IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

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| WILLIAM McABIER, | : | |
| KENNETH G. GILMORE AND RUTH | : | |
| GILMORE, HUSBAND AND WIFE, | : | |
| Plaintiffs | : | |
| vs. | : | No. 16-1724 |
| | : | |
| PLEASANT VALLEY WEST CLUB, | : | |
| Defendant | : | |

James P. Wallbillich, Esquire — Counsel for Plaintiffs
Michael A. Gaul, Esquire — Counsel for Defendant

Civil Law - Applicability of Uniform Planned Community Act – Duty of a Property Owners' Association to Build and Maintain Subdivision Roads to Specifications and Standards Set Forth in an Approved Subdivision Plan - Significance of Property Owners' Association's Incorporation as a Nonprofit Corporation – Standing - Applicability of Pa.R.J.A. 2156(1)'s Requirement that Litigation Involving a Nonprofit Corporation be Heard by the Orphans' Court Division of the Court – Challenge to Subject Matter Jurisdiction

1. Whether the property owners association for a private residential development to which ownership of the development roads has been conveyed can be held responsible to its members for building, constructing, and maintaining the roads to the standards and specifications set forth in the approved and recorded subdivision plan for the development requires the existence of a legally recognizable duty owed by the association to its members, whether arising under the Uniform Planned Community Act, the Municipalities Planning Code, by virtue of the members' ownership interest in real estate within the development, or from some other source.
2. The purchaser of an approved land development from the original developer for purposes of continuing the development assumes the rights and obligations of the original developer under the Pennsylvania Municipalities Planning Code, 53 P.S. §§ 10101-11202.
3. The transfer of ownership of the roads in a private residential development from the developer to a property owners' association consisting of all lot owners in the

development, unlike a transfer of all properties in an approved development from the original developer to a third party developer, does not by itself obligate the association to build and improve the development roads to the standards and specifications set forth in the approved subdivision plan for the development.

4. Under the Uniform Planned Community Act, 68 Pa.C.S. §§ 5104-5414, a subdivision of land into separate, individual building lots and designated roads to be used as the means of ingress and egress to the lots from surrounding public roads, with ownership of the roads to be held by a nonprofit property owners' association whose membership is restricted to and consists only of all of the lot owners in the subdivision, and with the cost of maintenance, repair and improvement of the roads to be assessed against and borne only by the lot owners by virtue of their ownership interest in the lots within the subdivision, is a planned community.

5. The Uniform Planned Community Act, 68 Pa.C.S. §§ 5101-5414, governs the formation and organization of planned communities in Pennsylvania created after its effective date, February 2, 1997, as well as the rights and obligations by and between the community's developer (declarant), property owners within the community, and the unit owners' association for the community.

6. Pursuant to Section 5102 of the Uniform Planned Community Act, various enumerated provisions are intended to apply retroactively to planned communities created prior to the effective date of the Act, subject, however, to the qualification applicable to all retroactive provisions of the Act, that they "apply only with respect to events and circumstances occurring after the effective date of [the Act] and do not invalidate specific provisions contained in existing provisions of the declaration, bylaws, or plots and plans of those planned communities."

7. For planned communities created after February 2, 1997, Section 5414(a) of the Uniform Planned Community Act places the obligation to complete roads and improvements depicted on a subdivision plan and designated as "MUST BE BUILT" on the declarant developer, not the property owners' association. Similarly, under Sections 10509 and 10511 of the Pennsylvania Municipalities Planning Code, the obligation to build and construct subdivision roads in accordance with an approved and recorded subdivision plan is upon the developer, or its successor, not upon the

property owners' association. Absent a pre-existing duty imposed on a property owners' association to build or improve development roads to specifications set by the developer, the enactment of the Uniform Planned Community Act cannot be applied retroactively to create such a duty where none previously existed.

8. The power and right of a property owners' association to assess its members under the common law, the Uniform Planned Community Act, and applicable covenants binding the owners of real estate within the development, the reasonable costs of maintaining and repairing development roads titled in the association's name does not create a secondary duty in the association to build and improve such roads to the standards and specifications provided for in the approved subdivision plans prepared and submitted by the developer.

9. For all planned communities, whether created before or after February 2, 1997, the Uniform Planned Community Act requires that the propriety of the actions of the property owners' association for the community in deciding what development roads to build and maintain, and in what manner and to what extent, be determined by whether the association's board acted "in good faith; in a manner they reasonably believe to be in the best interests of the association; and with care, including reasonable inquiry, skill and diligence as a person of ordinary prudence would use under similar circumstances." Whether this standard has been met is a question of fact to be determined by the finder of fact, after hearing, rather than as a question of law.

10. The incorporation of a property owners' association as a nonprofit corporation can in certain instances be a significant factor in determining whether the property owners' association by its conduct has breached a duty owed by the property owners' association to its members in the event the private residential community managed by the property owners' association is found not to be a planned community within the meaning of the Uniform Planned Community Act. In such a case, the standard of care imposed on the directors of a domestic nonprofit corporation pursuant to Section 5712(a) of the Nonprofit Corporation Law is substantially the same as that imposed on the executive board of a planned community under the Uniform Planned Community Act. In the case of nonprofit corporations, this deferential standard is enhanced by the business judgment rule which insulates corporate directors

from "second-guessing liability for their business decisions in the absence of fraud or self-dealing or other misconduct or malfeasance."

11. Pa.R.J.A. 2156(1) provides, *inter alia*, that the Orphans' Court Division of the Court of Common Pleas hear and determine disputes concerning the administration and proper application of property committed to charitable purposes held or controlled by a nonprofit corporation, as well as all matters arising under Title 15 of the Pennsylvania Consolidated Statutes or otherwise where is drawn in question the application, interpretation or enforcement of any law regulating the affairs of a nonprofit corporation holding or controlling any property committed to charitable purposes.

12. A challenge to the subject matter jurisdiction of the court to adjudicate the matter before it relates to the competency of a court to hear and decide the type of controversy presented. Without such jurisdiction, there is no authority to give judgment and one so entered is without force or effect.

13. Those properties within a private residential community which have been identified in the approved subdivision plan for the community for use as roads and rights-of-way, title to which has been conveyed to the property owners' association for the community, a nonprofit corporation, is not property committed to charitable purposes such that litigation commenced against the association by property owners within the community questioning the existence and extent of the association's duty to construct and maintain the roads to the standards and specifications set forth in the approved subdivision plan for the community is required to be heard and decided by the Orphans' Court Division of the Court of Common Pleas pursuant to Pa.R.J.A. 2156(1).

14. Absent a statutory grant of standing, for a plaintiff to have standing to commence suit, the plaintiff must have a substantial, direct and immediate interest in the controversy.

15. Section 5793 of the Nonprofit Corporation Law grants standing to any person aggrieved by the corporate action of a nonprofit corporation to question the validity of such action.

16. Where the claims made by property owners within a planned community against the property owners' association for that community are not premised on the decisions of a property owners' association which has been organized as a domestic

non-profit corporation, but upon rights and duties arising under principles of real estate law for events which occurred before the association came into existence, and are independent of the property owners' membership therein, Section 5793 of the Nonprofit Corporation Law does not apply and does not prohibit the exercise of equitable jurisdiction by the court for those claims seeking equitable relief.

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| vs. | : | No. 16-1724 |
| PLEASANT VALLEY WEST CLUB, Defendant | : | |

James P. Wallbillich, Esquire — Counsel for Plaintiffs
Michael A. Gaul, Esquire — Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. – May 26, 2017

Is a property owners' association which owns the roads and common areas in a private residential subdivision under a duty to build and construct these privately owned roads to the standards and specifications set forth in the approved subdivision plans if the roads do not meet such standards and specifications and did not at the time title to these properties was conveyed to the association by the developer. This, essentially, is the question at issue in this litigation in which the Plaintiffs, whose homes are located within the subdivision, claim that two roads depicted on the approved subdivision plans as providing access to their properties have in one instance not been built and in the other not built to the standards and dimensions called for in the recorded subdivision plans. Title to the land on which these roads were to be built

is now owned by the property owners' association for the subdivision, the defendant Pleasant Valley West Club (the "Association") - a nonprofit corporation whose members all own lots in the subdivision - under and subject to the right of all lot owners in the subdivision to use this property as a means of ingress and egress to their properties.

FACTUAL AND PROCEDURAL BACKGROUND

Pleasant Valley West is a 727.42 acre private residential subdivision (the "Development") located in Penn Forest Township, Carbon County, Pennsylvania. It was originally laid out in 1973 by Sellamerica, Ltd. ("Sellamerica"), the original developer, with approved subdivision plans recorded in the Carbon County Recorder of Deeds Office on January 18, March 6, and June 5, 1973, and a set of eighteen numbered protective covenants encumbering the Development properties filed on February 20, 1973. (Amended Complaint, ¶¶9-10, 12; Amended Complaint, Exhibit No(s). A and B).[1]

The Development consists of approximately 589 lots spread over six sections, namely Sections A through F inclusive, with lots ranging in size from one acre to five acres. (Amended Complaint, Exhibit No. A (Pocono Forest Lake Master Plan) and Exhibit No. G, p.1). The lots in Section D are all five acres in size. (Amended Complaint, Exhibit No. G, p.2). Within the Development, as depicted on the recorded subdivision plans, is a

private road system totaling 45,800 feet in distance, with 50 foot wide rights-of-way and 24 foot wide cartways, a 16 acre lake known as Pocono Forest Lake, and a community lodge. (Amended Complaint, Exhibit No. G, pp.6,8). In addition, Drakes Creek, a small stream varying between eight and ten feet in width, flows through the Development.

On January 5, 1976, the defendant Association, Pleasant Valley West Club, was incorporated as a Pennsylvania nonprofit corporation. (Amended Complaint, ¶15; Amended Complaint, Exhibit No. D (Articles of Incorporation)). By deed dated April 5, 1976, and recorded on April 7, 1976, in Carbon County Deed Book Volume 366, at page 341, Pocono Pleasant Valley Lake Estates, Inc. ("Pocono Pleasant Valley"), which purchased the Development in November 1973, conveyed title to all of the roads and common areas within the Development to the Association. (Amended Complaint, ¶17; Amended Complaint, Exhibit No. E (Deed of Conveyance)).[2] On September 14, 1981, the Association filed a second set of "restrictive covenants" applicable to the Development. (Amended Complaint, ¶18; Amended Complaint, Exhibit No. F).[3]

By deed dated August 27, 1996, the Plaintiff, William McAbier, became the owner of Lot 6, Section D, a/k/a 259 Forest Lake Drive, on which he resides within the Development. By deed dated November 20, 2004, the Plaintiffs, Kenneth G. Gilmore and

Ruth Gilmore, became the owners of Lot 9, Section D, a/k/a 207 Forest Lake Drive, on which they reside within the Development. Plaintiffs' properties front on Forest Lake Drive, one of the private Development roads now owned by the Association.

Forest Lake Drive is approximately 1700 feet in length. (Amended Complaint, ¶39). Its cartway averages 14 feet in width, rather than the 24 feet depicted in the subdivision plans, and its surface, at least in the vicinity of Plaintiffs' homes, is unpaved, in contrast to the majority of the subdivision roads in the Development. (Amended Complaint, ¶¶40, 41 and 49). Additionally, poor drainage on the road is a source of continuing washouts. (Amended Complaint, ¶42).

In consequence, Forest Lake Drive is too narrow for two vehicles to pass one another safely, emergency vehicles are unable to turn around on the road, and continuing potholes and surface water run-off due to the drainage issues make the road difficult and, at times, unsafe to use. (Amended Complaint, ¶¶43, 46, 48, 59 and 87). This is especially true for Plaintiffs who live at or near the end of Forest Lake Drive and have no other means of accessing their properties. (Amended Complaint, ¶¶38, 113). Mohawk Drive, which is depicted on the subdivision plans as intersecting with Forest Lake Drive and which, according to Plaintiffs, would otherwise have provided a second means of ingress and egress to Plaintiffs' properties,

has never been built, opened or maintained. (Amended Complaint, ¶¶60-62). Plaintiffs estimate the cost of paving Forest Lake Drive, addressing the drainage issues, and widening the road to conform with the recorded subdivision plans to be $155,000.00. (Amended Complaint, ¶50).

Plaintiffs instituted this suit by the filing of a complaint on August 1, 2016. In response to the Association's preliminary objections, Plaintiffs filed an Amended Complaint on September 29, 2016. The Association's preliminary objections to Plaintiffs' Amended Complaint are the subject of this opinion.

In the Amended Complaint, Plaintiffs claim the Association has a duty to build, widen and pave - and to repair and maintain - Forest Lake Drive and Mohawk Drive in accordance with the specifications depicted on the recorded final subdivision plans, as well as with an Offering Statement and Property Report (the "Offering Statement") dated November 21, 1974, and filed by Pocono Pleasant Valley for the interstate marketing of properties in the Development.[4] The Amended Complaint alleges that the Association has breached this duty and requests that the Association be court ordered to build and construct Forest Lake Drive and Mohawk Drive to the dimensions and specifications described in the approved subdivision plans.

The Amended Complaint contains five counts, each purporting to set forth a different cause of action with respect to the

source of the Association's duty to build and maintain Forest Lake Drive and Mohawk Drive in accordance with the specifications depicted on the recorded subdivision plans and contained in the Offering Statement filed by Pocono Pleasant Valley. Count I claims that the Association is the successor in interest to the original developer, Sellamerica, and has assumed its obligations;[5] Count II claims the duty is a fiduciary one imposed on the Association under the Uniform Planned Community Act, 68 Pa.C.S. §§ 5101-5414 (also referred to as the UPCA or the Act); Count III claims the Association also has a duty under the Act to properly budget for and fund a reserve for capital improvements to build and construct the subdivision roads according to the subdivision plans; Count IV claims the Association's duty to build and maintain the subdivision roads stems from the restrictive covenants it filed in the Carbon County Recorder of Deed's Office on September 14, 1981; and Count V claims the Association's duty to maintain and build the subdivision roads arises under its bylaws.

DISCUSSION

PRELIMINARY OBJECTIONS IN THE NATURE OF A DEMURRER

The Association has demurred to each count of the Amended Complaint as being legally insufficient under Pa.R.C.P. 1028 (a)(4) to sustain a cause of action.[6] Specifically, the Association contends Plaintiffs have failed to aver material

facts sufficient to establish any duty owed by the Association to ensure the building or improvement of either Forest Lake Drive or Mohawk Drive in accordance with the specifications identified in the original plans.[7] Given this basis of the Association's Preliminary Objections, in ruling on the Preliminary Objections we focus our attention on the source of the duty attributed to the Association in each count of the Amended Complaint.

(1) Duty: As a Successor Declarant

In Count I, Plaintiffs allege the Association has an "affirmative duty to build the roads within the community as depicted on the plans." (Amended Complaint, ¶78). The basis of this duty as claimed by Plaintiffs is that the Association is the successor declarant[8] for the Development and has assumed whatever duties, obligations, or liabilities Sellamerica and Pocono Pleasant Valley had to make these improvements. (Amended Complaint, ¶¶22, 69, 72, 80). This, of course, is a legal conclusion.

While courts when ruling upon a demurrer must accept as true all of the material facts set forth in the complaint and all of the reasonable inferences that may be drawn therefrom, courts "need not accept a party's allegations as true to the extent that they constitute conclusions of law." Walter v. Magee Women's Hosp. of UPMC Health Sys., 876 A.2d 400, 403-04

(Pa.Super. 2005) (quoting Fay v. Erie Ins. Group, 723 A.2d 712, 714 (Pa.Super. 1999)). No written assignment of rights and co-relative duties from Sellamerica or Pocono Pleasant Valley to the Association is attached to the Amended Complaint, nor any facts alleged identifying an assignment.

Nevertheless, to support their assertion that the Association is a successor of Sellamerica and is obligated as such to build and construct the subdivision roads to the standards and specifications set forth in the approved subdivision plans, Plaintiffs point to the recital contained in the restrictive covenants recorded by the Association on September 14, 1981, wherein Sellamerica is expressly identified as the Association's "predecessor in interest." Whether this characterization denotes that the Association has stepped into the shoes of Sellamerica and acquired its rights as well as its duties, or is simply descriptive of a chronological sequence of one coming before another, is a distinction that cannot be made in the face of a demurrer. Viewing the allegation as we must in the light most favorable to the Plaintiffs, as an evidentiary admission, we find this is sufficient to withstand the Association's demurrer to Count I of the Amended Complaint.

As to Pocono Pleasant Valley, under the Pennsylvania Municipalities Planning Code, 53 P.S. §§ 10101-11202, both Sellamerica, as the original developer of Pleasant Valley West,

and Pocono Pleasant Valley, which purchased the entirety of the Development from Sellamerica, were obligated to build and construct the subdivision roads in accordance with the approved and recorded subdivision plans. See 53 P.S. §§ 10509, 10511; Stivala Investments, Inc. v. South Abington Township Board of Supervisors, 815 A.2d 1, 6-7 (Pa.Cmwlth. 2003) (holding that the purchaser of an approved land development from the original developer for purposes of continuing the development assumes the rights and obligations of the original developer), *appeal denied*, 834 A.2d 1145 (Pa. 2003). That Pocono Pleasant Valley assumed this obligation is also confirmed in the following language contained in the Offering Statement it filed with the United States Department of Housing and Urban Development:

> [I]t is hereby warranted and represented to all persons who have already purchased lots or who may purchase lots in the future that it assumes all of the obligations and duties of the previous owner in connection with this subdivision and that it will perform and adhere to all of the warranties or representations made by the previous owner regardless of the change in name.

(Amended Complaint, Exhibit No. G, p.1).[9] This notwithstanding, no material facts are alleged or exhibits attached or documentation identified in the Amended Complaint to explain how whatever duties Pocono Pleasant Valley had to build and improve the Development roads were delegated to and assumed by the Association.[10]

(2) Duty: Founded Upon the UPCA

With respect to Counts II and III of the Amended Complaint, we believe Plaintiffs' reliance on the Uniform Planned Community Act as the basis for duties imposed on the Association is misplaced. The Uniform Planned Community Act was enacted on December 19, 1996, and became effective February 2, 1997: after the Development was formed in 1973; after Section A of the Development was sold out as reported in Pocono Pleasant Valley's November 21, 1974 Offering Statement (Amended Complaint, Exhibit No. G, p.2); and after the Association was incorporated in 1976 and took title to the Development roads and common areas. As evidenced by these facts, the Association is not a unit owners' association organized under Section 5301 of the Act. 68 Pa.C.S.A. § 5301 (Organization of Unit Owners' Association).[11]

Nor does the Uniform Planned Community Act seek to retroactively treat the Association as if it were a unit property owners' association created under the Act. Under the Statutory Construction Act of 1972, "[n]o statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly." 1 Pa.C.S.A § 1926. This intent appears in Section 5102 of the Act which sets forth an extensive list of provisions which are expressly made retroactive. Section 5301 is not included within these provisions. *See* Little Mountain Community Ass'n, Inc. v.

Southern Columbia Corp., 92 A.3d 1191 (Pa.Super. 2014) (holding that a property owners' association which first came into existence after the UPCA was enacted on December 19, 1996, with respect to a private residential subdivision that was formed before the effective date of the Act and from which subdivision lots had previously been conveyed, was not a unit property owners' association pursuant to Section 5301 of the Act and could not be deemed one retroactively).

Instead, the Association in this case, as in Little Mountain Community Ass'n, appears to be a self-proclaimed community association created after the Development began. Neither the protective covenants filed by Sellamerica, nor the restrictive covenants later filed by Pocono Pleasant Valley, refer to or make mention of any existing property owners' association or one to be formed in the future, of any plan to transfer title to the Development roads and common areas to an association, for an association to maintain or manage the Development, or that membership in any such association would be restricted to property owners who, by virtue of their ownership of lots within the Development, would automatically become members.[12]

At the same time, Section 5303(a) of the Act, which sets forth the standard by which decisions of the executive board of a property owners' association are to be viewed, applies

retroactively to planned communities created prior to the effective date of the Act, subject, however, to the qualification applicable to all retroactive provisions of the Act, that they "apply only with respect to events and circumstances occurring after the effective date of [the Act] and do not invalidate specific provisions contained in existing provisions of the declaration, bylaws, or plots and plans of those planned communities." 68 Pa.C.S.A. § 5102(b), (b.1).[13] To allow otherwise "could violate the constitutional prohibition against impairment of contracts," and the related principle that "provisions affecting property or contractual rights cannot be repealed or altered without the consent of the parties whose interests are thereby impaired." Little Mountain Community Ass'n, Inc., 92 A.3d at 1199-1200 (quoting from Pinecrest Lake Community Trust ex rel. Carroll v. Monroe County Bd. of Assessment Appeals, 64 A.3d 71, 80 (Pa.Cmwlth. 2013) and Schaad v. Hotel Easton Co., 87 A.2d 227, 230 (Pa. 1952), respectively). Consequently, if the Association had no duty to build or improve the Development roads to specifications set by the Developer before the Uniform Planned Community Act was enacted, the enactment of the UPCA cannot be applied retroactively to create such a duty where none previously existed.[14]

Section 5303(a) of the Act, in pertinent part, provides:

§ 5303. Executive board members and officers

> (a) POWERS AND FIDUCIARY STATUS.—Except as provided in the declaration, in the bylaws, in subsection (b) or in other provisions of this subpart, the executive board may act in all instances on behalf of the association. In the performance of their duties, the officers and members of the executive board shall stand in a fiduciary relation to the association and shall perform their duties, including duties as members of any committee of the board upon which they may serve, in good faith; in a manner they reasonably believe to be in the best interests of the association; and with care, including reasonable inquiry, skill and diligence as a person of ordinary prudence would use under similar circumstances.

68 Pa.C.S.A. § 5303; *see also* Burgoyne v. Pinecrest Community Ass'n, 924 A.2d 675, 683 (Pa.Super. 2007) (finding Section 5303 governs the standard by which to review decisions made by the board of directors of a nonprofit corporation serving as the governing body of the owners of a planned community created before the effective date of the Act); Logans' Reserve Homeowners' Ass'n v. McCabe, 152 A.3d 1094, 1097-98 n.6 (Pa.Cmwlth. 2017) (holding that Section 5303 of the Act, not the corporate business judgment rule, governs the standard for reviewing decisions made by an association's executive board). Therefore, the propriety of the actions of the Association's Executive Board in deciding what Development roads to build and maintain, and in what manner and to what extent, and the budgeting, funding and use of reserves for capital improvements – assuming the Development is a planned community[15] - are to be determined by whether the Board acted "in good faith; in a

manner they reasonably believed to be in the best interests of the Association; and with care, including reasonable inquiry, skill and diligence as a person of ordinary prudence would use under similar circumstances." 68 Pa.C.S.A. § 5303.[16] Whether the Association met this standard is a question of fact, not to be determined in preliminary objections. Wilson v. PECO Energy Company, 61 A.3d 229, 233 (Pa.Super. 2012) (holding that the question of the scope of the defendant's duty, and whether the defendant exercised reasonable care in the performance of that duty, is a question of fact for the jury).

(3) Duty: Arising Out of the Protective Covenants

Count IV of the Amended Complaint ostensibly claims the Association has breached the protective covenants filed by Sellamerica on February 20, 1973, and the restrictive covenants filed by the Association on September 14, 1981. No specific covenant allegedly breached is identified, however, in paragraph 75 of the Amended Complaint, Plaintiffs aver that "[t]he 1973 and 1981 covenants confirm a right of ingress and egress, which require a commensurate obligation of construction and maintenance of the road by the Association."[17] (*See also* Amended Complaint, ¶¶ 63, 94, 101).

Paragraph 133 avers "the Association has a duty to obey the mandates identified in the Covenants." In conclusory language, Plaintiffs then aver in Paragraph 138 that the Association's

"failure to abide by its covenants is the actual and proximate cause of Plaintiffs' damages."

We have read and re-read the covenants and find no basis therein for Plaintiffs' claim of a duty impressed on the Association to build or widen the Development roads (*e.g.*, Mohawk Drive and Forest Lake Drive, respectively) to the standards set forth in the recorded subdivision plan. Such a duty, as already discussed, may have existed with Sellamerica or Pocono Pleasant Valley, but nowhere does any language in the covenants suggest that such duty has been assumed or accepted by the Association. Moreover, the covenants contain no reference to the Association specifically by name, or even to an unnamed association of property owners to be formed at some time in the future.

On the issue of repair and maintenance, the covenants provide for ownership of the roads to remain with the seller (*i.e,* the Developer) until dedicated to public use, subject to the buyers' right to use the roads for access to their property, and allow the seller to charge the buyers an annual fee "for the repair, maintenance and snow removal of the streets and roads. . . ." (Amended Complaint, Exhibit No. B (Protective Covenants, Nos. 12 and 14)). With the transfer of title to the roads to the Association, both at common law and under the Uniform Planned Community Act the Association has the right to assess

the property owners for the reasonable costs of repairing and maintaining the roads. Hess v. Barton Glen Club, Inc., 718 A.2d 908, 912-13 (Pa.Cmwlth. 1998), *appeal denied*, 737 A.2d 745 (Pa. 1999); Spinnler Point Colony Ass'n, Inc., v. Nash, 689 A.2d 1026, 1029 (Pa.Cmwlth. 1997) (holding that "a property owner who purchases property in a private residential development who has the right to travel the development roads and to access the waters of a lake is obligated to pay a proportionate share for repair, upkeep and maintenance of the development's roads, facilities and amenities"); cf. 68 Pa.C.S.A. §§ 5302(a)(6), (10) (Power of a Unit Owners' Association), 5314 (Assessments for Common Expenses). To the extent the Association by taking title may also have assumed the duty to repair and maintain the roads – here, it is important to distinguish a landowner's settled right to maintain a road it owns and to be compensated on a proportionate basis from those who have a right to use the road for the cost of maintenance and repair from an affirmative duty to maintain the road imposed on a landowner either at common law or by statute (*see e.g.*, 68 Pa.C.S.A. § 5307(a) (placing on the unit owners' association responsibility to repair, maintain and replace the common elements)) - Plaintiffs have provided us with no legal authority that this duty extends to the construction of roads on paper streets or the widening of existing roads to conform with a subdivision plan.

Finally, when reviewing the good faith and reasonableness of corporate decisions, such as the Association's decisions here of what roads to repair, when, and how, the business judgment rule "embodies the 'policy of judicial noninterference with business decisions of corporate managers,' and insulates corporate directors from 'second-guessing or liability for their business decisions in the absence of fraud or self-dealing or other misconduct or malfeasance.'" Zampogna v. Law Enforcement Health Benefits, Inc., 151 A.3d 1003, 1012 (Pa. 2016) (quoting Cuker v. Mikalauskas, 692 A.2d 1042, 1046 (Pa. 1997)).[18] "[C]ourts should not act as super-boards second guessing decisions of corporate directors, as courts are 'ill-equipped' to become 'enmeshed in complex corporate decision making.'" Zampogna, 151 A.3d at 1014 (citing and quoting Cuker, 692 A.2d at 1046).[19]

(4) Duty: Arising Under Defendant's Bylaws

Count V of the Amended Complaint alleges a failure of the Association to comply with its Bylaws. In this Count, Plaintiffs allege Article III, Section 6, of the Bylaws obligates the Association to maintain the common areas (Amended Complaint, ¶¶25, 43); the proper level of maintenance is that defined in the declaration and plans (Amended Complaint, ¶146); although the Association has previously represented that membership approval is required before monies are used for road

maintenance, including the maintenance of Forest Lake Drive, the Bylaws provide to the contrary (Amended Complaint, ¶¶26, 55, 144, 145, 148); as a result of the Association's failure to maintain Forest Lake Drive, the Plaintiffs have been forced to use a poorly maintained and unsafe road. (Amended Complaint, ¶¶59, 87, 156).

The Association's bylaws have been attached to the Amended Complaint as Exhibit H. (Amended Complaint, ¶24). Article III, Section 6, of these bylaws acknowledges the Association's responsibility to maintain the roads[20] and Article III, Section 7 excludes the need to submit expenditures for the maintenance of roads for prior approval to the membership.[21] Nevertheless, the Bylaws, on their face, do not define any level of maintenance by reference to the recorded subdivision plans, any Development documents, or otherwise. Accordingly, what maintenance is to be provided is left to the discretion of the Association, subject to the dictates of Section 5303(a) of the Act and/or the business judgment rule. *See* 68 Pa.C.S.A. § 5303(a) (Powers and Fiduciary Status); 15 Pa.C.S.A. § 5712 (Standard of Care and Justifiable Reliance), respectively.

PRELIMINARY OBJECTIONS CHALLENGING THE COURT'S SUBJECT MATTER JURISDICTION

Pursuant to Pa.R.C.P. 1028(a)(1) and 1028(a)(7), the Association next argues that this court lacks subject matter

jurisdiction over Plaintiffs' action because Plaintiffs have not abided by Pa.R.J.A. 2156(1) and that equity is without jurisdiction to hear or grant relief because Plaintiffs have failed to exercise or exhaust a statutory remedy, namely that provided under 15 Pa.C.A. § 5793 to "select individuals vested with power and influence over [the nonprofit corporation]." Petty v. Hosp. Serv. Ass'n of Ne Pa., 967 A.2d 439, 444-45 (Pa.Cmwlth. 2009), *aff'd*, 23 A.3d 1004, 1012 (Pa. 2011). Included within this select group having standing to challenge the validity of corporate action are members of the nonprofit corporation, such as Plaintiffs.

(1) Pa.R.J.A. 2156(1)

"Subject matter jurisdiction relates to the competency of a court to hear and decide the type of controversy presented." Silver v. Pinskey, 981 A.2d 284, 292 (Pa.Super. 2009) (en banc) (quoting Commonwealth v. Bethea, 828 A.2d 1066, 1074 (Pa. 2003)).

> Jurisdiction is the capacity to pronounce a judgment of the law on an issue brought before the court through due process of law. It is the right to adjudicate concerning the subject matter in a given case. . . . Without such jurisdiction, there is no authority to give judgment and one so entered is without force or effect. The trial court has jurisdiction if it is competent to hear or determine controversies of the general nature of the matter involved *sub judice*. Jurisdiction lies if the court had power to enter upon the inquiry, not whether it might ultimately decide

> that it could not give relief in the particular case.

Estate of Gentry v. Diamond Rock Hill Realty, LLC, 111 A.3d 194, 198 (Pa.Super. 2015) (quoting Aronson v. Sprint Spectrum, L.P., 767 A.2d 564, 568 (Pa.Super. 2001)). "Jurisdiction is a matter of substantive law. 42 Pa.C.S. § 931(a)(defining the unlimited original jurisdiction of the courts of common pleas)." Silver, 981 A.2d at 292 (citation and quotation marks omitted).

The Association argues mandatory and exclusive jurisdiction over Plaintiffs' claims is in the Orphans' Court Division of this court, citing Bannister v. Eagle Lake Community Ass'n, Inc., 17 Pa.D.&C.4th 582 (Lack. Co. 1992). In Bannister, plaintiff averred two or more *ultra vires* overreaching and unconscionable agreements entered into by the directors of a nonprofit corporation; claimed that the *ultra vires* acts of the directors and officers of the nonprofit corporation were illegal, oppressive or fraudulent; asserted the corporate assets were being misapplied and wasted; and requested the corporation be wound up and dissolved. Relying on Pa.R.J.A. Rule 2156 (1), the Court concluded that for the type of challenges there made, the case should be transferred to the Orphans' Court Division.

Pa.R.J.A. Rule 2156 (1), in pertinent part, provides:

> In addition to other matters which by law are to be heard and determined by *the orphans' court division of a court of common pleas*, the division *shall hear and determine the following matters*:

> (1) Nonprofit corporations: The administration and proper application of property committed to charitable purposes held or controlled by any domestic or foreign nonprofit corporation and *all matters* arising under Title 15 of the Pennsylvania Consolidated Statutes (relating to corporations and unincorporated associations) or otherwise *where is drawn in question* the application, interpretation or enforcement of *any law regulating the affairs of nonprofit corporations holding or controlling any property committed to charitable purposes, or of the* members, security holders, *directors*, officers, employees or agents *thereof, as such*.

(emphasis added).

At issue in this case is the duty, if any, of a property owners' association in a private residential subdivision to build, construct, widen and improve - as well as to repair and maintain - development roads allegedly neither built or constructed by the developer in accordance with approved and recorded final subdivision plans. The roads in this case and, as applicable, the lands upon which they were to be built are privately owned by the defendant Association and are under and subject to the right of the private property owners in the Development and those claiming under them to use the same for ingress and egress to and from public roads as a means of access to their properties. Such roads and the property on which they were to be built are not committed to charitable purposes.

"'Property committed to charitable purposes' means all property committed to the relief of poverty, the advancement of

education, the advancement of religion, the promotion of health, governmental or municipal purposes, and other purposes the accomplishment of which is beneficial to the community,. . . ." Pa.R.J.A. 2156 (1). The Amended Complaint makes no claim regarding "the administration and proper application of property committed to charitable purposes" nor does it "[draw] in question the application, interpretation or enforcement of any law regulating the affairs of nonprofit corporations holding or controlling any property committed to charitable purposes."[22]

(2) 15 Pa.C.S.A. § 5793

The Association's claim of a statutory remedy is premised upon Sections 5791 through 5793 of the Nonprofit Corporation Law of 1988, 15 Pa.C.S.A. §§ 5791-5793. Section 5793 provides, in relevant part, as follows:

> § 5793. Review of contested corporate action
>
> (a) General rule. - Upon application of any person aggrieved by any corporate action, the court may hear and determine the validity of the corporate action.

15 Pa.C.S.A. § 5793(a). The words "corporate action" include "[t]he taking of any action on any matter that is required under [the Nonprofit Corporation Law] or under any other provision of law to be, or that under the bylaws may be, submitted for action to the members, directors, members of an other body or officers of a nonprofit corporation." 15 Pa.C.S.A. § 5791(a)(2). The

term "action" also includes a "failure to act" when there was a duty to act. *See* 15 Pa.C.S.A. § 5103 (Definitions); Ciamaichelo v. Independence Blue Cross, 928 A.2d 407, 410-411, 413 n.3 (Pa.Cmwlth. 2007).

Section 5793 of the Nonprofit Corporation Law grants standing to any person aggrieved by any corporate action of a nonprofit corporation to sue the corporation. In Chiamiachelo, the Court examined three factors in determining whether the subscribers to health insurance provided by the defendant insurer had standing under Section 5793(a) to bring suit against the defendant: (1) whether the challenged action constituted corporate action as defined in Section 5793(a); (2) whether the subscribers were included within the class of persons authorized by Section 5793(a) to question and commence suit over the corporate decisions at issue; and (3) whether the corporate action affected the subscribers' status, rights or duties. Ciamaichelo, 928 A.2d 410-11.[23]

Here, Plaintiffs have identified no provision of the Nonprofit Corporation Law that has allegedly been violated by the Association. Nor have Plaintiffs identified any rights or duties Plaintiffs possess as members of a nonprofit corporation which have been violated by the Association or which have been affected by any corporate action or inaction. Instead, the rights and duties Plaintiffs seek to enforce in this case arise

as an incident of their ownership of property in an approved final subdivision under the law applicable to real estate conveyancing. The rights and duties appurtenant to these properties were created with the approval and filing of the final subdivision plan for the Development and the filing of the protective covenants by Sellamerica on February 20, 1973, before the Association even existed.[24] Accordingly, we conclude Plaintiffs are not required to file a petition pursuant to Section 5793 of the Nonprofit Corporation Law to obtain the relief they seek.

CONCLUSION

Absent special circumstances, an association which takes title to development roads from the original developer of a private residential community, which roads do not conform to the dimensions and standards set forth in the approved and recorded subdivision plans for the development, has no independent affirmative duty to build and construct the roads to comply with such standards. Plaintiffs' Amended Complaint raises at least four legal theories which Plaintiffs contend obligates the defendant Association to improve and build the Development roads as laid out in the Development's formative documents: (1) the Association's assumption of the Developer's obligation to do so; (2) a fiduciary duty owed by the Association to unit property owners under the Uniform Planned Community Act; (3) obligations

flowing by and between the Association and the unit owners which arise from certain "restrictive" covenants and which bind the Association to make the improvements requested; and (4) enforcement of the Association's bylaws.

While hypothetically viable, the material facts set forth in the Amended Complaint to support these causes of action, either do not support the theory or are insufficient to sustain the cause of action with two exceptions: Plaintiffs' claim that the Association has succeeded to the liability of the original developer, Sellamerica, and Plaintiff's claim that the Association refuses to maintain the existing Development roads in a safe condition for vehicular travel and access to Plaintiffs' properties. Accordingly, while the remainder of Plaintiffs' claims will be dismissed, because Plaintiffs may be able to address the concerns identified in this opinion, and we believe Plaintiffs should be given the opportunity to do so, the order we enter will allow Plaintiffs to file a further Amended Complaint to set forth those material facts legally necessary to establish a right to relief under these alternate theories.

BY THE COURT:

_____

P.J.

[1] Protective Covenant Nos. 12 and 14 provide as follows:

(12) Until dedicated to public use, title to the portion of lands of the Seller laid down on the maps as streets shall remain in the Seller subject to the right of the Buyer and others and those claiming under them to use the same for ingress and egress to and from the public roads, and subject to the right of the Seller to maintain or grant the right to maintain water mains, sewer pipes, street drains, gas mains, fixtures for street lighting, telephones and electric poles, within the lines of such roadways.

(14) The Buyer agrees to pay unto the seller such annual fees as the seller may charge for each lot for the repair, maintenance and snow removal of the streets and roads, and/or control, maintenance and administration of any beach, lakes, trout streams, parks and other recreational facilities until or when dedicated.

(Amended Complaint, Exhibit No. B (Protective Covenants)).

[2] The Development when first created by Sellamerica was known as Pocono Forest Lake. This name was changed in 1974 to Pleasant Valley West by Pocono Pleasant Valley, which purchased the subdivision and is a successor to Sellamerica. (Amended Complaint, ¶¶13-14; Amended Complaint, Exhibit No(s). A, C and G, p.1). Upon its purchase of the subdivision, Pocono Pleasant Valley assumed all of the obligations and duties of Sellamerica with respect to the Development. (Amended Complaint, Exhibit No. G, p.1).

[3] These covenants are identical to those filed by Sellamerica on February 20, 1973 with one exception, an additional covenant identified by the number 19 was added. (Amended Complaint, ¶18; Amended Complaint, Exhibit No. F (Restrictive Covenants)). This additional covenant provides that the "Restrictive Covenants shall run with the land and shall bind all present owners, their heirs, successors and assigns." *Id*.

The effect of this new covenant is unclear since at the time these restrictive covenants were filed, the Association did not own the lots within the Development, only the roads and common areas, and as a general rule, covenants filed in conjunction with a general scheme of development as shown, for example, by the filing of a map laying out a certain tract or parcel of land in building lots and manifestly reflecting an intent to apply to all lots laid out in the plan, run with the land. Clancy v. Recker, 316 A.2d 898, 901-902 (Pa. 1974); Birchwood Lakes Community Ass'n, Inc. v. Comis, 442 A.2d 304, 307 (Pa.Super. 1992) ("The test for determining whether a covenant runs with the land is whether it was so intended by its creators."); Price v. Anderson, 56 A.2d 215, 219 (Pa. 1948) (discussing the doctrine of reciprocal covenants). Absent the applicability of this principle, the legal authority to bind existing lot owners to a restriction which did not exist at the time they purchased their property is not apparent. Moreover, since a span of more than eight years lapsed between the filing of the protective covenants by Sellamerica and the restrictive covenants filed by the Association, it appears likely that lots were sold prior to the filing of the Association's restrictive covenants.

The Association's characterization of these covenants as "restrictive covenants," especially covenant numbers 12 and 14 which are quoted in footnote 1, is also problematic. A restrictive covenant may be defined as:

> A covenant restricting or regulating the use of real property or the kind, character, and location of buildings or other structures that may be erected thereon, usually created by a condition, covenant, reservation, or exception in a deed, but susceptible of creation by contract not involving transfer of title to land and by implication. 20 Am J2d Cov ss 165 et seq.

Birchwood Lakes Community Ass'n, Inc., 442 A.2d at 307 (quoting Ballentine's Law Dictionary, 3rd Ed.). In construing the effect of a covenant it is important to distinguish between a restrictive covenant and a non-restrictive covenant: whereas a restrictive covenant is strictly construed against the grantor, a non-restrictive covenant is more liberally construed to "give effect to the intention of the parties as expressed at the time." *Id.* at 307.

Both the covenants filed by Sellamerica and those filed by the Association make no reference to the formation or creation of a property owners' association to which all lot owners within the subdivision would automatically become members and be subject to the association's rules and regulations. The Association's covenants also retain the same terminology as those filed by Sellamerica, including the use of the term "Seller," as the person or party in which title to the Development roads is held, and the "Seller" as being the person or party entitled to collect fees or assessments for the repair and maintenance of the Development roads and recreational facilities, notwithstanding that these roads were transferred to the Association more than five years earlier.

[4] Although the name of the subdivision is identified in this Offering Statement as Pocono Pleasant Valley West, this appears to be the same subdivision as Pleasant Valley West and we have so interpreted it for purposes of the Association's objections. As to the dimensions and surface covering of the Development roads, the Offering Statement on page 6 states: "At present, the roads in the subdivision have been cut, leveled and graded, and are of two lanes with a right-of-way of 50 feet and a cartway of 24 feet with necessary shoulders and drainage and will be covered with 6 to 9 inches of natural shale." This Statement, according to its terms, has been filed with the Office of Interstate Land Sales Registration, U.S. Department of Housing and Urban Development. (Amended Complaint, Exhibit No. G). In this regard, the Association notes that the plans attached to the Amended Complaint do not contain any representation that Forest Lake Drive would be a paved road. *See also* Section 10509(a) of the Pennsylvania Municipalities Planning Code which provides that "[n]o plat shall be finally approved unless the streets shown on such plat have been improved to a mud-free or otherwise permanently passable condition, or improved as may be required by the subdivision and land development ordinance. . . ." 53 P.S. § 10509(a).

[5] Count I may also be intended to assert a claim for detrimental reliance premised on the Offering Statement filed by Pocono Pleasant Valley. (Amended Complaint, ¶¶19-21, 76-77; Amended Complaint, Exhibit No. G). The elements of a *prima facia* claim of promissory estoppel are (1) the promisor made a promise that he should have reasonably expected to induce action or forbearance on the part of the promisee; (2) the promisee actually took action or refrained from taking action in reliance on this promise; and (3) injustice can be avoided only by enforcing the promise. Thatcher's Drug Store of West Goshen, Inc. v. Consolidated Supermarkets, Inc., 636 A.2d 156, 160 (Pa. 1994). In this respect, Plaintiffs fail to explain how the statements made by Pocono Pleasant Valley in its Offering Statement can be attributed to the Association and also fail to clearly state that Plaintiffs actually relied upon this Offering Statement to their detriment. (*See* Amended Complaint, paragraph 77, which alleges: "Based on these representations, buyers, including Plaintiffs, made financial decisions to acquire properties in the community, in some cases, to their ongoing detriment.").

[6] Preliminary objections in the nature of a demurrer require the court to resolve issues solely on the basis of the pleading at issue with no other evidence being considered. *See* In re Adoption of S.P.T., 783 A.2d 779, 782 (Pa.Super. 2001) (citing Mellon Bank, N.A. v. Fabinyi, 650 A.2d 895, 899

(Pa.Super. 1994). As such, the decision to grant or deny a demurrer is a question of law.

> Preliminary objections in the nature of demurrers are proper when the law is clear that a plaintiff is not entitled to recovery based on the facts alleged in the complaint. Moreover, when considering a motion for a demurrer, the trial court must accept as true all well-pleaded material facts set forth in the complaint and all inferences fairly deducible from those facts.

Little Mountain Community Ass'n, Inc. v. Southern Columbia Corp., 92 A.3d 1191, 1195 (Pa.Super. 2014) (quoting Yocca v. Pittsburgh Steelers Sports, Inc., 854 A.2d 425, 436 (Pa. 2004)). If an inconsistency exists between a pleading and a written instrument, the latter will prevail. Eberhart v. Nationwide Mutual Insurance Co., 362 A.2d 1094, 1097, n.6 (Pa.Super. 1976).

"Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief." Joyce v. Erie Ins. Exch., 74 A.3d 157, 162 (Pa.Super. 2013). The test is whether the complaint sets forth a cause of action upon which relief can be granted under any theory of law. Regal Indust. Corp. v. Crum and Forster, Inc., 890 A.2d 395, 398 (Pa.Super. 2005). Further, the plaintiff need not divulge the legal theory underlying the complaint. DelConte v. Stefonick, 408 A.2d 1151, 1153 (Pa.Super. 1979). If there is any doubt, it should be resolved by overruling the demurrer. Bailey v. Storlazzi, 729 A.2d 1206, 1211 (Pa.Super. 1999); McMahon v. Shea, 688 A.2d 1179, 1181 (Pa. 1997).

[7] In addition, the Association argues that Plaintiffs do not have standing to complain about any failure to construct road improvements as they purchased their properties many years after the Development was opened and after any alleged failure to construct improvements would have occurred. Standing is a doctrine of judicial restraint exercised where it is not clear the party who sues is truly interested, with a concrete stake in the action, sufficient to permit them to proceed. Robinson Tp. v. Com., 52 A.3d 463, 471 (Pa.Cmwlth. 2012) (*en banc*), *aff'd* in part, reversed in part on other grounds by 83 A.3d 901 (Pa. 2013). At its most basic level, standing is concerned with the question of who is entitled to make a legal challenge.

As a preliminary matter to judicial resolution of a controversy, a plaintiff must establish that he or she has standing to maintain the action. Johnson v. American Standard, 8 A.3d 318, 329 (Pa. 2010). In order to have standing, the individual must have a substantial, direct and immediate interest in the controversy. *Id.* at 334. With respect to decisions involving the internal operations of a nonprofit corporation, whether a party has standing to sue is governed by the Pennsylvania Nonprofit Corporation Law, 15 Pa.C.S.A. §§ 5101-6162. Petty v. Hosp. Serv. Ass'n of Ne. Pa., 967 A.2d 439, 444-45 (Pa.Cmwlth. 2009), *aff'd*, 23 A.3d 1004 (Pa. 2011). As amended in 2013, Section 5793(a) of the Nonprofit Corporation Law confers standing on any person aggrieved by any corporate action. 15 Pa.C.S.A. § 5793(a).

As alleged by Plaintiffs, neither Forest Lake Drive nor Mohawk Drive have been built or maintained as required by the recorded final subdivision plan and the Development documents. Plaintiffs claim Forest Lake Drive is a single, narrow, unpaved cartway, inadequate and unsafe as a means of access to their homes, but which, by necessity, they travel daily, and that the failure to construct Mohawk Drive has deprived them of a second means of ingress and egress to their homes. As property owners with a legal right to use all of the Development roads and as homeowners who live within the Development and whose sole means of access to their home is by way of Forest

Lake Drive whose alleged deteriorated and unsafe condition directly affects Plaintiffs each and every day, Plaintiffs claim to have a direct interest in the subject matter of this case which is "substantial and immediate." We agree. *See also* Doylestown Township v. Teeling, 635 A.2d 657 (Pa.Cmwlth. 1993) (recognizing that the buyer of a lot in a subdivision has standing to bring an action to enforce the notes on the final subdivision plan as a covenant running with the land); 68 Pa.C.S.A. § 5412 (providing that "[i]f a declarant or any other person subject to [the Uniform Planned Community Act] violates any provision of [the Act], or any provisions of the declaration or bylaws, any person or class of persons adversely affected by the violation has a claim for appropriate relief").

[8] Under the UPCA, the term "declaration" is defined as "[a]ny instrument, however denominated, that creates a planned community and any amendment to that instrument." 68 Pa.C.S.A. § 5103. The Amended Complaint refers repeatedly to the original developer, Sellamerica, as the declarant and the protective covenants filed by Sellamerica, as a declaration. (*See, e.g.*, Amended Complaint, ¶¶10, 12). While perhaps it might be more accurate to describe the combination of the recorded subdivision plan and the related filed protective covenants as a declaration (*see* 68 Pa.C.S.A. § 5210(a)), the adaptation of the UPCA's terminology to describe conduct which predates the enactment of the UPCA is needlessly confusing and fraught with legal connotations immaterial to the instant issue. For this reason, we believe it more accurate to refer to Sellamerica as the original developer of what is now known as the Pleasant Valley West Development. Finally, as it affects whether the Development is a planned community under the UPCA, since the UPCA does not make the mandatory filing of a declaration retroactive, "a planned community that predates the UPCA may meet the statutory definition regardless of whether it filed a declaration." Pinecrest Lake Community Trust v. Monroe County Board of Assessment Appeals, 64 A.3d 71, 75 n.8 (Pa.Cmwlth. 2013).

[9] Assuming for purposes of the Association's objections that Pocono Pleasant Valley assumed Sellamerica's obligations and duties for the Development as acknowledged in the Offering Statement - the manner, terms and documentation supporting this conclusion not having been disclosed - delegation of Sellamerica's duties to Pocono Pleasant Valley would not relieve Sellamerica of its obligations as the original developer in the absence of an agreement that the original obligation be extinguished and a new one substituted. Parish Mfg. Corporation v. Martin-Parry Corporation, 131 A. 710, 712 (Pa. 1926).

[10] The Pennsylvania Rules of Civil Procedure require that a plaintiff state the material facts on which a cause of action is based in a concise and summary form. Pa.R.C.P. 1019(a). To meet this standard, the complaint must not only give the defendant fair notice of what the plaintiff's claims are and the grounds upon which they rest, but must also "enable the defendant to know the nature of his alleged wrongdoing so that he may prepare a defense." General State Authority v. Lawrie & Green, 356 A.2d 851, 856 (Pa.Cmwlth. 1976). Accordingly, if Plaintiffs intend to pursue this claim on the basis of the Association having assumed the obligations of Pocono Pleasant Valley to build and construct the Development roads in accordance with the recorded subdivision plans or other Development documents, Plaintiffs need to aver and identify the material facts establishing the Association's assumption of such obligation, or allege that they are unable to do so but believe in good faith that this has occurred.

[11] Section 5301 provides:

> A unit owners' association shall be organized no later than the date the first unit in the planned community is conveyed to a person other than a successor declarant. The membership of the association at all

times shall consist exclusively of all the unit owners.... The association shall be organized as a profit or a nonprofit corporation or as an unincorporated association.

68 Pa.C.S.A. § 5301.

[12] The first mention of a property owners' association for the Development appears in the 1974 Offering Statement filed by Pocono Pleasant Valley, which provided that "[a]ll roads and cul-de-sacs in the subdivision will be maintained by the developer until such time as they are either offered to a lot owners association or unless dedicated to and accepted by local authorities" and that the assessment on lot owners for the cost of maintenance then being paid to the subdivider will be paid to the association once an association was incorporated. (Amended Complaint, Exhibit No. G (Offering Statement, "Improvements and Maintenance," p.6)).

[13] Nevertheless, "[i]n accordance with Section 5102(b) of the Act, Section 5103 of the Act, 68 Pa.C.S. § 5103 [the definitional section of the Act], applies retroactively to planned communities created before the effective date of the Act, to the extent necessary to construe the other applicable retroactive provisions." Rybarchyk v. Pocono Summit Lake Property Owners Ass'n, Inc., 49 A.3d 31, 35-36 n.4 (Pa.Cmwlth. 2012), *appeal denied*, 68 A.3d 910 (Pa. 2013).

[14] Under the UPCA, the obligation to complete roads and improvements depicted on a subdivision plan and designated as "MUST BE BUILT" is that of the declarant developer, not the "unit owners association." 68 Pa.C.S.A. § 5414(a). While the Association once having taken title to the Development roads and common areas clearly has the authority to make capital improvements of the type requested by Plaintiffs, ultimately, what Plaintiffs seek is to circumvent the discretion which resides with the unit owners as voting members of the Association to decide whether to exercise that authority, and, instead, to force the unit owners to assume the financial burden of construction which properly lies with the developer. *See* Fogarty v. Hemlock Farms Community Ass'n, Inc., 685 A.2d 241, 244 (Pa.Cmwlth. 1996) (holding that absent language in the deed covenant prohibiting a pre-UPCA association from levying special assessments for capital improvements, the homeowners may be assessed their proportionate costs to construct the new improvements); 68 Pa.C.S.A. § 5302(a)(7).

In referring to Section 5414, it's also important to note that this section is not retroactive to a planned community created before 1997. 68 Pa.C.S.A. § 5102 (b), (b.1). Therefore, to the extent Plaintiffs rely on the provisions of the UPCA as creating a duty imposed on Sellamerica to build and complete the Development's roads as depicted on the subdivisions plans, which duty has been assumed by the Association as the successor to Sellamerica, Section 5414 of the UPCA cannot serve as the source of this duty. At most, on the issues raised by Plaintiffs in their Amended Complaint, the UPCA imposes on the Association only the responsibility for the maintenance, repair and replacement of the roads in issue. *See* 68 Pa.C.S.A. § 5307 (Upkeep of Planned Community, General Rule). Further, all of this assumes that the Development is a "planned community" under the Act which, as discussed in footnote 15 below, is in question.

[15] Whether the Development is a "planned community" within the definition of the Act is at this time an open question. The Act defines a "planned community" as:

> Real estate with respect to which a person, by virtue of ownership of an interest in any portion of the real estate, is or may become obligated by covenant, easement or agreement imposed on the owner's interest to pay any amount for real property taxes, insurance, maintenance, repair, improvement, management, administration or

> regulation of any part of the real estate other than the portion or interest owned solely by the person....

68 Pa.C.S. § 5103.

As restated by the Pennsylvania Supreme Court:

> In simpler terms, a planned community is an area of land consisting of homes that are individually owned as well as common areas that are owned or leased by an association consisting of all of the homeowners in the community. *See id.* §§ 5103, 5205, 5301; Uniform Planned Community Act, prefatory note, 7B U.L.A. (1980); [Norman Geis, *Codifying the Law of Homeowner Associations: The Uniform Planned Community Act*, 15 Real Prop., Prob. and Tr. J. at 854, 856 (1980) ]. Significantly, however, the planned community homeowners are responsible for paying dues or fees to the homeowners' association for the common facilities. *See* 68 Pa.C.S. § 5103 (defining 'common expense liability' as the 'liability for common expenses allocated to each [home]'); *id.* § 5208 (explaining how the common expenses of the homeowners' association are allocated among the homeowners in a planned community).

Saw Creek Cmty. Ass'n, Inc. v. Cnty. of Pike, 866 A.2d 260, 263 (Pa. 2005) (footnote omitted).

First, while the protective covenants filed by Sellamerica, the original developer of what is now Pleasant Valley West, obligate property owners in the Development to pay assessments for the maintenance and repair of the Development roads and recreational facilities, which rights appear to have passed to Pocono Pleasant Valley as the successor to Sellamerica's ownership and interest in the Development, whether the Association has succeeded to these rights as the owner of the roads and common areas and, therefore, has the authority under Section 5302 of the Act to impose and collect assessments against all property owners in the Development to build and maintain the Development roads, is unclear. Under the protective covenants filed by Sellamerica, title to the subdivision roads and recreational areas was reserved to Sellamerica, with the right of dedication to public use. (*See* Amended Complaint, Exhibit No. B, (Protective Covenants, Nos.12 and 14)). Whether this "restraint on alienation" was violated when title to these properties was conveyed to the Association (*See* Amended Complaint, Exhibit No. E), and if so, whether such limitation on transferring title is enforceable and to what effect is too early to tell. *See* Ralston v. Ralston, 55 A.3d 736, 740 (Pa.Super. 2012) (holding that absolute restraints are against public policy and are void, but that limited and reasonable restraints are enforceable). Second, while the Association's bylaws require that its members be registered, titled owners of a lot in the Development, it is unclear whether membership in the Association is voluntary or mandatory, or whether all lot owners in the Development are automatically entitled to be members of the Association. (Amended Complaint, Exhibit No. H (Bylaws, Article III (Members, Section 1(A)))). Third, both the Development and the Association were created more than two decades before the enactment of the UPCA with no provision having been made in either the recorded subdivision plan or the protective covenants for ownership of the Development roads to be transferred to a property owners' association.

Based on similar factors, admittedly distinguishable, the Commonwealth Court in Rybarchyk v. Pocono Summit Lake Property Owners Ass'n, Inc., 49 A.3d 31 (Pa.Cmwlth. 2012), concluded the subdivision at issue was not a "planned community" as defined in the Act. *Id.* at 35-37. But *see* Pinecrest Lake Community Trust v. Monroe County Board of Assessment Appeals, 64 A.3d 71 (Pa.Cmwlth. 2013), in which the trial court determined a development qualified as a planned community under the UPCA, a conclusion not disputed by

the parties on appeal, where the lots within a planned residential development which pre-dated enactment of the UPCA were encumbered by restrictions obligating the owners thereof to pay their *pro rata* share of the expense to maintain and manage the common areas, which common areas were owned by a trust of which the lot owners were the beneficiaries.

[16] Whether the Development is a planned community and its executive board subject to the standard of care set forth in Section 5303(a) appears, in any event, to be of little significance on this issue since the standard of care applicable to the directors of a domestic nonprofit corporation, to which organizational form the Association belongs, is substantially the same. As to this standard, Section 5712(a) of the Pennsylvania Nonprofit Corporation Law provides, in pertinent part, as follows:

> Section 5712. Standard of Care and Justifiable Reliance
>
> (a) Directors. - A director of a nonprofit corporation shall stand in a fiduciary relation to the corporation and shall perform his duties as a director, including his duties as a member of any committee of the board upon which he may serve, in good faith, in a manner he reasonably believes to be in the best interest of the corporation and with such care, including reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances.

15 Pa.C.S.A. § 5712(a).

[17] In the context of the averments of the Amended Complaint, the "road" referred to in paragraph 75 appears to be in reference to Forest Lake Drive, however, this is unclear, and the singular road may be a typo and may have been intended to refer to all of the roads in the Development.

[18] In Zampogna, the Pennsylvania Supreme Court conducted a brief review of the history of corporate law in Pennsylvania noting that early on "corporations were required to be incorporated for a specific purpose and were limited to take only those actions that furthered the corporation's purpose"; "if a corporation's action was not fairly considered incidental or auxiliary to its corporate purpose, a court could deem the action unauthorized as beyond the scope of the corporation's authority (*i.e., ultra vires*)." 151 A.3d at 1011. In contrast, the Business Corporation Law today grants a business corporation broad corporate powers "[s]ubject to the limitations and restrictions imposed by statute or contained in its articles" and removes "the requirement that for-profit corporations be incorporated for a specific, limited purpose." 151 A.3d at 1011-12. As a result, "[b]ecause for-profit corporations are no longer limited to taking actions related to their corporate purposes, the *ultra vires* doctrine is, in effect, no longer viable to challenge a for-profit corporate action"; "[r]ather, a challenge to a corporate action proceeds in modern jurisprudence under what is known as the business judgment rule." *Id.* at 1012.

The Court further noted that the same developments have been extended to nonprofit corporations generally, and that although "nonprofit corporations are required by the [Nonprofit Corporation Law] and its regulations to be incorporated for a specified purpose, as opposed to for-profit corporations, which may be incorporated for 'any lawful purpose,'" this "does not necessarily mean that we must construe this requirement narrowly." 151 A.3d at 1013 (citations omitted). Summarizing its holding, the Court stated: "Thus, we find that a nonprofit corporation's action is authorized when: 1) the action is not prohibited by the [Nonprofit Corporation Law] or the

corporation's articles; and 2) the action is not clearly unrelated to the corporation's stated purpose." *Id.* at 1013.

[19] As previously noted, the standard of care set forth in Section 5712(a) of the Nonprofit Corporation Law, 15 Pa.C.S.A. § 5712(a), is virtually identical to that described in Section 5303 of the Uniform Planned Community Act, 68 Pa.C.S.A. § 5303(a). *See* footnote 16 *supra*.

[20] As relevant to the Association's Objections, Article III, Section 6, of the Association's bylaws provides:

> Since the Corporation is responsible to maintain all roads and recreational facilities and its only source of income is the annual dues, all lot owners should be assessed as described in the Offering Statement of the Pocono Pleasant Valley West Subdivision dated 11/21/70.

(Amended Complaint, Exhibit "H" (Pleasant Valley West Club Bylaws, Article III, Section 6)). *See also* 68 Pa.C.S.A. § 5307(a) (Upkeep of Planned Community, General Rule).

[21] As relevant to the Association's Objections, Article III, Section 7, of the Association's bylaws provides:

> Excluding the maintenance of all roads. . . expenditures over Two Thousand Dollars ($2,000.00) must be submitted in writing stating the purpose, total cost, and where the money would come from to all members in good standing. Members must then approve the expenditure by a simple majority vote.

(Amended Complaint, Exhibit "H" (Pleasant Valley West Club Bylaws, Article III, Section 7)).

[22] Nor does Section 711 of the Fiduciaries Act entitled "Mandatory Exercise of Jurisdiction through Orphans' Court Division in General" support the Association's position. As it relates to nonprofit corporations, Section 711 provides that jurisdiction of the Court of Common Pleas shall be exercised through its Orphans' Court Division for the following:

> Nonprofit Corporations - The administration and proper application of funds awarded by an orphans' court or an orphans' court division to a nonprofit corporation heretofore or hereafter organized under the laws of the Commonwealth of Pennsylvania for a charitable purpose at the direction of the orphans' court or an orphans' court division or at the direction of a settlor or testator of a trust or estate, jurisdiction of which is exercised through the orphans' court division except as the administrative, presiding or president judge of such division disclaims the exercise of future jurisdiction thereof.

20 Pa.C.S.A. § 711(21).

[23] At the time the conduct at issue in Ciamaichelo occurred, Section 5793(a) of the Nonprofit Corporation Law provided:

> (a) General Rule. Upon petition of any person whose status as, or whose rights or duties as, a member, director, member of an other body, officer or otherwise of a nonprofit corporation are or may be affected by any corporate action, the court may hear and determine the validity of such corporate action.

15 Pa.C.S.A. § 5793(a). This Section was amended to its current version effective September 7, 2013.

[24] Moreover, to the extent Plaintiffs claim the Development is a "planned community" within the meaning of the Uniform Planned Community Act and subject to the provisions of that Act, we have found no case raising issues related to the improvement or maintenance of common areas titled in the name of a community association which was organized as a nonprofit corporation which require that an action against the association be commenced by the filing of a petition pursuant to 15 Pa.C.S.A. § 5793(a). *Cf.* Logans' Reserve

Homeowners' Association v. McCabe, 152 A.3d 1094 (Pa.Cmwlth. 2017) (reviewing property owners' claim alleging association's breach of development declaration in failing to maintain common area behind owners' property asserted as a counterclaim in the court of common pleas in response to association's complaint seeking payment of unpaid assessments; reference to bylaws of the association and reliance by the association on the business judgment rule as a defense suggest the association was incorporated, but this is not stated definitively in the case).