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WHATCOM COUNTY
WASHINGTON

BY _____

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
SECOND AMENDED COMPLAINT
CLASS ACTION
Judge Robert E. Olson

For their Complaint, Plaintiffs allege as follows:

I. PARTIES

1. Plaintiff Scott Hillius (“Hillius”) is a resident of Whatcom County and the owner of residential property in the Homestead Planned Residential Development, Lynden Washington (“Homestead PRD”).

2. Plaintiff Tom Staehr (“Staehr”) is a resident of Whatcom Country and the owner of residential property in the Homestead PRD.

3. Plaintiff Randy Drubek (“Drubek”) is a resident of Whatcom Country and the owner of residential property in the Homestead PRD.

4. Plaintiff Mark Miedema (“Miedema”) is a resident of Whatcom Country and the owner of residential property in the Homestead PRD.

5. Plaintiffs Daniel and Sonja Lyons (“Lyons”) are residents of Whatcom County and the owners of residential property in the Homestead PRD.

6. Plaintiffs Douglas and Angelique Scarlett (“Scarlett”) are residents of Whatcom County and the owners of residential property in the Homestead PRD.

1 7. Plaintiffs Steven and Lisa Zehm (“Zehm”) are residents of Whatcom County and the owners
2 of residential property in the Homestead PRD.

3 8. Plaintiff Ronald Saran (“Saran”) is a resident of Whatcom County and the owner of
4 residential property in the Homestead PRD.

5 9. Defendant 18 Paradise LLP (“18 Paradise”) is a Washington limited liability partnership.

6 10. Defendant MJ Management, LLC (“MJ Management”) is a Washington limited liability
7 company.

8 11. Defendant William (Mick) O’Bryan (“O’Bryan”) is an individual resident in Whatcom
9 County and a governor of MJ Management.

10 12. Defendant Josh Williams (“Williams”) is an individual resident in Whatcom County and a
11 governor of MJ Management.

12 13. Defendant City of Lynden is a Washington State municipality.

13 **II. JURISDICTION AND VENUE**

14 14. This Court has personal and subject matter jurisdiction over the parties and claims in this
15 action.

16 15. Venue for this action is appropriate in Whatcom County Superior Court pursuant to RCW
17 Chapter 4.12.

18 16. On November 13, 2020, the Court certified this action as a class action pursuant to CR 23.

19 **III. FACTUAL ALLEGATIONS**

20 **A. Lynden’s Planned Residential Development Ordinance.**

21 17. In January 1992, the City of Lynden (the “City”) adopted an ordinance (the “Ordinance”)
22 to allow the development of Planned Residential Developments (“PRD”) in the City.

23 18. A PRD is a large tract of land that is developed pursuant to a cohesive plan that is designed
24 to satisfy the City’s overall development requirements and policies.

25 19. The PRD Ordinance contained many provisions designed to protect and benefit future
26 purchasers and residents of the PRD. These include:
27

1 a. Section 19.29.020: "To preserve community facilities and open space, every PRD
2 shall have a homeowner's association and agreements to fund such an organization.

3 b. Section 19.29.060(B): "The final plan may be approved by the Director of Public
4 Works if the application meets the minimum requirements as set forth in this chapter and
5 is in substantial compliance with the approved preliminary development plan."

6 c. Section 19.29.060(B): "The final development plan may be deemed sufficiently
7 consistent with the preliminary development plan, provided modification by the
8 applicant does not involve a change which would cause one or more of the following to
9 occur; (1) Violation of any provisions of this chapter."

10 d. Section 19.29.060(B): "Should any of the above conditions occur in the final plan, the
11 applicant shall resubmit the final plan for approval by the Planning Commission and City
12 Council."

13 e. Section 19.29.090: "A homeowner's association shall be formed as a part of the PRD."

14 f. Section 19.29.090(D): Privately owned land may be designated as common open
15 space, if the owner of such privately owned land: (1) Provides assurance satisfactory to
16 the Public Works Director that the open space will be maintained in perpetuity and will
17 only be used for the purposes intended as a part of the PRD. (2) Establish a formula for
18 the assessment of maintenance dues by the homeowners and rules whereby the common
19 land may be turned over to the homeowners. (3) Reduce these provisions to writing,
20 which must be approved by the Lynden City Council, in advance."

21 g. Section 19.29.130(A): "The final development plan must present all of the information
22 required for the preliminary development plan in a finalized, detailed form."

23 h. Section 19.29.150: "The approved final development plan is binding and shall be a
24 restriction on development which runs with the land."

25 20. The PRD Ordinance set forth a specific process for the approval of a PRD.

26 a. Section 19.29.040 required the applicant to submit a Preliminary Plan for the City to
27 review and revise.

1 b. Section 19.29.050 requires the City Council to hold a public hearing and approve the
2 PRD.

3 c. Section 19.29.060 requires the applicant to submit a proposed Final Plan for the PRD
4 to the Director of Public Works within one year after approval of the Preliminary Plan.

5 d. The Public Works Director is required to verify that the Final Plan will not cause a
6 violation of any provisions of the Ordinance.

7 e. Approval of the Final Plan constitutes the formal approval of a PRD under the PRD
8 Ordinance.

9 f. Upon approval by the Director of Public Works, Section 19.29.150 of the ordinance
10 required the City to record the Final PRD Plan against title to the property in the PRD.
11

12 **B. The Homestead Planned Residential Development.**

13 21. Immediately after the City adopted its PRD Ordinance, Homestead Northwest, Inc.
14 (“HNW”), filed an application for the Homestead PRD, which included a golf course and
15 surrounding developments.

16 22. The application identified an area of approximately 250 acres and defined the boundaries
17 of the proposed PRD.

18 23. HNW estimated that it would take 5-15 years to complete the Homestead PRD.

19 24. HNW submitted a Preliminary Plan for the Homestead PRD in compliance with Section
20 19.29.040 of the PRD Ordinance.

21 25. City Staff reviewed the Preliminary Plan, and on June 15, 1992 issued their
22 Recommendations for the PRD, which included a number of provisions that Staff believed should
23 be included.

24 26. On June 15, 1992, the City Council held a public hearing at which it approved the
25 Homestead PRD subject to review and revision by the Street/Planning Committee, Mayor, City
26 Attorney and Staff.
27

1 27. The June 15, 1992 City Council Action was not the approval set forth in Section 19.29.050
2 because it was conditioned on unknown revisions that the City might require.

3 28. After the June 15, 1992 City Council Action, HNW continued to work with the City to
4 revise the Preliminary Plan to the City's satisfaction.

5 29. On June 24, 1992 HNW recorded the first plat in the Homestead PRD, which was the
6 Maberry Plat of 33 lots under Whatcom County Recording No. 920624016.

7 30. On July 20, 1992, HNW, the Lynden Mayor and the Lynden City Attorney all executed a
8 document entitled "Homestead Northwest, Inc. Planned Residential Development Preliminary
9 Plan (As amended and approved)."

10 31. This July 20, 1992 document constitutes the City's approval of the Preliminary Plan for the
11 Homestead PRD.

12 32. HNW did not present a Final Plan to the Director of Public Works as was required by
13 Section 19.29.060 of the PRD Ordinance.

14 33. The Director of Public Works did not review a Final Plan for conformance with the
15 Ordinance and did not approve Final Plan.

16 34. The City of Lynden has treated its approval of the Preliminary Plan as the formal approval
17 of the Homestead PRD.

18 35. The City did not record any PRD Plan for the Homestead PRD.

19 36. In 1992, the Homestead PRD violated the PRD Ordinance in many respects, including:

20 a. Sections 19.29.020 and 19.29.090: The Homestead PRD does not have a bona fide
21 homeowners association;

22 b. Section 19.29.090(D): The Common Open Space of the Homestead PRD is privately
23 owned without satisfying the requirements of the ordinance.

24 37. The City of Lynden has been asked to enforce the PRD Ordinance but has declined to do
25 so.

1 **C. The Homestead Declaration of Restrictive Covenants.**

2 38. On June 24, 1992, HNW also recorded a Master Declaration of Covenants, Conditions,
3 Restrictions and Reservations for Homestead, a Planned Residential Development (the
4 “Declaration”) under Whatcom County Recording No. 920624017.

5 39. When it was recorded, the Declaration applied only to the 33 lots in the Maberry Plat.

6 40. The Declaration provided that HNW could add additional property to the Declaration
7 through “phasing amendments.”

8 41. In Amendments 1, 3, 4, and 5 to the Declaration, HNW added existing and future residential
9 platted areas within the Homestead PRD boundaries to the Declaration.

10
11 **D. Homestead PRD Common Open Space.**

12 42. The PRD Ordinance required each PRD to have common open space.

13 43. Paragraph 1.3.8 of the Declaration defines the term “Common Open Space” as follows:
14 “‘Common Open Space’ shall mean that certain real property described on *Exhibit B* which is
15 annexed hereto and by this reference incorporated herein which is intended for the common use of
16 all property owners in Homestead together with any later phased additions thereto. It may include
17 both fee interests and easement rights.”

18 44. The term “Common Open Space” is used more than 40 times in the Declaration and that
19 term has the meaning set forth in paragraphs 1.3.8 and 2.3.

20 45. When the Declaration was recorded, the Common Open Space was limited to Tract A in
21 the Maberry Plat, which is an area of 276,520 square feet, or 6.34 acres proximate to Fishtrap
22 Creek.

23 46. Paragraph 3.8 of the Declaration reserves to the declarant the right to add Common Open
24 Space with phasing amendments. That provision requires any phasing amendment to refer to the
25 Auditor File Number of the Declaration and to set forth the legal description of additional real
26 property which is added to the Common Open Space.

1 47. Pursuant to the terms of the Declaration, an area other than Tract A can be Common Open
2 Space only if it is legally described in a phasing amendment.

3 48. HNW added to the Common Open Space in Amendments 1, 3, 4, and 5 to the Declaration.

4 49. Each of those phasing amendments contained identical operative language that specifically
5 identified the property subject to the amendment as Common Open Space.

6 Common Open Space Phasing, Pursuant to Article II, paragraph 2.3 of the Declaration,
7 Common Open Space is hereby phased to include the following:

8 (a) Areas designated as Common Open Space or Open Space on plats now or hereafter filed
9 with respect to the property described on Exhibit A;

10 (b) Areas on plats now or hereafter filed on the property described on Exhibit A which are not
11 platted lots and also not dedicated to the City of Lynden for roadways and utilities.

12 (c) Easements for ingress and egress, pedestrian easements and pathways as appear on now
13 and hereafter platted portions of the property described on Exhibit A.

14 (d) Common Open Space shall not include easements for utilities and further, it shall not
15 include unplatted properties within the area described on Exhibit A, golf course areas which
16 are part of the property described on Exhibit A.

17 50. The total Common Open Space in the Homestead PRD is now approximately 381,915
18 square feet, or 8.77 acres.

19 51. Paragraph 3.1 of the Declaration states that it was the general intention of HNW to retain
20 ownership of the Common Open Space.

21 52. HNW retained private ownership of the common open space for a number of reasons
22 including its desire to prevent the formation of a homeowners association.

23 53. HNW's private ownership of the Common Open Space violated the clear terms of the PRD
24 Ordinance.

25 54. Section 19.29.090(D)(3) of the PRD Ordinance provides:

26 Privately owned land may be designated as common open space, if the owner of such
27 privately owned land:

1. Provides assurance satisfactory to the Public Works Director that the open space will
be maintained in perpetuity and will only be used for the purposes intended as a part
of the PRD.

2. Establish a formula for the assessment of maintenance dues by the homeowners and
rules whereby the common land may be turned over to the homeowners.

3. Reduce these provisions to writing, which must be approved by the Lynden City
Council, in advance.

1 55. HNW did not provide any assurance to the Public Works Director that the open space will
2 be maintained in perpetuity and will only be used for the purposes intended as a part of the PRD.

3 56. The Public Works Director did not find any assurances from HNW regarding the Common
4 Open Space satisfactory.

5 57. HNW did not provide in the Declaration for a formula for the assessment of maintenance
6 dues by the homeowners or rules whereby the common land may be turned over to the
7 homeowners.

8 58. HNW did not enter into a written agreement for the private ownership of the Homestead
9 Common Open Space.

10 59. The Lynden City Council did not approve HNW's private ownership of the Homestead
11 Common Open Space.

12 60. HNW had actual knowledge that its private ownership of the Common Open Space violated
13 the PRD Ordinance.

14 61. The fact that HNW would privately own the Common Open Space in violation of the PRD
15 Ordinance was obvious based on the text of the PRD Ordinance and the Declaration.

16 62. In its review of the Homestead PRD, the City of Lynden knew that HNW planned to
17 privately own the Common Open Space in violation of the PRD Ordinance.

18
19 **E. The Homestead Owners Association.**

20 63. The PRD Ordinance requires every PRD to have an HOA. Section 19.29.020 of the
21 ordinance states: "To preserve community facilities and open space, every PRD shall have a
22 homeowner's association and agreements to fund such an organization." Section 19.29.090
23 provides that "A homeowner's association shall be formed as a part of the PRD."

24 64. Paragraph 4.1 of the Declaration states that "There is hereby established an Owners
25 Association to be known as the 'Homestead Owners Association'."

26 65. However, the Declaration did not actually establish a homeowners association.
27

1 66. Paragraph 4.3 of the Declaration states that so long as the declarant retains ownership of the
2 Common Open Space, the association shall operate in advisory capacity only to the Declarant and
3 may not incorporate.

4 67. Paragraph 4.4.1 of the Declaration does not allow the homeowners association to hold an
5 initial meeting until after the declarant transfers the Common Open Space.

6 68. Paragraph 4.4.4 of the Declaration allows the declarant to adopt initial Articles and Bylaws
7 for the Association.

8 69. Paragraph 5.2 of the Declaration states that the declarant shall have the right to appoint
9 members of the Design Review Board.

10 70. Paragraph 8.2.1 states that the declarant shall have the right to amend the Declaration any
11 way it wishes.

12 71. HNW made a deliberate decision not to allow Homestead homeowners to form a
13 homeowners association.

14 72. HNW was motivated by its desire to avoid being answerable to a homeowners association.

15 73. HNW was aware of the requirement for a homeowners association and intentionally
16 violated the PRD Ordinance.

17 74. HNW had actual knowledge that the lack of a homeowners association violated the PRD
18 Ordinance.

19 75. The fact that the Homestead PRD would not have a PRD Ordinance compliant homeowners
20 association was obvious based on the text of the PRD Ordinance and the Declaration.

21 76. In its review of the Homestead PRD, the City of Lynden knew that Homestead owners
22 would not have a homeowners association as was required by the PRD Ordinance.

23
24 **F. The Maintenance Fee.**

25 77. The Declaration provided that the declarant would maintain the Common Open Space while
26 it retained ownership, and that it would pay all costs and expenses of maintenance.
27

1 78. The Declaration provided that HNW could charge each parcel a monthly fee for
2 reimbursement of Common Open Space maintenance expenses.

3 79. The Declaration provided that the maintenance fee was to be spent on maintenance of the
4 Common Open Space as defined by the Declaration.

5 80. The Declaration initially assessed each parcel a monthly fee of \$25.

6 81. When the declaration was recorded, the Homestead Parcel had one plat with 33 parcels and
7 approximately 6.34 acres of Common Open Space.

8 82. In 1992, the 33 Homestead owners paid a total of \$825 per month to maintain the
9 approximately 6.34 acres of Common Open Space.

10 83. The \$825 monthly amount was a reasonable estimate of cost to maintain the Common Open
11 Space in 1992.

12 84. The Declaration provides that the declarant could increase the maintenance fee by up to five
13 percent (5%) each year.

14 85. To increase the maintenance fee, the declarant was required to give written notice of the
15 increase in December of the year before the year when the increase would take effect. For example,
16 to increase the maintenance fee in 2020, the declarant would be required to give notice of the
17 increase during December of 2019.

18 86. The declarant did not have the right to increase the maintenance fee in a year if it failed to
19 give notice of the increase during the preceding December.

20 87. HNW did not increase the maintenance fee until 2005.

21 88. From 2005 to 2008, HNW increased the maintenance fee by \$1.25 each year to a final
22 amount of \$30.00 per month.

23
24 **G. 2010 Sale of Homestead PRD to Raspberry Ridge.**

25 89. HNW sold its remaining interests in the Homestead PRD to Raspberry Ridge LLC in 2010.

26 90. The sale included HNW's declarant rights pursuant to an assignment that was recorded on
27 January 10, 2012.

1 91. The Assignment states that it was intended to permit Raspberry Ridge to “recover the costs
2 for services and maintenance of the Common Open Space as from the owner of any lot or parcel
3 as provided for in the Master Declaration, as amended.”

4 92. The assignment of declarants’ rights was rerecorded on April 4, 2011. In its amended form,
5 the Assignment continued to state that the purpose of the assignment was to permit Raspberry
6 Ridge to “recover the costs for services and maintenance of the Common Open Space as from the
7 owner of any lot or parcel as provided for in the Master Declaration, as amended.”

8 93. The assignment of declarants’ rights was rerecorded on April 4, 2011. In its amended form,
9 the Assignment continued to state that the purpose of the assignment was to permit Raspberry
10 Ridge to “recover the costs for services and maintenance of the Common Open Space as from the
11 owner of any lot or parcel as provided for in the Master Declaration, as amended.”

12 94. The assignment of declarants’ rights was rerecorded a second time on January 10, 2012. It
13 once again retained the provision that its purpose was to allow Raspberry Ridge to “recover the
14 costs for services and maintenance of the Common Open Space as from the owner of any lot or
15 parcel as provided for in the Master Declaration, as amended.”

16 95. The declarant rights that were conveyed to Raspberry Ridge were limited to the right to
17 recover its actual costs for services and maintenance of the Common Open Space.

18 96. Raspberry Ridge did not increase the maintenance fee during its ownership.

19
20 **H. Ownership by 18 Paradise.**

21 97. On December 11, 2013, Raspberry Ridge sold the golf course, Common Open Space, club
22 house, maintenance yard and declarant rights in the Homestead PRD to 18 Paradise LLP.

23 98. Raspberry Ridge retained ownership of the profitable fitness center and restaurant within
24 the Homestead PRD.

25 99. The declarant rights were conveyed to 18 Paradise in a document entitled Assignment,
26 Transfer and Conveyance of Declarant Rights, Easement and Other Rights as Contained in the
27

1 Master Declaration of Covenants, which was recorded on December 11, 2013 under recording
2 number 213120975.

3 100. The assignment of declarant rights to 18 Paradise contains the same limitation that the
4 purpose of the maintenance fee was to “recover the costs for services and maintenance of the
5 Common Open Space as from the owner of any lot or parcel as provided for in the Master
6 Declaration, as amended.”

7 101. The declarant right to charge a maintenance fee that was assigned to 18 Paradise was
8 limited to recovering its actual costs incurred for the work.

9 102. When 18 Paradise purchased Homestead in 2013, Class Members were paying a \$30
10 monthly maintenance fee, which totaled more than \$18,000 per month, to maintain approximately
11 8.77 acres of Common Open Space. That amount computes to more than \$2,000 per acre per month
12 to maintain the Common Open Space.

13 103. The maintenance fee charged and collected by 18 Paradise immediately after its purchase
14 of Homestead exceeded its expenses to perform the maintenance.

15 104. 18 Paradise or its agents increased the maintenance fee to \$31.50 for 2016, and \$33.00 for
16 2017.

17 105. 18 Paradise and/or its agents told Homestead owners that these increases were necessary
18 to cover the cost of performing the maintenance.

19 106. In truth, the original \$30 monthly maintenance fee far exceeded the actual cost to perform
20 the maintenance work.

21
22 **I. Management By MJ Management.**

23 107. In November of 2017, 18 Paradise executed a Management and Lease Agreement with MJ
24 Management under which MJ Management would manage the Homestead Golf Course (the
25 “Management Agreement”).

26 108. The Management Agreement stated that MJ Management would act as an independent
27 contractor and would not be an agent.

1 109. However, the Management Agreement also stated that MJ Management would “act in a
2 fiduciary capacity with respect to the matters subject to Manager’s control and management under
3 this Agreement.”

4 110. Pursuant to the Management Agreement, MJ Management was authorized to retain the
5 maintenance fee and revenues from the Homestead golf course and paid 18 Paradise a fixed
6 monthly amount.

7 111. The Management Agreement prohibited MJ Management from altering the Property in
8 any material way without the express permission of 18 Paradise. The term “material change” was
9 defined by the Agreement as one which alters the property substantially or changes its use.

10 112. The declarant rights were “Property” as that term is defined and used in the Management
11 Agreement.

12 113. When MJ Management commenced performance of the maintenance under the
13 Declaration, the maintenance fee had been increased to \$33 per month, or a total of more than
14 \$20,000 per month and \$240,000 per year.

15 114. The maintenance fee exceeded MJ Management’s actual costs to perform the maintenance.

16 115. MJ Management increased the maintenance fee to \$34.50 for 2018 and to \$36.00 for 2019.

17 116. MJ Management told Homestead owners that these increases were needed to cover its
18 expenses to perform the maintenance work.

19 117. The 2019 increase was announced in a November 20, 2018 notice, which stated that it was
20 necessary because of rising costs and an increase in the minimum wage. This notice failed to
21 comply with the requirement of the Declaration for notice of increases to be sent in December.

22 118. The 2019 increase also failed to comply with the requirements of the Washington Uniform
23 Common Ownership Interest Act (“COIA”), which became effective on July 1, 2018. COIA
24 broadly regulates plat communities and applies to the Homestead PRD.

25 119. Several provisions of COIA supersede existing law and apply to pre-existing plat
26 communities. These provisions include RCW 64.90.100, RCW 64.90.095, 64.90.405(1) (b) and
27 (c), 64.90.525 and 64.90.545.

1 120. In particular, 18 Paradise as successor declarant and the entity in control of the Homestead
2 HOA failed to meet its obligations to adopt budgets and impose assessments in accordance with
3 COIA.

4 121. MJ Management has failed to comply with COIA in its performance of the Management
5 Agreement.

6
7 **J. The Sixth Amendment to the Declaration.**

8 122. On June 28, 2019, O'Bryan executed the Sixth Amendments to Covenants ("Sixth
9 Amendment"), which purported to Amend the Declaration to permit the imposition of special
10 assessments on Homestead homeowners.

11 123. O'Bryan executed the Sixth Amendment as 18 Paradise.

12 124. O'Bryan executed the Sixth Amendment as successor declarant.

13 125. On July 1, 2019, O'Bryan and MJ Management recorded the Sixth Amendment.

14 126. Paragraph 3.3 of the Declaration, states that the declarant is responsible for "All costs and
15 expenses of maintenance of and improvements to the Common Open Space."

16 127. The only form of reimbursement for the declarant's maintenance expenses in the
17 Declaration is the maintenance fee.

18 128. The Sixth Amendment created a new obligation for Homestead homeowners to pay special
19 assessments.

20 129. Paragraph 17 of the PRD Agreement provides that covenants, conditions and restrictions
21 "will not be altered or amended without the consent of the City."

22 130. Defendants did not seek or obtain the consent of the City to the Sixth Amendment.

23 131. On August 9, 2019, 18 Paradise notified Homestead parcel owners that it was imposing
24 an \$83.00 special assessment on each Homestead parcel pursuant to the Sixth Amendment.

25 132. COIA contains specific provisions for special assessments that apply to the Homestead
26 PRD. The Sixth Amendment failed to comply with those requirements.

1 133. The August 19, 2019 Notice falsely stated that “the joint maintenance fees came nowhere
2 close to covering the costs incurred” from a 2017-2018 storm.

3 134. Since learning of the Sixth Amendment, 18 Paradise has taken no action to remove or
4 invalidate the Sixth Amendment.

5 135. 18 Paradise benefitted from the funds paid pursuant to the Sixth Amendment because they
6 were used to pay for maintenance of the common areas and otherwise for the benefit of 18 Paradise.
7

8 **K. The Seventh Amendment to the Declaration.**

9 136. On December 3, 2019, O’Bryan executed the Seventh Amendments to Covenants
10 (“Seventh Amendment”), which purported to Amend the Declaration to permit retroactive
11 increases in the maintenance fee for prior years.

12 137. O’Bryan executed the Seventh Amendment as 18 Paradise.

13 138. O’Bryan executed the Seventh Amendment as successor declarant.

14 139. On December 3, 2019, MJ Management recorded the Seventh Amendment to Covenants.

15 140. The Seventh Amendment added a sentence to the Declaration stating that

16 The failure to increase maintenance fees in one or more years does not waive the right
17 to increase fees the following year up to the maximum combined amount for all years.

18 141. By its terms, the Seventh Amendment simply preserves the declarant’s existing right to
19 increase the maintenance fee.

20 142. The Seventh Amendment does not confer any new rights on the declarant.

21 143. Paragraph 3.5(e) of the Declaration states that “The Declarant shall have the right and
22 power to increase the maintenance fee each calendar year. Notices of fee adjustment shall be sent
23 to Parcel Owners in December of each year where an adjustment has been made for the following
24 calendar year.”

25 144. The Seventh Amendment did not alter or remove paragraph 3.5(e) from the Declaration,
26 and it remains in effect.
27

1 145. The Declaration permits the maintenance fee to be increased for a given year only if the
2 declarant delivers written notice of the increase to Homestead homeowners during December of
3 the year before the increase will take effect.

4 146. On December 4, 2019, 18 Paradise sent a notice to Homestead parcel owners falsely
5 stating that the Maintenance Fee increases from 2016-2019 “have been inadequate in covering the
6 bare minimum expenses required to maintain the common open space and cannot continue to
7 operate at a deficit.”

8 147. In 2019, MJ Management and 18 Paradise received more in maintenance fees than the
9 amount spent on maintenance pursuant to the Declaration.

10 148. The December 4, 2019 notice stated that the monthly maintenance fee would increase to
11 \$93 on January 1, 2020. The notice stated that this amount was calculated as a 5% retroactive
12 increase every year since 1992.

13 149. The increase to \$93 is contrary to the plain terms of the Seventh Amendment, which allows
14 retroactive increases **only in years for which a December notice was given.**

15 150. COIA contains specific provisions for the adoption of budgets and assessments that apply
16 to the Homestead PRD. The Seventh Amendment failed to comply with those requirements.

17 151. Neither MJ Management nor 18 Paradise obtained the consent of the City to the Seventh
18 Amendment as was required by paragraph 17 of the PRD Agreement.

19
20 **L. Scheme to Purchase Golf Course.**

21 152. The principals of MJ Management are O’Bryan and Williams. O’Bryan and Williams
22 wished to purchase the golf course from 18 Paradise and began making plans to do so.

23 153. In furtherance of their plans MJ Management requested and received from 18 Paradise a
24 right of first refusal (“RFR”) to purchase the golf course. The RFR was included in an Amendment
25 to Management Agreement and Lease Agreement made effective October 5, 2019.
26
27

1 154. MJ Management met with the officials of the City of Lynden and financial institutions to
2 negotiate financing for the purchase of the golf course proposing to use Class Member
3 maintenance fees revenue as a basis for repayment of requested financing.

4 155. As consideration for the RFR MJ Management and 18 Paradise amended the
5 Management Agreement providing in pertinent part “5.3 Compensation. Owner shall receive a
6 monthly payment due at the beginning of each month *payable from the maintenance fees paid*
7 *by residents*”.

8 156. MJ Management and 18 Paradise also diverted maintenance fees from Class Members to
9 fund development of a golf course, in Birch Bay called Sea Links, owned by an 18 Paradise
10 affiliate.

11
12 **M. Homestead Owners Actions.**

13 157. Many Homestead homeowners complained to MJ Management about the Sixth and
14 Seventh Amendments.

15 158. In response to those complaints, MJ Management and different groups of homeowners
16 held a series of meetings to discuss a resolution.

17 159. At those meetings, O’Bryan and Williams maintained that MJ Management was losing
18 money on the maintenance work.

19 160. In support of that claim, MJ Management has provided Class Members with a number of
20 what it claims to be financial records of its operations. Some of those documents were provided
21 informally and others were produced in the course of this action. The documents include:

- 22 a. 2016 Maintenance Budget
23 b. 2018 MJ Management Balance Sheet
24 c. 2018 MJ Management overall Profit and Loss Statement
25 d. 2018 MJ Management Maintenance Profit and Loss Statement
26 e. 2018 MJ Management Maintenance Profit and Loss Statement (v.2)
27 f. 2019 MJ Management Balance Sheet

- 1 g. 2019 MJ Management overall Profit and Loss Statement
- 2 h. 2019 MJ Management Maintenance Profit and Loss Statement
- 3 i. 2019 MJ Management Maintenance Profit and Loss Statement (v.2)
- 4 j. 2019 Summary of Storm Expenses
- 5 k. 2020 Maintenance Budget
- 6 l. 2020 Golf Course Budget

7 161. The different versions of documents for the same report and time are inconsistent. For
8 example:

- 9 a. The two versions of the 2018 Profit and Loss Statement identify total expenses of
10 \$308,402.74 and \$475,854.83, a difference of \$167,452.09 and 54 percent.
- 11 b. The accounting expenses on one 2018 P&L are \$2,317.50 on one and \$27,500.00 on
12 the other.
- 13 c. The two versions of the 2019 Profit and Loss Statement identify total expenses of
14 \$346,065.93 and \$551,312.55, a difference of \$205,246.62 and 59 percent.
- 15 d. Equipment lease and rental was \$13,237.39 on one 2019 maintenance P&L and
16 \$34,768.58 on the other.
- 17 e. The version of the 2020 budget for the entire golf course has an allowance of \$16,000
18 for contract labor, but the version for maintenance has \$40,000.
- 19 f. The budget for maintenance has \$12,200 for "Flowers/Hanging Baskets/Trees
20 Shrubs," while the budget for the entire course does not even have that category and has
21 a total budget of \$7,000 for all forms of plants.

22 162. The amounts in MJ Management's financial statements are inconsistent because MJ
23 Management has commingled and failed to account for the maintenance fee to the point that it
24 cannot separate golf course expenses and revenues maintenance.

25 163. An independent audit will be required to determine the true state of the relevant financial
26 affairs.

1 164. MJ Management and 18 Paradise have diverted and misused the maintenance fee for their
2 own benefit and to the detriment of Class Members. That will continue to happen until 18 Paradise
3 transfers the Common Open Space to the Homestead Owners Association so that the Class
4 Members can maintain and control their own neighborhoods.

5 **IV. CLASS ACTION ALLEGATIONS**

6 165. Plaintiffs bring this action on behalf of themselves and on behalf of a class consisting of
7 Parcel Owners subject to the Master Declaration (the "Class Members").

8 166. The Class consists of the owners of a fee interest in real property that is subject to the
9 Declaration.

10 167. The class consists of more than 1200 property owners who jointly and sererally own
11 Homestead Parcels.

12 168. It would be impractical at best to join all Class Members in a single action.

13 169. The legal and factual issues in this action are identical with respect to each of the Class
14 Members. Each of the Class Members were subject to exactly the same monthly maintenance fee
15 for exactly the same reason.

16 170. The claims of the named plaintiffs are typical of claims of the Class Members because all
17 class members have the same claims against the same defendants.

18 171. The named plaintiffs are personally and financially prepared to fairly and adequately
19 represent the interests of the Class Members.

20 172. If the Class Members each brought their own actions, there would be a high risk of
21 inconsistent adjudications of legally identical claims and/or res judicata or collateral estoppel
22 effects of earlier cases on later ones.

23 173. The Court's determination of the merits of the claims of some of the members of the class
24 would as a practical matter decide the merits of the claims of other members who did not
25 participate in the action.

26 174. The defendants have acted in exactly the same manner with respect to all Class Members.
27 The Court should render a single decision applicable to all Class Members.

1 175. The common questions between members of the class predominate over any potential
2 differences. Potential differences primarily concern the period and resulting amount of damages,
3 but all claims will be decided under the same standard.

4 176. A significant portion of Class Members have already opted to participate in this class
5 action and have requested class action certification.

6 177. The Court should certify this action as a class action pursuant to CR 23.

7 178. On November 13, 2020, the Court certified this action as a class action pursuant to CR 23.

8 **V. CAUSES OF ACTION**

9 **A. Consumer Protection Act, RCW Chapter 19.86.**

10 179. RCW 19.86.02 prohibits unfair or deceptive acts in trade or commerce.

11 180. Defendants 18 Paradise and MJ Management have engaged in a long series unfair and
12 deceptive acts, including the following:

- 13 a. Using the maintenance fee for purposes other than those allowed by the Declaration;
- 14 b. Commingling the maintenance fee and failing to maintain accurate accounting of the
15 funds;
- 16 c. Increasing the maintenance fee without justification;
- 17 d. Misrepresenting the need for the maintenance fee and the increases;
- 18 e. Recording the Sixth Amendment;
- 19 f. Recording the Seventh Amendment;
- 20 g. Collecting maintenance fees under the Sixth and Seventh Amendments; and
- 21 h. With respect to MJ Management, purporting to act as 18 Paradise without authority
22 to do so.

23 181. Each act described in the foregoing paragraphs is a separate and distinct violation of the
24 Consumer Protection Act and with respect to each individual class member.

25 182. The conduct of defendants alleged above constitutes unfair and deceptive acts or practices
26 in violation of RCW 19.86.020.
27

1 183. Defendants committed the unfair and/or deceptive act and practices in the conduct of their
2 business.

3 184. The unfair and deceptive acts and practices occurred in trade or commerce.

4 185. The unfair and/or deceptive acts and practices set forth herein affected the public interest
5 pursuant to RCW 19.86.093 because they injured hundreds of Homestead PRD homeowners and
6 have the capacity to continue to injure hundreds more.

7 186. Plaintiffs and the members of the class have been injured in their business or property as
8 a proximate result of the unfair and/or deceptive acts and practices because they incurred financial
9 losses in the amount of the payments made and because their properties lost value as a result of
10 the increased fees.

11 187. The unfair and/or deceptive acts and practices as alleged herein were the direct and
12 proximate cause of the harm incurred by plaintiffs and members of the class.

13 188. Plaintiffs and members of the class have incurred damages in an amount to be proven at
14 trial.

15 189. Pursuant to RCW 19.86.090, plaintiffs and members of the class are each entitled to
16 exemplary damages of three times their actual damages up to \$25,000 per violation.

17 190. Pursuant to RCW 19.86.090, plaintiffs and members of the class are entitled to a
18 permanent injunction prohibiting 18 Paradise from continuing its unfair and/or deceptive acts or
19 practices.

20 **B. Breach of Contract – Declaration.**

21 191. The Master Declaration constitutes a valid and enforceable contract between the Class
22 Members and the declarant.

23 192. The parties owe each other a duty of good faith and fair dealing in performing the terms
24 of their agreement in the Declaration.

25 193. 18 Paradise has breached the Declaration including in the following respects:

- 26 a. Failing to maintain the common areas;
27 b. Increasing the maintenance fees without cause;

- c. Using the maintenance fees for unauthorized purposes;
- d. Failing to enforce the covenants and rules;
- e. Failing to transfer the common areas to the HOA; and
- f. Failing to perform its dues in good faith.

194. Plaintiffs and members of the class have been damaged in an amount to be proven at trial.

C. Breach of Contract – PRD Agreement.

195. Pursuant to Section 19.29.010(C) of the PRD ordinance, approval of the PRD “constitutes a contract between the City of Lynden and the developer to guarantee development in accordance with the approved plan.”

196. The provisions of the PRD Agreement were intended to benefit the people of the City of Lynden and more particularly the Lynden residents who purchased property in the Homestead PRD.

197. Homeowners within the Homestead PRD are intended third party beneficiaries of the PRD Agreement.

198. As intended third party beneficiaries, homeowners with the Homestead PRD may enforce the terms of the PRD Agreement.

199. As successor declarant, 18 Paradise is an assignee of the declarant’s obligations under the PRD Agreement.

200. 18 Paradise has breached the PRD Agreement in many ways, including:

- a. Failing to comply with the requirements for the Storm Water Drainage system;
- b. Failing to maintain the street lights as required by section 11(b) of the PRC Agreement;
- c. Failing to obtain consent of the City for amendments to the Declaration as required by section 17 of the PRD Agreement.

D. Breach of Fiduciary Duty.

201. Pursuant to section 3.1 of the Declaration, 18 Paradise owns the Common Open Space of the Homestead PRD.

1 202. Pursuant to the PRD Ordinance, the PRD Agreement, and the common law, the common
2 space in a plat may only be used for the benefit of owners of property within the plat.

3 203. Paragraph 2.3 of the Declaration states that “Common Open Space is intended for the
4 common use of all Parcel Owners in Homestead.”

5 204. Because 18 Paradise holds the common space for the benefit of Homestead parcel owners,
6 it holds the Common Open Space in trust for their benefit.

7 205. As trustee, 18 Paradise owes the Homestead parcel owners a fiduciary duty.

8 206. In its performance of 18 Paradise’s duties, MJ Management owes the Homestead owners
9 the same fiduciary duty.

10 207. Defendants 18 Paradise and MJ Management have breached their fiduciary duties in many
11 respects, including:

- 12 a. Failing to account for moneys received from the Class Members;
- 13 b. Misappropriating moneys received from the Class Members;
- 14 c. Failing to preserve and maintain trust property; and
- 15 d. Making false statements to the Class Members about the trust property.

16 208. Plaintiffs and class members have suffered damages in an amount to be proven at trial as
17 a direct and proximate result of the breach of fiduciary duties.

18 209. In addition to awarding damages, the Court should exercise its equitable powers to compel
19 18 Paradise to transfer the Common Open Space to the Homestead Owners Association.

20 **E. Declaratory Judgment – Declaration.**

21 210. Pursuant to RCW 7.24.020, plaintiffs are entitled to have determined any question of
22 construction or validity arising under a contract to which they are party or in which they have an
23 interest.

24 211. Plaintiffs are parties to the Declaration and have a sufficient interest in it.

25 212. A justiciable dispute exists between the parties concerning the meaning and interpretation
26 of the Declaration, including the following:

- 27 a. The definition of Common Open Space;

- b. The definition of maintenance;
- c. Whether the Sixth Amendment is valid;
- d. Whether the Seventh Amendment is valid;
- e. Whether funds from the maintenance fee must be spent on maintenance; and
- f. The identity of the properties that are subject to the Declaration.

213. The Court should enter a declaratory judgment that:

- a. Common Open Space has the definition set forth in paragraph 1.3.8 of the Declaration;
- b. Maintenance has the definition set forth in paragraph 3.3 of the Declaration;
- c. The Sixth Amendment is invalid and void;
- d. The Seventh Amendment is invalid and void;
- e. Funds received as maintenance fees may only be spent on maintenance as defined in paragraph 3.3 of the Declaration; and
- f. Identifies the properties that are subject to the Declaration.

F. Declaratory Judgment – Homestead PRD Contract.

214. Class Members are third-party beneficiaries of the PRD Agreement, and therefore are parties to and have a sufficient interest in it.

215. A justiciable dispute exists between the parties concerning the meaning and interpretation of the PRD Agreement including:

- a. The scope and meaning of the requirements for the Storm Water Drainage system;
- b. Whether 18 Paradise has complied with the requirements for the Storm Water Drainage system;
- c. The scope and meaning of the requirement to maintain the street lights;
- d. Whether 18 Paradise has complied with the requirement to maintain the street lights;
- e. The scope and meaning of the requirement to obtain consent of the City for amendments to the Declaration;
- f. Whether 18 Paradise has complied with the requirement to obtain consent of the City for amendments to the Declaration

1 216. The Court should enter a declaratory judgment that:

- 2 a. Defines the scope and meaning of the requirements for the Storm Water Drainage
3 system;
- 4 b. Declares that 18 Paradise has failed to comply with those requirements;
- 5 c. Defines the scope and meaning of the requirement to maintain the street lights;
- 6 d. Declares that 18 Paradise has failed to comply with the requirement to maintain the
7 street lights;
- 8 e. Declares that 18 Paradise was required to obtain the approval of the City for the Sixth
9 and Seventh Amendments; and
- 10 f. Declares that 18 Paradise failed to obtain the required consent of the City to the Sixth
11 and Seventh Amendments.

12 **G. Declaratory Judgment – PRD Ordinance.**

13 217. Class Members are persons whose legal rights are affected by a municipal ordinance
14 because they own property in the Homestead PRD, which is subject to the PRD Ordinance.

15 218. A justiciable dispute exists between the parties concerning the PRD Ordinance, including
16 the following:

- 17 a. Whether the PRD Ordinance currently applies to the Homestead PRD;
- 18 b. Whether the Homestead PRD satisfied the requirements of sections 19.29.020 and
19 19.29.090 for a homeowners association;
- 20 c. Whether the Declaration satisfied the requirements of section 19.29.090; and
- 21 d. Whether the private ownership of the Common Open Space violates section
22 19.29.090.

23 219. The Court should enter a declaratory judgment that:

- 24 a. The PRD Ordinance currently applies to the Homestead PRD;
- 25 b. The Homestead PRD violates the requirements of sections 19.29.020 and 19.29.090
26 for a homeowners association;
- 27 c. The Declaration violates the requirements of section 19.29.090; and

1 d. The private ownership of the Common Open Space violates section 19.29.090(D).

2 **H. Injunction to Comply With PRD Ordinance.**

3 220. As successor declarant, 18 Paradise has control over the Homestead PRD.

4 221. As successor declarant, 18 Paradise is responsible for declarant compliance with
5 applicable laws and regulations, including the PRD Ordinance.

6 222. The Homestead PRD does not comply with the PRD Ordinance in many respects,
7 including:

8 a. Section 19.29.020: The Homestead PRD does not have a *bona fide* homeowners
9 association;

10 b. Section 19.29.060: The Homestead PRD was never properly approved.

11 c. Section 19.29.090: The Homestead PRD does not have a *bona fide* homeowners
12 association;

13 d. Section 19.29.090(D): The Common Open Space of the Homestead PRD is
14 privately owned without satisfying the requirements of the ordinance.

15 223. The ongoing violation of the PRD Ordinance by the Homestead PRD affects the public
16 interest and the interests of the class members.

17 224. The Court should issue a permanent injunction compelling 18 Paradise to comply with
18 the PRD Ordinance.

19 **I. Failure to Enforce the PRD Ordinance.**

20 225. The City of Lynden has failed to enforce its PRD Ordinance.

21 226. The City of Lynden knew that the Homestead PRD did not comply with the PRD
22 Ordinance.

23 227. The PRD Ordinance sets forth mandatory duties of the City with respect to PRD
24 Applications.

25 228. The PRD Ordinance requires the City to enforce the requirements for a PRD
26 application.

1 229. The City of Lynden knowingly failed to enforce the PRD requirements including, but
2 not limited to; failing to require or approve a final plan; failing to require a bona fide
3 homeowners association; and allowing HNW to retain private ownership of the common areas in
4 violation of Section 19.29.090(D).

5 230. The City of Lynden has been asked to take corrective action but refuses to do so.

6 231. Plaintiffs and class members have been injured in an amount to be proven at trial.

7 232. Plaintiffs and class members are entitled to an injunction compelling the City to enforce
8 the PRD Ordinance.

9 **VI. RELIEF REQUESTED**

10 Based upon the foregoing, Plaintiffs requests this Court enter judgment as follows:

- 11 1. Awarding plaintiffs damages and treble damages under the Consumer Protection Act;
- 12 2. Awarding plaintiffs damages for breach of contract;
- 13 3. Awarding plaintiffs damages and equitable relief for breach of fiduciary duty;
- 14 4. Entering declaratory judgment as set forth above;
- 15 5. Imposing an injunction requiring 18 Paradise to comply with the PRD Ordinance;
- 16 6. Imposing an injunction requiring the City to enforce the PRD Ordinance;
- 17 7. Granting plaintiffs such additional relief as may be provided for by law; and
- 18 8. Awarding plaintiffs costs and attorney fees as provided by law.

19 DATED this 3rd day of May, 2021.

20 ANDERSSON CROSS BORDER LAW CORPORATION

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