

The State of Homestead - 2021 Year End

2021 was a busy and productive year for the Homestead class action lawsuit against the Declarant, 18 Paradise, LLP; its agents, MJ Management, LLC; and the City of Lynden. Sixteen motions were heard in court this year, and the Plaintiffs obtained thousands of pages of relevant evidence in addition to live testimony from six key witnesses.

Because of harassment of class members by the agents for 18 Paradise and difficulties experienced by class members in refinancing property, Plaintiffs filed a motion for an injunction prohibiting 18 Paradise and its agents from engaging in threats and harassment in connection with the disputed \$93 maintenance fees. After a sympathetic hearing, counsel for the parties agreed to Plaintiff's requested terms. The Court Order of September 15, 2021, set the maintenance fee payable to 18 Paradise and its agents back to the pre-dispute rate of \$36/month.

Significant progress has been made in the case even though the pandemic has halted the hearing of most civil trials. Even routine things like scheduling depositions were frustrated this year by events like the Whatcom County floods. Moreover, 18 Paradise and its agents MJ Management are doing everything they can to stall and impede progress. They will not succeed.

And remarkably, the City of Lynden has taken the position that it owes no duty to class members to enforce its own City ordinances and agreements enacted to protect owners in the Homestead Planned Residential Development (PRD). However, thanks to the tireless efforts of Homestead class members, the City was formally presented this year with a citizen's petition signed by more than 235 homeowners, which now places both City policy makers and administrators on notice to take appropriate action.

The following is a summation of what happened with the class action lawsuit, and other related issues, as well as a preview of what to expect in 2022.

I. The Lawsuit

In early 2020, it was clear that Homestead homeowners were being treated unfairly. After good faith attempts to negotiate a resolution and upon researching the history and current situation, we concluded that the best theory for class member protection was found in the Consumer Protection Act. At trial the Plaintiffs need to prove the following five elements of their claim:

1. The defendants engaged in unfair and deceptive acts;
2. In the course of trade or commerce with the class members;
3. Which are against the public interest;
4. Causing economic harm or damage to the class members; and
5. Showing that the defendant's actions were the proximate cause of those damages.

The unfair and deceptive acts were generally the sixth and seventh amendments to the Declaration and the associated false accounting presented to the class members to justify the special assessment and retroactive increase in maintenance fees. This year the Plaintiffs obtained additional evidence that such acts extend back to when 18 Paradise first acquired its Declarant rights in December of 2013. Additional evidence also shows misappropriation and expenditure of maintenance fees outside the PRD, and that the real reason for the fee increase was to fund the acquisition of the golf course by MJ Management. Further evidence shows that the City may have

condoned, encouraged or colluded with a scheme to have 18 Paradise sell the golf course, and the maintenance fee revenue stream, to MJ Management.

The defendants in the lawsuit are the PRD Declarant, 18 Paradise LLP, its agent, MJ Management LLC, Mick O'Brian, Josh Williams and the City of Lynden.

The City was initially included as a defendant because it has a regulatory interest in the PRD and resolution of the dispute with the Declarant requires City consent and approval. The City remains a defendant primarily because it refuses to enforce its own ordinances and agreements regarding the Homestead PRD. From public records, it appears that of the eight registered PRDs in Lynden, Homestead is the only development operating in clear and flagrant contravention of the City's ordinances.

A. The Judges

The case was originally assigned to Judge Robert Olson, who is a relatively new judge. He was appointed to the bench in 2018. Judge Olson's background is in child welfare, and he did not appear to have deep experience or knowledge about real estate law. More than a year after the lawsuit was filed, we were waiting for decisions from Judge Olson on two key motions, when he abruptly recused himself from the case. When a judge has a potential conflict of interest, he must withdraw from the case.

The case was then assigned to Judge David Freeman. Judge Freeman is even newer than Judge Olson and was appointed on January 28, 2020. However, he appears to have some familiarity with real estate law. Judge Freeman seems receptive of our case, but he has yet to make a decision on any of our motions. It has now been months since the definition of Common Open Space was before him, and it will be hard to move forward without that decision. However, when Judge Freeman rules on those motions, a lot of things will fall into place and the case will gain significant momentum.

B. Discovery of Evidence.

"Discovery" allows parties to obtain information and documents from the other side. We have sent written questions to all the defendants, which they have answered. We also have obtained and reviewed thousands of pages of evidence.

Discovery also allows us to take depositions, which are like court testimony, but taken in a board room with a court reporter to make a transcript. We can use the transcript as evidence. To date, depositions have been taken from Jim Wynstra, Alex Crabtree (accountant for MJ Management), Mark Sandal (City of Lynden Public Works), Patrick Starr (Real Estate agent for Mao Chen), Josh Williams, and Mick O'Bryan. O'Bryan's deposition was not finished and will be completed in January. Those depositions have provided a lot of evidence that we can use for motions and trial. In general, they have gone very well.

C. The Motions, Orders, and Stipulations

More than 20 motions have been brought in the case to date, 16 in this year alone. Many of those motions have been procedural, but we have been actively prosecuting the case. To bring the case as a class action, we needed an order from the court, and Judge Olson initially denied our motion. However, on reconsideration, he granted the motion, and on Friday November 13, 2020, our case

was determined to be a class action. We have brought two summary judgment motions and a motion for reconsideration of summary judgment. The defendants have brought four summary judgment motions, all of which have been denied or are still under consideration.

We also brought a motion for a preliminary injunction to roll back the maintenance fee to \$36 while the lawsuit is pending, and we secured an agreed Court Order to that effect. Pursuant to that Court Order, Homestead owners are required to pay only \$36 per month in maintenance fees, subject to the outcome of the case.

We are still awaiting a decision from the Court on three summary judgment motions. Although the length of time those motions have been pending is not particularly unusual in civil litigation, the case will benefit significantly when Judge Freeman issues rulings in the new year.

D. Trial Date

A trial date is set by order of the court, and we have informed the court and defendants that we want to obtain a trial date as soon as possible. However, it is unlikely that Judge Freeman will set a trial date until he has ruled on the pending motions. After reviewing Judge Freeman's trial docket we, are targeting late summer for the initial scheduling of our trial.

II. Common Open Space and Maintenance

Defining the Common Open Space and the scope of maintenance duties that are performed is critical to the case. The Declaration clearly defines what constitutes Common Open Space and specifies the additional things that the maintenance fee may be used for. By our calculation, there is approximately 8 acres of total Common Open Space, almost all of which is grassland around the City walking trail by Fishtrap Creek. The rest of the Common Open Space consists of random spaces like turnarounds or mailboxes. The Court's pending ruling on our motion to define the Common Open Space for purposes of the lawsuit will significantly move our case forward.

18 Paradise and MJ Management have provided budgets and profit and loss statements for the maintenance work over the years. A 2016 Budget, that predates MJ Management's contract, claims that expenses for 2016 were estimated to be \$220,050. For 2018, MJ Management provided two different profit and loss statements, one identifying expenses as \$308,402 and the other as \$475,854. For 2019, MJ Management also provided two profit and loss statements, \$366,053 and \$551,312. None of the numbers add up or make sense.

The Declaration states that the cost of the streetlights is included in maintenance, and it is the largest single part. Electricity costs about \$25,000 per year, and maintenance would be extra if MJ Management actually did it. Based on estimates obtained, it appears that the annual cost of maintenance should be about \$50,000 per year. At \$93, the agents for 18 Paradise would collect \$685,000 per year. Even at \$36, the agents for 18 Paradise would collect \$265,000.

III. The Petition

Homestead owner Lynn Button spearheaded an effort to prepare and present a petition to the City of Lynden asking it to enforce its own laws. Over 235 Homestead residents signed the petition, and it was presented to the City on August 19, 2021. The petition has consequences because it forces

the City to reexamine the approval of the Homestead PRD. The City claims that it is “looking into” the petition, but it has neither taken action nor explained what it is doing.

IV. MJ Management Actions

In an undated letter, handed out in April of 2020, MJ Management said that by May 31st they would assemble an Advisory Board that would, in conjunction with MJ, create a Master plan and priority list. It is unclear who this board was supposed to represent. In a subsequent undated letter handed out in mid-December 2020, MJ stated that they had assembled a 7-member board to make recommendations and comply with state law, although which law it complied with is not listed. The letter goes on to say that the Advisory Board’s responsibilities would soon be posted, and “within months” there would be an election to vote in members of an “official elected Advisory Board”. There has been no evidence of who was on the Advisory Board, if they ever met, or if they ever existed.

MJ Management also has harassed homeowners with threats to send them to collections or take other unspecified actions. The Order entered by the court should put a stop to that. MJ Management appears to be desperate for cash to pay its lawyers and likely will continue to create problems. The Court Order entered by Judge Freeman limits the obligation of homeowners to \$36 per month.

V. O’Bryan Fraudulent Easement

In October of 2020, the City of Lynden required a utility easement for the new development being constructed at the corner of Depot Road and West Maberry Drive (at the former location of the tennis courts). The easement required granting by, among others, the Chateaux condominium owners association (COA). The City obtained the signature of Mick O’Bryan, who fraudulently signed as President of the Chateaux COA, and recorded the document with Whatcom County. **This is a clear criminal offense in Washington State.**

O’Bryan not only is NOT the association president but also has never even owned a unit at the Chateaux. Ron Saran, the true president of the Chateaux COA contacted the City and the Lynden police department, who refused to even investigate. The issue has been forwarded to the Sheriff, the County Prosecutor and the Washington State Attorney General office, but to date, they have declined to take action.

VI. Sale of Golf Course

As you probably have heard, Mao (Morris) Chen and 18 Paradise has agreed to sell the golf course. Due to the nature of a small town, the identity of the buyer is widely known. The sale is not scheduled to close until after the lawsuit has been resolved. We are informed that the sale includes the Declarant rights and the right to collect the maintenance fee. The prospective buyer is a Lynden native, and we have some hope that he would deal fairly with the homeowners. However, we have not received any information about his intentions.

VII. Lawsuit Website

Several Plaintiffs have devoted their time and effort to the creation and maintenance of a website for the lawsuit. The website is <https://homestead-hoa.org>. It is both a source for current information and a place where class members can provide updates and ask questions.

VIII. Big Picture

The lawsuit is the first in what we hope will be a series of steps to bring order to the Homestead neighborhood. When the PRD was created, a single set of restrictive covenants was adopted for the entire PRD, but Homestead has never been one thing. It has single family residences, condominiums, senior housing, and some commercial properties. A single set of rules are not a good fit for all those parts.

The condominiums all have their own Common Open Spaces, and condominium owners pay their own dues on top the Homestead dues. Those properties have no Homestead Common Open Space, and the owners are effectively paying for someone else's open space. Some of the single-family plats have no common space either. Once control has been transferred to a legitimate Homestead Owners Association, it would make sense for the community to decide what it wants in terms of a homeowners association and covenants.

The streetlights are a large expense and require specialized maintenance. Few homeowners associations maintain their own streetlights because Puget Sound Energy has a program to take over streetlights and add a small surcharge to the electricity bill of affected homeowners. If homeowners elect to pursue that option, more than half of the need for a larger association would go away.

MJ Management has argued on behalf of 18 Paradise that the Homestead stormwater maintenance system should be included as "common open space", and costs for maintenance of the system be the sole responsibility of Homestead residents. The Homestead stormwater system is actually a system shared by, Homestead, the Park, Emerald Green, Harrison Place, Rose Ellen, Woodfield, and Heartland subdivisions, as well as over 3 miles of public streets.

The Master Declaration does not mention stormwater maintenance at all, and MJ has never included stormwater in any of the Declarant's budgets. The lawsuit has focused long overdue attention to this extremely important and technical issue and we are optimistic that the current legal action will help resolve this for the benefit of all the citizens of Lynden.

IX. 2022 and Strategy Going Forward

We are hoping to get a trial date for late summer 2022. The pandemic has completely disrupted the court system, and we have to work on the court's schedule. Once the court rules on the pending motions, we believe that we will be able to get a trial date set. However, civil trial dates are not certain, and are often postponed by matters of more urgent priority before the court.

In anticipation of a 2022 trial, we have a very busy beginning of the year planned. We have scheduled 4 summary judgment motions on various issues in February to April. Those motions must be filed 28 days before the hearing, so we will start filing them in early January.

We have identified ten more depositions that we believe are necessary, and those will be completed by the end of May. Scheduling depositions has been made more difficult by the pandemic, but we are confident that they will be finished by June.

X. Trust Fund and Expenses

Every lawsuit is expensive, and sweeping class action lawsuits like this one are particularly time consuming. In addition to attorney fees, we are incurring more and more out of pocket expenses. Depositions require a court reporter and a transcript, which often total more than \$1,000 for a deposition. Obtaining copies of records costs money, and many third-party services are essential to win a lawsuit.

The Court Order we obtained immediately reduced the required monthly fee by \$57 from \$93 to \$36. Maintaining or further reducing that amount will require us to win the lawsuit. A modest regular contribution would greatly help to ensure that happens. We are setting up an easy automatic monthly payment at the website <https://homestead-hoa.org>