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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.

**REBUTTAL MEMORANDUM
OF MOUNT DALLAS
ASSOCIATION IN SUPPORT OF
ITS MOTION FOR SUMMARY
JUDGMENT**

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

Introduction.

Prompted by the Plaintiffs' motion for partial summary judgment requesting that the Court adopt their method of prorating road maintenance costs, the Defendant Mount Dallas Association brought a separate motion on the same issue, in which the Association seeks the same relief with respect to its method.

The Plaintiffs filed a Response in Opposition, in which they raise the following issues: (a) the Association lacks standing; (b) the Association failed to properly serve all Defendants with its motion; and (c) the Association's proposed proration method (the Actual Use Method - AUM) lacks certainty, includes improper charges, and varies from the Plaintiffs' proposed methods.

1 Arguments (a) and (b) above are addressed in the Association's responses to the
2 Plaintiffs' concurrent motions to strike Association' motion, and to amend their complaint. On
3 those subjects, please see the Association's reply memoranda and supporting declarations as to
4 those motions.

5 Argument (c) above fails, because it is based solely upon factual inaccuracy and legal
6 error.

7
8 **Factual Inaccuracy.**

9 In their responsive pleading and supporting declarations, the Plaintiffs assert that the
10 Association's methods of pro-ration yields unfair results. This is not accurate. The Plaintiffs'
11 argument is based upon a factual misinterpretation of the Actual Use Method employed by the
12 Association. See the supporting Declaration of L. Curtis Widdoes, Jr., Declaration of Sandra
13 Hawley, and Reply Declaration of James Guard, filed concurrently herewith.

14
15 The Actual Use Method employed by the Association differs significantly from that
16 proposed by the Welkers. Reply Declaration of James Guard, at pages 2-3. The significant
17 differences are related to the facts that: (a) the Plaintiffs' method fails to differentiate between
18 developed and undeveloped parcels; and (b) the Plaintiffs' surveyed distance of the road's total
19 length is inaccurate. Id., at page 3.

20
21 The Plaintiffs support their argument with an example appended as an Exhibit to the
22 Declaration of Mrs. Welker. This example is factually incorrect, as are its results and the
23 conclusions drawn from it.

24
25 The example provided by the Plaintiffs incorrectly interprets the Association's AUM.
26 Declaration of L. Curtis Widdoes, Jr., at pages 2, and 4-11; Reply Declaration of Sandra
27 Hawley, at page 3. The example upon which the Plaintiffs' argument rests is based upon

1 assumptions that are "either incorrect or nonsensical." Id., at pages 4-5. The example assumes
2 that the Association's AUM calculations portions as if all users used all of the road, while the
3 truth is that the Association's method assumes that each user uses only the portion of the road
4 actually traversed. Id. The example uses incorrect numbers and calculations, and contains
5 erroneous results. Id., at page 6.

6
7 The method proposed by the Plaintiffs in Exhibit 5 to the Declaration of Mrs. Welker
8 would result in an unfair allocation of road maintenance expenses. Declaration of L. Curtis
9 Widdoes, Jr., at page 6. The Plaintiffs' method assumes that the per-unit maintenance cost is the
10 same for every section of the road, and fails to take into account that the lower sections of the
11 road are more heavily traveled. Id., at pages 6-7. In contrast, the Association's AUM is fair and
12 mathematically accurate, because it "distributes the cost of maintaining each section of road
13 equally among all the parcels that require use of the section..., [and] assumes that per-unit-area
14 maintenance costs are proportional to the number of users of the section." Id., at pages 6-7.
15 Reply Declaration of Sandra Hawley, at pages 4-5.

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18 The Plaintiffs' assert in their reply that their proposed Legal Use Method results in a fair
19 allocation of road maintenance costs. However, the Legal Use Method is not based on the
20 amount of roadway traversed, does not change when a parcel's access point changes, and
21 therefore does not parallel with a parcel's actual road use. Declaration of L. Curtis Widdoes, Jr.,
22 at pages 7-8.

23
24 The Plaintiffs' example and declarations incorrectly characterize the Association's AUM;
25 the Association's AUM is in fact fair to all users. As stated in the Declaration of L. Curtis
26 Widdoes, Jr., at pages 3-4, "The Association's Actual Use Method results in assessments for
27

1 developed [and undeveloped] parcels that are proportional to the road areas actually used." See
2 also Reply Declaration of Sandra Hawley, at pages 4-6.

3 Contrary to the Plaintiffs' assertion, the Association's Actual Use Method is also fair in
4 the circumstance where a repair is required to a certain point on the roadway. At Section 12(F)
5 of the Association's Road Maintenance Agreement, allowance is made for major abnormal
6 damage, such as that caused by a landslide. Declaration of L. Curtis Widdoes, Jr., at pages 8-9.
7 The method would pro-rate the expense among users based upon the area of the repairs actually
8 traversed. Id. Emphasis added. No parcel that does not traverse the repaired area would be
9 responsible. Id. at page 9. Mrs. Welker's Declaration is inaccurate when it states otherwise. Id.

10 In sum: (i) the Association's Actual Use Method is fair and accurate and takes into
11 account the increasing numbers of users over the lower sections of the road, while the
12 Plaintiffs' method does not; and (b) the Plaintiffs' objections to the Association's method are
13 based upon factual inaccuracies and should be disregarded.

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18 **Legal Error.**

19 In their responsive pleading and supporting declarations, the Plaintiffs inform the Court
20 that no portion of an easement may be legally extinguished by the unilateral act of the owner of
21 the benefitted parcel. Plaintiffs' Response, at page 11.

22 In support of this information, the Plaintiffs cite Meresse v. Stelma, 100 Wn.App. 857
23 (2000) and MacMeekin v. Low Income Hous. Inst. Inc., 111 Wn.App. 188 (2002).

24 Those cases stand for the well-settled point of law that the owner of a burdened parcel
25 may not unilaterally relocate an established easement. None of those cases holds that the owner
26 of a benefitted parcel may not unilaterally extinguish all or any portion of an easement.

1 This is because it is equally well-settled law in Washington that an easement may be
2 unilaterally abandoned by non-use coupled with express or implied abandonment. Heg v.
3 Allredge, 157 Wn.2d 154, 161 (2006).

4 In King County v. Squire Investment Co., 59 Wn.App. 888, 894-895 (Div. I, 1990), the
5 Division One Court of Appeals held that an easement was terminated when it was formally
6 abandoned by the beneficiary; no action by the burdened property owners was necessary.

7 The cases cited by the Plaintiffs refer to an easement's "relocation," and not its
8 extinguishment. The Plaintiffs have made this argument by citing improper case law and either
9 without researching or omitting the correct law. The argument is frivolous.

10 The Plaintiffs also argue to the Court that it must exclude from allowed road maintenance
11 expenses any costs incurred by the Association that are not directly spent on road-work (i.e.,
12 licensing, insurance, etc.). In support, the Plaintiffs cite Buck Mountain Owners Association v.
13 Prestwich, 174 Wn.App. 702, 716 (Div I 2013), and Visser v. Craig, 139 Wn.App. 152, 160
14 (2007).

15 Neither case supports the Plaintiffs' argument, and Buck Mountain is directly contrary.

16 In Buck Mountain, the existing homeowners association sued a non-member road-user
17 for contribution to the Association's road maintenance expenses. The trial court stated in its
18 opinion, "It would be well within the evidence presented and the court's discretion to require the
19 defendants' parcel to pay 100% of the share paid by all members of the plaintiff association."
20 Id., at 724. **In other words, the Association's expenses of licensing, insurance and other**
21 **overhead could have equitably been allocated to the non-member.** The Buck Mountain court
22 held that "sufficient evidence supported" this finding. Id., at 726.

1 In Visser, no apportionment of costs was at issue. Rather, the court concerned itself with
2 "whether an easement appurtenant to one parcel of land ... may be extended by the owner of the
3 dominant estate to other parcels owned by him, to which the easement is not appurtenant."
4 Visser, at 160. Nowhere does the Visser case refer to the proposition, urged by the Plaintiffs,
5 that the Court in its equity powers is restricted to the face of an underlying real property
6 easement or covenant.
7

8 One case cited by the Plaintiffs is directly contrary to the Plaintiffs' position, and the
9 other does not support their position. The Plaintiffs have made this argument by citing improper
10 case law. The argument is frivolous.
11

12 Conclusion.

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14 The Plaintiffs' arguments regarding lack of standing and lack of proper service are
15 addressed in Mount Dallas Association's responsive pleadings to the Plaintiffs' concurrent
16 motions to strike and to amend their complaint. As set forth therein, the Association has legal
17 standing and has properly served all parties. The Plaintiffs' motion, based on these points, is not
18 well taken and should be denied.
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20 The Plaintiffs also argue that the Association's Actual Use Method lacks certainty,
21 includes improper charges, and varies from the Plaintiffs' proposed methods. As demonstrated
22 herein, the Plaintiffs' position is based upon a misstatement of the facts and should be denied.
23

24 The Plaintiffs argue that no portion of an easement may be legally extinguished by the
25 unilateral act of the owner of the benefitted parcel, and that no Association "overhead" expenses
26 may be prorated among members. These positions are based upon erroneous legal conclusions
27 and should be denied.
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1 The Association requests, pursuant to CR 11, its costs and attorney's fees in answering
2 those arguments that are characterized as frivolous herein.
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5 DEREK MANN & ASSOCIATES PLLC

6 Attorney for Mount Dallas Association and for L. Curtis Widdoes, Jr.
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8  4/11/16
9

Derek Mann date

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