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SAN JUAN COUNTY, WASHINGTON

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
RESPONSE TO PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT

QUESTIONS PRESENTED

Question 1: At summary judgment, may the Court order that all Mount Dallas Road maintenance expenses be prorated among the users of Mount Dallas Road?

Answer 1: No. The Mount Dallas Association and other parties should have the opportunity to prove that certain road maintenance expenses are not fairly pro-ratable, and instead should be allocated evenly among the users.

MEMORANDUM OF MOUNT DALLAS ASSOCIATION - 1
IN RESPONSE TO PLAINTIFF' MOTION
FOR SUMMARY JUDGMENT

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1
2 **Question 2: At summary judgment, may the Court order that Mount Dallas Road**
3 **maintenance expenses (that are fairly subject to proration) shall be prorated by using the**
4 **road length and configuration as set forth in the Plaintiffs' supporting Declaration?**

5 **Answer 2:** No. The road length and configuration as shown on the Plaintiffs' supporting
6 declaration are inaccurate, and would yield incorrect pro-ration figures.
7

8
9 **Question 3: At summary judgment, should the Court order that all those Mount Dallas**
10 **Road maintenance expenses that are fairly subject to proration shall be prorated among**
11 **all users of Mount Dallas Road per the "Legal Use" method advocated by the Plaintiffs?**

12 **Answer 3:** No. The Legal Use method results in disparate treatment for those minority of
13 parcels with easement rights that exceed the length of roadway actually used. It has been not
14 been approved by a majority of owners, who endorse the Actual Use method. It also fails to
15 differentiate between developed and undeveloped parcels.
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19 **Question 4: At summary declaratory judgment, should the Court order that Mount**
20 **Dallas Road maintenance expenses (that are fairly subject to proration) shall be prorated**
21 **among all users of Mount Dallas Road per the "Actual Use" method employed by the**
22 **Mount Dallas Association and endorsed by over 70% of all Mount Dallas Road users?**

23 **Answer 4:** Yes. The Actual Use method treats all users equally, and is therefore preferable to
24 the Legal Use method, especially where a supermajority of owners concurs with the Actual
25 Use method, and the existing road maintenance entity uses such method.
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1
2 INTRODUCTION

3 Plaintiffs are users of the private right-of-ways comprising the Mount Dallas Road
4 network (Mount Dallas Road and its several side roads). Because there is no written road
5 maintenance agreement binding all users of the road network, and in order to determine the
6 parties' relative rights and responsibilities, the Plaintiffs brought this declaratory judgment
7 action against the existing road maintenance entity Mount Dallas Association ("the
8 Association") and all owners of property accessed via Mount Dallas Road.
9

10 The Plaintiffs now seek partial declaratory summary judgment that, with respect to
11 Mount Dallas Road maintenance expenses only (and not to those of its side-roads), all road
12 users be bound by a certain method of proration, and the proration be calculated using the road
13 length and configuration as set forth in their survey data.
14

15 The Plaintiffs describe two alternative methods of proration, Actual Use (based upon the
16 area actually traversed along the road to a parcel's access point) and Legal Use (based upon the
17 length of the easement right enjoyed by the subject parcel). They assert that either method is
18 equitable and allowable, and argue the Legal Use Method yields a better result.
19

20 The Association believes that this controversy is an actual, present and existing dispute,
21 and is therefore ripe for resolution under Washington's Declaratory Judgment Act. Nollette v.
22 Christianson, 115 Wn.2d 594, 599 (1990); City of Spokane v. Taxpayers of Spokane, 111
23 Wn.2d 91, 96 (1988).
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1
2
3 **Question 1: At summary judgment, may the Court order that all Mount Dallas Road**
4 **maintenance expenses be prorated among the users of Mount Dallas Road?**

5
6 An order adopting a method of proration should distinguish between expenses that are
7 fairly proratable (i.e., expenses conferring a benefit on users in proportion to the length of
8 roadway used) and those that are not (i.e., expenses conferring a benefit on users regardless of
9 the length of roadway used).

10
11 Certain road maintenance expenses are for work evenly-distributed over the length of the
12 roadway (such as general maintenance, major road repairs, ditch work and future repaving) and
13 are fairly prorated among the users according to the area of the roadway used by each. The
14 Association has pro-rated such expenses among its members and contributors since 2014. See
15 Declaration of Sandra Hawley in Support of Mount Dallas Association's Motion for Summary
16 Judgment, pages 2-3. Prorating direct road maintenance costs is fair and reasonable, because
17 there are no particular sections of Mount Dallas Road that require more maintenance on average
18 than any other section. See Declaration of Susan D. Allen in Support of Mount Dallas
19 Association's concurrent Motion for Summary Judgment.
20

21
22 However, other maintenance expenses confer an equal benefit on all users, regardless of
23 the length of the roadway used by each. As the entity that has historically maintained, and
24 continues to maintain, Mount Dallas Road, the Mount Dallas Association incurs expenses for
25 activities such as licensing, professional fees, insurance, printing, postage, and website hosting.
26 See Declaration of Sandra Hawley in Response to Plaintiffs' Motion for Partial Summary
27 Judgment, page 2, lines 4-9.

1 These are necessary expenses, and would be incurred by any legitimate road maintenance
2 entity. There has been no assertion that Mount Dallas Road should be maintained by anyone
3 other than a single qualified road maintenance organization. The existence of such an
4 organization confers an equal benefit on all road users, regardless of the length of roadway used
5 by each (i.e., a shorter roadway does not reduce such expenses correspondingly).
6

7 The Association also conducts roadwork related to fire prevention, including weed
8 whacking, brush clearing and removal of trees and branches. See Declaration of Sandra Hawley
9 in Response to Plaintiffs' Motion for Partial Summary Judgment, page 2, lines 4-9. The
10 prevention of fire on Mount Dallas is equally beneficial to all road users there. This expense has
11 also been shared equally by all.
12

13 The Court's decision as to the method of proration should be limited to those road
14 maintenance expenses that are fairly proratable, and it should allow the Association and other
15 parties the opportunity to prove that certain road maintenance expenses are not fairly pro-
16 ratable, and instead should be allocated evenly among the users.
17

18 The primary case cited by the Plaintiffs is Northwest Properties Brokers Network, Inc.,
19 v. Early Dawn Estates Homeowners Association, 173 Wn.App. 778 (Div. II 2013). There, an
20 owners association sued a non-member road user for a share of the association's costs in
21 maintaining the roadway. Specifically at issue was whether the road user should contribute to
22 the association costs on an equal basis with member-users. The appellate court (citing with
23 approval the Iowa case of Okoboji Camp Owners Assoc. v. Cooper, 461 N.W.2d 652 (Iowa
24 1998)), held that, while such an association's allocation of expenses is not automatically binding
25 upon a non-member, the association has right to prove and to recover for the "actual value of
26 services" it provides. Northwest Properties Brokers Network, at 797-798.
27

1 Here, the Mount Dallas Association had offered proof that it provides services the actual
2 value of which is evenly distributed among all users, and is therefore not fairly proratable. This
3 conclusion is supported by Buck Mountain Owners Association v. Prestwich, 174 Wn.App. 702,
4 725 (Div I 2013), which holds that, while “frequency and intensity of use” is a factor to be
5 considered in allocating road maintenance costs, a court is not limited to this single factor, and
6 may consider others.
7

8 The Plaintiffs introduce no evidence of the type of expenses that are incurred in
9 maintaining Mount Dallas Road. The Court's decision should not preclude the Association and
10 other parties from proving and recovering for costs that are not fairly proratable.
11

12
13 **Question 2: At summary judgment, may the Court order that Mount Dallas Road**
14 **maintenance expenses (that are fairly subject to proration) shall be prorated by using the**
15 **road length and configuration as set forth in the Plaintiffs’ supporting Declaration?**
16

17 The Plaintiffs request that, in selecting one of their proposed proration methods, the
18 Court adopt the survey data and road length/configuration as set forth in the supporting
19 Declaration of Robert Wilson.

20 The Association asserts that the road length and road configuration incorporated into the
21 Plaintiffs’ proration methods are incorrect, would yield incorrect results, and therefore cannot
22 be adopted. The overall road-length utilized in the Plaintiffs' calculations ends 200 feet short of
23 the end of the paved surface. The Plaintiffs' calculations fail to take into account that the
24 easement at the end of the roadway was rescinded and a replaced with a new one (San Juan
25 County Auditor's File No. 2001-1226016), resulting in an end point corresponding to the end of
26 the paved surface. The Plaintiffs' methodologies are based on calculations of a total road
27

1 distance that is too short by some 200 feet, and would produce erroneous results. Declaration of
2 James Guard in Response to Plaintiffs' Motion for Partial Summary Judgment.

3 Also, there are other inaccuracies in the roads used for the calculations with respect to
4 Lots belonging to Hohenlohe, Liebman, Moss, Smith, Guard, Erskine, Swanson and Widdoes.
5 Id.

6
7 Summary judgment is warranted only if “there is no genuine issue of material fact and
8 the moving party is entitled to judgment as a matter of law.” Ellis v. City of Seattle, 142 Wn.2d
9 450, 458 (2000), quoting Trimble v. Wash. State Univ., 140 Wn.2d 88, 92-93, (2000); CR 56.
10 In a declaratory judgment action as to the collective rights and responsibilities of road users
11 with respect to maintenance, whether an obligation to contribute exists is a question of law.
12 Buck Mountain Owners Association v. Prestwich, 174 Wn.App. 702, 714 (Div I 2013). The
13 magnitude of the obligation is a question of fact.
14

15 In this case, there is a dispute as to a material fact which precludes the granting of
16 summary judgment in the form of adopting proration formulae proposed by the Plaintiffs.
17 Those formulae are based upon incorrect factual conclusions as to the road's length and
18 configuration.
19

20
21 **Question 3: At summary judgment, should the Court order that all those Mount Dallas**
22 **Road maintenance expenses that are fairly subject to proration shall be prorated among**
23 **all users of Mount Dallas Road per the “Legal Use” method advocated by the Plaintiffs?**
24

25 The Legal Use method prorates a user-parcel's maintenance obligation by measuring the
26 distance of the parcel's easement along Mount Dallas Road. This method results in disparate
27

1 treatment for those parcels with easement rights that exceed the length of roadway actually
2 used.

3 As pointed out by the Plaintiffs and by the Declaration of James Guard in Response to
4 Plaintiffs' Motion for Partial Summary Judgment, and Declaration of Susan D. Allen in Support
5 of the Association's concurrent Motion for Summary Judgment, there are two groups of user
6 parcels: (a) those whose distance actually traversed closely approximates the length of the
7 parcels' easements; and (b) those whose easement-distance substantially exceeds the distance
8 actually traveled. Of the 84 user parcels, 52 fall into category (a) and 32 into (b).
9

10 Adoption of the Legal Use method would result in a system that creates a financial
11 distinction between the two groups. Rejecting this method, and by implication adopting the
12 Actual Use method, would result in a system treating all user parcels uniformly.
13

14 The Legal Use method is not more convenient than the Actual Use method. The
15 spreadsheet automatically adjusts to the incorporation of new data, such as a distance in
16 question. See Declaration of Sandra Hawley in Support of the Association's concurrent Motion
17 for Summary Judgment.
18

19 The Legal Use method is not more likely to result in fewer changes over time. The
20 financial incentive for such a change is more likely to induce a legal extinguishment of a portion
21 of an easement, than a relatively more expensive relocation of a driveway. See Declaration of
22 Sandra Hawley in Support of the Association's concurrent Motion for Summary Judgment.
23 Declaration of James Guard in Response to Plaintiffs' Motion for Partial Summary Judgment,
24 and Declaration of Susan D. Allen in Support of the Association's concurrent Motion for
25 Summary Judgment.
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1 Also, the Legal Use method as proposed by the Plaintiffs would fail to distinguish the
2 differences in use between developed and undeveloped parcels, which is inherently unfair. See
3 Declaration of Declaration of James Guard in Response to Plaintiffs' Motion for Partial
4 Summary Judgment, at page 4, lines 23-28, and page 5, lines 1/2. See Declaration of Thomas
5 M. Schilling in Response to Plaintiffs' Motion for Partial Summary Judgment, at page 3, lines
6 10-14.
7

8
9 **Question 4: At summary declaratory judgment, should the Court order that Mount**
10 **Dallas Road maintenance expenses (that are fairly subject to proration) shall be prorated**
11 **among all users of Mount Dallas Road per the "Actual Use" method employed by the**
12 **Association and endorsed by over 70% of all Mount Dallas Road users?**
13

14 The Actual Use method treats all users uniformly, and is therefore preferable to the Legal
15 Use method. In this case, a supermajority of owners concurs with the Actual Use method, and
16 the existing road maintenance entity uses such method.
17

18 In its concurrent Motion for Summary Judgment, the Association sets forth facts and
19 argues in favor of adoption of the Actual Use Method. The Association incorporates those facts
20 and arguments herein.
21

22 The Association is the entity that has fairly and responsibly maintained the Mount
23 Dallas Road system for over 27 years. In 2014, the Association's membership chose to pro-rate
24 certain of its road maintenance expenses (costs directly related to routine general maintenance,
25 major road repairs, ditch work and future repaving of Mount Dallas Road), and to continue to
26 bill a flat sum to all users for its administrative expenses and its fire protection activities.
27

1 Declarations of Sandra Hawley and Susan D. Allen in Support of Mount Dallas Association's
2 concurrent Motion for Summary Judgment.

3 The Association's Actual Use method prorates select road maintenance expenses among
4 user parcels according to the "area traversed" to each parcel. To calculate the prorated amount
5 for each parcel, the Association utilizes a spreadsheet that may be easily changed to reflect
6 changes in a parcel's driveway location. Declaration of Sandra Hawley in Support of Mount
7 Dallas Association's concurrent Motion for Summary Judgment.
8

9 The Association's Actual Use method takes into account the difference in actual use
10 between developed and undeveloped parcels, by charging undeveloped parcels 25% of a
11 developed parcel's share. Declaration of Sandra Hawley in Support of Mount Dallas
12 Association's Motion for Summary Judgment, page 4, line 14. It calculates Actual Use from the
13 parcel's furthest point of access along Mount Dallas Road. Id.
14

15 The Association's Actual Use method is accurate, as confirmed in 2015 by utilizing the
16 Plaintiffs' survey data. Declaration of Sandra Hawley in Support of Mount Dallas Association's
17 concurrent Motion for Summary Judgment, page 4.
18

19 The Association has never used the Legal Use Method, which would calculate a user
20 parcel's contribution according to the distance of the parcel's easement along Mount Dallas
21 Road.
22

23 A supermajority of owners of the user parcels support the Association's Actual Use
24 method, as demonstrated by:

- 25 (i) 77% paid the Association's invoices in 2014 and 79% in 2015, which invoices
26 utilized the Actual Use method;
27

1 (ii) over 70% signed and submitted Petitions expressing allegiance to the Association
2 and endorsing its practices as to organization, maintenance and allocation of its costs,
3 including the Actual Use method; and

4 (iii) so far, 60% have signed and delivered to the Association a "Joinder" in the
5 Association's recorded Road Maintenance Agreement for Mount Dallas Road (San Juan
6 County Auditor's File No. 2016-0302026).

7
8 See: Declarations of Sandra Hawley and Susan D. Allen in Support of Mount Dallas
9 Association's concurrent Motion for Summary Judgment; Declaration of Susan D. Allen in
10 Response to Plaintiffs' Motion for Partial Summary Judgment.

11
12 Because the Joinder documents are still being received and processed, the Association
13 requests permission to submit at the hearing on April 15 a Supplemental Declaration of Susan
14 D. Allen, stating the then-current number of signed and delivered "Joinders."

15 Majority-approval is legally significant. First, it indicates that most users consider it
16 fair. Second, the Plaintiffs' acknowledge that the will of the majority of the user-parcels'
17 owners should govern the method of allocating expenses. Their "Complaint" specifically
18 requests the following relief: "judgment that the Owners of Benefitted Properties allocated a
19 majority of the expenses for maintenance of Mt. Dallas Road... are authorized to maintain Mt.
20 Dallas Road in accordance with the Expense Allocation Method." "Complaint" at Paragraph 8
21 (emphasis added). The Plaintiffs reiterate this position in their May 21, 2015, letter to the
22 Association. Declaration of Susan D. Allen in Response to Plaintiffs' Motion for Partial
23 Summary Judgment.
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1 The endorsement by a supermajority of owners, the history of use of the Actual Use
2 method, and the payment of invoices and participation within the association by a supermajority
3 and by the Plaintiffs, all amount to a pattern of conduct indicating the road-users' intent with
4 respect to allocation of maintenance costs. The Court's decision should reflect these actions as
5 indication of the parties' intent. Where an agreement is ambiguous, such a pattern of conduct is
6 relevant to the issue of what the original parties intended in that regard, and the court must
7 consider their intent. Id., at 718 and footnote 17; Restatement (Third) of Property: Servitudes
8 Sec. 4.13(3) (1998). ["Because the circumstances of the creation and use of easements... can
9 vary so widely, this rule (allowing a court to choose a reasonable allocation of maintenance
10 costs)... should yield readily to the inferences as to the actual or probable intent of the parties
11 drawn from the circumstances of the particular case."].
12
13

14 CONCLUSION

15
16 The Court has before it sufficient undisputed facts to decide whether those costs that are
17 fairly subject to proration shall be prorated according to the "Actual Use" or "Legal Use"
18 method. The Court should adopt the Actual Use method and discard the Legal Use Method,
19 because the Actual Use method yields results that are fair to all users, while the Legal Use
20 method unduly burdens the significant number of parcels whose easement rights exceed the
21 length of roadway actually used.
22

23
24 The Association has demonstrated that the Actual Use method should differentiate
25 between developed and undeveloped parcels, and it is fair to allocate a 25% share to
26 undeveloped parcels.
27

1 The Association has introduced facts demonstrating that certain road maintenance
2 expenses are fairly allocated evenly among all users, and are therefore not subject to any
3 proration method (Flat Rate Method). The Court's decision should reflect that any proration
4 method adopted applies only to those expenses that are in fact fairly prorable.

5
6 The Association has introduced facts demonstrating that the road's length and
7 configuration differ from those set forth in the Plaintiffs' supporting documents. Therefore the
8 Court's decision should leave for trial the decision as to the data by which the proration is
9 calculated.

10
11
12 DEREK MANN & ASSOCIATES PLLC

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

14  9/1/16
15 Derek Mann date

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