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SUPERIOR COURT OF WASHINGTON, COUNTY OF SAN JUAN

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

v.

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

NO. 15-2-05069-0

**MEMORANDUM OF MOUNT
DALLAS ASSOCIATION IN
SUPPORT OF ASSOCIATION'S
MOTION FOR SUMMARY
JUDGMENT**

QUESTION PRESENTED

Question 1: On summary declaratory judgment, may the Court order those Mount Dallas Road maintenance expenses that are fairly subject to proration to be prorated among all users of Mount Dallas Road per the "actual use" method, when the actual use method treats all users most fairly, is endorsed by over 70% of all Mount Dallas Road users, and is the method employed by the existing road maintenance entity?

Brief Answer: In the absence of a written road maintenance agreement, the Court should employ the proration method that treats all owners most fairly, especially where a supermajority of owners concurs, and the existing road maintenance entity uses such method.

1 **Question 2: On summary declaratory judgment, may the Court order those Mount Dallas**
2 **Road maintenance expenses that benefit all road users equally to be allocated evenly**
3 **among all users of Mount Dallas Road, when this practice is equitable, is endorsed by over**
4 **70% of all Mount Dallas Road users, and is the method employed by the existing road**
5 **maintenance entity?**
6

7
8 Brief Answer: Expenses that benefit all road users equally, are by definition not fairly subject to
9 proration, and must therefore be spread evenly across all road users, especially where a
10 supermajority of owners concurs, and the existing road maintenance entity uses such method.
11

12
13 **INTRODUCTION**

14 As users of the private right-of-ways comprising the Mount Dallas Road network, the
15 Plaintiffs brought this declaratory judgment action against the Mount Dallas Association and all
16 owners of property accessed via Mount Dallas Road, in order to determine the parties' relative
17 rights and responsibilities as to road maintenance. See "Complaint for Declaratory Judgment."
18 Such an action is appropriate in this instance, where no written agreement or covenant binds all
19 parties.
20

21 In a separate concurrent motion, the Plaintiffs seek partial declaratory summary
22 judgment that, with respect to Mount Dallas Road only (and not to its various side roads), all
23 parties be bound by a certain method of proration, and they describe two alternative methods,
24 Actual Use Method (based upon the area actually traversed along the road to a parcel's access
25 point) and Legal Use Method (based upon the length of the easement right enjoyed by the
26 subject parcel). While the Plaintiffs admit that the Actual Use Method is equitable and
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1 allowable, they argue the Legal Use Method yields a better result. See generally, Plaintiffs'
2 Motion for Partial Summary Judgment and the Addendum thereto.

3
4 The Defendant Mount Dallas Association brings this concurrent motion seeking the
5 Court's partial summary declaratory judgment that, as to those Mount Dallas Road maintenance
6 expenses that may be fairly prorated, all parties shall be bound by the Actual Use Method and as
7 to those Mount Dallas Road maintenance expenses that benefit all road users equally, all parties
8 shall be bound by the Flat Rate method (which allocates expenses equally among benefited
9 parcels). [Expenses related to side-roads are not addressed by this motion, nor by the
10 Plaintiffs' pending motion.]
11

12 FACTS

13 The facts in this matter are extensive, many of which were set forth last October in the
14 Defendant Mount Dallas Association's Declarations filed in opposition to the Plaintiffs' first
15 motion for partial summary judgment. See Declarations of Susan Allen, Sandra Hawley, James
16 Guard, Florence McAlary, Bob Tauscher, Maury Liebman, Glenn Kaufman, Pat Ballenger,
17 Royce Meyerott, John and Sharon Boyd, Mike Carlson and Curt Widdoes, which are
18 incorporated herein by this reference.
19

20 The Mount Dallas Association is the entity that has fairly and responsibly maintained the
21 Mount Dallas Road system for over 27 years. Over that time span, the Association has been
22 responsible for over \$500,000 in voluntary dues. See Declaration of Sandra Hawley.
23

24 The Association is a duly authorized non-profit Washington State corporation, licensed,
25 and insured. See Declarations of James Guard and Susan Allen, filed last October in opposition
26 to Plaintiffs' first motion for partial summary judgment. A super majority of owners of the
27 benefited properties pay the Association's invoices. Over 70% of owners signed and submitted
28

1 Petitions expressing allegiance to the Association and endorsing its practices as to organization,
2 maintenance and allocation of its costs. See Declarations of Susan D. Allen and Sandra
3 Hawley.
4

5 Since the beginning, the Association collected dues on a voluntary basis. The amount
6 requested to be paid has varied over the years based upon factors such as whether the parcel was
7 developed or undeveloped, whether the resident was full time or part time and if the road was at
8 the time being chipsealed. In 2014, the Association's membership chose to prorate its road
9 maintenance expenses and to bill a flat sum to all users for its administrative expenses and its
10 fire protection activities. The prorated amount was based upon the area traversed to the parcel's
11 most distant property line on Mount Dallas Road or the area traversed on Mount Dallas Road to
12 reach the side road used to access the parcel. In 2015, the prorated amount was refined and
13 based upon the area traversed to reach a parcel's access point, such as the driveway or side road.
14 This method is known as the Actual Use Method. See Declaration of Sandra Hawley.
15

16 As a method of proration, the Association utilized, and continues to utilize, the Actual Use
17 Method, under which a user parcel's contribution is calculated according to the actual area of
18 Mount Dallas Road actually traversed to the parcel's access point. The Association has never
19 used the Legal Use Method, which would calculate a user parcel's contribution according to the
20 distance of the parcel's easement right along Mount Dallas Road. This is so, in part, because
21 the easement rights of 31 of the 84 parcels substantially exceeds the area actually traversed to
22 reach the parcels access points. (In one case, the Gerhardstein parcel, the easement right is
23 approximately double the Actual Use distance). See Declaration of Susan D. Allen.
24

25 In 2015, the Association was able to confirm the accuracy of its Actual Use calculation by
26 utilizing survey data provided by the Plaintiffs. To calculate the prorated amount for each user
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1 parcel, the Association utilizes a spreadsheet that mathematically apportions a given expense
2 among the many different properties according to the area actually traversed by each property
3 owner. See Declaration of Sandra Hawley.
4

5 The Association's practice for 2014 and 2015 has been to differentiate between: (a) costs
6 directly related to routine general maintenance, major road repairs, ditch work and future
7 repaving of Mount Dallas Road and (b) other costs such as licensing, professional fees,
8 insurance, printing, postage, website hosting and those related to fire prevention including weed
9 whacking, brush clearing and removal of trees and branches. Costs under category (a) have
10 been prorated among all user parcels (Actual Use Method), while those under category (b) have
11 been divided equally among all user parcels (Flat Rate Method). See Declaration of Susan D.
12 Allen.
13

14 The Plaintiffs paid the Association's 2014 invoice based upon such practices. See
15 Declaration of Sandra Hawley. They instituted this lawsuit in 2015.
16

17 The Association's role as the entity performing road maintenance, and its method of
18 prorating certain expenses and charging a uniform fee for others, has recently been formalized
19 by the recording of a road maintenance agreement for Mount Dallas Road, and by a number of
20 user parcels executing and delivering to the Association a "joinder" in such agreement. The
21 agreement was recorded in March 2016, and joinder documents are still being delivered to the
22 Association. See Declaration of Susan D. Allen.
23

24 It cannot be expected that all owners will review the agreement and sign and return a
25 joinder thereto (or decide not to) by the time of the filing of this Memorandum. Therefore, on
26 the date of the hearing on this motion, the Association requests permission to supplement its
27
28

1 Declarations in support with a Declaration showing the number of parcels that have joined by
2 that time.

3 Prorating direct road maintenance costs is fair and reasonable, because no sections of
4 Mount Dallas Road require more maintenance, on average, than any other sections. Charging a
5 flat fee for the Association's other costs specified above is fair and reasonable, because such
6 costs are essential to the legal existence and function of a representative non-profit association,
7 and no user parcel derives any greater benefit from those items than any other. See Declaration
8 of Susan D. Allen.
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12 ARGUMENT

13 The controversy here is an actual, present and existing dispute, and is therefore a
14 justiciable controversy ripe for resolution under Washington's Declaratory Judgment Act. See
15 Justice Philip A. Talmadge, "Understanding the Limits of Power: Judicial Restraint in General
16 Jurisdiction Court Systems," Seattle University Law Review, Volume 22, Number 3, Winter
17 1999; Nollette v. Christianson, 115 Wn.2d 594, 599 (1990); City of Spokane v. Taxpayers of
18 Spokane, 111 Wn.2d 91, 96 (1988). Road maintenance has been and continues to be performed
19 on a road system with numerous users, many of whom are not bound by a written road
20 maintenance agreement, resulting in the current need for a judicial declaration of the parties'
21 respective rights and responsibilities.
22
23

24 Summary judgment is warranted only if "there is no genuine issue of material fact and
25 the moving party is entitled to judgment as a matter of law." Ellis v. City of Seattle, 142 Wn.2d
26 450, 458 (2000), quoting Trimble v. Wash. State Univ., 140 Wn.2d 88, 92-93, (2000); CR 56.
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1 In a declaratory judgment action as to the collective rights and responsibilities of road
2 users with respect to maintenance, whether an obligation to contribute exists is a question of law.
3 Buck Mountain Owners Association v. Prestwich, 174 Wn.App. 702, 714 (Div I 2013) at 9. The
4 magnitude of the obligation is a question of fact.
5

6 A trial court sitting in equity has power to “do substantial justice” that is “inherently
7 flexible and fact-specific.” Id., at 715, footnote 14, quoting Proctor v. Huntington, 169 Wn.2d
8 491, 503 (2010).
9

10 This motion concerns the proration method to be applied to those road maintenance
11 expenses that are fairly proratable, and the Association requests that other, non-proratable, costs
12 be imposed uniformly across all road users.

13 To render a decision on such matters at summary judgment, the Court may limit its
14 consideration to the undisputed facts that (a) the Mount Dallas Association is the only entity that
15 has and continues to maintain Mount Dallas Road; and (b) the costs of road maintenance include
16 costs that are fairly proratable, and costs that are not. [There may be disputes of material fact
17 regarding the length of the roadway and the easements and / or access points for the numerous
18 parcels involved, which would be resolved at trial.]
19

20 Even on such limited undisputed facts, the Court may render a decision on the general
21 concept of the most equitable method of prorating direct maintenance costs – the Actual Use
22 Method or the Legal Use Method, and it may still render a decision on the general concept of
23 there existing certain expenses incurred by the maintenance entity that confer an equal benefit on
24 all parcels, and are thus fairly allocated evenly among all such parcels using the Flat Rate
25 Method.
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1 When an easement is silent on road maintenance, all user parcels are obligated to
2 contribute to maintain the roadway. Buck Mountain, supra, at 715-720.

3 On Mount Dallas Road, the only entity performing maintenance is the Mount Dallas
4 Association. There has existed for two years a practice of prorating direct road maintenance
5 expenses among user parcels and of allocating a flat sum to all parcels for other costs that confer
6 an equal benefit on all parcels. A supermajority of owners of user parcels has expressly
7 endorsed this practice, and an even greater majority has implicitly endorsed it by paying the
8 invoices.
9

10 This majority approval is significant, because it indicates that most users consider it fair.
11 It is also significant because the Plaintiffs' Complaint acknowledges that the will of the majority
12 of the user parcels' owners should govern the method of allocating expenses. The "Complaint"
13 specifically requests the following relief: "judgment that the Owners of Benefited Properties
14 allocated a majority of the expenses for maintenance of Mt. Dallas Road... are authorized to
15 maintain Mt. Dallas Road in accordance with the Expense Allocation Method." See
16 "Complaint" at Paragraph 8 (emphasis added).
17
18

19 In 2014, the Plaintiffs paid such invoices, and also participated as members in the
20 Association's meetings. It is undisputed that the Plaintiffs were members, served on the Board
21 and as officers, and paid under the Actual Use Method and the Flat Rate Method.
22

23 The Association's practices, the participation of a supermajority of owners, and the
24 actions of the Plaintiffs, all amount to a pattern of conduct indicating the road users' intent with
25 respect to allocation of maintenance costs. The Court's decision should reflect these actions as
26 an indication of the parties' intent. Where an agreement is ambiguous, such a pattern of conduct
27 is relevant to the issue of what the original parties intended in that regard, and the court must
28

1 consider their intent. Id., at 718 and footnote 17; Restatement (Third) of Property: Servitudes
2 Sec. 4.13(3) (1998). [“Because the circumstances of the creation and use of easements...can
3 vary so widely, this rule (allowing a court to chose a reasonable allocation of maintenance
4 costs)... should yield readily to the inferences as to the actual or probable intent of the parties
5 drawn from the circumstances of the particular case.”].

7 By Petition, and by joining in the Association’s road maintenance agreement for Mount
8 Dallas Road, a supermajority of owners has endorsed the Actual Use Method of prorating direct
9 road maintenance expenses as well as the practice of allocating an equal sum to all user parcels
10 for other expenses that confer an equal benefit on all user parcels. This majority approval is
11 significant for an additional reason: it indicates that most users consider it fair. It is also
12 significant, because the Plaintiffs’ Complaint acknowledges that the will of the majority of the
13 user-parcels’ owners should govern the method of allocating expenses. The “Complaint”
14 specifically requests the following relief: “judgment that the Owners of Benefited Properties
15 allocated a majority of the expenses for maintenance of Mt. Dallas Road... are authorized to
16 maintain Mt. Dallas Road in accordance with the Expense Allocation Method.” See
17 “Complaint” at Paragraph 8 (emphasis added).

20 One factor in determining how much a non-member parcel should contribute toward road
21 maintenance is “the frequency and intensity of use made.” Third Restatement of the Law of
22 Property, 1998, Section 4.13(3), at Comment d. This leads to the conclusion that (where road
23 maintenance is uniform along the road’s length) direct road maintenance costs are fairly
24 prorated.

26 While “frequency and intensity of use” is a factor to be considered in allocating road
27 maintenance costs, a court is not limited to this single factor, and may consider others. Buck

1 Mountain, supra, at 725. In the recent case of Northwest Properties Brokers Network, Inc., v.
2 Early Dawn Estates Homeowners Association, 173 Wn.App. 778 (Div. II 2013), a property
3 owners association sued a non-member road user for a share of the association's costs in
4 maintaining the roadway. At issue was whether the road user should contribute to certain
5 association costs that were not directly expended on maintaining the roadway. The appellate
6 court held that those costs a non-member user may be required to pay are not necessarily limited
7 to those costs incurred by the association solely for road maintenance. Rather, the association
8 was entitled to introduce as evidence to prove the "actual value of services" it provides. Id., at
9 797-798.
10
11

12 In this case, the Association has introduced undisputed evidence that certain of the
13 services it provides benefit all user parcels equally. There must be an entity that maintains the
14 roadway: ad hoc maintenance by individual members has never been practiced, and is not
15 practical in this instance, where the road is long and shared by over 80 parcels. Such an entity
16 will have administrative costs, such as licensing, supplies, website hosting, insurance and
17 services such as collecting from non-paying users, that are all required for its legal existence and
18 its function. In this case, the Mount Dallas Association also engages in fire protection, from
19 which all user parcels derive an equal benefit. These essentially administrative expenses benefit
20 each user parcel equally. See the Declaration of Susan D. Allen. This leads to the conclusion
21 that certain road maintenance entity's expenses are not fairly proratable, and should therefore be
22 allocated equally among all user parcels.
23
24

25 The Actual Use Method (of prorating those maintenance expenses that are fairly
26 proratable) yields a more equitable result than the Legal Use Method.
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1 First, for a 31 of 84 parcels, the length of its easement right substantially exceeds the
2 distance actually traveled to its access point. One parcel, owned by the Gerherdstein's, benefits
3 from an easement right that is approximately double the actual distance to its access point. For
4 all such parcels, and especially the Gerhardstein's parcel, the Legal Use Method would yield a
5 result that treats them differently than other users, i.e., the obligation of other users is equivalent
6 to the area of road actually used.
7

8 Second, the Association's spreadsheet that functions to create the allocations among users
9 based upon Actual Use may easily be updated to reflect a change in a parcel's access point (and
10 thus the area of the roadway the parcel uses). See Declaration of Sandra Hawley. Therefore,
11 there is no particular advantage in efficiency for using the length of a parcel's easement right for
12 proration.
13

14 Third, to avoid inequitable treatment under the Legal Use Method, an owner has an
15 incentive to relinquish easement rights past its access point. Under the Actual Use Method,
16 there is no incentive to alter easement rights. See Declaration of Susan D. Allen.
17

18 CONCLUSION

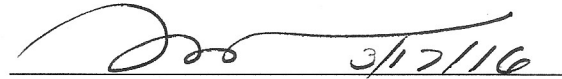
19 The Defendant Mount Dallas Association is entitled, under the authority of Chapter 7.24
20 RCW and CR 56, to the Court's declaration of the parties' respective rights and obligations as to
21 road maintenance for Mount Dallas Road.
22

23 In this instance, the Association requests the Courts the determination that (a) the Actual
24 Use Method of proration is appropriate for those expenses that are fairly proratable (general
25 maintenance, major road repairs, ditch work and future repaving); and (b) there are certain
26 expenses incurred (licensing, professional fees, insurance, printing, postage, website hosting and
27 those related to fire prevention including weed whacking, brush clearing and removal of trees
28

1 and branches) that confer an equal benefit on all parcels and therefore should be allocated
2 equally among them by a Flat Rate Method.
3

4 DEREK MANN & ASSOCIATES PLLC

5 Attorney for Mount Dallas Association and for L. Curtis Widdoes, Jr.

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7  3/17/16

8 Derek Mann date

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