DEREK MANN
& ASSOCIATES, PLLC

P.O. BOX 399, EASTSOUND, WASHINGTON 98245
296 "A" STREET, EASTSOUND, WASHINGTON 98245
(360) 376-3299 or (888) 875-3193 / (888) 220-0983 fax
derek@orcaslaw.com

May 23, 2016

Mount Dallas Road Property Owners

RE: Mount Dallas Road Litigation / Welker v. Association et al.

Dear Mount Dallas Road Property Owners:

Since Christopher Brain, attorney for the Welkers, felt it was appropriate to write you a nine-page letter explaining his slant on the proceedings, we, the attorneys for the Mount Dallas Association, feel the need to provide you with our perspective.

Many of you have lived on Mount Dallas Road, or one of the side roads accessed via Mount Dallas Road, for several years, some for decades, and most of you have been there longer than the Welkers. Some of you who started the Association in 1989 are still around. Many of you regularly attend the annual meetings and cast your vote for officers and other agenda items set for vote. Some of you have served on the Board, and you know that Board service is a difficult and thankless task. Most of you have voluntarily paid your assessments as they were billed over the years. When the Association was considering changing the method of calculating assessments, many of you participated in person or by proxy in choosing and approving each new method -- *these decisions were not based upon the Board's whim, as alleged by Mr. Brain.*

Mr. Brain told you repeatedly throughout his letter, in various ways, that the Association does not have any legal interest in the road. We assume that everyone knows that the Association does not "own" the road. Sometimes roads are owned by an association, but that generally is only when a developer creates a plat and dedicates the road to an association that the developer set up at the same time he created the plat. Mount Dallas Road was not created in that manner. Mount Dallas Road is a series of easements, granted at different times, and the road was never dedicated to any association.

However, as a matter of fact, the Association does have a legal interest in the road, which interest derives from the implicit and explicit delegation of maintenance authority by property owners benefiting from easements over the road. In 1989, the road needed to be maintained, so a group of volunteer owners took it upon themselves to set up an Association to do that maintenance. For twenty-seven years, road maintenance was handled in a way that was objectively successful and satisfied a substantial majority of owners. The Association continued, thrived, managed to pave the road in 2005, and then resurfaced it in 2011. Membership was voluntary. Delegation of maintenance authority was clear, but implicit. Eventually, in 2016, owners of a substantial majority of parcels signed joinders to an RMA that *explicitly* delegated maintenance responsibilities to the Association.

Regardless of the fact that a majority of owners were satisfied with the way the Association had managed the road, the Welkers decided that things should be different. Last year, they abruptly filed a lawsuit against the Association and all Mount Dallas property owners. So far, their attorney, Mr. Brain, has filed five motions against the Association, and there have been two lengthy hearings in front of Judge Eaton. Defending against these motions has been extremely expensive for the Association. All of the Association's legal expenses have been paid by voluntary contributions to a special legal-defense fund from owners who want the Association to continue managing the road in the same way as it did in the past.

The first motion brought by Mr. Brain sought to have the Association adjudged to be 1) lacking legal authority to manage maintenance or any other aspects of Mount Dallas Road, 2) lacking legal authority to enter into contracts on behalf of property owners, regardless of the desires of the property owners, and 3) lacking legal authority to establish, assess or collect maintenance expenses from property owners. Judge Eaton substantially modified or denied all of those requests. He clearly stated that the Association is entitled to: (a) continue to perform road maintenance; and (b) enter into road-maintenance agreements with its members, which agreements are binding between the Association and its membership.

The second motion brought by Mr. Brain asked the Court to determine a methodology for calculating road maintenance expenses. Although a substantial majority of property owners had already declared their preference for a specific, well-defined "actual use method", Mr. Brain sought a ruling for the "legal use method". (The legal use method would require each of you to pay based on the length of your easement, rather than the length of the road you actually use.) Naturally, we brought a counter motion asking the Court to adopt the actual use method. The Court adopted the actual use method.

In-between those two hearings, a group of property owners, including Board members and others, had formed a committee to draft a detailed Road Maintenance Agreement (RMA) that would be compatible with the desires of a majority of property owners, as expressed in the Association's 2015 surveys. The committee completed an RMA and sent it out to all of you along with a joinder. Before the second hearing, the Association recorded the RMA as a stand-alone document, with the intention that it not bind any owner's parcel until and unless such owner signed the joinder. A substantial majority of property owners did sign joinders. The Court recognizes the Association's agreements with its members. The lawsuit must therefore be resolved by reconciling the rights and obligations of non-members with the existing agreements of members.

Upon learning of the recording of the RMA document, Mr. Brain served three new motions on the Association: 1) a motion to strike the Association's own motion for summary judgment, based on a legal technicality (Judge Eaton denied Brain's motion to strike); 2) a motion to cancel the recorded RMA document; and 3) a motion to amend the Welkers' complaint. In the second motion, Mr. Brain argued that the RMA, as written, burdened every parcel along Mount Dallas Road, whether the owner had signed a joinder or not, and he pointed out language in the document that he thought supported his claim. That was certainly not the Association's intention, and we still disagree with his claim that the language can be interpreted in that way. However, in Court, when those issues were brought to our attention, we agreed to voluntarily cancel the RMA document, which made Mr. Brain's third motion moot.

In Court that day, it was agreed that any new RMA to be recorded would first have to be approved either by Mr. Brain and the Welkers, or by Judge Eaton, to certify that it did not burden non-members' properties. As you may know, the committee then began meeting again to revise the RMA to remove the language that caused concern. The committee has now completed the draft of a new RMA. The new RMA is identical in all its terms to the previous RMA, but the language has been changed to avoid any interpretation that the agreement would burden the property of any owner who did not sign a joinder to the agreement. As of this writing, Mr. Brain is still reviewing the new RMA, together with a new joinder, and has not provided his opinion. If necessary, we will return to Court to have Judge Eaton rule on this issue. *The Association intends to have a recordable RMA document.*

The Board has not reached any decision yet about whether it will seek to obtain joinders to the new RMA before trial, or, if so, whether it will seek permission from those who signed joinders, to record those joinders.

Nevertheless, Mr. Brain seeks in his letter to frighten you about signing a joinder. He makes several misrepresentations in telling you that recording an RMA against your property may have a material adverse impact. Mr. Brain would have you believe that signing the Association's road maintenance agreement would "create a cloud on the title to your real property". This is simply incorrect. The effect on your title will be to provide you an agreement that adds value to your property, for example, by satisfying lenders that your property benefits from a road maintenance agreement (a general requirement for a conventionally-financed sale).

Mr. Brain goes on to list three other purported issues with the RMA:

a. Insurance. According to Mr. Brain, the only insured is the Association, and there is no coverage for property owners. We have carefully reviewed the policy and we have spoken with the insurance broker at length. The insured under the policy includes the Association *and its members.* Of course, each of you still needs your own insurance for claims not related to road maintenance, but the Association's insurance covers its members for road-maintenance-related claims. This type of coverage has substantial value for property owners who are members of the Association, and, importantly, *this type of coverage is standard for road associations that maintain roads on behalf of association members.* The topic merits no debate. But Mr. Brain goes on to claim that, because the Association lacks any legal interest in the road, it may have no insurable interest in the road. That is completely ridiculous: In Washington State, there is no legal requirement that an Association must own a road in order to insure itself and its members with respect to its road maintenance responsibilities.

b. Reserve Account. Mr. Brain would have you believe that accumulating funds in a reserve account "can be a material issue to a buyer in the event of a sale". We agree – a reserve account is a material positive issue for a buyer: (A) Washington statutes governing homeowners associations and condominium associations strongly encourage the keeping of reserves. [See RCW 64.38.065 and RCW 64.34.380, set forth below.] (B) No buyer wants to face a large special assessment (for example, an assessment to resurface a road) immediately after buying a property. (If funds are only collected just prior to resurfacing, then a property owner who sells just before resurfacing has essentially used the road for free and passes his cost on to the new owner – but a savvy buyer will inquire about a reserve account during the due-diligence period.) (C) The authority to maintain a reserve account is a tool that makes it practical for an association like ours to collect and accumulate the large amount of money required to pay for major, infrequent road-maintenance expenses, like resurfacing the road -- and an association that has the necessary tools is a real positive for a sensible buyer.

c. Side Road Expenses. The RMA developed by the Association governs the maintenance and cost-sharing for the paved portion of Mount Dallas Road, *not for the side roads*. It authorizes no assessments or spending for the maintenance of the side roads, nor any spending for the special benefit of side-road property owners. We have no idea how Mr. Brain got the idea that the side roads were a subject of the Association's RMA for Mount Dallas Road, or why he brings up side roads as an issue in this litigation. His comments about side roads are irrelevant to the matter at hand and should be ignored -- he might as well be talking about maintenance of High-Haro Drive.

Note that *none of the above three items adversely affects your property.*

The Association did not initiate this litigation, and the Association wants it to cease. We therefore sought a trial date. Trial has now been set to begin October 17. At trial, the Association intends to vigorously pursue approval by the Court of all the provisions of the RMA that the majority of owners have signed. You are all encouraged to attend.

All this should be over by the end of October, so please bear with us until then.

Thank you for your support in this difficult time.

Sincerely,

Derek Mann

Mary Stone

RCW 64.38.065 Reserve account and study.

(1) An association is encouraged to establish a reserve account with a financial institution to fund major maintenance, repair, and replacement of common elements, including limited common elements that will require major maintenance, repair, or replacement within thirty years. If the association establishes a reserve account, the account must be in the name of the association. The board of directors is responsible for administering the reserve account.

(2) Unless doing so would impose an unreasonable hardship, an association with significant assets shall prepare and update a reserve study, in accordance with the association's governing documents and this chapter. The initial reserve study must be based upon a visual site inspection conducted by a reserve study professional.

(3) Unless doing so would impose an unreasonable hardship, the association shall update the reserve study annually. At least every three years, an updated reserve study must be prepared and based upon a visual site inspection conducted by a reserve study professional.

(4) The decisions relating to the preparation and updating of a reserve study must be made by the board of directors in the exercise of the reasonable discretion of the board. The decisions must include whether a reserve study will be prepared or updated, and whether the assistance of a reserve study professional will be utilized.

RCW 64.34.380 Reserve account—Reserve study—Annual update.

(1) An association is encouraged to establish a reserve account with a financial institution to fund major maintenance, repair, and replacement of common elements, including limited common elements that will require major maintenance, repair, or replacement within thirty years. If the association establishes a reserve account, the account must be in the name of the association. The board of directors is responsible for administering the reserve account.

(2) Unless doing so would impose an unreasonable hardship, an association with significant assets shall prepare and update a reserve study, in accordance with the association's governing documents and RCW 64.34.224(1). The initial reserve study must be based upon a visual site inspection conducted by a reserve study professional.

(3) Unless doing so would impose an unreasonable hardship, the association shall update the reserve study annually. At least every three years, an updated reserve study must be prepared and based upon a visual site inspection conducted by a reserve study professional.

(4) This section and RCW 64.34.382 through 64.34.392 apply to condominiums governed by chapter 64.32 RCW or this chapter and intended in whole or in part for residential purposes. These sections do not apply to condominiums consisting solely of units that are restricted in the declaration to nonresidential use. An association's governing documents may contain stricter requirements.