Sussex County and Morris and Passaic County. There very basic concept was, in a community such as this one, to form a club community, typically one owner, a developer had a large tract of land around either a natural or manmade lake and the idea was that certain recreational facilities would end up being owned by the community. When I say community, the people living in the neighborhood, I do not mean the public municipal government, they would end up being owned by the community centered around the lake. And those facilities would be maintained by the community and they wouldbe financed by charges made on individuals who owned land in the community.

Typically, it would be substantially recreational facilities, a lake, beachfront, often a clubhouse, tennis courts, baseball fields and badminton courts, that type of

thing, very common mode of development which occurs in the northern counties of New Jersey and typically was centered around a recreational facility such as a lake. Very often also the roads in such a community were not normal public roads owned by the municipality or by the state or by the public at large. Instead of that, roads were owned, to be owned first by the developer and then by the community. They would have to be maintained at the expense of the local property owners, the perceived advantage was that they would be private ways rather than public roads and therefore, the general public could be excluded from physically entering and traveling upon the community.

What I've just been talking about is a rather common kind of community development plan which was employed by many real estate developers in the counties of northern New Jersey. If the legal work is done carefully in setting up such a community, it is possible for the community to function well. And there are a number

of happy examples of such communities in Morris County, Sussex County and in Passaic County that I happen to know of because I've been involved with them as a judge hearing cases and also that I happen to know of simply because I live in this general area.

There are a number of very unhappy lake communities and this is one of them. And one of the reasons for the unhappiness is that the developer originally in charge of planning the community and his legal advisors simply dropped the ball in terms of creating an appropriate legal mechanism for carrying out the general intent of the developer and the general intent of people who would come and buy in such communities.

If a community such as this is to work properly, the way it has to be done basically is this: Before he starts selling lots, before he loses any control at all, the developer has to commit himself to a legal scheme under which initially the developer holds and controls communital facilities such as the lake, the beachfront,

the tennis courts, the roads and he builds them and operates them and funds them out of his general development operating funds. However, as lots are sold off and as individuals come to own those lots, a club corporation is formed. Every property owner must be admitted to the club corporation and so the club must accept him and also, he must join the club and have an obligation to pay dues to it.

The club is turned over, as the lots get sold and in sufficient number are in the hands of individuals, the club corporation gets turned over to the people who live or own property in the community. They all have a right to vote and participate and they select the leadership. Then the club community takes over the common facilities and operates them out of funds assessed against the members of the club.

The club community under its---the club community corporation, under its certificate of incorporation and by the by-laws has the right to vary the assessment from year to year, depending on the actual

needs, financial needs of the community. What I have just been describing is the way in which a successful community may be run and this legal mechanism, which I have been speaking of, has to be something that is designed and is set up consentually before the development starts selling off lots and everybody has to be locked into it in advance and if this kind of mechanism is used, it can be successful. It can be, first of all, legally enforceable, can bind everybody and it can also be pragmatically successful.

I'd also point out that this general conception that I've been speaking of is now routinely employed in condominiums. Some of the problems are different as between condominiums and a club community such as the ones that have developed around a recreational lake in northern New Jersey but we have, during the last decade in New Jersey, become involved with considerable condominium developments. And the legislature in New Jersey back in 1969 adopted a Condominium Act which appears at N.J.S.A. 46:6(b)-1

and following, the Condominium Act employs the concept which I have just been speaking of, that is to say, the developer of the condominium, from the very beginning, sets up a scheme under which there will be communal ownership and responsibility for the common portions of the condominium that sets up from the very beginning, that each lot owner is locked into it, the plan provides for the democratic control of the organization and also for democratic fiscal obligation to meet the financial burdens of the community.

Unfortunately, Lake Neepaulin was flawed from the beginning in terms of its legal planning because the original developer never provided a mechanism for turning over the common facilities to a club corporation which would include all the property owners in the lake. He simply didn't do it. There was no mechanism for handing over, as the developer sold off his lots or most of them and as he became less involved in the management and operation of the community from the viewpoint of promoting his sales,

he was no longer interested in running a lake and at one stage, not the original developer but a subsequent developer, asked the property owners collectively to take over what we might call the common recreational facilities. Asking isn't the way it should be done. There should be a legal obligation and duty to take them over created in advance, but that wasn't in this case.

So back in 1960's or so, the developer or the successor to the developer wanted to get out, but he had no mechanism for getting out, he had no mechanism for requiring anybody to take control and the individual property owners were not under any obligation, legal obligation to take control. So in 1969, the developer attempted to get the community at large to take over the community, the community at large was not interested, 16 or 17 individuals formed the plaintiff corporation Neepaulin Community, Inc. That corporation is a non-profit membership organization of the kind which typically runs community facilities in a lake community such as the one in question. It is a

corporation which is owned by 16 or 17 shareholders. They have no obligation to admit other people. Membership is not tied in with ownership of the land, although the people who own the shares in this corporation happen to also be people who own land and live in the community. But this plaintiff corporation is not a broadbased membership corporation. It is a corporation which ostensibly at least has the makings of profit as its end. It has no obligation in terms of its organization to admit any property owners in the lake Neepaulin community to membership in the corporation. It is controlled by its limited group of shareholders and it is not accountable in the way in which a non-profit membership corporation would be accountable to its members. It is fundamentally an inappropriate vehicle for the owning and operating of the recreational facilities at Lake Neepaulin.

This is not to be critical of the 16 or 17 people who formed that corporation. They at least had enough sense of social responsibility to wish to do something to

preserve the communal aspect of Lake Neepaulin and they made a financial commitment to try to do that. They also made a substantial commitment of their own time and effort and their personal life resources. So what I'm saying about this corporation being an inappropriate vehicle, is not meant to be critical of the 16 or 17 people.

Indeed, the appalling thing really is that out of the five or six hundred families who own lots in Lake Neepaulin and who have a stake in the management of these recreational facilities, out of these large number of families apparently only a tiny handful have been willing to shoulder responsibility for doing something about the communal facilities. It's a sad, it's really a sad commentary on the sense of the community, on the sense of responsibility of the vast majority of people at Lake Neepaulin, that back in 1969, instead of there being a broadbase community corporation formed, people weren't willing to do that and it was left to 16 or 17 people to try to put something together and make the thing

work.

The difficulty that confronts us now is this: We have recreational facilities which really ought to, which are really in a sense community property in terms of how they ought to be made available and used. They are also supported by a system of mandatory community assessments, namely, $30 per lot. Mr. Dolan has pointed out that there are few deeds which have a different annual assessment, some deeds I think are 40 or 50 dollars. There are a few deeds which depart from the $30 figure, but basically the typical lot is assessed at $30. This is a mandatory figure. So there's a mandatory community assessment, but as it has developed, this community property is being administered by a narrowly owned corporation.

Now, there are several problems. The $30 a year assessment is woefully inadequate to the task of running the community's recreational facilities in a minimally acceptable way, woefully inadequate. The most actual money which has been generated

in a single year is $28,430. Perhaps $30 a lot or a little more for some other lots were collected for all of those lots, this figure might be increased another $10,000 or so. But at the rate of $30 per lot, there is not even the beginning of a fund to operate these facilities properly. That's obvious from the testimony in this case and even if there weren't any testimony in the case, that's perfectly obvious.

I suggested to Mr. Dolan yesterday that I didn't really want to hear his defense, it wasn't that it wasn't in an appropriate way of prejudgment of his defense or expressing a disinterest in what his witnesses would say, I actually did hear the witnesses, but I said that, and now having heard the witnesses and consider what they have said, I'm left really with where I thought, we all know, just as a matter of being reasonably sensible people living in our society, living in communities of one kind or another, belonging to recreational clubs of one kind of another, paying bills in our daily life, we know that it is fundamentally impossible

to operate this kind of large recreational facility on $28,000 maximum which has actually been collected under the present assessment system or under the perhaps $35,000 that might be collected if everybody actually paid every year. Just can't be done.

I've had cases involving much simpler recreational facilities which require four and five times the money each year to operate as is being spent on these rather larger recreational facilities. It's absolutely impossible to maintain these facilities in anything like an acceptable way and that's just running them, that is to say nothing of capital replacement, just to run them, have lifeguards, have the grass cut, have the place cleaned up, have minimally acceptable recreational facilities and sanitation facilities. It couldn't be run properly for four times the price, it's as simple as that.

And when the people in that community complain about the state of the facilities, their complaints make about as much sense

as the man who is annoyed because he can't get a lobster dinner with all the trimmings for $2.89. Somebody wants a lobster dinner with all the trimmings, he better be prepared to pay $20 or $25 or $30 for it, he can't get it for $2.89 and if somebody wishes to run a 40 acre lake, 500 feet of acceptable beachfront and an 18 acre recreational facility separate from that, then an eight acre pool separate from that, if he wants to do all of that on 25 or 35 dollars a year, he is asking absolutely beyond question for the impossible. Cannot be done, can't even come close to being done.

What I've said about the inadequacy of the funding takes no account at all of two things; in the first place, not all of the money being paid in each year is available for operating expenses. It's to be remembered that the plaintiff corporation bought these facilities from the developer for a price of something like $80,000. There is still a mortgage being paid off and something like five to seven thousand dollars

a year comes out of the assessment just to carry the mortgage.

In addition, there are municipal taxes that are assessed every year. So that the amount available, the gross amount available is reduced by something on the order of 25 to 33 percent just to pay for carrying the mortgage and paying the real estate taxes and what it comes down to is that the ongoing operation of this rather physically extensive recreational facilities are being, there's an attempt being made to run them properly with something that works out to 17 or 18 thousand dollars a year. Can't be done.

I also note that there is a major problem confronting this community in the form of a capital improvement that may be needed in order to keep the lake in existence. There is a statewide program that is going on throughout New Jersey. We had testimony of it in this case. I've seen it in other cases, statewide program of evaluating every dam in the state. The state government and the federal government

finally woke up a few years ago to the fact there are a lot of old dams around this state and if some of them start breaking people can start dying in the worst cases and in the lesser cases, there could be inappropriate flooding that damages property and there could be loss of recreational facilities such as lakes. So for the last few years the United States Army Corps of Engineers, in cooperation with the State Department of Environmental Protection, has made an exhaustive survey and purportedly they have supposedly now surveyed every dam in the state trying to see whether it structurally is sound and what has to be done to keep it in existence.

The Corps of Engineers has reported to the owner of this lake that they must do $75,000 worth of repairs on the dam. If the dam is not repaired the Corps of Engineers working through the New Jersey Department of Environmental Protection may remove the dam or order the owners to. And apparently they haven't gotten close to getting around to that kind or order yet

in this case, but I have actually been involved in cases where that has been done. I'm thinking of Lake Swanee here in Morris County, Jefferson Township. The lake in that case was drained because the dam was dangerous and where there was a recreational lake there is now a mudhole, a smelling mudhole. I don't know whether the removal of this dam will completely destory Lake Neepaulin, I'm not sure just how this lake came to be formed. It may be that there would be a fairly large natural lake there even without the dam. We haven't had any testimony about that and I'm not familiar enough with the topography of the area to know, but if the dam is required to be open for safety reasons, it is certain that the lake will recede and it may disappear altogether just depending on how natural it was before the dam was built.

X But we now have this problem with very substantial dam repairs that have to be faced up to and this is by a group that can't even make the toilet flush - to put it very plainly - in the clubhouse

which has to be kept closed most of the time because the plumbing doesn't work and how an organization which can't make the plumbing work, can take care of the work needed on the dam, how it can do that is beyond me. The answer is, it can't.

Now, what is to be done about this situation? I do not believe that we have to be locked in forever to the $30 a year annual assessment. I'm thinking, for example, of a case such as State versus East Shores, Inc., 131 New Jersey Superior Court Reports, 300 which was decided in the Chancery Division in 1974. In that case Judge Muir found that deed restrictions limiting assessments to $50 a year could in effect be worked around. The theory that he used was a theory of mutual mistake. Said that 1, when that figure was originally put into the community deed restrictions there was a belief that it would be an adequate sum. It turned out that the sum was not adequate, it was totally inadequate. The device he used was to say there was mutual mistake of fact and he reformed the deeds and

equity and provided for a more flexible way of fixing assessments. That's an approach which can be used and should be used in an appropriate case.

We do have cases such as Petersen versus Beekmere, 157 New Jersey Court Reports, 155 and that was decided in 1971 by Judge Lora sitting in the Chancery Division.

In that case Judge Lora found there was not an enforceable neighborhood scheme because not all the lands in the neighborhood were encumbered by the restrictions and covenants in question. And he also, page 174, used this language by way of explaining in part his reluctance to find and enforce a neighborhood scheme. He said at Page 174, "In the convenants before this Court, there is no formula by which to calculate future assessments, thus binding property owners to specifed obligations and leaving open the responsibility of an equitable assessment as to each member of the lake community," This lack of definite assessment was preserved by Judge Lora in that case really

to be a reason for making the scheme unenforceable.

With all due respect to Judge Lora, who was a very distinguished judge and has since moved on to greater things, now sits in the Appellate Division, I think he simply missed the boat. The fact is that the only way a club community can work is not to have fixed assessments, affixed assessments, anything in dollar terms, specific dollar terms is absolute surefire candidate for failure. The only way in which an assessment system can work is if there is the ability to move up the assessment in light either of general inflation or in light of, aside from inflationary pressure, just the need to get certain physical jobs done, it could be that the physical job required might be bigger than what's originally contemplated, to say nothing of inflationary pressures. So the only way in which there can be a workable assessment plan is if there is the ability to change the assessment.

Now, this is not a change to be made at the arbitrary discretion of whoever

happens to control the assessment procedure. It has to be made in accordance with formula, has to be made in accordance with a system in which all the property owners have a participatory right and the funds have to be used for legitimate communal purposes. There's nothing at all offensive in terms of imposing unreasonable restraints on alienation or in terms of unfairness of property owners to have a flexible assessment system provided it's fairly designed and we have had cases that have recognized that. For example, there is the Paullinskill Lake Association, Inc. versus Emmich, 165 New Jersey Superior Court Reports, 431. That was decided by the Appellate Division in 1978. In that case the Appellate Division held quite straightforwardly, that open ended dues obligations are not intrinsically offensive, on the contrary, they are perfectly acceptable and the court reached that resolution quite readily and really decided expressly, as a matter of fact, that Petersen versus Beekmere decided earlier by Judge Lora, was

not to stand in the way of reaching that result. And there's an express reference in the Paullinskill Lake Association case to the Petersen versus Beekmere case.

We also have of course, as I mentioned earlier, we have the 1969 Condominium Associations Act which provides for open ended assessments and we know condominium assessments are very, very substantial and I've been in a number of cases where they amount to three, four, five, six hundred dollars a month per unit. Very substantial condominium assessment and the legislature has very clearly authorized those and they have gained common acceptance.

The key to controlling that assessment procedure is that it must be defined in the organizational documents of the condominium association units or of the club community corporation and the membership in the corporation which makes the assessment and it must be opened to all of the property owners and they must all have an input into how the assessments are calculated and the assessments must be used

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for legitimate communal purposes, but as long as those things are done there's nothing at all wrong with the idea of flexible assessment. On the contrary, the only way in which an organization can be run is to have flexible assessment.

Now, because of what I have just said, If I were confronted in this case with a situation in which there was a broad membership club corporation, I would have no hesitation under the facts of this, the other facts of this case, in knocking out the $30 assessment and in permitting the membership of the community corporation to change the assessment as needs require it from year to year. I would have no hesitation in doing that. That is the only way in which this community can function.

I've suggested to the lawyers in this case in settlement conferences, which we've had in chambers, that the parties to this case should look to the formation of such a club community corporation and I have suggested that the plaintiff in this case should be willing to hand over, to transfer

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its assets to such a community corporation. Of course, the present stockholders would have to be compensated for their economic stake in the corporation. I forget what the sum is, but they still owe forty or fifty thousand dollars to the developer. He still has some mortgage, they have investments they have made so what should be done in terms of the pragmatic solution of this problem, what should be done is the plaintiff corporation should turn over the assets to a new broad membership corporation which is mandatorily opened to all of the property owners in the lake community. The debts of the plaintiffs should be picked up and some compensation should be paid in addition to that, so that the shareholders in the plaintiff corporation can get their money out.

If I had a club community corporation I think we could work out a viable way of running this community. But, I'm confronted with an impossible dilemma, as long as the community facilities are owned as they are presently owned, which is to say that

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by a narrowly owned private corporation which is organized for the making of profit, I do not think it appropriate, either legal or as a matter of common fairness to require the property owners in this community to pay more than the $30 which is called for in their deeds to an organization which they do not control and whose assets they do not ultimately own. If I, for example increase the assessment to $150 a year, the facilities would be operating much better, they would also be improved in a capital sense and we would vastly enhance the equity of the narrow group of shareholders in the plaintiff corporation. I don't think I'm legally at liberty to do that and if I am, I, as a matter of sound exercise of discretion would not do that.

The fact is, this is the wrong kind of corporation to own these assets in this community the way it is organized. I'm not being critical of the people who formed this corporation, they at least tried to do something, but the time has come for them to get out and for these assets to be

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turned over to a community organization and the community organization must be mandatorily open to all the property owners in the community.

Now, unless that is done we are confronted here with a totally hopeless and unworkable situation because we have people locked into a dues or in an assessment system which is dooned to failure. The results will be that the whole quality of life in the lake community will get worse and worse and worse.

I've come to the conclusion that the neighborhood scheme and the assessment scheme involved in this community lake Neepaulin must be terminated because it is a failure. We do have a neighborhood scheme set up in the deeds, it would be enforceable under many circumstances and that scheme had been recognized by Judge Waugh's judgment of 1968 and normally we would of course follow through on this judgment and attempt to implement it. But the fact is that the operation of this neighborhood scheme is physically a financial - financially impossible,

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cannot be done, can't work and it will lead to a deterioration of the environment in the community and it will lead to a wasting of natural resources and it will lead to a squandering of financial resources.

Because of the impossibility of implementing this neighborhood scheme on an appropriate basis, I will enter a judgment terminating the neighborhood scheme and terminating all of the obligations of the property owners to contribute to, in accordance with their deeds and the effective date of termination will be February 18, 1983, a little more than two years from now. Until that termination date the provisions of Judge Waugh's agreement will remain in force, that is to say, the property owners will be required annually to pay their $30 and the plaintiff corporation will be required to do the best it can, which won't be very good, but do the best it can to keep facilities running for the next two years. But we can't continue beyond that because the thing simply won't work.

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When the termination takes place, the

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plaintiff corporation will own the lake, its section of beachfront, the 18 acres where the clubhouse is, it will own the eight acres where the pool is, it will own that, but it's, that is free of any obligation to the land owners in the community and there will be no obligation to make that facility, those facilities available for the property owners. There will also be no obligation for the property owners to pay anything. And then, we will just be back in a straightforward free enterprise situation and we will see whether the market economy can make some sense out of this situation. The artificial unworkable neighborhood scheme has not made any sense out of it.

Now, we're just going to release all of theproperty up there from the common restrictions. The plaintiff corporation will just own its property and will not be under any obligation to make it available and the property owners will not be under any obligation to pay. That will occur on February 18, 1983.

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I want to make a point which I hope lawyers will take back to whoever their respective clients are, that is, what I'm really hoping is the before February 18, 1983 the people who live in Lake Neepaulin will get themselves together and will form a community corporation and that they will come to court with this community corporation and with a proposal for shifting the assets to the community corporation and for changing the assessment system for the land. I will retian jurisdiction over the case so that I can hear applications along these lines at the foot of the judgment and if appropriate application is made, I will consider it and I would like to be in a position, if all the factors permit it, I would like to be in a position to see this situation converted in a true community club, club community where the assets are owned by a corporation whcih includes in its membership all of the property owners.

So we are really, presenting to the people who live at Lake Neepaulin, the challenge of giving them two years in which to see if

they can retrieve this situation and turn it into a viable club community. If they cannot, then we will simply, the judgment, the termination will go into effect and on February 18, 1983 we will be back, will be in a straight laizez-faire situation with unencumbered property.

What I've said thusfar takes care of the kind of relief which the plaintiff was seeking in this case, it's not what the plaintiff wanted, but that disposes of the issues raised by the plaintiff.

We'll now deal with the counterclaim. All of the claims of the counterclaim are dismissed. There is an obligation on the part of the plaintiff corporation, both under the general deed scheme and under the term of Judge Wuagh's judgment, there is an obligation to attempt to operate and maintain these facilities in a reasonable fashion. I'm satisfied that this obligation has been met within the limits of the resources available to the corporation.

In fact, the operation has not been good, it has been very poor. The communal

facilities have deteriorated badly, but they have deteriorated badly essentially because they have been funded of a fifth to a third of the funding level that is necessary and the inevitable has occurred, it's not anybody's fault, that's not to say that I am agreeing that the plaintiff corporation has acted perfectly within the limits of his resources, it has not, but what I am saying is that in terms of the basic concepts involved here, as a basic proposition the plaintiff corporation has performed more or less as well as could be expected under the circumstances.

There is no point in assessing any damages, no damages are justified. There is no point to having any formal accounting, there simply is no point to it. It amounts to disecting a corpse. The penny here and there might be found to have been ill-advisedly spent, but that's not the problem, that's not what this case involves and if we were simply, no advantage would be gained to anybody for us to spend a lot of time figuring out the exact pennies of where the

money has gone.

The proof in the case indicates, as a broad proposition, that the money has been used for the proper purposes of reducing the mortgage, paying the taxes and operating the facilities and it would simply be a monumental waste of time for us all to spend hours and hours pouring over figures to see whether we can trace the odd dime.

There have been complaints made of the fact that the plaintiff corporation has excused a large property owner from the assessment scheme. This is a corporation which owns something like 250 undeveloped lots in the community. Those lands are being held for future development by someone who bought them from the original developer. They may or may not ever be developed. There are no people tied into those lots who would make demands on the recreational facilities. The deed restrictions do give to the plaintiff corporation the right to waive requirements in the exercise of their sound non-discriminatory judgment

and it seems to me that it's fairly arguable that it is the exercise of good discretion not to assess each of those 250 lots being held by the developer at the rate of $30. It would not be fair to the developer that these lands get assessed in the same way as lands which are in active use. Perhaps they should have been assessed, arrangements should have been made where they paid more than they have, but this is the kind of management decision which should not be second guessed it seems to me.

There was a broad right under the deed provision for the plaintiff to make the kind of judgment which was made. I'm satisfied the judgment was made in good sense, in good faith and I'm satisfied that it is, at least fairly arguable, that the judgment was the right one. So there will be no relief with respect to that.

No relief with respect to its exclusion from recreational facilities, if there have been any wrongs, they are deminimus and they're not worth fussing about.

So all of the requests for relief under the counterclaim are denied. Request for relief by the plaintiff are denied and the relief granted has not been requested by anyone, but it's relief which I am giving, namely the termination relief, it's relief that I am giving in the common interest of all.

Now, sofar as counsel fees are concerned, I will not award any at the present time. I will entertain applications, supported by affidavits of service from Mr. Fitzgibbons and from Mr. Dolan.

I think I've disposed of everything, gentlemen. Is there anything else that I missed that I should have covered?

MR. DOLAN: Your Honor, this is a class action. I think you have an application from 40-some people to be excused from the class. I think the Court has the discretion to either accept their application or to deny it, perhaps that should be addressed by the Court maybe now or later.

THE COURT: I think under the class action rules they are out of the case and

they are not bound by the judgment. I don't think that I can bind. They made the election to be out. I don't think I can bind them. However, I can't bind them without some further, at least without some further procedural steps.

MR. FITZGIBBONS: I thought it was within your discretion to review their requests and to rule.

THE COURT: No, I don't think so.

MR. FITZGIBBONS: I think as an alternative, Your Honor, would you consider that service of the judgment upon them and then set down a hearing within so many days or written response?

THE COURT: Why don't you have a seat while I pull out the rules in class action. Well, I'm looking at rule 4:32-2. Incidentally, the people in the class are all of the property owners except for the 40 or so who have specifically filed requests to be included. But under the rule, if they ask to be excluded they must be excluded and they are not bound by the judgment, it seems to me. I'm going to ask

Mr. Dolan to prepare the judgment in the case and you have a list of people, we gave you a list of the people who wrote in and asked to be excluded.

MR. DOLAN: Yes, Your Honor.

THE COURT: In setting up the judgment, the class should be defined and it's everybody except those people. What should we do with those people? I think we should; they can't simply be bound by the judgments. Under the terms of the rule they have opted out and they're not bound, But I think we should now try to bind them in everybody's interest, not take advantage of them in their absence, it's an attempt to clean the situation up.

I would suggest that what we might think of doing is entering an order to show cause which we'll serve on these 40-odd people and attached to the order will be a copy of the judgment in the case and they will be told that they will be bound by the terms of that judgment unless they personally appear in court on a specified date to explain why they should not be bound.

I suspect that most of them will want to be bound. They should want to be bound, I don't know why they wouldn't, really. If they don't they'll come to court and we'll see why they shouldn't be bound and we'll deal with it then.

Any other thought?

MR. DOLAN: I think that's---

THE COURT: This is a mechanical way of doing it. I think they have to be given the chance.

Any other thoughts, gentlemen, as to what you should do?

MR. FITZGIBBONS: The only other reason was, it had to do with the previous agreements that were on record in regard to holding dues in abeyance.

THE COURT: I thought all the dues had been paid over.

MR. FITZGIBBONS: No. In regards to Luxury Homes and some of these other people that were made by prior owners.

THE COURT: Well, I don't think Luxury Homes should pay $6000 a year whatever it is toward this community. That would be

one-quarter of the revenues when nobody is using it. On the other hand, nobody from Luxury Homes is using the facilities, on the other hand, I certainly think some contribution should be made. I think they should pay several hundred dollars, it seems to me at least, but I'm not in a position to fix that, no one has asked me to fix it and I'm not in a position to fix it. I think we won't make any provision in court now, I think the plaintiff has the right to make fair determinations and waivers in that regard and I think the plaintiff should take a look at the situation. I don't think it makes any sense to get into anything protracted because in the next two years the plaintiff should take a fresh look at that.

Incidentally, gentlemen, do you think there's - I've allowed two years here because it takes a while, if something is to be organized, it takes a while for it to be organized and as I've indicated, what I am really hoping is that we will have a true community club corporation that somebody

will put together. And that takes some doing, takes a lot of work. Someone is going to have to become involved in doing that and I hope that somebody will. There has to be a handful of community minded people who have the time and energy and the skill to make it work if it's to work at all. So I hope you encourage people to do that. I don't want people to get the idea, well, it's two years so we won't do anything for the next year, I'm allowing two years to give them enough time to do it, but somebody should start, somebody should be interested and if they are, they ought to start trying to put this together fast. They'll need some legal help. It doesn't have to be you, but some lawyer who works with these organizations and sets them up and organizes them is going to have to help them. Ideally it would be nice if there were a few lawyers living there who would do it for free or for a minimal charge, that would be ideal. I don't know whether there are any who live in that community. Are there any?

MR. DOLAN: I'm not sure that there are.

THE COURT: What would really be nice is if you had a couple of lawyers, couple of bankers, couple of accountants, couple of people with broad business experience who had a personal interest in making it work and they would put their time in for nothing and maybe work out a mortgage with the bank and do the legal work, that's what would really be nice, if they're available. If not, I'm sure four or five hundred families there, there have to be some people with a little enterprise and get up and go who will try to do something.

Let me return the exhibits. I will initially return all the joint exhibits to Mr. Fitzgibbons, I'm not sure they're all his documents but Mr. Fitzgibbons, you take them back and give Mr. Dolan his share of them and the defendant's exhibits will go to Mr. Dolan and the plaintiff's exhibit to Mr. Fitzgobbons.

Thank you, gentlemen. Thank you

very much. Let's see what happens, I hope some good comes from all this.

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C E R T I F I C A T E

I, RAYMOND J. MASTANDREA, A Certified Shorthand Reporter and Notary Public of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes.

RAYMOND J. MASTANDREA, C.S.R.