

JUN 13 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,

NO. 15-2-05069-0

v.

**MEMORANDUM IN SUPPORT OF
ORDERS ON PRESENTATION**

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

QUESTIONS PRESENTED

- I. Should the Court sign the Order Granting Plaintiffs' Motion for Order Cancelling the Road Maintenance Agreement presented by Defendants?**
- II. Should the Court allow for the recording of the Declaration of Revocation of Recording of Road Maintenance Agreement for Mount Dallas Road presented by Defendants, in lieu of recording a Court Order as proposed by Plaintiffs?**
- III. Should the Court sign the Order Regarding Revised Road Maintenance Agreement and Joinder presented by Defendants?**

1 **I. Should the Court sign the Order Granting Plaintiffs' Motion for Order Cancelling**
2 **the Road Maintenance Agreement presented by Defendants?**

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4 Defendants' arguments in favor of the Order prepared by Defendants are set forth
5 in detail in the Declaration of Mary L. Stone, filed herewith. In summary, the Defendants'
6 Order, as written, ensures that the RMA remains an enforceable contract between the
7 Association and those parcel owners who signed Joinders to it. Plaintiffs' language would
8 nullify and void the RMA contract which is NOT what this Court intended or ordered.
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10 Additionally, the Plaintiffs have added a sentence at the end of their proposed Order
11 stating that "any party may record a copy of this Order with the San Juan County Auditor." We
12 object to the inclusion of that sentence. We seek to have fewer, rather than more, exceptions
13 reported on the titles of Mount Dallas parcels. According to the title officer for Chicago Title,
14 Dean M. Prather, the RMA will not show as an exception on title for a parcel unless and until a
15 Joinder to such RMA has been recorded against such parcel. There is no reason to cloud title
16 with a court order that cancels an RMA document that has never shown up on title and will never
17 show up on title.
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19 **II. Should the Court allow for the recording of the Declaration of Revocation of**
20 **Recording of Road Maintenance Agreement for Mount Dallas Road presented by**
21 **Defendants, in lieu of recording a Court Order as proposed by Plaintiffs?**

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23 Instead of recording the Order Cancelling the RMA as the Plaintiffs propose, which
24 Order will appear as an exception on title for every Mount Dallas parcel, even though the RMA
25 itself will not, Defendants propose to record the *Declaration of Revocation of Recording of Road*
26 *Maintenance Agreement which is attached hereto as Exhibit "A"*. As long as this Declaration is
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1 signed by the same two parties who signed the recorded RMA, neither the RMA nor the
2 Declaration will appear on title for any Mount Dallas parcel. *See Declaration of Dean M.*
3 *Prather, filed herewith.* There is simply no reason to add unnecessary exceptions to title.
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5 **III. Should the Court sign the Order Regarding Revised Road Maintenance Agreement**
6 **and Joinder presented by Defendants?**

7 As detailed in the Declaration of Mary L. Stone, filed herewith, Plaintiffs raised four
8 concerns with the contents of the RMA that had been recorded by the Association, which, in
9 their opinion, clouded title to all 84 parcels accessed via Mount Dallas Road. Those concerns
10 were 1) the legal description attached as Exhibit A-1; 2) the map of the road attached as Exhibit
11 A; 3) the definition of "Property Owner" and the use of "Property Owner" in Sections 12, 15 and
12 16 of the RMA; and 4) the mentioning of the term "Side Roads". *A Revised RMA and a Revised*
13 *Joinder rectifying all four concerns have now been drafted by the Association and are filed*
14 *herewith.* However, after reviewing the Revised RMA and Revised Joinder, Mr. Brain still
15 objected to having them recorded. In addition to referencing the issues brought up by Mr. Peters
16 (and later refuted per the Declaration of Mr. Prather), he expressed concern about only a single
17 section in the Revised RMA -- **Section 12. Equitable Contributions**, which states, in full:
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20 "In addition to assessing Bound Property Owners, the Association shall seek equitable
21 contributions, to the extent permitted by law, from owners of Parcels that are not Bound
22 Parcels."
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24 According to Mr. Brain, this section creates a cloud on the title of Non-Bound Parcels.
25 He alleges that this section puts owners of Non-Bound Parcels at the mercy of the Association in
26 terms of what the Association may seek to collect and what actions it may seek to take through
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1 the authority delegated to it for the benefit of Bound Parcels and their owners. *See Chris Brain*
2 *email, May 27, 2016, attached hereto as Exhibit "B"*. Notwithstanding the fact that the Revised
3 RMA would not appear as an exception on title for any Non-Bound Parcel, per Declaration of
4 Dean M. Prather, and notwithstanding the fact that the Revised RMA does not in any way bind
5 or obligate the owner of any Non-Bound Parcel, or their property, per Declaration of Dean M.
6 Prather, Mr. Brain misrepresents the clearly expressed meaning of Section 12. At the end of the
7 trial in this matter, this Court may order owners of Non-Bound Parcels to pay their fair share of
8 road maintenance costs to the Association. Possibly, the legislature will eventually pass a law
9 requiring parties residing on private roads who are not bound by road maintenance agreements to
10 pay their fair share to an association that has been, or must be established. Section 12 simply
11 states that *if and when the law permits the Association to seek equitable contributions from*
12 *owners of Non-Bound Parcels, the Association will do so*. This language does not purport to
13 create any additional burdens for Non-Bound Parcels: As long as the law does not permit the
14 Association to seek any equitable contributions from owners of Non-Bound Parcels, then it will
15 not seek such contributions. After such time as the law *does* permit the Association to seek
16 equitable contributions from owners of Non-Bound Parcels, the obligation to make those
17 equitable contributions will already exist, according to law, and therefore such obligations will
18 already burden Non-Bound Parcels. *The Revised RMA does not purport to affect those burdens.*
19 If any such burdens exist, according to law, they will continue to exist, unchanged, whether or
20 not the Revised RMA is recorded. Because the Revised RMA cannot affect and does not purport
21 to affect the burdens of Non-Bound Parcels, recording it does not cloud title of such parcels.

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27 Mr. Brain also claims that the Revised Joinder creates a cloud on the titles of Non-Bound
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1 Parcels because it references Mount Dallas Road, references the Mount Dallas Association, and
2 states that the Mount Dallas Association "is organized for the purpose of maintaining Mount
3 Dallas Road and its side roads". Notwithstanding the fact that, according to contract law, owners
4 of parcels who do not sign the Revised RMA or the Revised Joinder are not bound by the
5 Revised RMA, Mr. Prather has made it very clear that a properly prepared title report would not
6 even show the Revised RMA or Revised Joinder as an exception on title to their parcels, and
7 therefore the Revised RMA and Revised Joinder would not cloud title.
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10 The Plaintiffs would have one believe that even mentioning the name of the maintained
11 road in a road maintenance agreement clouds title for owners who do not sign the agreement.
12 This is obviously false: Contract law does not allow any party to bind a second party without the
13 second party's agreement. In this case, the Revised RMA does not bind any owner of any parcel
14 without the owner's agreement -- in writing.
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16 Notably, however, per the Declaration of Mr. Prather, Plaintiffs *did* cloud title of all 84
17 Mount Dallas parcels when Mr. Welker deliberately sent Chicago Title a copy of George Peters'
18 declaration, notifying Chicago Title of the ongoing litigation.
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20 In summary, we ask the Court to enter the Orders presented by Defendants, specifically,
21 to 1) amend and clarify the Plaintiffs' Order Cancelling the Road Maintenance Agreement; 2)
22 allow Defendants to "unrecord" the original RMA by recording a Revocation, rather than, as
23 Plaintiffs request, by recording a Court Order; and 3) allow Defendants to record the Revised
24 RMA and Revised Joinder.

25 Respectfully submitted this 13th day of June, 2016.

26 _____
27 MARY L. STONE/WSBA#17327
28 Attorneys for Defendants Mount Dallas Association
& L. Curtis Widdoes, Jr.

Filed for Record at Request of
When Recorded Return to:

Mary L. Stone, Inc., P.S.
P.O. Box 623
Friday Harbor, WA 98250

Document Title: **DECLARATION OF REVOCATION OF RECORDING OF
ROAD MAINTENANCE AGREEMENT FOR MOUNT
DALLAS ROAD**

**Declarants/
Revoking Parties:** **MOUNT DALLAS ASSOCIATION**

Grantees: **MOUNT DALLAS ASSOCIATION**

Short Legal: **Ptn Sections 13, 14 and 24, T35N, R4W**

TPN: **N/A**

Related Documents: **2016-0302026**

This Declaration is effective as of this ____ day of _____, 2016, is made by
MOUNT DALLAS ASSOCIATION, a Washington nonprofit corporation (the "Association").

RECITALS

- A. The Association recorded a document titled "Road Maintenance Agreement" on March 2, 2016, under San Juan County Auditor's File No. 2016-0302026.
- B. The Association wishes to revoke the recording of said Road Maintenance Agreement so that it no longer appears of record.

DECLARATION

The Association hereby revokes the Road Maintenance Agreement document that was recorded on March 2, 2016, under San Juan County Auditor's File No. 2016-0302026. This revocation hereby cancels and terminates the recording of said Road Maintenance Agreement, with the intention that said Road Maintenance Agreement shall no longer appear of record.

IN WITNESS WHEREOF, this Declaration of Revocation of Recording of Road Maintenance Agreement is executed by the President and the Secretary of the Association, as of the date first written above.

MOUNT DALLAS ASSOCIATION

Susan D. Allen, President

Robert C. Tauscher, Secretary

STATE OF WASHINGTON)
)ss.
COUNTY OF SAN JUAN)

I certify that I know or have satisfactory evidence that Susan D. Allen and Robert C. Tauscher are the persons who appeared before me and said persons acknowledged that they signed this instrument, on oath stated that they were authorized to execute the document and acknowledge it as President and Secretary of Mount Dallas Association, to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

GIVEN under my hand and official seal this _____ day of _____, 2016.

Notary Public in and for the State of
Washington, residing at _____
My commission expires: _____

Mary L. Stone

From: Chris Brain <CBrain@Tousley.com>
Sent: Friday, May 27, 2016 2:47 PM
To: Mary Stone (mlstone@rockisland.com)
Cc: Derek Mann; Katie Loring; Romney Brain; Jake Humphreys; Chris Brain
Subject: Proposed RMA Issues and SJ Orders
Attachments: Peters Declaration.pdf

Mary

This email responds to your emails dated 5-24 and 5-26.

We have reviewed the RMA and the Joinder in accordance with Section 2 of the Order Granting Plaintiff's Motion For Order Cancelling Road Maintenance Agreement Recorded By Defendant Mount Dallas Association and its Board Members. Our objections are discussed and set forth below.

We have also retained and discussed this matter with George Peters as our expert on title matters, title clouds and Schedule B exceptions. Mr. Peter's Declaration is attached to this e-mail and is self-explanatory.

Understand that as we have previously indicated, there is no reason to record any RMA or Joinder to achieve what you are seeking. If you wish to proceed without recording, then we have no objections, provided that there is no future recording without our review and approval at that time in accordance with the above Order. However, as noted in Mr. Peter's Declaration, the damage has already been done. The recording of the prior RMA will show up as an exception on Schedule B for all properties on Mt. Dallas Road, whether they agree, sign a Joinder, or disagree and sign nothing that specifically binds their respective property. This is why having the Court Order that expressly cancel, terminates and renders the recorded RMA null and void is essential.

Our objections below focus more on specific objections to the Proposed RMA and Joinder, and are supplemental to Mr. Peter's Declaration.

The Proposed RMA

Our main objections to the Proposed RMA come down to Section 12.

12. Equitable Contributions. This is the Section under the RMA where the Owners of Bound Parcels effectively assign their rights to the Association to collect from the Owners of Non-Bound Parcels.

Our objections can be summarized as follows:

- (1) How and by whom are "equitable contributions" to be determined? A Parcel that is not Bound certainly cannot be required to pay or contribute more than what (a) the Court ultimately determines is that Parcel's equitable "fair share" based upon the final Actual Use Method adopted, and (b) the equitable fair share contribution can only apply to those expenses that the Court determines are appropriate "Road Expenses" (i.e. not all the expenses covered under Section 11 of the Proposed RMA). So without clear and final definition from the Court, this provision creates a huge unknown and cloud on the title of Non-Bound Parcels. It is conceptually possible to prospectively limit this provision to what the Court finally determines is a Non-Bound Parcel's "fair share" and the Court's "approved Road Expenses". However,

at this juncture of the Court proceedings, there are still way too many unknowns. As such, we do not believe any such limiting language would be sufficient to fully remove the “cloud” issue.

- (2) Because the Proposed RMA, and the Association historically, include Road expenses that are not legally assessable, this provision puts the Non-Bound Parcels at the mercy of the Association in terms of what it may seek to collect and what actions it may seek to take through its assigned authority from the Bound Parcels. There is also no protection if the Association exceeds its finite and limited authority on these issues. Until a process is set forth and/or implemented by the Court to address this issue, and set forth the rights and procedure for the Non-Bound Parcels to object (without having their property lien-ed and/or having to go to Court to fight inappropriate Road expenses), these provisions are separately objected to on this basis. Again, the unknowns and uncertainties create a cloud on the Non-Bound Parcels.
- (3) Both the Proposed RMA and the Joinder specifically reference “Mount Dallas Road”. The Non-Bound Parcels have legal easement rights over Mount Dallas Road. As a result, we believe (as confirmed by Mr. Peters in his Declaration) that any title search of a Non-Bound Parcel would pick up and reflect the Proposed RMA as an exception on title.

The Proposed Joinder

The “Whereas” Recitals under the Joinder again specifically reference Mount Dallas Road. The second Recital also specifically references Mount Dallas Association and states that it “is organized for the purpose of maintaining Mount Dallas Road and its side roads”. The third Recital specifically references the Proposed RMA (which will be attached and recorded as part of the Joinder) and states that the Association “has agreed to administer the maintenance of Mount Dallas Road. For the reasons above stated, these provisions are objected to and potentially create a cloud on the titles of the Non-Bound Parcels once a Joinder is recorded. Separately, we object to these provisions to the extent that they are not properly qualified or limited and imply greater authority than the Association clearly has. The failure to clearly and expressly qualify and limit the Association’s authority in these provisions simply implies more authority than the Association has, which exacerbates the potential cloud on the titles of Non-Bound Parcels. For example, these provisions do not (a) clearly state and reflect that the Association is strictly voluntary and has no legal right to administer the maintenance of Mount Dallas Road on behalf of the Non-Bound Parcels, or (b) reflect the Court’s prior holding that the Association has no legal rights or interests in Mount Dallas Road. The current wording of these Recitals simply leaves too much ambiguity as to the Association’s authority over the Road vis-a-vis the Non-Bound Parcels.

Our Position on the Proposed RMA

We do not intend to challenge the Association and any Bound Parcels from entering into an RMA. However, in light of Mr. Peter’s Declaration, if you want to proceed with the Proposed RMA and record Joinders before the final Court decision, then at an absolute minimum, you need to go alone and expressly exclude the Non-Bound Parcels from the Proposed RMA in order to create absolute legal clarity in regard to the Non-Bound Parcels. Understand that per Mr. Peter’s Declaration, this would not prevent the Proposed RMA from showing as an exception on the title of Non-Bound Parcels, but it would clarify the legal liabilities on this before we get a final Court decision. If you still wish to proceed with any effort to record the Proposed RMA and Joinders, then the current Section 12 needs to be dropped from the Proposed RMA, and in its place a new Section 12 added that provides: “Notwithstanding any provision of this Agreement, no Parcel that is a Non-Bound Parcel (a) shall be considered a party to this Agreement, (b) shall have any responsibility or liability under this Agreement, or (c) shall have any responsibility or liability direct, by way of contribution, or otherwise, for any (i) Maintained Road expenses covered under Sections 6 through 10 of this Agreement, or (ii) Assessments made pursuant to Section 11 of this Agreement. The Association has no legal rights or interests in Mount Dallas Road, and as such, has no legal authority to administer the maintenance of Mount Dallas Road on behalf of the Non-Bound Parcels.” The forgoing proposed new Section 12 is merely suggested as a possible interim solution

that we will consider and review further with Mr. Peters. We reserve our right to withdraw this suggestion and contest any recording of any Proposed RMA or Joinder.

The Proposed Declaration of Revocation

For the above reasons, and those stated in Mr. Peter's Declaration, we object to your recording of a Revocation by the Association. It will solve nothing and potentially adds further confusion the situation relating to exceptions on title. As mentioned above, this is why having the Court Order that expressly cancels, terminates and renders the recorded RMA null and void is essential, and is the only proper approach. Separately, we question whether the Association, which had no legal authority to record the RMA in the first place, has legal authority to record a Revocation of that first RMA. Again, the Association aggressively elected to record the first RMA without anyone's approval, including the prior approval of the Court. The Association is now stuck with the damage and consequences of that recording and must rely on the Court and its Order cancelling that RMA to remedy its improper actions.

We agree that we need to get the orders entered from the past hearing. At this point it appears we do not agree on the SJ order proposed by the Association or the Order Cancelling the RMA. Unfortunately, I am not available for a hearing until June 24. Both the 10th and 17th are already occupied by other matters and the 3rd is not timely. But, given there is no urgency, that should work for all.

Chris