70329-3

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

NO. 70329-3-I

SUDDEN VALLEY COMMUNITY ASSOCIATION,
a Washington homeowners' association,

Appellant,

v.

CURT CASEY, DAVE SCOTT, BARBARA VOLKOV,
Washington residents,

Respondents.

ORIGINAL

REPLY BRIEF OF APPELLANT SUDDEN VALLEY COMMUNITY ASSOCIATION

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I. INTRODUCTION

A. The Legislature did not require a Homeowners' Association to impose dues exclusively according to the process for approving a budget.

1. Since budgets deal with projections rather than binding and enforceable obligations, the process for approving them can, and should, be distinct from the process for imposing assessments.

Prior to 1995, Washington had no law regulating homeowners' associations. For years, associations were formed, governing documents were created, and assessments were imposed on members. Association members formed contractual expectations based on the contents of their governing documents, and associations were free to draft their governing documents as they pleased, subject to the requirements of any other existing laws that might apply (e.g., Washington Nonprofit Corporation Act, RCW 24.03).

Prior to 1995, it is clear that homeowners' associations could impose assessments by whatever means and voting thresholds their governing documents provided. Plaintiffs insist that changed in 1995 when the Homeowners' Association Act was passed. Plaintiffs assert the legislature stepped in to address some poorly

defined problem of "inconsistency", and it therefore mandated that associations use a single method and voting threshold to impose assessments. If that story is to be believed, one would have expected the legislature's mandate to be loud and clear since the legislature would be upsetting years of contractual expectations and well established association procedures throughout the state. But as this case demonstrates, that intent was expressed, if at all, so vaguely and obliquely that this Court can safely conclude the legislature never had any intent to standardize the process or voting threshold.

SVCA has previously observed that none of the provisions in the Act explicitly mandate a single procedure or voting threshold by which homeowners' associations must impose dues (whether regular or special assessments) on its members. Rather, this "mandate" can only be inferred, and only then by a rather convoluted analysis.

In short, the means and voting thresholds by which associations impose assessments remains, as it always has, up to individual associations. Admittedly, some associations may voluntarily adopt the process and voting thresholds in RCW

64.38.025(3) to impose assessments. But the Act does not mandate that they do this, and SVCA has chosen not to adopt it. Rather, SVCA continues to comply with the process mandated by Article III, Section 19 of its Bylaws.

In arguing that the legislature *did* mandate a change in process, Plaintiffs spend nearly two pages arguing a point that SVCA has never disputed, (i.e., that a budget includes both *projected* revenues and expenses). SVCA's budget has always contained both projected revenues and expenses. But, the operative term here is "projected." Plaintiffs cite definitions from Webster's and Black's Law Dictionary, both of which confirm that the defining characteristic of a budget is that it contains "projected" amounts. Webster's indicates that a budget includes "estimates" of expenditures and "proposals for financing them." Black's Law Dictionary[1] states that a budget is a "statement of *estimated* receipts and expenditures." Similarly, the budget statutes cited by Plaintiffs all include the term "projected" or "anticipated."[2]

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[1] Black's Law Dictionary, Sixth Edition.
[2] RCW 36.40.040; RCW 53.35.010.

SVCA has never asserted that it is entitled to present a budget to the members which only identifies projected expenses. Rather, its position has consistently been that the revenues and expenses listed in the budget are simply projections, not binding and enforceable obligations on the association or its members. To conclude otherwise is to ignore the fundamental nature of a budget as a financial planning tool. Since budgeted revenues are projections, and since the legislature has not imposed either a process or an approval threshold for imposing assessments, it follows that homeowners' associations are free to establish their own processes and approval thresholds, just as they are free to establish processes and voting thresholds for numerous other matters (e.g., filling vacancies on the board, amending governing documents, etc.). The legislature saw no need to legislate "consistency" with regards to these actions.

It is not at all remarkable that the acts of adopting budgets and imposing assessments should be distinct actions. Governments work the same way. While numerous statutes could be cited, one needs to look no further than the statutes cited by Plaintiffs to understand that the act of adopting a budget, in and of

itself, imposes no financial obligations on the taxpayers. Each of the statutes that Plaintiffs cite distinguish between the act levying of taxes (i.e., revenues) and the act of adopting a budget. RCW 36.40.080, for instance, governs the county's approval of its budget, but the county must undertake a separate and distinct act of levying taxes if it wants to collect those taxes in the following year. RCW 36.40.090. Likewise, port districts are required to annually adopt a budget pursuant to RCW 53.35, but they must also undertake the separate action of levying taxes as required by RCW 53.36.020 in order to collect the tax revenue.

Moreover, due to tax laws in Washington State, an "underfunded" budget (in the sense that it is used by Plaintiffs to express a budget where projected revenues are less than projected expenses) is not only possible but has been very common during the economic downturn. Washington voters passed I-747[3] in 2002 which prohibited a taxing district's levy from increasing annually by more than one percent without voter approval. RCW 84.55.050 establishes the process (i.e., election) by which a government may

[3] I-747 was later declared unconstitutional but the 1% limitation was reintroduced during the 2007 legislative session as HB 2416 which was passed. This has now been codified at RCW 84.55.010-.0101.

increase its levy more than 1% in any given year. Therefore, it is possible that a taxing district could have an underfunded budget if the approved budget assumes passage of a tax measure that is subsequently rejected by the voters. If this happened, the taxing district would need to take money out of reserves or cut expenses in order to avoid a deficit.

SVCA is able to address an underfunded budget in the same way. During the three year period of 2009-11, it elected to cut spending in an organized fashion (rather than by taking money from reserves) by adopting a spending plan. Although the Board has the inherent authority to adjust expenditures as necessary to deal with unexpected events, Plaintiffs have erroneously contended that the spending plan is a budget that must be submitted to the membership for approval .

2. Subsection (4) of RCW 64.38.025 does not evince any legislative intent to abrogate conflicting provisions of governing documents.

In interpreting RCW 64.38.025, Plaintiffs incorrectly rely upon subsection (4) which deals with the "summary of the budget." This language was added to the Act a mere two years ago and some 16 years after the Act was originally passed. The legislative

history shows beyond any doubt that the purpose was to ensure that members received specific information concerning an association's capital reserves, future capital projects (e.g., repairs, improvements) and the manner in which those capital projects would be funded. CP 182-84.

The foregoing chronology is pertinent because Plaintiffs have argued that, in 1995, the legislature expressly and unambiguously abrogated any conflicting provisions in homeowners' association governing documents that dealt with the imposition of assessments. Since Plaintiffs' argument deals with the legislature's intent in 1995, subsection (4)—which was passed sixteen years later—is completely irrelevant to that inquiry. Indeed, if this lawsuit had been filed by Plaintiffs prior to 2011, Plaintiffs could not have cited to subsection (4) because it would not have existed. It goes without saying that a determination as to legislative intent cannot be made by referring to legislation passed at a later date.

Putting aside the question of legislative intent, subsection (4) simply does not support Plaintiffs' argument because the summary of the budget has nothing to do with whether the budget ratification

process automatically imposes a binding assessment obligation on members. The "summary of the budget" is merely an informational document. It is not voted on by the membership, and it has no independent legal effect. The purpose of the "summary" is to distill a rather technical document (i.e., capital reserve study)—which makes thirty year projections[4]—into easily digestible information for the lay member. At a glance, it tells a member whether the association is poised to fund its capital projects in the coming years, and how it plans to do so. It allows members to brace themselves for additional assessments that may be coming next year, or even years into the future, to pay for these capital expenses.

Plaintiffs seriously misapprehend the effect of RCW 64.38.025(4). They assert, for instance, that if members reject the budget, they would reject the "additional regular or special assessments scheduled to be imposed", the current amount of assessments budgeted for contribution to the reserve account and the funding plan itself. None of this is true. Assume that a very

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[4] RCW 64.38.065.

large special assessment was levied two years ago which, because of the hardship on members, was stretched out over a 48 month payment period. The summary of budget would, of course, identify this special assessment, but the special assessment itself would not suddenly be rejected if this year's budget is rejected. Nor would the association's funding plan be affected in any way if the budget is rejected. The funding plan is merely the association's strategic plan for paying for upcoming capital improvements; this funding plan might include various funding sources besides regular and special assessments. For example, the funding plan might identify loans, grants, fundraising events, donations, etc.

In short, RCW 64.38.025(4) is completely unhelpful and irrelevant to analyzing the issue in this case, and Plaintiffs' efforts to muddy the waters should be ignored.

3. The link in RCW 64.38.035 between budgets and assessments is an optional, not mandatory link.

For the first time on appeal, Plaintiffs make the argument that RCW 64.38.035 conclusively establishes that the legislature intended for the act of budget ratification to result in a binding assessment obligation. It does no such thing. As explained above,

associations remain free to select the process by which they impose assessments. Some associations may allow the Board to impose assessments without member approval, in some or in limited cases such as emergencies. See, e.g., *Eastport Shores Condo. Ass'n v. Berry*, 147 Wn. App. 1015 (2008); *Sunrise Vill. Condo. Tract E v. Lambert*, 135 Wash. App. 1024 (2006).[5] Some associations may always require assessments to be approved by a majority of the members, others (such as SVCA) may require a supermajority vote of members and yet others may take the approach that is advocated by Plaintiffs (i.e., ratification of the budget automatically imposes assessments). Clearly the language in RCW 64.38.035 would apply to associations that fall in this latter category, and because the legislature was concerned about ensuring that members received notice, this language makes sense. But, to take this language, as Plaintiffs do, and conclude that the legislature abrogated any inconsistent provisions in association governing documents is to take the argument too far.

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[5] These are unreported decisions, but they are not cited for any legal precedent. They are only cited to show that the process established by associations in their governing documents may vary and may involve approval of assessments by the board without member approval or ratification.

4. The legislature's intent to provide consistent laws did not extend to imposition of dues.

Plaintiffs assert that divorcing the imposition of assessments from the budget ratification process would lead to "wildly inconsistent"[6] rules and would allow associations to provide little to no "protection" from having assessments imposed by the board or as otherwise provided in the governing documents. Of course, this is a policy argument which is best left up to the legislature. It is certainly not a basis for statutory interpretation. Regardless, there are several problems with the argument itself.

First, the legislature did not insist upon consistency with regards to every aspect of an association's administration. And, Plaintiffs have adduced no substantive evidence that the legislature insisted upon consistency with regards to imposing assessments.

Second, the fact that there may be "wildly different rules" should, in and of itself, be no cause for alarm. The Act established a minimum standard of care for directors, and it also provides that directors are subject to removal for any reason at any time. RCW 64.38.025. The fact that boards of some associations may have

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[6] Response Brief at 16.

greater authority than other boards is unremarkable. An association, just like a corporation, is free to decide how much authority to grant the Board of Directors and how much authority to reserve to the members. Large corporations with many shareholders normally place most of the authority in the Board simply because to do otherwise is unmanageable. But a smaller corporation consisting of, say, three shareholders might be governed almost entirely by the shareholders acting by consensus. Because every corporation is different, they have different bylaws tailored to their specific situation. There has never been a "one size fits all" when it comes to issues of this sort.

Third, there is no evidence in the legislative history that the legislature was concerned about consistency with regards to the specific issue before this Court. There are many areas where the legislature did not weigh in at all. RCW 64.38.030 provides a list of things that need to be included in an association's bylaws but which are left to the full discretion of the association. The main legislative concerns were (i) ensuring that members were afforded appropriate "notice" of certain actions taken by the Board, and (ii) preventing associations from taking advantage of uninformed owners. CP 83,

88. Standardizing the process for imposing assessments does not satisfy either of these.

Lastly, Plaintiffs' argument on this point brims with irony. They concede that budgeted revenues are merely projections which may or may not be realized; however, they contend that SVCA is *obligated* to impose and collect these revenues, even when the members reject them under Article III Section 19 of the Bylaws. They cannot have it both ways. Either the revenues are merely projections (that may or may not be accurate), or they are binding and enforceable financial obligations of the association members as soon as the budget is ratified. It is clear that the dues identified in the budget do not become a binding and enforceable obligation upon ratification, unless of course the legislature used the word "budget" in a manner that is completely contrary to its ordinary usage. However, that is not a presumption this court can, or should, make.[7]

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[7] As explained by Division I of the Court of Appeals: "When engaging in statutory interpretation, this court looks first to the plain language of the statute. This court interprets the words and phrases used in accordance with statutory definitions. In the absence of statutory definitions, standard dictionary definitions control."

5. The absence of any requirement in RCW 64.38.030 to include a process for imposing assessments does not constitute evidence that the legislature intended the imposition of dues to be regulated by RCW 64.38.025.

Plaintiffs argue that associations are not free to adopt procedures for imposing assessments because the legislature did not say they had to include such procedures in their bylaws. This argument can be dispensed with quickly. There are many administrative matters that RCW 64.38.025 does not require to be in the bylaws. Does this mean that anything excluded from RCW 64.38.025 is automatically regulated by the legislature? Of course not.

6. It is inconceivable that the legislature would have been so obtuse in implementing such a significant change.

If the legislature intended to effect such a dramatic change in the way associations raise revenue (which is essential to their survival), it is certain that the legislature would have issued clear and explicit notice to associations. It could have done this in

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Estate of Bunch ex rel. Bunch v. McGraw Residential Ctr., 159 Wash. App. 852, 857, 248 P.3d 565, 567-68 (2011) *review granted,* 171 Wash. 2d 1021, 257 P.3d 662 (2011) and *rev'd sub nom. Estate of Bunch v. McGraw Residential Ctr.*, 174 Wash. 2d 425, 275 P.3d 1119 (2012).

several ways. It could have expressed this intent in RCW 64.38.010. It didn't. It could have written the statute in such a way that the abrogation of governing documents was clear and unambiguous, like it did with political yard signs. It didn't. It could have issued a grace period before the law went into effect so that associations would have time to adjust. It didn't.

Further, if RCW 64.38.025(3) effected the massive overhaul Plaintiffs assert, one would have expected to find at least a scintilla of evidence in the legislative history that the legislature recognized—and intended to abrogate—contractual expectations of thousands of Washington HOA members. But, not even a scintilla of evidence can be found in the legislative history.

Plaintiffs refer to Appendix J to SVCA's ACC Guidelines to suggest that *SVCA* members, at the very least, should not have been surprised. However, as SVCA has argued extensively on appeal, there is no conflict between Chapter 64.38 RCW and SVCA Article III, Section 19 of the Bylaws and, hence, there is nothing over which RCW 64.38 "takes precedence."

Plaintiffs' response regarding political yard signs and flag displays is interesting because it actually supports SVCA's position.

Plaintiffs' argue that the legislature made these retroactive prohibitions explicit to avoid confusion over whether the law was, indeed, retroactive. However, the same could be said for the Act as a whole. There is nothing in the Act that says whether it applies to associations already in existence or just to those which come into existence after passage of the Act.

Worse yet, under the Plaintiffs' argument, the legislature knew that conflicting bylaws already existed (because all associations raise revenue by imposing assessments), but it said nothing about abrogating existing, inconsistent bylaw provisions. Using Plaintiffs' analysis, since the legislature did not explicitly abrogate pre-Act bylaws, it evidently did not want to make it clear that RCW 64.38.025(3) applies retroactively, and we can therefore safely assume the legislature did not intend for it to do so.

B. The Legislative history for the Homeowners' Association Act and other statutes provides no support for Plaintiffs.

1. The legislative history does not reveal a concern about the method by which associations were imposing assessments.

The only thing in the legislative history that Plaintiffs can latch onto is the phrase "consistent laws." But, nowhere in the Act

itself or the legislative history did the legislature evince any intent to provide comprehensive procedural uniformity on homeowners' associations as Plaintiffs seem to suggest. Neither the language of the Act nor the legislative history suggest the legislature was attempting to create comprehensive procedural rules. Indeed, the Act contains almost no procedural requirements.

Plaintiffs also argue that if SVCA's reading is correct, another association might have bylaws that give members no right to approve or reject a dues increase. First, we already know that to be the case. See, e.g., *Eastport Shores Condo. Ass'n v. Berry*, 147 Wn. App. 1015 (2008); *Sunrise Vill. Condo. Tract E v. Lambert*, 135 Wash. App. 1024 (2006). Second, whether or not that is a problem that needs to be addressed is not before this Court and was certainly not contemplated by the legislature as evidenced by the legislative history. Plaintiffs hint that the legislature was concerned about "protecting members", but it is clear that the legislature's concern was to protect them *from lack of information*. To address that, the legislature imposed notice requirements so that members had access to information necessary to make well-informed

decisions. To read more into this, as Plaintiffs urge, is pure conjecture.

Lastly, as this Court has already recognized in *Ackerman v. Sudden Valley Community Ass'n*, 89 Wn. App. 156 (1997), Article III Section 19 of the Bylaws provides a check and balance on the Board's authority by requiring a 60% vote of the membership.

2. The Washington Condominium Act lends no support to Plaintiffs' interpretation.

Plaintiffs argument on this point is mere conjecture. They assert that since the legislature "lifted the language of RCW 64.38.025(3) from RCW 64.34.308(3), it is reasonable to infer that the legislature intended to give members of homeowners' associations the same rights as those previously provided to condominium members."[8] It isn't. If the legislature found it imperative to protect members from willy-nilly governing documents (Plaintiffs' terminology), then why didn't the Washington Condominium Act extend the protections of RCW 64.34.308(3) to members of pre-1991 condominiums? Why only give that protection to members in condominiums formed after 1991 and to

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[8] Response Brief at 27.

members of homeowners' associations? It makes no sense, particularly when the legislature expressly imposed numerous other provisions of the Washington Condominium Act to pre-1991 condominiums. RCW 64.34.010.

Further, Plaintiffs cannot escape the uncomfortable fact that the legislature simply did not use the same language in RCW 64.38. It did not say—as it did for condominiums in RCW 64.34.360—that assessments are to be based on the budget. Plaintiffs wish to ignore that inconvenient fact. But, the omission is significant and must be given effect by this Court.

C. The three spending plans approved by the Board did not violate Chapter 64.38 RCW.

Plaintiffs concede that the budget is a planning tool and that the board (as the body responsible for governing the association) has the inherent authority to spend more or less than the budgeted amount on any item in the budget. Indeed, if it were otherwise, the Board would have a marginal and insignificant role in governing the association during the year. But, the Board's role is to govern the association and to deal with unanticipated events. It does this by adjusting certain expenses downward from the budgeted amount to

absorb higher than budgeted costs on other line items or costs that were unanticipated.

Plaintiffs draw a distinction between unanticipated expenses and the membership's rejection of an assessment increase. They assert that the Board is entitled to deal with the former as it deems appropriate, but the Board has no such entitlement with regards to the latter. It's difficult to understand why this is anything other than a distinction without a difference. Both events are unplanned and unexpected. Both deal with a lack of sufficient revenue to cover projected expenses.

Plaintiffs deal with this obvious similarity by making a rather startling argument (i.e., that because the assessment increase projected in the budget was rejected *and the assessments are merely staying the same*, a new budget must be adopted). That is such an obvious misreading of the statute and legislative intent that it simply demonstrates the desperation by Plaintiffs to find any kernel of support for their position in the statute. Obviously, the legislature wanted members to be apprised of *increases* that would affect their pocketbook. Since the dues are staying the same as

the prior year, any further notice would be a futile waste of time and money.

Plaintiffs next argue that SVCA should have, at the very least, treated the failure of the assessment increase as a rejection of the budget and reverted to the last budget. There are two problems with this. First, that is only required by RCW 64.38.025(3) if the budget was rejected. In the three years that spending plans were adopted, the budget was always ratified. Second, that is indeed what happened in practice insofar as members' assessment obligations were concerned.

D. SVCA did not collect assessments that were not authorized by the Bylaws.

Plaintiffs request new relief for the first time on appeal, and the request must be ignored. Specifically, they assert that if the Court rules in SVCA's favor, SVCA did not properly impose assessments in years 2009, 2010, 2011, and 2012. Thus, Plaintiffs request this Court to remand the matter to the trial court to grant the alternative relief that SVCA be ordered to disgorge assessments previously collected.

This alternative relief was not pled in the complaint, was not briefed to the trial court, and is raised here for the first time on appeal. The request must be denied.

As for Plaintiffs' argument that SVCA did not properly impose assessments after 2008, that argument has already been addressed sufficiently in SVCA's Opening Brief at pages 33-34 and will not be repeated here.

E. The trial court's declaration that SVCA present a unified budget should be reversed.

Plaintiffs urge this Court to uphold the trial court's order that SVCA be required to present a "unified budget." This term "unified budget" is not defined in the statute but was created by Plaintiffs as a way of characterizing a budget that contains both projected revenues and expenses. As SVCA explained in its Opening Brief, this is what SVCA has always done. There is no evidence in the record that SVCA has ever presented any budget that did not contain *projected* expenses and revenues. This part of the trial court's order should be reversed because the trial court wrongly interpreted SVCA's budget. The issue was moot, and there was no

basis for the trial court to issue an order to continue doing what it has always done.

F. SVCA should be awarded attorneys' fees if it is the prevailing party, but Plaintiffs should not recover fees if they are the prevailing party.

1. This is not an appropriate case for Plaintiffs to recover fees.

Plaintiffs' request for fees should be denied if this Court finds in their favor. Their request for fees is premised on SVCA's violation of the Act in multiple ways: by adopting the wrong standard for imposition of assessments and by adopting spending plans that were, in essence, budgets. But, even if the Court finds any of these violations, the Court should also determine that the record is devoid of any aggravating factors that would make this an appropriate case for fees to be awarded against SVCA.

For the almost twenty (20) years that the Homeowners' Association Act was in existence prior to this lawsuit, SVCA faithfully complied with Article III, Section 19 of its Bylaws when imposing assessment increases on its members. SVCA's Board was, in fact, obligated to follow the Bylaws because, as previously briefed to the Court, bylaws represent a contract between an

association and its members. If the Board had tried to impose an increase in assessments without adhering to Article III, Section 19 of the Bylaws, SVCA would have surely been sued for violating its Bylaws.

The Board's actions were at all times reasonable, informed, and in strict compliance with SVCA's governing documents. There is no allegation that the Board acted in bad faith. To the contrary, the Board made diligent efforts to understand and to correctly apply the law.

This lawsuit is all about legislative intent. If this Court finds in favor of Plaintiffs, it must nevertheless be conceded that the legislature's intent was far from a model of clarity. The legislature could have been far more explicit in order to avoid the uncertainty that led to this action. In light of the foregoing, an award of fees to the Plaintiffs would be essentially punitive, as it punishes SVCA for complying with its own Bylaws in the face of an ambiguous law and a debatable legal position taken by Plaintiffs.

2. SVCA is entitled to an award of fees.

If this Court agrees that the trial court erred, the trial court's ruling should be reversed in its entirety. In that case, SVCA is the

prevailing party. Plaintiffs respond that this would not be an appropriate case for an award of fees because the Act was not intended to protect associations from their members. If that were the case, then associations would never be deemed the prevailing party under RCW 64.38.050, and the statute would have been written to provide that only an aggrieved who prevails would be entitled to fees.

Plaintiffs also contend that an award of fees to SVCA would be inappropriate because SVCA is not an aggrieved party. But, that is the wrong criteria for receiving an award of fees. The only criteria set forth in the statute are: (i) the case was appropriate, and (ii) the party seeking fees prevailed. The first sentence in RCW 64.38.050 merely indicates who may sue and the remedy to which they are entitled. The first sentence does not modify the second sentence and, thus, does not constitute a criteria for receiving an award of fees.

Plaintiffs also suggest that an award would be inappropriate because it would deter members from bringing legitimate suits to protect their rights. That is incorrect for several reasons. First, this is not an absolute "prevailing party" case; each case must be

decided on its own merit as to whether it is "appropriate" for an award of fees. The Court's decision on this issue mitigates any alleged "deterrent" effect this might have on members who otherwise feel their rights are being violated. Moreover, if the claims are legitimate, the likelihood of having fees awarded against the member is minimal.

This case would be appropriate for an award of fees as set forth in SVCA's Opening Brief, and the Court is requested to issue an award of fees to SVCA.

II. CONCLUSION

In passing RCW 64.38, the legislature was trying to address several problems involving homeowners' associations which, up to that point, had been unregulated. The legislative history demonstrates conclusively that the primary issue to be addressed was to ensure that members received adequate notice of significant action taken by the association. And, the Act contains provisions to address this issue.

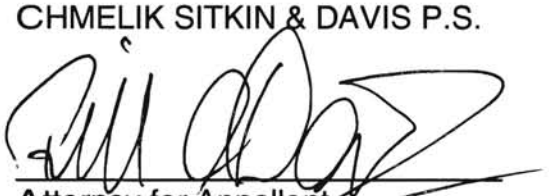
But, there is no evidence that the legislature intended to eradicate contractual expectations that had been established for years in associations throughout the state and which concerned

one of the most significant areas of concern that a member could have: the authority of the association to impose binding assessments on members. If the legislature had really intended to usurp the ability of associations to deal with this issue, the legislature would have clearly indicated its intent as it did with political yard signs and flags.

This court should reverse the trial court and enter an award of fees for SVCA.

Dated this 7th day of October, 2013.

CHMELIK SITKIN & DAVIS P.S.



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