

PROPERTY OWNERS ASSOCIATION
OF ARUNDEL ON THE BAY, INC. *et. al.*

Plaintiffs/Counter-Defendants

v.

MAURICE B. TOSE', *et ux.*

Defendants/Counter-Plaintiffs

* IN THE
* CIRCUIT COURT
* FOR
* ANNE ARUNDEL COUNTY
* Case No. C-02-CV-19-003640

* * * * *

MOTION TO DISMISS FOR FAILURE TO JOIN NECESSARY PARTIES
AND REQUEST FOR A HEARING

The Defendant/Counter-Plaintiff, Maurice Tose' and Teresa Layden ("Tose"), by and through their attorneys, Barbara J. Palmer and Hyatt & Weber, P.A., files this Motion to Dismiss for Failure to Join Necessary Parties pursuant to Maryland Rule 2-211 and as grounds therefor, state:

1. The only Plaintiffs in this action are the Property Owners Association of Arundel on the Bay, Inc. (the "Association") and two individual property owners who are members of the Board of the Association, David Delia and Lori Strum ("Delia" and "Strum").

2. The Defendant in this action is Maurice Tose' and his spouse, Teresa Layden ("Tose"). Tose' is a property owner and resident of the community of Arundel on the Bay. Tose' is also a member of the Association.

3. This action filed by the Plaintiffs is "To Quiet Title, for Declaratory Relief and Injunctive Relief for Wrongful Interference with Easement" related to a paper road adjacent to Tose' property in which the Plaintiffs assert rights for themselves and for the benefit of all members of the community of Arundel on the Bay.

4. The Plaintiffs describe the case as "a dispute between Plaintiffs and Defendants over the Defendants (sic) conduct in obstructing its easement rights and *those of the lot owners*

within the community of Arundel on the Bay, which includes the Association, to use the street ends of Magnolia Avenue.” (Complaint at Para. 7)

5. The Association, in its Complaint, asserts the right to regulate the use of the paper road of the street end of Magnolia Avenue and Saratoga Avenue, adjacent to the Defendant’s lots, and assert in Count 1 that the Plaintiffs “*and the other individual property owners in Arundel on the Bay* utilize the Disputed Street” (Complaint Para. 26)

6. The Plaintiffs further assert “[t]here clearly exists an implied easement for the benefit of the Plaintiffs *and all of the lot owners within Arundel on the Bay* to use the Disputed Street...” (Complaint Para. 28)

7. The relief sought is for the Court to declare the rights of the Plaintiffs and all lot owners within Arundel on the Bay to the Disputed Street.

8. Count 2 of the Plaintiffs’ Complaint seeks declaratory relief for the benefit of not only the Plaintiffs, but *all lot owners* for use of the Disputed Street.

9. Count 3 seeks to enjoin the Defendants from interfering with the Plaintiffs’ and *the other lot owners’* use of the Disputed Street.

10. The Defendant filed a Counterclaim asserting its claim to right, title and interest in the Disputed Street.

11. Neither the Plaintiffs, in its Complaint, nor the Defendant, in its Counter-complaint, named all of the property owners in the community of Arundel on the Bay as parties to the action.

12. It was the desire of the Defendant to follow the lead of the Plaintiffs and proceed toward a resolution of the action in an expedient, neighborly and cost-effective manner, without bringing all of the approximately three hundred forty (340) property owners into the litigation.

13. The Defendant is aware of the burden that such actions place on the parties, the court, and a neighborhood, and accepted the general position of the Association in its Complaint, that it voiced the position of the interests of the property owners.¹

14. The Defendant proceeded in good faith with the understanding that joinder of all property owners in the community was not necessary for the resolution of the action.

15. On March 4, 2021, the Plaintiffs issued the attached email blast to all members of the community of Arundel on the Bay, seeking the input of all members because the resolution of the litigation would affect the rights of the members, and disclosing that the Association did not speak for its members in the litigation. (See Exhibit A)

16. The Plaintiffs' message to the members addresses a proposed resolution of the action, which the Plaintiffs do not support. However, the message states a stark divergence of position between the Association and its members, in stating, "Our attorneys have been told that the community supports this deal and we need to survey them in a fair and impartial manner."

17. The Plaintiffs' public statement makes it obvious that complete relief of this property dispute unfortunately cannot be accorded among those already parties, as specifically required by Maryland Rule 2-211(a)(1).

WHEREFORE, for all of the reasons set forth in the accompanying Memorandum of Law, the Defendant respectfully requests:

A. that the matter be dismissed without prejudice for failure to join all necessary parties, unless the Plaintiffs join all property owners in the community of Arundel on the Bay as

¹ See *Atterbeary et al. v. Property Owners Association of Arundel on the Bay, Inc.*, Circuit Court for Anne Arundel County, Case No. C-02-CV-15-003736, in which this Court required the Plaintiffs, who were the two lot owners in that case, to bring all members of the community of Arundel on the Bay as additional Defendants in the action.

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**MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS FOR FAILURE TO JOIN NECESSARY PARTIES**

The Defendant/Counter-Plaintiff, Maurice Tose' and Teresa Layden ("Tose"), by and through their attorneys, Barbara J. Palmer and Hyatt & Weber, P.A., files this Memorandum of Law in Support of Defendant's Motion to Dismiss for Failure to Join Necessary Parties pursuant to Maryland Rule 2-211 and state:

Introduction

This action involves a dispute brought by the Property Owners Association of Arundel on the Bay, Inc. (the "Association") and two of the members of the Board of the Association ("Delia" and "Strum"), against resident property owners, Maurice Tose' and his wife, Teresa Layden (Tose'). At issue are the claimed rights of the community and the rights of the Defendant in and to the paper roads adjacent to property owned by Tose'.

The matter is brought as an action to Quiet Title and for Declaratory Relief. Because the Association does not speak for all persons who have, or may have a claim to the subject property, or may be impacted by the declaration in this action, all necessary parties are not present in the action. All individuals who may be impacted by the outcome of this action are necessary parties pursuant to MD. CODE, CTS. AND JUD. PROC. ART. § 3-405, and must be joined as provided by Maryland Rule 2-211.

Argument

The Association filed this declaratory judgment action against Tose' asserting certain rights and interests in real property associated with and adjacent to Tose's lots, in which Tose' claims a superior interest. The action, involving three named individual Plaintiffs only, contains claims to quiet title to real property and for declaratory and injunctive relief. The Courts and Judicial Proceedings Art. has detailed requirements that must be addressed when bringing a declaratory action. According to the provisions of MD. CODE, CTS. AND JUD. PROC. ART. § 3-405 (a)(1):

If declaratory relief is sought, a person who has or claims any interest which would be affected by the declaration, *shall be made a party*.

In this action, the Association filed suit asserting that the rights of the Association and the other two named Plaintiffs were adversely affected by the actions of the Defendant; it also asserted that the rights of all of the lot owners within Arundel on the Bay were impacted. *See for example*, para. 30 and 33 of the Complaint. The general representations of the lawsuit are that the Association was acting on behalf of, and express the position of, its members and resident property owners in the pursuit of the action. In the course of these proceedings, the Defendant has made various overtures to the Association, in an effort to reach a resolution of the ongoing litigation.

On March 4, 2021, the Association issued an email blast to the residents of the community of Arundel on the Bay concerning the status and a settlement offer made by the Defendant. The email, attached as Exhibit A, is entitled "Update on the Tose Litigation" (the "Update"). The Update makes it clear that the position of the individual property owners and the members of the Association are not in accord with the position expressed by the Association. The views of all necessary parties are not represented in the action.

As summarized in the Update, the Defendant made an offer in settlement, to convey to the Association several separate, contiguous, residentially zoned lots in the community for use as a

community center, plus a cash payment, in exchange for the termination of the claim of right to use the property which is the subject of the litigation. The Update reports that the Association voted to reject the offer, however, the Update further discloses that *the Association does not speak for or otherwise represent the position of its members in the litigation*. Specifically, the Update states: “*Our attorneys have been told that the community supports this deal and we need to survey them in a fair and impartial manner. So we ask for your thoughts.*” (Exhibit A, page 2) Through this communication, it is clear that the Association does not represent the interests of, or speak on behalf of, all individuals with an interest in the subject matter of the litigation. Any judgment ultimately entered in this action may leave persons who are parties to the litigation at risk of incurring inconsistent obligations because individual Association members may raise an inconsistent claim to the subject property.

If the position of all of the individuals with an interest in the subject matter of the action are not represented in the lawsuit and complete relief cannot be accorded among those already parties, then Maryland Rule 2-211 is triggered and must be applied. Where complete relief cannot be achieved, or the disposition may result in inconsistent obligations, then all persons subject to service of process must be joined as parties in the action. Md Rule 2-211(a). If a person meeting the criteria of (1) or (2) of this Rule cannot be made a party, the court shall determine whether the matter shall proceed or be dismissed under 2-211(c). Where the decisions of the parties to the action could adversely affect the interests of individuals who have not been included in the action, then the matter is subject to dismissal for want of necessary parties. When the “disposition of the action may impair or impede the person’s ability to protect a claimed interest relating to the subject of the action or may leave persons already parties subject to a substantial risk of incurring multiple

or inconsistent obligations by reason of the person's claimed interest" then those persons subject to service of process must be joined in the proceeding. See Md Rule 2-211(a)(2)

Rounds v. Maryland National Capital Park and Planning Comm. 441 Md. 621 (2015) is a recent case with similarities to the present action, involving a declaratory judgment action pursuant to MD. CODE, CTS. AND JUD. PROC. ART. § 3-405. *Rounds* addressed the impact of the failure to join necessary parties in an action involving rights to an easement. The Court of Appeals held that the failure to name those parties whose interests would be affected by the outcome was fatal to the action. The Court stated:

We have long held that the "general rule [is] that ordinarily, in an action for a declaratory judgment, all persons interested in the declaration are necessary parties." *Williams v. Moore*, 215 Md. 181, 185, 137 A.2d 193, 196 (1957). Similar to this case, *Williams* involved a declaratory judgment action regarding an easement. In that case, at least two other property owners had an interest in the purported easement, because their properties abutted the easement, but were not named in the suit. This Court held that without all adjacent property owners (who could be affected by the declaratory judgment regarding the easement), the case had to be dismissed. *Williams*, 215 Md. at 186, 137 A.2d at 197. In other words, the failure to join necessary parties was "fatal." *Id.*

Id. at 655.

The Court in *Rounds* acknowledged that there are circumstances which joinder may be excused, but in those instances, the petitioner must clearly demonstrate that the non-joined party had knowledge, but declined to do so.

In the instant case, the Plaintiffs' Complaint alleges that the actions of the Defendant related to the paper roads have had an effect on all of the residents of the community. In their declaratory judgment action, they portend to speak for the members of the Association. However, when the Defendant presented a resolution, the disconnect between the position of the named Plaintiffs and the position of the residents is obvious and unavoidable. The individual Plaintiffs, who are members of the Board, and the Association expressed their vote to reject the offer, the

property owners who are alleged to have individual property rights in the disputed property take another position: “Our attorneys have been told that the community supports this deal and we need to survey them in a fair and impartial manner.” *See* Ex. A, page 2.

For all of the above reasons, it is now obvious that the Plaintiffs must bring all property owners in the community of Arundel on the Bay as additional parties in this action. Without this, the Defendant is at risk of being unable to protect his claimed interest relating to the subject matter of the action, and at substantial risk of incurring multiple of inconsistent obligations, which is a result that Maryland Rule 2-211 is designed to prevent.

Respectfully Submitted,

/s/

Barbara J. Palmer (CPF # 8501010468)
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200 Westgate Circle, 5th Floor
Annapolis, Maryland 21401
(410) 266-0626
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Attorney for Maurice Tose’ and Teresa Layden

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of March, 2021, a copy of the foregoing Memorandum of Law in Support of Defendant’s Motion to Dismiss for Failure to Join Necessary Parties was filed in accordance with the MDEC system and a copy will be electronically served upon:

Wayne Kosmerl
Tucker Meneely
125 West Street, 4th Floor
Annapolis, Maryland 21401
kosmerl@councilbaradel.com
meneely@councilbaradel.com
Attorneys for the Plaintiffs

/s/

Barbara J. Palmer (CPF # 8501010468)

Palmer, Barbara

From: Maurice Tose' <tose@annapolispartners.com>
Sent: Thursday, March 4, 2021 10:24 AM
To: Palmer, Barbara
Subject: [External]Fwd: Update on Tose Litigation

Not exactly, but

Sent from my iPhone

Begin forwarded message:

From: AOTB Property Owners Association <info@arundelonthebay.org>
Date: March 4, 2021 at 9:24:07 AM EST
To: tosemb1@comcast.net
Subject: Update on Tose Litigation
Reply-To: info@arundelonthebay.org



March 4, 2021

UPDATE ON THE TOSE LITIGATION

In an effort to keep the community informed, the Board and Officers are providing this update on the status of the Tose Litigation.

In late 2018 and early 2019, Maurice Tose began making changes to the Magnolia Ave roadbed in front of his house at 1299 Magnolia. Gravel was placed to enlarge portions of the roadway and create a parking area for two pickup trucks and a jeep at the west end of Magnolia even though the community generally seeks to avoid street parking because our streets are so narrow. In addition, large wooden pilings were placed along the edges of the roadway, narrowing it considerably. In response, in November 2019 the Association sued, requesting the removal of these obstructions from our roadway. This matter is presently scheduled to go to trial May 12, 2021. To date, the community has spent \$60,000 on this litigation.

AOTB has received a settlement proposal from Tose whereby he would convey 3 contiguous lots (3515, 3517 and 3519 Cohasset) which have a

total assessed value of \$754,000. In addition, Tose would pay to the Association the sum of \$100,000 in cash. The property and cash could be used for any purpose that the Association sees fit.

In exchange, the Association would transfer **a deed conveying fee simple title** to all portions of Magnolia between Saratoga and Fishing Creek as well as to one-half of the south end of Saratoga between Magnolia and the water, excepting the rights of use of the paved/graveled portions of Magnolia and Saratoga. **At present, the extent of the “rights of use” is not clear** and could range from yes we can drive on the graveled section of Magnolia west of Saratoga to only 3550 Magnolia can drive on that section and only to get to his house (James Stryver); there is no mention of Marc Apter’s access rights. **Transferring title to Tose would terminate the rights of community members to access the full 80 feet of the platted street Magnolia and prevent access to the Bay for fishing, boating, swimming, and scenic observation.** Each property owner in the Association would need to sign a binding agreement to these provisions.

The Board and Officers met on Sunday, February 28, 2021 to discuss the offer. After lengthy and careful discussion in which all aspects of the proposal were considered, a motion was made to reject the settlement offer, which was seconded. The Board voted 6 in favor of **rejecting the offer**, none in favor of accepting the proposal, and one abstention. The majority of the Board and all of the Officers believe it is important to maintain all of the community’s waterfront access. We acknowledge the need expressed by many for a community center and that will be pursued regardless of the outcome of this matter.

Once the settlement is agreed to, the community and its attorneys would need to have **each property owner sign a sworn statement** consenting to the terms of the agreement and the deed to Tose.

Right now we have been asked to seek informal community input on the merits of the settlement offer. Our attorneys have been told that the community supports this deal and we need to survey them in a fair and impartial manner. So we ask for your thoughts. Email secretary@arundelonthebay.org.

Property Owners Association of Arundel-on-the-Bay | PO Box 4665, Annapolis, MD 21403

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