

#3

LBA/LBWID Liability Regarding the Dam & Parcel 165 Questions Submitted by Lake Barcroft Residents & Answers (11/5/2024)

1.

Question: As to LBA not being sued if there's a disaster after title transfer, have we looked at whether we are still liable for problems and defects existing in the dam at the time it was transferred? That is retroactive liability. If that's the case, the transfer doesn't really protect us. Thank you.

Answer: Should the community vote to transfer ownership of Parcel 165 and the Dam to LBWID, LBA will transfer Parcel 165 and the Dam to LBWID without any representations regarding its condition. The Deed will state that the property is being transferred “as is”, and as such, LBWID will take the property as is. In Virginia, the doctrine of “caveat emptor” buyer beware applies with great force to real estate transfers, including via deeds of gift. Unless there is fraud or misrepresentation, the buyer/grantee is responsible for the condition of the property after conveyance. LBA is not fraudulently conveying the Dam to LBWID or misrepresenting its condition. Indeed, LBWID has been solely responsible for the maintenance and operation of the Dam for 51 years. LBWID, not LBA, is intimately familiar with the condition of the Dam and Parcel 165. Further, the Dam Safety Act does not impose liability on a prior dam owner for injuries and damages that result from flooding that occurs after the conveyance of the dam to a new owner. Given this backdrop, we are not aware of any applicable statute or common law principle that would create retroactive liability for LBA for injuries and property damage caused by downstream flooding.

2. Question: Are you certain that the LBA will not be sued and held liable for injuries and damages from flooding that occurs after it transfers the Dam to LBWID?

Answer: We are not saying that after the Dam is transferred to the LBWID, LBA would not be sued for property damage and injuries resulting from downstream flooding resulting from a dam failure or malfunction. LBA very possibly could be sued, but it should be dismissed from the lawsuit since it will no longer own the Dam and Parcel 165. Similarly, we cannot say that there is 100% certainty that LBA would never be found liable for such damages and injuries. Legal results are seldom if ever 100% certain. But we are quite certain that there is a much higher risk of LBA liability for downstream damages and injuries from flooding if LBA owns the Dam than if it does not own the Dam.

3.

Question: If the WID accepts the dam in “as is” condition does that address the retroactive liability concern raised at the beginning of this Q&A session?

Answer: The Deed will state that the property is being transferred “as is”, and as such, LBWID will take the property as is. In Virginia, the doctrine of “caveat emptor” buyer beware applies with great force to real estate transfers, including via deeds of gift. Unless there is fraud or misrepresentation, the buyer/grantee is responsible for the condition of the property after conveyance. LBA is not fraudulently conveying the Dam to LBWID or misrepresenting its condition. Indeed, LBWID has been solely responsible for the maintenance and operation of the Dam for 51 years. LBWID, not LBA, is intimately familiar with the condition of the Dam and Parcel 165. Further, the Dam Safety Act does not impose liability on a prior dam owner for injuries and damages that result from flooding that occurs after the conveyance of the dam to a new owner. Given this backdrop, we are not aware of any applicable statute or common law principle that would create retroactive liability for LBA for injuries and property damage caused by downstream flooding.

4.

Question: If the General Assembly were to permit non-resident trustees, could we include a provision that the dam revert to LBA?

Answer: If the Dam (Parcel 165) automatically reverts upon the approval of non-resident Trustees, the LBWID would be effectively terminated. LBWID could no longer carry out its statutory and court-ordered duties to operate and maintain the Dam because it would have no legal access to or control over the Dam. Because it would no longer own the reverted Parcel 165 and because the easement to access and operate the dam it now has will have been extinguished with the fee simple conveyance, LBWID would not be able to access the Dam or operate and maintain it. The reversion clause would have the effect of preventing LBWID from carrying out its statutory and court-ordered duties, which the clause cannot legally do.

Moreover, such a clause in the deed would be unlawful because it circumvents the statutorily defined dissolution/termination process for a WID. It would also circumvent and be in direct conflict with paragraph C of the Dam Safety Act, which provides “prior to conveying ownership, the owner shall notify the director of such transfer of ownership in accordance with the requirements set out in the Virginia Impounding Structure Regulations”. Such notice to the director shall include a warrant by the transferring owner that the transferee is a responsible party capable of discharging all obligations of an impounding structure owner imposed by law and regulations.” It is doubtful that LBA would be capable of discharging all obligations of an impounding structure owner and would likely prefer not to.

Such a reverter clause would also be in violation of the longstanding relationship between the LBWID and the LBA, as evidenced in their 1973 Contract, paragraph 4 (which requires any real estate conveyance out from the LBA to not have a materially adverse effect upon the LBWID). Such a clause will clearly have a materially adverse effect upon the WID.

5.

Question: Whether LBWID, as a political subdivision of the Commonwealth of Virginia, may file for bankruptcy; and if so, what impacts may result to real property owned by LBWID. Will LBA's reversion deed clause be triggered by a bankruptcy?

Answer: Given the LBWID's sovereign immunity defense, it is highly unlikely that a judgment would be entered against LBWID, especially for an amount that exceeds its insurance limit. But if it were, LBWID, as a political subdivision (a "municipality" under the Bankruptcy code), may file for chapter 9 bankruptcy under 11 U.S.C. § 109(c). However, the reversion clause in the deed will not be triggered by a chapter 9 bankruptcy because the LBWID will not have been terminated.

Following a valid petition for chapter 9 bankruptcy, with the dam as its primary asset, a forced sale or transfer of that property interest would have a near zero probability given that municipalities may not proceed under chapter 7 (liquidation) of the Bankruptcy Code. A turnover of LBWID's property interest in the dam would effectively be a liquidation of the political subdivision. For this reason, and for the relatively fewer creditors of LBWID compared to the large city chapter 9 bankruptcies, a chapter 9 proceeding by LBWID should not result in a loss of the property including and surrounding the dam.

If necessary, a relatively small chapter 9 bankruptcy case (in comparison to the larger cases that cities have filed in recent years) would provide sufficient flexibility to LBWID to protect its real property interests necessary to perform its statutory duties (Parcel 165), in a "plan of adjustment," through a restructuring of debt rather than through a conveyance or liquidation of property.

6.

Question: Where is lot 165? (The lot that would be transferred with the dam.)

Answer: The Dam sits on Parcel 165, and Parcel 165 extends from the Dam to Columbia Pike. Please see the map of Parcel 165 outlined in red below:

