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7 **SUPERIOR COURT OF WASHINGTON, COUNTY OF SAN JUAN**

8 CLARE LINN WELKER and ABIGAIL
9 METZGER WELKER, Trustees of the Big
10 Sky Trust UDT 11-14-2002,
11 Plaintiffs,

12 v.

13 MOUNT DALLAS ASSOCIATION, a
14 Washington non-profit corporation; et al.,
15 Defendants.

NO. 15-2-05069-0

**MEMORANDUM OF MOUNT
DALLAS ASSOCIATION IN
RESPONSE TO PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT ON 02/03/17**

16 I. Summary

17 On summary judgment, the Plaintiffs seek the Court's order declaring that: (a) the
18 longstanding Mount Dallas Association (the "Association") is not a "homeowners association
19 under RCW 64.38, et seq.;" and (b) the Association therefore "lacks the authority to manage or
20 administer Mount Dallas Road or any of the side roads on behalf of..." non-consenting owners.

21 See [Proposed] Order Granting Plaintiffs' Motion for Partial Summary Judgment on Defendant's
22 RCW 64.38 Status," at paragraphs 1 and 2.

23
24 The Plaintiffs incorrectly claim that the Association's authority to maintain Mount Dallas
25 Road and any particular side road must be based upon the Washington State Homeowners
26 Association Act and the cases interpreting it. Whether or not the Mount Dallas Association is a
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1 valid homeowners association under chapter 64.38 RCW is not relevant to the Court's resolution
2 of this declaratory judgment action.¹

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4 The Association is validly formed and insured; it includes in its membership and under
5 contract owners of two-thirds of the parcels accessed via Mount Dallas Road; 83% (70 of 84)
6 parcels pay the Association's invoices for road maintenance expenses; and it has, exclusively,
7 maintained Mount Dallas Road for over 20 years. See the Declaration of Sandra J. Hawley in
8 Support of Defendant's Motion for Partial Summary Judgment, paragraph 2, filed concurrently
9 herewith; and Declaration of Robert C. Tauscher in Support of Defendant's Motion for Partial
10 Summary Judgment, paragraph 2(b), filed concurrently herewith.

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12 In fashioning an equitable remedy, the Court may acknowledge the Association's
13 contractual relationships with its members, and, at the same time, fairly treat the rights and
14 obligations of the road users who are not members.

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16 Contrary to the Plaintiffs' assertion, the Court is not constrained to acknowledge only a
17 homeowners association as defined under chapter 64.38 RCW (i.e., one that is contractually
18 bound to 100% of affected owners).

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20 The Association therefore requests that the Court deny Plaintiffs' motion for partial
21 summary judgment.

22 II. Summary Judgment Standards

23 The Association agrees with the Plaintiffs' statement of the law on summary judgment.
24 See Plaintiffs' Motion for Partial Summary Judgment on Mt. Dallas Association's Status Under
25 RCW 64.38 et seq., at page 3-4, Paragraph A.

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28 ¹ Regardless, the Association does so qualify, as argued below.

1 The Plaintiffs' motion for partial summary judgment rests upon the argument that the
2 Mount Dallas Association lacks the "legal" right to maintain Mount Dallas Road for a road user
3 who has not contracted with the Association. The Plaintiffs' Motion for Partial Summary
4 Judgment on Mt. Dallas Association's Status Under RCW 64.38 et seq., at page 2, lines 13-16,
5 quotes that portion of this Court's ruling on their prior motion, speaking of "legal rights" to
6 manage the roadway's maintenance. This argument fails to take into consideration the equitable
7 nature of a declaratory judgment action to determine road maintenance obligations among parties
8 in the absence of a contract. The Court recognized this basic distinction in its decision on the
9 Plaintiffs' motion. The Court specifically limited its Order to state that Association has no
10 "legal" right to do so "on behalf of **all** benefitted owners." The Court was careful not to mention
11 equitable rights in its decision, and was careful to preserve the Association's existing contractual
12 rights with consenting owners.

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15 The Plaintiffs' current motion seeks to delegitimize the Mount Dallas Association on the
16 basis that the Association lacks contracts with **some** affected property owners. See Plaintiffs'
17 Motion for Partial Summary Judgment on Mt. Dallas Association's Status Under RCW 64.38 et
18 seq., at page 5, lines 14-15. This argument is based upon the parties' "legal rights" as described
19 under the law of contract. As explained above, such a contractual relationship is not required for
20 the court's equitable remedy in this matter to acknowledge the Association as the entity to
21 manage the roads' maintenance.

22 IV. Contractual Rights and Status as a Homeowners Association Under Chapter 64.38 RCW

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25 The Plaintiffs first ask the Court to declare that the Mount Dallas Association is not "a
26 valid homeowners association under 64.38 RCW." They do so on the basis that the Association
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1 lacks a contractual relationship with **some** of the affected property owners, which they claim
2 renders the Association invalid under the Homeowners Association Act. See Plaintiffs' Motion
3 for Partial Summary Judgment on Mt. Dallas Association's Status Under RCW 64.38 et seq., at
4 page 5, lines 14-15.

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6 The case cited by the Plaintiffs (Halme v. Walsh, 192 Wn.App. 893 (Div. II, 2016)) in
7 support of this argument is distinguishable, and not relevant to this matter. It was a case based
8 upon contract law, and was not an action in equity seeking to establish rights as between non-
9 contracting parties.

10
11 In Halme, a group of property owners were bound by a road maintenance covenant. Less
12 than all of them purported to amend the covenant, and then attempted to enforce its amended
13 terms on a non-consenting owner. They did so alleging that they were a "homeowners
14 association" under chapter 64.38 RCW, and that the non-consenting owner was contractually
15 bound to less-than-unanimous amendments to the original agreement. The Halme court held
16 that: (a) the road maintenance agreement itself was not sufficient to create a "homeowners
17 association," in the form of an unincorporated entity or otherwise, as defined by the
18 Homeowners Association Act; and (b) the original road maintenance agreement had no provision
19 for amendment other than by unanimous consent, and therefore any amendment to its terms is
20 not binding on non-consenting property owners.

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22
23 Halme is not useful to the Court in this matter.

24 First, the Mount Dallas Association was validly formed, as conceded by the Plaintiffs.
25 See Plaintiffs' Motion for Partial Summary Judgment on Mt. Dallas Association's Status Under
26 RCW 64.38 et seq., at page 5, paragraph 1.

1 Second, unlike the plaintiffs in Halme, here the Association does **not** assert that it has
2 legal authority to manage a roadway by virtue of a contract with **all** affected owners. For the
3 purpose of this declaratory judgment action, the Association does **not** assert that its authority to
4 maintain Mount Dallas Road arises from the fact that it is a valid homeowners association as
5 defined in chapter 64.38 RCW.

7 Rather, the Association's authority to manage Mount Dallas Road arises from: (a) its
8 contracts with a majority of the affected owners and its role historically as the sole entity
9 maintaining the road; (b) the lack of any other actual or proposed maintenance entity; and (c) the
10 Court's authority, in equity, to declare the rights and obligations of all road users as to road
11 maintenance, taking into account items (a) and (b) above.

13 The Association currently is bound by contract with the owners of 54 of the 84 affected
14 parcels (64% of affected parcels). See the Declaration of Sandra J. Hawley in Support of
15 Defendant's Motion for Partial Summary Judgment, paragraph 2, filed concurrently herewith.
16 The Mount Dallas Association is validly formed and insured. Declaration of Robert C. Tauscher
17 in Support of Defendant's Motion for Partial Summary Judgment, filed concurrently herewith, at
18 paragraph 3, and Exhibit A thereto (Road Maintenance Agreement for Mount Dallas Road), at
19 paragraphs 1 and 12.A. The owners of 70 of the 84 affected parcels pay the Association's
20 invoices for road maintenance expenses (83% of affected parcels). Declaration of Robert C.
21 Tauscher in Support of Defendant's Motion for Partial Summary Judgment, filed concurrently
22 herewith, at paragraph 2. The Association has raised and spent over \$500,000 over the past 25
23 years as it has, exclusively, maintained Mount Dallas Road since the road's inception. See the
24 Declaration of Robert C. Tauscher in Support of Defendant's Motion for Partial Summary
25 Judgment, filed concurrently herewith, at paragraph 2.

1 V. Equitable Rights and the Right of the Association to Continue to Maintain the Roads

2 The Plaintiffs sole argument is that, because the Mount Dallas Association lacks
3 contracts with **some** benefitted property owners, the Association has no "legal" right to collect
4 from those affected property owners, and, therefore, the Court may not fashion a remedy that
5 includes any role by the Association in road maintenance. See Plaintiffs' Motion for Partial
6 Summary Judgment on Mt. Dallas Association's Status Under RCW 64.38 et seq., at page 4,
7 lines 11-13 (the Association's right to maintain the roadway is "related" to its status as a
8 homeowners association under 64.38 RCW), and at page 6, paragraph 3.
9

10 This case arises specifically **because** there is not a contract that binds all road users. As
11 argued above, and as the Court recognized at the outset, in the absence of such a contract, the
12 Court has the authority to declare the equitable rights among the users of the road. Buck
13 Mountain and Bushy, supra, emphatically uphold the authority of a trial court to declare the
14 rights and obligations of non-contracting parties as to the maintenance of their shared roadway.
15

16 For this reason, the pre-existence of such a contractual relationship with **all** benefitted
17 owners is not and cannot be a pre-requisite to the Association's participation in a lawsuit to
18 declare the parties' equitable rights. It is therefore improper to ask the Court to decide whether
19 the Association is a "homeowners association" under that statute. Whether the Association does
20 or does not meet that particular definition is not dispositive of any issue in this lawsuit: The
21 question is therefore irrelevant.

22 In the Buck Mountain case, the trial court acknowledged the pre-existing contractual
23 relationship among the majority of users of the roadway in question. Those users comprised the
24 membership of the association. The association was not "invalid" and its rights to collect a fair
25 share from non-contracting road users were not diminished due to a lack of contract among **some**
26 affected road users.

27 The Plaintiffs also appear to assert that the Association lacks the authority to collect from
28 its own contractually-bound members, and argue the Association is therefore not a homeowners

1 association. See Plaintiffs' Motion for Partial Summary Judgment on Mt. Dallas Association's
2 Status Under RCW 64.38 et seq., at page 6, paragraph 3. This factual assertion is incorrect (and
3 the legal argument, if any, therefore fails). The Association's Road Maintenance Agreement for
4 Mount Dallas Road, at paragraphs 2 and 3, authorize the Association to maintain Mount Dallas
5 Road and to assess and collect fees for the maintenance. Declaration of Robert C. Tauscher in
6 Support of Defendant's Motion for Partial Summary Judgment, filed concurrently herewith, at
7 paragraph 3, and Exhibit A thereto (Road Maintenance Agreement for Mount Dallas Road), at
8 paragraphs 2 and 3.

9
10 VI. The Association Is a Homeowners Association Under Chapter 64.38 RCW

11 Even so, the Association technically meets the definition of a "homeowners association"
12 under the Homeowners Association Act. The test, as stated by the Court of Appeals in Halme,
13 supra, as and relied upon by the Plaintiffs herein, is three-pronged: "(1) There must be a
14 corporation, association or other legal entity; (2) each member of the entity must be an owner of
15 real property within the entity's jurisdiction as defined in its governing documents; and (3)
16 members must be obligated to pay real property taxes, insurance premiums, maintenance costs,
17 or for improvements to real property that the member does not own."

18 **(1) A corporation, association or other legal entity.** The first prong is conceded by the
19 Plaintiffs. See Plaintiffs' Motion for Partial Summary Judgment on Mt. Dallas Association's
20 Status Under RCW 64.38 et seq., at page 5, paragraph 1.

21 **(2) Owner of real property within the entity's jurisdiction.** As to the second prong,
22 each member of the Mount Dallas Association does in fact own property within the
23 Association's "jurisdiction" as defined by its governing documents. The Association's Bylaws
24 state that its members include owners whose property is accessed via Mount Dallas Road.
25 Bylaws, at Art. 1, Sec. 1. There is no Association member who does not own property accessed
26 via Mount Dallas Road. The Plaintiffs incorrectly assert that the membership must consist of **all**
27 affected property owners. The test has no such requirement. The test requires that "each"

28 member own property within the jurisdiction. Furthermore, such a requirement is not imposed

1 by case law: The contract in the Halme decision was held to be unenforceable because it was not
2 a valid contract, not because **some** affected property owners were not “members” of the
3 association.

4 **(3) Obligation to pay real property taxes, insurance premiums, maintenance costs,**
5 **or for improvements to real property that the member does not own.** As to the third prong,
6 the Association’s members are, in fact, bound to the Association by contracts. As pointed out
7 above, the Association's Road Maintenance Agreement for Mount Dallas Road, at paragraphs 2
8 and 3, authorize the Association to maintain Mount Dallas Road and to assess and collect fees
9 for the maintenance, as do the maintenance agreements for the various side roads. See also, the
10 Supporting Brief of Widdoes / MDA Motion for Partial Summary Judgment, filed concurrently
11 herewith, at page 15 - 17, Sections B and C. Once a property owner joins a road maintenance
12 agreement, the owner is legally bound and must pay maintenance costs for the property of others
13 (no property owner owns all of Mount Dallas Road). It simply cannot be argued that these
14 contracts do not require the members to pay for costs to maintain and improve property that they
15 do not own.

16 Since all three prongs of the test are satisfied, the Association technically meets the
17 definition of a “homeowners association” under the Homeowners Association Act. The Court
18 should therefore deny any portion of the Plaintiffs’ motion for partial summary judgment to the
19 effect that the Association does not meet the requirements of a validly existing homeowners’
20 association under RCW 64.38 et seq. or is therefore not a homeowners’ association under that
21 statute.

22 23 VII. Contractual Rights and the Right of the Association to Continue to Maintain the Roads

24 The parties are before the Court on concurrent cross motions for partial summary
25 judgment, seeking prior to trial to clarify a basic issue: Will the Court’s remedy acknowledge
26 the authority of the Mount Dallas Association to maintain the road system and recognize its
27 contracts with consenting owners?
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1 The Plaintiffs argue that the Court cannot fashion a remedy that includes the existence of
2 such contracts, because the Association lacks contracts with **some** of the affected owners (i.e.,
3 that the Association is not a valid homeowners association under chapter 64.38 RCW due to a
4 lack of such contracts). The Association admits that there is no contract binding **all** owners. For
5 that reason, the Court will be deciding who has the “equitable” right to manage the road. As
6 mentioned above, and as argued below, this case presents a situation where the Court’s remedy
7 can, and must, rest upon “equitable,” as opposed to “legal,” principals, and one which must not
8 interfere with the parties right to contract.
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11 The Buck Mountain case honored the pre-existing contractual relationship among a
12 majority of users of the subject roadway. The trial court fashioned a remedy that took this
13 existing set of contracts into account, and interpreted the non-contracting party’s rights and
14 obligations with respect to that status quo. The remedy was to require the non-contracting party
15 to pay a percentage of the road maintenance cost-burden borne by the contracting members.

16 Similarly, here, the Association is requesting that the Court take into account its existing
17 contracts with a majority of affected property owners, and that the Court fashion a remedy that
18 declares the rights and obligations of the non-contracting parties vis-à-vis that status quo.

19 Furthermore, in the Buck Mountain case, the appellate court overturned that portion of
20 the trial court’s ruling that required the non-contracting party to enter into a contract with the
21 others. This gives a strong disincentive for a trial court to fashion a remedy that creates an
22 entirely new system of road management by creating a new contract among the various parties.

23 There can be only one entity that manages the road. No party has suggested a system
24 whereby the management may be divided or shared. No such divided system would be rational,
25 efficient, effective or fair.

26 In this case, there can be only two possible solutions: (i) retain the Mount Dallas
27 Association as the managing entity, per its existing contracts; or (ii) nullify those contracts and
28 create an entirely new system of management. The first solution protects the parties’ right to

1 contract and is consistent with Buck Mountain. However, the second violates the parties' right
2 to contract; it is not allowed under the ruling of Buck Mountain, because it would dissolve
3 existing contracts and require the parties to enter into contracts with a new entity.

4 This Court has consistently acknowledged the parties' right to enter into contracts with
5 regard to the maintenance of Mount Dallas Road. (a) The Court's July 6, 2016, "Order Granting
6 Plaintiffs' Motion for Order Cancelling Purported Road Maintenance Agreement Recorded by
7 Defendant" recognizes the rights of the Association and its members to execute and to record
8 one or more road maintenance agreements for Mount Dallas Road, so long as those agreements
9 do not purport to bind non-signing property owners. **At Paragraph 2, the Order acknowledges**
10 **that such road maintenance agreements are binding on those property owners who have**
11 **"joined."** At paragraph 4, the Order contemplates that in the future the Association may record
12 such agreements, subject to the above proviso as to non-signers. The Court, in its oral ruling on
13 the Plaintiffs' first motion for summary judgment in this matter, recognized the Association's
14 standing to enforce its equitable right to contributions for the work it performs pursuant to such
15 agreements. See Oral Ruling at 2:28.

16 The Plaintiffs, in turn, concede that "the Association may gain contractual authority over
17 a particular Benefitted property by agreement of that Benefitted Owner..." Plaintiffs' Motion
18 for Partial Summary Judgment on Mt. Dallas Association's Status Under RCW 64.38 et seq., at
19 page 6, lines 13-15.

20 It is clear, therefore, that the remedy in this matter must honor the parties' contractual
21 rights and must steer clear of dissolving those contracts and requiring owners who use the road to
22 enter into contracts with a new entity. For these reasons, it is appropriate for the Court to
23 acknowledge the Association, and for the Court's remedy to allow the Association to continue to
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1 maintain the roadways, with non-contracting parties paying a fair share of the maintenance costs,
2 as determined by the Court's equitable powers. The Court should therefore, at this juncture,
3 deny any portion of the Plaintiffs' motion for partial summary judgment to the effect that the
4 Association lacks authority to manage the roadways.
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6
7 VIII. Conclusion

8 The Association requests that the Court deny the Plaintiffs' motion for partial summary
9 judgment.
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11
12 DEREK MANN & ASSOCIATES PLLC
13 Attorney for Mount Dallas Association, and for
14 Robert Tauscher and Sandra Hawley

15 
16 1/23/17
17 Derek Mann date

18 WSBA No. 20194
19 P.O. Box 399
20 Eastsound, WA 98245
21 (360) 376-3299
22 (888)875-3193 toll free
23 derek@orcslaw.com
24
25
26
27
28

1 STATE OF WASHINGTON)
2)ss. DECLARATION OF SERVICE
3 COUNTY OF SAN JUAN)

4 The undersigned being first duly sworn, on oath states:

5 1. I served true and correct copies of this "Memorandum of Mount Dallas Association in
6 Response to Plaintiffs' Motion for Summary Judgment on 02/03/17," as follows:

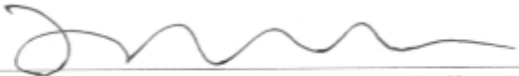
7 2. To CLARE and ABIGAIL WELKER: On January 23, 2017, I emailed one copy to their
8 Attorney of Record Christopher Brain, Tousley Brain Stephens PLLC, to cbrain@tousley.com.

9 3. To THE SAN JUAN PRESERVATION TRUST: On January 23, 2017, I emailed a copy
10 to its Attorney of Record Kathryn C. Loring, Goddu Langlie Loring Sandstrom PLLC, to
11 kloring@sjilaw.com.

12 4. To RIKKI SWIN: January 23, 2017, I emailed a copy to her Attorney of Record Stephen
13 A. Brandli, Brandli Law PLLC, addressed to service@brandlilaw.com.

14 5. To JEROME S. and ANN MOSS: On January 23, 2017, I deposited in the U.S. Mail, first
15 class postage prepaid, a copy to their Attorney of Record Lawrence S. Kartiganer, Rosenfeld,
16 Meyer & Susman LLP, 232 North Canon Drive, Beverly Hills, CA 90210-5302.
17

18
19 Dated this 23rd Day of January 2017, at Eastsound, WA

20
21  1/23/17
22 Derek Mann, Attorney for Mount Dallas Association
23 and for Robert C. Tauscher and Sandra J. Hawley
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