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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR WHATCOM COUNTY**

SCOTT HILLIUS, et al.,

Plaintiffs,

v.

18 PARADISE, LLP, et al.,

Defendants.

No. 20-2-00701-37

REPLY ON MOTION FOR
RECONSIDERATION ON PARTIAL
SUMMARY JUDGMENT

Judge Robert E. Olson
February 26, 2021
Motions Calendar

I. INTRODUCTION

MJ Management's response to this motion inadvertently reveals far more than it may have intended. As the Court may recall, in opposition to summary judgment, Mick O'Bryan submitted a declaration attaching as Exhibit D a Profit and Loss statement for MJ Management's maintenance of the Homestead Common Open Space. That exhibit showed a loss of \$210,000 for 2018 and a loss of \$261,000 for 2019. Yet Defendants fight tooth and nail to avoid transfer of that responsibility and financial burden to the Class Members?

The answer to that mystery starts to become apparent with a single sentence in MJ Management's response to this motion: "As the Homestead Master Declaration directs, MJ Management uses the Joint Maintenance fees exclusively to maintain and administer the Common Open Space for the residential owners." Response at 2. On its face, that statement would seem to moot much of this case. If the maintenance fees are all being spent on maintaining the Common Open Space for the benefit of the "residential owners", then the Class Members would seem to have little to complain about.

1 All becomes clear later in MJ Management’s response when it asserts that the Common Open
2 Space includes the infrastructure of the golf course and surrounding areas. The fundamental
3 disagreement in this case is about what is included in the term “Common Open Space” and the
4 application of maintenance fees thereto. That question is ripe for decision on the record before the
5 Court.

6 **II. DISCUSSION**

7 **A. The Master Declaration is Clear and Uncontroverted Evidence.**

8 A careful review of the Declaration may not resolve all issues in the case, but it is all the evidence the
9 Court needs to make important findings of law and fact.

10 The Declaration provides both a clear starting point and a mechanism for phasing in additional
11 Common Open Space. It is also clear that Common Open Space **does not and shall not include the**
12 **golf course**, clubhouse, R.V. storage and maintenance areas. It only includes the property described on
13 Exhibit B to the Declaration and any phased amendments thereto.

14 The Declaration sets out the scope of the maintenance fees for which the Class Members are
15 responsible. The scope is greater than the “geographic boundaries” of the Common Open Space. It also
16 includes the items set out at paragraph 3.3. Paragraph 3.3 lists entry signs and landscape, mailbox
17 surrounds, streetlight electrical power bills, and maintenance of lights not maintained by the City of
18 Lynden.

19 The Declaration sets up the only mechanism by which Class Members can organize the Homestead
20 Owners Association. Although the Association was created by the Declaration, there is a critical next
21 prerequisite for organization. The Declarant alone controls that condition precedent by notifying its intent
22 to convey the Common Open Space to the Association as set out at Section 3.10. The Defendants
23 steadfastly refuse to do so and maintain that they intend to own the Common Open Space in perpetuity.
24 The Class Members cannot do what the Defendants have made impossible. The Court’s finding that the
25 Class Members have somehow failed to form a governing association and board is, with respect,
26 erroneous and must be revisited.
27

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2 **B. The Master Declaration Defines the Common Open Space.**

3 The parties are now in agreement on the record that the maintenance fees are to be used
4 “exclusively to maintain and administer the Common Open Space for the residential owners.”
5 Response at 2. The term “Common Open Space” is used 42 times in the Declaration, and it is defined
6 in paragraph 1.3.8.

7 "Common Open Space" shall mean that certain real property described on Exhibit B which is
8 annexed hereto and by this reference incorporated herein which is intended for the common use
9 of all property owners in Homestead together with any later phased additions thereto,
10 Exhibit 1 at ¶1.3.8. Exhibit B to the Declaration identified the Common Open Space by legal
11 description as “ ‘TRACT A’ AS IT APPEARS ON THE FACE OF MABERRY PLAT.”

12 The Declaration also provided that the Common Open Space could be increased with “phasing
13 amendments” to the Declaration.

14 The Declarant reserves the right to phase and add to the Common Open Space for which the
15 easement and license herein is granted by filing a phasing amendment to this document, said
16 amendment having reference to the Auditor File Number of this document and setting forth the
17 legal description of additional real property which is added to the Common Open Space.
18 Exhibit 1 at ¶ 3.8. Consequently, the term “Common Open Space” is not some amorphous term that
19 refers to vague areas or general concepts. It is a reference to specific and defined property, and any
20 discussion of the Common Open Space must begin with that definition. Moreover, all Common Open
21 Space must be identified in a phasing amendment by legal description. *Id.* at ¶ 3.8.

22 As a matter of law and simple logic, the Court therefore should rule that the Common Open Space
23 is limited to those areas that satisfy the definition in the Declaration. Washington Courts vigorously
24 enforce contractual definitions. *Zhaoyun Xia v. ProBuilders Specialty Ins. Co. RRG*, 188 Wn.2d 171,
25 182, 393 P.3d 748 (2017) (“So long as the defined terms of the contract comport with Washington law,
26 we will apply them as written.”)

27 **C. The Master Declaration Defines and Directs the Use of Maintenance Fees.**

MJ Management complains about the reference to use of the maintenance fee as a “slush fund,”
but it then concurs with the relief sought in this motion. As MJ Management put it,

1 As the Homestead Master Declaration directs, MJ Management uses the Joint Maintenance fees
2 exclusively to maintain and administer the Common Open Space for the residential
3 owners.

4 Response at 2. According to MJ Management, the maintenance fees must be spent to maintain and
5 administer the Common Open Space for the benefit of the residents.

6 The proposed order submitted with this motion says exactly the same thing with the inclusion of
7 references to the terms of the Declaration.

8 Pursuant to CR 56(d), the Court rules as a matter of law that the maintenance fees assessed
9 under the Declaration may only be spent on maintenance of the Common Open Space as defined
10 in paragraph 1.3.8 and the items set forth in paragraph 3.3 of the Declaration, to wit,
11 maintenance of the entry signs for the residential development and surrounding landscaping,
12 and mail box surrounds, payment of electric bills for street lights serving the Homestead PRD,
13 and maintenance of street lights withing the Homestead PRD to the extent not maintained by
14 the City of Lynden.

15 Proposed Order at ¶ 2(f).

16 The maintenance fees are to be spent “exclusively” on the Common Open Space and in accordance
17 with paragraph 3.3 of the Declaration. The parties agree that they are to be spent for the benefit of the
18 Class Members. There is no reason for the Court not to enter an order to that effect. If the Court has
19 concerns about the exact identity of the Common Open Space and the scope of required maintenance,
20 it could rewrite that paragraph using MJ Management’s *own* language:

21 f. Pursuant to CR 56(d), the Court rules as a matter of law that the maintenance fees assessed
22 under the Declaration may only be spent to maintain and administer the Common Open Space
23 and those items set out at paragraph 3.3 for the benefit of Homestead owners.

24 Because the scope of maintenance and Common Open Space are defined by the Declaration, the Court
25 should incorporate the defined terms in its order.

26 **D. 18 Paradise Delegated Absolute Authority and Unfettered Discretion to MJ Management.**

27 As Plaintiffs conceded MJ’s authority at the hearing, the Court need only address the evidence
from the Defendants. This consists of the Lease, the declarations of Raymond Chou and Mick O’Bryan,
and the statements of 18 Paradise in its Joinder. This evidence is clear and uncontroverted.

Defendants did not say that 18 Paradise delegated “limited” declarant rights to MJ Management.
In his declaration, O’Bryan testified that “The purpose of this lease was to assign MJ Management the
rights and responsibility to operate and maintain the Homestead Resort as a whole.” O’Bryan
Declaration at ¶ 2. He further testified that “the Lease gave MJ Management the authority to exercise

1 **18 Paradise's right as Declarant to amend the Master Declaration.**” *Id.* at ¶ 10. Amending the
2 Declaration irrevocably alters the fundamental relationship of the parties. It is the single most drastic
3 action that the declarant can take.

4 For his part, Chou testified that the delegation was so broad that it “included **all of the declarant’s**
5 **rights to set and collect maintenance fees collectible from Homestead homeowners, use those fees**
6 **to manage the common open space, and amend Homestead's covenants, conditions and**
7 **restrictions (“CCRs”) as necessary to accomplish those tasks.**” Chou Declaration at ¶ 3. A broader
8 delegation of declarant rights would not be possible.

9 That brings us to MJ Management’s complaint about the description of its discretion as
10 “unfettered.” Plaintiffs did not use that term casually or carelessly. To the contrary, that statement was
11 based on 18 Paradise’s very clear statement.

12 18 Paradise did not review, approve, or have any role in the recording of the Sixth and Seventh
13 Amendments to the CCRs, **as it considered this to be within the scope of MJ’s rights and**
duties under the Lease.


14 According to 18 Paradise itself, its delegation of declarant rights to MJ Management permitted MJ
15 Management to amend the Declaration without informing 18 Paradise in advance, without providing
16 18 Paradise a draft of the change for review, and without even informing 18 Paradise what it had done.
17 The Cambridge Dictionary defines “unfettered” as “not limited by rules or any other controlling
18 influence.” <https://dictionary.cambridge.org/us/dictionary/english/unfettered>. The term is apt.

19 DATED this 24th day of February, 2021.

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