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DOCUMENT REVIEW

History of Clifton Park, Clifton Beach and its use by the Clifton Club

This document is the result of a review of multiple sources. The Clifton Park Trustees (the Trustees) produced over 12,000 pages of unorganized Clifton Park Trust history which were reviewed, organized and reduced to exclude non-relevant material. This source provided a large part of the material eventually summarized in this review. The Clifton Club (the Club) allowed a review of over 70 boxes of files from which the copies of relevant documents were requested. These documents were eventually produced and included in this review. The Clifton Beach Improvement Association (CBIA) historical files were reviewed and relevant documents were included. Material was also gathered from the local historical societies, newspaper archives and other printed historical material.

All of these information sources form the basis of this comprehensive examination of the relationship of the Clifton Park Trustees and the Clifton Club with respect to the issue of the non-lot-owning Club members' use of the Clifton Park Trust-owned Beach. The research is ongoing as discovery proceeds and this document is continually being developed. The information presented here represents what we have been able to determine as of June 2014.

This review is based on the facts found in the original documents. No attempt has been made to color the facts. The information that is presented is simply the summary of what occurred and can be checked by any reader.

The Plaintiffs offer this summary to all of the involved parties in order to establish a common understanding of our history. An understanding of that history is the starting point from which to move forward.

A Brief Summary

The early history from the late 1800's to 1942 is very sparse and is found primarily by reviewing the early records of deeds, plat maps and information from newspaper articles. These show that the first developers, the Clifton Park Association (the CPA), finally acquired title to all of the lands necessary to fulfill their plans for the Clifton Park development in 1892, after which they spent $143,000 to install extensive infrastructure. The property was sold to the Clifton Park Land and Improvement Company (CPLIC) in 1899, still in the legal form of a totally private

tract of land including private streets (except for two previously sold lots), with a deed restriction on their entire Clifton Park property forbidding the sale of any land within Clifton Park for the purpose of a Club ***except*** for a Club for the use of the lot owners. (For details see "History of the Clifton Park: the Clifton Park Association" in the History section of the CliftonBeach.com website)

In 1900, the new owners, the Clifton Park Land and Improvement Company, published that the exclusive use of the Beach would be given to the residents of Clifton Park. Records also show that the Clifton Club and the Lakewood Yacht Club were strategic creations of the developers, on leased land. The Clubs were immediately used to assist in promoting lot sales as recognized by the Ohio Supreme Court in the Wallace case. In 1902, the developers leased the Clifton Club its 4 lots for one dollar per year. The original Clubhouse and eventually the Club's land appear to have been essentially gifts from the developers, to provide a social center for people living in the Clifton Park allotment and to attract buyers for the properties.

The Club's 1902 lease of 4 lots from the CPLIC included an option to buy the lots later for $14,000. That lease included a commitment by the Clifton Park Land and Improvement Company to allow an additional lease to the Club to use certain unspecified areas of beach and riverfront which were to be determined later, and a stable at no extra cost. This option was specifically limited to the same period of time as the lease. The size and location of land referred to for beach use and riverfront use were to be agreed upon later, but there is no evidence that these options were ever exercised or that these areas were ever further defined.

That 1902 Club lease also contained the commitment of the lessors to place the lands reserved for Park use into the hands of not less than 3 Trustees "***with the power to hold said property for the use and benefit of persons owning land in said allotment***" which placed the Club on notice at its very inception that only lot owners were to have the right to use the common Trust property. (underline added).

In July of 1912, the Club purchased the 4 lots which it had leased in 1902 but apparently did so on separately negotiated terms outside of the option to buy them for $14,000 contained within the lease. Instead, the Club **only paid $10.00** for the entire property (the Club's property was essentially a gift from the developer).

The Club's deed contains the exact same language as all other deeds of that time without any special modification aside from allowing the Club to operate as a social Club, presumably for the Park lot owners, as that was the only basis upon which the Club could have purchased the land according to the deed restriction on all of the land within the Clifton Park allotment. That deed contains no mention of any permission for the Club's non-lot-owning members to use

Trust property.

The Club's formal activities for the approximately 100 early members occurred almost exclusively at the Clubhouse. All of the early Club members apparently were required to own shares in the Clifton Park Land and Improvement Company or lots in Clifton Park. Many of the early members were or became lot owners. The change in membership to predominantly non-lot-owners is difficult to track but appears to have progressed noticeably after the Clubhouse burned to the ground in 1942.

As a final part of this overall attrition, in 1950 the Club required members to "contribute" $500.00 each, for rebuilding the Clubhouse. Those who refused to purchase a $500.00 interest free nonrefundable 50 year promissory note, were expelled from the Club. There were 13 resignations and 32 expulsions at the meeting during which that mandated funding requirement was adopted.

Moving back to its early years, the Club was controlled and managed at the outset by individuals closely associated with the Clifton Park Land and Improvement Company, all of whom would have been totally aware of the deed restriction forbidding the sale of land to a Club other than for the lot owners. The lease of the land, in conjunction with the requirement to own stock in the Clifton Park Land and Improvement Company in order to be qualified to join the Club, both may have served to satisfy that deed restriction. One can reasonably assume that the sale of the 4 lots to the Club (for $10) therefore must have complied with the deed restriction as that sale was completed by directors in the Clifton Park Land and Improvement Company and directors of the Club, who all would have been well aware of the deed restriction which limited the Clifton Club to "*be for the lot-owners*".

There is little information on the yearly financial contributions by the Club to the Clifton Park Trust before the 1942 Club fire. There does appear to have been a conflict regarding the propriety and/or the cost of non-lot-owning Club member's use of the Beach present in 1942 initiated by the lot owners of Clifton Park. This apparently led to the Club obtaining its own legal review of its Beach use rights.

Based on the Club's legal review which has not been produced, the Club began paying yearly financial contributions to the Clifton Park Trust as requested by the Trustees for substantially more than just its 4 lot assessment with no further recorded objections made by the Club. Those yearly payments were recorded by the Club as "*being for Beach use by its members".*

Not only did the Club Directors believe its non-lot-owning members had no rights to use the Beach, they even expressed doubt that the Park Trustees possessed the authority to lease the

use of the Beach to the Club's non-lot-owning members.

In 1943, the stockholders of the Club, after extensive discussions on the topic, instructed the Club's directors to obtain an official legal opinion on possible barriers to rebuilding the Club on its 4 lots in the park. There were apparently significant concerns by the stockholders of the Club, which by then would not have qualified as being "*for the lot owners"*, regarding rebuilding, possibly due to the restriction within the Clifton Park Land and Improvement Company deed. One wonders if that opinion in addition to the threat of legal action if they moved within the Park factored into the delay in rebuilding the Club until 1950 during which time the Club's directors explored other solutions including merging with the Westwood Club.

Over the years, the Trustees repeatedly acknowledged and re-informed the Club that use of the Beach by its non-lot-owning members was merely permissive and not a right granted by the Trust deed. The Trustees reminded the Club's directors of this fact regularly until 1999.

Beginning in 1949, the arrangement for use of the Beach by Club members was paid for by a financial contribution which was a percentage of only the Beach expenses, excluding all property taxes and other costs associated with the rest of the Trust. Efforts were frequently made by the Club (and agreed to by the Trustees) to reduce the Club's contribution in order to support the Club during its many supposedly "*poor*" years. Despite this consideration, the Club was often delinquent in its payments and was continually pushing to get more and pay less. Despite this support, the first recorded complaints of Beach crowding ironically originated from the Club in 1955.

The records also show the effect of the frequent changes in Club leadership. Newly elected leaders were often unaware of the historical basis upon which the Trustees allowed the yearly use of the Beach by non-lot-owning Club members only in exchange for a negotiated fee. (I.e. permissive use.)

There are numerous instances in this history of the Club claiming it was "*only"* obligated to pay its lot value assessment, which is the assessment authority granted to the Trustees by the Trust. Prior Trustees found that the only way to proceed beyond the Club's wish to rely only on this legally defined position was to point out that the Trust defined that the lot value based assessment only allowed one resident lot owner and their household, presumably living at the Club, to use the Beach.

The Club also argued that the lot owners all enjoyed property value enhancement due to their equity benefits of Beach ownership which the (non-lot-owning) members of the Club did not share in. That was one of the arguments repeatedly used by the Club for defending that its

members should pay less for their usage of the Beach than the average of the lot owners.

Many of the current Trustees' statements regarding the prior management of the Trust, and their claim that they have not changed their approach to the issue of the legal rights of the non-lot-owning Club members' use of the Beach from the prior Trustees' approach, are simply not supported by the records of the Trustees or the Club. In particular, the current Trustees' claim that all Club members have always been equal beneficiaries under the Trust is incorrect and not possible to support from the historical records.

Over the years, there were repeated claims made by the Club that it had rights to Beach use for all of its members, in addition to recurring objections to paying the Trustees' financial requests. These also included objections to paying amounts which the Club had previously agreed to. Nevertheless, there was no instance prior to 1999 in which the Club persisted in making any claim that the Trustees did not have the right to impose and fully control the terms and conditions of the non-lot-owning Club's members' use of the Beach.

The Club's repeated attempts to gain greater Beach rights at lower cost culminated in threats by the Club to settle this question in the courts in 1999. How that threat of legal action was avoided is unclear as minutes of some of the relevant meetings on that topic have not been produced by the Trustees.

However, since 1999, the Trustees have taken a very different approach which apparently no longer denies that the Club has legal rights for its non-lot-owning members to use the Beach. The Trustees have now even claimed that the Club's members, without exception, have beneficial rights to use the Beach equal to the lot owners. The current Trustees' new interpretation, adopted without turning to the court for guidance, now grants the Club a right to Beach access for its members regardless of their lot ownership, and relies only on the Club's goodwill to pay an assessment above that required by the Club's deeded ownership of its 4 lots. Permanently establishing such a change in the interpretation of the Trust would be simply disastrous to Clifton Park, eventually allowing a large number of users on the limited Beach area for the cost of only a 4 lot assessment from the Club.

As a defense in this legal request for clarification of its Beach access rights for its non-lot-owning members, the Club has essentially claimed that the lot owners are barred by "*latches*". This roughly translates into the concept that things have been going on this way (presumable the way they wish for us to believe) for sufficiently long, and with the awareness of the community, that the Plaintiffs are no longer allowed to correct the error. This wrong re-interpretation of the Club's deed must be promptly corrected before the Club's current legal argument that the lot owners are prevented from fixing this mistaken approach by "*latches*"

becomes valid.

There are some records which show the Trustees trying to establish a negotiating position for an increased contribution from the Club based on the phrase that the Club must pay its "***proportionate share"*** of the Trust expenses contained within the Club's deed. As that phrase is present in all of the deeds of the Clifton Park allotment, it stands to reason that if the Trustees had the claimed authority to adjust the charge levied against a lot owner (in this case the Club) to accommodate its use level, the Trustees also have the authority to increase or reduce the charge to any lot owner to establish a charge "*proportionate*" to their use. That is obviously not the case. The Trustees' specific and limited authority to levy assessments on the lot owners is defined within the Trust deed.

The Trustees "*legal opinion*" appears to have been based heavily on the limited information contained within an unpublished internal Trustee summary of the "History of the Club's Beach Privileges" written by John Pyke Jr., a currently serving Trustee. This short single page document first appeared within Trustee emails as a "*white paper*" on the issue of Beach use by Club members in the summer of 2011 and is most recently seen in the produced documents as a two page offering in February of 2012. The author openly admitted creating his document without a review of the full Trust history. In a separate email, Pyke reveals that the Ulmer & Berne opinion was not based on any of the actual history of the prior Trustees' management of the Club's use of the Beach.

John Pyke Jr.'s early position as a President of the Clifton Club negotiating on the Club's behalf against the Trustees in 1979 and 1980 would have introduced him to the Club's view that all of its members have equal rights to use Trust property. (Ironically, Pyke was accompanied in those negotiations by Club Director Richard Kuhn, the father of current Clifton Park Trustee Peter Kuhn).

Both the 2012 Pyke "*History*" and the U&B opinion failed to address any of the numerous points previously raised and published by the plaintiffs at the time. Additionally, the Pyke "*History*" contains numerous fundamental misstatements and in general, does not follow the facts found on review of the records of the Trustees or the Club.

The records show that the Club has claimed on more than one occasion, that the Trustees have no right to limit the number of Club members allowed to use the Beach. The records also show that the Club has also stated that the Trustees cannot set a fee for their members to use the Beach and that the amount the Club pays above its lot assessment is simply a voluntary contribution (at its sole discretion).

The Plaintiffs' concerns are validated by the records of the past Trustees which documented

their experiences with a Club that has aggressively pursued full rights to the use of Clifton Beach by ***all*** of its members for only the assessment based on the property value of its 4 lots. These facts show that the concerns of the plaintiffs are not merely theoretical and that resolving this issue should not be delayed.

The plaintiffs initiated multiple conversations aimed at resolving this conflict amicably both with the Trustees and with the Club's leadership. The Plaintiffs goal was to return the management of the Trust to its historical foundations under which the Beach use of the non-lot-owning Club members was always only permissive rather than a right, and was totally at the discretion of and under the control on the Trustees. The need for legal action became clear as the Club refused to discuss or reconsider its claim of unlimited Beach use rights for all of its members and the Trustees refused to discuss or reconsider their claim that the Club's members were all beneficiaries of the Trust with rights equal to lot owners.

Legal action became inevitable after the Trustees en masse emphatically stated that they would refuse to further discuss these issues or respond to any communications with the Plaintiffs in a public meeting in April 2012, with Jack Rupert who had been a Trustee from 1969 until 1997 and Dr. Arthur Dueck who eventually became a Plaintiff. In that meeting, the Trustees also stated that the concerned lot owners should take their issues to the courts if they wished to pursue them any further.

The Plaintiffs' subsequent suggestion of mediation prior to filing this lawsuit was rebuffed by the Club stating that its right to Beach use was well established and nonnegotiable. Neither the Trustees nor the Club have made any overtures to discuss an amicable resolution, other than to try to enter mediation in the summer of 2013 on the condition that the Plaintiffs would not proceed with discovery a year after the suit was filed. To do so after the Club's and the Trustees' many claims of how the Trustees and the Club had interacted in the past was of course not acceptable without a full review of the facts.

We clearly are at a pivotal point. The lot owners have this one last opportunity to clarify the Trust issue of beneficial status before the claim that their efforts are barred by latches becomes the reality along with the Club's other claims of Beach use rights for all of its members for only its routine lot assessment. The privacy of the Beach which this community was given in Trust, and which our deeds obligate us to support, risks being lost forever if we do not resolve these issues now, while we still can.

The Full Details Supporting the Summary

The following pages present the details that support the preceding summary. This is a carefully presented lengthy and complex review of the relevant documents produced for our review through discovery requests as well as other publically available relevant information. Every effort has been made to accurately portray the volumes of records produced. Analysis of the produced documents took many months of review and assembly into this summary. That process is ongoing and continues to contribute to the development of our understanding. All details can be checked by the reader by referring to the referenced sources.

This section contains many more very significant details which are not possible to quickly summarize. The reader may wish to set aside some time to read and review this information as it is likely to take a number of hours simply to read through casually. An in depth review of the following details will take quite some time and is best approached in segments.

To review any of the source documents produced by either the Trustees or the Club, the reader must first download those documents from the fileshare website managed by Ulmer & Berne. Readers must obtain a password and instructions from dkrall@ulmer.com to access that site. All documents have Bates numbers at their footer. The Trustees documents begin with "CPT". The Clifton Clubs' documents begin with "CliftonClub". Documents from other sources are found on the Cliftonparkpreservation.com web site in the documents section under "Supplement"

THE EARLY YEARS OF CLIFTON PARK

The reader is referred to the **History of Clifton Park: The Clifton Park Association** for the time period up until 1899. That complete history can be found at the website cliftonbeach.com under the history section. It ends with the sale of all the remaining property of Clifton Park to the Clifton Park Land and Improvement Company. The deed memorializing that sale contains restrictions on all of the land such that all lots had to be sold for residences only, except for the possibility of "***stables, canal slips, boat houses, casinos or club houses, ice houses or bathing houses for the use of the owners of lots in said allotment***"(underline added).

The CPLIC promptly leased land to a group of yachtsmen for the creation of a Yacht Club on the Rocky River the year after its acquisition of the land of Clifton Park. In 1902, the CPLIC also made plans for a social club, to be made up of only 100 members, again on leased land. Leasing the land to these clubs may have addressed concerns caused by the deed restrictions which

allowed the sale of property for a club only if it was for the lot owners.

The CPLIC also formally created an allotment plan with 229 smaller lots, registered the allotment and dedicated the streets to public use (the 1902 allotment map of suburbs of Cleveland found in book 28, page 11 of the County archives plat maps of Allotments). That allotment map references its parent map in book 9, page 28, which is an 1875 map of a different Clifton Park Association "Minor" allotment which shows only the undeveloped Clifton Park Association ownership of a part of Clifton Park and a prior partial lot plan for the south-eastern portion of the Clifton Park.

In early February of 1902 the CPLIC formally began plans for a centrally placed Inn for the stockholders and their friends (Sup 1). One month later, those plans were changed to a Social Club with rooms for borders (sup 2). Public documents that year indicate that the CPLIC paid the $25,000 to build the original Clubhouse (sup 3) on land leased from the CPLIC for $1.00 per year.

Early within that 1902 Clifton Club lease, the lessors state their commitment to place the lands reserved for Park use into the hands of not less than 3 self-perpetuating Trustees "***with the power to hold said property for the use and benefit of <u>persons</u> owning land in said allotment***" (underline added). There was no mention of use of that Park land by Club members or the Club as a corporation in that statement within the original Club lease. The initial Club leaders were clearly aware of whose use the Park lands were to be reserved for.

Later in that lease there is a commitment by the Clifton Park Land and Improvement Company to provide an additional lease to the Club to use certain unspecified areas of Beach, River front and a stable at no extra cost, "***the size and location of the three pieces of property to be hereafter agreed between the parties hereto***". There was no evidence found in any documents produced that any of these options were ever exercised or that the specific parcels were ever identified. That option was also specifically limited to the same period of time as the lease which ended with the sale of the 4 lots to the Club.

The Club's 1902 lease of 4 lots to the Clifton Club included an option to later buy the lots for $14,000. In July of 1912, the Club purchased the 4 lots of land which it had leased in 1902 but apparently did so outside of the option to buy them for $14,000 contained within the lease. Instead, the Club only paid $10.00 for the entire property. (The Club's property was essentially a gift from the CPLIC.)

That lease also contained a 250 member restriction on the number of members the Club could have without express consent of the first party (the CPLIC) or its successors. A clear original or readable copy of the 1902 lease to the Club has not been produced by either the Club or the

Trustees. (Text which is purportedly a portion of that lease can be found on the Cliftonparkpreservation.com website listed as 1902 lease in the public documents section)

In addition to the 1902 allotment map, another key map is the "Clifton Park Allotment Number Two" map of the Beach area drawn in 1904. That map, which is considered an official legal document and is signed and sealed by the members of the Clifton Park Land and Improvement Company, contains the statement that the land at the Beach is private and is "***reserved to owners of lots in Clifton Park***". (See 1904.allotment map on the CliftonBeach.com website).

A 1904 article in The Ohio Architect and Builder, an early trade journal containing what appear to be well researched articles on noteworthy Ohio suburbs, stated that at the outset, all Clifton Park common property was restricted to use by the "***dwellers in the Park***". This article, which was written shortly after the Club was formed, also states that the Clifton Club was a "***regularly organized social club***" whose members "***had to own stock"*** in the land company in order to join. The Clifton Park Land and Improvement Company, is the only land company mentioned in this article. The article also mentions that the Lakewood Yacht Club had a lease to use the river front (not the Beach). There is no mention of any Club use of or any Club activity at the Beach in that article. (Available on the Internet as google search "Ohio Architect and Builder 1904 Clifton Park")

This contemporaneously written article confirms the understanding that the Plaintiffs have assembled from various other sources such as early newspaper articles describing the grandeur of the Clifton Club (sup4). The early Club membership brochures and membership applications which listed activities at the Club did not mention use of the Beach.

The lack of significant or official Beach use by the early Clifton Club is evident in the Club's early activity calendars, some of which are still available. The Club provided a copy of a 1924 directory including a listing of events for the week of June 27 to July 4th. Although difficult to read, all of the events listed occurred at the Club. There is no listing of any activities at the Beach. (CliftonClub00115 or CliftonClub00114).

The many Club events memorialized in one later existing calendar found in a book by Blythe Gehring all occurred on the Club property (Sup 5). The Club did however offer picnic baskets for use at the Beach in that 1932 summer calendar (see the small note at the end).

1940's

The Club produced records beginning in 1942, starting with minutes of meetings immediately after the Clubhouse fire. Some key records of the Club were apparently preserved in their safe (CliftonClub01819); others, including the originals of their 1902 lease and 1912 deed among

other important documents, were stored in a remote safety deposit box (CliftonClub01899) and (CliftonClub02039). Copies of the important original papers were also stored with Squire, Sanders and Dempsey (CliftonClub02101). None of these records have been produced for review.

The Clifton Park Trustees' records begin with one set of minutes in 1947 and sporadic minutes thereafter. Despite the Plaintiffs' request, there is no explanation of where earlier records are or were and no explanation for the missing documents.

Within the minutes of the Club's directors' first meeting the day after the Club House was totally destroyed by fire, it is stated that "***Mr. Smith reviewed the situation of the Park Trustees and suggested that the Club should reconsider the beach situation***" (CliftonClub01817). The documents do not detail what the situation of the Park Trustees or beach situation was or what that original plan was that was to be reconsidered.

A committee of the Club's directors was immediately created to search for a new location for the Club within the Park as one of their options for restoring Club activities quickly (CliftonClub01817). An option to purchase the Leech Hanna Parsons house was obtained but the threat of legal action by a lot owner based on the Clifton Park deed restrictions emerged. This threat was made by a neighbor of the Parsons house, Fred. C. Dorn Esq. At a special meeting of the Club's stockholders held at the Lakeshore Hotel in June of that year, the Club's lawyer, Sterling Newell Esq., advised that Dorn was sincere in his objections and that a purchase of that otherwise ideal property was unwise (CliftonClub01834). That threat of legal action prevented the Club from purchasing and simply relocating to the Leech Hanna Parsons property in 1942.

At that same meeting, the Club's directors also discussed with the Club's stockholders, the risk of an injunction being filed against them to prevent any rebuilding of the Club upon its prior property within the Park, as well as the question of the Club's "***beach rights***". More specific details regarding their concerns were not apparently recorded, but possibly the deed restriction of the CPLIC requiring that any Club within Clifton Park needed to be only for the lot owners may have figured into their concern. A motion to empower the Club directors to assess all Club members for one quarter's dues to be given to the Park Trustees, which was made by a stockholder at that meeting, was also passed (CliftonClub01834).

The Club's directors took up the issue of paying for Beach use rights in greater detail in their next meeting in which there was a thorough discussion "***concerning the various problems raised by the insistence of residents of Clifton Park that the Clifton Club make a substantial contribution for the care and maintenance of the beach***" (CliftonClub01836-01838). A motion eventually authorized the President of the Club to collect one quarter of the annual dues from

the Club's members to be given to the Trustees, "***provided that he shall not issue such call until advised by the Board of Directors that the Board of Trustees of Clifton Park have the legal authority and right to agree with The Clifton Club Company concerning the use of the beach by members of the Clifton Club***" (CliftonClub01838). Concerns regarding obtaining equal Beach usage rights for the Club's members were also discussed.

Another separate motion at the same meeting set up a committee to meet with the Trustees to "***investigate the legal authority and right of the [Clifton Park] Board of Trustees to execute an agreement with The Clifton Club Company concerning the use of the beach by members of the Clifton Club***" (CliftonClub01838). There was clearly quite a concern among the Club's directors and members of the Club that the Clifton Park Trust did not empower its Trustees to enter into an agreement to grant Beach use privileges to anyone not owning property within Clifton Park. The subsequent additional two motions on the same topic restated and refined the process to be followed, all of which indicated the magnitude of the directors' concern over whether the Trustees were authorized to offer to lease access to the Beach to non-lot-owners who belonged to the Club.

It is very significant that it is implicit in the Club's request for such reassurance from the Trustees that the Club's leaders did **not** believe the Club had Beach use rights for its non-lot-owning members otherwise.

The written response from the Trustees on this topic was taken up by the Club's directors for the entirety of their July 1942 meeting (CliftonClub01840-01842). First they rewrote the previously passed motions on the topic of beach use and Club's financial contribution apparently leaving the substance intact (CliftonClub01841). The committee tasked with investigating the issue with the Trustees then reported and a letter signed by Park Trustee Chairman Chester G. Newcomb was read. That letter expressed the Trustees' willingness to allow the Club's members "***full use and privileges of the beach and beach facilities***" but also "***emphasized the necessity of prompt receipt of contributions by the members of the Clifton Club***" (CliftonClub01842).

Additionally the Trustees stated in that letter to the Club that "***neither this letter nor any action taken, or to be taken, hereunder shall impair or affect either your rights or the rights of our beneficiaries or of us with respect to any such questions, nor shall it or any such action constitute a precedent for any future year***" (CliftonClub01842). (An original copy of the above referenced letter was not found within the records of the Club or the Trustees' records which were produced for review despite its significance.)

In the mid 1940's many of those responsible for creation of the Trust and the Club, were still available as resources to provide information on Trust and Club related questions. One Trustee

Mr. Andersen for example, served as a Trustee from the creation of the Trust until 1947. (CPT 01553)

The issue of another financial contribution to the Trustees for the Beach came up again the next year in April. Newcomb again asked "***the Club to put up a quarter's dues for each member for use at the Beach***." Club Director Crider argued that "***this might result in a general refusal to pay***". Club Director Smith spoke in favor of paying one quarter's dues. Others "***feared the establishment of a precedent***". Eventually the Club's directors voted for an assessment of only $10 per member with an additional $10 each for "***those members who are accustomed to use the Beach***" (CliftonClub01850). (One quarter's dues would have been $20 per member.)

There was further discussion of the "***problems incident to the Beach***" in June of that year and the Club's Directors decided to send all Club members a copy of a letter from the Trustees dated June 15, 1943, together with a note of explanation (CliftonClub01850). (Neither the Trustees letter nor the accompanying note were produced by the Club.) Two days later a Club stockholders meeting took place at Horace Mann School. Club Treasurer Crider reported that "***Club members had paid in a total of $1963.10 in assessments and gift for use at the Clifton Park Beach and that the sum of $1,500 had been turned over to the Park trustees***" (CliftonClub01852).

At that same stockholder meeting, after extended discussion, the Club's "***stockholders instructed the directors to obtain the opinion of counsel on possible legal obstacles to the rebuilding of the Clubhouse on the old site or to the use of the Clifton Park Beach by clubmembers***" [sic] (underline added) (CliftonClub01852).

In the review of the Club's documents, the legal opinions referenced above and minutes of meetings containing the discussion of those documents were not produced. However, the contents of that legal opinion can be inferred as the Club Directors thereafter promptly paid the Trustees their yearly financial requests without recorded question or objection. In addition, they eventually recommended that the stockholders vote to pay a pro rata yearly beach contribution to the Trustees in 1947.

In May of 1944, the minutes of a Club directors meeting memorialize the passage of a motion to "***assess members of the Club one half of one quarter's dues - $10 – plus federal tax for use at the Clifton Park Beach and to call also for the accustomed contributions to the Beach Fund***" (CliftonClub01853). After extended discussion, the motion passed unanimously.

In their June minutes of 1944, the Club's directors acknowledged that the payment to the "***Clifton Park Trustees [was] for use at the Beach***" (CliftonClub01856). They also list over 16 new members who joined during the prior year, presumably to obtain Beach use as the Club

was otherwise nonfunctional. The purpose of the Beach contribution was restated again in their July minutes which stated that "***the sum of $1,000 had already been forwarded to the Trustees of the Common property in Clifton Park for use at the Beach***" (CliftonClub01857). Apparently the Club eventually paid the Trustees $2,000 that year for the Beach use (CliftonClub01854).

In 1945, Clayton Quintrell Esq. a prominent Cleveland attorney, Park resident and Clifton Park Trustee, became a Club Director and Club General Counsel (CliftonClub01861). John Pyke Sr. Esq., who was already a Clifton Park Trustee, also joined the Club in 1945 (CliftonClub01859). In that same year, the July Club Director meeting minutes indicate there was an assessment of "***one quarter's dues***" to pay for running expenses and to raise $1500.00 to be given the Trustees that year "***to cover Beach privileges for Clifton Club members***" (underline added) (CliftonClub01861). This unequivocal statement leaves no doubt regarding the purpose of the Beach contributions.

In 1947, Quintrell had a central position as both Club Counsel and as a Trustee, during the process of setting up the first agreement for the Club to contribute a yearly percentage of the Beach maintenance expenses to the Trustees (CliftonClub01875). At their April 1947 meeting, the Club's Directors passed a motion recommending that the Club's members pay a pro rata portion of the Trustees' Beach "***operation, repair and maintenance***" expenses. The Directors adopted that motion by an affirmative vote despite being opposed by Messrs. Sessions, Crider, and Allen (CliftonClub01876). Later in July of that year, the Directors passed a motion to pay $20.00 per resident member of the Club (this is not the same as a resident of Clifton Park) to the Trustees of Clifton Park from that year onwards (CliftonClub01882) but that motion was later amended to be for 1947 only in a meeting of the Directors on July 28th (CliftonClub01881).

A formal agreement to pay the Trustees a percentage of their yearly budget based on the number of Club members determined as a fraction of the number of Club members divided by the sum of the number of Club members plus the number of "***lot owners in the Clifton Park entitled by virtue of their ownership to the use of the beach"***, was voted on by the Club stockholders at their annual meeting in August of 1947 (CliftonClub01883). (The Club directors apparently did not consider the Club's members to be entitled to the use of the beach by the Club's ownership of its 4 lots.) Beginning in 1948, this percentage was to be applied annually to the projected expenses of the Beach maintenance portion of the Trustees' expenses to determine the yearly Club contribution (CPT 11016). All other Trust expenses including property tax were excluded from that agreement.

It is quite interesting to learn about the process of the Club's rebuilding. The Club was initially unable to relocate to the Hanna Parsons house due to objections by the neighboring lot owner Mr. Fred Dorn, who was an attorney. When that property changed hands in 1945, the Directors

again reviewed the possibility of making that purchase (CliftonClub01884). That plan once more ran into obstacles and the Directors next considered merging with the Westwood Club (CliftonClub01885). A formal merger committee was formed (CliftonClub01886). Many Club members objected to that merger plan and signed a petition to the Directors to abandon those negotiations. Those members stated that they feared losing their Clifton Club identity as well as losing their negotiated beach use privilege (CliftonClub00200).

1950's

Eventually, the Directors of the Club raised money for rebuilding the Club house at the original location through a non-interest bearing 50 year promissory note for $500.00 which all Club members were forced to purchase. If people resigned from the Club after purchasing their promissory notes, their note was forfeited (CliftonClub01904). Those who chose not to purchase a promissory note were expelled from the Club (CliftonClub01919-01920). The minutes of the February 1950 Club Directors meeting outline that process which resulted in thirteen resignations and thirty two expulsions (CliftonClub01920-01921). Over the years, some notes were redeemed for a nominal fee while others became non-redeemable as members left the Club. The remaining outstanding promissory notes eventually came due and were repaid by the Club in the year 2000.

Additionally, a construction loan for $35,000 from the Cleveland Trust company (CliftonClub01948) was promptly retired in part via a rather innovative plan to obtain prepaid funds from members in exchange for future services (this was described as a "subscription plan" in Club minutes) (CliftonClub01949-01950).

In 1950, the Club's attempts to reduce their beach contributions also started, as Club President Paul Sessions Esq. requested that the Trustees' Beach budget be kept as low as possible to reduce the Club's financial burden (CPT 11008). In this regard he also requested that the Club's board of directors be given the opportunity to review the Trustees' budget to make cost reduction suggestions. (Recall that he had voted against the Club contribution for Beach use in 1948.) Club Director Mr. Karl Roesch wrote a critical review of the Trustees' budget suggesting it was excessive and could be trimmed by about 30% (CliftonClub00113). Nevertheless, the Club continued to pay yearly as per the 1948 formula (CliftonClub01925), (CliftonClub01953), (CliftonClub01963), (CliftonClub01967) and (CliftonClub01971).

Parenthetically, in 1950, a letter from past Club General Counsel Quintrell to then current Club General Counsel Sumner Canary Esq. regarding the Club's proposed update of the Code of Regulations makes extremely interesting reading as it explained why the Club was originally organized as a for profit corporation and outlined some ramifications of ownership of the early

stock versus membership (CliftonClub01896-01897). Quintrell wrote that the Clifton Club was an ***"ordinary Ohio corporation for profit***", with its affairs "***governed and controlled by its stockholders***". He interestingly mentioned that the stockholders up to that time might or might not be members of the Club according to its original Code of Regulations. He doubted that retrospectively adding restrictions to the past stock certificates would be legally valid as the previously issued shares made no references to such restrictions. Overall, this letter also shows Quintrell's total grasp of the intimate details of the Club's legal foundation. It also shows that the formation of the Club by its very successful founders, who were also the primary shareholders of the Clifton Park Land and Improvement Company, was very carefully crafted and reflected an astute business sense. Any suggestion that they intended to give non-lot-owning Club members rights to Beach use but simply "*overlooked*" the details is not credible.

The 1950 revised Club Code of Regulations which Quintrell's comments related to, dealt with the unencumbered outstanding stock issue by continuing to allow non-members of the Club to own stock but cleverly added a restriction preventing those stockholding non-members from voting (CliftonClub01918-01947). Canary had found a simple and effective way to address Quintrell's concerns while still accomplishing his goal. These were brilliant men.

In 1955, the Clifton Club complained that the Beach was too crowded and suggested "***more restrictive regulations as to Beach use***" (CPT 10987). The Trustees analyzed reservation data which seemed to identify the problem as coming from too many guests (CPT 10987-10991). There were, however, no records produced of the Trustees' eventual disposition of this concern.

In 1955, the Club records indicate that L. J. Beresford turned over numerous original records to the Club's directors. These included the original incorporation papers for a stock issue for 125 shares, the original lease, and the Club's land purchase title among others (CliftonClub02102). None of these papers have been produced.

In 1956, the original two story bathhouse at the Beach, built by the developers in about 1902 or 1903, was completely destroyed by fire (CliftonClub01974). No cause was ever determined but vandalism was suspected (personal communication from former Trustee Jack Rupert Esq.).

In an extensive annual report to Club members in 1957, written by outgoing Club President Carlisle Milner, it was stressed that "***the Club has only two things to offer—good food and good service in pleasant surroundings***". He went on to write that the Club was traditionally comprised of a "***discriminating group which expects and is, I am sure, willing to pay for the type of operation we have tried to maintain***" (CliftonClub01979). There is no mention of the Beach or Club members' use of the Beach in that annual report.

In 1958, the Club increased the number of its shares from 300 to 350, each valued at $200.00 (CliftonClub00128). The Club produced no evidence that it sought any approval from the Park Trustees who would have been the closest successors of the CPLIC. This would seem to indicate that they believed that the need for approval to increase their numbers which was contained in their original lease was no longer valid. The lease expired in 1912 when the Club bought 4 lots after the Trust was formed.

The Trustees unanimously lauded Quintrell's contributions to the management of the Trust in March 1958 (CPT 10962) as he retired from their board. The Trustees stated that they had "***relied heavily on Mr. Quintrell's leadership in solving their many problems, that his counsel and judgment invariably had been sound and well considered***".

In 1959, the Trustees' records indicate that the Club complained more forcefully that their portion of Beach expenses was too high (CPT 10947) and (CliftonClub01990). Mr. W. Crighton Sessions of the Clifton Club (not his father Paul) wrote a letter to Club President Mr. Conley Dunn with a copy to the Trustee President Pyke Sr., which provided his usage analysis and stated that the great many children using the Beach were primarily those of Park lot owners not the Club's members (CPT 08108-08109). The Trustees considered the Club's strongly stated concerns that its payments were "***much too high"*** (CPT 10942). See also their April meeting minutes (CPT 12262-3 and 10942-5). Quintrell, now an ex-trustee, was present at the Trustees' April meeting and provided his historical background knowledge. He reminded all of the other Trustees present that "***this agreement [allowing the Club's members to use the Beach for a yearly fee] had been approved by both the Club membership and the lot owners and that in his judgment it could not be departed from in any material fashion without submitting any proposed revision for re-approval by these two groups***" (underline added) (CPT 10943-4). This input was recorded as having occurred twice in differing form in those minutes.

Nevertheless, during their May meeting, the Trustees under the leadership of Trustee President Pyke Sr. (who was also a stockholding member of the Club at that time), proceeded to accommodate the Club's complaint that it was paying too much by adjusting the manner in which the Club's payment would be calculated. Their payment was reduced by first subtracting the number of lot owning Club members from the membership total to be used in the previously agreed formula prior to calculating the Club's percentage of the Beach expenses to which the Club was to contribute (CPT 10933-10939) and (CliftonClub01986). This was presumably not considered a material departure from the previously ratified agreement. Property taxes and all other non-beach Trust expenses were still not shared and remained the exclusive obligation of the Park's lot owners. This agreed upon adjustment to the Club Beach expense contribution was confirmed in a letter from Mr. W. C. Sessions, apparently representing the Club, to the Trustees (CPT 02726-7) and then accepted in final form by the

Trustees (CPT 10932). The parties reserved the right to change the agreement in the future (CPT 02724). The fact that the Club was behind on its payments and was to immediately make good its debt was also mentioned in the letter to the Club's directors.

1960's

In September of 1960, the outgoing Club President's report by Mr. Henry Van Luit contains a listing of the Club's financial performance for the past decade. Although the total Club income had steadily grown, he claimed that the Club had never actually recovered and the Club had run at a loss for the entire ten years following its rebuilding after the clubhouse fire (CliftonClub02019). Recall however that during this time, the Club had paid back the $35,000 building loan, in part directly and in part through the indirect loan made to it by its membership through the 1951 *"subscription plan"* in which some members' prepayment for future services provided a virtual cash advance to repay the loan but obligated the Club to later provide those services at no additional charge. The Club would have made a profit but for the need to provide services without charge to pay off the outstanding obligations of the *"subscription plan"*. Indirectly, the Club's claims of poverty and the Trustees' reduction of the agreed upon Club contribution resulted in the lot owners secondarily increased assessments paying off a portion of the Club's rebuilding.

The Trustees, at the Club's request, adopted a resolution in their September 1960 meeting, which clarified the Club's responsibilities regarding its past Trust Deed mandated lot assessments. That resolution stated that the Club's yearly financial contributions which had been made up until that date, were to be considered as having included the compulsory lot assessment which was mandated within the Trust Deed and that the Club had no outstanding financial obligations to the Trustees (CliftonClub01983-4). For a number of the following years, the annual financial requests of the Club specified the lot assessment and the additional Club contribution for the Beach use of its non-lot-owning members separately (CliftonClub01985), (CliftonClub00100) and (CliftonClub00109).

In April of 1961, the Trustees declined a proposal for a further Club contribution reduction made to them by the Club in March. Instead the Trustees further adjusted the formula mechanism to use an average tally of Club members taken at October and April rather than the single January membership number previously used, as the Club felt that number was too high (CPT 10924-5). The Trustees also shifted various other expenses out of the Beach expense category so that the Club would not share in them. The Club still only contributed to a portion of the Beach related expenses (CPT 09971), not to the full Trust expenses which were borne entirely by the lot owners.

In March of 1962, in response to properties being taken, reduced or split by the State through eminent domain for the new road through the Park and bridge across Rocky River, the Trustees unanimously stated that "***to be a Trust beneficiary and thus entitled to Beach privileges,"*** one must own a buildable lot with road frontage within Clifton Park (CPT 10917). This decision was apparently their interpretation of the Trust which gave Beach rights to "***owners of lots or sublots***" in the Trust Deed. The grantors would not have foreseen the myriad of small lot pieces created by the taking of the properties through eminent domain requiring the need for this statement. This is restated again in 1964 in a letter to **all Clifton Park lot owners and Club members** (CliftonClub01999).

The Club's records of April 1962 detail its efforts to address its failing finances. Club Director Gund pointed out the aging membership (average age 60) and suggested a swimming pool be considered on Club grounds to attract new younger members (CliftonClub02015). A committee to be chaired by Club Director Mr. Robert C. Sessions (not to be confused with his father W. Crighton Sessions or his grandfather Paul Sessions) was created to examine the Club's financial problems in detail (CliftonClub02014). Among suggestions made by that committee was mention of a number of ways in which the Club could "avoid excessive charges for the beach" (CliftonClub02008). However, for the reader to keep this financial analysis in perspective, recall that the Club had since its reconstruction in 1950, repaid the entire $35,000 additional Clubhouse rebuilding mortgage.

An internal memo one year later written by R. Sessions outlined the problems meticulously and suggested numerous ways in which the Club might address its deteriorating financial condition (CliftonClub02010-13).

In January of 1963, Quintrell distributed to the Trustees four copies of a carefully prepared response of his regarding a "*Walton proposal*" from the Club (CPT 08102). Walton was a resident and a Club Director at that time. Neither the content of the Walton proposal nor those copies referred to by Quintrell have been produced to us for review by the Trustees or the Club. This Walton proposal is further referenced in a Trustee letter to the Club among other places and appears to have significant content related to Club member use of the Beach and therefore is relevant to this case (CPT 08100-1).

In 1963, the Club set up a special file to contain details of the yearly negotiations with the Trustees (CliftonClub02002). The Club did not produce this file for review. However, Director R. Sessions' lengthy notes on that year's meeting with the Trustees were produced for review (CliftonClub02003-02006). Sessions detailed the very meeting with four pages of meticulous notes. Important points include that the Trustees advised him that the Clifton Club members had no material ownership interest in any of the trust property. Sessions countered with the

point that the lot owners therefore benefited from the value of the Beach while the Club members did not. (This concept is repeated throughout Club history and is more carefully considered on the next page of this review). The possibility of the Club's members rescinding the 1948 agreement was threatened as well if expenses for Beach use grew too large. According to his notes, Sessions stated that he believed that the Club was overpaying and throughout the meeting tried to negotiate for a reduction.

Later in 1963, Mr. R. Sessions also wrote an internal Club memo to Pyke Sr. expounding his view of the Club's rights to Beach use for its members and the Club's limited lot assessment obligation to the Clifton Park Trustees (CliftonClub00504-6). Pyke Sr. had ceased being a Clifton Park Trustee 2 years earlier in 1961 (CPT 01554). He was however a Club member and was at times a Club Director now representing the Club in negotiations against the Trustees. In that letter, Sessions outlined his belief that the 1902 Club lease and the 1912 Club deed gave the Club rights for all of its members to use the Beach. He also stated that he believed that the Club's deed gave the Trustees only the right to assess the Club based on its lot value and that contributing anything above that amount to the Trustees was entirely voluntary.

In 1964, a letter was drafted by Quintrell and reviewed and approved by the Trustees (CPT 08098) and sent out with the expectation of wide circulation. Quintrell was once a Club Director in addition to being Club General Counsel in the mid-forties and would have reviewed the Club's own legal opinion regarding the Club's members' rights to use the Beach which the Club stockholders requested in 1942 (CliftonClub01852) as part of his role as Club General Counsel. In his 1964 letter, Quintrell wrote that "***the arrangement between the Trustees and the Club is that the Trustees have afforded the Club and its members permission on a year-to-year basis to use the Beach but [the Club members] do not have any ownership of the Beach or the improvements***" (underline added) (CPT 01249).

A draft of a suggested pair of motions that were offered to the Club's Directors to consider putting before the stockholders at their 1964 annual meetings contained firstly a simple rescission of the 1947 agreement with the Trustees which the Club's stockholders apparently voted to approve and secondly, an alternative possible modification of that agreement which would have reduced the number of Club members to be used in the annual calculation of that contribution (CliftonClub00038). (The stockholder minutes of that year were not produced by the Club). The Clifton Club Directors' meeting minutes of August 1964 also indicate that the Club was going to form a committee to "***consider rescission of the 1947 stockholders resolution relative to beach expense payments***" (CliftonClub01994-01997). John Pyke Sr., who was by then a Club director, was a member of that committee.

A letter from then Club President Mr. Robert C. Sessions to the Club's members in September

1964 outlined that the Club was facing a financial crisis from increased costs, an increased membership age averaging 60, and a lack of younger members (CliftonClub01992-3). That two page letter mentioned that the stockholders would be asked to vote on a new code of regulations at their 1964 annual meeting but made no mention of any intention to raise the previously mentioned rescission of the 1947 agreement. Although the threat of rescission was made, the yearly calculations of the Club's contribution continued as before based on the original formula raising the question of whether the Club's 1947 stockholder decision was ever rescinded. Example calculations from 1967 until 1980 are found at (CliftonClub00110-1), (CliftonClub00082), (CliftonClub00078), (CliftonClub00071), (CliftonClub00069), (CliftonClub00065), (CPT 00302), (CPT00304), (CPT 00305) and (CPT 07756). The exact basis for the changes after 1980 is not clear. There is never a definite mention of the 1947 Club stockholder agreement ever being rescinded nor have we found evidence that this agreement was ever put before the Club's stockholders.

The Trustees produced documents of May 12th and 18th, 1965 which refer to yet another letter written and edited by Quintrell with Trustee input which was to be sent to lot owners and Club members (CPT 08087), (CPT 08086). That letter has also not been produced for review.

A 1965 copy of the Rules of the Beach produced by the Trustees stated that "***Clifton Beach is the property of every lot owner in Clifton Park, and is maintained jointly by all lot owners and all members of the Clifton Club***". It also interestingly added that users must not bring a guest more than once per week (CliftonClub00011). Another letter from the Trustees to lot owners and Club members that year noted that payment of the markedly increased property tax that year was a legal obligation of the lot owners, not the Club members, as "***the Club members do not have any proprietary interest in the Beach property***" (CliftonClub00098).

An internal memo of the Club in 1965 outlined that "***A well maintained beach directly benefits the Clifton Park property owners, maintaining property values. In the event of a sale this would make the real estate more valuable.***" (CliftonClub02032). It adds that in contrast, the Club gains nothing more than "***the enjoyment which the members obtain through the use of the beach***". This claim was first seen in a memo by Sessions in 1963 and will reappear continually from 1965 on in the Club's negotiations with the Trustees (CliftonClub02004).

The concept that the lot owners benefited from the ownership of the Beach through enhancement of their property values which the Club members did not enjoy was used by the Club to negotiate for and justify a reduced contribution to Beach maintenance for the Club's members for decades. Because of this false logic, the average contribution per Club member using the Beach was held well under the average lot owner assessment. Two thirds of the average lot owners' assessment was often the target. Although the fact is correct, the logic of

its application is flawed and the reverse application would actually be true. The Clifton Park property owners are really in a position of increased risk, not increased benefit, from their ownership interest in the Beach.

The Park property owners are at risk because they have all paid a significantly higher price to purchase their properties within the Park due to the past perceived value of the associated Beach. (This is of course more true for inland lots than lakefront lots.) Since the purchase price of Clifton Park homes included this "*beach premium*" on acquisition, there is only the potential of cost recovery, not an additional profit, on the sale of the property. There is, however, a risk of a loss of value, such as has occurred recently as the overcrowding at the Beach and the mass advertising of cheaper access to the Beach available through Club membership has made purchasing the relatively expensive larger homes within the Park less desirable.

Those who purchased the homes with a high beach premium included in the price will therefore experience a relative loss as the beach premium is now less. In reality, the consequences of ownership of Park properties, is the opposite of what the Club represented over the decades of negotiations with the Trustees. This concept would actually support higher premiums for Beach use by Club members, not lower, than those of the average Park property owner.

On another topic, in 1968 there was an interesting but not directly relevant letter stating that the Lagoon owners own only one foot of land from the water's edge (CPT 10891-2). More interesting yet is a comment in the January minutes of 1969 that due to a letter written by Quintrell to the Lagoon owners in 1959, no further notifications would be needed to prevent Trust property takeover by Lagoon owners (CPT 10888). A copy of that letter which was to be incorporated into the minutes has also not been produced to the Plaintiffs for review.

In a 1969 letter from CBIA to all Clifton Park lot owners and all Club members regarding the continued discussions of a Beach swimming pool, the authors explained their understanding of the differences in the status of the lot owners and the Club's members with regard to the Beach. They wrote on page one that "***Clifton Club members, through the Club, make an equitable [contribution] to the finance of the expense of the common property at the beach, and in return the Clifton Park property owners are quite happy to permit the Club Members to make use of these facilities with equal privileges***" (sup 6). The CBIA leadership at that time was comprised of both lot owners and Club members and this letter was sent to all of the Park lot owners and Club members.

1970's

In minutes found in the Club's records of a May 1970 meeting between the Trustees and some

of the Club Directors, Mr. D. Smith representing the Club apparently stated that the Club felt it had no legal obligation to pay the amount the Trustees were requesting. Mr. Robert Hartford, the Trustee President, plainly told the Club Directors that "***Club members have no rights to the beach under the land deed as these rights were reserved for the lot owners and that [members of the Club] were given these rights only because of [the Club's] agreement to carry a large portion of the assessment***" (CliftonClub00081). Smith stated that he was not sure of his grounds but felt the matter should be investigated. In either case, these minutes, taken by a member of the Club, make no mention of any objection by Club leadership to that statement and the same formulation for calculating the Club's financial contribution according to the modifications made in 1959, (still limited specifically to Beach expenses) continued (CPT 07762). Despite this seemingly adversarial comment, Smith stated that the meeting overall was on a friendly basis.

The minimal legal basis permitting the Trustees to make an agreement with the Lagoon Trust for Lagoon owners to have access to the Clifton Beach is found in the Trustee minutes of June 1970 which record that the Trustees felt there to be little legal foundation for such an agreement (CPT 10341). The minutes of the December meeting between the Clifton Park Trustees and the Lagoon Trustees that year summarized the propriety of charging the Lagoon owners for shared guard provisions at the Beach stating that it "***Seems to be almost parallel with the Clifton Club situation. Also it seems equitable that the Lagoon property owners have beach privileges in return for full share payment.***" [sic] (CPT 10871)

At first the Lagoon funds were kept separate and used only for certain major improvements (CPT 10864) and (CliftonClub00077). Later they were split proportionally between the lot owners and the Clifton Club (CPT10850).

The absence of the non-lot-owning Club members' proprietary interest in the Beach is stated openly in many places, and was the basis for why they had not paid any share of the Beach property taxes. An example of this commonly made statement is found in a letter to lot owners and Clifton Club members (CPT 09932). See also (CPT 10862) and (CPT 09965).

Interestingly, in 1971, the Club's records showed that less than 10 % of its 314 members then lived in the Park (CliftonClub02097).

Former Clifton Club President Paul Sessions Esq., at that point a Lagoon owner, clearly opposed the Lagoon Trustees agreement with the Park Trustees stating that the Park Trustees should limit themselves to the authority given to them in the Trust which he stated in a prior letter did not give the Trustees such authority (CPT 01260-61) (CPT 10327-28). In a clear and revealing response to Sessions, Robert Hartford, on behalf of the Trustees, answered that "***The Trust Deed specifically states that beach privileges shall be extended only to property owners in***

Clifton Park and members of their household" (CPT 01257). He goes on to say that under the historical interpretation of the Trust deed applied by Quintrell, Pyke Sr. and others, Beach privileges under the Trust extended only to individuals "***and members of their household if there is a house in which people reside located on the property in question. This would mean, for example that only Mrs. Westlake would be eligible for beach privileges at the Clifton Club***". (Mrs. Westlake lived in residence at the Clifton Club at the time.) He further added that the historical documents indicate that the decision to grant Club members access to the Beach "***may rest upon sand but [it] is a gentleman's agreement that in return for a reasonable amount of money members of the Clifton Club shall have beach privileges***".

In 1973, the Club's prior deficiency (its payment arrears) was waived and its share of the break-wall expense was indefinitely deferred (CliftonClub00101).

Crowding at the Beach was once more addressed in a letter from the Trustees to the lot owners in 1974 in which new rules were added to reduce the overall parking congestion. Additionally, weekend group size in the Beach House was limited to 25 people and the number of picnic tables that could be concurrently reserved was reduced (CPT 09914).

In 1974, the Trustees began the procedure of deducting one half of the income of the Lagoon contribution, from the Beach expenses before they were proportioned between the Club and the lot owners (CPT 10850), (CPT 10836). A summary of yearly Club contributions listed values of 54% to 56% for 1970 to 1976 but this must be interpreted cautiously as it represents the contribution only as a percentage of the limited Beach expenses, now further reduced by one half of the Lagoon contribution. It did not represent a percentage of the total Trust budget for which the lot owners assessments were responsible (CPT 10836).

To keep this in perspective, the Club, even in these times of seemingly high contribution, was only paying on average one half of what a lot owner paid for Beach usage for each non-lot-owning Club member with Beach access through the Club. This was in part because the Club contribution was for a portion of the Beach expenses only while the lot owners remained responsible for the total Trustee budget.

In 1977, additional allowances were made to reduce the Club's contribution and support the Club's financial position. The Club was then given credit for the total contribution from the Lagoons and was exempted from taking part in the purchase of a truck for the Beach maintenance (CPT 10829) in addition to Beach taxes and other Trust expenses.

1980's

In 1979 and 1980, Mr. John Pyke Jr. was the President of the Clifton Club (CliftonClub01675)

and negotiated on behalf of the Club with the Clifton Park Trustees to lower the Club's contribution (CPT 10806). (This is not Pyke Sr. who had once been a Trustee from 1944 until 1962 before he worked on behalf of the Club in the mid 60's and early 70's.) Pyke Jr.'s negotiation partner from the Club was Club Director Richard Kuhn, the father of current Clifton Park Trustee Peter Kuhn. Again, further specific allowances were made by the Trustees to financially support the Club by reducing its contribution in 1980. That year both the lagoon contribution and the Beach house income were subtracted from the Beach expenses before the Club contribution was calculated (CPT 07756). Even this lowered amount was then further reduced from the calculated $20,000 per year to an arbitrary $16,000 for that year. Of course all Club reductions required an increased financial contribution from Clifton Park lot owners.

The Trustees' support of the Clifton Club took on even greater proportions when in 1981, in addition to the advantage already given to the Club through the above adjustments, an even greater arbitrary further reduction was made to reduce the Club's contribution from the formula derived $20,000 for that year to $12,000 (CPT 00314). That difference was, of course, paid for by an extra financial contribution from the lot owners. Despite this gracious gesture, the Club President Mr. Bargar, complained that the Club was overpaying and claimed that "***legally the Club's share of Beach expense is based only on the parcel of land the Club owns***" (CPT 00312).

In 1982, minutes of the May 18 Club Directors' meeting indicate it would pay ***"$12,000 for its contribution to the Clifton Park Trustees <u>for the club members use of the beach</u> for the current year***" (underline added) (CliftonClub00339).

That year an extraordinary spring storm caused massive damage and the Trustees planned a break wall project. The costs were to be tentatively apportioned according to the following schedule: lot owners (60%), the Club (25%) and the Lagoon Trustees (15%) (CPT 00876). A letter to lot owners explained that this large assessment would be billed in two installments (CPT 00711-13). A meeting of residents and lot owners was held at Horace Mann School April 11 (CPT 00710). An information sheet presented a project financial overview (CPT 00797). This break wall appears to be the first major additional Beach expense that the Club was asked to contribute to, albeit at a reduced rate.

The minutes of the Clifton Club Board of Trustees [sic] on March 15, 1983, contain an authorization for the finance committee to "***negotiate with the Clifton Park Beach Trustees [sic] up to the amount of $12,000 <u>for annual use of the beach</u>*** [by Club membership]" (underline added) (CliftonClub00358).

The minutes of the Clifton Club Board of Trustees [sic] on May17, 1983, show the Club amending the April minutes to clearly show that "***the payments to the Clifton Park Trustees <u>for</u>***

<u>the club members' use of the beach</u> will be $12,000 per year as distinguished from the Clifton Club's contribution of $18,000 to the Clifton Park Trustees for the breakwall project …." (underline added) (CliftonClub00363).

An IRS audit of the Clifton Park Trust in 1983 resulted in a re-categorization of the Trust to 501(c)7 status(CPT 06291). There apparently were various issues of Beach usage by residents or members versus non-member usage and income which resulted in the need for the change which could not be clearly understood from the records which were produced.

In 1984, the Trustees' minutes record a resolution of unclear purpose possibly related to the IRS audit, which listed those who could use Trust property (CPT 10264-5). Club members, in contrast to lot owners, only were allowed to use the Trust facilities subject to "***payment of the assessment on the terms and conditions agreed upon from time to time***" between the Trustees and the Club.

In 1984, the Trustees calculated an average constituent cost which showed lot owners paid $184 per year while Club members paid $64 per year (CPT 07755), (CPT 07936) despite a picnic table reservation review which showed that the Club members made nearly twice the number of table reservations (131) as lot owners (87) (CPT 04800-02). Both groups enjoyed the same Beach use privileges. That same year includes Club Director minutes which referred to a suggestion made to the Club by members of the CBIA to allow Park lot owners to have a membership in the Club under certain special conditions as a way to "***settle the Beach situation***" (CliftonClub02104). This appears to be another instance of earlier lot owners voicing their concerns regarding the non-lot-owning Club members' use of the Beach.

In 1985, the Trustees wrote a summary letter to the Club continuing their support of the Club through allowing a reduced Club contribution coupled of course with a subsidy via an increased Park lot owner's assessment (CPT 04796). An interest in re-establishing a long term formula was once more evident. Trustees Jack Rupert Esq. and Mr. Bill Gorton were appointed to work on obtaining such a formula (CPT 10596).

The Trustees' growing frustration with the Club was apparent in a letter written by Trustee President Douglas Cooper Esq. to the Club in 1986 regarding the Club contribution seen first in a document labelled as a draft (CPT 04733-04736). The finished letter indicated a willingness to forego the Club payment and "***deny Club members access to the Beach***" (CPT 04777) as one option on how to settle the Trustee/Club differences. The letter went on to suggest that in return for the Club's wish for further reduced payments, the Club would alternatively be given a reduced number of Beach passes (CPT 04778-80). The Club and the Trustees agreed to this system of payment for the non-lot-owning Club members' Beach use and the Trustees again promptly gave the Club a further financial break by allowing more Club members to have access

than the calculations based on the newly instituted formula would have allowed (88 families would have been allowed by the new formula while 99 families were given Beach use) (CPT 04770). This admittedly cumbersome system was used for a while with the anticipated confusion (CPT 04699), (CPT 04767), (CPT 04811). The original 99 member allotment was quickly increased to 125 by the Club in exchange for an increase in the Club's financial contribution from $20,000 to $25,000 (CPT 04701).

Despite the commitment to pay $25,000 that year for the Beach privileges of their 125 member families (which incidentally crept up to 149 during the year (CPT 10583)), a letter from the Trustees to the Club in November documented the serious degree that the Club's payments had fallen into arrears (CPT 04689). No payment ensued and the Trustees in their minutes of January, 1987 wrote that the Club would need to be reminded to pay immediately and totally, and complete the negotiations for the 1987 financial contribution by March 31, adding "***There will be no Beach privileges for [Clifton Club] members if this deadline is missed***" (CPT 10574). The corresponding letter to the Club advanced that deadline to February 28, 1987 (CPT 08823-4). The Club then promptly apologized claiming extenuating circumstances in their letter of February 2, 1987 (CPT 08822).

In February of 1987, the Trustees' written response to the Club further showed their frustration and limited the Club to 88 non-lot-owning members allowed to be given Beach privileges for a $25,000 contribution (CPT 08768). Trustee Rupert's record of a phone conversation with the Club president February 17 shows more evidence of the Trustees' difficulty dealing with the Club (CPT 08951-2). The Club made a written proposal for a longer term formula for its contributions (CPT 08905-21) which the Trustees rejected outright adding crisply that they nevertheless "***appreciate and welcome it as the first evidence of cooperation and negotiation in some time***" (CPT 08740-41). Trustees Gorton and Cooper were assigned to meet with Club Directors Mr. Charles Gallagher and Mr. Wally Mann Sr. to try to resolve their apparent financial differences.

Negotiations proceeded (CPT 10566), (CPT 08751-54), (CPT 08749-50), (CPT 10565). Foundation documents were reviewed (CPT 08808-9). The Trustees eventually conditionally agreed on a Club contribution for 1987 (CPT 10564). The Trustees understanding and terms for the 1987 agreement, which required immediately settling on a formula for the future or there would be no agreement that year, were sent to Club President Gallagher (CPT 08747). An intense series of negotiations and meetings followed in which the Club tried to reduce its financial contributions in an effort lead by Mann Sr. (CPT 08747-8), (CPT 10563), (CPT 08989), (CPT 08938090), (CPT 08745), (CPT 08942-3), (CPT 08930), (CPT 04182-3), (CPT 08742-4), (CPT 08890-95), (CPT 08924). A letter from Trustee Cooper summarized the Trustees' stance regarding the consequences of the Club not coming to an agreement with the Trustees. He

wrote "***So there is no misunderstanding, non-payment of the accrued monthly installments and the absence of a formula for future years on April 30, 1987, will result in a denial to [non-lot-owning] Club Members of beach access***" (CPT 08745).

In a letter from Trustee President Rupert to Club president Gallagher, Rupert explained that a document summarizing the understandings achieved would be prepared. He also added that on the condition of the immediate receipt of a $4,166.67 check that evening, which represented the amount the Club was in arrears from the prior year, and on the basis of the understanding which had been established, the Trustees stood "***ready to accept Clifton Club member reservations [at the Beach] on our starting date, May 1***" (CPT 08924).

This "understanding" which resulted in a 60/40 split (of the expenses after subtracting the Lagoon contribution) was referred to again by Rupert in a letter to the new Club President Mr. Ed Denk in December of that year (CPT 08810-11). Rupert went on to explain to the Club that under that proposal, the non-lot-owning Club members would be paying only 2/3 of what the average lot owning resident of the Park would be paying. The entire letter shows the degree of frustration which the Trustees felt towards the Clubs' reluctance to participate in early negotiations with the Trustees.

We have not had any copies of that "understanding" which Rupert refers to in his letter, produced by the Trustees. The acceptability of this document now referred to as a "***Memorandum of Understanding***", (or MOU) for the following year 1988, is discussed in a January 1988 letter between two Trustees, Mr. Doug Cooper and Mr. William Gorton (CPT 04184). An undated and unsigned apparent draft version of a document titled "***Memorandum of Understanding***" was produced by the Club to Dennis Butler (CliftonClub00030-34), but none of the presumed bulk of information regarding the entire communication process that must have surrounded the creation of such a document was present in the extensive unorganized files which the Club produced for the Plaintiffs to review.

Shortly thereafter, protestations from the Club again resulted in the Trustees compromising and reducing the Club's contribution to accommodate its poor financial position as described in a letter from Rupert to Denk, which outlined the additional compromise and the Trustees overall growing frustration with the Club (CPT 04189-90). In that letter, it is clearly stated by the Trustees that the Club contribution of $40,000 was for "***full and equal participation in the activities of the Beach for 1988***". The Club's response written by President Denk, specifically **acknowledges and agrees** to the same (CPT 04187).

Then despite the Trustees' compromise to accommodate the Club, the Club tried to short the Trustees in September of that year by unilaterally paying only half the agreed amount due by

August 30 (CPT 04199), (CPT 04200), (CPT 04198). The Trustees did not tolerate this.

In December 1988, the new Club President Mr. Gary Amandola continued the Club's efforts to further reduce its payments to the Trustees by asking for an increased contribution from the Lagoon owners (to offset the Club's contribution) with additional references to the MOU (CPT 04193-94 and 04238). There must have been some very significant discussions that December as a copy of a carefully formulated position paper from the Park Trustees was produced to Dennis Butler by the Club (CliftonClub00049-50). The Trustees did not produce this paper or associated meeting documents to the Plaintiffs. That position paper is a simple unrevealing summary of a starting position towards a negotiated 60/40 split of expenses. It was probably attached to a response from Rupert to the Amandola letter referenced above according to a note from Amandola to the Club's board (CliftonClub00048) and (CliftonClub00051). The Plaintiffs await the opportunity to review the remaining documents.

In July 1989, despite the accommodations previously made for their poor financial situation, the Club was once again discovered to be in serious arrears (CPT 10172). In their annual retreat of that year, the Trustees' notes indicate they decided to embark on an incremental plan to equalize the contributions of the Park lot owners and the Club by 1994 (CPT 10528). The minutes of that retreat also list the Trustees' intent to advise the Club regarding their prescriptive rights for use of other parcels of the Trust's land which did not belong to the Club. Those minutes also state that the "***Bottom line is that the Clifton Park does not need Clifton Club to continue functioning***".

In a 1989 loan application to First Federal of Lakewood, Trustee President Rupert re-stated the Trustees' long held view that the "***Clifton Club and the Clifton Lagoon Trustees currently participate financially in our Clifton Beach operations <u>in return for</u> continued use of the property owned by Clifton Park at Clifton Beach***" (underline added) (CPT 03233).

There must have been another attempt to establish a 5 year agreement in the fall of 1989 based on a draft memorandum of understanding produced by the Club (CliftonClub0035-37). There were no corresponding documents produced by the Trustees and it is unclear who originated that draft. This attempt apparently was unsuccessful based on the future year's relationship.

1990's

As delinquency of Club payments continued to be an issue, the Trustees considered imposing a late charge/penalty (CPT 10499). A letter from Trustee President Rupert to Mr. Al Fowerbaugh as Fowerbaugh ascended to the Presidency of the Clifton Club in December of 1991 reviewed the still informal relationship of the Trustees and the Club (CPT 00348-49). In this very well

written summary letter, Trustee President Rupert first clarified that there was "***no formal agreement of any kind between the [Trustees and the Club]. Each year that the Club chooses to participate in Clifton Beach activities, a new arrangement is worked out or not, depending on the circumstance.***" He continued to outline the past history of the informal workings between the two groups and finished by insisting that if the Club wished to continue that relationship, it was to see to it "***that the two remaining 1991 payments***" which were delinquent, be made immediately. In a responding letter to the Trustees, the Club apologized and pledged to pay immediately (CPT 00371).

Apparently the Trustees did not receive any payment from the Club and a draft letter to the Club with language typical of Trustee President Rupert was created January 11, 1992 in which it was stated that the Club had until January 31 to let the Trustees know if they were terminating the current relationship (CPT 00368-69). It also stated that "***This would be regrettable but [the Trustees] can live with it***" and cautioned that "***re-establishing a relationship in the future would probably be of doubtful probability***". A demand for full payment by May and a threat of a 10% late penalty were included. It finished with "***We can live without you. It will be more expensive for our residents, but it can be done***". The plaintiffs have not been furnished with a finished copy of that letter.

The minutes of the March Trustee retreat showed the Trustees acknowledging that the "***Club relationship has no recorded basis***" (CPT 00365). The Trustees also clearly affirmed that use of the Beach by Club members was "***subject to the continuation of mutually acceptable arrangements***" (CPT 10082).

The Club eventually paid but tardiness continued to be a problem in 1993 (CPT 10452), in 1995 (CPT 10414), and again in 1996 (CPT 10400) when talk of a late penalty re-emerged in records of Trustee minutes (CPT 10397).

In 1994, another IRS audit of the Trust concluded with no penalties but an interesting note that "***nonmember Beach house income***" needed to be treated in some special procedure (CPT 09249). Documentation produced by the Trustees is sparse on this audit, as it is on the prior audit.

In 1995, essentially at the Trustees' urgings, the Club initiated a "***special membership***" for Clifton Park and Clifton Lagoon residents (CPT 10415). This "Park Resident" membership program created quite a controversy within the Club articulated very clearly in a letter by Club Director Richard Endress (CliftonClub00523-21). This must read letter illustrates some of the Club members' attitudes towards the Park residents as he accused the Park residents of cheapening the Club and destroying its exclusivity through the creation of the new Park resident membership program. Although Endress' efforts failed to block the creation of the new

membership category for Park residents, his negative view had widespread support. The irony of that view is inescapable when contrasted with the current struggle by the Club to gain rights for all of its members to use the Clifton Trust Beach (held in Trust for the very Park lot owners that are the topic of Endress' letter).

Over 90 Clifton Park residents joined the Club as a result of this program contributing over $4,000 to the Club's monthly cash flow (this approximately equaled the Club's yearly Beach contribution of $49,000 in 1995 (CPT 09789)) (CPT 10400). In 1996, the Club raised the cost of that program causing many lot owners to resign from the Club with an overall marked negative financial impact (CPT 10392).

In 1996, the Trustees' monthly meeting minutes indicate they again addressed the worsening problem of "***Beach Overcrowding***" and proposed to control the crowding by instituting more rules (CPT 10387). They also apparently intended to increase the Club's contribution as the Club had gained more members (CPT 10385). The Club still considered itself as being poor in a 1996 letter to the Trustees (CPT 06421). In partial response, Trustee President Rupert prepared a summary of yearly Club contribution percentages which appears to have been a recalculation based on yearly Club contributions off ***total*** Trustee expenditures. This summary showed that at times, the Club's contribution was allowed to drop to 20% of the total Trust expenses with the lot owners subsidizing the balance (CPT 07621 and 02687).

In January 1997, Trustee President Rupert met with the Club liaison committee which apparently stated that the Club could not afford the contribution increases which the Trustees wished to have in order to bring the Club's contribution up to par with that of the lot owners (CPT 10375). The fourth draft of guidelines and a proposed five year budget plan for the Park/Club financial relationship showed the Trustees' intent to raise the Club contribution (CPT 06356-61). The prior 3 drafts have not been produced for review. Only three of the over thirteen pages of the fifth draft are found in the files which the Trustees did produce for review by the Plaintiffs (CPT 06353-55). The rest of those pages have not been produced.

A letter from the Clifton Park Trustees to the leadership of the Club in February 1997 responded firmly to Club concerns voiced in an earlier meeting for which neither the Club nor the Trustees produced minutes or meeting notes (CPT 06349-50). The Club apparently once more was proposing to pay less and draw out its payment schedule. The Trustees appear to have taken a firm stand on a position which actually already represented a compromise. They allowed the Club to make ten monthly payments (the Trustees originally wanted only eight) and they changed their eventual goal of an equal Park lot owner/Club split to progressively trying to achieve a 55/45 lot owner/Club split (of the expenses remaining after the Lagoon contribution was subtracted from the total Trustee budget).

In February of 1997, Trustee President Rupert also announced his plans to retire from the Trustees at the end of June of 1997, ending his 28 year tenure as one of the longest serving Trustees (CPT 10373). He was eventually replaced by Ms. Mary Anne Crampton.

On March 3, 1997, Club President Dr. Dianna Foley replied to the Trustees' above February letter with what can only be described as a blistering response (CPT 06396-7). In addition to attempting to use innovative math to make the Trustees' demands on the Club seem excessive, she quoted the Trust Deed highlighting the language giving the Trustees only the right to assess lot owners [including the Club] a percentage of trust expenses based on relative property values. She challenged the Trustees' authority to ask for any greater financial contribution from the Club above its 4 lot Trust mandated assessment. She claimed that the Club had been overpaying for decades. (Apparently, she was unaware of the history and the basis of the Club's contribution above the 4 lot assessment). Then on page 2 of that letter, Foley criticized the Trustees for poor performance on multiple other Trust management topics.

The Club's Directors next unilaterally decided to send a check for a reduced financial contribution to the Trustees (CPT 06370).

The Trustees' March response to the letter from Foley is quite measured and surprisingly low key. The reduced payment was sent back with a letter simply stating that the Trustees expected a check in the correct amount from the Club promptly "***So that the Club members can continue to use the Beach in the same manner which they have in the past***" (CPT 06370). The check was promptly replaced with a check from the Club for the correct amount and work toward accomplishing a 55/45 split in 5 years was pursued through development of a 5 year agreement (CPT 06425) (the second page of this letter is missing), (CPT 10365-6), (CPT 06401), and (CPT 06419). All this leads to the eventual letter from the Trustees to the Club in July accepting the Club's agreement to a 1% increase each year to achieve a 55/45 lot owner/Club split (of expenses after subtracting the Lagoon contribution) (CPT 06394-5).

The concerns regarding the high number of Clifton Club Beach users grew in 1998. That year, Trustee Crampton discovered that the Club had registered 280 families for Beach use (CPT 00378). She thought that their limit was 250. In response to an email outlining her concerns, Cooper concurred that the maximum number of Club members was 250. The minutes of the next meeting of the Trustees in June of that year indicate that following a discussion of the issue, Trustee Mr. Don Strang made a motion to re-affirm that the Trustees were setting a 250 limit on club families (CPT 10723). The Club's expressed wish to pay more in order to have more of its non-lot-owning members allowed to use the Beach was denied (CPT 10720). The Club's additional request for 275 families was again denied by the Trustees in October of 1998 (CPT 10717), (CPT 10708).

During the November 1998 Trustee retreat, the Trustees decided to no longer have their annual financial reports reviewed by an outside financial firm (CPT 10708). More rules were devised to manage vehicle stickers including registering the owner and vehicle make. The Trustees also decide to sell a small piece of Trust owned land adjoining the Kilbane property, to the Kilbanes subject to lot owner approval (CPT 10710). The Kilbane's garage apparently was already placed on the Trust property in question. Interestingly, no record of lot owner approval for this transfer appears in the Trust records produced to the Plaintiffs for review.

1999

In 1999, the Trustees' approach to the Club appears to have changed and greater allowances now began to be made. For example, the Trustees volunteered to spread the Club's payments out over 12 months instead of the ten months that the prior Trustees had accepted only as a compromise of their earlier goal of obtaining full payment from the Club in 8 months under Rupert's leadership (CPT 10706). (Recall that the prior Trustees had constantly tried to move the payments forward to be more equitable with the lot owners who must pay in full by May or they are barred from the Beach). The number of non-lot-owning Club members given Beach access remained an issue (CPT 00450-51). The Trustees relented from the recently firm 250 family limit and allowed the Club up to 258 families (CPT 10703), and (CPT 00449). More rules were then added with a further parking restriction placed on <u>all</u> beach users, Club and lot owners alike, due to overcrowding.

In a May 1999 letter to the Trustees, an aged Mrs. Albrecht who had lived in the Park all her adult life, showed her prescience as she raised her concern that the Clifton Club, one property owner, would now expand its commercial activities to the lot owners' Beach as it received special consideration exempting it from the rules governing all others (CPT 00398). She further wrote that she was not against the Club but objected to "***allowing one Property Owner to gradually take over the place for their own use like the self appointed group did when they put a padlock on the original Beach House***". While the Trustees' response to her avoided her concerns (CPT 00397), the Trustees' conversation between them ironically stated that "***the beach house looks like the summer home of the Clifton Club***" in an email from Trustee Cooper to the other Trustees (CPT 00447).

In June 1999, the Club's approach towards the Trustees took on new aggressiveness with a handwritten letter from the new Club President Mr. Nick Carter in which he accused the Trustees of "***violating Clifton Club's bylaws with the limitation of members using the Beach to 250***" (CPT 00482). The Trustees responded to the multiple points of his threatening letter with a combined position statement and a point by point rebuttal (CPT 00437-8). This defensive response contained the first clear statement of the Trustees' changed position with regard to

the basis upon which they founded their right to request a financial contribution from the Club greater than a proportion of Trust expenses based on the relative value of its 4 lots. Unlike the position of the prior Trustees, there now developed an exclusive reliance on the statement in the Club's deed that it was responsible for a "***proportionate share of the taxes and expenses***" of the Trust rather than the past assertions of prior Trustees that the Club had no inherent Beach rights for its non-lot-owning members and that the Trustees at their sole discretion controlled the number of non-lot-owning Club members allowed to use the Beach and the financial contribution the Club must make for permission for those members to use the Beach (CPT 00437).

This position can immediately be seen as erroneous as it assumes that the Trust gave the Trustees the authority to modify the assessment formulae used to calculate the yearly assessment of any lot owners based on their Beach usage. There was clearly no such authority granted to the Trustees by the Trust.

Additionally, the Trustees' response to the Club's letter from Carter recognized that due to "***significant increased usage of the Beach by all members but in particular the Club members overcrowding has become a serious problem***" (underline added). The Trustees' response continued, adding that "***overcrowding at the Beach is of great concern to the Trustees and the effect that overcrowding has upon the normal operating expenses of the Beach, the reduced enjoyment of those using the Beach [including the lot owner beneficiaries] and the general wear and tear upon the Beach property***" (CPT 00436).

On July 1 1999, essentially the next day, the Club wrote a letter to its members in which Club President Carter restated his complaints against the Trustees similar to what he wrote in the prior handwritten note to the Trustees mentioned above and indicated that "***if the Clifton Park Trustees do not work with us to resolve this issue, the only remaining option is legal. With legal action as a possibility, the Club will not incur any major expenses…..***" (underline added) (CPT 00434). It is telling that the first threat of legal action regarding Beach use by Club members originated from the Club. The minutes of the next Trustee meeting in July contained no mention of this letter or of the issues which had been raised therein relating to the Club's use of the Beach (CPT 10700).

On July 23, 1999, the Trustees met with Club President Carter and Club members Mr. Greg Knittle and Joe Gibbons Esq. to review the Trustee/Club differences (CPT 00433). This apparently lengthy and unproductive meeting was summarized by the participants listing the points the Club made and the opposing position of the Trustees. The Club steadfastly asserted that it should have "***The ability to immediately increase their beach membership from 250 to 350***" and to "***Limit the amount of the assessment [required of] the Club by the Trustees***" (CPT

00433). It also wanted representation on the establishment of the Trustees budget. The meeting apparently ended with the parties acknowledging that "***both parties would do what they had to do***" while discussions would continue.

The Club's files which were eventually produced by the Club for review did not contain any further information surrounding these exchanges in 1999.

According to records produced for review by the Trustees, the foundation of the Trustees' position in relation to their authority to set the contribution of the Club or the number of members allowed on the Beach was now apparently based entirely on interpreting the Club's deed as requiring the Club to pay a "***proportionate obligation***" towards Beach operations and the "***tradition***" of 250 Club members being given Beach privileges. Gone was the prior long-standing and often repeated Trustee assertion that the Trust deed contained only a provision for Beach use by lot owners and their families, not Club members who did not own lots, and that there were no rights for the Club's non-lot-owning members to use the Beach without the Trustees' permission and then only according to the Trustees' terms. This major change in Trust Deed interpretation apparently took place without turning to the Court for any formal legal review and guidance. This same new emphasis on "***proportionate share***" and "***tradition***" is seen from then on, starting with a letter from Mr. George Frank, the Trustees' manager, to Club President Carter in August of that year (CPT 00462).

The phrase that lot owners are responsible for a "***proportionate share of the taxes and expenses***" is present in essentially all the deeds of Clifton Park and establishes the lot owners' obligations to pay the portion of the Trust expenses for maintenance as defined within the Trust deed. Legally, this is the basis upon which the Trustees can exert their demand for the financial contribution as determined by the Trust deed formula for assessments based on relative lot value. There does not appear to be any legal framework within the Trust deed which empowers the Trustees to freely modify a lot owner's assessment based on the use made of the Trust property by any given lot owner while ignoring the Trust formula. Yet this is exactly what the Trustees apparently began to try to do in attempting to manage the Club's contribution according to their new approach.

Later in 1999, Gibbons, representing the Club, met with Trustee Mr. John Macmillan on August 3, to further discuss the unresolved differences between the Trustees and the Club. Gibbons apparently started out stating that both sides had differing views and suggested they should "***meet in the middle***" to which Trustee Macmillan recorded quite appropriately responding that the Trustees had "***moved toward the middle in prior years and that each new [Club] board started discussions with the previous year's compromise as the new starting point***" (CPT 00459). In those discussions, the Club apparently was willing to consider having multiple

membership access classes potentially limiting some members to weekday or alternate day use only. (This would not have changed Beach crowding as Beach users would simply have changed the days on which they made their Beach plans). At the same meeting, Gibbons, who is an attorney, reportedly stated that he had only casually reviewed the relevant documents but that the Club had had all documents reviewed by outside counsel who had advised them the Club's position was solid. Copies of this outside review were not produced for the Plaintiffs to review.

The August 1999 Club newsletter contained Club President Carter's restatement of the Club's position and his perception of the Trustees position (CPT 00423-25). Later in August there followed a meeting between representatives of the Club and the Trustees where very little appears to have been settled and Club President Carter again "***suggested closure of the issues might be achieved with a binding judgment from an outside part***y", yet another threat of legal action against the Trustees initiated by the Club (CPT 00421-22).

There was also a reference in August in which Trustee Cooper asked for any "old" Trust documents in preparation for an upcoming September meeting with the Club. Neither the Trustees nor the Club produced any records or minutes of that key meeting. The minutes of the Trustees' September, October or November meetings in 1999 contained no information on how this issue was resolved although the Trustees increased the D&O insurance coverage for themselves to 5 million in September (CPT 10697), (CPT 10696), and (CPT 10695).

2000's

In January of 2000, the Trustees acquiesced to the Club's request for 5 more Beach users for one year at no additional cost (CPT 10692). Interestingly, in a letter thanking the Trustees for the additional 5 Beach users, the Club also offered the Trustees free personal memberships in the Club beginning in January of that year (CPT 07745). The Trustees appropriately declined the free membership offer (CPT 10691) but instead applied for a paid business membership. See (CPT 10687), (CPT 10685) and (CPT 07737). Detailed justification for this business membership, which was to be used for Trustees' functions and meetings, was not produced (CPT 10685). It was of course paid for by funds collected from lot owners under the Trustees' assessment authority. The cost on application was $395.00 per year (CPT 10695). Recall that the Trust deed specifically limited the Trustees' assessment authority to the expenses of Trust property maintenance. This membership was discontinued nine years later, May 15th of 2009 due to the Trustees' unwillingness to pay a proposed additional Club food minimum monthly charge (CPT 00059).

In a lengthy January 2000 letter from retired trustee Rupert to the currently serving Trustees, Rupert demonstrated his detailed understanding of the Trustees' responsibilities and the issues affecting the Trust property management regarding the use of the Riverfront, a question confronting the Trustees at the time. While this letter makes very interesting reading and clearly shows us the talent by which the Beach was transformed so dramatically into our current beautiful facility during his near three decade tenure, it is a sentence under point three of his letter that is relevant to the current question. Rupert stated that "***arguably rental [of property usage] is a partial conveyance requiring unanimous vote of Park residents***" [sic] (CPT 01522-26). This was essentially the position taken by Quintrell recorded decades earlier. Quintrell, like Rupert, was also a lawyer with a very long history of 23 years of serving as a Trustee (CPT 10943).

Later in 2000, in an undated memo from the Club Directors to the Clifton Park Trustees, the Directors assert that the Club assessment is ***"not in keeping with the formula delineated in the Trust deed"*** and the Directors "***do not recognize the authority of the Trustees to unilaterally make determinations regarding the amount or percentage for the Club to contribute…"***. The Club's directors further state that they ***"believe the language in our deed and the Trustees' Deed is controlling and any additional funds paid by the Club above the formula are voluntary"*** (CliftonClub00496). The Club's Directors also stated their belief that the Trustees could not limit them to 4 families. They claimed that the Trustees were causing them harm with an unjustified Beach access limit of 250. They also stated their belief that all rules initiated by the Trustees had to affect all users equally. The Trustees have not produced their response to this Club memo.

Also in 2000, a campaign to gain new members for the Club began to heavily market the use of the Clifton Beach by Club members with the erroneous phrase "***One half mile sandy protected beach***" among others placed in their brochures (CPT 00386) and (CPT 00389). (The Beach is only about 1000 feet long, about 300 meters and less than one quarter mile according to the Trustees.) Historically the Club was advertised as and represented itself as a social Club. This was how it originally was conceived by its founders and is according to its lease and deed. It now began to heavily advertise its Beach availability through Club membership to a large audience of potential Beach users attracting many new and younger members much more prone to use the Beach heavily.

The minutes of the June 2000 Trustees' meeting indicate that Mr. Knittle, the president of the Club "***wanted to respond to the Trustees' response letter of May 30th"*** (CPT 10685). The Trustees have not produced any of this conversation, neither the response from the Trustees or the letter they responded to. These letters are clearly relevant as they deal with deed documents and therefore alleged Club rights. Despite whatever was being debated, which

neither the Club nor the Trustees produced, the Club's contribution achieved its targeted 40% of the Trustees expenses that year (CPT 10672). (Lot owners paid 50% and Lagoon owners 10% which approximated a 55/45 lot owner/Club split).

In the minutes the Trustees produced for their July 3, 2001 meeting, they note under the topic of the riverfront that "***Greg Knittle from the Clifton Club has sent a letter to the Trustees pledging their support and continued cooperation in these actions***" (CPT 10667). (In the Riverfront lawsuit, the Trustees sued a group of lot owners who were opposed to the Trustees' plan to sell the Trust owned frontage on Rocky River.) Both the Club and the Trustees failed to produce that letter or any other information relating to the topic of that "*pledge of cooperation"*. Information on how and by what process the Club moved from its adversarial interactions with the Trustees one year earlier to pledging *"continued cooperation"* with the Trustees on the riverfront issues has not been produced.

In another short letter to the Trustees which must again be considered a tribute to her clear perspective, Mrs. Albrecht once more wrote the Trustees regarding her perceptions of a yearly meeting in which the Trustees outlined their plan to sell land they owned on the riverfront of Rocky River. She first expressed her frustration "***to find so much time and effort spent in defense of the Trustees' ill-conceived attempt to circumvent the Trust***." adding "***There is no ambiguity about the word "unanimous***"" referring to the Trust language requiring unanimous consent of all lot owners for the Trustees to sell any Trust-owned land. She then reminded the Trustees that it was the "***first responsibility of a Trustee to honor the intent and uphold and implement the provisions of the Trust. If he disagrees with the provisions and terms of the document, he is serving in the wrong place***" (underline added) (CPT 02970). Trustee Crampton's diplomatic response to her avoided addressing the pertinent issue of her objection to the Trustees' attempt to sell land without complying with the terms of the Trust (CPT 02969).

A comment by Club Director Borchert contained within the minutes of the February 2003 minutes of the Club's directors reveals her awareness of the changing character of the people joining the Club. Borchert proposed a $250.00 monthly food minimum to insure use of Club facilities since "***so many people join to get Beach privileges"*** (CliftonClub00041).

In March of 2003, the Club sent out a newsletter to its members which took an entirely novel approach to claiming Beach use rights for the non-lot-owning Club members. The Club stated that ownership of the Beach lay with the Trustees who were "***charged with the duty of maintaining these common areas for the enjoyment of all residents***". They went on to claim that Club members "***are considered residents because they own land in the neighborhood due to their purchase of stock in the Clifton Club***". The absence of any basis for this sudden new claim, which is totally contrary to the history of the Trust in every regard, is further highlighted

by the information on a membership application from that decade which stated that Club membership and the purchase of a share of stock did **not** entitle the purchaser to any ownership of the Club's land or facility (Sup 7).

In 2005, after a number of years in which the Club paid its financial contribution without apparent objections, there was once more an unsuccessful attempt by the Club to reduce its contribution to the Beach. See (CPT 10613) (CPT 07628) (CPT 07634) (CPT 07631-3) (or CliftonClub00047) (CPT 07627) (CPT 07625) (CPT 10612) (CPT 07624) (CPT 07623) and (CPT 07636). All this began with a February letter from then Club President Mr. Tom O'Dougherty to the Trustees which indicated that the Club would not accept the Trustee's budget increase. He again argued that the indirect ownership of the Beach which the lot owners had as exclusive beneficiaries of the Clifton Park Trust contributed to the real estate values of the lot owners in a way that the Club members did not benefit from, therefore justifying that the lot owners should pay a greater share (CPT 07628).

The Trustees' analysis showed that with 250 non-lot-owning members receiving use of the Beach, the Club's Beach use at the time cost the Club $378 per non-lot-owning member compared with the Clifton Park lot owner average of cost of $568 per household for the same privileges (CPT 07634). Emails and letters went around and back and forth. Eventually Trustee President Mr. Charles Drumm exercised the Trustees' authority and told the Guards not to give out Beach stickers to Club members until all of the disagreement was resolved. The Club then reluctantly agreed to the increase and reaffirmed their mutual interests (CPT 07636).

In March of 2009, the Club was found to be two months delinquent in contributions (CPT 00098). The delinquency persisted until October when the Trustees apparently addressed it (CPT 12154). During this time the Trustees renewed the Trust's credit line (CPT 00099-00100).

Despite the acknowledged Beach overcrowding that the Club and the Trustees were aware of, the Club began a year-long membership drive with a 50 % off initiation fee enticement in March of 2009. Some discounts were as high as 80 % off the regular initiation fees. Parents of active members could join with no initiation fees and only a $100 stock purchase (CliftonClub02211). Sponsors for the new members also received a credit on their dues as a reward.

By comparison, in 1902, members apparently not only paid to join but had to buy one share of stock for $200.00 which by inflation adjusting is equivalent to $5,500 in 2014 dollars in addition to having to own stock in the Clifton Park Land and Improvement Company.

2010's

It is interesting to note that in February of 2010, Trustee Mr. John Pyke Jr. Esq. apparently

researched the Trust documents in order to discover the historical precedent of not granting Beach use rights to owners of non-buildable lots or lots upon which there was no residence. The Trustees had decided this shortly after the road was built through Clifton Park. This single piece is deeply buried in Trust history (see 1962 above). The current Trustees then enforced this precedent upon a number of owners of the lot residuals left behind after the eminent domain took the majority of their land for the road through the Park. Despite this document search through the Trust and his research of original documents for a book on the history of Clifton Park, Pyke's response to multiple interrogatory questions asked of him in 2013 was to avoid providing an answer based on a claimed lack of knowledge of Trust history (CPT 06579).

The Club's discount membership program which was started in 2009 naturally led to an exacerbation of the prior overcrowding problem. With this surge of new members, the Club sent a letter to all of its members warning them of the need to behave appropriately while at the Beach and to heed the rules. That letter to the Club's members also expressly added the warning to "***remember that you are a member of a private Club***" (CliftonClub02206). That letter also listed an interesting number of possible future remedies for the crowding problem including possible adoption of "***guest passes, limitations on the number of times a guest can visit the beach, increased fees for maintenance and garbage removal***" among others.

One wonders whatever became of the "***discriminating group which expects and is, I am sure, willing to pay for the type of operation we have tried to maintain***" (CliftonClub01979) that the Club was so proud of in 1957?

Overcrowding again was a topic on the Trustees' minds in their 2010 June meeting when they record that they decided to instruct the guards to strictly enforce the 10 person per table limit (CPT 06524). Beach house rental fees were increased to $150 with a $5 charge for non-members (CPT 06456). Nevertheless, the Club was allowed to expand its business to the Beach by introducing a food cart to deliver orders of Club prepared meals, snacks and beverages to the Club's members at the Beach despite the long standing rule forbidding catering at the picnic tables on the Beach.

The Club finally ended its 50% off program for membership promotion in March of 2011 (CliftonClub02207). That program was to have been for one year only but had been extended to two years during this time when Beach overcrowding was a well-recognized problem.

The "***Conflict of Club facility vs the neighborhood as well as complaints regarding the Club food cart***" were to be topics of the March 2011 Trustee meeting but minutes of that meeting were not produced (CPT 06758). In fact, an entire meeting between the Trustees and the Club took place March 18 of 2011 on the topic of overcrowding according to an agenda provided by the Trustees (CPT 12102). Topics to be discussed included changing (reducing) the picnic table

reservation limit, and establishing a further parking restriction among others. Unfortunately, no other details of that meeting were produced by the Trustees or the Club.

As the busy Beach season of 2011 began to raise the issue of overcrowding even further, a Trustee internal email from Drumm indicated his belief "***that if we attempted to remove or severely limit Beach access to the [Clifton Club] we would probably end up in court with [an] indefensible position***"(CPT 12364). Later that month, an internal Trustee survey showed that about 64% of the Beach usage was from the Club, which paid 40% of the budget. That survey analyzed only the number of table reservations and did not factor in the large size of the Club's groups which included many additional non-member guests (CPT 12446).

Many concerned Clifton Park lot owners and the Trustees were invited to a meeting to discuss overcrowding of the Beach with concerned lot owners at the home of Ms. Constance Mansell in July of 2011. Despite personal invitations no Trustee attended or inquired regarding what the lot owners, the Trust's beneficiaries, discussed at that meeting. (verbal per Ms. Mansell)

A well written summary of the overcrowding problem written by Park lot owner Ms. Mansell in August of 2011 was received by the Trustees but no commentary by the Trustees' on its content was produced (CPT 06687-92). Similarly, there is a marked absence of minutes of meetings (for instance the August meeting between the Trustees and lot owners at the Beach on overcrowding), Trustee meetings, conversations and emails and other communications relevant to the Trustees' management of the erupting overcrowding issue prior to the initiation of the current legal action. The single out of context email from Club President Mr. Jeff Weber to Trustee Mr. Woody Hall would seem to indicate there is an entire email trail not produced (CPT 12099). If that email is representative of the pattern of communication, there must be many email trails not produced.

Some revealing relatively contemporary documents were however produced. The final notes in preparation for the 2011 fall town hall meeting are one example. These notes interestingly include multiple misstatements of Trust history (CPT 06663-6). For instance, in the section given by Pyke (section b. subsection iv.) he stated that the "***anecdotal evidence that Clifton Club members by virtue of their membership have always access to the Beach. For 109 years, Club members have enjoyed Beach privileges. They are not guests***" [sic] and in subsection vi. "***These negotiated amounts reflect the fact that the Club <u>members</u> had been granted Beach privileges and therefore the Club should pay a disproportionate amount of the annual costs of maintaining the common property***" [sic] (CPT 06664). Neither the Trustees' nor the Club's documents which were produced for review support these statements.

This new concept of the "proportionate contribution" as the authority upon which to base the Club contribution is not found in the Trust history prior to 1999. It is a new concept upon which

to base the Club's increased contribution. If that concept of lot assessment based on proportionate Beach use by a lot owner were valid, a household with no children would pay less than a household full of children. The Trust however, clearly states that the assessment proportion is based on relative property values as a fraction of the total assessable property values of the land of Clifton Park and grants the Trustees no authority to consider the proportional usage of any particular lot owner in determining the assessment.

The fall 2011 town hall meeting was attended by over 100 concerned lot owners who discussed the overcrowding and made many questions on how it could be addressed while preserving the use of the Beach for the lot owners, the Trust's beneficiaries. The Trustees sadly did not follow the suggestions favored by the majority of the Clifton Park lot owners (Trust beneficiaries) who attended that fall 2011 Town Hall meeting.

An email response from Trustee Ms. Crampton to a lot owner on September 20th of that year shows that the decision to impose more restrictive rules on all users was already essentially a fait accompli in her mind the day after the 2011 fall meeting with the many concerned lot owners (CPT 12482). It is also interesting to note some of the material contained in the email she responded to.

In the email Crampton was responding to, Mr. Joe Kerrigan suggested that the voices of those more than 100 concerned lot owners present at the September meeting were not representative of the underlying Park sentiment and that those present did not understand ***"the bigger picture".*** The Trustees' later letters to the lot owners and the Club members appear to echo that view, characterizing the concerned lot owners as a small poorly informed minority.

Kerrigan also interestingly raised the possibility that the Club had simply outlived its purpose and ought to take a serious look at its own future (CPT 12482). He finished that email with a pledge of support for the Trustees ***"Whatever you want from me to help you, please DO NOT HESITATE to ask. I don't mind contributing in any capacity. I can be a voice ….. I can volunteer time to organize whatever you need."***

Interestingly, some differences in opinion among the Trustees apparently eventually developed on the potential direction they might take as a result of the lot owner input from that fall 2011 meeting which is referenced in emails (CPT 12468-9) (CPT 12502) and the subsequent September 30 Trustee meeting (CPT 12241). These were categorized in the minutes of that meeting as "***changes in the CPT relationship with the Clifton Club and operating procedures and rule changes***" [sic]. The rule changes unfortunately prevailed.

Again, although much data has clearly not been produced relating to Trustee and Club Director meetings, emails and communications in the fall of 2011, we were nevertheless provided with

some further interesting insights. For instance, the Club clearly stated its erroneous then current belief that "***Since 1902 Members of the Clifton Club have shared and continue to share <u>equal rights</u> with the Park residents relative to access and use of Clifton Beach***" (underline added) in a letter written to the Trustees in October of 2011 which summarized the position of the Club regarding corrective actions which should be taken with respect to Beach crowding (CliftonClub00027-29). Many suggestions made by the Club were incorporated into the Trustees' rule changes. This is in contrast to the Trustees' near total lack of incorporation of any of the suggestions made nearly unanimously by the lot owners who they supposedly are to serve. In fact, except for limiting the Club to 40% of the picnic tables, the Trustees did not incorporate any of the lot owners' suggestions made in the 2011 town hall meeting on overcrowding and appear to have followed the Club's suggestions.

On November first of 2011, Trustee President Hall wrote the Club informing them of the intent of the Trustees to rely on an expanded rule-making mandate to limit Club Beach use to 40 % of the picnic table reservations on any given day and advised that the Trustees would give the Club a draft of the Trustees' intended rules, presumably for comment (CliftonClub00022). No such consideration for early comment was afforded to the lot owners.

The Trustees followed this with a November 22nd letter to the Club which opened with thanking the Club for its "willingness to engage in discussions regarding beach use" (CliftonClub00020-21). There were no copies of the content of those discussions produced by either party. Interestingly, the Trustees emphasized that these new rules did not limit Beach use by the Club, but were only *"rules to regulate picnic table use",* effectively avoiding the issue of whether the Trustees had the authority to limit the Club's Beach use by its non-lot-owning members in a more global sense. The Trustees' willingness to discuss their proposed draft with the Club stands in contrast to their absence of willingness to discuss their proposals with the lot owners.

On December 1 of 2011, after receiving a copy of the new rules, the Club responded to the Trustees with a threatening legal letter which they copied to a lawyer, Thomas W. Baker Esq. of Tucker Ellis West LLP, who was a Club member but not the Club's General Counsel. The Club stated that "***the Park Trustees have breached their fiduciary responsibility***" and pointed out that the Trustees had been **forewarned** of the "***catastrophic impact disparate restrictions***" would have on the Club. (This warning must have occurred in some form of the dialogue not produced for review by the Plaintiffs) (CliftonClub00001). The Club further warned the Trustees regarding any "***further discriminatory actions***" (CliftonClub00002). This threatening letter was not openly copied to Gibbons who had been acting as Club Counsel in the past, and who was particularly familiar with the issues of the Club's Beach use rights from his extensive prior involvement. Instead, the letter was now only copied to Baker.

Concerned Lot Owner Interactions with the Trustees

The Trustees produced no meeting minutes of their December 9, 2011 meeting between the four Trustees, Hall, Pyke, Crampton and Kuhn, and the lot owners Dennis Butler, Esq., Michael Polito, Esq., Ms. Rhonda Loje and Dr. Arthur Dueck held at the Yacht Club. They also produced no copies of pre-meeting or post-meeting information exchanges, regarding the meeting. The Trustees clearly had prepared for the meeting as they arrived with a "newly uncovered" Club Lease and the Club's land purchase deed which they stated they believed might give the Club Beach use rights for its members, lot owners and non-lot owners alike. (In response to prior public questioning they had only admitted to a vague longstanding yearly handshake agreement. Additionally, Trustee Hall had publically explained that the Club's members were all beneficiaries of the Trust along with the Lagoon owners.)

This sudden, "*discovery*" of the Club's Lease and the Club's Deed in the scenario of prior claimed lack of knowledge, and the fact that 3 of the 4 Trustees present specifically affirmed that they were uncertain if they as Trustees had any authority to limit the number of Club members who were allowed to use the Beach, lead to the lot owner group ending that meeting. (The fourth Trustee was not asked the question regarding what he understood was the Trustees' authority to limit the number of Club members given Beach use).

At this point, it seems of value to assemble a few bits of information together for consideration. The Trustees produced 4 emails written between them in the summer and fall of 2011, all of which apparently showed that at the time, these 4 Trustees were favoring placing some specific restrictions on Club usage of the Beach. Those possibilities included some items requested by the concerned lot owners such as fewer parking passes for Club members, limiting the number of Club member guests and specific guest fees for Club members (CPT 12465) (12501) (CPT 12505) (CPT 12468).

However, by a meeting the Trustees had with a group of concerned lot owners at the Yacht Club on December 9, 2011, the Trustees had changed their views and appeared unable to answer questions regarding what specific restrictions they could impose on the Club stating that they were unsure of whether they had any right to restrict the non-lot-owning Club members from using Clifton Beach, as well as claiming to have newly discovered the Club's 1902 lease and 1912 deed. The Trustees also repeatedly referenced their concerns regarding being sued by the Club in that meeting.

While the Plaintiffs were not given any information on when or how the Club's lease was

rediscovered, the change in the Trustees' approach to resolving the Beach crowding seems to have occurred around or after the December 1, 2011 threatening letter from the Club. Although not originally produced as part of the over 12,000 pages of documents produced by the Trustees, a placating letter from the Park Trustees to the Club on December 9, 2011, was found within emails more recently produced (this letter is dated the same day as the meeting between the Trustees and the concerned lot owners at the Yacht Club) (CPT 12539-10). In that letter, the Trustees "***acknowledge that the Club has deeded rights to use the Beach***" and add that they have publically acknowledged the same in their letter to all their constituents in a letter which they enclosed dated December 8, 2012. The Trustees go on in the 4th paragraph of that December 9th letter to write "***Turning to the "discrimination" issues you raise in your letter***" [sic] indicating that this letter from the Trustees to the Club is in response to the December 1, 2011 threatening letter the Trustees had received from the Club.

It is now clear why that meeting between the concerned lot owners and the Trustees at the Yacht Club on December 9, 2011 was a failure. The Trustees had already changed their position back in favor of the Club's interest after the Club made its threats. Considering all the information that has emerged, it would seem that the Trustees fell far short of their legal obligation to keep the concerned lot owners (their beneficiaries) sufficiently informed of the Trustees' activities to allow the lot owners to protect their interests, either during or following their meeting with the concerned lot owners at the Yacht Club on December 9, 2011.

In the clarity of hindsight, the threatening letter of December 1st from the Club may have been responsible for some of the Trustees' evasiveness and unwillingness to be forthright in their conversation with the concerned lot owners which took place during the meeting at the Yacht Club. Ironically, the Trustees had already prepared a public rebuke of the lot owners' concerns the day before that meeting (CliftonClub00012-13). That Trustee letter to all lot owners and Club members publically berated the concerns of the lot owners.

Moving forward, we note that the brevity of the fall 2011 Trustee meeting minutes is uncharacteristic. These minutes also use alternative fonts and formats compared to other prior minutes. See (CPT 12241), (CPT 06642) and (or CPT 06639). A return to the usual font and format is present in the minutes of December, 2011 (CPT 12148).

On December 15, 2011, the Trustees eventually sent a more detailed written letter to all lot owners, Lagoon Residents and Clifton Club Members providing them with a summary of the Trustees' position in addition to distorting the Plaintiffs' concerns (CPT 06622-06626). Although the Trustees were aware that the question was whether "non-lot-owning Club members" had Beach rights, not the "Club" as a single lot owner, this lengthy attempt to discredit the concerned lot owners misrepresented the lot owners' issue as only involving the Club as a lot

owner.

The language in item “e.” of that Trustee letter is also opposite to what is actually found in the Trust’s historical documents (as one example, see Hartford letter to Sessions (CPT 01257-9)). Furthermore, in item “h.” of their letter to all lot owners, Lagoon residents and Clifton Club Members, the Trustees indicated they considered the Club’s members to be beneficiaries of the Trust. This appears to be the first time the Trustees claimed the Club’s members were beneficiaries of the Trust.

On February 2, 2012, lot owners Butler and Dueck met with Trustees Drumm and Hall at Michael’s restaurant to discuss how to move forward to a resolution of the question of Beach use rights of the non-lot-owning Club members. A summary of that meeting, provided to the Trustees by Dueck was produced by the Trustees (CPT12121-2). It outlined the contents of the meeting in which Butler explained the need for a judicial review of the question of beneficial rights to the Beach and asked the Trustees to join the lot owners in seeking a judicial clarification of whether the Clubs’ non-lot-owning members had beneficial rights to use the Beach. (recall that the Trustees on December 9th, 2011, had stated that they had no clear understanding of the non-lot-owning Club member rights to Beach use or their rights as Trustees to limit the number of non-lot-owning Club members allowed to use the Beach.)

The Trustees produced none of minutes of their subsequent discussions of that meeting.

On a separate and related topic, Trustee Pyke Jr., a history buff whose father was also once a Clifton Park Trustee, apparently wrote his summary of the “History of the Club’s Beach Privileges” for the Trustees’ use in mid-February of 2012, with a preamble admitting he did not have the benefit of the full Trust documents available to review as they were being scanned (CPT 12082-3). That account contained numerous inaccuracies.

The February Trustee minutes of 2012 indicate that Trustee Pyke planned to approach a number of potential Law firms for the Trustees (CPT 12176). Ulmer & Berne was chosen and Pyke has been the primary Trustee in communication with them. Lawyers from that firm and two Trustees met with concerned lot owners at the law offices of Michael Polito Esq. in March of 2012. The Ulmer attorneys presented their view that the Club’s members all had unrestricted Beach use rights. Upon discussion, those attorneys did not respond to the questions of the concerned lot owners regarding how that opinion could be consistent with certain deed and Trust issues nor did they address the previously published lot owner concerns available on the lot owner’s website at Cliftonparkpreservation.com.

Some of the concerned lot owners wrote to the Trustees demanding a copy of the Ulmer opinion on April 27, 2012 in order to better understand it but were denied a copy of the opinion

by the Trustees. On May 4, 2012 Trustee Pyke responded to that request with an email to Dueck and others. Pyke wrote that "***legal counsel concluded that the Clifton Club and its members are entitled to access the beach pursuant to the 1912 Trust Deed and the Clifton Club deed. <u>This conclusion is not based on any internal documents in the Trustees' records</u>***."(underline added) (SUP 9). In other words, the Plaintiffs take it that Pyke, who was and is the liaison with the attorneys, stated that the Ulmer attorneys did not review any of the past history of the prior Trustees' management of the non-lot-owning Club members' use of the Beach before concluding in their brief that their opinion was consistent with the past century of Trust management. Parenthetically, the letter demanding a copy of the opinion and the email response from Pyke which is referenced above were not produced by the Trustees and were only obtained from the Plaintiffs' files.

Pyke went on to claim that "***Counsel's conclusion is consistent with the interpretation of those two legal documents made by the current Trustees and <u>their predecessors over the century of their existence</u>***"(underline added). As we can see, although counsel's view was certainly consistent with the current Trustees' practices, and with Pyke's view of the history of the Clifton Club's non-lot-owning members' use of the Beach, it was in no way consistent with the past history of the management of the Clifton Park Trust. That claim is entirely incorrect and cannot be supported by any review of the produced documents either from the Trustees or the Club, of the past history of the management of the Clifton Park Trust.

As the historical documents produced by the Trustees and the Club show that the prior Trustees and the Club interacted based on exactly the opposite understanding which was that the Club's non-lot-owning members had no Beach use rights, it is of interest to list the rare prior occurrences of opinions similar to Ulmer's. Such an opposing view to the Trustees' historical interpretation was first seen in a letter from Sessions to Pyke Sr. in 1963 after Pyke Sr. resigned as a Trustee and was working instead on behalf of the Club in negotiations against the Clifton Park Trustees (CliftonClub00504-6). It was again seen as a basis of the renewed efforts of the Club to establish unrestricted beach use rights under Club President Carter in 1999. It was the Club view that Gibbons referred to in his discussions with Trustee Macmillan in 1999. And it is the view expounded by Pyke Jr. (who negotiated on behalf of the Club as its president in 1979 and 1980) in his memo on that topic in February of 2012 to the other Trustees, just prior to his asking Ulmer & Berne for their review of that issue (CPT 12082-3).

Upon comparing the Pyke memos to the Ulmer & Berne opinion, many of the so called "facts" in the Pyke memos appear to have become foundational in that opinion.

Obtaining the official confirmation of the extent of communication and apparently limited document review underlying the original Ulmer & Berne opinion given to the Trustees in the

spring of 2012, is the object of the most recent set of motions currently before the Judge to rule on. The Ulmer opinion is not a part of this litigation, was obtained as a separate engagement, and was eventually published on the Internet as a justification for the Trustees' changed view of the rights of non-lot-owning Club members. All of the beneficiaries therefore are entitled to know all of the details of how it was arrived at in order to protect their rights.

On March 31, 2012, after being told of the Ulmer opinion, Arthur Dueck also wrote an e-mail to Chuck Drumm, the President of the Trustees, offering to pay one half of the cost of obtaining an *"independent"* legal opinion on the Trust interpretation issues that the lot owners had raised regarding the legal basis of the non-lot-owning Club members' use of the Beach. That email stressed the need for a "***neutral and complete review and analysis"*** of the issues from a "***distinguished and recognized expert***".

The concerned lot owners had already verbalized in March at the meeting with the Trustees and the Ulmer & Berne attorneys, that the opinion as represented by the attorneys that day seemed to be simply the formulation of a defense of the Trustees' position at the time rather than an independent detailed review.

Trustee President Drumm declined the offer to partake in obtaining such a third party expert opinion indicating that he felt the Ulmer & Berne opinion was adequate. A copy of that email exchange was again not produced by the Trustees but was obtained from the Plaintiffs' records. (Sup 12)

Following the meeting of all lot owners in April of 2012, Rupert arranged a meeting between himself, Dueck and two of the Trustees. In that meeting, the Trustees (all 5 appeared) made it clear that they would no longer respond to any communication from the concerned lot owners and that if there were any issues to resolve, the lot owners should take them to the court. The Plaintiffs, upon hearing of that meeting, proceeded to retain legal counsel to protect their interests and to address their concerns over their loss of beneficial rights.

Members of the Club board of directors met in May of 2012 and after discussion of the potential legal action, apparently identified Park lot owner Dueck as meriting a "***cease and desist letter***" which was to be sent to him by the Club's legal team (CliftonClub02247). The Club's leadership apparently failed to recognize the broad extent of the concerns developing among the lot owners over the issue of the Club's Beach use by its non-lot-owning members and preferred to focus on single individuals. That letter was apparently never sent.

In May on the 26th, Club President Jeff Weber responded to a brief email from Dueck regarding a meeting between the two of them with a two page position paper (CliftonClub00003-4). That response was blind copied to all the Trustees, the Club's attorneys and the Club's board. In fact,

the Park Trustees' email addresses ranked ahead of those of the Club's board of directors on that emailing. That email exchange shows how closely the Club and the Trustees are aligned.

The minutes of the Club's annual members' meeting of 2012 contained a public restatement of its position and added nothing new to the information already available (CliftonClub00043-6).

Information beyond this point was not produced by either the Club or the Trustees.

Conclusion

The facts of how the Trustees historically managed the Beach use of the non-lot-owning Clifton Club members over the past 80 or more years have been presented based on reviewing and assembling the over 30,000 unorganized pages produced by the Trustees and the Club. The key findings are the following.

The sale of any lot within Clifton Park for the purpose of a Club was restricted to a Club for the use of the lot owners in the initial deed of the Clifton Park Land And Improvement Company in 1899.

The Club originally was incorporated on land leased for 20 years for $1 per year in 1902 with stock for 125 shares. The number of shares was later increased in 1905. The 1902 Club Lease mentions no membership numbers. The Club purchased its land within Clifton Park from the Clifton Park Land And Improvement Company presumably complying with the 1899 CPLIC deed which restricts it to be a Club for use of the lot owners in order for the Club to be allowed to own land within Clifton Park.

Clifton Park lot owners' concerns regarding the Club's non-lot-owning members' use of the Beach appear to date back to at least 1942 when records first become available. No records prior to that time were provided to the Plaintiffs for review.

The Club had concerns about its right to rebuild within the Park and its members' Beach rights at least as early as 1942.

The Club for its entire history has been trying to gain more Beach use and pay less, often forgetting or not abiding by its previous agreements.

Historically, the Trustees abided by the Trust which instructed them to maintain the Beach for the use and enjoyment of the lot owners and their households. Over the years, they repeatedly informed the Club that the non-lot-owning members of the Clifton Club were not mentioned in

the Trust Deed and had not been given Beach use rights.

The Trustees repeatedly were forced to apprise the Club's annually or bi-annually elected new leaders of the absence of other than a permissive basis for their non-lot-owning members to use the Beach.

The current Trustees have adopted a new interpretation of the Trust Deed sometime after 1999 which abandoned the prior Trustees' historical position that the Trust Deed was the primary controlling document and that its absence of permission for the Club's non-lot-owning members to use the Beach was determinant.

Although the Club was publically established in the form of a social club, it was intentionally incorporated as a "for profit" business with a clear business model including the sale of controlling stock. It is still a business now based on selling access to the Trust-owned Clifton Beach and much less on its merits as a social club. The Club has repeatedly asserted that without the profit from its sale of access to the Beach it could not survive on its social club merits.

The Trustees supported the Club during its many years of financial hard times by reducing its requisite contribution to Beach expenses in addition to historically calculating the Club's financial contribution on only a reduced portion of the Trust's expenses. As such, the Park lot owners indirectly financed the Club. During those years the Club's members were primarily elderly, often prior Park lot owners who had downsized and moved out of their large Park homes, leaving the Park. Now the Club's membership drive, focusing on selling its Beach access has resulted in a dramatic demographic shift. In 2012, Club members brought with them to the Beach approximately 386 children (and friends). By comparison, the lot owners contributed only about 130 children.

The Plaintiffs' concerns that the Club is trying to gain a non-regulatable right to Beach access for its non-lot-owning members as beneficiaries of the Trust while paying only the Club's 4 lot assessment are validated by the history of the Club's activities present in the history of the Trust. This poses a real and serious danger for all of the lot owners of Clifton Park.

Numerous efforts were made by the Plaintiffs to resolve this conflict amicably. All of these efforts were initiated by the Plaintiffs and included discussions with the Trustees, the Directors of the Club and the associated counsel. The Plaintiffs appealed to both the Trustees and the Club to return to the historical terms under which the Trust was managed. Those terms were based on the fact that the Club's non-lot-owning members were given no Beach use rights under the Trust and only used the Beach by permission, for a fee set by the Trustees and in a manner controlled entirely by the Trustees that was aligned with the Trustees' responsibility to

maintain the Beach for the sole use and enjoyment of the lot owners of Clifton Park and their households.

Legal proceedings were only begun after all of the Plaintiffs' efforts were met with an outright and persistent refusal by the Trustees and the Club to return to the historical and well established terms of the Trust.

The Plaintiffs' request for the court to clarify their question regarding the beneficial rights of the non-lot-owning Club members which is at the root of their concerns was filed on June 6, 2012 naming only the Club as defendant. The Plaintiffs felt this simple approach would most effectively lead to a quick resolution as the question is simply a legal issue for the court to address. Unfortunately, both the Club (which argued that all lot owners must be parties to the lawsuit) and the Trustees (who moved to intervene in the case and inserted themselves on the Club's side) did not agree with that simple straight-forward approach to resolving this issue.

The original Ulmer & Berne opinion which supports the Trustees yielding to the Club's view that it has rights for all of its members to use the Beach, affects all lot owners in Clifton Park and all information on how it was arrived at is needed in order for the lot owners to protect their interests as beneficiaries of the Trust.

As a response to being named in this legal action, many of the lot owners wrote that they wished the court to protect their interests [in the Trust]. Although the Plaintiffs' attorney can only represent the Plaintiffs, that is exactly what the Plaintiffs are seeking to accomplish by their legal action: protecting the interests of all of the lot owners with respect to the rights given to all lot owners within the Clifton Park Trust.

It is hoped that this summary of the information found in the documents produced by the Club and by the Trustees serves to clarify the facts and replaces some of the broad-brush misrepresentations which have been circulating. As always, we can only summarize that which we were given to review. We would welcome additional information from any source.

Arthur Dueck MD and Ms. Rhonda Loje

For The Plaintiffs

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