STATE OF VERMONT

SUPERIOR COURT Windham Unit	CIVIL DIVISION Docket No. 426-11-19Wmcv
JOHN F. RAWLEY, JANE E. RAWLEY, MARIA SHIK, TRUSTEE, STEVE McCARROLL, ANNIKA MALMBERG, GREG WILSON, and MARK WOJTKIEWICZ, Plaintiffs, v. NICHOLAS HEYMANN, BIBIANA HEYMANN, CATHRYN ABBOTT, and VICTOR BAISLEY, Defendants.	

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT
(Motion Nos. 6, 11, 12)

Plaintiffs and Defendants own properties located in Dummerston or Brookline, Vermont. They access their parcels by a privately maintained cul-de-sac known as Purple Mountain Road (hereinafter also referred to as "the Road").

Although all parties recognize that they have an obligation to contribute some portion of the costs associated with maintenance of their shared private right of way, Plaintiffs and Defendants disagree as to how those costs should be allocated. Pursuant to 12 V.S.A. § 4712, the Plaintiffs seek a declaratory judgment which defines the parties' obligations to contribute to the costs of maintaining Purple Mountain Road. Both Plaintiffs and Defendants have filed cross motions for summary judgment in which they, *inter alia*, set forth their understandings of what it means to contribute a "proportionate" share of maintenance costs.

Plaintiffs argue that owners of parcels accessed by the Road should contribute based upon some "percentage of distance traveled from public road to access provided by their driveways." *See* Complaint for Declaratory Judgment (filed Nov. 27, 2019) at ¶ 17. By contrast, the Defendants maintain that parcel owners should divide costs equally. *See, e.g.,* Defendants Abbot and Baisley's Cross Motion for Summary Judgment (filed Aug. 2, 2022). Upon consideration of the parties'

submissions, and for the reasons set forth below, Plaintiffs' Motion for Summary Judgment is *denied*, and Defendants' Motions for Summary Judgment are *granted*.

I. Background

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a). The court may enter summary judgment when, "after adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an element essential to [his or] her case and upon which [he or] she has the burden of proof." *Gallipo v. City of Rutland*, 2005 VT 83, ¶ 13, 178 Vt. 244.

When determining whether there is a disputed issue of material fact, a court must afford the party opposing summary judgment the benefit of all reasonable doubts and inferences. *Carr v. Peerless Insurance Co.*, 168 Vt. 465, 476, 724 A.2d 454 (1998). However, a non-moving party cannot rely on unsupported generalities or speculation to defeat a properly supported motion for summary judgment. *See* V.R.C.P. 56 (c), (e). Conclusory allegations without facts to support them do not preclude the entry of summary judgment. *Robertson v. Mylan Laboratories, Inc.*, 2004 VT 15, ¶15, 176 Vt. 356; *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) ("If the evidence is merely colorable, . . . or is not significantly probative, . . ., summary judgment may be granted.") (citations omitted). An opposing party's allegations must be supported by affidavits or other documentary materials which show specific facts sufficient to justify submitting that party's claims to a factfinder. *See Robertson*, 2004 VT 15, ¶15; *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25, 676 A.2d 774 (1996).

The salient facts are undisputed and straightforward. *See generally* Plaintiffs' Statement of Undisputed Material Facts (filed June 27, 2022); Heymanns' Response to Plaintiff's Statement of Undisputed Material Facts (filed Aug 2, 2022); Abbott's and Baisley's Response to Plaintiff's Statement of Undisputed Material Facts (filed Aug. 2, 2022). Purple Mountain Road is a privately maintained right-of-way located in the towns of Dummerston and Brookline. The Road currently is 50 feet wide and extends 3,790 feet to a dead end terminus which permits access to Defendants' two properties, one parcel owned by Nicholas and Bibiana Heyman and one owned by Cathryn Abbott and Victor Baisley. *See, e.g.* Exhibit A (filed Aug. 2, 2022) (Road map). All Plaintiffs and Defendants use the Road to access their properties, and their deeds contain a grant of such use. *See, e.g.*, Complaint at ¶¶ 2, 5; *see also* Abbott/ Baisley Answer (filed Dec. 18, 2019)

(admitting Complaint ¶¶2 and 5) and Heymann Defendants' Answer (filed Jan. 21, 2020) (same).

Collectively, the named Plaintiffs and Defendants represent the seven lot owners whose parcels are accessed via the Road. At this time, there is no written road maintenance agreement that binds all the parties to this suit, that is, those who access their parcels via Purple Mountain Road. *See* Plaintiffs' Statement at ¶ 15 (asserting "no present ...agreement that binds all Lot owners"; Heymanns' Response at ¶ 15 (responding "Undisputed"); Abbott/Baisley Response at ¶ 15 ("Not Disputed that the 2012 Recorded Agreement was not signed ....").

Historically, most property owners have contributed some percentage of the costs to maintain and repair the Road. In their submissions, the parties have offered affidavits and other calculations which show that, over the years, the parties to this suit, or their predecessors in interest, have computed and contributed to the costs of maintaining the Road in several ways. For example, in 2012, some, but not all, owners executed and filed in the land records a "Road Maintenance Agreement," purporting to have all those using the Road share costs and expenses equally. *See* Exhibit E (filed Aug. 2, 2022) at p. 1200521 ("The Owners hereby agree to share equally the costs of such maintenance and repair pro rata based upon the number of lots owned, regardless of the size of any particular lot or distance traveled over the road. Each lot shall be assessed an equal amount."). As a result, it appears that some owners contributed equally. Others, however, have cited (1) either that their parcels are a shorter distance from the public highway than owners whose parcels are at the end of the cul-de-sac, or (2) the notion that they make minimal use of the Road as compared to other parcel owners, and therefore have offered to pay some amount less than an equal, one seventh share of the total cost. *See, e.g.,* Heymanns' Statement of Undisputed Material Facts (filed Aug. 2, 2022) at ¶¶ 19 *et seq.* (offering details such as number of days certain owners reside at their property at ¶ 28, and the "correct allocation of costs for plowing based on all distances calculated from the start of Purple Mountain Road to Each landowner's driveway" at ¶ 32).

While the parties all recognize that they have an obligation to contribute, their current dispute centers on the meaning or impact each side ascribes to following phrase, found in most, but not all property owners' deeds: The owner "will bear [his, her, or their] proportionate share of the repair and maintenance of the road ...." *See, e.g.* Plaintiffs' Motion for Summary Judgment (filed June 13, 2022) at 6-7; Heymanns' Memorandum in Support of Cross Motion for Summary Judgment (filed Aug. 2, 2022) at 7; *see also* Warranty Deeds (filed June 13, 2022) and Heymanns' Statement of Undisputed Material Facts at ¶ 31 (Abbott/Baisley deed does not contain proportionate language); Plaintiff's Response to Heymanns' Statement at ¶ 31 ("Undisputed that the first Deed conveyed out of development did not contain a maintenance provision."). As one would expect, each side urges a

meaning for "proportionate" that would result in their smaller required contribution: The Plaintiffs, whose parcels are closest to public road, urge that "proportionate" should be tied to Road use and the distance of their driveways from the main public road, while the Defendants, whose parcels are at the end of the cul-de-sac, believe "proportionate" requires all who own a parcel on the Road to share costs equally instead of being tied to use or distance from the public road access.

II. Discussion

Plaintiffs request a declaratory judgment in which the Court holds "that Proportionate shall mean the percentage of distance traveled from a public road to the access provided by their driveways." *See* Complaint at ¶ 17. Defendants, who have not filed counterclaims, urge the Court to deny Plaintiffs' motion for summary judgment and to "develop an equitable cost sharing formula and method for resolving disputes about what level of maintenance is necessary," presumably meaning a formula which requires contributions assessed equally among property owners, as opposed to assessments linked to a parcel distance from the public road. *See* Defendants Abbott and Baisley's Answer at 2; *accord* Defendants Nicholas and Bibiana Hamann's' Answer (filed Jan. 21, 2020) at 2; *see also* Heymann Defendants' Memorandum in Support of Cross Motion for Summary Judgment (filed Aug. 2, 2022) at 2 ("Defendants are seeking a Road Agreement that provides equal payment by each property owner who has a developed lot ...").

The Vermont Supreme Court "has long recognized the equitable principle that when several persons enjoy a common benefit, all must contribute rateably to the discharge of the burdens incident to the existence of the benefit." *Hubbard v. Bolieau*, 144 Vt. 373, 375, 477 A.2d 972 (1984) (citations and quotation marks omitted). "The obligation to contribute applies in the absence of an express agreement . . . its purpose being to prevent unjust enrichment." *Id.* at 375-76 (citation omitted).

As related to private roadways, the Vermont legislature has reiterated this equitable principle. Title 19 V.S.A. § 2701 provides:

> The intent of this chapter is to state the responsibilities for the maintenance of a private road, in the absence of an express agreement or requirement governing such maintenance responsibilities, in accordance with the Vermont Supreme Court decision of *Hubbard v. Bolieau*, 144 Vt. 373 (1984), which draws upon established principles of Vermont law. This chapter will only apply to resolve conflicts regarding maintenance of private roads in the absence of an express agreement or requirement. The provisions of this

chapter are not intended to abridge, enlarge, or modify any right provided under *Hubbard* and the common law of Vermont.

In addition, 19 V.S.A. § 2702 states:

> In the absence of an express agreement or requirement governing maintenance of a private road, when more than one person enjoys a common benefit from a private road, each person shall contribute rateably to the cost of maintaining the private road, and shall have the right to bring a civil action to enforce the requirement of this section.

In this case, there is no operative express agreement governing maintenance of the Road. *Cf.* Black's Law Dictionary 344, "express contract" (8th ed. 2004) ("A contract whose terms the parties have explicitly set out."). In the absence of such agreement, § 2702 requires "each person to contribute rateably." In common usage, something "rateable" is "made or calculated according to a proportionate rate" or "pro rata." *See* "Ratable." *Merriam-Webster.com Dictionary*, merriam-webster.com; accessed Dec. 1, 2022. Thus, requiring a "rateable" contribution is virtually the same as indicating that some proportion of contribution must be computed.

The parties' focus on the meaning of "proportionate" is not that helpful in this case. Contrary to the parties' assertions, indicating that contributions must be proportionate does not resolve what such proportion might be. As Judge Teachout has observed, "rateable" as used in 19 V.S.A. § 2702, "does not necessarily mean proportionate **to** use" but instead is dependent upon the particular circumstances. *Perkinson v. Perry*, 2014 WL 10321331, *5 (Vt. Super. Dec. 18, 2014 (Teachout, J.) (emphasis in original). "Thus, even if 19 V.S.A. § 2702 were the sole source of guidance, there would still be an issue as to whether 'proportionate' (rateable) contributions should be proportionate to use or to the number of lots served or to the number of developed lots or to some other measure." *Id.*

On at least two occasions, this Court has declined the invitation to employ one's asserted use of a private roadway as the measure for determining a rateable share under § 2701 and § 2702. In *Khan v. Alpine Haven Property Owners Association, Inc.*, No. 186-5-11 Frcv, Ruling on Cross-Motions for Summary Judgment (Vt. Super. Jan. 25, 2019), *aff'd*, 2020 VT 90, 245 A.3d 1234, Judge Mello considered the basis for calculating road maintenance and other fees from property owners in the Alpine Haven development. Specifically addressing the argument that lot owners in the development were entitled to only pay for maintenance of the development's network of private roads in proportion to their use of such roads, Judge Mello explained:

Construed together, the deeds and applicable statutes indicate that the Large Lot owners must pay for their use of and access to the overall Alpine Haven road network. The gravamen of the Plaintiff's complaint, as related to their Large Lots, is that they should not be required to pay maintenance fees for all the Alpine Haven developments' private roadways when they only use a portion of their granted right of way. In the present case, this argument is not well-taken.

Where, as here, Plaintiffs knowingly have purchased property located in a private development with a network of roads and have been granted common access and benefit from those roads, they are required under §§ 2701 and 2702 to contribute ratably to the maintenance of those roads. ... As the Supreme Court has observed, an equitable obligation to contribute based on the use of the road, or the use of certain services, is not the same as a servitude that obligates a homeowner to pay regardless of use. ...

Even though it may not be a legally recognizable common interest community, Alpine Haven, as a practical matter, operates as one unified development for the purpose of providing a means to access Plaintiffs' properties.... The Plaintiffs have the continuing right to utilize that access at any time. ... That access enhances private and commercial access to their properties, as well as future development possibilities. ... As compared to land-locked parcels, the existence of their access rights adds value and potential benefit to that property whether or not Plaintiffs decide to use some of all of the roads. ...

Khan, No. 186-5-11 Frcv, slip op. at 5-6 (citations and quotation marks omitted).

On appeal, the Supreme Court specifically affirmed this reasoning:

We note that it would be impossible for AHPOA [the property owner's association] to know which roads plaintiffs used and to charge them accordingly. Plaintiffs have the right to use all of the roads and it is reasonable and equitable for them to contribute toward their upkeep whether they use them or not. We find no basis to disturb the court's decision.

2020 VT 90, ¶ 40.

Similarly, *Moyer v. Poon*, No. 82-5-18 Ancv, Opinion and Order on Remand (Vt. Super. Nov. 1, 2021) was a long-running dispute involving a private driveway and parking area shared by a number of neighbors. One of the questions Judge Arms was required to consider on remand from the Supreme Court was framed as follows:

While defendants agree to pay a ratable share, we cannot determine as a matter of law what a ratable share would be. This is particularly true

> considering that the trial court has not yet weighed the persuasiveness of plaintiff's testimony about his costs; there are other neighbors who are also using the private drive[way] and parking area, including plaintiff; and there appear to be different levels of use among neighbors; i.e., parking and /or deliveries ...

Moyer, No. 82-5-18 Ancv, slip op. at 1 (quoting *Moyers v. Poon*, 2021 VT 46, ¶ 38). Citing *Khan*, Judge Arms observed:

> Judge Mello's opinion in *Khan*, while not on all fours with the instant dispute, is nevertheless instructive. Here, the Defendants have agreed to contribute Plaintiff's reasonable costs of maintaining the driveway and parking lot.... In a case such as this one, where a number of individuals or businesses share and are entitled to use a driveway and parking lot when they need to do so, the Court finds that a "ratable share" of maintenance costs must be divided among all entitles who have the right to use that driveway and parking area, and not based on some virtually unprovable notion of "actual use."

Moyer, No. 82-5-18 Ancv, slip op at 6 (citation omitted).

While not on entirely on point, these two decisions suggest that, in circumstances such as the instant one, equal contributions by all who possess the right of use and access to a road constitutes an equitable and rateable share. Plaintiffs would have the Court consider Purple Mountain Road the equivalent of a private driveway, one which is for his or her exclusive use and which an individual owner maintains at his or her own cost. That clearly is not what the parties created here.

In this case, the parties created a right of way with shared benefits, and all have the right to utilize the entire Road at any time. *Cf. Birchwood Land Company, Inc. v. Krizan,* 2015 VT 37, ¶¶ 11 and 21, 198 Vt. 420 (incidental benefits not unjust enrichment). Their right of way enhances private and commercial access to their properties. The fact that the Road is a cul-de-sac does not compel a different conclusion, in that all who access their properties through this road also share in privacy afforded by the fact that it is not a thoroughfare. *Cf. Regan v. Pomerleau,* 2014 VT 99, ¶ 34-35, 197 Vt. 449 (discussing access/easements by necessity as essential to enjoyment of land). In short, under these circumstances, all parties must pay a reasonable equal fee for maintenance of the Road, and they cannot parse out some smaller amount based on some notion of actual use.

Finally, the Court declines the Defendants' invitation to further outline their obligations or to otherwise review owing or future assessments. "The purpose of a declaratory judgment is to declare rights, status and other legal relations, and such declaration may be either affirmative or negative in form and effect. ... The

declaration should enunciate so far as is requested and appropriate the rights of the parties and nothing more." *Benson v. Hodgdon*, 2010 VT 11, ¶ 19, 187 Vt. 607 (citations and quotation marks omitted).

"Ordinarily, a declaratory judgment action may be brought only as an independent action ... or as a counterclaim or cross-claim ...." *Price v. Leland*, 149 Vt. 518, 519, 546 A.2d 793 (1988) (citations omitted). In this case, Plaintiffs have brought a declaratory judgment action in which they seek to clarify their otherwise disputed obligation to maintain Purple Mountain Road. In turn, the Defendants have not filed a counterclaim for monetary relief, and the Plaintiffs, in fact, object to having this Court "account for past fees or monetary relief." *See* Plaintiffs' Supplemental Memorandum in Support of Summary Judgment (filed Sept. 2, 2022) at 1; *cf. Price*, 149 Vt. at 519 ("While the parties did not formally stipulate to an enlargement of the proceedings to include a declaratory judgment action, plaintiff made no objection to the form of defendants' motion before the trial court."). Accordingly, the Court declines to write an agreement for the parties or to render what otherwise would be an advisory opinion concerning the reasonableness of costs due and owing.

III. Conclusion

Plaintiff's Motion for Summary Judgment is *denied*, and Defendants' Motions for Summary Judgment are *granted*.

Pursuant to 19 V.S.A. §§ 2701 and 2701, the Court concludes that an equitable, rateable share of reasonable costs and fees associated with the maintenance of Purple Mountain Road requires all Plaintiffs and Defendants to share such costs equally, on a parcel by parcel basis.

The Clerk is directed to enter judgment.

SO ORDERED.

Michael R. Kainen
Superior Court Judge
Pursuant to V.R.E.F. 9(d)(1)(D).
Electronically Signed December 6, 20222 10:19 AM