

LPCOA

Presidents Report September 3, 2007

Summer is coming to an end. Where has it gone? The time has passed so quickly. Our family has enjoyed being back. Of course, for some of them it's their first season, as it was for our two year old granddaughter, Katie.

Claudia and I have great memories of Linwood Park. This year has created many more. We have made so many new friends and renewed old friendships.

These months have also been a learning period. To know the past and present is helpful for looking to the future. But, we can't dwell on the recent past. We must create our future at Linwood Park from our positive memories and an open communication among ourselves as Cottage owners and with the Linwood Park Co.

The disharmony has taken a toll on many. It's time that we take a new breath and rededicate our mission to the preservation of Linwood Park. But in order to do that we must understand our position as a lease holder. What follows is a start to developing an understanding of the rights and obligations of a lease holder. Obviously, this description will be general since, we don't know the actual language of all of our leases. It would be helpful to have copies of our leases for reference purposes.

There are few cases, in Ohio or otherwise, that speak to the inherent rights of the lessee in a ground lease. There are general guidelines that are provided, but because of the complexity and peculiarity of a ground lease contract, some rights and responsibilities may be placed in the lease.

"A lessee who wishes to maximize his or her control of the use of the land and its improvements will seek the greatest degree of flexibility in developing the leased land." 12-207 *Ohio Transaction Guide* § 207.27. In Linwood, improvements have already been made and we have control over the use of the leased land.

According to *Ohio Real Property Law and Practice*, a land contract should include clauses that determine who is responsible for utilities, property taxes, insurance, and maintenance. Generally the lessor would require the lessee to maintain and repair the improvements and pay certain expenses. The lessee of land lease is afforded greater control over the leased property than a tenant in a normal landlord/tenant lease. The lessee is granted many of the same rights, such as the covenant for quiet enjoyment, but the lessee also maintains near absolute control and management over the leased property depending on any building restrictions contracted by the lessor.

Most land leases are long-term perpetual leaseholds, usually for 99 years as ours are, and renewable forever, and are for land only. Therefore, the lessee, not the lessor, owns any structure build upon the leased land and may tear down or alter on building provided he does not commit any waste. *City of Cincinnati v. Smythe*, 2 Ohio Supp. 342 (Ohio Com.Pl. 1937). So, even though the lessee may be leasing the land he is still the owner of the building.

In a perpetual leasehold, the lessee is liable for payment of rent to the lessor, including heirs and assigns, whom carry a reversion. However, upon lessee defaulting on the lease, lessor can take possession but allow lessee two years to cure and pay any arrearages. *Quill v. R.A. Investment Corp.*, 707 N.E.2d 35, (Ohio App. 2 Dist., 1997). Before ever taking possession upon default, the lessor must provide advance notice to the lessee.

The Linwood Park Company (hereinafter “the Company”) has strived to promote a certain landscape to attract patrons and leaseholders. According to the “Linwood Park Building Regulations,” as of May 2003, the Company believes that open areas are important to the enjoyment of the Park. In order “to preserve and maintain the Park for the benefit and enjoyment of all, it is necessary to have regulations which govern Park building and construction.”

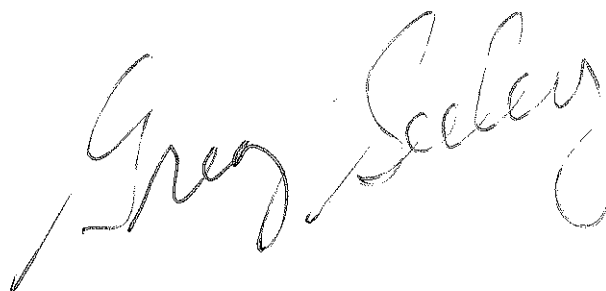
This same philosophy would appear to be the predominant reason why many residents have chosen to abide by the Linwood Park Building Regulations. Linwood Park which includes the beach, the grove, the stand etc. is inducement to the public. This in turn would impart in the residents an easement by implication. For example, where a lake was the predominant basis of a development, was advertised as such, and was an inducement to the public to purchase in the development, the purchasers of lots had an implied easement across the retained lands to access the lake. See *Stoney Creek Resort, Inc., v. Newman*, 240 Va. 461 (Va. 1990). “While implied

grants of easements are not favored, being in derogation of the rule that written instruments shall speak for themselves, the same may arise when the following elements appear: (1) A severance of the unity of ownership in an estate; (2) that before the separation takes place, the use which gives rise to the easement shall have been so long continued and obvious or manifest as to show that it was meant to be permanent; (3) that the easement shall be reasonably necessary to the beneficial enjoyment of the land granted or retained; (4) that the servitude shall be continuous as distinguished from a temporary or occasional use only.” *Mapes v. Smith*, 2003 Ohio 428, P15 (Ohio Ct. App. 2003) (citing *Ciski v. Wentworth*, 122 Ohio St. 487, paragraph one of the syllabus (Ohio 1930)).

It is well established that residents and visitors have used the Linwood Park and its open and common areas for many years under the assumption that the use was to be permanent. If the Company were to take that away from the residents, this action would sever ownership. The third element states that the easement shall be reasonably necessary to the beneficial enjoyment of the land granted or retained. “The word ‘necessary’ does not impart extreme need...” *Linwood Park Co. v. Herkner*, 1931 Ohio Misc. LEXIS 1293 (Ohio Misc. 1931). In *Linwood Park Co.*, the Plaintiff bought her property at a time when one of the areas reasonably necessary to its enjoyment was access to the Vermillion River. *See also Ciski v. Wentworth*, 122 Ohio St. 487.

Linwood Park as a whole is that which induces the people to reside and visit here. Therefore, it is “reasonably necessary” for the beneficial enjoyment of the property. The Company has always used the Park as a whole as its focal point to attract patrons and residents. By doing this, they have induced a degree of reliance on the Park as a whole always being available.

I welcome your input or comments. Please feel free to contact me over the winter at [REDACTED] or at any time by email GDSeeley@sseg-law.com.

A handwritten signature in cursive script that reads "Greg Seeley". The signature is written in dark ink and is positioned in the lower right quadrant of the page.