

No. 67714-4-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BUCK MOUNTAIN OWNERS' ASSOCIATION,
a Washington Non-Profit Corporation,
Respondent,

v.

GLENN PRESTWICH and BARBARA BENTLEY,
His Spouse, and their Marital Community, Individually and as
Trustees of the Bentley-Prestwich Living Trust,
Appellants,

v.

J. MICHAEL STARR and RICHARD U. STARR,
TRUSTEES, and the JACK M. STARR CREDIT SHELTER TRUST,
Third-Party Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR SAN JUAN COUNTY
THE HONORABLE VICKIE CHURCHILL

BRIEF OF RESPONDENT
BUCK MOUNTAIN OWNERS' ASSOCIATION

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I. INTRODUCTION

This case concerns the existence and magnitude of road maintenance obligations between two users of a common access easement. The easement is written and recorded, and no one questions its validity, but it says not a single word about the existence or apportionment of road maintenance responsibilities and costs.

One of the users is the Respondent Buck Mountain Owners' Association of 130 members. By the terms of its covenants, its members use the easement, and it maintains the easement for its members. The association also maintains the easement for the benefit of several parcels outside of the association's boundaries, per the terms of various recorded road maintenance agreements.

Appellants Prestwich and Bentley purchased in 2005 a residential real property which lies outside of the boundaries of the association, but which uses the easement and which since 1986 had paid to the association a share of road maintenance according to the association's procedures. Neither the Appellants nor their predecessors-in-interest ever maintained or attempted to maintain the easement themselves. When Appellants decline to pay the 2006 bill from the association for road maintenance, the association commenced this suit.

Appellants countersued for slander of title, outrage, emotional distress and abuse of process, and then brought a third-party action against the trust that sold them their property, claiming a breach of warranties in the deed.

At trial the association's theory of law was that, where a dispute arises between parties to a recorded easement as to the parties' respective rights and obligations thereunder, and the easement is silent or ambiguous as to such rights and obligations, a court may define the parties' respective rights and obligations. The association proceeded to prove that, as the sole entity that maintains the easement, its method of determining the magnitude of the maintenance and allocation of its costs among users is the most rational and cost effective way to do so.

The Appellants asserted at trial that the court had no authority to define the parties' relative rights and obligations with respect to road maintenance, absent a separate agreement between them on the subject. They argued for different a procedure by which to determine the future magnitude of maintenance and allocation of costs.

Over a six-day trial, the court heard and considered all the evidence and law, and at the conclusion rendered a thorough factual and legal analysis, fashioning a reasonable manner in which to fairly

apportion road maintenance obligations between the easement's users, and dismissing all of Appellants' counterclaims and the third-party claim.

From the Appellants' Brief can be distilled eleven arguments. None has merit, because each either misinterprets the law or presents issues of fact that were resolved by the trial court among conflicting evidence. The decision should be affirmed in all respect.

II. STATEMENT OF ISSUES

II.i Does substantial evidence support the trial court's finding of fact that the association is a user of an access easement, where the association's developers were the original beneficiaries of the easement, where the developers subsequently dedicated the easement's use to the association's members, and where the Association is and has always been the sole entity that maintains the roadway?

II.ii Do common users of an access easement owe relative road maintenance obligations, where the easement contains no provisions on the subject of road maintenance?

II.iii Does substantial evidence support the trial court's finding of fact that there existed a pattern of conduct between of the Respondent homeowners Association and the Appellants' predecessors-in-interest in

charging and paying for road maintenance, and did the court correctly conclude that such pattern may be significant in determining the intent of the original parties to the easement?

II.iv Where an easement contains no provisions on the subject of road maintenance, does the obligation for road maintenance obligations arise from the doctrine of “equitable restriction?”

II.v Where an easement contains no provisions on the subject of road maintenance does the obligation for road maintenance obligations violate the “statute of frauds?”

II.vi Did the trial court improperly rely upon evidence of a party’s subjective intent in imposing a road maintenance obligation, where such evidence was unobjected to, and did not vary, contradict or subjectively interpret a term of the document in question, and where in any event the ruling is supported by numerous independent bases?

II.vii Does substantial evidence support the trial court’s finding of fact that Appellants’ road maintenance obligation should be 62.5% of the amount paid by the members of the entity that maintains the roadway, where such fact was established by expert testimony?

II.viii Does substantial evidence support the trial court's finding of fact that it would be difficult for the Association to actually prorate the costs of road maintenance, where such fact was established by expert testimony?

II.ix Does a requirement that the Appellants pay a fraction of the association's uniform assessment rate violate Appellants' constitutional right to free elections?

II.x Does a homeowners' association have standing to sue a non-member for contribution to the association's costs to maintain a roadway used in common by the association's members and by the non-member, even if the association actions in maintaining the roadway are ultra vires?

II.xi Where a trial court's underlying conclusion (that Appellants owe a road maintenance obligation) is valid, was it error to grant judgment for arrearages, interest and late fees, when Appellants' only argument on appeal against such judgment is that the court's underlying conclusion is in fact invalid?

III. STATEMENT OF FACTS

Respondent Buck Mountain Owners' Association (association) is a Washington non-profit corporation, in good standing,

organized under RCW 24.03 *et seq*, established in 1983. Findings of Fact, Conclusions of Law, and Judgment and Order (FFCLJO), Finding of Fact 3, unchallenged, CP 318; Declaration of Covenants, Conditions and Restrictions for Buck Mountain, Exhibit 15, at page 11.

In 2005 Appellants purchased real property adjacent to that governed by the covenants and other governing documents administered by the Respondent association. FFCLJO, Findings of Fact 4 and 6, unchallenged, CP 318-319; RP 93.

Appellants' predecessors-in-interest were Jack M. Starr, Mary M. Starr, Victor B. Guynup and Dorothea B. Guynup ("Starr and Guynup"), who in 1977 sold approximately 1,200 acres of land to the Respondent association's predecessors-in-interest who were William H. Carlson, David A. MacBryer, Barbara MacBryer, Donald S. Gerard, and M. Arlene Gerard ("Carlson, MacBryer and Gerard"). This transaction was recorded in the Statutory Warranty Deed, San Juan County Auditor's File Number 98152, which is Exhibit 9. FFCLJO, Finding of Fact 9, unchallenged, CP 319. The area conveyed is outlined in orange on the Map, Exhibit 1; RP 66-67.

As part of this sale, as stated in the 1977 Deed AFN 98152, Starr and Guynup retained an L-shaped parcel of approximately 30 acres, a portion of which is the real property now owned by the Appellants.

FFCLJO, Finding of Fact 11, unchallenged, CP 319-320. See also the Map, Exhibit 1, showing this area in the upper left side, accessed by what is labeled “Parker Reef Road.”

As part of this sale, as stated on the final page of the 1977 Deed AFN 98152, Starr and Guynup retained an easement for access “from the Stonegate north to the property retained by grantors,” i.e. the “L” shaped piece. FFCLJO, Finding of Fact 12, unchallenged, CP 320. The 1977 Deed AFN 98152 is silent on the issue of road maintenance. FFCLJO, Finding of Fact 13, unchallenged, CP 320.

Concurrently with the 1977 sale, the association’s predecessors-in-interest Carlson, MacBryer and Gerard granted a Deed of Trust, San Juan County Auditor’s File number 98153, for the benefit of Starr and Guynup, in which Carlson, MacBryer and Gerard agreed to:

“construct a serviceable rock roadbed twenty (20) feet in width and at least six (6) inches in depth within two years after July 8, 1977 over the existing roadbed and fifty (50) feet easement held by the Beneficiaries from the Stonegate north to the property retained by the Beneficiaries.”

FFCLJO, Finding of Fact 14, unchallenged, CP 320.

Appellants argued that paragraph 1 of the 1977 Deed of Trust AFN 98153 requires Carlson, MacBryer and Gerard, and now the Respondent association as successor, to maintain the roadway without

any obligation by the Appellants to contribute to such costs. Paragraph 1 states that Carlson, MacBryer and Gerard agree:

“To keep the property in good condition and repair: to permit no waste thereof; to complete and building, structure or improvements being built or about to be build thereon; to restore promptly any building, structure or improvement thereon which may be damaged or destroyed, and to comply with all laws, ordinances, regulations, covenants, conditions and restrictions affecting the property.”

FFCLJO, Finding of Fact 15, unchallenged, CP 320.

The Deed of Trust AFN 98153 (and its paragraph 1) is a form document, on which was interlineated the language requiring Carlson, MacBryer and Gerard to construct the rock roadbed as stated above.

FFCLJO, Finding of Fact 16, unchallenged, CP 321.

Deed of Trust AFN 98153 does not bind the parties thereto in perpetuity; Deed of Trust AFN 98153 was reconveyed in 1994 by the Full Reconveyance recorded under AFN 94020910, many years prior to the occurrence of the road maintenance that is the subject here. Exhibit 12; FFCLJO, Finding of Fact 19, unchallenged, CP 321; RP 70-72.

In *additional* support of its conclusion that the 1997 Deed of Trust AFN 98153 did not operate to provide the Appellants with free road maintenance in perpetuity, the trial court also cited the testimony of Mr. Carlson, an original signor of the document, that “there was no free ride for anybody,” and that “everybody would share equal,” and that “they

would all share in the Buck Mountain Road Maintenance Association,” and that it was “always the intent that everybody would share equal in road maintenance.” FFCLJO, Finding of Fact 18, CP 321. This testimony was admitted without objection. RP 222.

In 1981, the easement retained in the 1977 Deed AFN 98152 was extinguished and replaced by the Declaration of Easement, AFN 116378. Exhibit 10; FFCLJO, Finding of Fact 20, unchallenged, CP 321. Easement AFN 116378 is silent on the issue of responsibility for road maintenance. FFCLJO, Finding of Fact 23, unchallenged, CP 322.

Easement AFN 116378 is depicted on the Map Exhibit 1 as beginning at the intersection of Crescent Beach Drive and Olga Road, running east and then southeast along what is called Buck Mountain Road, before turning north along what is labeled Parker Reef Road, and ending after the “S” curve at the southern boundary of what is labeled “Sucia View 1.” RP 68-69. It is also depicted on face of the Short Plat of Sucia View, AFN 130579, Exhibit 19. [This accessway was first called Sucia View Lane, and was later re-named Parker Reef Road. RP 70 and 303.]

Easement, Auditor’s File number 116378 extended the easement across the land retained by Starr and Guynup, and granted the easement to the benefit of the land owned by the developers. See Exhibit

10, at p. 1, paragraphs 3 and 4, and RP 68-69. By this easement, therefore, the Respondent association's predecessors in interest obtained the right to use Sucia View Road for the benefit of their property at the end of the road.

By 1981, however, before the developers ever established a plat, they had sold in various parcels a substantial amount of the 1,200 acres purchased in 1977. Agreement Between San Juan County and Buck Mountain Property Owners AFN 119146, Exhibit 14, at pp. 1-2. San Juan County sued the developers, alleging that certain lots had been created illegally. Id., at pp. 1-4. In settlement, the County and the developers agreed, with respect to the original 1,200 acres, that those parcels already sold would remain unaffected, but the remainder must be subdivided properly and the entire 1,200 acres must then be made subject to a single comprehensive set of restrictions. Id. at pp. 3-8. Specifically, therein at section 7.2 and 7.3, (page 8), the County required the developers (and those owners who had already purchased) to establish a property owners association governing all of the original 1,200 acres and all private roads within it. See also: Receipt, Release and Settlement Agreement AFN 19980921013, Exhibit 18, p. 1, and Deposition of William H. Carlson, submitted by Appellants with Clerk's Papers, pp. 36-38.

The developers did this in 1983 when they recorded the Covenants, Conditions & Restrictions for Buck Mountain, AFN 128911, Exhibit 15. Exhibit 15, at page 1, center, after “Now Therefore,” at page 1, Article I Section 2, Definitions, and at Exhibit A thereto. See also, Receipt, Release and Settlement Agreement AFN 19980921013, Exhibit 18, at p. 1. The area defined in Exhibit A thereto, and therefore governed by the covenants for Buck Mountain, is outlined on the Map Exhibit 1 in blue. RP 75-80 and 168-169. The area is the same 1,200 acres that were conveyed in the 1977 Deed AFN 98152.

The Plat of Buck Mountain, Exhibit 13, in contrast, created lots within those remaining areas that had not yet been sold. Agreement Between San Juan County and Buck Mountain Property Owners AFN 119146, Exhibit 14, at pp. 1-8. The area subdivided by the Plat is outlined on the Map Exhibit 1 in yellow. RP 73-75. It consists mostly of the eastern portion of the 1,200 acres conveyed in 1977. The Master Road Easement likewise only creates roadways in those newly platted areas. Exhibits 200 and 429. The pre-existing Easement AFN 116378 (Exhibit 10), then called Sucia View Road (and on its western end, a portion of Buck Mountain Road), was depicted on the face of the Plat, and had no need to be created by the Master Road Easement. See Plat of Buck Mountain, Exhibit 13, at northwest corner of page 7. The Plat of

Buck Mountain, and the Master Road Easement were designed to address those areas not yet sold by the developers were not designed to define the boundaries governed by the association.

Sucia View Lane / Parker Reef Road (and the western end of Buck Mountain Road) is one of the roadways maintained by the Respondent association for the benefit of its 130 member-parcels. The Covenants, Conditions & Restrictions for Buck Mountain, Auditor's File number 128911, Ex 15, at pp. 3-4, dedicates Sucia View Lane and Buck Mountain Road as private roadways to be used by the association's members. See also RP 304. The Plat of Buck Mountain Auditor's File number 127665, Ex 13, depicts Sucia View Lane and Buck Mountain Road in the northwest corner of page 7. [This is in accord with the Agreement with County, Auditor's File number 119146, Ex 14, at p. 8, which requires the resulting association to manage covenants governing the lots and roadways within the entire 1,200 acres conveyed to the developers in 1977.] See also Deposition of William H. Carlson, p. 17, lines 7-22; p. 18, all; p. 71, lines 11-12; and p. 73, lines 3-7.

The purpose of the 1981 Easement AFN 116378 was to provide access to property that was to become part of the Buck Mountain development. This real property was divided and known as the Short Plat of Sucia View. FFCLJO, Finding of Fact 24, unchallenged, CP 322.

The governing documents of the Sucia View Short Plat grant its lots access over the easement described by the 1981 Easement AFN 116378 (Sucia View Lane), and require its lots to abide by and become part of the Respondent Buck Mountain subdivision when the association comes into existence. FFCLJO, Finding of Fact 25, unchallenged, CP 322; Short Plat of Sucia View, AFN 130579, Ex 19 at Dedication, first paragraph, and Restrictions 4 and 7.

The Short Plat of Sucia View was at that time owned by one of the association's predecessors-in-interest, Barbara MacBryer. Short Plat of Sucia View, Dedication; Deposition of William H. Carlson, p. 66. The land comprising the Short Plat of Sucia View was part of the original 1,200 acres sold to the developers in 1977 and which benefitted from access Easement AFN 116378. See Map, Exhibit 1; RP 66-67 and 83-84.

In addition, the Respondent association maintains Sucia View Lane / Parker Reef Road by operation of other independent agreements with: (a) San Juan County (see Receipt, Release and Settlement Agreement, Auditor's File number 19980921013, Ex 18, at p. 2); and (b) the other successors in interest to Starr and Guynup, whose properties are located in the same "L"-shaped area (see Road Maintenance Agreement, AFN 20020918001, Ex 21; Road Maintenance Agreement, AFN

20021122009, Ex 22; Road Maintenance Agreement, AFN 20110307001, Ex 23; and RP 84-5 and 88-90).

Appellants' real property benefits from Easement AFN 116378 over Sucia View Lane / Parker Reef Road. Exhibit 193. RP 783. The Respondent association is the only entity that maintains Sucia View Road / Parker Reef Road; neither Appellants nor their predecessors in interest ever maintained their accessway. RP 577, 1061-1062, 1150 and 1166.

With limited exceptions¹, the association assesses each of its 130 member parcels the same amounts for road maintenance. It does so because of the extraordinary difficulties in accurately prorating such costs, and because its governing documents mandate that course. Such was the testimony of engineer and road maintenance expert Gregg Bronn. RP 565-567 and 575-611; Expert Opinion, August 23, 2010, by Gregg Bronn, at Issue 2, Exhibit 95. The association's system of charging is fair. It is not possible for the association to engage in a minute proration of each of its 300-plus member. Id.; RP 1170-1171.

The Appellants' real property uses approximately the same amount of roadway for its principal access as does the average member of

¹ One such exception is the association's agreements with some owners within the L-shaped parcel retained by the Appellants' predecessors-in-interest to pay 62.5% of the full assessment amounts, plus 100% of the association's fee for construction impacts. FFCLJQ, Finding of Fact 30, unchallenged, CP 323; Exhibits 21, 22 and 23.

the Respondent homeowners' association. RP 575-611 and 638-658; Expert Opinion, by Gregg Bronn, at Issue 1, Exhibit 95.

This is due to the fact that there are numerous entries to and exits from the Buck Mountain development, and no property owner is required to traverse to entire road system to gain access. Id.; RP 283-297. The average distance traveled by a member to its closest exit is approximately equal to that traveled to and from the Appellants' real property. RP 575-611 and 638-658; Expert Opinion, by Gregg Bronn, at issue 1, Exhibit 95. It is therefore reasonable to require the Appellants' parcel to pay 100% of the share paid by members of the association. Id.

Against the association's evidence that Appellants' use of the easement approximates that of an average association member, Appellants offered not expert testimony, but their own estimation that their use is equivalent to 7% of that of an average member. RP 638-658; Testimony of Appellants.

The original party to the 1977 sale Mr. Starr, Sr., paid to the association fees for road maintenance on behalf of the Appellants' real property from the date such fees were first imposed, and for several years thereafter, until he put the property into trust and into the trusteeship of his sons, the current third-party Respondents, who continued to pay such

fees through 2005. FFCLJO, Finding of Fact 27, unchallenged, CP 322-323. RP 352-353, 357-363, 371-377, 707, 965-995.

When Appellants purchased the real property from the Third-Party Respondents Starr, the Respondent association notified Appellants of, and demanded payment for, road maintenance fees together with interest at 12% and late fees, all accruing since 2005. FFCLJO, Finding of Fact 33, unchallenged, CP 324. When payment was declined, the association sought the superior court's declaration of road maintenance obligations between two users of a common access easement, accruing since 2005. See generally, First Amended Complaint for Declaratory Judgment as to Road Maintenance Obligations, CP 150-165. Appellants denied the complaint and brought several counterclaims against the association, which denied the same. FFCLJO, Finding of Fact 2, unchallenged, CP 318.

The court granted judgment to the Respondent association in the form of a binding covenant requiring the Appellants' parcel's owners to contribute a 62% share of the sums regularly assessed by the plaintiff association on its members for road maintenance, as well as for arrearages, interest and late fees. FFCLJO, Conclusion of Law 7, CP 327, Order 1, CP 329. Appellants' counterclaims were dismissed for

lacking merit. FFCLJO, Finding of Facts 39-47, unchallenged, CP 324-327, and Conclusions of Law 10-15, CP 328-329.

The court held that the Respondent association may sue and be sued, complain and defend, in its corporate name, and is not limited to suits involving just the real property described within its governing documents (FFCLJO, Conclusions of Law 3 and 4, CP 327), and has standing under the Uniform Declaratory Judgments Act. FFCLJO, Conclusions of Law 5 and 6, CP 327.

The court held that the Respondent association and Appellants are co-users of a common easement (Easement AFN 116378), which easement is silent on the issue of road maintenance, and therefore the association is entitled to judgment in the form of a binding covenant requiring the owners of the Appellants' parcel to contribute a share of the sums for road maintenance regularly assessed by the association on its members. FFCLJO, Conclusion of Law 7, CP 327-328.

The court granted the Respondent association judgment against Appellants for monetary damages for a 62.5% share of past unpaid road maintenance assessments, plus interest and late fees. FFCLJO, Conclusion of Law 8, CP 328.

IV. ARGUMENT

IV.i Does substantial evidence support the trial court's finding of fact that the association is a user of an access easement, where the association's developers were the original beneficiaries of the easement, where the developers subsequently dedicated the easement's use to the association's members, and where the Association is and has always been the sole entity that maintains the roadway? Answer: Substantial evidence that the association is a user was presented at trial: its developers dedicated the easement's use to the association's members, and the association has historically maintained the roadway pursuant to various recorded agreements.

Appellants assert that the trial court erred in finding that the Association is a user of the easement in question. Appellants' Brief at p. 26. They claim that the association has no right, title or interest in the easement. Id. Appellants assert that the trial court erred in failing to rule that the Respondent homeowners' association's rights are limited to the easements it maintains within its geographic boundaries (citing Exhibit 15, 33 and 200, which are the Association's covenants, its bylaws, and a certain document entitled Master Road Easement). Appellants' Brief at pp. 26-27.

Findings of fact supported by substantial evidence become verities upon appeal. City of Seattle v. Hammon, 131 Wn. App. 801, 806 (2006); and Craftmaster Restaurant v. Cavallini, 11 Wn. App. 500, 502-503 (1974), citing Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570 (1959).

Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise. City of Seattle v. Hammon, 131 Wn. App. 801, 806 (2006), citing Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 819, 828 P.2d 549 (1992).

Findings of fact unchallenged on appeal are verities. State v. Eriksen, 170 Wn.2d 209, 215 n. 4, (2010).

The court found, at Finding of Fact 7, that “Defendants’ real property benefits from a non-exclusive perpetual easement for access over and across roadways maintained by the plaintiff association for the benefit of plaintiff’s 130 member-parcels, and for the benefit of other parcels of real property similarly situated to that of the defendants with whom the plaintiff has road maintenance agreements.”

The court found, at Finding of Fact 22, that “the 1981 Declaration of Easement AFN 116378 expanded the width of the accessway to 60 feet, extended the accessway across the L-shaped parcel

retained by defendants' predecessors'-in-interest to the real property purchased in 1977 by plaintiff's predecessors'-in-interest, and granted the benefit of the easement to such real property purchased by plaintiff's predecessors'-in-interest."

The court found, at Finding of Fact 25, that "the governing documents of Sucia View grant its parcels access over the easement described by the 1981 Declaration of Easement AFN 116378, and require its parcels to abide by and become part of the Buck Mountain subdivision."

As set forth in the Statement of Facts above, substantial evidence supports the finding that the Respondent owners' association not only maintains the roadway in question, but does so as a successor in interest to the easement creating the roadway. The developers and their 1,200 acres became beneficiaries of Easement AFN 116378 in 1981, and they dedicated its use to their acreage in the Covenants for Buck Mountain. By 1983, the Short Plat of Sucia View was still owned by one of the developers (Barbara MacBryer), but in all events the land of Sucia View never ceased to benefit from Easement AFN 116378, and its owners dedicated it to the use of the lots within Sucia View and required those lots to become a part of the Buck Mountain Association.

Any confusion regarding the description of the roadway in the Plat or other association documents arises from the fact that the development was created in two phases, a first phase that included the easement in question, and a second phase that included the land depicted on the face of the Plat and the roadways described in the Master Road Easement. Regardless, the entirety of the land purchased by the developers is governed by the Covenants for Buck Mountain.

IV.ii Do common users of an access easement owe relative road maintenance obligations, where the easement contains no provisions on the subject of road maintenance? Answer: In the absence of a written road maintenance agreement, all users of a shared access easement are obligated to pay a reasonable share of the costs to maintain the roadway.

Nowhere in Appellants' Brief, or in their trial brief or arguments to the trial court, did they acknowledge the existence of, refer to any of the case law supporting the central legal theory propounded throughout by the Respondent homeowners' association, or cite any law to the contrary.

In its First Amended Complaint, in its Trial Brief, and in closing argument, the Respondent homeowners' association presented the following legal theory.

This legal issue has been unequivocally answered in the leading treatises and in cases all over this country. It is not uncommon for recorded easements to have no reference at all to road maintenance obligations, and courts have been called to decide how to apportion such maintenance. The holding of those cases is unanimous. There is no line of minority cases, or even dissenting opinions to suggest an alternative rule of law. Scholarly treatises and the law of other states are unanimous in this principal: there is no dissenting line of cases.

The rule is: **when an easement is silent on road maintenance, and both the benefited and burdened parcels share use of the easement, each is obligated to contribute to maintenance for that portion of the roadway used in common.** Restatement of the Law Third, Property (Servitudes), American Law Institute, May 12 1998, Section 4.13(3) and (4), and the Comment d thereto; 28 C.J.S. Easements, Section 94(a) (1941 and Supp. 1991); 25 Am.Jur2d Easements and Licenses, Section 85 (1966 and Supp.1991); Beneduci v. Valadares, 812 A.2d 41, 50-51 (Conn.App. 2002); Apartment Owners v. Wailea Resort, 58 P.3d 608, 620 (Hawai'i App. 2002); Drolsum v. Luzuriaga, 611 A.2d

116, 125 (Md.App. 1992); McDonald v. Bemboom, 694 S.W.2d 782, 786 (Mo.App. 1985); Hayes v. Thompkins, 337 S.E.2d 888, 891 (S.C.App. 1985); Larabee v. Booth, 463 N.E.2d 487, 492 (Ind.App. 4 Dist 1984); Lindhorst v. Wright, 616 P.2d 450, 454-455 (Okl.App. 1980); Janes v. Politis, 361 N.Y.S.2d 613, 616-617 (1974); Marsh v. Pullen, 623 P.2d 1078, 1080 (Or.App. 1981); and Island Improvement Association v. Ford, 383 A.2d 133, 134-135 (N.J.App. 1978).

All the above cases and treatises are in accord and are factually apposite.

For example, in Beneduci v. Valadares, *supra*, a landowner brought suit for the allocation of maintenance costs associated with a common driveway. An easement for the driveway was created by express grant in deeds by the parties' predecessors in interest. The driveway was located on the plaintiff's property alone, but was used in common by both properties. No mention of maintenance is made in the deeds creating the easements. The Beneduci Court faced the situation "where both the dominant and servient estates derive the same benefit from the common use of a driveway." *Id.*, at 51. The Court held, "the proper rule is, absent language in a deed to the contrary, 'joint use by the servient owner and the servitude beneficiary... of the servient estate for the purpose authorized by the easement... gives rise to an obligation to

contribute jointly to the costs reasonably incurred for repair and maintenance of the portion of the servient estate used in common.’ [citing the Restatement Third of Property, Servitudes, section 4.13(3).]” That Court reasoned, “We cannot conclude that the defendant should be required to subsidize the plaintiff’s use of his own property. It is appropriate that both parties contribute to the wear on the driveway.” Id., at 51.

Where easements are silent on the issue of road maintenance, despite the fact that easements are generally construed favorably to the conveyee, it is not assumed that the conveyor agrees to maintain or repair the easement for the conveyee’s benefit; rather such duty is assumed to be upon the conveyee. Restatement of the Law of Property, Volume 5 (Servitudes), American Law Institute, May 12 1944, Section 485, comment b.

Therefore, in this case, the easements creating the access right are to be interpreted in favor of finding an equitable obligation of road maintenance by all users of the accessway.

Washington case law is in accord. Washington courts have analyzed property owners’ respective rights under easements that are silent on certain aspects of the easement’s use or scope. In Standing Rock Homeowners Association v. Misich, 106 Wn.App. 231, 236 (2001),

a homeowners association brought a declaratory judgment action against the beneficiary of an easement across the association's property, in which the court analyzed whether the association's erection of a gate constituted an unreasonable interference with the beneficiary's use. The easement was silent on whether a gate could be erected.

When called upon to analyze whether concurrent users of a shared easement (with no road maintenance provisions) must share road maintenance, Washington courts have ruled that in such instances road maintenance must be shared. Bushy v. Weldon, 30 Wn.2d 266, 271-272 (1948), affirmed a trial court decision in which concurrent users of an easement with no road maintenance provisions were required to share proportionately the cost of road maintenance.

IV.iii Does substantial evidence support the trial court's finding of fact that there existed a pattern of conduct between of the Respondent homeowners Association and the Appellants' predecessors-in-interest in charging and paying for road maintenance, and did the court correctly conclude that such pattern may be significant in determining the intent of the original parties to the easement? Answer: The trial court's finding is supported by the

uncontradicted testimony of the third-party respondent Mr. Michael Starr and the President of the homeowners' association.

Appellants assert no substantial evidence supports the trial court's finding of fact that between the Respondent homeowners' association and the Appellants' predecessors-in-interest there existed a pattern of conduct of charging and paying for road maintenance. Appellants Brief at pp. 34-35 (no citation to authority), referring to Findings of Fact 26 and 34 (CP 322 and 324). Appellants claim that the only evidence was that such payments were made under ambiguous terms and lacked probative value. Appellants' Brief at pp. 34-35, citing RP 188-89, 702 and 1123.

Appellants are mistaken. In fact, substantial evidence supports the trial court's finding in this regard.

One of the original parties to the easement in question, Mr. Jack Starr (the father of J. Micheal Starr, Trustee, third-party Respondent) paid the assessments for several years before his son took over. Appellants do not challenge Finding of Fact 27, which is therefore a verity on appeal: "Until the Appellants took title from them in 2005, Appellants' predecessors-in-interest paid 100% of the road maintenance obligations levied by the plaintiff association. J. Michael Starr assumed responsibility for the subject real property from his father Jack M. Starr

in 1989, several years after the plaintiff began to levy and collect road maintenance assessments on the subject property.” There could have been no ambiguity with respect to the actions of Mr. Starr, Sr., because he knew that the property he retained was outside of the boundaries of the homeowners association established by his buyers.

The trial court’s uncontradicted finding is supported by the testimony of the third-party respondent Mr. J. Michael Starr and the President of the homeowners’ association.

Appellants do not argue that the trial court’s decision was erroneous as a matter of law, and neither do they cite any case law for that proposition. However, as a matter of law, the trial court did properly rely upon such a pattern of conduct in determining the intent of the original parties with respect to an issue upon which the easement was silent.

Where an agreement is ambiguous, such a pattern of conduct is relevant to the issue of what the original parties intended in that regard, and the court must consider their intent. Third Restatement of the Law of Property, 1998, Section 4.13(3), at Comment d:

“Because the circumstances of the creation and use of easements...can vary so widely, this rule (allowing a court to chose a reasonable allocation of maintenance costs)... should yield readily to the inferences as to the actual or probable intent of the parties drawn from the circumstances of the particular case.”

The original documents were silent on the subject of road maintenance, and thus ambiguous on that point. The parties' multi-year pattern of conduct supplies one reliable indication of their intent.

IV.iv Where an easement contains no provisions on the subject of road maintenance, does the obligation for road maintenance obligations arise from the doctrine of “equitable restriction?”

Answer: Where an easement lacks a written road maintenance agreement, the legal theory by which the mutual obligation to maintain the roadways arises in no way relies upon the doctrine of “equitable restriction.”

Appellants assert that the legal theory under which the trial court imposed a road maintenance obligation was that of an “equitable restriction.” Appellants Brief at p. 30-31, citing Dickson v. Kates, 132 Wn. App. 724, 732 (2006), and Hollis v. Garwall, 137 Wn.2d 683, 691 (1999). [Those cases also refer to the doctrine as “constructive covenants” or “equitable covenants”] The Appellants claim that no road maintenance obligation arises, because certain elements of the legal theory of equitable restrictions were allegedly not proved (notice, and a written agreement). Appellants Brief at p. 31-32.

Appellants' claims in this regard are mistaken, because the legal theory presented by the Respondent homeowners' association at trial (see Section IV.2 above) was not that of "equitable restriction" or "constructive covenants." Rather, Respondent's legal theory is based upon the cases and treatises cited in section IV.2 above. In those authorities, there is no mention of the doctrine of equitable restrictions, and questions as to whether the affected landowner had "notice" of the obligation that would be imposed by the court or whether there existed a written agreement.

At trial, the Respondent homeowners' association relied upon the existence of the valid original easement that created the access rights, and sought a declaration of the parties' rights thereunder. The Respondent did not ask the trial court to create covenant between the parties where none exists.

For those reasons, Appellants' reliance upon Dickson v. Kates, *supra*, and Hollis v. Garwall is misplaced. In Dickson a landowner brought a declaratory judgment action seeking to declare a restrictive view covenant invalid. The Dickson court held the covenant invalid for violation of the Statute of Frauds, but went on to consider whether some other theory of law would suffice to make the covenant enforceable. Dickson, at 734-735. That theory was the theory of constructive

covenants, under which a Court may impose real property restrictions in the absence of a recorded agreement, but only if the affected property owners had “notice” of the obligation created thereby and if the obligation arose from a written agreement. Id., at 734-735. In Hollis, a homeowners’ association brought an action to enforce a plat covenant. Hollis, supra, at 683. The Hollis court found that the covenant was enforceable as an equitable restriction. Id., at 691-693.

In contrast, in this case, there is no question of whether the underlying property right exists. The underlying property right is the recorded easement. Therefore, the doctrine of equitable restrictions does not apply. Rather, the doctrine set forth in the authorities cited in Section IV.2 above is applicable. In Bushy v. Weldon and Standing Rock Homeowners Association v. Misich, supra, the statute of frauds was never raised, because its requirements were met by the unquestioned existence of the underlying easement. In those cases, the question for the court was to determine the parties’ relative rights as to an issue upon which the underlying easement was silent. That is the distinction.

Regarding the issue of whether the Appellants had “notice” of the existence of the road maintenance obligation, to the extent this issue was relevant at trial, it was so only with respect to the third-party

Respondent Starr's defense. See Appellate Brief of Third-Party Respondents Starr, at pp. 4-6.

IV.v Where an easement contains no provisions on the subject of road maintenance does the obligation for road maintenance obligations violate the "statute of frauds?" Answer: Where an easement lacks a written road maintenance agreement, the legal theory by which the mutual obligation to maintain the roadways arises in no way violates the statute of frauds.

Appellants argue that a homeowners association or other form of road maintenance association may only collect contributions for road maintenance from its membership, through a covenant binding the respective properties and organization. Appellants Brief at pp. 28-29, citing Lake Arrowhead Community Club, Inc., v. Looney, 112 Wn.2d 288, 293 (1989), and Dickson v. Kates, 132 Wn. App. 724, 731 and 733 (2006). They assert that in the absence of a written road maintenance agreement sufficient to satisfy the statute of frauds, a court may not impose an obligation of road maintenance upon a landowner. Appellants Brief at p. 29-30, citing Dickson, supra, at 733, Rodruck v. Sand Point Maintenance Comm., 48 Wn.2d 565 (1956), and RCW 64.04.010. Appellants assert that the Association may only sue for contributions for

road maintenance from a non-member if an agreement exists between those parties or their predecessor in interest. Appellants Brief at p. 27.

As in Section IV.4 above, Appellants' claims are mistaken, because the legal theory presented by the Respondent homeowners' association at trial (see Section IV.2 above) was not that of "equitable restriction" or "constructive covenants" which in part rely upon the statute of frauds. The Respondent did not allege that the Appellants' real property is somehow described in or expressly included in the writings that constitute the association's covenants, plat maps, legal descriptions, etc.

Rather, Respondent's legal theory relied upon a validly recorded easement, and is based upon the cases and treatises cited in section IV.2 above, which do not mention of the statute of frauds in any respect. In those authorities, the issue of whether an underlying covenant exists (and therefore whether the statute of frauds is brought into question) never arises. It never arises, because the underlying covenant (in this case the easement) is recorded and satisfies the statute of frauds. Instead, the legal question is the determination of the parties' respective rights as to a subject on which the underlying covenant is silent. In all authorities cited in Section IV.2 above, there is no question as to the applicability of the Statute of Frauds. The inquiry is negated where the

original valid easement constitutes the “writing” that avoids the application of the Statute of Frauds.

IV.vi Did the trial court improperly rely upon evidence of a party’s subjective intent in imposing a road maintenance obligation, where such evidence was unobjected to, and did not vary, contradict or subjectively interpret a term of the document in question, and where in any event the ruling is supported by numerous independent bases?

Answer: The trial court properly admitted such evidence without objection, and relied upon it for the proper purpose of ascertaining the drafters’ intent with respect to the existence of a current maintenance obligation, because the evidence did not vary, contradict or subjectively interpret the terms of the document in question, and in all events the court’s ruling was supported by several independent valid bases.

Appellants argue that, when the trial court concluded that their property is subject to a road maintenance obligation, the court improperly relied upon extrinsic evidence of a drafter’s unilateral intent. Appellants’ brief at 33, citing Hollis v. Garwall, supra, at 696. Appellants claim the court therefore erred in entering Findings of Fact 13, 34 and 35, at CP 321 324. Appellants Brief at pp. 33-34.

In this case, the Appellants argued to the trial court that a 1977 deed of trust between the parties' predecessors in interest contained a current promise with respect to the maintenance of the roadway at issue. The trial court found that, among other factors, the testimony of an original party to the deed of trust (that road maintenance was intended to be shared by the respective property owners) was relevant to the issue of whether a promise for current road maintenance existed within the wording of the 1977 deed of trust. The trial court held that the deed of trust did not contain a promise currently enforceable between the parties. The trial court's conclusion was based upon several factors apart from the subjective intent described above. Those factors are: (a) the deed of trust was reconveyed in 1994, rendering any promises within it null and void after that time; (b) the language within the deed of trust urged by the Appellants to constitute a currently binding promise was a boilerplate contract provision that was ambiguous as to the promise and probably not intended to function as such.

The Appellants mischaracterize the trial court's finding as to the relevance of the evidence of the original party's subjective intent. The trial court did not rely upon such evidence in ruling that a maintenance obligation exists between the parties. The trial court found a road maintenance obligation based upon the mutual use of the easement

in question. Rather, the trial court's finding as to the relevance of this evidence was strictly limited to its ruling that the deed of trust introduced by the Appellants did not function as a currently enforceable promise with respect to road maintenance.

The trial court properly relied upon such evidence, because the evidence does not show an intent independent of the instrument (in this case the deed of trust), does not vary, contradict or modify the written word, and is not the unilateral subjective opinion as to the meaning of a word or term therein. Riss v. Angel, 131 Wn.2d 612, 623 (1997); Berg v. Hudesman, 115 Wn.2d 657, 667 (1990); Hollis v Garwall, supra at 695; Nationwide Fire Insurance Co. v. Watson, 120 Wn.2d 178, 189 (1992).

The 1977 deed of trust was a boilerplate document that contained a special provision drafted by the parties, which required the construction of a roadway. Another provision in the boilerplate section of the document required the borrowers to maintain all improvements on the subject property in good condition. The deed of trust was reconveyed and became inoperative in 1994.

The question before the court, presented by the Appellants, was whether this deed of trust contained language relevant to the

Respondent homeowners' association's claim that a current road maintenance obligation arises from a separate easement.

With respect to a current road maintenance obligation (i.e., existing after the deed of trust was reconveyed in 1994) the deed of trust is undeniably ambiguous, whatever it may say with respect to such obligation during the period of the deed of trust's operation.

Regardless of ambiguity, under the parole evidence rule, the testimony of an original party to the deed of trust is admissible for the limited purpose of explaining the original parties' intent, where such evidence does not vary, contradict or modify the writing, and is not the unilateral subjective opinion as to the meaning of a word or term therein. Here, the evidence in question is the testimony of a party to the 1997 deed of trust to the effect that, after the deed of trust was conveyed, road maintenance was to be shared. Such testimony does not vary, contradict or modify the 1997 deed of trust, nor is it a unilateral interpretation of a term contained within it. As such, the testimony was properly admitted and relied upon for its limited purpose.

Furthermore, the trial court's ruling is supported by two independent bases which are not contested by the Appellants: the deed of trust was reconveyed in 1994 rendering it inoperative at that juncture, and the language relied upon by the Appellants did not in fact create an

enforceable maintenance obligation during the short period in which the deed of trust was operative.

Where a trial court's ruling is independently supported by one or more valid bases, the invalidity of another such basis constitutes harmless error not requiring reversal. Miller v. Arctic Alaska Fisheries, 133 Wn.2d 250, 261 (1997).

Finally, the evidence at issue was introduced without objection. Deposition of William Carlson, pp. 7 and 16.

Evidence admitted without objection may not be the basis of claimed error on appeal. State v. Robinson, 4 Wn.App. 515, 516 (1971).

IV.vii Does substantial evidence support the trial court's finding of fact that Appellants' road maintenance obligation should be 62.5% of the amount paid by the members of the entity that maintains the roadway, where such fact was established by expert testimony?

Answer: Substantial evidence that 62.5% of the amount charged to all association members reasonably approximates the magnitude of the Appellants' road maintenance obligation was presented in the form of the testimony of the Respondent association's president and its expert (an engineer with road maintenance expertise) that Appellants' use of the roadway is equivalent to that of an average Association member.

Appellants argue no substantial evidence was presented by which the court could find that Appellants' road maintenance obligation is approximately equivalent to that of an average association member. Appellants' Brief at pp. 37-38, citing Bushy v. Weldon, 30 Wn.2d 266, 272 (1948). Appellants point to Ex 26 in the record. Appellants' brief at p. 38.

Finding that a road maintenance obligation exists, the trial court was compelled to apportion the obligation between the parties fairly and reasonably. One of the factors in determining how much a non-member parcel should contribute toward road maintenance is "the frequency and intensity of use made". Third Restatement of the Law of Property, 1998, Section 4.13(3), at Comment d. Such determinations must be decided on a case-by-case basis. Id.

Substantial evidence was presented in the form of the testimony of the president of the association and an expert road engineer that the Respondent association spends essentially 100% of its revenue on road maintenance, and the Appellants' real property does not differ significantly in intensity and magnitude of use of such roadways from a typical association-member.

Because the trial court's findings of fact are supported by substantial evidence, those are verities upon appeal. City of Seattle v. Hammon, supra; and Craftmaster Restaurant v. Cavallini, supra.

IV.viii Does substantial evidence support the trial court's finding of fact that it would be difficult for the Association to actually prorate the costs of road maintenance, where such fact was established by expert testimony? Answer: Substantial evidence that it would be difficult for the Association to actually prorate the costs of road maintenance was presented in the form of the testimony of the Respondent owners' association's expert, an engineer with road maintenance expertise, that the numerous entries and exits from the entire road system renders accurate proration impractical.

Appellants argue no substantial evidence was presented by which the court could find that it would be difficult for the Association to actually prorate the costs of road maintenance. Appellants' Brief at pp. 39-40. Appellants refer to the evidence they presented at trial in arguing for a different manner of approximating Appellants' road maintenance obligation.

However, Appellants fail to refer to the evidence presented by the expert witness of the Respondent homeowners' association.

Substantial evidence was presented in the form of the testimony of the expert road engineer and the president of the association that the numerous entries and exits from the entire road system renders accurate proration impractical.

Because the trial court's findings of fact are supported by substantial evidence, those are verities upon appeal. City of Seattle v. Hammon, supra; and Craftmaster Restaurant v. Cavallini, supra.

IV.ix Does a requirement that the Appellants pay a fraction of the association's uniform assessment rate violate Appellants' constitutional right to free elections? Answer: The method found by the trial court to reasonably approximate, charge and collect for road maintenance does not violate the constitutional right enunciated in Washington State Constitution, Article I, Section 19.

The trial court found the Respondent homeowners' association's method of determining the magnitude of the Appellants' road maintenance obligation to be the most reasonable way to do so. This method involves engineering studies and the execution of long-range maintenance plans in the context of a 9- mile road system. This system also involves approval of the road maintenance budget by the association's membership.

Appellants argue that in making its Findings of Fact 28 and 31, CP 323, the trial court improperly relied upon the Association's method of calculating its members' road maintenance obligations. Appellants' Brief at pp. 38-39. They assert that their rights to free elections are violated because they have no vote in Association affairs, and the method involved in determining the magnitude of their maintenance obligation depends upon the Association's determination. Appellants Brief at p. 27, 28 and 35-37, citing Malim v. Benthien, 114 Wash. 533, 539 (1921).

Malim is distinguishable. Malim rests entirely on the application of Washington State Constitution article I, section 19, which provides, "Freedom of Elections. All Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Art. I, sec. 19, operates to secure to the citizens a free "government" (Malim, supra at 539), and protects individuals in their capacity as "citizens" [Eugster v. State, 171 Wn.2d 839, 845 (2011)].

The principals set forth in Constitution article 1, section 19, and enunciated in Malim apply only to elected or legislative bodies exercising the "political" power of taxation. Larson v. Monorail Authority, 156 Wn.2d 752, 768-770 (2006) (dissent discussing the

context of art. I, sec. 19). This State's Constitution reserves "political" power to its people (Wa. Const. art I, sec. 1) and is concerned with free government (Wa. Const. art. I, section 32). *Id.*, at 770. Art. I, sec. 19, functions to limit the authority of the legislature to delegate taxing authority to local governments as granted in art. XI, sec. 12, and art. VII, sec. 9. *Id.*

Cases interpreting art. I, sec. 19, including Malim and its successors, are limited to an analysis of a governing body exercising legislative or taxing authority, and not of private covenants between individual landowners. See Malim, *supra* (challenging the voting scheme behind a diking- drainage district); Jones v. Hammer, 143 Wn. 525 (1927) (challenge to authority of a diking district); Carstens v. PUD 1, 8 Wn.2d 136, cert. denied 314 U.S. 667, 86 L.Ed 533, 22 S.Ct 128 (1941) (challenge to authority of a municipal corporation); King County Water District v. Review Board, 87 Wn.2d 536 (1976) (challenge to authority of a water district); Foster v. Sunnyside Valley Irrigation Dist., 102 Wn.2d 395 (1984) (challenge to authority of irrigation district); Granite Falls Library v. Taxpayers, 134 Wn.2d 825 (1998) (challenge to authority of a quasi municipal corporation); and Larson v. Monorail Authority, 156 Wn.2d 752, 768 (2006) (challenging the imposition of a motor vehicle excise tax and the creation of the Seattle Monorail Authority).

For these reasons, Malim and any analysis under art. I, sec. 19, is inapplicable to this case. Here, there is no violation of Appellants' rights as citizens to the free governmental exercise of the public taxing authority. Here, the trial court fashioned a remedy between two private landowners based upon substantial and reasonable evidence that this form of remedy was the only reasonable form.

IV.x Does a homeowners' association have standing to sue a non-member for contribution to the association's costs to maintain a roadway used in common by the association's members and by the non-member, even if the association actions in maintaining the roadway are ultra vires? Answer: An association has standing to sue and be sued, even if its actions are allegedly ultra vires, so long as the other party has benefitted and will continue to benefit from the association's actions.

Appellants assert that the Association's articles, bylaws and covenants, and chapter 64.38 RCW provide no authority or standing to sue for contributions for road maintenance from a non-member, because such person's property lies outside of the Association's "jurisdiction." Appellants Brief at p. 27.

As an actual, present and existing dispute this is a ripe, justiciable action to determine the respective rights and obligations under a covenant to real property, this suit was properly brought under the Declaratory Judgment Act at RCW 7.24.010 and 7.24.020. See also Justice Philip A. Talmadge, “Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems,” Seattle University Law Review, Volume 22, Number 3, Winter 1999; Bunnell v. Blair, 132 Wn.App. 149, 151 (2006); Nollette v. Christianson, 115 Wn.2d 594, 599 (1990); and City of Spokane v. Taxpayers of Spokane, 111 Wn.2d 91, 96 (1988). This court has jurisdiction pursuant to RCW 7.24.010, RCW 2.08.010 and Washington State Constitution article 4, section 6.

For example, in Standing Rock Homeowners Association v. Misich, supra at 236, a homeowners association brought a declaratory judgment action against the beneficiary of an easement across the association’s property, asking the Court to determine the parties’ rights as to an issue on which the easement was silent (did the association’s erection of a gate constitute an unreasonable interference with the beneficiary’s use?). This case is similar, except that the trial court was requested to rule on the issue of road maintenance instead of the erection of a gate.

The Respondent homeowners' association has legal authority to bring this action. In addition to the authority set forth in the association's articles, bylaws and covenants, this State's statutes provide an adequate basis upon which the association may claim against a third party for an obligation owed to it.

RCW 64.38.020(4) (5) (6) (9) (10) (12) (13) and (14) (the statutes applicable to homeowners associations) provide:

“Unless otherwise provided in the governing documents, an association may:...

(4) Institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself... on matters affecting the homeowners' association...;

(5) Make contracts and incur liabilities;

(6) Regulate the use, maintenance, repair, replacement, and modification of common areas;...

(9) Grant easements, leases, licenses, and concessions through or over the common areas and petition for or consent to the vacation of streets and alleys;

(10) Impose and collect any payments, fees, or charges for the use, rental, or operation of the common areas;...

(12) Exercise any other powers conferred by the bylaws;

(13) Exercise all other powers that may be exercised in this state by the same type of corporation as the association; and

(14) Exercise any other powers necessary and proper for the governance and operation of the association.”

Similarly, RCW 24.03.035(2) and (20) (the statutes applicable to nonprofit corporations) provide:

Each corporation shall have power: ...

(2) To sue and be sued, complain and defend, in its corporate name. ...

(20) To have and exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is organized.

In any event, there can be no argument that the Respondent homeowners' association is estopped from asserting its claims herein on the basis that the association's actions are in some way "ultra vires." An alleged obligor to a private corporation is not allowed to oppose a claim on the ground that an obligation arose in an ultra vires exercise of corporate power, when the obligor has received and will continue to receive all of the benefits for which the corporation seeks to recover. See Port of Penninsula v. Bendikson, 71 Wn.2d 530, 534 (1967).

Here, the Appellants as owners of real property which uses as its sole access a roadway maintained (and that will continue to be maintained indefinitely) by the Respondent homeowners' association are by law estopped from asserting the defense of ultra vires, because their property has received and will continue to receive the benefits for which the Respondent homeowners' association seeks to recover. Id.

IV.xi Where a trial court's underlying conclusion (that Appellants owe a road maintenance obligation) is valid, was it error to grant judgment for arrearages, interest and late fees, when Appellants' only argument on appeal against such judgment is that the court's underlying conclusion is in fact invalid? Answer: Where the trial

court properly concludes that a road maintenance obligation binds the Appellants' real property, and where the Appellants' only argument against a judgment for arrearages, interest and late fees is that the court's underlying conclusion is invalid, the decision on arrearages, interest and late fees must be affirmed or reversed on appeal with the underlying conclusion.

In their Brief at page 32, Appellants assert that the trial court erred in awarding unpaid arrearages, interest and late fees. As their sole basis for this argument Appellants contend that no such award may be made if there is no valid road maintenance obligation to enforce. Therefore, in the event the court's decision as to the validity of the road maintenance obligation is affirmed, the award must stand.

V. CONCLUSION

This appeal presents well-settled issues of law and well-substantiated issues of fact. The decision of the trial court should be affirmed in all respects.

Dated this 9th Day of April, 2012.

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By:  _____

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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BUCK MOUNTAIN OWNERS' ASSOCIATION,)	
A Washington Non-Profit Corporation,)	NO. 67714-4-1
Respondent,)	
vs.)	DECLARATION
)	OF SERVICE
)	BY RESPONDENT
GLENN PRESTWICH and BARBARA BENTLEY, his spouse, and their marital community, Individually and as Trustees of the Bentley- Prestwich Living Trust,)	BUCK MOUNTAIN OWNERS' ASSOCIATION
)	
Appellants.)	
vs.)	
)	
J. MICHAEL STARR and RICHARD U. STARR, TRUSTEES, and JACK M. STARR CREDIT SHELTER TRUST,)	
Co - Respondents.)	

FILED
 COURT OF APPEALS DIV 1
 STATE OF WASHINGTON
 2012 APR -9 PM 3:40

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on April 9, 2012, I served a true and correct copy of the Brief of Respondent Buck Mountain Owners' Association, Respondent's Designation of Exhibits to the attorneys listed below, as follows:

By delivering the same by hand to Smith Goodfriend, P.S., and Howard M. Goodfriend and Valerie A. Villacin, Appellants' Attorneys, at 1109 First Avenue, Suite 500, Seattle, WA 98101.

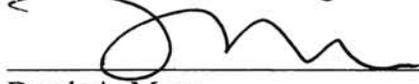
By depositing the same in the U.S. Mail, first class postage pre-paid, addressed to Michael K. Murray, P.S., Appellant's Attorney, at P.O. Box 10, Eastsound, WA, 98245.

By depositing the same in the U.S. Mail, first class postage pre-paid, addressed to J. Michael Starr, Pro Se Respondent, at 278 Spyglass Drive, Eugene, OR 97401.

By depositing the same in the U.S. Mail, first class postage pre-paid, addressed to Landerholm, P.S., and Michael Simon, Attorney for Respondents J. Michael Starr and Richard U. Starr, at P.O. Box 1086, Vancouver, WA 98666-1086.

I declare under penalty of perjury under the laws of the State of Washington that on April 9, 2012, I filed a true and correct copy of Respondent's Designation of Exhibits in the San Juan County Superior Court by depositing the same in the U.S. Mail, first class postage pre-paid, addressed to the San Juan County Superior Court Clerk, Michael at 350 Court Street, #7, Friday Harbor, WA, 98250.

Dated at Seattle, Washington, this 9th Day of April, 2012.



Derek A. Mann
Attorney for Respondent
Buck Mountain Owners' Association

COURT OF APPEALS No. 67714-4-1

SAN JAUN COUNTY CAUSE NO. 06-2-05182-4

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Respondent Buck Mountain Owners' Associations' Designation of Exhibits

<u>Document Name</u>	<u>Exhibit Number</u>
Map (large) of Buck Mountain Road System	1
Full Reconveyance of Deed of Trust, Auditor's File #94020910	12
Expert Opinion, August 23, 2010, by Gregg Bronn, with exhibits	95