SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SAN JUAN COUNTY

Donald E. Eaton
Judge

Jane M. Severin
Court Administrator

August 18, 2017

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Re: Welker v Mount Dallas Association
Superior Court Cause 15-2-05069-0

Dear Counsel and Self-Represented Parties,

This matter was before the Court on July 27th and 28th for hearing on summary judgment motions filed by Plaintiffs, by Defendants Widdoes and Mount Dallas Association ("the MDA"), and by Defendant San Juan Preservation Trust ("the Trust"). The Court's references hereinafter to "Defendants" is intended to reference only Defendants Widdoes and the MDA. Also noted for hearing at that time was a Motion to Shorten Time filed by Defendants, asking to be heard on the 28th on their Objection To Admissibility Of Evidence And Motion To Deny Admission Of Evidence ("Motion to Deny"). Plaintiffs filed two documents in opposition to the Motion To Deny, but did not oppose the Motion To Shorten Time. The Court therefore granted the Motion To Shorten Time and then heard brief argument on July 28th on the Motion to Deny.

The Court will deny Defendant's Motion To Deny, as to both the Declaration of Clare Welker and the Declaration of Christopher I. Brain. As to the foundational objections, ER 602 establishes a nominal burden for the proponent of the evidence. Testimony should only be excluded if, as a matter of law, no trier of fact could reasonably find that the witness had personal knowledge of the facts in question. State v Vaughn, 36 Wn.App 171 (Div. 1, 1983).

Viewing Mr. Welker's Declaration in its entirety, paragraph 3 in particular, there is an adequate foundation for the portions that Defendants object to.

Defendants' objections to Exhibits 16 (a chart) and 17 (photographs) attached to the Brain Declaration might be sustained under ER 602 if paragraphs 7 and 8 of Mr. Brain's Declaration failed to explain the source of the chart and the photographs. Because his Declaration identifies the source of the Exhibits as Mr. Welker, Mr. Brain's client, the first question is whether Mr. Welker's Declaration lays a foundation for the exhibits, which, as noted above, it does. Next, the fact that the chart and the photographs were attached to Mr. Brain's Declaration, rather than Mr. Welker's Declaration, does not make them hearsay, for the reasons set forth in Hale v Island County, 88 Wn.App 764 (Div. I, 1997).

As to the objection to portions of Mr. Welker's Declaration under ER 701, the Court would agree with Defendants that portions do contain lay opinions. However, they quite clearly appear to be rationally based on Mr. Welker's perceptions [ER 701(a)]. And because there is no jury at this stage of the proceedings, the extent to which Mr. Welker's opinions may be helpful to a clear understanding of a fact in issue [ER 701(b)] is essentially a matter of the Court deciding what weight to give them. The Court will do so, rather than strike them.

The rulings requested by the three summary judgment motions overlap to some extent. Further, the Court has previously made rulings that resolve, at least in part, some of the issues presented by the motions. Last, all parties agree that, with some minor exceptions, the issues presented by the motions can be ruled upon as a matter of law and by use of the Court's authority to grant declaratory relief. It is also noted that Plaintiffs agree that all users of the Road have an obligation to share in paying at least the costs incurred for routine road maintenance.

A. Managing Entity.

Defendants ask the Court to declare that the MDA should be affirmed as the managing entity for all of the owners of all of the properties that are legally entitled to use the Mount Dallas Road or any portion of it.[1] Plaintiffs, on the other hand, ask the Court to declare that no entity can manage the Road on behalf of those property owners who do not consent to such management. The Court has already ruled that the MDA lacks legal authority to manage the Road on behalf of all benefited owners (October 13, 2015 Order), but that it does have the right to act as managing entity on behalf of those owners who have consented (February 3, 2017 Order). To the extent the motions are now asking the Court to rule on whether the MDA has equitable authority to manage the Road on behalf of owners who have not given their consent, the Court has concluded that the MDA does not. The Court will also reiterate that it does not have authority to give the MDA authority to manage the Road on behalf of owners who have not given their consent. Defendants have not provided the Court with any persuasive legal authority that would be a basis for this Court to determine that the MDA has acquired equitable authority, or that it is entitled to an equitable grant of authority, over the non-consenting owners.

[1] References to Mount Dallas Road ("the Road") is intended to include the side roads unless otherwise indicated.

The Court will enter an order, as requested by Plaintiffs, stating that no managing entity can possess more rights than such rights as individual owners may possess and elect to assign to that entity. [2] However, the order will provide that a managing entity may be granted additional rights over all owners by virtue of an order from a court having proper jurisdiction and authority to grant such rights. In that regard, Defendants' derivative rights argument does not preclude this Court from granting to a managing entity rights that exceed the rights that could be assigned to it by the individual owners. As discussed below, the more difficult issue is determining the scope of the Court's authority to grant such additional rights.

B. Voting.

Before turning to that issue, the Court will address the voting issues raised by the motions. Defendants ask the Court to declare that "all benefited property owners should be entitled to vote on an annual budget" and that a "majority rules" in connection with any such vote. Plaintiffs agree in principle, but argue that many details remain to be determined about the process for proposing and approving a budget. The Court would agree with Plaintiffs in that regard, but will enter an order providing that all benefitted owners should have the right to vote on any proposed budget or assessment, so long as they are current in the payment of all past assessments, and that non-consenting owners are entitled to the same information as is provided to owners who have consented to management by the MDA (or any other managing entity). To be current on all past assessments should only mean payment of assessments approved after entry of a final order in this matter. A judgment against owners who did not pay assessments prior to the filing of this litigation (or who do not pay during the course of this litigation) is beyond the scope of this litigation as the pleadings now stand.

C. Enforcement Rights.

Defendants next ask the Court to declare that the managing entity for the Road should have certain enforcement rights, a request Plaintiffs strongly oppose. In particular, Defendants argue that the MDA should be authorized to file a lien against the property of any benefitted owner who fails to pay an assessment, although during oral argument they suggested that recording something less than a formal claim of lien might also be an acceptable way to put future buyers on notice that there are unpaid assessments associated with the property in question. In support of their request for the right to file a lien (or something else) Defendants argue that the MDA (or, presumably, any managing entity) has no adequate remedy at law. But that is not necessarily the case. Defendants acknowledge that they actually do have a remedy, pointing out that the MDA "would be forever tasked with trying to litigate against those who refuse or fail to pay their assessments." (Page 23 of Supporting Brief). And Buck Mountain v. Prestwich, 174 Wn.App 702 (Div. I, 2013) makes it clear that there is a remedy available to collect from any owner who fails to pay a fair and reasonable share of the cost to maintain a shared road. The real question

[2] This is a confirmation that the Court, as stated on the record previously, agrees with Plaintiffs "derivative rights" argument. The Court would note that, among the rights that can be assigned to an entity, would be the right to seek payment of a fair share of road maintenance expenses from other owners. In that regard, an entity can be used as a vehicle to "collect" payments from non-paying owners.

raised by Defendants is whether that remedy is, in the absence of lien authority, an adequate remedy. The Court would agree with Defendants that having lien authority would be very beneficial to any managing authority. But the absence of lien authority does not necessarily render the available remedy inadequate.

The Court need not decide if lien authority is necessary in order for the MDA to have an adequate remedy because the Court has concluded that it does not have authority to give the MDA (or any managing entity) lien authority. A court's authority to grant a managing entity (or any group of owners who share a road) powers it or they do not otherwise have over non-consenting owners who share a road is derived from the existing case law in Washington[3] and the principles upon which those court decisions are based. While the cases suggest there may be some broadening of the authority of courts to impose obligations on the owners of properties benefitted by a shared road, it is nevertheless clear that there is an attempt to remain within the framework established by Bushy and Buck, as is clearly reflected most recently in Bowers. To the extent Defendants ask the Court to rely on or be guided by the Snohomish County Superior Court's decision in the case of Mt. Index Riversites Community Club, Inc. v Anderson, the Court declines. Not only is it a trial court decision, which has no precedential value, but the decision was rendered after a bench trial and the case involved roads that were owned by Mt. Index. Also, the Decree does not provide this Court with the benefit of findings and conclusions that might at least inform this Court of the reasoning behind the rulings.

The fundamental principle upon which Washington courts have relied in ordering all beneficial users to share in the cost of the road maintenance is one of simple fairness. As stated in Buck, at page 716:

> "(Bushy) affirmed the trial court's exercise of its inherent equity power to resolve a cost-sharing dispute between users of a shared driveway, premised on basic rules of fairness."

But to date the courts have not applied that principle to resolve disputes involving the maintenance of shared roads other than as they relate directly to the sharing of the costs incurred to actually maintain the shared road. Bowers did approve the trial court's use of its authority to impose a requirement that related to the use, rather than to the maintenance, of the shared road. In doing so it stated that the trial court had authority to do so under Bushy. Bushy did reject the appellant's complaints about the trial court's order that required each party to park their cars in a manner that would not interfere with the other party's use of the shared driveway, but Bushy did not identify the source of the court's authority to do so. This Court, however, is aware that there is long-standing case law in Washington that recognizes the authority of courts to enter orders that ensure reasonable and unobstructed use of a shared easement by all benefitted owners. In light of that independent authority, this Court does not read Bowers as expanding upon the scope of a trial court's authority as it relates to equitable cost-sharing for road maintenance by all

[3] Bushy v Weldon, 30 Wn.2d 266 (1948); Buck Mountain Owners' Association v Prestwich, 174 Wn.App 702 (Div I, 2013); and the unpublished opinion in Bowers v Dunn, No. 48367-0-11 (April 4, 2017).

benefitted owners. It is notable that the Bowers court reversed the trial court's ruling that would have provided a process for agreeing to and paying for road signs, concluding that those provisions did not address an obstruction to the use of the road. Nor, this Court would observe, did those provisions relate to costs for maintenance of the road. Likewise, this Court does not see how lien rights are reasonably related to the actual cost to maintain or to use a shared road. Rather, a lien would only be a convenient, but not even necessary, tool to assist the MDA in collecting assessments.

D. Administrative Costs.

Defendants next ask the Court to declare that all benefitted owners should be required to pay an equal amount to cover administrative costs incurred by the MDA (or other managing entity). They also ask the Court to declare that all benefitted owners should be required to pay, in addition to an allocated share for the cost of routine road maintenance, an additional allocated amount that would be placed into a reserve account to pay for future costs to resurface the Road. Plaintiffs oppose both requests, arguing that the Washington cases do not authorize a court to require non-consenting benefitted owners to pay anything other than an equitable share of the cost to perform ongoing routine maintenance of a shared road. The Court may have to consider three issues regarding administrative costs: 1) should any administrative costs be included in an annual assessment; 2) if so, what administrative costs should be included; and 3) should any approved administrative costs be paid equally, or in some other proportion?

The Court concludes that certain administrative expenses would be appropriate to include in the annual assessments. Some types of administrative expenses are essentially unavoidable, and therefore necessary, in connection with calculating and collecting assessments and accounting for expenditures, and in connection with arranging for and overseeing the actual maintenance work on the Road. Other administrative expenses may be incurred only because the majority of benefitted owners in this case have elected to form a non-profit corporation for ease of managing their individual interests in maintaining the Road. Those expenses are not necessary to the maintenance of the Road and should not be included.

Given this ruling, the Court will now require additional briefing or, more likely, an evidentiary hearing in order to determine which particular administrative costs are sufficiently related to the task of maintaining the Road that they should be considered necessary and therefore includable. The Court will therefore enter an order declaring that administrative expenses which are reasonably necessary to accomplish road maintenance must be paid by all benefitted owners. The Court will not, at this point, identify precisely which of the expenses proposed by the Defendants fall into that category, although the Court has indicated that expenses reasonably related to calculating and collecting assessments, arranging for and overseeing road maintenance work, and accounting to owners for expenses paid would appear to be appropriate.

As to how administrative expenses should be allocated, the Court agrees with Defendants that equal sharing by all beneficial users would be the most fair and equitable method. Regardless of

how much of the Road a particular owner may use, all owners would be equally benefitted by the work for which approved administrative costs are incurred. Because the Court will require equal sharing of proper administrative expenses, but will determine how to otherwise fairly allocate costs for actual road maintenance, the Court will need to determine which of those categories firewise expenses should fall into.

E. Reserve Fund.

As noted, Plaintiffs oppose Defendants' request that the Court authorize the MDA (or other managing entity) to require all benefitted owners to pay into a reserve fund for future use in resurfacing the Road. Defendants' request is clear that all funds paid into a reserve account would be used only for purposes of resurfacing the Road. They would, in that sense, be entirely related to maintaining the Road and therefore would seem to be squarely within the rationale expressed by Bushy, Buck, and Bowers. To the extent Plaintiffs may argue that resurfacing should be treated as a capital expense, and therefore not as routine road maintenance, the Court finds that to be a distinction without a difference.

The only issue from the Court's perspective is whether or not it is appropriate to require payment of funds for costs that will not be incurred until long after the payment has been made. In that regard, the Court notes that many of the routine road maintenance costs will be incurred only after the assessments have been paid. The fact that the delay between paying into a reserve account and accomplishing the work for which the payment was made may be a few years rather than, as with routine maintenance expenses, only a few weeks or months, does not seem dispositive, as owners are almost always paying somewhat in advance for much of the benefit they will receive. Periodic resurfacing is clearly necessary to maintain the Road over time and creating reserves to pay for that particularly large expense is a reasonable way to be assured that the necessary funds will be available when the need arises. It is possible that some owners may sell their property before the next resurfacing is done, and therefore not receive the benefit of their payment, but any amounts they have paid into the reserves can be recaptured at closing, as with any other prepaid expense that is prorated during escrow.

The Court will enter an order that authorizes the MDA (or other managing entity) to assess all benefitted owners an amount to be held in a reserve account that is strictly limited to paying the costs incurred for resurfacing the Road. The amounts should be assessed on the same basis as the approved allocation method (see below) for all other road maintenance expenses. However, the assessments must be based on an informed estimate of future resurfacing costs and a reasonable projection of the remaining life of the existing road surface, so that each annual assessment for the reserve account will, as nearly as reasonably possible, be only in an amount that will generate sufficient reserves, over the time remaining, to accomplish the work when the work becomes necessary.

F. Discount.

Defendants, as well as the Trust, ask the Court to declare, as a matter of law, that the owners of undeveloped lots should not be required to pay the same amount to maintain the Road as do the owners of developed lots, relying on the fundamental principle that fairness should include a recognition that those who make less use of a shared road contribute less to the wear and tear that necessitates expenditures to repair the Road. The Defendants also ask the Court to declare, as a matter of law, that a discount to 25% of the full assessment is appropriate. The Trust goes even further by asking the Court to declare, as a matter of law, that it should be entirely exempt from paying any assessment because its lot is not only undeveloped but can never be legally developed. As an alternative to declaring that it should be entirely exempt, the Trust asks that its obligation should be substantially reduced—arguing that paying even 25% of the full assessment is too much.

Plaintiffs argue that there are factual issues that need to be addressed in order to determine whether undeveloped lots should even have a discounted assessment and, if so, what the appropriate discount should be. The Court notes that the Trust, during oral argument, took the position that the Court could rule as a matter of law on the amount of any discount, although the Trust's Motion recognizes that a limited fact finding hearing might be necessary.

The Court will rule, as a matter of law, that lots which are not developed should pay a reduced amount in road maintenance costs, but the amount of that reduction can be determined by the Court only after an evidentiary hearing. Any discount will necessarily be somewhat within the discretion of the Court, even after a hearing, as no particular discount will necessarily be equally fair for all undeveloped lots, given that usage among the owners of undeveloped lots will vary. However, the Court will at least have some factual basis upon which to exercise that discretion. The Trust's Motion does provide some rationale for how a discount might be determined, at least for its property, but Defendants have provided no factual basis for their proposed 25% discount.

The Court will not rule, as a matter of law, that the Trust's property should be entirely exempt from any assessment. While its usage is limited, and presumably will remain so, it does have and it does exercise the right to use the Road. The Court will also not rule, as a matter of law, that the discount for the Trust's property should be different than the discount for any undeveloped lot. The fact that the Trust's property can never be developed does not necessarily mean that the Trust will use the Road less than the owners of other undeveloped lots. Again, use by owners of undeveloped lots will vary according to circumstance and even the use by a particular owner may vary over time. The Court will not approve an approach to discounts that would require or invite individual lot calculations or demands for recalculations as circumstances may change. Any discount for the owners of undeveloped lots is necessarily a rough attempt to afford fairness for those owners. Perfect fairness is not achievable, nor is it required.

Last, the Court declines to rule at this time on whether discounts should be applied only to routine maintenance expenses or, in addition, to administrative expenses and/or to reserve

assessments. As with the amount of any discount, those rulings should occur only after an evidentiary hearing.

G. Allocation Method.

On August 10, 2016 the Court entered an Order Granting Partial Summary Judgment And Adopting Actual Use Method For Allocation Of Road Maintenance Expense. In that Order the Court made the following finding:

> "3. For allocating road maintenance and repair costs among owners of parcels accessed via Mount Dallas Road, a method of proration based upon the length of the road actually used by each such parcel (the Actual Use Method) is more fair and equitable than one based upon the length of the road legally available by easements benefitting each such parcel (the Legal Use Method)."

The Order then provided that the Court granted MDA's Motion

> "establishing the Actual Use Method as the distance component to be factored into an allocation formula as to those Mount Dallas Road expenses that may be fairly prorated among the benefitted parcels."

It now turns out that the parties have a fundamental disagreement about how the Actual Use Method is to be calculated.

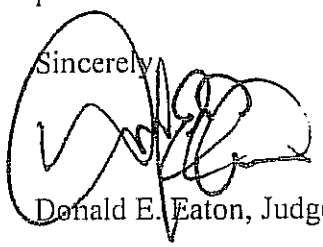
At the conclusion of the hearing on July 28th the Court expressed uncertainty about fully understanding the difference between the parties' proposed methods for calculating the Actual Use Method. Defendants' proposed method is consistent with what the Court had understood would be used when it entered the August 6, 2016 Order. Plaintiffs' proposed method, on the other hand, contemplates a different way of applying the concept of actual use and has been challenging for the Court to fully understand and to therefore determine if it represents a more fair and equitable methodology than Defendants'.

The Court has now had the opportunity to more thoroughly study Plaintiffs' proposed methodology and has concluded that not only is the Defendants' proposed methodology essentially consistent with what the Court contemplated when the August 10, 2016 Order was entered, but, more importantly, Plaintiffs' proposed methodology, while having its own logic, is less fair and equitable when considered in terms of the fundamental factor upon which the burden of the cost should be allocated among all benefitted users: the amount of wear and tear on the Road. There are unquestionably many alternative ways to calculate actual use, and each alternative may have some acceptable rationale. But Defendants' proposed methodology is appropriately focused on the actual impact on the Road (wear and tear) of each owner's usage, based upon the location of each owner's benefitted parcel. Plaintiffs' proposed methodology, on the other hand, focuses on the amount of road used, rather than on the amount of impact to the

road used. Again, both approaches have certain logic, but the Court will approve, as a matter of law, Defendants' Actual Use Method.

The Court will await proposed orders, either noted for presentation or approved for entry by all parties of record.

Sincerely,



Donald E. Eaton, Judge

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