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Washington State Supreme Court

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SUPREME COURT NO. ~~900636-0~~

COURT OF APPEALS NO. 70329-3-1

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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SUDDEN VALLEY COMMUNITY ASSOCIATION, a  
Washington Non-Profit Corporation,

Respondent

v.

CURT CASEY, DAVE SCOTT & BARBARA VOLKOV,

Petitioners

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AMICUS CURIAE MEMORANDUM AMENDED

IN SUPPORT OF PETITIONERS

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**A. TABLE OF AUTHORITIES.**

**Cases**

*Hagemann v. Worth*, 56 Wn. App. 85, 88-89, 782 P.2d 1072 (1989) .....4  
*Mains Farm Homeowners Ass’n v. Worthington*, 64 Wn. App. 171, 179,  
824 P.2d 495 (1992) .....4  
*Metzner v. Wojdyla*, 125 Wn.2d 445, 450, 886 P.2d 154 (1994) .....4  
*Riss v. Angel*, 131 Wn.2d 612, 622-24 (1997).....4  
*Spencer’s Case*, 77 Eng. Rep. 72 (Q.B. 1583) .....3  
*Tulk v. Moxhay*, 41 Eng. Rep. 1143 (Ch. 1848) .....3

**Statutes**

RCW 64.38.035(3).....3, 7, 8

**Other Authorities**

Garrett Hardin, “The Tragedy of the Commons.” SCIENCE 162 (3859):  
1243–1248 (1968).....8  
The Foundation for Community Association Research, 2013 COMMUNITY  
FACT BOOK FOR WASHINGTON, § 2.2, at 7, section 2.2 (2014).....2

**Treatises**

Wayne S. Hyatt, CONDOMINIUM AND HOMEOWNER ASSOCIATION  
PRACTICE: COMMUNITY ASSOCIATION LAW 9-10 (3d ed. 2000) .....4

**B. IDENTIFY AND INTEREST OF AMICUS**

The Community Associations Institute (CAI) is an international organization dedicated to fostering well-governed, successful community associations. For more than 40 years, CAI has provided education, tools and resources to the volunteer homeowner leaders who govern community associations and the professionals who support them. CAI’s more than

33,000 members located in 60 local chapters include homeowners, professional managers, community management firms, attorneys, and other professionals and companies that provide products and services to community associations. CAI estimates that approximately 65 million Americans make their homes in more than 328,000 homeowners associations, condominium communities, cooperatives and other planned communities. This number constitutes roughly 21 percent of the U.S. population.

The Foundation for Community Association Research estimates there are two million Washington State residents living in approximately 10,000 community associations with estimated annual assessments of \$1.979 billion and with an estimated value of homes of \$142 billion. The Foundation for Community Association Research, 2013 COMMUNITY FACT BOOK FOR WASHINGTON, § 2.2, at 7, section 2.2 (2014). CAI has a Washington state chapter as well as a Legislative Action Committee that represents its members' interests in state legislative, regulatory, and judicial proceedings.

The decision of the Washington State Court of Appeals, Division I, adversely affects the interests of CAI's members by limiting, in contravention of legislative intent and sound public policy, a homeowners association's ability to generate revenue to pay for anticipated necessary

expenses for the maintenance, repair, and replacement of common areas and facilities used and shared by the association's members.

### **C. STATEMENT OF THE CASE**

CAI adopts the Statement of the Case in the Petitioner's Petition for Review, at pages 2 through 10.

### **D. MEMORANDUM**

Owners who share the responsibility for maintaining common areas and facilities in a residential community must solve three problems: one, they must find a way to pass on to future owners the obligation to maintain the common areas and facilities; two, they must decide who maintains the common areas and facilities; and three, they must pay the cost of ongoing maintenance of the common areas and facilities. RCW 64.38.035(3) solves the third problem, how to pay for the cost of ongoing maintenance of the common areas and facilities.

The ability of an owner to bind future owners to a maintenance obligation is done through real covenants and equitable servitudes, legal doctrines arising out of British law. See, for example, *Spencer's Case*, 77 Eng. Rep. 72 (Q.B. 1583) and *Tulk v. Moxhay*, 41 Eng. Rep. 1143 (Ch. 1848).

Communities in the United States in the 19<sup>th</sup> century began to use trusts and recorded maintenance agreements to solve the problem of

financing future maintenance obligations created by covenants. Wayne S. Hyatt, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW 9-10 (3d ed. 2000) (hereinafter "Hyatt").

The use of trusts and recorded maintenance agreements evolved into the creation and use of owner associations to maintain and operate common areas and facilities. Hyatt, at 10. Developments throughout Washington State with covenants to maintain also include covenants to pay assessments.

Enforcement of residential restrictive covenants is generally favored in Washington State. *Riss v. Angel*, 131 Wn.2d 612, 622-24 (1997); *Metzner v. Wojdyla*, 125 Wn.2d 445, 450, 886 P.2d 154 (1994). Enforcement exists to protect the character of established residential neighborhoods. *Hagemann v. Worth*, 56 Wn. App. 85, 88-89, 782 P.2d 1072 (1989). Courts recognize the importance of preserving the expectations of property owners. *Mains Farm Homeowners Ass'n v. Worthington*, 64 Wn. App. 171, 179, 824 P.2d 495 (1992). Property owners expect that common areas and facilities will be maintained and expect to pay for that maintenance.

The tension between the duty to maintain and the power to assess is exacerbated by the privatization of traditional government services. Municipalities permit large developments such as Sudden Valley to be

developed on the condition the developer creates a homeowners' association that will assume the responsibility for maintaining roads, waters and sewer systems, and other infrastructure historically provided and maintained by local government. With more responsibility comes greater costs and more disputes over the enforcement of the covenant to assess.

The State Legislature adopted RCW 64.38 in part to bring consistency to the governance of homeowner associations and to provide a reliable method of financing that balances an association's need to pay for maintenance costs with its member's need to understand, through disclosure and participation in the budgeting process, the true cost of membership in a covenanted community with common areas and facilities.

**1. The Court's Decision Leaves Sudden Valley with the Least Equitable Means by which to Fund the Maintenance of Common Areas and Facilities.**

The Court's decision leaves Sudden Valley with the least equitable means by which to fund the maintenance of common areas and facilities.

An association has five methods by which to fund the maintenance and repair of common areas and facilities. The association can (1) assess owners a sufficient amount to pay the cost while the common areas and facilities are being consumed through use; (2) borrow money to pay for the cost of common areas and facilities that have already been used, then

service debt through the collection of member assessments, (3) defer maintenance, (4) assess more than is necessary, and (5) collect monies from other sources such as leases to third parties and usage fees.

The most equitable choice is the first method—owners pay for the cost of maintaining and using common areas and facilities while they are being consumed. For example, if the estimated cost of replacing a roof is three million dollars and the roof has a 20 year-life span, the owners contribute  $1/20^{\text{th}}$  of the cost of replacement each year plus periodic maintenance expenses such as gutter cleaning. Because some common facilities have a useful lives that span years and decades, associations set aside money in reserve accounts so that these big ticket items can be paid for at the end of their useful lives.

The second method, borrowing money, benefits past owners at the expense of future owners; it imposes a financial burden on future owners to pay for past use of the common areas and facilities.

The third method, deferring maintenance, often results in the decline of common areas and facilities, and leads a community down the path toward abandonment of the declarant's general scheme of development. This is the path that Sudden Valley is on and that the Court of Appeals' decision supports. This method runs contrary to the expectation of property owners. This is the least desirable method.

The fourth method, collecting more than is necessary, benefits future owners at the expense of current owners.

The fifth method, collecting money from other sources, such as rental payments or user fees, is rarely adequate, at least on its own, to pay maintenance expenses when the common area or facilities exist for the use and benefit of its members.

**2. The Court's Decision Runs Contrary to RCW 64.38.035(3)'s, which codifies the most Equitable Method An Association has to Fund the Maintenance of Common Areas and Facilities.**

The Court's decision runs contrary to RCW 64.38.035(3)'s budget ratification procedures, the most equitable means available to an association to fund the maintenance of common areas and facilities. When an association follows the requirements of RCW 64.38.035(3), it is more likely the association will execute the most equitable choice—owners pay for the cost of maintaining and using common areas and facilities while they are being consumed, even when a budget is rejected by less than 50 percent of the total voting power of the membership.

The statutory ratification provision recognizes that a popular vote for an assessment increase is very difficult to obtain. Whether played out on the public stage, where citizens are asked to vote in favor of a tax increase, or in private associations, where owners are asked to vote in



favor of an assessment increase, a substantial minority of the total voting power, acting with passionate intensity, will act to defeat the increase. In the tragedy of commons, left without guidance or restraint, individuals will deplete a common shared resource even when it is clear that it is not in anyone's long-term interest to do so. Garrett Hardin, "The Tragedy of the Commons." SCIENCE 162 (3859): 1243–1248 (1968). The State Legislature intended that RCW 64.38.035(3) account for the practical realities of community association living.

#### **E. CONCLUSION**

Applicant Community Associations Institute (CAI), an international organization dedicated to fostering well-governed, successful community associations, submits this memorandum to assist the Court. The lower court's decision defends the least equitable method of financing Respondent Sudden Valley's ongoing maintenance of common areas and facilities and runs contrary to the plain language and intent of

RCW 64.38.035(3). For these reasons the Court of Appeals' decision should be reversed.

Respectfully submitted this 9<sup>th</sup> day of December, 2014.

Leahy McLean Fjelstad



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Brian P. McLean, WSBA #24923

For Applicant Community Associations Institute

PROOF OF SERVICE

I certify that on December 10, 2014, I caused to be served by legal messenger a copy of this motion and attached Amicus Curiae Memorandum on

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Signed on December 10, 2014, at Seattle, Washington.

  
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