



**COMMON PLEAS COURT OF OTTAWA COUNTY**

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for Summary Judgment and its Reply Brief filed January 27, 2006, and Defendant's Memorandum in Opposition to Motion to Strike Johnson's Island Property Owner's Association's Cross-Motion for Summary Judgment filed February 3, 2006.

{¶2} This matter is before the Court on Plaintiff's Motion for Summary Judgment, which presents to this Court for consideration whether Plaintiff can meet the standard for establishing that it is entitled to declaratory judgment as to the certain rights claimed by Plaintiff which include: (1) a legally enforceable, non-exclusive right of way and easement over and across Gaydos Drive, the Causeway and all private roads on Johnson's Island; (2) unrestricted access to the Baycliffs Subdivision and Johnson's Island from the nearest publicly dedicated street, Bayshore Road; (3) no obligation to contribute to JIPOA for the maintenance, repair and improvement of roads platted in any subdivision other than Baycliffs; and (4) a refund of all monies paid by and on behalf of Baycliffs Homeowners Association ("BHOA") members to obtain toll gate passes, including monies in the "joint account" or "escrow account" at Marblehead Bank.

{¶3} This matter is also before the Court on Defendant JIPOA's and Defendants' Charles L. Gaydos, Individually and as Trustee, Mary Gaydos and Gregory R. Gaydos ("the Gaydos Defendants"), Cross-Motion for Summary Judgment, which presents to this Court whether Defendant can meet the standard for establishing that Plaintiff has no right to the relief requested.<sup>1</sup>

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<sup>1</sup> Plaintiff's moved to strike Defendant JIPOA's Cross-Motion for Summary Judgment on the basis that Defendants had failed to comply with Local Rule 25.01(a), which requires a Notice of Non-Oral Hearing. However, as Defendants note, a Notice of Non-Oral Hearing was filed, setting a Non-Oral Hearing date of February 16, 2006. As such, Plaintiff's Motion to Strike is not well taken.

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unimpeded access to the Baycliffs subdivision on Johnson's Island. However, this Court also finds that Plaintiff is obligated to contribute to the maintenance, repair and improvement of Gaydos Drive, the Causeway, and Confederate Drive and Memorial Shoreway Drive within Bay Haven Estates. As a result, the monies deposited by Plaintiff and its members in the "joint account" or the "escrow account" shall remain in escrow pending further order of this Court.<sup>4</sup>

**I. STANDARD OF REVIEW**

{¶6} Under Civ.R. 56(C), summary judgment is appropriate when the moving party demonstrates that (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) after construing the evidence most favorably for the party against whom the motion is made, reasonable minds can reach only a conclusion that is adverse to the nonmoving party.<sup>5</sup>

{¶7} The moving party bears the initial responsibility of informing the court of the basis for the motion and identifying those portions of the record that support the requested judgment.<sup>6</sup> If the moving party discharges this initial burden, the party against whom the motion is made then bears a reciprocal burden of specificity to oppose the motion.<sup>7</sup> Moreover, it is well

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judgment or injunctive relief on behalf of its members who have standing to sue individually \* \* \* .")

<sup>4</sup> See Plaintiff's Motion for Summary Judgment (Partial), at 2.

<sup>5</sup> *Zivich v. Mentor Soccer Club, Inc.* (1998), 82 Ohio St. 3d 367, 369-370, 696 N.E. 2d 201, Citing *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 1995 Ohio 286, 653 N.E. 2d 1196, paragraph three of the syllabus; *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O.3d 466, 472, 364 N.E.2d 267, 274; *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 117, 522 N.E.2d 489, 505.

<sup>6</sup> *Vahila v. Hall* (1997), 77 Ohio St. 3d 421, 430; see also *Dresher v. Burt* (1996), 75 Ohio St. 3d 280, 293, 662 N.E.2d 264 ("the moving party cannot discharge its initial burden under Civ.R.56 simply by making a conclusory assertion that the non-moving party has no evidence to prove its case").

<sup>7</sup> *Vahila v. Hall* (1997), 77 Ohio St. 3d 421; see also *Mitseff v. Wheeler* (1988), 38 Ohio St. 3d 112.



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settled that the party seeking summary judgment bears the burden of showing that no genuine issue of material fact exists for trial.<sup>8</sup>

{¶8} In reviewing a motion for summary judgment, the court must construe the evidence and all reasonable inferences drawn therefrom in a light most favorable to the party opposing the motion.<sup>9</sup>

**II. BACKGROUND**

{¶9} Baycliffs Homeowners Association, Inc. ("BHOA") is a not-for profit corporation created by Declarant, Baycliffs Corporation ("Baycliffs Corp."),<sup>10</sup> to operate, manage, maintain and to represent all owners of the property included in and known as the Baycliffs Subdivision, in accordance with its Declaration of Restrictions, Covenants and Easements.<sup>11</sup> Each BHOA member/lot owner acquired certain rights of way and easements by virtue of a deed which accorded them rights of access over and across several private roads from the nearest public-access road, Bayshore Road, from the developer of Baycliffs subdivision and Declarant of BHOA, Baycliffs Corp.<sup>12</sup> Baycliffs Corp. acquired these certain rights of access from Johnson's Island, Inc. ("JII"),<sup>13</sup> which received these rights by grant from Ms. Dorothy Gaydos Saunders.<sup>14</sup> Ms. Gaydos Saunders was the record owner of the common areas of Cold Harbor Subdivision,

<sup>8</sup> *Celotex Corp. v. Catrett* (1987), 477 U.S. 317, 330, 91 L. Ed. 2d 265, 106 S. Ct. 2548; *Mitseff v. Wheeler* (1988), 38 Ohio St. 3d 112, 115, 526 N.E.2d 798; *Dresher v. Burt* (1996), 75 Ohio St. 3d 280.

<sup>9</sup> *Morris v. Ohio Cas. Ins. Co.* (1988), 35 Ohio St. 3d 45; *Harless v. Willis Day Warehousing* (1978), 54 Ohio St. 2d 64; *Murphy v. Reynoldsburg* (1992), 65 Ohio St. 3d 356, 358-359, 604 N.E.2d 138 (Doubts must be resolved in favor of the nonmoving party).

<sup>10</sup> See Amended Verified Complaint for Declaratory Judgment and Damages ("Amended Complaint"), at ¶ 1.

<sup>11</sup> Vol. 398, Page 567 et. seq. of Ottawa County Records ("Declaration"). See Amended Complaint, at ¶ 1.

<sup>12</sup> Amended Complaint, at ¶ 8.

<sup>13</sup> Vol. 366, Pg. 821-823, Ottawa County Records (Quitclaim Deed).

<sup>14</sup> Vol. 225, Page 717 of Ottawa County Records (Warranty Deed). See Amended Complaint, at ¶ 5 (Exhibit 4).



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including the private road known as Gaydos Drive.<sup>15</sup> Ms. Gaydos had also previously granted in 1964, the same certain rights to JII by Easement Agreement.<sup>16</sup> Accordingly, JII as the developer of Bay Haven Estates and Shiloh subdivisions, granted to Johnson's Island Club ("JIC") the authority to administer restrictions.<sup>17</sup> Defendant JIPOA is a property owners' association comprised of some, but not all of Johnson's Island landowners, some of whom own property within subdivisions other than Bay Haven Estates and Shiloh subdivisions.<sup>18</sup> JIPOA also acquired an interest in the common area of Cold Harbor Subdivision and in Gaydos Drive from Defendant Charles Gaydos.<sup>19</sup> Defendant Mr. Gaydos had acquired his interest from his mother, Ms. Dorothy Gaydos Saunders.<sup>20</sup>

{¶10} Baycliffs Corp. deeded to each BHOA member/lot owner, certain rights of access over and across several private roads from the nearest public-access road, Bayshore Road.<sup>21</sup> These certain rights are limited to Gaydos Drive, the Causeway, Confederate Drive and Memorial Shoreway Drive within Bay Haven Estates ("Roads").<sup>22</sup> Baycliffs Corp. is the record owner of the leasehold estate on which the Causeway is situated. The fee simple title to this land is owned by the State of Ohio. Baycliffs Corp.'s leasehold estate was created by that certain Lease of Submerged Lands of Lake Erie between the State of Ohio, as lessor, and Johnson's Island, Inc. as lessee, dated October 2, 1968.<sup>23</sup> JII granted to Baycliffs Corp. by quitclaim deed, "all of Grantor's right, title, estate and interest, if any, in and to the roadways and causeway

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<sup>15</sup> Amended Complaint, at 3, ¶¶ 3-4.

<sup>16</sup> Vol. 227, Pg. 737 (Easement Agreement). See Amended Complaint at 4, ¶ 6.

<sup>17</sup> Amended Complaint, at 2-3, ¶ 2. Pursuant to deed restrictions.

<sup>18</sup> See Amended Complaint, at ¶ 2.

<sup>19</sup> Vol. 709, Page 461, Ottawa County Records (License Agreement Between Charles L. Gaydos, Trustee and Johnson's Island Property Owners Association). See Amended Complaint, at ¶ 3.

<sup>20</sup> Vol. 433, Page 202, Ottawa County Records (Quitclaim Deed). See Amended Complaint, at ¶ 3.

<sup>21</sup> Amended Complaint, at ¶ 8.

<sup>22</sup> Amended Complaint, at ¶ 8.

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located thereon.”<sup>24</sup> Baycliffs Corp. also acquired the leasehold interest in the Causeway from JII by virtue of an Assignment Agreement,<sup>25</sup> and by Assignment of Lease, which was approved by the State of Ohio.<sup>26</sup> The record reflects that the leasehold interest in the Causeway still remains with Baycliffs Corp.

{¶11} BHOA members/lot owners allege that access to Johnson’s Island has been impeded by the use of a tollgate, which is operated by Defendant JIPOA.<sup>27</sup> JIPOA asserts that it obtained consent to operate this tollgate from Defendant Charles Gaydos who owned the property upon which it sits.<sup>28</sup> On June 26, 2003, Defendant Charles Gaydos deeded this property upon which the tollgate is located to JIPOA.<sup>29</sup>

{¶12} Because of this obstruction of BHOA’s deeded rights of access, BHOA has brought this cause of action, seeking declaratory judgment against Defendants that would allow BHOA members/lot owners unrestricted and unimpeded access to the Baycliffs Subdivision from Bayshore Road.<sup>30</sup>

**III. ANALYSIS**

{¶13} Plaintiff suggests that it is entitled to declaratory relief because it enjoys easement rights “across the platted road of the Cold Harbour Subdivision (Gaydos Drive), the southerly extension of Gaydos Drive, \* \* \* owned by the Gaydos Defendants, the Causeway and the

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<sup>23</sup> Vol. 23, Pg. 525, Ottawa County Records (Lease of Submerged Lands of Lake Erie to Johnson’s Island, Inc.).

<sup>24</sup> Vol. 366, Pg. 821, Ottawa County Records (Quitclaim Deed).

<sup>25</sup> Vol. 366, Pg. 825, Ottawa County Records (Assignment Agreement), recorded August 16, 1991. See Vol. 030, Pg. 539, Ottawa County Records (Assignment of Lease from JII to Baycliffs Corp).

<sup>26</sup> Vol. 030, Pg. 539, Ottawa County Records (Assignment of Lease), recorded January 9, 1992.

<sup>27</sup> See Amended Complaint, at ¶¶ 8, 9 & 10.

<sup>28</sup> Amended Complaint, at ¶ 10.

<sup>29</sup> Vol. 929, Page 520, Ottawa County Records (Warranty Deed).

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platted roads of the Bay Haven Subdivision.”<sup>31</sup> Plaintiff argues that “[t]he chain of title to sublots [sic] in Baycliffs Subdivision recites no restrictions to these easements and rights-of-way.”<sup>32</sup>

{¶14} Defendant suggests however, that Plaintiff has omitted “crucial facts,”<sup>33</sup> including the fact that (1) JIPOA through its predecessor, Johnson’s Island Club (“JIC”), has operated a tollgate controlling access to, and collecting tolls for passage over, the Causeway since 1979; (2) the Causeway was completed with “substantial”<sup>34</sup> funding from JIC’s members after it was partially built in the early 1970’s by JII; and (3) the tollgate was “existing, conspicuous, and in plain sight for potential purchasers of property on Johnson’s Island.”<sup>35</sup> Based on these “crucial facts,” Defendant argues that Plaintiff is “estopped” from denying JIPOA’s easement interest.<sup>36</sup>

{¶15} In response, Plaintiff asserts that it is only asking this Court “to declare its right to access the Baycliffs subdivision on Johnson’s Island without impediment and in full accordance with the instruments recorded in Ottawa County public records.”<sup>37</sup> Arguing that it is entitled to unimpeded access because these recorded documents reflect the existence of an easement over the lands and the Causeway, Plaintiff suggests that Defendant’s reliance upon documents outside the chain of title of both Plaintiff’s members and Defendants fails to create a genuine issue of material fact.

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<sup>30</sup> See Amended Complaint, judgment demanded, 1-11.

<sup>31</sup> Plaintiff’s Motion for Summary Judgment (Partial), at 4.

<sup>32</sup> Plaintiff’s Motion for Summary Judgment (Partial), at 4.

<sup>33</sup> Memorandum of Defendant Johnson’s Island Property Owner’s Association (“JIPOA”) in Opposition to Plaintiff’s Motion for Summary Judgment and Cross-Motion for Summary Judgment, at 5.

<sup>34</sup> Memorandum of Defendant Johnson’s Island Property Owner’s Association (“JIPOA”) in Opposition to Plaintiff’s Motion for Summary Judgment and Cross-Motion for Summary Judgment, at 6.

<sup>35</sup> Memorandum of Defendant Johnson’s Island Property Owner’s Association in Opposition to Plaintiff’s Motion for Summary Judgment and Cross-Motion for Summary Judgment, at 6.



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{¶16} The two essential issues before this Court are (A) whether Plaintiff has easements granting it access from Bayshore Road to Baycliffs Subdivision on Johnson's Island; and (B) whether Plaintiff has an obligation to contribute toward the costs related to the maintenance, repair and improvement of Gaydos Drive, the Causeway, Confederate Drive and Memorial Shoreway Drive within the Bay Havens Subdivision.

{¶17} For the foregoing reasons, this Court finds that Plaintiff has an easement granting it access to the Baycliffs Subdivision and Johnson's Island from the nearest publicly dedicated street, Bayshore Road, and that Defendant's imposition of a toll as a condition of obtaining access to the Baycliffs Subdivision and Johnson's Island from the nearest publicly dedicated street, Bayshore Road, interferes with Plaintiff's use of that easement. This Court also finds, however, that Plaintiff and its members have an obligation to contribute to the maintenance of Gaydos Drive, the Causeway, Confederate Drive and Memorial Shoreway Drive within Bay Haven Estates.

**A. Plaintiff Has Easements Granting it Access from Bayshore Road to Baycliffs Subdivision on Johnson's Island**

{¶18} An easement has been defined as an interest in the land of another created by prescription or express or implied grant, which entitles the owner of the easement to a limited use of the land in which the interest exists.<sup>36</sup> The owner of the easement is referred to as the

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<sup>36</sup> Memorandum of Defendant Johnson's Island Property Owner's Association in Opposition to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment, at 4, 8.

<sup>37</sup> Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss, at 2.

<sup>38</sup> *Alban v. R.K. Company* (1968), 15 Ohio St. 2d 229, 239 N.E.2d 22.

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dominant estate and the land in which the interest exists is called the servient estate.<sup>39</sup> When an easement is granted by an express grant, the extent and limitations upon the dominant estate's use of the land depends upon the language of the granting instrument.<sup>40</sup> The easement at issue here is an express easement.

{¶19} An examination of the land records reflects that BHOA property owners enjoy easement rights across the platted roads of Cold Harbour Subdivision (Gaydos Drive), the southerly extension of Gaydos Drive, a triangular piece of the property previously owned by Defendants Charles Gaydos, Gregory Gaydos, and Yonko Gaydos ("the Gaydos Defendants"),<sup>41</sup> the Causeway and the platted roads of the Bay Haven Subdivision (Confederate Drive and Memorial Shoreway Drive). The chain of title to lots in the Baycliffs Subdivision recites no restrictions on these easements and rights of way. Thus, as the holder of the easements, BHOA is the dominant estate and JIPOA is the servient estate in the platted roads of Cold Harbor Subdivision, the Causeway and the platted roads of the Bay Haven Subdivision.

{¶20} Further, BHOA's easement rights extend to their guests, invitees, and licensees. In *Madej v. Alkop, Inc.*,<sup>42</sup> the Sixth Appellate Court affirmed the decision of this Court holding that "by necessary implication' the lot owners' use, access and enjoyment shall extend to their guests, invitees and licensees." In *Madej*, the trial court rejected Appellant's argument that the subdivision plat does not extend the right to use dock space to appellee's guests, invitees and

<sup>39</sup> *Alban v. R.K. Company* (1968), 15 Ohio St. 2d 229, 239 N.E.2d 22. See *Trattar v. Rausch* (1950), 154 Ohio St. 286, 95 N.E.2d 685, paragraph one of the syllabus.

<sup>40</sup> *Alban v. R.K. Company* (1968), 15 Ohio St. 2d 229, 239 N.E.2d 22.

<sup>41</sup> See Plaintiff's Motion for Leave to File Amended Complaint, at 1 ("Plaintiff has learned that in September of 2005, Charles Gaydos sold the property in Gaydos Laone \* \* \* to a Jeff G. Campbell.")

<sup>42</sup> *Madej v. Alkop, Inc.*, 6<sup>th</sup> Dist. No. OT-97-004, 1997 Ohio App. LEXIS 4787 ("The trial court found that 'by necessary implication' the lot owners' use, access and enjoyment shall extend to their guests, invitees and licensees.")

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houses.<sup>43</sup> The trial court held that appellee's rights to their respective dock spaces were set forth in their deeds, not in the plat.<sup>44</sup> Here, Each BHOA member/lot owner acquired certain rights of way and easements by virtue of a deed which accorded them rights of access over and across several private roads from the nearest public-access road, Bayshore Road, from the developer of Baycliffs subdivision and Declarant of BHOA, Baycliffs Corp.<sup>45</sup> Baycliffs Corp. acquired these certain rights of access from Johnson's Island, Inc. ("JII"),<sup>46</sup> which received these rights by warranty deed from Ms. Dorothy Gaydos Saunders.<sup>47</sup>

{¶21} Having determined that the Plaintiff and its members were granted an easement permitting them access to Johnson's Island and the Baycliffs Subdivision, the question then becomes whether the tollgate that Defendant has constructed and maintains interferes with the easement pursuant to *Gibbons v. Ebding*.<sup>48</sup> In *Gibbons v. Ebding*,<sup>49</sup> the Ohio Supreme Court held that the landowner may "use his land for any purpose that does not interfere with the easement." It is accepted law that the extent of an easement created by an express grant is fixed by the terms of the grant and the circumstances surrounding the transaction.<sup>50</sup>

<sup>43</sup> *Madej v. Alkop, Inc.*, 6<sup>th</sup> Dist. No. OT-97-004, 1997 Ohio App. LEXIS 4787.

<sup>44</sup> *Madej v. Alkop, Inc.*, 6<sup>th</sup> Dist. No. OT-97-004, 1997 Ohio App. LEXIS 4787

<sup>45</sup> Amended Complaint, at ¶ 8.

<sup>46</sup> Vol. 366, Pg. 821-823, Ottawa County Records (Quitclaim Deed).

<sup>47</sup> Vol. 225, Page 717 of Ottawa County Records (Warranty Deed). See Amended Complaint, at ¶ 5 (Exhibit 4).

<sup>48</sup> *Gibbons v. Ebding* (1904), 70 Ohio St. 298, 71 N.E. 720, 1904 Ohio LEXIS 364.

<sup>49</sup> *Gibbons v. Ebding* (1904), 70 Ohio St. 298, 71 N.E. 720, 1904 Ohio LEXIS 364.

<sup>50</sup> *Hensen v. Stine* (1943), 74 Ohio App. 221, 224.



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1) **Although a Gate May Not Unreasonably Interfere With the Use of the Easements by the Plaintiffs, a Toll Does**

{¶22} The grant of an easement includes the grant of all things necessary for the dominant estate to use and enjoy the easement.<sup>51</sup> Thus, in determining the nature and extent of an easement, the court must construe the easement in a manner permitting the dominant estate to carry out its purpose.<sup>52</sup>

{¶23} Absent a specific provision in an easement which defines the easement's scope, the scope of the easement should be interpreted to include all uses which are reasonably necessary and convenient to carry out the purpose of the easement.<sup>53</sup> In other words, an unrestricted grant of an easement gives the grantee all such rights as are necessary to the reasonable and proper enjoyment thereof.<sup>54</sup> This is important because it is the use of an easement, more than its possession or occupancy, which distinguishes an easement as an interest in real property.<sup>55</sup>

{¶24} Defendant asserts that it is entitled to construct, maintain and operate a tollgate because its use does not unreasonably interfere with the easement.<sup>56</sup> In *Gibbons v. Ebding*, the Court observed, "The rule is general that the landowner may put gates and bars across a way over his land, which another is entitled to enjoy, unless, of course, there is something in the instrument creating the way, or in the circumstances under which it has been acquired or used, which shows that the way is to be an open one. The easement of way is for passage only.

<sup>51</sup> *Day, Williams & Company v. RR. Company* (1884), 41 Ohio St. 392.

<sup>52</sup> *Alban v. R.K. Company* (1968), 15 Ohio St. 2d 229, 239 N.E.2d 22.

<sup>53</sup> *Columbia Gas Transm. Corp. v. Bennett* (1990), 71 Ohio App. 3d 307, 318, 594 N.E.2d 1.

<sup>54</sup> *Rueckel v. Texas E. Transm. Corp.* (1981), 3 Ohio App. 3d 153, 159-160, 444 N.E.2d 77.

<sup>55</sup> *Rueckel v. Texas E. Transm. Corp.* (1981), 3 Ohio App. 3d 153, 160, 444 N.E.2d 77.

<sup>56</sup> See *Gibbons v. Ebding* (1904), 70 Ohio St. 298, 71 N.E. 720, 1904 Ohio LEXIS 364.

{¶25} Asserting that it “is entitled to make any use of the servient estate that does not unreasonably interfere with enjoyment of the servitude,”<sup>57</sup> Defendant argues that “The Court must balance the benefits to the servient estate in creating a fund for Causeway maintenance with the financial benefit to all landowners in creating a fund for Causeway maintenance.”<sup>58</sup> Suggesting that the tollgate is a reasonable method of enforcement for the collection of maintenance costs, Defendant relies on this Court’s prior decision in *Bremenour v. Johnson’s Island Property Owner’s Association*,<sup>59</sup> which held “Equity would demand that a title holder cannot reap the benefits without accepting the responsibility of funding that which causes the benefits.”

{¶26} However, Defendant’s reliance upon *Bremenour*, is inappropriate at this juncture. *Bremenour* is relevant only to the issue of whether Plaintiff is obligated to contribute to the maintenance, repair and improvement of Gaydos Drive, the Causeway, and any other private roads on Johnson’s Island. Instead, this Court must apply the standard articulated in *Gibbons* to determine whether the tollgate interferes with the Plaintiff’s use of its easement.

{¶27} In *Gibbons*, the Court observed that “the erection of gates or bars at the termini of the way was not an unreasonable interference with its use,” because “There is nothing in the language of the reservation \* \* \* that indicates that it was to be either open or public.”<sup>60</sup> Emphasizing that “there was nothing to show that the driveway was to be an open way, \* \* \* the Court held “equity will not enjoin the erection or maintenance of a gate.”<sup>61</sup>

<sup>57</sup> Quoting Restatement (Third) of Property, § 4.10,

<sup>58</sup> Memorandum of Defendant Johnson’s Island Property Owner’s Association in Opposition to Plaintiff’s Motion for Summary Judgment and Cross-Motion for Summary Judgment, at 20.

<sup>59</sup> *Bremenour v. Johnson’s Island Property Owner’s Association*, Ottawa County C.P. No. 23134.

<sup>60</sup> *Gibbons v. Ebding* (1904), 70 Ohio St. 298, 71 N.E. 720, 1904 Ohio LEXIS 364.

<sup>61</sup> *Gibbons v. Ehding* (1904), 70 Ohio St. 298, 71 N.E. 720, 1904 Ohio LEXIS 364.

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{¶28} But here, Plaintiff does not suggest that Defendant may not construct, maintain and operate a gate, but asserts instead, that Defendant may not charge Plaintiff a toll as a condition of obtaining access to their lots in the Baycliffs Subdivision. Defendant insists, however, that it “acquired an easement interest to erect, operate and maintain the Tollgate from JJI, predecessor-in-interest to [Baycliffs Corp.] and the lot purchasers in the Baycliffs Subdivision.” As such, it argues that “BHOA is now estopped from denying JIPOA’s easement interest.”<sup>62</sup>

{¶29} Absent a specific provision permitting the collection of tolls, interpretation of the easement to include all uses which are reasonably necessary and convenient to carry out the purpose of the easement precludes the imposition of a toll. Thus, the charging of a toll as a condition of entry is an unreasonable interference with Plaintiff’s easement.

**2) JIPOA Does Not Claim Easement by Estoppel**

{¶30} Easements may be created by express grant, by implication, by prescription or by estoppel.<sup>63</sup> In *Monroe Bowling Lanes v. Woodville*,<sup>64</sup> the Seventh Appellate Court emphasized that an easement by estoppel may arise “[w]here an owner of land, without objection, permits another to expend money in reliance upon a supposed easement, when in justice and equity the former ought to have disclaimed his conflicting rights, such owner is estopped to deny the

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<sup>62</sup> Memorandum of Defendant Johnson’s Island Property Owner’s Association in Opposition to Plaintiff’s Motion for Summary Judgment and Cross-Motion for Summary Judgment, at 8.

<sup>63</sup> *Kamenar R.R. Salvage Co. v. Ohio Edison Co.* (1992), 79 Ohio App. 3d 685, 689, 607 N.E.2d 1108.

<sup>64</sup> *Monroe Bowling Lanes v. Woodville* (1969), 17 Ohio App.2d 146, 244 N.E.2d 762, 1969 Ohio App. LEXIS 642.



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easement.”<sup>65</sup> Further, the Sixth Appellate Court in *Schmiehausen v. Zimmerman* held “An easement by estoppel may be found when an owner of property misleads or causes another in any way to change the other’s position to his or her prejudice.”<sup>66</sup> The party seeking to establish an equitable easement by estoppel must show (1) a misrepresentation or fraudulent failure to speak, and (2) reasonable detrimental reliance.<sup>67</sup> Courts are generally reluctant, however, to find an easement by estoppel on the basis of passive acquiescence.<sup>68</sup>

{¶31} Plaintiff asserts that “the owners of the servient estates subject to these access rights (including the Gaydos Defendants and JIPOA) cannot lawfully impose restrictions upon the owners of the dominant estate (in this case BHOA members) subsequent to the original creation of the recorded easements.”<sup>69</sup> Plaintiff alleges that “In order to perpetuate this ongoing, unlawful impediment to Plaintiff’s access, JIPOA has obtained the consent and active assistance and cooperation of the Gaydos Defendants by virtue of a succession of conveyances and transactions designed to impart a false veneer of legitimacy over a blatant violation of Plaintiff’s lawful, prior, vested access rights.”<sup>70</sup>

{¶32} Notwithstanding Plaintiff’s allegations, Defendant misconstrues the doctrine of easement by estoppel. In this case, Defendant is the owner of land (the common area of Cold

<sup>65</sup> *Monroe Bowling Lanes v. Woodville* (1969), 17 Ohio App.2d 146, 244 N.E.2d 762, 1969 Ohio App. LEXIS 642. (Emphasis added). See *Schmiehausen v. Zimmerman*, 6th Dist. No. OT-03-027, 2004 Ohio 3148, 2004 Ohio App. LEXIS 2823.

<sup>66</sup> *Schmiehausen v. Zimmerman*, 6th Dist. No. OT-03-027, 2004 Ohio 3148, 2004 Ohio App. LEXIS 2823. (citing *Monroe Bowling Lanes v. Woodville* (1969), 17 Ohio App.2d 146, 244 N.E.2d 762, 1969 Ohio App. LEXIS 642).

<sup>67</sup> *Maloney v. Patterson* (1989), 63 Ohio App.3d 405, 410, 579 N.E.2d 230, 1989 Ohio App. LEXIS 2576.

<sup>68</sup> *Schmiehausen v. Zimmerman*, 6th Dist. No. OT-03-027, 2004 Ohio 3148, 2004 Ohio App. LEXIS 2823. Section 2.10(1) of the Restatement of Property sets forth the easement by estoppel doctrine: “If injustice can be avoided only by establishment of a servitude, the owner or occupier of land is estopped to deny the existence of a servitude burdening the land when: (1) the owner or occupier permitted another to use that land under circumstances in which it was reasonable to foresee that the user would substantially change position believing that the permission would not be revoked, and the user did substantially change position in reasonable reliance on that belief \* \* \*.” Restatement of the Law, Property 3d (2000), 143.

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Harbor Subdivision and Gaydos Drive), not the Plaintiff. Thus, Defendant cannot claim that it was misled or caused to change its position as a result of its own reliance upon a supposed easement. Defendant may construct, maintain and operate a gate, but may not charge Plaintiff a fee as a condition of obtaining entry.

**3) Defendant Does Not Possess a License to Operate a Tollgate**

{¶33} Alternatively, Defendant suggests that it had an irrevocable license to operate and maintain a tollgate. Generally, a "license" is a mere personal privilege to do an act on the land of another. It creates a privilege to act, but one that is personal, revocable, and non-assignable.<sup>71</sup> It does not create or convey a possessory interest in the land.<sup>72</sup> With very limited exceptions, a license is terminable at the will of the property owner for any reason.<sup>73</sup>

{¶34} In a letter dated June 10, 1979, JIC requested permission of JII to collect tolls, stating it would "consider a gate or person to collect tolls only until funds were collected sufficient to repair the road." On June 18, 1979, JII granted to JIC permission "to collect tolls to be used for repair of the causeway \* \* \*," requiring "weekly reports of the tolls collected and an accounting of the funds expended." But failing to obtain a satisfactory accounting, Baycliffs Corp., in a letter dated May 3, 1996, revoked "any and all licenses JIPOA has or may have to block the causeway for any period of time with a gate or any type to collect tolls or for any use

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<sup>69</sup> Plaintiff's Motion for Summary Judgment (Partial), at 4.

<sup>70</sup> Plaintiff's Motion for Summary Judgment (Partial), at 4.

<sup>71</sup> *Norfolk & Western Railway Co., v. Wammes*, 6<sup>th</sup> Dist. No S-99-016, 2000 Ohio App. LEXIS 543; *Rodefer v. Pittsburg, O. Valley & C.R. Co.* (1905), 72 Ohio St. 272, 74 N.E. 183.

<sup>72</sup> *Norfolk & Western Railway Co., v. Wammes*, 6<sup>th</sup> Dist. No S-99-016, 2000 Ohio App. LEXIS 543; *Ripple v. Mahoning Nat'l Bank* (1944) 143 Ohio St. 614, 56 N.E.2d 289.

<sup>73</sup> *Norfolk & Western Railway Co., v. Wammes*, 6<sup>th</sup> Dist. No S-99-016, 2000 Ohio App. LEXIS 543; *Mosher v. Cook United, Inc.* (1980), 62 Ohio St.2d 316, 317, 405 N.E.2d 720.



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of Baycliffs' property at the north end of the causeway." As the successor to JIC, JIPOA asserts that it had the right to collect tolls. BHOA contends, however, that the original license, which was granted to JIC by JII did not survive the transfer of the subject premises from JII to Baycliffs Corp. on August 16, 1991.<sup>74</sup> As such, BHOA asserts that no license exists that permits JIPOA to collect tolls for the maintenance of the Causeway.

{¶35} On September 18, 2000, a License Agreement between Charles L. Gaydos, Trustee and Johnson's Island Property Owner's Association was recorded.<sup>75</sup> The Agreement reflects that Charles L. Gaydos, as Trustee for himself and Gregory G. Gaydos and Mary M. Gaydos \* \* \* owns and controls certain common areas in the Cold Harbor subdivision, including, but not limited to the roadways, beach area, and park, the roadway being commonly referred to as Gaydos Drive,<sup>76</sup> and purports to grant a license to JIPOA for the construction, operation, and maintenance of a toll gate facility on Gaydos Drive. The License Agreement between Charles L. Gaydos, Trustee and Johnson's Island Property Owner's Association reflects that while JIPOA "has and continues to maintain a tollgate on Gaydos Drive to control access to the causeway for ingress and egress to Johnson's island," the terms and conditions reflect that "In consideration of the license to operate the tollgate, [JIPOA] agrees to maintain Gaydos Drive in a reasonable condition \* \* \*."<sup>77</sup> It does not, however, provide that the toll collected will be used to maintain the Causeway.

{¶36} It is settled that unless expressly reserved as such licenses do not run with the land. A license which does not run with the land is terminated when the purpose has been

<sup>74</sup> Plaintiff's Motion for Summary Judgment (Partial), at Exhibit 2-F & 2-G.  
<sup>75</sup> Plaintiff's Motion for Summary Judgment (Partial), at Exhibit 2-J.  
<sup>76</sup> Plaintiff's Motion for Summary Judgment (Partial), at Exhibit 2-J.

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Confederate Drive and Memorial Shoreway Drive, the fact that the easement is silent as to the issue of contribution does not affect Plaintiff's obligation to contribute its fair share. Pursuant to this Court's decision in *Bremenour v. Johnson's Island Property Owner's Association*,<sup>80</sup> and *Johnson's Island Property Owner's Association v. Nachman*,<sup>81</sup> Plaintiff has an obligation to contribute to the maintenance, repair and improvement of Gaydos Drive, the Causeway, Confederate Drive and Memorial Shoreway Drive within Bay Haven Estates.

{¶39} Although Plaintiff seeks declaratory judgment that it has "no obligation to contribute to the repair and/or improvement of roads platted in any subdivision other than Baycliffs,"<sup>82</sup> Plaintiff's Complaint also seeks an order establishing a tollgate commission to administer the maintenance, repair and improvement of the Causeway and enforcement of the settlement agreement of the parties in *Johnson's Island, Inc. v. Johnson's Island Property Owner's Association*.<sup>83</sup>

{¶40} Conceding that it has an obligation to support the maintenance, repair and improvement of the Causeway, Plaintiff asserts that it does not wish to pay to JIPOA any funds earmarked for this purpose because those funds may not be properly used by JIPOA. Plaintiff also argues that with the exception of the Causeway, it has no obligation to contribute to the maintenance of roads platted in any subdivision other than Baycliffs Subdivision. As well, Plaintiff's suggestion in its Complaint that this Court enforce the settlement agreement of the

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<sup>79</sup> For example, unreasonable delays to Plaintiff or its invitees caused by the gate operation may warrant its removal.

<sup>80</sup> *Bremenour v. Johnson's Island Property Owner's Association*, Ottawa County C.P. No. 23134.

<sup>81</sup> *Johnson's Island Property Owner's Association v. Nachman*, 6<sup>th</sup> Dist. No. OT-98-043, 1999 Ohio App. LEXIS 5478.

<sup>82</sup> Plaintiff's Motion for Summary Judgment (Partial), at 2.

<sup>83</sup> *Johnson's Island, Inc. v. Johnson's Island Property Owner's Association*, Ottawa County C.P. No. 90-CI-126.

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parties in *Johnson's Island, Inc. v. Johnson's Island Property Owner's Association*,<sup>84</sup> cannot be considered because the record does not reflect the existence of any such agreement.

{¶41} In *Nachman*, the Court observed that "the Nachmans were given actual notice of the existence of JIPOA's predecessor, Johnson's Island Club, Inc., and knew that they took their property subject to conditions and restrictions 'of record.'"<sup>85</sup> The Articles of Incorporation for JIC provided in part that JIPOA shall: (1) promote the development of the common facilities on Johnson's Island for the use and benefit of all lot owners; (2) operate and maintain said facilities and adopt and enforce regulations governing the conditions of use thereof; and (3) promote service on or to the Island for the members.

{¶42} Further, in *Nachman*, the deposition testimony of Harold Clagg reflected that the normal operation costs of JIPOA included "road repair, services \* \* \* like refuse containers, security, insurance, taxes, \* \* \* electricity bills, all of these things that deal with the normal cost of running the operation."<sup>86</sup> Finding this testimony to be uncontroverted, the Court observed that "These stated activities on the part of JIPOA are also consistent with the deed restrictions and articles of incorporation. Those documents clearly focus JIPOA's purpose on activities that deal with the operation and maintenance of the common facilities on the Island. They then allow JIPOA to adopt and enforce regulations governing the conditions of and use of those common facilities."<sup>87</sup>

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<sup>84</sup> *Johnson's Island, Inc. v. Johnson's Island Property Owner's Association*, Ottawa County C.P. No. 90-CI-126.

<sup>85</sup> *Johnson's Island Property Owner's Association v. Nachman*, 6<sup>th</sup> Dist. No. OT-98-043, 1999 Ohio App. LEXIS 5478.

<sup>86</sup> *Johnson's Island Property Owner's Association v. Nachman*, 6<sup>th</sup> Dist. No. OT-98-043, 1999 Ohio App. LEXIS 5478.

<sup>87</sup> *Johnson's Island Property Owner's Association v. Nachman*, 6<sup>th</sup> Dist. No. OT-98-043, 1999 Ohio App. LEXIS 5478.



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{¶43} The Court in *Nachman* concurred with the trial court in *Bremenour*, which stated, “\* \* \* there is ample authority to substantiate the legal proposition that, given notice, the purchaser of land takes it subject to all the rights, entitlements, benefits, liabilities and responsibilities to which he has constructive or actual notice of. It becomes axiomatic that when the notice specifically enumerates that all covenants and restrictions run with the land -- it does just that. Equity would demand that a title holder cannot reap the benefits without accepting the responsibility of funding that which causes the benefits. Given the posture that an organization causes the benefits it can only legally and equitably follow that the organization be funded so it may continue to operate, i.e. dues. The old adage applies, you want to dance - you pay the fiddler.”<sup>88</sup>

{¶44} In *Nachman*, the appellees bought their properties knowing of the existence of the tollgate and JIPOA and knowing that JIPOA provided services and benefits to all owners of property on Johnson’s Island, and that all of those property owners were required to pay for those benefits. As a result, if the appellees are not required to contribute to the normal operating costs of the maintenance, repair and improvement of Gaydos Drive, the Causeway, Confederate Drive and Memorial Shoreway Drive, they would be unjustly enriched by the benefits JIPOA provides to them.

{¶45} Plaintiffs argue however, that pursuant to *Spring Lake, Ltd. v. O.F.M. Co.*,<sup>89</sup> “no owner of real estate is obligated to abide by restrictions or provisions that do not appear in that owner’s chain of title.” In *Spring Lake, Ltd. v. O.F.M. Co.*, the Ohio Supreme Court held that appellant did not have actual or constructive notice of the easement where there was no recorded

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<sup>88</sup> *Johnson’s Island Property Owner’s Association v. Nachman*, 6<sup>th</sup> Dist. No. OT-98-043, 1999 Ohio App. LEXIS

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instrument evidencing appellee's easement in appellant's chain of title.<sup>90</sup> Thus, the Court concluded that appellant did not have constructive notice of a possible easement.<sup>91</sup> As such, Plaintiff asserts that *Bremenour* and *Nachman* are inapplicable because these cases concerned only the "obligation of Bay Haven owners to contribute to the maintenance of common properties platted in Bay Haven Estates and administered by JIPOA,"<sup>92</sup> and BHOA lot owners had no constructive notice of a possible easement.

{¶46} Unlike the land contracts that the Nachmans signed when purchasing their property, including the deed restrictions and the deeds themselves, Plaintiff's easements and restrictions of record are silent as to Plaintiff's obligation to contribute to the maintenance, repair and improvement of Gaydos Drive, the Causeway, Confederate Drive and Memorial Shoreway Drive. Although Plaintiff has no obligation to pay for services beyond road repair, such as refuse containers, security, insurance, taxes, etc., Plaintiff is obligated to pay its fair share of the costs for maintenance, repair and improvement of Gaydos Drive, the Causeway, Confederate Drive and Memorial Shoreway Drive, otherwise they would be unjustly enriched.

{¶47} Although the Court in *Nachman* observed that "membership was not dispositive of the decision, \* \* \* the court's language invoking principles of equity suggests that because \* \* \* the plaintiffs bought their properties knowing of the existence of JIPOA and knowing that JIPOA provided services and benefits to all owners of property on Johnson's Island, all of those

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5478 (quoting *Bremenour v. Johnson's Island Property Owner's Association*, Ottawa County C.P. No. 23134).

<sup>90</sup> *Spring Lake, Ltd. v. O.F.M. Co.* (1984) 12 Ohio St. 3d 333, 467 N.E.2d 537, 1984 Ohio LEXIS 1221.

<sup>90</sup> *Spring Lake, Ltd. v. O.F.M. Co.* (1984) 12 Ohio St. 3d 333, 467 N.E.2d 537, 1984 Ohio LEXIS 1221.

<sup>91</sup> *Spring Lake, Ltd. v. O.F.M. Co.* (1984) 12 Ohio St. 3d 333, 467 N.E.2d 537, 1984 Ohio LEXIS 1221.

<sup>92</sup> Plaintiff's Reply Brief, at 9.

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property owners were required to pay for those benefits."<sup>93</sup> Similarly, in this case, the fact that Plaintiff and its members are not members of JIPOA is not a bar to their obligation to pay its fair share of the costs for maintenance, repair and improvement of Gaydos Drive, the Causeway, Confederate Drive and Memorial Shoreway Drive. Plaintiff was aware of its easement across the platted road of Cold Harbor Subdivision, the Causeway and the platted roads of the Bay Haven Subdivision. Thus, Plaintiff is obligated to contribute its fair share toward the maintenance, repair and improvement of Gaydos Drive, the Causeway, Confederate Drive and Memorial Shoreway Drive. Likewise, JIPOA is also obligated to contribute its fair share toward the maintenance, repair and improvement of Gaydos Drive, the Causeway, Confederate Drive and Memorial Shoreway Drive. Because the record reflects that the leasehold interest in the Causeway still remains with Baycliffs Corp., the question then, before this Court, is whether JIPOA is the appropriate entity through which the improvements to Gaydos Drive, the Causeway, Confederate Drive and Memorial Shoreway Drive shall be directed.

**III. CONCLUSION**

{¶48} Based on the foregoing, this Court concludes that Plaintiff's Motion for Summary Judgment is appropriate and that there are no genuine issues of material fact exist regarding the easements across the platted road of Cold Harbor Subdivision (Gaydos Drive), the southerly extension of Gaydos Drive, a triangular piece of the property previously owned by Defendants

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<sup>93</sup> *Johnson's Island Property Owner's Association v. Nachman*, 6<sup>th</sup> Dist. No. OT-98-043, 1999 Ohio App. LEXIS 5478.



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Charles Gaydos, Gregory Gaydos, and Yonko Gaydos ("the Gaydos Defendants"),<sup>94</sup> the Causeway and the platted roads of the Bay Haven Subdivision (Confederate Drive and Memorial Shoreway Drive), over which Plaintiffs have unrestricted and unimpeded access to Baycliffs Subdivision and Johnson's Island because Plaintiffs have an easement appurtenant granting it that right. However, this Court concludes that charging a toll unreasonably interferes with Plaintiff's use of the easement, particularly because the easement provides an open way to Johnson's Island. This Court also concludes that equity demands that both Plaintiff and Defendants contribute their fair share to the normal operating costs to the maintenance, repair and improvement of Gaydos Drive, the Causeway, Confederate Drive and Memorial Shoreway Drive.

{¶49} Thus, this Court finds Plaintiff's Motion for Partial Summary Judgment and Defendant JIPOA and the Gaydos Defendants' Motion for Partial Summary Judgment to be appropriate in part. Accordingly,

{¶50} IT IS ORDERED, ADJUDGED, and DECREED that Plaintiff's Motion for Summary Judgment is GRANTED in part and DENIED in part;

{¶51} IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Defendant JIPOA's Motion for Summary Judgment is GRANTED in Part and DENIED in part;

{¶52} IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the Gaydos Defendants' Motion for Summary Judgment is GRANTED in Part and DENIED in part;

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<sup>94</sup> Plaintiff asserts that in September of 2005, Charles Gaydos sold the property to Jeff G. Campbell. As a result, Plaintiff argues that "the Gaydos Defendants no longer have a property interest in this parcel of land and is no longer a proper party in this lawsuit." Plaintiff's Motion for Leave to File an Amended Complaint seeks to name Mr. Campbell as a defendant in this action.

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{¶53} IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiff's Motion to Strike is DENIED;

{¶54} IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiff was granted an easement over the platted road of Cold Harbor Subdivision (Gaydos Drive), the southerly extension of Gaydos Drive, a triangular piece of the property previously owned by Defendants Charles Gaydos, Gregory Gaydos, and Yonko Gaydos ("Gaydos Defendants"),<sup>95</sup> the Causeway and the platted roads of the Bay Haven Subdivision (Confederate Drive and Memorial Shoreway Drive);

{¶55} IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Defendant's imposition of a toll as a condition of obtaining access to Baycliffs Subdivision and Johnson's Island from the nearest publicly dedicated street, Bayshore Road, interferes with Plaintiff's use of that easement;

{¶56} IT IS FURTHER ORDERED, ADJUDGED, and DECREED that all property owners, including Plaintiff and Defendants have an obligation to contribute their fair share of the cost for the maintenance, repair and improvement of Gaydos Drive, the Causeway, Confederate Drive and Memorial Shoreway Drive;

{¶57} IT IS FURTHER ORDERED, ADJUDGED, and DECREED that all monies deposited in the "joint account" or "escrow account" at Marblehead Bank shall remain in that account until further order of this Court;

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<sup>95</sup> On February 22, 2006, Plaintiff's Motion for Leave to File an Amended Complaint was filed, requesting that it be permitted to add a new party Defendant, Jeff G. Campbell, to replace the Defendants. The property owned by the Defendants was sold to Jeff G. Campbell.

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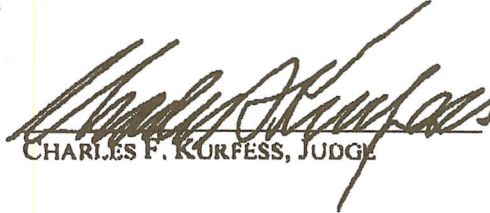
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{¶58} IT IS FURTHER ORDERED, ADJUDGED, and DECREED that costs of this proceedings is to be paid by Defendant JIPOA;

{¶59} IT IS FURTHER ORDERED, ADJUDGED, and DECREED that this matter is set for Status Pre-Trial on June 14, 2006, at 10:00am;<sup>96</sup>

{¶60} Clerk of Courts shall send copies of this Decision and Judgment Entry to all parties of record or their counsel by regular U.S. Mail.

MAY 31, 2006

  
CHARLES F. KURFESS, JUDGE



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**CERTIFICATE OF SERVICE**

A copy of the foregoing "Judgment Entry" was delivered by regular mail, this 31<sup>st</sup> day of May, 2006, to the following:

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MAY 31, 2006

  
\_\_\_\_\_  
JOAN MONNETT, CLERK OF COURTS  
/DEPUTY CLERK

**Note:** If there is a party and/or attorney not listed above, but is reflected on the Clerk's Docket as not excused, the Clerk's Office will add them to this page.

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\* Attorneys only.