

COUNTY CLERKS OFFICE  
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APR 04 2016

JOAN P. WHITE  
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

DECLARATION OF  
SUSAN ALLEN IN RESPONSE  
TO PLAINTIFFS' MOTION FOR  
PARTIAL SUMMARY  
JUDGMENT

I, SUSAN ALLEN, state as follows:

1. I am over the age of 18 and am competent to be a witness in this lawsuit. I make the following statements based upon my personal knowledge of the matters testified to herein.

2. I am the President of Mount Dallas Association and have served on the Board of Directors since August of 2012.

3. My husband, James Timothy Allen, and I are Defendants in this lawsuit.

4. I make this declaration in response to Clare and Abigail Welker's motion for partial summary judgment requesting the Court exercise its equitable power to establish a method for allocating road maintenance expenses for Mount Dallas Road.

5. I restate everything included in my Declaration in Support of Mount Dallas Association's Motion for Summary Judgment dated March 17, 2016.

6. Attached as Exhibit A is a letter from the Welker's Attorney dated May 21, 2015, signed by Romney R. Brain.

7. On Page 6 of the letter, attorney Brain states:

*Declaration of Susan Allen in Response to Plaintiffs'  
Motion for Partial Summary Judgment - 1*

*Derek Mann & Associates, PLLC  
P O Box 399  
Eastsound WA 98245  
360-376-3299*

1 "In light of the Buck Mountain case, we believe that if the owners of a solid majority of the  
2 Benefitted Properties agreed to a specific RMA methodology for assessing and apportioning the  
3 cost of maintaining the Road (i.e. a reasonable and equitable assessment process), there is a  
4 strong likelihood that the court would adopt that methodology even without 100% agreement.  
5 The owners of the Benefitted Properties that approved the RMA methodology (as approved  
6 and/or determined by the court) could then grant the Association the authority to manage the  
7 assessments and maintenance of the Road. Although the Benefitted Properties that did not  
8 agree to the RMA methodology would still not be bound by the Associations authority and  
9 assessments, they would be bound by the methodology and the amount of the assessments as  
10 approved and determined by the court. The Benefitted Properties that approved the RMA  
11 methodology and the Association's authority to make assessments would have a claim against  
12 the other Benefitted Properties for their "fair share" of the cost of the Road maintenance.  
13 Those owners could then assign that right to the Association, and the Association would then be  
14 in a position to collect the amount of the assessments against those other Benefitted Properties.  
15 We also believe that once a court action is brought and "the writing is on the wall", so to  
16 speak, the ability to get all of the owners of the Benefitted Properties to agree on a court  
17 approved methodology would significantly improve, as the only options would be for those  
18 owners to engage in a court battle. As noted, with a solid majority in favor of the RMA  
19 methodology, the others would be fighting a significant uphill battle to convince the court that  
20 some other methodology should apply. And in the end, if no voluntary agreement can be  
21 reached, the court would be making the decision in a timely manner."

22 8. As of the date of this declaration, the Association has obtained signed  
23 Joinders to Road Maintenance Agreement AFN 2016-0302026 from owners of 60% of the 84  
24 tax parcels accessed via Mount Dallas Road, agreeing to a specific methodology for assessing  
25 and apportioning the cost of maintaining the Road (i.e. a reasonable and equitable assessment  
26 process). See Exhibit B. I request leave at the April 15 hearing to supplement this Declaration  
27 by stating the updated number of tax parcels that have become contractually bound to the  
28 Agreement by that time.

9. The Road Maintenance Agreement, AFN 2016-0302026, adopts the Association's  
current Actual Use Method and Flat Rate Method for assessments. (See Exhibit C attached to



1 my Declaration in Support of Mount Dallas Association's Motion for Summary Judgment dated  
2 March 17, 2016.)

3 10. The Legal Easement Method proposed by Clare and Abby Welker is not an  
4 appropriate methodology for assessing and apportioning the cost of maintaining the road,  
5 because a majority of property owners approve a different method and property owners would  
6 have to pay for a portion of the road that they do not actually use.

7 11. The Association has listened closely to the voice of the property owners via two  
8 surveys, six petitions, a Road Maintenance Agreement and countless meetings, phone calls and  
9 emails. The majority has spoken and made it clear that the Actual Use Method and the Flat  
10 Rate Method for assessments is agreed upon and the most equitable approach.

11 12. The Association has also listened to the Welkers and their desire for a Road  
12 Maintenance Agreement. It is time to put this issue to rest. The Association strongly requests  
13 that the Welkers stop this court battle and stop subjecting their Mount Dallas neighbors to an  
14 inordinate waste of time, energy and money in defending this lawsuit. It is time to move  
15 forward and accept the fair and equitable terms of the Road Maintenance Agreement agreed to  
16 by a majority of property owners on Mount Dallas.

17 I declare under penalty of perjury under the laws of the State of Washington that the  
18 foregoing is true and correct.

19 Signed at Friday Harbor, Washington on April 1, 2016.

20 Susan Allen  
21 Susan Allen

ROMNEY R. BRAIN  
rbrain@tousley.com

OUR FILE NO:  
W-6027-001.B1

May 21, 2015

Susan Allen, President  
Mt. Dallas Association  
2000 Mt. Dallas Road  
Friday Harbor, WA 98250

Re: Mt. Dallas Road and Mt. Dallas Association

Dear Ms. Allen:

We represent Clare and Abigail Welker, who own two properties accessed by Mt. Dallas Road. The Welkers have asked us to review the documentation (including recorded documentation) related to the creation of Mt. Dallas Road and the Mt. Dallas Association. Outlined below are our initial comments and conclusions. We have broken our comments and this letter into three parts. The first part discusses the status and current issues related to Mt. Dallas Road and the Mt. Dallas Association, both factual and legal. The second part sets out our recommendations for resolving the outstanding issues related to Mt. Dallas Road, the Mt. Dallas Association and the maintenance of the Road. The third part discusses what we believe to be the only practical approach for moving forward with a resolution of the outstanding issues, including implementing some or all of the recommendations. Some of the information set forth in this letter was obtained from First American Title Company (San Juan Title). Our comments are intended to be an overview that addresses the main substantive issues related to the Road, the Association and the maintenance of the Road. We have not reviewed every easement or document related to the Road or the Association, and are not attempting to address every provision of the documents that we have reviewed.

#### The Road and the Association

1. Mt. Dallas Road (the "Road") was originally created as an easement in the Real Estate Contract recorded in 1964 under San Juan County Auditor's File No. 58558. This easement was amended by the Extinguishment and Grant of Substitute Easement recorded on March 26, 1987 under San Juan County Auditor's File No. 87144952. These easements are reflected in the legal description for the Welker properties. These documents control the easement rights to Mt. Dallas Road from West Side Road to the



Welker properties, as well as establish the easement for Nighthawk Lane. Per the title company, the access to the Road and easement rights of properties further up the Road past the Welker properties are governed by a series of separate easements that link to the lower Road easement, and in various cases, create easements for the additional side roads.

2. The recent survey the Welkers had completed by San Juan Surveying shows the total length of the Road as 10,857 feet (with the Welker properties being about half way at 5,455 feet). The width of the Road is not uniform throughout its whole length. The surveyed length should be compared against the combined length reflected in all of the recorded easements that established the complete Road end to end.
3. The Road easement(s) benefit each of the properties served by the Road (the "Benefitted Properties"). Another way to say this is that all properties benefitted by the Road own easement rights over the Road for ingress, egress and utilities to their respective properties.
4. There is no existing Road Maintenance Agreement (recorded or otherwise) for the Road that would specify the methodology and procedures for maintaining the Road and assessing the Benefitted Properties for their respective share of the cost of maintenance. As such (i.e. where no agreement exists), all Benefitted Properties remain subject to the general holding in the case Buck Mountain Owners' Association v. Prestwich, 174 Wash. App. 702 (2013) (the "Equitable Maintenance Obligation"). Note that the Buck Mountain case establishes the general principle that where no road maintenance agreement exists, the court has equitable powers to impose reasonable road maintenance obligations. However, the Buck Mountain case does not establish any set methodology for proportioning road maintenance obligations where no agreement exists. In fact, the court specifically stated that "we decline to adopt a fixed rule delimiting the court's inherent equity power to allocate maintenance costs based on the particular facts and equity of a case". Which is to say, there is no governing methodology (other than that the allocation be equitable and reasonable), and that each situation will be looked at on a case by case basis by the court if the property owners cannot come to their own agreement. We mention this in part because the April 8, 2015 letter from you and the other officers and directors of the Association that discusses the Buck Mountain case correctly states the general requirement that those using the Road pay an equitable and fair share for maintenance. However, that letter also states "Fair share is to be based on the length of the road that the owner uses". This statement of the legal obligation of the property owners using a road is not correct. The court did not hold this, and as noted, refused to adopt a specific methodology for allocating shared maintenance expenses. Basing proportional maintenance obligations in part on the length of road used may very well be a fair and equitable way of allocating maintenance expenses under the given circumstances, and may be an appropriate method to apply here in regard to the maintenance of the Road, but it is not an exclusive methodology mandated by the court.
5. The Mt. Dallas Association (the "Association") was formed upon the filing of its Articles of Incorporation (the "Articles") on February 21, 1989. The first stated purpose of the

Exhibit A P2

- Association is "To maintain and upgrade the Mt. Dallas Road". The Articles further provide that "The regulation of the internal affairs of this corporation shall be set forth in the By-Laws".
6. The most recent version of the By-Laws appear to have been adopted by the Board in July of 2014.
  7. All easement rights in the Road run directly to the individual Benefitted Properties. The Association has no rights or interests in the Road or any of the easements that created the Road. Stated another way, the Association is not a legal beneficiary of the Road easement(s), and therefore (absent the express consent of and grant of authority by all of the property owners), the Association has no enforceable legal authority to exercise its purpose of maintaining the Road. In order to address its lack of authority (and apparently to satisfy lenders) the Association (as executed by the then president of the Association) recorded a purported "Road Maintenance Agreement" on April 21, 2006 under San Juan Auditor's File No. 2006-0421042. At apparently the same time the Association attached a "Notice to Lenders" to the Articles that stated "To verify road maintenance agreement and payment of related fees on an individual tax parcel contact . . ." These documents created the appearance of a road maintenance agreement and the related authority of the Association to make assessments and maintain the Road, when in fact there was no road maintenance agreement and the Association's authority was totally limited due to the fact that it (a) had no actual legal or beneficial interest in the Road easement(s), and (b) its authority was limited due to it being only a voluntary association (i.e. the Benefitted Properties are not bound by the Association's actions regarding the Road). These filings were therefore both incorrect and unauthorized. Note also that the court in the Buck Mountain case (where again there was no road maintenance agreement) specifically declined to require the property owners to sign a road maintenance agreement that would require them "to contribute a share of the sums for road maintenance regularly assessed by the . . . association on its members". The court in essence recognized that an association has no authority to make road maintenance assessments against property owners where the property owners are not subject to (i.e. burdened by) the association's authority and have not otherwise entered into an agreement authorizing the association to allocate and assess the maintenance costs.
  8. As noted, the Association is strictly voluntary. Pursuant to the By-Laws, owners of the Benefitted Properties accessed by the Road and having the beneficial right to use the Road are entitled to be members of the Association. No owner of a Benefitted Property is required to join or otherwise become a member of the Association. Not all owners of Benefitted Properties are members of the Association. And not all owners (members or non-members) pay the assessments made by the Association. Here again the April 8, 2015 letter is incorrect when it states that the Association can pursue legal action to collect unpaid assessments. The Association simply has no such legal authority.
  9. Given that the Association has no legal rights or interests in the Road, that membership in the Association by owners of the Benefitted Properties is strictly voluntary, and the above holding in the Buck Mountain case, the Association has no legal or independent right to

*Exhibit A P3*



- (a) maintain the Road, or (b) make assessments for the maintenance of the Road that would be binding upon the Benefitted Properties, except through the voluntary agreement of the owners of the Benefitted Properties. Stated another way, any owner of a Benefitted Property who elects not to join and become a member of the Association is not bound by the Road assessments or other Road related decisions made by the Association. And no owner of a Benefitted Property who is a member of the Association is bound by the Associations method or amount of Road expense assessment. All such Benefitted Properties do remain bound by the Equitable Maintenance Obligation, just not the Associations' interpretation of that obligation. Given that the Equitable Maintenance Obligation related to the Road has not been defined by agreement of all of the owners of the Benefitted Properties, without such an agreement it would ultimately have to be determined by the court.
10. Over the years, the Association has taken a number of approaches to making assessments for Road maintenance. Most recently, in 2014, it began to pro-rate the maintenance expenses somewhat in line with the Equitable Maintenance Obligation, but not entirely so. For example, some expenses are still assessed equally, and the proportional assessment was done by grouping properties within various stretches of the Road. This may or may not be "equitable and reasonable". Without agreement of all of the owners of the Benefitted Properties, the court would have to decide that.
  11. Over the years, the Association also began making and managing assessments and maintenance expenses for the side roads (the "Side Roads"). This was apparently done by the Board without the knowledge or input of all of the members of the Association. This also exceeds the stated purpose of the Association as set forth in the Articles, which is "To maintain and upgrade Mt. Dallas Road". It appears that the Board amended the By-Laws in 2014 to authorize the Side Road Assessments, and to authorize the Association to manage those Side Road Assessments. However, if the maintenance of the Side Roads is not authorized by the Articles (which it is not), the Board cannot merely amend the By-Laws to create this authority. Stated another way, the authority and purpose of the Association is limited by the Articles and cannot be materially modified or increased by an amendment to the By-Laws. Any change in the purpose and authority of the Association would require an amendment to the Articles approved by 2/3 of the members of the Association. And again, remember that the Association has no legal authority over the Road or the maintenance of the Road aside from the fact that it has no authority over the Side Roads or the maintenance of the Side Roads.
  12. So the bottom line here is that the Association has no authority over any Benefitted Property (or to establish Road maintenance assessments obligating a Benefitted Property) except where the owner of the Benefitted Property voluntarily agrees to submit to the Association's authority. Given that you have (a) Benefitted Properties that are not members of the Association, (b) Benefitted Properties that are members of the Association who disagree with the Boards methodologies and procedures for assessments, (c) Benefitted Properties that do not pay all or a portion of the assessments made by the Association, and (d) the Association separately making and managing

*Exhibit A P 4*

assessments for the Side Roads without any authority to do so, you have a rather messy situation that has been ad hoc at best, and that could easily get worse in the future. In order to provide certainty as to the assessments and the legal basis for the assessments, and to protect the value of all Benefitted Properties, a definitive solution is necessary.

#### Recommendations

In a perfect world where all owners agreed, implementing the following recommendations would address all of the current issues and resolve any of the current uncertainties related to Road maintenance and assessments:

1. Prepare a formal Road Maintenance Agreement ("RMA") to be signed by the owners of all of the Benefitted Properties. The RMA should reflect the Equitable Maintenance Obligation, as agreed to by all of the property owners. This could resemble the methodology that the Association started to use in 2014, a modification of that, or a new methodology that potentially better allocates the expenses in an equitable and fair manner.
2. The RMA could formally authorize the Association to manage the assessments and maintenance of the Road, giving it the actual authority that it currently lacks. Since the RMA will be recorded and be binding on all of the Benefitted Properties, all of the properties would be formally and legally granting the Association this authority. This would fully resolve the uncertainty that currently exists (and as noted, certainty on these sorts of things adds value to the properties and avoids the prospect of future litigation).
3. Each of the Side Roads should then separately adopt their own respective Side Road Maintenance Agreements ("SRMA"). The SRMA agreements could mirror the main RMA, and could (to the extent desired or appropriate) establish a separate association for each of the Side Roads to handle assessments and maintenance.
4. Other related clean-up items should include the following: (a) Amend the Articles as necessary to clarify the purpose of the Association, to cross-reference the recorded new RMA and to get rid of the earlier "Notice to Lenders", (b) have the new RMA cancel and supersede the unauthorized "Road Maintenance Agreement" recorded by the Association under San Juan Auditor's File No. 2006-0421042, and (c) amend and update the By-Laws consistent with the other changes related to the Articles, the Association's purpose and authority and the terms of the RMA.

As noted, one of the primary reasons to clarify and provide certainty with regard to the situation with the Road, maintenance and assessments is to protect the value of all of the Benefitted Properties. Without a clear and binding solution, the maintenance of the Road (and the related impact on the value of the properties) remains potentially subject to any Benefitted Property owner bringing a lawsuit to have the court determine the Equitable Maintenance Obligation on all of the properties (which would by-pass the Association) and which would create a cloud on all of the properties until resolved or the court determination is made. And any court

*Exhibit APS*



Susan Allen  
May 21, 2015  
Page 6

determination regarding the Equitable Maintenance Obligation of the Benefitted Properties would not necessarily solve all of the administrative problems (i.e. having a system and procedures in place to determine assessments and maintain the Road, given that the Association, as it currently stands, has no authority to do this).

#### Implementing the Recommendations – A Practical Course of Action

In order to implement the above recommendations, all Benefitted Properties would need to agree to and execute the RMA. There are presently 60 owners of Benefitted Properties. As a practical matter, negotiating and obtaining the agreement of 100% of the property owners to the terms of a RMA and a methodology for assessing Road maintenance expenses is highly unlikely. It would amount to an all or nothing, extremely time consuming approach with a very low chance of success. There needs to be a structured forum in which to address all of these issues and come to a timely resolution. As such, we intend to file (on behalf of the Welkers) an action in San Juan Superior Court to gain the court's assistance in resolving these issues (by agreement, or if not agreement, ultimately by court decision). We desire that this will be more of a managed process than an adversarial process, but in either case, placing this under the court's jurisdiction is the only practical way to proceed as it will require all owners of the Benefitted Properties to agree or be bound by a court decision within a limited time period.

In light of the Buck Mountain case, we believe that if the owners of a solid majority of the Benefitted Properties agreed to a specific RMA methodology for assessing and apportioning the costs of maintaining the Road (i.e. a reasonable and equitable assessment process), there is a strong likelihood that the court would adopt that methodology even without 100% agreement. The owners of the Benefitted Properties that approved the RMA methodology (as approved and/or determined by the court) could then grant the Association the authority to manage the assessments and maintenance of the Road. Although the Benefitted Properties that did not agree to the RMA methodology would still not be bound by the Association's authority and assessments, they would be bound by the methodology and the amount of the assessments as approved and determined by the court. The Benefitted Properties that approved the RMA methodology and the Association's authority to make assessments would have a claim against the other Benefitted Properties for their "fair share" of the cost of the Road maintenance. Those owners could assign that right to the Association, and the Association would then be in a position to collect the amount of the assessments against those other Benefitted Properties.

We also believe that once a court action is brought and "the writing is on the wall", so to speak, the ability to get all of the owners of the Benefitted Properties to agree on a court approved methodology would significantly improve, as the only option would be for those owners to engage in a court battle. As noted, with a solid majority in favor of the RMA methodology, the others would be fighting a significant uphill battle to convince the court that some other methodology should apply. And in the end, if no voluntary agreement can be reached, the court would be making the decision in a timely manner.

So as noted above, shortly we will be filing an action to get these matters resolved. Hopefully that action will lead to cooperation and agreement, but in any event, it will definitely lead to a

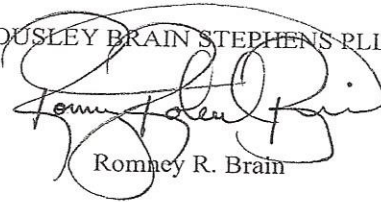
*Exhibit A PG*

Susan Allen  
May 21, 2015  
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resolution. Upon filing the action, a copy will be provided to all of the owners of the Benefitted Properties (who are all necessary parties to the action), including the officers and directors of the Association. As initially filed the action will not ask for any specific methodology for making Road maintenance assessments other than it be "equitable and fair", so from that standpoint, there will initially be no proposal to dispute. As the proceeding progresses there will be several possible outcomes. An acceptable methodology will get developed and be proposed by a majority of owners, or if that does not occur, owners (or groups of owners) may propose their preferred methodology, with the court making the final decision. Those owners who do not wish to be directly involved in the action and who are willing to agree to the final decision of the court on the methodology for Road assessments will, upon such agreement, be able to substantially avoid ongoing involvement in the litigation.

Sincerely,

TOUSLEY BRAIN STEPHENS PLLC

A handwritten signature in black ink, appearing to read "Romney R. Brain", is written over the printed name and the firm name.

Romney R. Brain

RRB/pc  
0099/001/299215.1

cc: Clare Welker  
Abigail Welker  
Royce Meyerott  
Sharon Boyd  
Sandy Hawley  
William Severson  
James Fritz

Exhibit A P7



**Mount Dallas Association**  
**Road Maintenance Agreement**  
**San Juan County 2016-0302026**  
**Joinder Status As of April 1, 2015**

Property Owners That Signed RMA Joinder

1 Allen #1  
2 Allen #2  
3 Auth  
4 Ballenger  
5 Blackmer  
6 Bienvenu  
7 Boyd  
8 Davis #1  
9 Davis #2  
10 Dearfield  
11 Duggins  
12 Erskine  
13 Francis #1  
14 Francis #2  
15 Fritz  
16 Gimlett  
17 Graham  
18 Guard  
19 Gubelman  
20 Haberman  
21 Hohenlohe #1  
22 Hohenlohe #2  
23 Kaufman  
24 Lagerquest  
25 Liebman #1  
26 Liebman #2  
27 McAlary #1  
28 McAlary #2  
29 McClellan  
30 Meyerrott #1  
31 Meyerrott #2  
32 Przybylski  
33 Rath #1  
34 Rath #2  
35 Rath #3  
36 Roberts #1  
37 Roberts #2  
38 Schumy  
39 Severson  
40 Sheppard  
41 Silverstein  
42 Swanson  
43 Tauscher  
44 Taylor  
45 Troutman/Sabin  
46 Twoomey  
47 Widdoes #1  
48 Widdoes #2  
49 Widdoes #3  
50 Widdoes #4

**60% Have Signed**

Property Owners That Have Not Sign RMA Joinder Yet

1 Albert  
2 Bailor  
3 Borys  
4 Casey  
5 Chapman  
6 Crawford  
7 Eichler  
8 Gerhardstein  
9 Gero #1  
10 Gero #2  
11 Henneman  
12 Smith #1  
13 Smith #2  
14 Keeler #1  
15 Keeler #2  
16 Keeler #3  
17 Keeler #4  
18 Keeler #5  
19 Keeler #6  
20 Kroesche  
21 Moss  
22 Navratil  
23 Padilla  
24 Schilling  
25 Schoebel/Farrer  
26 SJ Preservation Trust  
27 SP Investments #1  
28 SP Investments #2  
29 Staunton/Sikorski  
30 Swin #1  
31 Swin #2  
32 Swin #3  
33 Welker  
34 Whalen

**40% Have Not Signed Yet**

*EXHIBIT B*