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** **MOUNT DALLAS ASSOCIATION'S MEMORANDUM IN OPPOSITION TO MOTION TO AMEND COMPLAINT AND TO CANCEL ROAD MAINTENANCE AGREEMENT**

I. INTRODUCTION

Defendants Mount Dallas Association ("Association") asks the Court to deny Plaintiffs' Motion for Leave to Amend Complaint and its Motion for Order Cancelling Purported Road Maintenance Agreement ("RMA").

Plaintiffs allege that the RMA that was recorded by the Association clouds the title to the Plaintiffs' real property and that the Association lacks a substantial justification under RCW 4.28.328 for filing the RMA and has thus violated the statute. Plaintiffs seek to add claims against the Board Members who authorized the recording of the RMA. Plaintiffs further seek to amend their Complaint based on the proposition that the Association does not meet the requirements to legally exist as a homeowners' association and therefore lacks standing to participate in this lawsuit or take any action whatsoever.

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P.O. Box 623
Friday Harbor, WA 98250
360-378-6778; 866-309-2611 Fax

Alternatively, Plaintiffs seek to have the Court enter an order cancelling the recording of the RMA and awarding attorney fees, based on the proposition that the Association did not have the authority to record such an agreement, both under this Court's rulings and Washington law.

II. FACTS

Soon after Plaintiffs initiated this lawsuit, their counsel sent a letter, dated July 24, 2015, to all owners of parcels accessed via Mount Dallas Road. *See Exhibit A, Declaration of Susan Allen.* This letter included an "Outline of Proposed Method of Allocation, Assessment and Management for Mt. Dallas Road" (the "Outline"). Said Outline proposed the allocation of expenses to be based, pro-rata, on the square footage of the road *to each driveway* and Side Road. It set two tiers of assessments - developed and undeveloped, with an undeveloped property to be obligated to pay one-half of that which a developed property would pay. Lastly, this letter also enclosed a "Contingent Approval Form". This form asked property owners who generally approve of the proposed allocation method presented in the Outline, to acknowledge such approval in writing and return the signed form back to Tousley Brain Stephens, PLLC. Notably, the form did not ask for any feedback. It did not suggest that if you did not generally approve of the proposed allocation method presented in the Outline, to please explain why. It did not ask for other ideas that people who have been living on that road, some for decades, and who had been paying for road maintenance already, some for decades, to suggest alternatives. It was all or nothing.

After this Court heard arguments on Plaintiffs' first Motion for Summary Judgment on October 30, 2015, the Association decided to actually invite input from the property owners who use Mount Dallas Road to see whether a consensus could be reached with regard to the provisions of a RMA. They sent out questionnaires and surveys and held numerous meetings, writing and re-writing drafts, parsing every word and seeking input throughout the process. They felt they were in a better position than Mr. Brain, to get feedback. After all, Mr. Brain had sued everyone who used the road, so they weren't feeling particularly friendly to him. After

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P.O. Box 623
Friday Harbor, WA 98250
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hundreds of hours of work, a final Road Maintenance Agreement was approved and recorded. *See Declarations of James Guard and Susan Allen.* The RMA attached to no parcels of real property on the road and by its terms, would not attach to any parcels until and unless a parcel owner signed a Joinder and that Joinder got recorded. Although 63% of the Joinders have been signed and returned to the Association as of this writing, none has yet been recorded.

III. ISSUES

1. **Should the Court Deny Plaintiffs' Motion for Leave to Amend its Complaint?**

2. **Should the Court Deny Plaintiffs' Motion for Order Cancelling Purported Road Maintenance Agreement Recorded by Defendant Mount Dallas Association and its Board Members?**

IV. EVIDENCE RELIED UPON

In seeking the denial of both of Plaintiffs' motions, Defendant Mount Dallas Association and its Board Members rely on the Declaration of Sandra Hawley, the Declaration of Susan Allen, the Declaration of James Guard, the Declaration of L. Curtis Widdoes, Jr., the pleadings filed by co-counsel Derek Mann, and all the files and records of the case.

V. ARGUMENT

A. LEAVE TO AMEND COMPLAINT.

Plaintiffs seek leave to amend their Complaint, alleging that as a result of the Association's recording of a RMA, Plaintiffs' title to their real property has been clouded in violation of the lis pendens statute. The Plaintiffs also seek to add claims against the Board Members who authorized the recording of the RMA.

They seek to further amend their Complaint to add additional Defendants if any property owners on Mount Dallas Road signed and recorded a Joinder, alleging that signing and recording a Joinder would somehow also cloud Plaintiffs' title.

Lastly, they seek to amend their Complaint based on the theory that the recent *Halme v.*

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P.O. Box 623
Friday Harbor, WA 98250
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Walsh case holds that the Association lacks standing to participate in this lawsuit or take any action whatsoever.

Plaintiffs argue that leave to amend their Complaint should be freely given because justice so requires, that Plaintiffs have not engaged in undue delay, that the Association cannot claim to be unduly surprised by these new claims, that no jury confusion will result from an amended complaint, that adding these claims is not futile, that the Plaintiffs' proposed amendments do not introduce remote issues, and the Association will not suffer unfair prejudice by the Plaintiffs' proposed amendments. Some of those allegations are true. Leave should be granted when justice so requires. The Plaintiffs have not engaged in undue delay. No jury confusion will result from an amended Complaint. The proposed amendments do not introduce remote issues. But, Defendant Mount Dallas Association does disagree with the following assertions:

1. <u>The Association CAN Claim to be Unduly Surprised by These New Claims</u>.

Plaintiffs support their assertion that the Association cannot claim to be unduly surprised by these new claims because this Court's prior statement at the October 30, 2015 hearing stated that the Association lacked the authority to impose a road maintenance agreement. Although I was not personally present at that hearing, I have read the transcript and this Court did *not* say that the Association lacked the authority to impose a road maintenance agreement. In fact, the Court seemed to invite the Association to do just that:

> "...Well, my point is that less than 100% of these people could come up with a very comprehensive agreement that they all want to be bound on and they could record it and they could be bound by it. So when I said 100%, I'm just pointing out that less than 100% can form - have an Association, can have an agreement and can record it and it will be binding but only on those who sign it...." Judge Eaton Transcript, Oct. 31, 2015, 2:31:05 - 2:31:43

2. <u>Adding These Claims IS Futile</u>.

Plaintiffs support their assertion that adding these claims is not futile based on the theory

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P.O. Box 623
Friday Harbor, WA 98250
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that recording the RMA clearly violated RCW 4.28.328. But that requires the Court to agree that by virtue of the Association having recorded the RMA, that somehow clouded Plaintiffs' title. It did not. The recording cover sheet names the Grantors as "Mount Dallas Association". It names the Grantees as "Consenting Owners of Properties Accessed via Mount Dallas Road". It shows the short legal description as "PTN Section 13, 14 and 24, TWP 35N, R4W, W.M." It lists no tax parcel numbers and no related documents. It attaches no individual owner's legal description or tax parcel number. The prologue of the RMA specifically states that the Agreement is made "by and among Mount Dallas Association, a Washington State non-profit corporation ("the Association"), and those owners of parcels of real property accessed via Mount Dallas Road who have signed and delivered to the Association Joinders to the Agreement ("Consenting Property Owners")." Unless and until the Plaintiffs actually sign a Joinder, their real property is not encumbered, or clouded, by this RMA.

We do not dispute the fact that if we had filed a lis pendens against the Plaintiffs' real property, that would cloud their title, just as Plaintiffs have clouded the title of 84 parcels on Mount Dallas Road by filing their lawsuit. However, a lis pendens was not filed. The question becomes, can this RMA be considered a cloud on title and if so, did the Association have a substantial justification for recording this RMA. If the RMA is not a cloud on title, then we do not need to address the question of whether there was substantial justification for recording the RMA.

Plaintiffs do not cite any Washington law for the proposition that the recording of an RMA, that specifically says it doesn't attach to any parcels until a Joinder has been signed and recorded, is still considered a cloud on title. On the other hand, Defendant Susan Allen ordered a

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P.O. Box 623
Friday Harbor, WA 98250
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Subdivision Guarantee on the parcel owned by her husband and her, to see if the recording of the Association's RMA showed up as an exception, or cloud on her title. It did not. *See Exhibit C to Declaration of Susan Allen.* We see no evidence that the Association's RMA clouds Plaintiffs' title.

3. The Association WILL Suffer Unfair Prejudice by the Plaintiffs' Proposed Amendments.

Plaintiffs's assertion that the Association will not suffer unfair prejudice relies upon its inaccurate interpretation of the Court's statements. The Court did not say that the Association could not impose a RMA unless it had 100% of the Benefitted Owners signed up. The Court said that the Association lacks legal authority to manage maintenance and other aspects of the Mt. Dallas Road on behalf of ALL of the benefitted properties, but they may have authority to manage it on behalf of SOME owners. The recording of the RMA, albeit without yet recording the Joinders, does show that the Association has the authority to manage maintenance and other aspects of the road on behalf of SOME owners. To accuse the Association of "flouting" the court's authority is wrong.

Defendant Mount Dallas Association requests that Plaintiffs' Motion to Amend Complaint be Dismissed with Prejudice and without costs or fees.

B. PLAINTIFFS' MOTION FOR ORDER CANCELLING ITS RMA.

In this motion, counsel again misstates the Court's prior statement, alleging that the Court said that Defendant Mount Dallas Association cannot impose a road maintenance agreement absent the consent of 100 percent of the Benefitted Owners. Based on that inaccurate statement, counsel asserts that the Association recorded the RMA in violation of the Court's order and in

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violation of Washington law. The Washington law allegedly violated is the lis pendens statute, discussed above, and the recent decision from Division II of the Court of Appeals, *Halme v. Walsh*, 47129-9-II, 2016 WL 917769 (Wash. Ct. App. Mar. 8, 2016).

Plaintiffs' reliance on *Halme* is misplaced. In *Halme*, there existed a Road Maintenance and Use Agreement that had been signed by all the lot owners in 1990. It required lot owners to make an annual payment to a road maintenance fund, and it stated that one lot owner would be elected each year to serve as the manager, whose duties it was to call meetings, and contract for, and oversee authorized repairs and maintenance of the road. All decisions regarding the road required a majority vote and the annual contribution for road maintenance could be adjusted by an 80 percent vote. There was nothing in the road maintenance agreement that provided for the formation of any formal organization of lot owners. In 2014, some of the homeowners decided to organize a homeowners association. They elected a board and officers and adopted amendments to the CC&Rs. A non-participating homeowner objected and filed suit, seeking a declaration that the amendments to the CC&Rs were void and that the homeowners association did not legally exist. The court held that (1) ***based on the language of the RMA***, the homeowners association did not meet the definition of a homeowners' association under RCW 64.38.010(11); and (2) the RMA did not authorize a majority of lot owners to amend the RMA to adopt governing procedures. *Halme* at WL p. 3. (*Emphasis added)*

The *Halme* Court was working with an existing RMA that provided that a manager would oversee the road repairs and maintenance of the road. The *Halme* Court held only that based on the language of that particular road maintenance agreement, the association that some of the members set up later, did not meet the definition of a homeowners association. The court looked

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at RCW 64.38.010(11), the definition of "homeowners' association", and broke that down into its three requirements (1) that it is a corporation, an unincorporated association or other legal entity; (2) that each member is an owner of residential property located within the association's jurisdiction, as described in the governing documents, and (3) by virtue of membership or ownership of property is obligated to pay real property taxes, insurance premiums, maintenance costs, or for improvement of real property other than that which is owned by the member. The court found that requirements (2) and (3) seemed to have been met, but not (1), because "the RMA clearly did not create a corporation". *Id* at p. 7. In other words, the *Halme* court was forced to look at the existing RMA, which called for a "manager" and nothing more, and concluded that the governing documents precluded the defendants from creating a HOA that they expected to have apply to everyone. Does that mean that a voluntary HOA cannot be formed to govern only those who sign on to it? No. Had the defendants in *Halme* asked that the HOA they formed be allowed to govern all those who voted for it, and that the remaining owners should pay their fair share based on *Buck Mountain*, the result may have been very different. In other words, the defendants in *Halme* argued that the association they created controlled all property owners, not just those who voted in favor of it.

Our case is different. The Mount Dallas Association, a nonprofit corporation, was formed in 1989, and membership was, and always has been, voluntary. When the easements along Mount Dallas Road were created, no road maintenance agreement was imposed. No document was recorded that established that a manager would oversee the maintenance and repair of the roadway. Instead, the owners along the road had to improvise. They established an entity and that entity held annual meetings. At these meetings, budgets for the upcoming year

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P.O. Box 623
Friday Harbor, WA 98250
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were agreed upon. Most owners along the road paid their fair share when they received their bill. Some did not. Those who did not, continued to use the road and the remaining owners each had to pay a little more in order to cover the budget. The Association sent a bill to all property owners, but made no effort to try to collect from the non-payers, or to try to lien their property, knowing that there was no enforcement mechanism set up to allow them to do so. Had the Mount Dallas Association tried to force payment, or tried to lien the property of one who failed to pay, then the *Halme* case would apply. They did not. *Halme* does not apply.

VI. CONCLUSION

Plaintiffs' motion for leave to amend its complaint in order to add claims based on the alleged violation of RCW 4.28.328 (the lis pendens statute) and based on the theory that the Association does not meet the requirements to legally exist as a homeowners' association, based on the recent *Halme* decision should be denied because the Association did not record a lis pendens and the Mount Dallas Association does meet the requirements to legally exist, unlike the association in *Halme*.

Plaintiffs' alternative motion for an order cancelling the recording of the Road Maintenance Agreement is based on the same two arguments as their motion for leave to amend and should be denied for the same reasons.

Respectfully submitted this 11th day of April, 2016.

MARY L. STONE/WSBA#17327
Co-counsel for Defendants Mount Dallas Association & L. Curtis Widdoes, Jr.

MARY L. STONE, INC., P.S.
P.O. Box 623
Friday Harbor, WA 98250
360-378-6778; 866-309-2611 Fax