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EXPANDING RESTRICTIVE COVENANTS

*Tishomingo Property Owners Association v. Cronin*¹

In 1984, the Missouri Supreme Court issued a significant opinion in the law of restrictive covenants. The brevity of *Lake Tishomingo Property Owners Association v. Cronin*² is deceiving in that the case concerns issues that have been debated by courts and legal scholars for many decades.

Lake Tishomingo Subdivision is a high-quality residential area.³ The subdivision was developed and constructed by Lake Development Enterprises, Inc. (hereinafter "LDE") in the late 1940s.⁴ Deeds to the subdivision lots included restrictions "denominated . . . as covenants running with the land."⁵ The restrictions provided for an annual assessment "not to exceed fifty-five cents per [lake]front foot" to cover maintenance expenses of the common areas, over which LDE retained title.⁶

In 1969, several property owners brought a class action against LDE, claiming that LDE had misused funds and failed to properly "maintain the

1. 679 S.W.2d 852 (Mo. 1984) (en banc).

2. *Id.*

3. *Id.* at 854. The subdivision "consist[s] of a 120 acre man-made lake surrounded by approximately 930 lots." *Id.*

4. *Id.* The subdivision was originally platted in 1948 in plat book 9 at p. 61 of the land records of Jefferson County, Missouri. Respondent's Brief and Argument at 2, *Lake Tishomingo Property Owners Ass'n v. Johnson*.

5. *Lake Tishomingo*, 679 S.W.2d at 855.

6. *Id.* The common property included roads, parkways, the lake, and a dam. The specific provision read as follows:

As a part of the consideration for the sale of this lot, GRANTOR shall have the right to assess the owner of this lot after August 1, 1949, and each succeeding August 1st thereafter, such sum as GRANTOR shall deem necessary for the upkeep and maintenance of the Dam, Roads, and other improvements, provided, however, that no assessment for any one year shall exceed the sum of fifty-five cents . . . per front foot, and further provided that the assessment as levied each year shall be and become a lien without filing of suit or legal procedure to establish such lien on said lot if not paid within thirty days after August 1st of the year in which the assessment is made.

Id. at 855 n.4. The custom in Jefferson County, at the time the restrictions were platted, was for the surveyor who platted the subdivision to prepare the restrictions. The customary restrictions of the time did not contain amendment or modification provisions. Respondent's Supplemental Brief and Argument at 37, *Lake Tishomingo*, 679 S.W.2d 852.

subdivision's dam and roads."⁷ The suit was settled, and a consent decree was approved by the court and entered as a final judgment.⁸ The decree changed the original subdivision covenants in three ways. First, Lake Tishomingo Property Owners Association (hereinafter "LTPOA") was established to serve as trustee for the lot owners. LTPOA assumed all the "rights, powers and obligations" of LDE as the original grantor.⁹ Second, LDE was required to transfer title to the common property to LTPOA. Third, the court inserted a provision allowing future modification of the original restrictions.¹⁰ The decree went unchallenged until this suit.¹¹

This dispute arose because of the need to dredge the lake.¹² Estimates by an engineering firm placed the cost of the dredging operation at "approximately \$170,000."¹³ The annual assessment could not cover the cost of the operation. In response to this problem, LTPOA's Board of Directors

7. *Lake Tishomingo*, 679 S.W.2d at 855. This case, entitled *Dortch v. Lake Dev. Enter.*, was presented in the Circuit Court, City of St. Louis in Cause No. 81690-E (1969). Respondent's Brief and Argument, *supra* note 4, at 2.

8. *Lake Tishomingo*, 679 S.W.2d at 856. "The applicable venue statutes place[d] jurisdiction over the case with the Circuit Court of Jefferson County." *Id.* at 855 n.6. "Consequently, though the [St. Louis] [C]ourt purported to approve the decree, it labeled substantial [parts] of it as 'advisory only.'" *Id.* at 856. A new class action was filed in the Circuit Court of Jefferson County. *Id.* The cause entitled *Dortch v. Lake Dev. Enter.*, was presented as Cause No. 41728, Division 11 (1978). Respondent's Brief and Argument, *supra* note 4, at 3. The suit was substantively identical to the St. Louis case. *Lake Tishomingo*, 679 S.W.2d at 856.

Notice of settlement was mailed to all property owners. This notice informed the lot owners that the decree was binding unless objected to within thirty days. No objections were filed. *Id.* There were discussions regarding the litigation at an association meeting. This association was open to all property owners. A copy of the decree was posted in the community center. Respondent's Brief and Argument, *supra* note 4, at 20, 22.

The property owners were represented by Albert Beyer in both actions. *Lake Tishomingo*, 679 S.W.2d at 856. Mr. Beyer was the appellant in the later actions. See *infra* note 17 and accompanying text.

9. *Lake Tishomingo*, 679 S.W.2d at 856.

10. *Id.* This provision allowed for:

changes in, or additions to, the said subdivision restrictions . . . [upon approval] by a simple majority of the votes cast at an election wherein each lot owner in the subdivision shall be entitled to cast one vote for each ten (10) front feet of lot owned by him, but not less than five (5) nor more than ten (10) votes per platted lot. (Said changes or additions may be for the purpose of assessments, extension of the restrictions, and other matters consistent with the purposes of the subdivision and the trust)

Id. at 854.

11. *Id.* at 856.

12. *Id.* at 854. "There [was] no substantial dispute [over] the seriousness of the problem." *Id.* "The lake was filled with sediment and sand rendering portions thereof unusable." Respondent's Brief and Argument, *supra* note 4, at 18.

13. *Lake Tishomingo*, 679 S.W.2d at 854.

called a special election of the lot owners, as allowed under the consent decree, to amend the original covenants to allow a "one-time special assessment of \$2.60 per [lake]front foot."¹⁴ The amendment passed by the amount required pursuant to the decree, "a simple majority of the votes cast."¹⁵

"Respondent [LTPOA] filed . . . suit in 1978 against [the] property owners who had failed to pay the special assessment."¹⁶ LTPOA proceeded to trial against the few property owners who would not pay the assessment.¹⁷ The question before the court was whether the consent decree properly amended the restrictions so as to allow modifications to the original covenants.¹⁸ Defendants contended that the court was "powerless to amend or reform the original covenants . . . so as to increase the original burden on the covenanted land."¹⁹ The trial court found for LTPOA and "ordered enforcement of the [special assessment] liens."²⁰

In addressing the appellants' contentions, the Missouri Supreme Court stated, "It is undisputed that the special assessment was not authorized by

14. *Id.* The proposition read as follows:

The restrictions applying to Lake Tishomingo Subdivision of Jefferson County, Missouri, said subdivision being as shown in Plat Book 9 at Page 61 of the Jefferson County Land Records, are amended by adding thereto: 'The Board of Directors of Lake Tishomingo Property Owners Association are authorized to make a special assessment of Two Dollars and sixty cents (\$2.60) per front foot to be levied by the said Lake Tishomingo Property Owners Association upon the owner or owners of each Lot in said subdivision which is subject to the annual maintenance assessment provided however that each lot shall, in making said assessments, be considered as having not less than fifty (50) front feet nor more than one hundred (100) front feet; special assessment to be made on or about August 1, 1976, and one time only, *which special assessments shall be in addition to the annual assessment for maintenance and upkeep* and said special assessments herein referred to shall be a lien and shall be collected in all manner as though they were the annual assessments for upkeep and maintenance and the funds obtained by said special assessments are to be expended by the Lake Tishomingo Property Owners Association for the purpose of cleaning Lake Tishomingo of silt, weeds and other debris; by mudcat dredge equipment leased as per Engineers Report on the Lake Study.'

Id. at 854 n.2 (emphasis added). An election notice was published for several weeks, and there were three open meetings concerning the election. Respondent's Brief and Argument, *supra* note 4, at 20-21.

15. *Lake Tishomingo*, 679 S.W.2d at 854. Out of 4913 possible votes 2904 were cast; 1976 in favor and 928 against. This vote represented the 246 property owners who voted in the election; 163 voted for the special assessment; 83 voted against it. *Id.*

16. *Id.* at 854-55.

17. *Id.* The defendants included Albert Beyer, the attorney who originally obtained the consent decree for what was to become LTPOA, and four of Beyer's relatives.

18. *Id.* at 853-56.

19. *Id.* at 856.

20. *Id.*

the covenant restrictions contained in the original indenture and no provision in the original covenants permitted their subsequent modification."²¹ The court summarized the issue presented by the case as "whether a consent decree, entered as a final judgment . . . which amended the original covenants so as to permit special assessments [could be] enforced against [the] property owners."²²

The court agreed with the appellants that the court in the prior action was "powerless to . . . reform the original covenants," finding that neither fraud nor mistake were alleged or proven in the *Lake Tishomingo* proceeding.²³ The court found, however, that the other parts of the consent decree making LTPOA trustee and conveying title to the common properties to LTPOA were accepted by all parties and were valid.²⁴

The court denied that the lower court had the ability to modify the restrictions. The court held, however, that under these facts the equitable obligation of the appellants to pay the lien could not be disputed, stating "[w]hile the Court is powerless to reform or amend the original covenants, we cannot close our eyes to the fact that, when compared to the cost of the dredging operation, the assessment permitted by the original covenants was tantamount to no assessment at all."²⁵ The court concluded that the assessment "voluntarily" paid by most lot owners appeared fair and equitable stating "our sense of fairness and justice compels us to enforce the clear equitable obligation of appellants to bear their share of the costs necessary for preserving the common property essential for continuation of the subdivision."²⁶

Nationally and statewide, the law of restrictive covenants has undergone a great deal of change spanning many decades. In *Gardner v. Maffitt*,²⁷ the Supreme Court of Missouri stated that restrictions are "in derogation of the fee" and should be narrowly interpreted.²⁸ Generally, Missouri courts enforce

21. *Id.* at 853.

22. *Id.*

23. *Id.* at 856. The court implicitly approved either fraud or mistake as adequate ground for reform. See *infra* note 46.

24. *Lake Tishomingo*, 679 S.W.2d at 857.

25. *Id.*

26. *Id.*

27. 335 Mo. 959, 74 S.W.2d 604 (1934).

28. *Id.* at 965, 74 S.W.2d at 607; see, e.g., *Steve Vogli & Co. v. Lane*, 405 S.W.2d 885 (Mo. 1966); *Mathews Real Estate Co. v. National Printing & Engraving Co.*, 330 Mo. 190, 48 S.W.2d 911 (1932); see also *Jones v. Park Lane for Convalescents*, 384 Pa. 268, 120 A.2d 535 (1956). In *Jones*, the Supreme Court of Pennsylvania noted: "[R]estrictions on the use of land are not favored . . . because they are an interference with an owner's free and full enjoyment of his property; nothing will be deemed a violation of a restriction that is not in plain disregard of its express words." *Id.* at 272, 120 A.2d at 537. The *Jones* court further stated that restrictions interfere with free use of property and should not be "extended or enlarged by implication." *Id.* "Every restriction will be construed most strictly against the grantor and every doubt and ambiguity in its language resolved in favor of the owner." *Id.* at 272, 120 A.2d at 537-38.

restrictive agreements in residential land, "avoid[ing] narrow . . . constructions . . . [and interpretations by] endeavor[ing] to ascertain the actual intention of the parties."²⁹

Missouri's change in attitude toward restrictions parallels the increased usage of these covenants. "[I]n the past only certain classes of covenants, [particularly] those in leases and those concerning party walls . . . [were] of great importance to property owners."³⁰ "[W]ith the growth of cities and the . . . crowded conditions of modern life, the desire of home owners to secure desirable home surroundings . . . led to a demand for land limited entirely to development for residen[tial] purposes."³¹ Restricted residential property is now prevalent throughout the country.³²

There are two types of covenants that run with the land. Those "that run under doctrine[s] developed in the English common law courts of Common Pleas and King's Bench are known as covenants running at law or . . . 'real covenants.'"³³ The second type runs under doctrines originating in equity from Lord Chancellor Cottenham's *Tulk v. Moxhay*³⁴ decision.³⁵ "Recent court decisions rarely turn upon real covenant doctrine."³⁶

29. Scurlock, *Missouri Law of Land Agreements Which Run with the Fee*, 23 U. KAN. C. L. REV. 3, 29 (1954). When the language is clear, however, "its meaning . . . must be given effect without consider[ing] extraneous factors." *Id.* at 29-31.

30. C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" INCLUDING LICENSES, EASEMENTS, PROFITS, EQUITABLE RESTRICTIONS, AND RENTS 170 (2d ed. 1947).

31. *Id.*

32. *Id.*

33. R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY 468 (1984) [hereinafter CUNNINGHAM, STOEBUCK & WHITMAN].

34. 2 Phil. 774, 41 Eng. Rep. 1143 (1848). This landmark decision, creating the second category of restrictions, involved a covenant to maintain the property as "a square garden and pleasure ground . . . in neat and ornamental order." *Id.* at 775, 41 Eng. Rep. at 1143. The land passed to the defendant whose purchase deed contained no similar covenant, but who admitted to having purchased with notice of the covenant. *Id.* The court stated, "[T]he question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased." *Id.* at 777-78, 41 Eng. Rep. at 1144. The court held that when a restrictive covenant is attached to the property by the owner, no one purchasing with notice of that covenant "can stand in a different situation [than] the party from whom he purchased." *Id.*

35. CUNNINGHAM, STOEBUCK & WHITMAN, *supra* note 33, at 468, 485-86. *Tulk v. Moxhay* brought the principles of equity into the field of agreements that run with the land. Scurlock, *supra* note 29, at 4.

36. CUNNINGHAM, STOEBUCK & WHITMAN, *supra* note 33, at 487. The law of equitable restrictions is generally applicable except in two situations: when money damages are sought (which equity normally will not give and, in "a few jurisdictions, where courts will not enforce affirmative covenants in equity." *Id.* If the requirements for running have been met, Missouri courts will enforce affirmative covenants or

In *Lake Tishomingo*, the Court cited *Weatherby Lake Improvement Co. v. Sherman*³⁷ for support of the equitable obligation principle. In that case, the deeds to the subdivision did not contain restrictions regarding privileges or responsibilities, such as maintenance, in connection with the lake, nor was there a homeowners association provision.³⁸ *Weatherby Lake Improvement Company* was incorporated by property owners.³⁹ The right of the company to levy assessments was at issue in *Weatherby Lake*.

In *Weatherby Lake* the lower court found it "fair and equitable that all of the owners contribute . . . their fair and proportionate share" to the Improvement Company for the general maintenance and repair of the lake property commonly owned.⁴⁰ The right of the company to make yearly assessments against all property owners was upheld by the lower court, notwithstanding the fact that the original restrictions lacked any such provision.⁴¹

Appellants in *Weatherby Lake* unsuccessfully challenged the validity of the court authorized assessment provision. Appellants also argued that the burden of a later special assessment voted in by the company's board of directors was not equitably distributed.⁴² The court quoted a 1918 Missouri Supreme Court decision on this point that stated:

It is true exact equality in apportioning the burdens of improvements is beyond human wisdom, and no heed will be given complaints against a rule which approximates justice as nearly as reasonably may be. Exceptional cases of hardship in the natural and ordinary application of a principal [sic] of apportionment generally fair and just must be borne as one of the imperfections of human things.⁴³

covenants to pay money. See *Scurlock*, *supra* note 29, at 21. Although there has been much debate over whether a promise to pay an assessment or dues runs, because of its affirmative nature, courts today are in agreement that those covenants do run. See, e.g., *Adaman Mut. Water Co. v. United States*, 278 F.2d 842, 847 (9th Cir. 1960); *Kell v. Bella Vista Property Owners Ass'n*, 258 Ark. 757, 528 S.W.2d 651, 653 (1975); Annotation, *Covenants as Running with the Land*, 68 A.L.R.2d 1022 (1959) (covers affirmative covenants running with the land). "While cases from a few American jurisdictions contain language indicating the adoption of the English rule that the burdens of covenants, affirmative or otherwise, do not run at law, except as between landlord and tenant, it is the general rule in the American courts that covenants which otherwise satisfy the requirements of intention [and] privity, and [which] 'touch and concern' do run, both at law and in equity, both as to benefit and burden." *Id.* at 1026-27. Whether the burden is affirmative or negative is seldom referred to at all. *Id.*

37. 611 S.W.2d 326 (Mo. Ct. App. 1980).

38. *Id.* at 328.

39. *Id.*

40. *Id.* at 328-29. The court justified this decision by declaring that all the landowners had easements for the use of the lake and its facilities. *Id.* at 328.

41. *Id.* at 328-30.

42. *Id.* at 332.

43. *Commerce Trust Co. v. Blakely*, 274 Mo. 52, 59, 202 S.W. 402, 404 (1918).

The *Weatherby Lake* court concluded that as long as an equitable method was devised for distributing costs of repairs, courts should not second guess the amounts levied against the property owners.⁴⁴

The majority's reference in *Lake Tishomingo* to *Lake Wauwanoka, Inc. v. Spair*⁴⁵ is one disturbing aspect of the *Lake Tishomingo* case. Although *Lake Wauwanoka* is cited for its proposition that reformation or amendment of covenants is permissible only upon proof of fraud or mistake,⁴⁶ other language in the case appears to be in direct conflict with *Lake Tishomingo*, yet this part of *Lake Wauwanoka* goes without mention.

Lake Wauwanoka involved a class action to amend the method of changing the applicable restrictions.⁴⁷ The court denied the relief requested but did increase the amount of the assessment.⁴⁸ Alleging the increase was insufficient because of changed conditions, the appellant requested the court to order an amendment.⁴⁹ The trial court dismissed the petition for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted stating:

The judicial function is a limited one and is not empowered to answer all of the 'political' and social problems that beset a community. We have no more business amending the restrictive covenants and setting assessments than we do passing legislation and levying taxes. Separation of powers and limitations of authority are vital to the maintenance of our system. Government by judiciary would be an unwarranted and violent intrusion into the local political affairs of this lake community and the private property interests involved. The resourceful people of Lake Wauwanoka must find their answer in private contract, voluntary association, and the political process. The court must not trespass this domain.⁵⁰

The *Lake Wauwanoka* court observed that the "[a]ppellants focus[ed] their arguments on the trial court's jurisdiction to grant the relief requested . . . [which] rest[s] on the abstract principle that the remedies of equity are plastic and may be molded to meet the needs of justice."⁵¹ The court disagreed with

44. *Lake Weatherby Improvement Co. v. Sherman*, 611 S.W.2d 326, 332 (Mo. Ct. App. 1980).

45. 622 S.W.2d 309 (Mo. Ct. App. 1981).

46. *Lake Tishomingo*, 679 S.W.2d at 856 (citing *Lake Wauwanoka*, 622 S.W.2d at 314). "Covenants in a deed are essentially promises and, as such, are only reformed upon proof of fraud or mistake." *Lake Wauwanoka*, 622 S.W.2d at 314. Without fraud or mistake, the clear and explicit language of a covenant limits the court's authority. "The court may not rewrite the agreement." *Id.*; see also *Grantham v. Rockhurst Univ.*, 563 S.W.2d 147, 150 (Mo. Ct. App. 1978).

47. *Lake Wauwanoka*, 622 S.W.2d at 310.

48. *Id.* at 310-11. The amount was increased by twenty cents to seventy-five cents per front foot. *Id.* at 311.

49. *Id.*

50. *Id.* at 311 n.5.

51. *Id.* at 312.

appellants' contention that a change in conditions furnished the necessary ground for modifying the method of changing the restrictions, calling such a remedy a "novel" equitable remedy.⁵²

It could have been argued in *Lake Tishomingo* that the original indenture provided for an assessment for the upkeep of the improvements,⁵³ which had become impracticable without awarding the amount allowed. This argument, however, failed in *Lake Wauwanoka* where it was argued that the covenants "should be construed in light of general language contained in the original indenture which state[d] the purpose of the indenture [was] to maintain the subdivision as a high [quality] . . . area."⁵⁴

The *Lake Wauwanoka* court found that the language of the covenant was "clear and unambiguous" as to the responsibilities and rights of the original grantor, grantees, and successors.⁵⁵ Therefore, the court found that judicial modification was not allowed.⁵⁶ It would similarly be very difficult in the *Lake Tishomingo* case to argue that the original covenants were vague regarding the authorized assessment.⁵⁷

The case of *Lakeland Property Owners Association v. Larson*⁵⁸ involved a deed which contained a provision authorizing changes of the covenants by a majority vote of the lot owners in the subdivision.⁵⁹ Under this provision, a majority adopted a provision permitting the property owners association to assess dues, "the nonpayment of which would [create] a lien upon the property."⁶⁰

In an action by the Association for nonpayment, the lower court held that the majority of lot owners could not enact new covenants.⁶¹ The lower court stated that "the covenants . . . were not changes in the original cov-

52. *Id.* The court found that the appellants were incorrectly attempting to analogize those cases in which the court, in equity, recognized changed conditions and either refused to enforce the covenants or declared them void. *See, e.g.,* Gibbs v. Cass, 431 S.W.2d 662 (Mo. Ct. App. 1968) (refused to enforce the covenants); Pickel v. McCawley, 329 Mo. 166, 44 S.W.2d 857 (1931) (declared the covenants void).

53. *See supra* note 6.

54. *Lake Wauwanoka*, 622 S.W.2d at 313.

55. *Id.*

56. *Id.*

57. The provision at issue specifically states that no assessment for any one year shall exceed the sum of fifty-five cents per front foot. *Lake Tishomingo*, 679 S.W.2d at 855 n.4. Furthermore, recitals of the fact that the assessment is for upkeep of the subdivision are not generally considered part of the agreement and cannot be used to broaden or change unambiguous and explicit restrictions. *Vinyard v. St. Louis County*, 399 S.W.2d 99, 106 (Mo. 1966) (en banc).

58. 121 Ill. App. 3d 805, 459 N.E.2d 1164 (1984).

59. *Id.* at 807, 459 N.E.2d at 1166.

60. *Id.*

61. *Id.*

enants but rather entirely new and different in character . . . [T]herefore . . . the Association had no power to make a binding assessment on the defendant as he had not agreed to be bound by the terms thereof.”⁶² The court concluded, “Where a deed contains restrictive covenants but also permits their future alteration, the language employed determines the extent and scope of that provision.”⁶³

The *Lakeland* court affirmed the lower court’s conclusion that the addition of the assessment provision was an unacceptable addition of a new provision. The court stated that it is not the function of the courts to approve the addition of provisions merely to serve equitable goals, but that courts should endeavor to construe deeds “to give effect to the . . . intent of the parties . . . [when] the covenant was made.”⁶⁴ The Association in *Lakeland* argued that the assessment provision was not new in effect because the land to be maintained included easements for property owners’ use.⁶⁵ The court recognized that under Illinois law, the easement owner has a duty of maintenance but did not allow the theory to be used at trial.⁶⁶ In Illinois, apportioning the repair costs of an easement is based on actual “use” of the easement.⁶⁷ The easement maintenance theory was not addressed in *Lake Tishomingo*.⁶⁸

In holding that the voluntary assessment made and honored by the majority of property owners was equitably enforceable in *Lake Tishomingo*, the Missouri Supreme Court left many questions unanswered. Although under the *Lake Tishomingo* fact situation the conclusion reached by the court

62. *Id.* at 808, 459 N.E.2d at 1167. The court stated further that in interpreting restrictive covenants the object is to effectuate the intent of the parties at the time the covenant was made. *Id.* at 809, 459 N.E.2d at 1168.

63. *Id.* at 810, 459 N.E.2d at 1169. The court reasoned that the language permitting changes of the covenants was directed at changes of existing covenants, not the adding of new covenants. *Id.*; see also *Van Deusen v. Ruth*, 343 Mo. 1096, 125 S.W.2d 1 (1938) (per curiam) (provision in agreement that any restriction might be modified, amended, released, or extinguished did not authorize any new or additional restrictions to be added, but only authorized existing restrictions to be made less harsh or entirely extinguished). *But see Hening v. Maynard*, 227 Va. 113, 313 S.E.2d 379 (1984). A restriction creating a more restrictive neighborhood development was impliedly validated by the court even though the covenants did not contain a mechanism to modify or amend the covenants. *Id.* at —, 313 S.E.2d at 381-82. The *Hening* court, however, invalidated a modification which purported to waive the assessment provision finding that unanimity was necessary to amend or terminate an existing restriction. *Id.*

64. *Lakeland Property Owners Ass’n v. Larson*, 121 Ill. App. 3d 805, 809, 459 N.E.2d 1164, 1168 (1984).

65. *Id.* at 810, 459 N.E.2d at 1169.

66. *Id.* at 811, 459 N.E.2d at 1169-70. The theory was not allowed because it had not been raised at the trial court level.

67. *Id.* at 811, 459 N.E.2d at 1170.

68. See *infra* notes 82-83 and accompanying text.

is facially pleasing and intuitively fair, the Court provides little future guidance. Surely the court is not authorizing a *carte blanche* to similarly-situated subdivisions to assess their neighbors against their will. Such a reading would provide for an implicit ability to tax.

In the future, the question will probably come up in the context of an extraordinary expense. If a majority has agreed to and honored an assessment for a golf course, does this invoke the court's equitable obligation analysis? A more complicated situation would be where a majority votes to erect a new clubhouse when arguably all that is needed is a new roof. The solution to this dilemma may only be avoided by including in the original restrictions an express denial of any implicit powers.

In *Lake Tishomingo*, the viability of the subdivision was threatened. In other situations, property owners could argue that to maintain their subdivision's high-quality standard, it is necessary to assess landowners for improvements such as tennis and racquetball courts because modern high-quality subdivisions have these amenities.⁶⁹

The answer to this problem is found in the case. In discussing the dredging operation the Court states, "The evidence regarding the dredging operation reflects that it was both reasonable and necessary for the preservation of the property value of the . . . lots in the subdivision."⁷⁰ This standard provides a workable formula for courts to apply in this situation. A related question involves a situation where there are no assessment provisions. Presumably, the court would follow a similar analysis under the guise of equity if the viability of the subdivision were at stake.

A recent line of authority has developed in the New York courts that holds when property owners buy lots within a private incorporated community, they, by their purchase, impliedly accept a corporate offer to provide "services necessary to the well-being of [the] community."⁷¹ The terms of this implied in fact⁷² agreement include the "obligation to pay a proportionate share of the cost of maintaining" the community.⁷³

69. This argument would not succeed if the sole basis for advancing it was the general language in the covenants that the assessments are for the upkeep of the high-quality subdivision. See *supra* notes 54, 57, and accompanying text.

70. *Lake Tishomingo*, 679 S.W.2d at 857.

71. *Sea Gate Ass'n v. Fleischer*, 211 N.Y.S.2d 767 (1960); see, e.g., *Tides Property Owners Ass'n v. Paolillo*, 56 A.D.2d 888, 392 N.Y.S.2d 670 (1977); *Fieldston Property Owners Ass'n v. Decorative Trends, Inc.*, 83 Misc. 2d 685, 373 N.Y.S.2d 806 (1975), *aff'd*, 56 A.D.2d 525, 391 N.Y.S.2d 828 (1977), *appeal dismissed*, 42 N.Y.2d 960, 367 N.E.2d 652, 398 N.Y.S.2d 146 (1977); *Patchogue Properties, Inc. v. Eirillo*, 54 Misc. 2d 863, 283 N.Y.S.2d 560 (1967); *Tomkins Lake Estates Ass'n v. Speisman*, 51 Misc. 2d 488, 273 N.Y.S.2d 457 (Sup. Ct. 1966).

72. *Sea Gate*, 211 N.Y.S.2d at 781. Their obligations to the plaintiff-corporation, arose because they impliedly agreed to accept the "facilities and services," such as the police force, entrance gate, and street lights, which had been supplied by

Although the leading case establishing this principle, *Sea Gate Ass'n v. Fleischer*,⁷⁴ was chiefly concerned with the issue of whether membership in the corporate city's association affected the obligation to contribute,⁷⁵ the case contained strong language concerning the obligation to pay for upkeep of the community development. The court stated:

The right of the Association to exercise the control of the easements and to maintain them in condition so that they can be mutually used and enjoyed by all property owners has long been settled by the courts. Inherent in its right of management is the right to maintain. Maintenance costs money. Those who are entitled to enjoy the easements are the ones who must pay the cost of the maintenance.⁷⁶

Sea Gate is at least partially distinguishable from *Lake Tishomingo*. First and most importantly, the provisions governing maintenance in *Sea Gate* contained no dollar limit, providing only that assessments could be levied for maintenance.⁷⁷ Second, the nature of the services to be provided in *Sea Gate* was different. There, the services included not only maintenance of the common property, but also protection through a police force, street lighting, and other services provided in a private community.⁷⁸ Third, the agreement binding the resisting members of the *Sea Gate* community was deemed to be implied in fact whereas, in *Lake Tishomingo* the court found that the deeds served to bind the homeowners contractually to pay an assessment.⁷⁹ Fourth, the easement theory was not addressed in *Lake Tishomingo*.⁸⁰

The overtone of *Sea Gate*, however, is clearly consistent with *Lake Tishomingo*. When property owners agree to or accept the benefits of an association that is obligated to maintain the common property they have a right to enjoy, each has an obligation to pay a proportionate share of the cost of maintenance. This principle may follow from straight easement law, which has been utilized by analogy in the restrictive covenant situation in Missouri.⁸¹

the plaintiff as the accepted practice in the community for many years and that were obvious to any buyer in the community. *Id.* at 779, 781.

73. *Id.* at 781.

74. 211 N.Y.S.2d 767 (1960).

75. *Id.* at 778-82. The court concluded that such membership bore no relationship to the right to enjoy the easements and thus did not affect their obligation to support the maintenance required to the common properties. *Id.*

76. *Id.* at 778-79.

77. *Id.* at 779.

78. *Id.* at 781.

79. *Id.* at 781-82. This difference suggests that it should be easier to bind the property owners in *Lake Tishomingo*, since they were contractually bound.

80. See *infra* notes 82-83 and accompanying text.

81. *Weatherby Lake Improvement Co. v. Sherman*, 611 S.W.2d 327, 328-29 (Mo. Ct. App. 1980).

The original subdivision plat and later deeds to the individual lot owners at Lake Tishomingo created easements in and the right to use common areas.⁸² LTPOA reasoned that no new obligation was created, because as owners of the easements each lot owner had a legal obligation to participate in the upkeep and repair of the common areas.⁸³ Although this theory was not addressed by the court, the reasoning appears to apply with equal force to the undisputed need to dredge the lake.

Sea Gate is more expansive than *Lake Tishomingo* in that the *Sea Gate* court authorized the board of directors of the corporation to assess for all necessary maintenance costs, whereas, in *Lake Tishomingo* the right of assessment was authorized only to the extent that subdivision viability was threatened.⁸⁴ Perhaps the *Sea Gate* court found the necessary flexibility for this interpretation within the provisions governing assessments which, unlike the comparable restrictions in *Lake Tishomingo*, were unspecific as to amount and did not establish liens if unpaid.⁸⁵

Another solution to the inadequate assessment problem was rejected in *Lake Tishomingo*. The method for modification provided by the consent decrees would have certainly helped prevent a potential multiplicity of actions in the future over the needed amendments to the outdated restrictions. Since the provision for modification in the decree was disallowed,⁸⁶ all future problems concerning extraordinary expenses could produce separate litigation. Judge Blackmar was distressed by the majority's blanket pronouncement of the consent decree as void.⁸⁷ Arguably, a consent decree procured through a valid class action would be the equivalent of a unanimous agreement to amend and should be upheld.⁸⁸

82. Respondent's Supplemental Brief and Argument, *supra* note 6, at 24.

83. *Id.*; see also *Larabee v. Booth*, 463 N.E.2d 487, 492 (Ind. Ct. App. 1984) (the owner of an easement must generally bear the entire cost of maintenance, absent an express agreement to the contrary); *Lynch v. Keck*, 147 Ind. App. 570, 582, 263 N.E.2d 176, 182-83 (1970) (easement created for the benefit of appellants, imposed on appellants the duty to keep the easement in a proper state of repair); *McDonald v. Bemboom*, 694 S.W.2d 782, 786 (Mo. Ct. App. 1985) (where the owners of both the dominant and servient tenements regularly use the easement, apportionment of the cost of repairs and maintenance is fair, even though the agreement creating the easement is silent with respect thereto).

84. *Lake Tishomingo*, 679 S.W.2d at 857.

85. Punishment for nonpayment was denial of use of the streets, beach facilities, sewers, and other common property. *Sea Gate*, 211 N.Y.S.2d at 779. If enforced, however, these provisions would obviously impair the rights to enjoyment of the subdivision.

86. *Lake Tishomingo*, 679 S.W.2d at 856-57.

87. *Id.* at 857 (Blackmar, J., concurring in result). Blackmar's concern, however, might have been unwarranted in this case because it was not clear whether all successors in title were parties to the consent decree. *Id.* at 856.

88. *Steve Vogli & Co. v. Lane*, 405 S.W.2d 885, 888 (Mo. 1966) (restrictive covenants may be "extinguished, modified, or changed by mutual agreement between

Certainly the courts acting in equity should be allowed to amend provisions through a valid consent decree, especially in circumstances similar to *Lake Tishomingo*, where notice was given to all lot owners of the substance of the new provision and no objections were filed.⁸⁹ This argument is strengthened if the need for additional funds is apparent at the time the decree is issued. A court, however, may not allow this approach because of the potential supervision problems.

It is obvious that the fifty-five cent maximum assessment, which might have appeared adequate in 1948, could not cover all contingencies. Requiring property owners to pay a proportionate share of the cost to dredge the lake seems fair. The operation was admittedly necessary to preserve the value of their lots and the viability of their subdivision. Binding a property owner to a provision that is not contained in the restrictions, however, is a novel solution, and arguably contravenes the policy of certainty involved in establishing restrictions.⁹⁰

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all of those subject to the restrictions and all of those entitled to enforce them"); see also *La Esperanza Townhome Ass'n v. Title Sec. Agency*, 142 Ariz. 235, 689 P.2d 178 (1984).

89. See *supra* note 8. No objections were made for a period of approximately seven years.

90. See, e.g., *Crimmins v. Simonds*, 636 P.2d 478 (Utah 1981). There the court invalidated a modification to a covenant which purportedly cancelled a prohibition on the operation of trades or businesses within the subdivision. *Id.* at 479-81. The court held that unanimity is necessary to nullify the original covenants stating, "persons who own property in a neighborhood subject to restrictive covenants are entitled to rely on the covenants according to their terms, even if some of their neighbors no longer desire their enforcement." *Id.* at 480-81. The restrictions in *Crimmins* were set for twenty-five years, "followed by an automatic ten year renewal unless modified by a majority of the owners." *Id.* at 479. It was not argued in *Crimmins* that the modification provision could be exercised outside of the renewal context.

