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**FILED**

AUG 11 2009

JUSTIA KRASKI  
SNOHOMISH COUNTY CLERK  
EX-OFFICIO CLERK OF COURT

IN THE SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

MT. INDEX RIVERSITES COMMUNITY CLUB, INC., a Washington Corporation,

Plaintiff,  
vs.

ELEANOR ANDERSON, a single person, GARY D GRABER, a single person, and All Others Similarly Situated,

Defendants.

No. 07-2-07884-1

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER having come on regularly for trial before the Honorable Thomas J. Wynne on June 8<sup>th</sup> and 9<sup>th</sup>, 2009, and the Plaintiff Mt. Index Riversites Community Club, Inc., a Washington Corporation, appearing with its attorney, Brice E. Howard, of Adams, Duncan & Howard, Inc., P.S., and the Defendant Class appearing through its attorney, Drew Nielsen, Defendant Gary Graber appearing *pro se*, and Defendants Bailey and Bollman appearing through their attorney, Thom H. Graafstra, the Court having heard the testimony of witnesses, examined the items admitted into evidence, and having heard the argument of counsel, now makes the following:

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## FINDINGS OF FACT

1. This is a class action. The class was defined in the legal notice approved by the Court. The class consists of all property owners now and in the future who use or will use the roads owned by MIRCC, excluding any property owners with existing contracts, agreements, or covenants with MIRCC.
2. This notice to the class, as authorized by the court, indicated that the class action was certified by the Court pursuant to Civil Rule 23, and that all property owners within the class would be affected by the decision of the Court.
3. Mr. Graber is a representative member of the class. He is not a year-round property owner and has an undeveloped lot. As he said, he is not quite sure where his lot is up there.
4. Ms. Anderson is a year-round property owner and is a representative member of the class.
5. The court appointed John Galt as an expert witness on this matter. Mr. Galt prepared a report with extensive findings of fact and filed his report on March 6, 2009. The parties stipulated to the majority of those findings of fact for the purpose of this trial and filed a stipulation with the court on June 3, 2009. The court adopts those findings of fact, and incorporates those findings herein by this reference, contained within Mr. Galt's report to which the parties have stipulated.

1 6. The property owners of the Mt. Index Riversites Community Club area have an  
2 implied easement over the roads owned by the community club from the  
3 entrance leading to the development to their lots and on the roads adjacent to  
4 their property. That implied easement does not extend to other roads or  
5 bridges in the development. The property owners, therefore, have a duty to  
6 maintain roads and bridges for which they have an implied easement, but they  
7 have no duty to maintain roads and bridges for which they do not have an  
8 implied easement.  
9

10 7. In 2004 this court issued a decision on the matter of Mt. Index Riversites  
11 Community Club vs. Guy Bennett, et al., case number 03-2-10105-1.  
12 Subsequent to that decision, the money collected for replacement of the Canyon  
13 Falls Bridge was subsequently returned to those from whom it was obtained by  
14 MIRCC. MIRCC now has no plans to replace that bridge. The property owners  
15 in Block G have obtained separate access to their properties over the Burlington  
16 Northern property through another lot.  
17

18 8. Also, in July of 2006, MIRCC and the US Forest Service entered into a Road Use  
19 and Maintenance Agreement, and that is found in Exhibit No. 15 in these  
20 proceedings.  
21

22 9. The Court previously had noted in Conclusion of Law 9 in 2004: "There is no  
23 duty on the part of the owners of lots within Mt. Index Riversites to contribute  
24 to the maintenance of six-tenths of a mile of the United States Forest Service  
25

1 Road lying outside Mt. Index Riversites.” Due to subsequent developments  
2 and the fact that there is now a maintenance agreement between the US Forest  
3 Service and MIRCC, that conclusion of law is no longer valid under the facts of  
4 this case.

- 5  
6 10. Since the court’s decision in 2004, there have been weather-related wash-outs  
7 and catastrophic failure of road systems within MIRCC. There is a current need  
8 for additional improvements and upgrades to the emergency repairs which  
9 were made to prevent future wash-outs and catastrophic failure of the road  
10 system in MIRCC.  
11

12  
13 Having heretofore entered its Findings of Fact, the Court now makes the following:

14 **CONCLUSIONS OF LAW**

- 15 1. The Court has jurisdiction over the subject matter and the parties to this action.  
16 2. MIRCC is a non-profit corporation governed by RCW Chapter 24.03. RCW  
17 24.03.165 provides for procedures to amend the Articles of Incorporation.  
18 Subsection (1) of that statute provides that two-thirds of the votes of members  
19 present at a meeting of members with voting rights are required to amend the  
20 Articles of Incorporation. This Court has basically been asked by all parties to  
21 consider governance issues of MIRCC.  
22 3. Under the facts of this case, the membership requirement in the current Articles  
23 of Incorporation is violative of the US Constitution’s First Amendment right of  
24  
25

1 freedom of association and the corresponding right not to associate. Therefore,  
2 the Court will direct MIRCC to utilize the procedures set forth in Subsection (2)  
3 to amend MIRCC's Articles of Incorporation.

4 4. The Board shall submit to the Court amendments to the Articles of Incorporation  
5 consistent with this Court's decision for the Court's approval. An order will then  
6 be submitted to the Secretary of State's Office consistent with this decision  
7 covering on the Court's findings of a constitutional violation of the current  
8 Articles of Incorporation and regarding the statutory requirements and the  
9 Court's order regarding how the Articles of Incorporation have been directed to  
10 be amended.  
11

12 5. The Articles of Incorporation shall provide that MIRCC is not primarily a  
13 membership-based organization or corporation. The primary purpose of the  
14 corporation is to own, maintain, and improve the MIRCC roads which are the  
15 subject of this litigation, and to collect and disburse the implied easement road  
16 maintenance fees as authorized in this decision. All other purposes for which  
17 MIRCC exists are secondary to its responsibilities regarding the roads.  
18

19 6. For all purposes other than owning, maintaining, and improving the MIRCC-  
20 owned roads, MIRCC may solicit membership and collect dues. Such  
21 membership shall be voluntary.  
22

23 7. Any "property owner" as currently defined in the MIRCC by-laws, so long as  
24 that property owner is in good standing, shall have the right to vote on Board  
25

1 members, officers, and all issues open to a vote of the membership regarding  
2 maintaining and improving the roads.

3 8. Any "property owner," as long as they are in good standing, shall be eligible to  
4 serve as a Board member or officer.

5 9. No "property owner" shall be required to be a member or pay a membership  
6 fee to vote or speak at meetings.

7 10. The by-laws shall be amended to provide that a property owner in good  
8 standing is one who has paid the road maintenance fee for the preceding year.  
9 No property owner shall be denied a right to vote at MIRCC corporate  
10 meetings or Board meetings unless they are in arrears on implied easement  
11 road assessments for one year or more.

12 11. Three of the MIRCC Board of Directors shall not be year-round residents of a  
13 lot accessed by a MIRCC-owned road. One of those three directors shall be  
14 elected each year.

15 12. Three of the MIRCC Board members shall be year-round residents on a lot  
16 accessed by MIRCC-owned roads, and one of those directors shall be elected  
17 each year.

18 13. The remaining Board members may be either elected at large or by  
19 development, but the by-laws shall fix the number of directors at a number not  
20 less than seven nor more than the current maximum number of 15.

21 14. Voting for Board members shall be by a mail vote of all property owners who  
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1 are in good standing

2 15. The by-laws shall provide for use of an outside bookkeeper or accountant who  
3 is not a property owner.

4 16. Property owners and Board members may adopt such other provisions in the  
5 Articles of Incorporation or by-laws which are not inconsistent to this decision.  
6

7 17. The July 2006 agreement between MIRCC and the US Forest Service does  
8 establish a mutual benefit to MIRCC and property owners within the MIRCC-  
9 served roads. The agreement is a valid agreement, and establishes a basis for  
10 contribution by the property owners to that six-tenths of a mile of the Forest  
11 Service Road leading to the MIRCC developments. This is contrary to the  
12 Court's previous Conclusion of Law in 2004.  
13

14 18. The Burlington Northern agreement with MIRCC found in Exhibit No. 15 is a  
15 valid agreement, provides mutual benefit to the property owners and  
16 Burlington Northern, and MIRCC shall adhere to that agreement. It would  
17 appear that the Burlington Northern-owned lots are not included in this action,  
18 and Burlington Northern is not a part of this class.  
19

20 19. The agreement with the Adams family does not appear to be part of this class,  
21 as they appear to have been excluded by the definition of this class in the  
22 notice.  
23

24 20. The stipulated judgment in King County Cause No. 93-2-07964-8 is res judicata.  
25 The property owners at that time covered by that stipulated judgment are also

1 not members of this class.

2 21. Block G is no longer accessed by MIRCC roads. Block G provides separately  
3 for maintenance of roads in that division by agreement with the MIRCC Board.

4 That arrangement may continue.

5  
6 22. Property owners in Block G are excluded from this decision insofar as this  
7 decision covers assessments for the roads.

8 23. Administrative costs for bookkeeping, mailing, accounting, insurance, et cetera,  
9 are reasonable and necessary to the maintenance improvement of the roads  
10 owned by MIRCC. The Court finds that those administrative costs should be  
11 assessed to the owners served by implied easements on the MIRCC-owned  
12 roads on a flat per-owner basis.

13  
14 24. The attorney's fees and costs of this lawsuit may be assessed to property  
15 owners as administrative costs, including the cost of the Court-appointed  
16 expert.

17 25. The attorney fees of Mr. Nielsen shall be assessed equally to all members of the  
18 class represented, all property owners, not just those who had not paid dues.

19  
20 26. From time to time, there is a necessity to have special assessments due to wash-  
21 outs, slides, and other catastrophic failure of the road. Those shall be assessed  
22 according to the implied easement assessment formula established in this  
23 decision. However, the Board of Directors may exclude property owners from  
24 that assessment whose lots are not affected by such catastrophic failure or  
25



1 wash-out.

2 27. MIRCC may also include a reasonable amount as set by the Board for a reserve  
3 fund for capital improvements using the same formula as required for implied  
4 easement road assessments.

5  
6 28. Pursuant to this decision no property owner is precluded from doing any road  
7 maintenance or improvement, nor does this decision grant any express  
8 authority for property owners to perform individual maintenance on the road.  
9 MIRCC shall not be required to credit property owner's road assessments for  
10 such work as they may do on the road. Any individual work which may be  
11 done certainly may not adversely affect other property owners.

12  
13 29. The current implied easement road assessments established by the Board of  
14 Directors in 2005 constitute a good faith attempt by the Board to devise an  
15 equitable assessment formula based on this Court's 2004 decision. However,  
16 those fees were imposed by a membership-based corporation, which required  
17 payment of dues to vote. This practice is violative of the First Amendment  
18 right to freely associate or not associate. On this basis no judgment for  
19 outstanding assessments imposed by the Board in Exhibit No. 32 will be  
20 entered. Those assessments, in effect, constitute taxation without  
21 representation.

22  
23 30. The road maintenance and improvement funds assessed by MIRCC shall be  
24 accounted for and maintained in an account separate from MIRCC funds used  
25

1 for other purposes of the corporation.

2 31. The 1984 Road Use Regulations are not enforceable against property owners.

3 32. The road assessment fees for lots owned and used by MIRCC for its secondary  
4 purposes will be assessed to MIRCC and reassessed to property owners as  
5 administrative costs. Provided, that if MIRCC restricts access to lots owned by  
6 MIRCC, than the road assessment fees and assessments for lots owned by  
7 MIRCC cannot be paid as administrative costs, but may be paid out of the  
8 voluntary membership fees established for MIRCC's secondary purposes.  
9

10 33. The Court finds that every lot is benefited by an adequate access to those lots  
11 by MIRCC-owned roads. Implied easement assessment must be based upon  
12 the principles adopted by this Court in its 2004 decision and reiterated in this  
13 decision.  
14

15 34. The more valuable the lot and the improvements, the greater the benefit  
16 received for an adequate road. Theoretically, the more likely it is to be used.  
17

18 35. The primary basis for the assessment shall be the current assessment formula  
19 adopted by the Board of Directors. Assessed valuation is an imperfect means  
20 of assessing use, but it is probably the best means that readily available without  
21 encouraging or making more likely additional litigation.

22 36. The road assessments shall be determined using the current implied easement  
23 road assessment formula for 80 percent of the assessment and assessed  
24 valuation for 20 percent of the assessment.  
25

1 37. The total assessed value of a lot will be determined as compared to the total  
2 assessed valuation of all the lots in the development, and that is how that 20  
3 percent will be computed.

4 38. Side roads are presently assessed using a flat rate. It is simply not practical to  
5 assess every lot owner a different amount depending upon where their lot is in  
6 that particular development, and a flat rate is the only practical means of  
7 assessing side roads.

8  
9 39. Commercial use of property impacts the roads to a higher degree than non-  
10 commercial use. For the purposes of this decision, commercial use is not any  
11 rental of a property for a season or a period longer than a week. Those lots  
12 which rent out their premises for a week or less on a regular basis contribute  
13 more traffic and, therefore, there is more wear and tear on the roads. Those  
14 properties that have trucks coming in or outside sources coming in to make  
15 deliveries or purchases or use the lots on a regular basis, such as the rentals for  
16 a week or less, are defined as commercial users. Anyone who merely has a  
17 home business and does not have outside non-owners coming in to make  
18 deliveries or make purchases does not constitute a commercial use as court  
19 defines it here. A reasonable surcharge of \$25 per lot may be levied by MIRCC  
20 for commercial use.  
21

22  
23 40. Block G is no longer accessed from the road which goes through the other  
24 blocks due to removal of the Canyon Falls Bridge. The roads within Block G,  
25

1 however, are still owned by MIRCC, so that raises some issues regarding  
2 governance and participation and decisions made by MIRCC by Block G  
3 members. In the event that MIRCC deeds the roads in Block G to another  
4 entity, the property owners in Block G will be excluded from all aspects of this  
5 decision.  
6

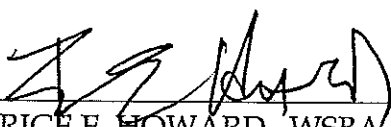
7 41. There is no adequate remedy at law to enforce payment of implied easement  
8 road assessments. The Court, in this decision, will authorize MIRCC the  
9 authority to prospectively file a lien on property of those owners who are  
10 delinquent in their implied easement road assessments by 90 days or more.  
11

12 Dated this 10<sup>th</sup> day of August, 2009.

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16 HON. THOMAS J. WYNNE, JUDGE  
17

18 Presented by:

19 ADAMS, DUNCAN & HOWARD, INC., P.S.

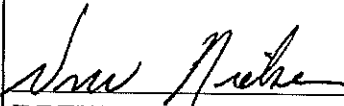
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22 BRICE E. HOWARD, WSBA #34326  
23 Attorneys for Plaintiff  
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1 Approved for Entry:

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DREW NIELSEN, WSBA #18689  
Attorney for Defendants

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GARY GRABER

*pro se*

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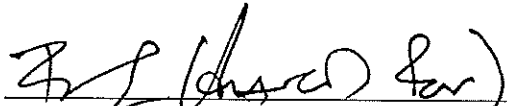
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THOM H. GRAAFSTRA #7099  
Attorney for Defendants Bailey &  
Bollman

*(Approved by email)*